



**American
Public Power
Association**

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August 22, 2016

Attention: Steve Souders
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency
Mail Stop: 5304P,
Washington, DC 20460
Docket Id. No: EPA-HQ-OLEM-2016-0274

RE: Comments on the Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Extension of Compliance Deadlines for Certain Inactive Surface Impoundments; Response to Partial Vacatur; Direct Final Rule (81 Fed. Reg. 51802 (Aug. 5, 2016)) and Proposed Rule (81 Fed. Reg. 51838 (Aug. 5, 2016))

Dear Mr. Souders:

The American Public Power Association (APPA) is the national service organization for the more than 2,000 not-for-profit, community-owned electric utilities in the U.S. Collectively, these utilities serve more than 48 million Americans in 49 states (all but Hawaii).

We appreciate the opportunities to comment on the Environmental Protection Agency's (EPA) direct final rule, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Extension of Compliance Deadlines for Certain Inactive Surface Impoundments; Response to Partial Vacatur (CCR Extension Rule or Direct Final Rule). APPA's members own and operate coal combustion residual (CCR) surface impoundments subject to EPA's requirements under the Disposal of Coal Combustion Residuals from Electric Utilities (CCR rule), including inactive surface impoundments, i.e., those units that did not receive CCR after October 19, 2015, but still contain water and CCR.^{1,2}

On July 14, 2016, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) vacated provisions in 40 C.F.R. §257.100 that applied to "early closure" of inactive surface impoundments by April 17, 2018. As a result of the vacatur, many of our members must now meet the requirements applicable to existing CCR surface impoundments. We believe it is appropriate for EPA to extend the compliance deadlines applicable for these new regulatory requirements as set forth in the CCR Extension Rule. However, we note that EPA's authority to

¹ Fed. Reg. 21,302 (April 17, 2015)

² Fed. Reg. 51,803

regulate inactive surface impoundments is an issue subject to litigation in the D.C. Circuit (*USWAG, et al. v. EPA*, Case No. 15-1219).

APPA is a member of the Utility Solid Waste Activities Group (USWAG). We are supportive of USWAG's comments on the CCR Extension Rule and underlining CCR Rule. We offer the following comments because the CCR Extension Rule raises a number of compliance questions that EPA must address in some form of guidance because the CCR rule is self-implementing.

A. CCR Units That Close Prior to the Extension Rule Deadlines Are Not Subject to Certain Requirements

The Extension Rule only applies to those inactive surface impoundments that stopped receiving CCR by October 19, 2015, submitted the notice of intent to close, and planned to complete closure by April 17, 2018 under the CCR early closure provision in §257.100. While the original deadline no longer applies due to the vacatur, there are a number of owners and operators of affected CCR units that intend to meet the original "early closure" deadlines. Through no fault of their own these affected units pursued physical closure, by dewatering, grading and/or capping of the unit and are no longer in operation. There is uncertainty about what deadlines in the Extension Rule apply in this circumstance. These closed or partially closed units do not meet the definition of a CCR surface impoundment. They are no longer designed to hold an accumulation of CCR *and liquids*; therefore, since they are no longer CCR surface impoundments, they can no longer be inactive CCR surface impoundments as the definitions are dependent.³ These units are now closed or partially closed and as such, are now designed and engineered to keep liquids out and/or prevent storage of liquids. APPA recommends EPA offer guidance to address which criteria and new deadlines, if any, apply to units that are no longer designed to hold liquids as they were closed or partially closed prior to the Extension Rule deadlines.

In this situation the CCR unit is no longer in operation as defined in the CCR rule.⁴ Therefore, the operating criteria in § 257.80-84, location restrictions in §257.60-64, and the structural integrity criteria in §257.73 no longer apply after the unit completes closure. The only exception to this general understanding would be for units that closes by leaving CCR in place. It is understood these units must conduct post-closure care requirements, including post closure groundwater monitoring and any corrective action obligations if necessary.

APPA understands that without the Extension Rule a number of owners and operators of inactive CCR surface impoundments (i.e., CCR units still designed to hold liquids at the time of vacatur) would be in immediate noncompliance with certain provisions in the CCR rule. However, there are untold financial implications for CCR units that began closure due to other environmental and societal pressures before the Extension Rule becomes effective. In the case of public power utilities, our customers assume the financial burden associated with closure of CCR impoundments. Ninety percent of public power utilities operate in communities with populations of 50,000 or less and can ill afford the investments required to complete closure without an impact on consumer electricity rates.

³ 40 C.F.R 257.53

⁴ *Id.*

B. Certain Requirements Should Not Apply for CCR Units That Have Commenced Closure, But Closure Is Not Complete

The Extension Rule nor the CCR Rule address what requirements and deadlines apply after a CCR unit “commences” closure but closure is not completed. A number of inactive CCR surface impoundments units will be involved in the closure process before the Extension Rule becomes effective. These units are undergoing closure and are also in operation, therefore operating criteria under §257.80-84 likely apply.⁵ However, since these units are already undergoing closure, certain deadlines and requirements should not apply, such as location restrictions and structural integrity assessments. It is unreasonable for units undergoing closure to meet the deadlines for location restrictions and structural integrity assessment because failure to do so results in the unit being classified as an open dump subject to closure, which it is already conducting.⁶

C. EPA Should Clarify that Eligible Inactive CCR Surface Impoundments Have Five Years to Close

Inactive CCR surface impoundment will be required to meet the closure provisions in §257.102 when the D.C. Circuit lifts its stay of the vacatur of the early closure provisions in §257.100.⁷ However, there may be inactive surface impoundments that qualify for extended deadlines in the Extension rule but have not “commenced” closure and have only signaled their intent to close by placing a notice in the facilities operating record by December 17, 2015.^{8,9} These units may not have “commenced” closure because they continue to place non-CCR waste streams in inactive surface impoundments or plan to extract CCR for beneficial purposes. EPA should clarify that under these circumstances owners and operators have five years to complete closure, starting from the date they “commence” closure as prescribed in 40 C.R.F. §257.102 (e) (3).

D. Operation of Impoundments After Early Closure Provision is Vacated

EPA should make clear that inactive CCR surface impoundments that qualify for the extended compliance deadlines should be allowed to remain in operation, so long as all requirements in the CCR rule are met. The “early closure” provisions in §257.100 “created an incentive to expedite closure of inactive CCR surface impoundments.”¹⁰ This incentive worked as intended and many units closed early. If EPA had not provided this incentive some owners and operators would have continued to use their impoundments in compliance with the CCR rule to manage non-CCR waste, or kept the units in operation to remove CCR for beneficial use. We believe owners and operators should not have to continue to closure their inactive surface impoundments now that the “early closure” provisions have been vacated. Nothing in §257.102, mandates closure if the unit is still receiving or intends to receive non-CCR waste or if the owner or operator removes CCR from an impoundment for beneficial use.

⁵ 40 C.F.R. §257.53

⁶ 40 C.F.R. §257.1(a)(1)

⁷ 80 Fed. Reg. 21,408-21,409

⁸ 40 C.F. R. § 257.102 (e) (3)

⁹ 40 C.F.R. § 257.100 (c) (1)

¹⁰ Fed. Reg. 21,302 and 21,408

APPA appreciates the opportunity to comment on the Extension Rule. Please contact APPA's Carolyn Slaughter (cslaughter@publicpower.org or 202-467-2943) if there are questions regarding these comments.

Sincerely,

A handwritten signature in black ink that reads "Carolyn Slaughter". The signature is written in a cursive, flowing style.

Carolyn Slaughter, Director of Environmental Policy