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Re: Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure

The American Coal Council (or ACC) submits these comments in response to the Environmental Protection Agency's (EPA) Federal Register Notice of March 3, 2020 regarding its proposal for revisions to regulations for the disposal of coal combustion residuals (CCR) from electric utilities into landfills and surface impoundments under the Resource Conservation and Recovery Act (RCRA).

The ACC is a nonprofit trade association in its 38th year representing the collective business interests of the American coal industry. Our members include coal suppliers and energy traders, utilities and independent power providers, industrial consumers, transportation companies, terminals, and support services suppliers. Since our member companies touch every aspect of turning one of America's most abundant energy resources into reliable and affordable electricity for the United States economy, our Association has first-hand knowledge of the direct and indirect impacts of coal-related regulations and a unique, "boots on the ground" perspective. Coal is also integral to the steel-making process and the industrial production of cement, chemicals, and paper. Our diverse membership base encompasses the entire coal supply chain, and it is from this broad perspective that we assess the impacts of regulations impacting coal supply and use. While ACC provides these comments from that broad perspective, individual member companies of ACC may submit separate comments on their own behalf that offer additional or other views.

Background and Introduction

EPA's proposed rule addresses four components of the 2015 CCR rule. EPA is proposing in this Part B to allow facilities to request approval to operate with an alternate liner for existing CCR surface impoundments, two options for the use of CCR during unit closure, an additional closure option for CCR units being closed by removal of CCR, and requirements for annual closure progress reports.

The American Coal Council appreciates EPA's proposal which provides additional options, information, and clarifications pertaining to these components of CCR regulations. Regulatory certainty and clarity are crucial to the continued operation of coal power plants and the management of their combustion products including the beneficial use of those products. Regulations must include sufficient flexibility and appropriate timeframes to be achievable and enable effective outcomes.

The current coronavirus pandemic is a major public health threat. In its COVID-19 response, the U.S. Department of Homeland Security (DHS) has reinforced the coal supply chain, from the mines to transportation to coal-fueled power plants, as essential infrastructure. The fundamental importance of providing electricity 24/7 could not be more evident than in the images of dedicated staff caring for patients in medical facilities around the country. The reliable supply of electricity has also provided continuity to families and schools with a sudden need to shift to working and educating on a virtual basis. The coronavirus pandemic underscores the need for a diverse mix of power sector generating resources to support electricity reliability and resilience across a variety of foreseeable and unforeseeable situations.

Our nation's coal plants are critical assets that directly support the reliability and resilience of the electric grid. They are dispatchable so they can operate anytime 24/7. They store inventory onsite so they are fuel secure. They are ready to be deployed as needed to assure that electricity supply meets demand every minute.

Unfortunately, coal plants continue to be closed and retired. EPA recognized this in the economic analysis in its Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 108(b) rulemaking for the electric power industry last year. EPA referred to 40 percent of U.S. coal power plant capacity being shut down or designated for closure since 2010. EPA's economic analysis in the CERCLA rulemaking also stated that approximately 85 plants (or 18 percent of coal generation) open in 2014 have closed or converted to another fuel type.

Many of the coal plant closures and conversions are attributed to EPA regulations. According to the U.S. Energy Information Administration, coal plant closures reached a high in 2015 driven in part by EPA's Mercury and Air Toxics Standards (MATS) rule.¹ That regulation took effect in April 2015. The United States Supreme Court struck it down just a few months later, deeming it inappropriate for EPA to impose billions in

¹ U.S. Energy Information Administration, "Today in Energy", December 28, 2018.

economic costs for a few dollars of health or environmental benefits. Despite the high court ruling, it was too late for many coal plants. The power sector had been forced to choose between installing emissions controls or closing the affected coal units well before the Supreme Court's ruling due to the April 2015 compliance deadline. The MATS rule is a clear example of the significant impacts of regulations.

This EPA CCR Part B rulemaking is of importance to impoundment facilities at coal power plant sites, and by extension to retaining existing coal plants to support a reliable, resilient electric grid.

Alternate Liner Demonstration

The August 2018 decision by the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit, or Court) in *Utility Solid Waste Activities Group, et al. v. EPA* (USWAG decision) upheld most of EPA's 2015 CCR rule, but the decision did vacate and remand back to EPA some provisions regarding surface impoundments.

The D.C. Circuit found that EPA had erred in the 2015 CCR rule by classifying clay-lined impoundments as lined. Therefore, with the Court's decision, impoundments classified as clay-lined would be considered unlined and required to close.

The D.C. Circuit also found that EPA erred by not requiring closure of unlined surface impoundments in the 2015 CCR rule. EPA's rule had provided for unlined surface impoundments to continue operation as long as they showed no adverse groundwater impacts.

In response to the D.C. Circuit's ruling, industry stakeholders reported that some unlined CCR surface impoundments that would be required to retrofit or close as a result of the Court's decision, can in fact perform at or even exceed the level of performance of the liners required by the CCR rule. This is due to site-specific characteristics such as underlying soils or engineered liners. Thus, these impoundments can continue operating without posing an unreasonable risk of adverse effects on health or the environment. EPA has agreed that it is possible that an impoundment not lined with either a composite liner or alternate composite liner can still be protective of human health and the environment.

EPA's Part B proposal would provide the opportunity to demonstrate that unlined impoundments can operate in accordance with the RCRA Subtitle D protectiveness standard. The proposal would create a process for EPA or the Participating State Director to approve an alternate liner for CCR surface impoundments.

This is important because without a path for such a demonstration, some impoundments would be forced to close. This would involve cost, reduce the availability of combustion products to the marketplace for beneficial reuse, and likely cause the coal generating units these impoundments are associated with to shut down.

ACC supports EPA's position regarding alternate liners, the two-step process for making an alternative liner demonstration with site-specific information, and a one-time approach for the alternative liner demonstration, with our additional comments below.

Two-step Process for Alternate Liner Demonstration

EPA is proposing a two-step demonstration process with an initial application and then the submission of the alternative liner demonstration. The proposed two-step process is appropriate. It will allow EPA to quickly identify impoundments that are not currently impacting groundwater to target only these impoundments for eligibility to then seek an alternative liner demonstration. Since these impoundments are posing no risk in the short-term, they meet the protectiveness standard of RCRA subtitle D and can continue to operate while owners and operators develop the data for the demonstration that they can continue to operate to the standard over their lives.

The first step in the process provides for an impoundment to stay open for a short period of time, and this first part of the process should not be more stringent than for the step two demonstration that the impoundment can remain open for the life of the unit. For purposes of the first step, an impoundment facility should only be required to show that it has not adversely affected groundwater and with reasonable certainty will not adversely affect it during the time of the demonstration review part of the two-step process. Data from the facility's groundwater monitoring system should be deemed adequate to show that the impoundment facility has not adversely impacted groundwater.

Step two in the process would require submission of information for a facility containing two lines of evidence – characterization of site hydrogeology and potential for infiltration. EPA has recognized the need for flexibility, including because the site-specific data and complexity of analysis for a demonstration will vary with the size of the facility, whether there is an engineered liner, and the diversity of site geology. ACC supports this flexibility. Additionally, since no two impoundment facilities are the same, rigid regulatory language or strict criteria or requirements for the development of alternative liner demonstrations should be avoided.

ACC agrees with EPA that submission of a complete application should toll the deadline to cease receipt of waste at the impoundment facility until issuance of a final decision on the facility's eligibility. ACC also believes EPA should clarify that such tolling would continue without interruption through the period of review and final decision on the facility's alternate liner demonstration.

We would note the need for clarity and certainty with regard to what constitutes a "complete application". EPA should explicitly identify the specific pieces of information that will make an application complete. Additionally, it is important for EPA to clearly distinguish between a complete application and a substantive determination on the application that a facility is eligible. A complete application is dependent on whether the

facility has submitted the specifically-required pieces of information to EPA. It is not a judgement about or decision on whether the facility is eligible to submit an alternate liner demonstration.

EPA should also allow additional or clarifying information to be provided after a complete application has been submitted, and should provide a reasonable, achievable timeframe for this to occur.

Availability of Alternative Closure

Alternative closure must be available to any impoundment facility that applies for but is ineligible or does not meet the requirements of an alternate liner demonstration.

EPA proposes in CCR Part B that if EPA determines an impoundment facility is not eligible or that a demonstration does not meet the standard for approval, the owner or operator must cease receipt of waste and initiate closure within six months. However, this EPA proposal would also allow facilities unable to meet this deadline to utilize procedures EPA proposed separately in § 257.103 which provide additional time to initiate closure in the event a facility has no alternative disposal capacity available. The provisions in § 257.103 should be applicable for the practical reason that an owner or operator cannot stop placing waste and initiate closure if there is no other location to dispose of the waste. If a facility is forced to initiate closure before alternative capacity is available, the continued operation of the power plant itself could be jeopardized.

It is important for EPA to clarify and revise certain aspects of its § 257.103 provisions for those units applying for the alternative liner demonstration. EPA should be clear that facilities submitting an application do not need to seek alternative capacity during the period of the application review and demonstration. To qualify for the § 257.103 provisions, a facility owner or operator must show its ongoing efforts to obtain alternative disposal capacity or that it was infeasible to complete the measures necessary to obtain alternative disposal capacity by November 30, 2020. This showing should not be required until a facility is certain it must close.

Additionally, it is important that EPA adjust the time periods applicable under § 257.103 for impoundments that are unable to make the alternative liner demonstration. The dates should be extended by the commensurate amount of time it takes the facility to go through the alternative liner demonstration. Under this EPA proposal, it may be 17 months or longer for a final decision denying an alternative liner. These facilities should have the same amount of time as facilities not submitting alternative liner demonstrations to develop alternative disposal capacity.

Appropriateness of One-time Demonstration

EPA proposes that an approved demonstration would be effective for the remaining active life of the impoundment facility. EPA notes that groundwater monitoring at the site will continue. If groundwater monitoring data at a future time indicates that the original

demonstration may have been made in error, a facility would be required to conduct additional analyses to demonstrate the ability to meet the protectiveness standard. If the owner or operator cannot to do so, EPA can revoke the authorization.

Timelines

The timing of EPA's promulgation of a final rule is critical. The current CCR rule requires closure be initiated for unlined impoundments by October 31, 2020. In a separate rulemaking, EPA proposed to revise this date to August 31, 2020. Whatever date to initiate closure is ultimately determined by EPA, it is imperative that EPA finalize the alternative demonstration provisions of this CCR Part B rule in time for facilities to actually be able to utilize this option. Thus, a final rule for the alternative liner provision would need to be issued by EPA no later than thirty days before the deadline to initiate closure. If not, facilities would have insufficient time to submit the application required as step one per this Part B proposal before the deadline to initiate closure. If that were the case, the step two alternative liner demonstration would become moot since it is the submission of the application that tolls the deadline for initiating closure. This would result in subjecting some unlined impoundments not posing an unreasonable risk of adverse effects to closure solely because of a regulatory-induced timing problem.

Participating State Directors

EPA's proposal would allow Participating State Directors to review and approve a facility's alternative liner demonstration in states with an approved CCR permit program. This is consistent with the provisions of the WIIN (Water Infrastructure Improvements for the Nation) Act which requires Participating State Directors to be provided this authority.

Conclusion

ACC appreciates the opportunity to submit these comments regarding alternate liners, a two-step process for making an alternative liner demonstration with site-specific information, and a one-time approach for the alternative liner demonstration.

We urge EPA to expediently clarify some elements of its proposal and address timelines that are not workable as proposed, including with regard to other EPA-proposed CCR rule revisions.

We are especially concerned that there will not be enough time for EPA to review and respond to comments in this Part B rulemaking and publish a final rule in time for facilities to submit applications for alternate liner demonstrations before the deadline to initiate closure occurs. It is critically important that EPA take whatever steps are necessary to address these timing issues and ensure the full availability of the two-step process for facilities to engage in that process.