

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 257****[EPA–HQ–OLEM–2020–0107; FRL–]****RIN 2050-~~AH14XXXX~~****Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Advance Notice of Proposed Rulemaking.

SUMMARY: On April 17, 2015, the Environmental Protection Agency (EPA or the Agency) promulgated national minimum criteria for existing and new coal combustion residuals (CCR) landfills and existing and new CCR surface impoundments. On August 21, 2018, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion in the case of *Utility Solid Waste Activities Group, et al. v. EPA*, which vacated and remanded the provision that exempted inactive impoundments at inactive facilities from the CCR regulations. As a first step to implement this part of the court decision, EPA is seeking comments in this advanced notice of proposed rulemaking (ANPRM) and data on inactive surface impoundments at inactive facilities to assist in the development of future regulations for these CCR units. This ANPRM also discusses the related research conducted to date, describes EPA’s preliminary analysis of that research, and seeks additional data and public input on issues that may inform a future proposed rule. ~~EPA is not reopening any existing regulations through this ANPRM.~~

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0107, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).
Follow the online instructions for submitting comments.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, OLEM Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand Delivery or Courier (by scheduled appointment only): EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004.
The Docket Center's hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking.
Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the SUPPLEMENTARY INFORMATION section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

~~Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0107, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.~~

FOR FURTHER INFORMATION CONTACT: For questions concerning this ANPRM, contact Michelle Long, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, MC: 5304P, Washington, DC 20460; telephone number: (703) 347-8953; email address: Long.Michelle@epa.gov. For more information on this rulemaking please visit

<https://www.epa.gov/coalash>.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Docket

EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2020-0107. EPA has previously established a docket for the April 17, 2015, CCR final rule (80

FR 21302) under Docket ID No. EPA-HQ-RCRA-2009-0640. All documents in the docket are listed in the <https://www.regulations.gov> index. Publicly available docket materials are available either electronically at <https://www.regulations.gov> or in hard copy at the EPA Docket Center. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

B. Written comments

Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0107, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage

the public to submit comments via <https://www.regulations.gov/> as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

C. Submitting CBI

Do not submit information that you consider to be CBI electronically through <https://www.regulations.gov> or email. Send or deliver information identified as CBI to only the following address: ORCR Document Control Officer, Mail Code 5305-P, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; Attn: Docket ID No. EPA-HQ-OLEM-2020-0107.

Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit a CD-ROM or disk that does not contain CBI, mark the outside of the disk or CD-ROM clearly that it does not contain CBI. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

II. General Information

A. Does this action apply to me?

A future rulemaking for inactive (“legacy”) CCR surface impoundments potentially applies to owners and operators of all CCR generated by electric utilities and independent power producers that fall within the North American Industry Classification System (NAICS) code 221112 and may affect the following entities: electric utility facilities and independent power producers that fall under the NAICS code 221112. This discussion is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This discussion lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not described here could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in § 257.50 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the agency contemplating?

EPA is seeking comments and data on legacy CCR surface impoundments at inactive facilities to assist in the development of future regulations for these CCR units. This action is in response to the August 21, 2018 opinion by the U.S. Court of Appeals for the District of Columbia Circuit (*Utility Solid Waste Activities Group, et al. v. EPA*) that vacated and remanded the provision that exempted inactive impoundments at inactive facilities from the 2015 CCR rule.

By this notice, EPA is seeking public input on key issues at this preliminary stage to inform its thinking on any future proposed rulemaking. EPA is not reopening any existing regulations through this ANPRM.

C. What is the agency's authority for taking this action?

EPA is publishing this notice under the authority of sections 1008(a), 2002(a), 4004, and 4005(a) and (d) of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) and the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016, 42 U.S.C. 6907(a), 6912(a), 6944, and 6945(a) and (d).

III. Background

On April 17, 2015, EPA finalized national minimum criteria for the disposal of CCR as solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA) titled, “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities,” (80 FR 21302) (2015 CCR rule or CCR regulations). The 2015 CCR rule, codified in subpart D of part 257 of Title 40 of the Code of Federal Regulations, established regulations for existing and new CCR landfills and existing and new CCR surface impoundments and all lateral expansions of CCR units. The criteria consist of location restrictions, design and operating criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, recordkeeping, notification and internet posting requirements.

The 2015 CCR rule regulated existing and new CCR landfills and existing and new CCR surface impoundments and all lateral expansions of CCR units. The rule also imposed

requirements on inactive surface impoundments¹ at active facilities,² but did not impose requirements on inactive surface impoundments at inactive facilities. The preamble to the 2015 CCR final rule (80 FR 21344) explained that inactive units at inactive facilities were not covered by the rule in part due to possible complications that were specific to inactive or closed facilities: the concern that the present owner of the land on which an inactive site was located might have no connection (other than present ownership of the land) with the prior disposal activities. For that reason, EPA exempted those units at § 257.50(e).

The rule was challenged by several parties, including a coalition of regulated entities and a coalition of environmental organizations (“Environmental Petitioners”). Environmental Petitioners raised two challenges that are relevant to this ANPRM: first, they challenged the provision that allowed existing, unlined surface impoundments to continue to operate until they exceeded the groundwater protection standard. See § 257.101(a)(1). They contended that EPA failed to show how continued operation of unlined impoundments met RCRA’s baseline requirement that any solid waste disposal site pose “no reasonable probability of adverse effects on health or the environment.” 42 U.S.C. 6944(a). Secondly, Environmental Petitioners challenged the provisions exempting inactive surface impoundments at inactive power plants (i.e., “legacy ponds”) from regulation. The environmental petitioners argued that legacy ponds are at risk of unmonitored leaks and catastrophic structural failures. The U.S. Court of Appeals for the D.C. Circuit issued its decision on August 21, 2018. The Court upheld most of the rule but ruled for the environmental petitioners on these two claims. The court held that EPA acted

¹ An “inactive CCR surface impoundment” is defined at § 257.53 as a CCR surface impoundment that no longer received CCR on or after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015.

² An “active facility or active electric utilities or independent power producers” is defined at § 257.53 as any facility subject to the requirements of this subpart that is in operation on October 19, 2015. An electric utility or independent power producer is in operation if it is generating electricity that is provided to electric power transmission systems or to electric power distribution systems on or after October 19, 2015. An off-site disposal facility is in operation if it is accepting or managing CCR on or after October 19, 2015.

“arbitrarily and capriciously and contrary to RCRA” in failing to require the closure of unlined surface impoundments³ and in exempting inactive surface impoundments at inactive power plants from regulation. The court ordered that these provisions be vacated and remanded back to the Agency. *Utility Solid Waste Activities Group (USWAG), et al. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018). This decision is referred to as the ‘USWAG decision’ in this ANPRM.

In overturning the exemption for legacy ponds, the court pointed to evidence from the 2015 CCR rule that legacy ponds are most likely to be unlined and unmonitored and have been shown to be more likely to leak than units at utilities still in operation, therefore these units are at risk of leaks and catastrophic structural failures. The court stated that legacy ponds pose the same threats to human health and the environment as the riskiest coal residuals disposal methods, compounded by diminished preventative and remediation oversight due to the absence of an onsite owner and daily monitoring. *See* 80 FR at 21343 through 21344 (finding that the greatest disposal risks are “primarily driven by the older existing units, which are generally unlined”). For these reasons, the court vacated and remanded the provision of the 2015 CCR rule that exempted inactive impoundments at inactive facilities from regulation, at § 257.50(e). Until EPA finalizes amendments to the regulations to effectuate the court’s order, facilities are not legally obliged to take any action to comply with the federal CCR regulations. As currently drafted, nothing in § 257.50 would bring inactive surface impoundments at inactive facilities within the scope of the federal CCR regulations.

IV. What information is EPA seeking?

In this action, EPA is seeking additional information related to inactive surface impoundments at inactive facilities, referred to as “legacy” CCR surface impoundments

³ Unlined CCR surface impoundments were addressed in a separate regulatory action that was published on July/August xx28, 2020 (85 FR 53516)-[FR citation].

throughout this preamble, to better inform a future rulemaking. The Agency is seeking input on regulatory authority and, a potential definition of a legacy CCR surface impoundment, ~~and it~~ It is also specifically soliciting specific information on the types of inactive surface impoundments at inactive facilities that might be considered legacy CCR surface impoundments. Specifically In particular, EPA is requesting information on how many of these units might exist, their current status (e.g., capped, dry, closed according to state requirements, still holding water), and names and locations of former power plants that may have these units and when they closed. Finally, the Agency is taking comment on which CCR regulations should apply to legacy CCR surface impoundments and on suggestions for the timeframes to that EPA should prescribe for come coming into compliance with those regulations.

A. EPA regulatory authority

As discussed in the preamble to the final 2015 CCR rule (80 FR 21302, April 17, 2015), EPA has previously interpreted RCRA subtitle D to grant it the authority to regulate both active units—*i.e.*, those landfills and impoundments that receive waste after the effective date of the regulation—and inactive units—those landfills and impoundments which ceased receiving waste before the effective date of the regulation. 80 FR at 21342 through 21346.

A challenge to this interpretation in the context of EPA’s regulation of inactive units at currently operating power plants in the 2015 CCR rule was rejected by a panel of the D.C. Circuit in *Utility Solid Waste Activities Group, et al. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018) (“*USWAG* decision”), which concluded that “resolution of this issue begins and ends with RCRA’s plain text.” *Id.* at 440. The court focused on the phrase “is disposed of” in the statutory definition of an open dump, concluding that “while the ‘is’ retains its active present tense, the ‘disposal’ takes the form of a past participle (‘disposed’).” In this way the disposal itself can

exist ('it is') even if the act of disposal took place at some prior time.” *Id.* (citations omitted).

Based on this reading, the court concluded that “an open dump includes any facility (other than a sanitary landfill or hazardous waste disposal facility) where solid waste still ‘is deposited,’ ‘is dumped,’ ‘is spilled,’ ‘is leaked,’ or ‘is placed,’ regardless of when it might originally have been dropped off. In other words, the waste in an inactive impoundment ‘is disposed of’ at a site no longer receiving new waste in just the same way that it ‘is disposed of’ at a site that is still operating.” *Id.* The court also opined that, “[e]ven if the text were ambiguous, EPA’s interpretation is eminently reasonable under *Chevron* step two.” *Id.* at 442. Judge Henderson wrote separately and concluded that “the text—and more precisely, the grammatical structure—of RCRA’s definition of ‘open dump’ is temporally ambiguous” and that EPA’s interpretation of its authority to regulate inactive units was a reasonable interpretation of that ambiguity under *Chevron* step two. *Id.* at 451 (Henderson, J., concurring in part and concurring in the judgment).

EPA requests comment on whether, in light of the court’s opinion in the *USWAG* decision, the Agency has the discretion to reinterpret the extent of its authority under RCRA subtitle D. *See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). If EPA has the discretion to revisit its interpretation (including potentially identifying an alternative basis for not regulating legacy inactive surface impoundments at inactive facilities units (“legacy CCR surface impoundments”) while addressing the court’s concern about risk), EPA requests comment on whether (and, if so, why) it should interpret its authority, including whether for technical and policy reasons or for other reasons, to extend only to units that were in operation after November 1980 or to some other smaller universeset of units. If EPA does not revisit the extent of its authority to regulate inactive units, EPA requests comment on how far back in time it should reach and whether EPA should regulate units

differently based on when they became inactive. In addition, EPA requests comment as to whether EPA's regulation of inactive units should be limited to only units at former power plants that sold electric power to the grid or whether it should also reach units at former power plants that provided power to a single site or facility. [EPA generally requests comment on the technical, policy, and legal rationales for any distinctions that commenters believe it is appropriate for EPA to draw in this area or with respect to other topics that are subject to this advance notice of proposed rulemaking.](#)

B. Definition

EPA is considering several options to define a legacy CCR surface impoundment. For example, EPA could define a legacy CCR surface impoundment as:

A surface impoundment that is located at a power plant that ceased generating power prior to October 19, 2015 and

- Option 1—the surface impoundment contained both CCR and liquids on the effective date of the 2015 CCR rule (i.e., October 19, 2015); or
- Option 2—the surface impoundment contained both CCR and liquids on the date the Court issued its mandate for the August 21, 2018 court decision (i.e., October 15, 2018); or
- Option 3—the surface impoundment contains both CCR and liquids on the date EPA issues a final rule bringing legacy CCR surface impoundments under the federal regulations.

EPA is specifically requesting comment on these options for the definition of legacy CCR surface impoundments. [EPA provided three options for the definition of legacy CCR surface impoundment because the Agency is soliciting comment from the public on which option](#)

is best for this newly regulated universe and when such units contained both CCR and liquids. EPA does not have an estimated number of units that would be classified under each definition option at this time.

Furthermore, EPA requests comment on how the current owner of the legacy CCR surface impoundment should be defined. In particular, should there be a definition of innocent owner that would exclude certain qualifying landowners from regulation? If so, what should be the criteria? Should, for example, criteria be based on, or similar to, the criteria for the landowner liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, see, <https://www.epa.gov/enforcement/landowner-liability-protections#ild>? To the extent that certain landowners are exempted from the CCR rule requiring owners ensure impoundments meet the national minimum criteria, how should EPA address the impoundments under their ownership? Relatedly, for this potential subset of impoundments and for other, abandoned impoundments that may still contain CCR and liquids, but do not have an identifiable owner/operator, or for impoundments whose ownership has been transferred, should EPA evaluate other authorities, (such as CERCLA), or state programs, to address those units?

C. Size of Universe

The USWAG decision referenced a database that identifies legacy ponds and their owners that was included in the Regulatory Impact Analysis supporting EPA's Proposed RCRA Regulation of Coal Combustion Residues.⁴ Upon further examination, it appears that these data include all the units that the Agency could identify at the time, not just ~~legacy inactive surface impoundments at inactive facilities~~units.

⁴ A copy of *Information Request Responses from Electric Utilities* (April 30, 2010) is available in the docket to this action.

EPA is requesting information on any known inactive surface impoundments at inactive power plants as of the effective date of the 2015 CCR rule, October 19, 2015. For example, ~~the Agency is interested in the plant~~

- ~~p~~Plant name (or former plant name); ~~address~~
- ~~location; current owner;~~
- ~~if known,~~ retirement ~~date-year~~ of power plant;
- ~~if known,~~ ~~current~~ status of unit (e.g., still holding water);
- ~~if known,~~ the ~~date-year~~ the surface impoundment ceased receipt of waste ~~and;~~ whether the unit has gone through any sort of closure process;
- ~~any~~ characteristics of the unit (e.g., size, volume); ~~or~~
- ~~and~~ any other available information about the inactive surface impoundment.

Additionally, should there be a ~~de minimis~~ size limitation for legacy CCR surface impoundments?

Approximately 10 states have reported to EPA that they have estimated a total of 37 possible legacy CCR surface impoundments within their states. USWAG, after surveying their members, indicated they know of 45 units that could possibly be legacy CCR surface impoundments.

Data showing approximately 140 facilities that have been reported to have one or more CCR units (boilers) retired or gone out of service between January of 1993 and October of 2015 were provided to EPA by the Department of Energy (DOE).⁵ Those facilities are assumed to be

⁵ These data are from DOE's contractor, Energy Ventures Analysis, as of March 1, 2019. A copy of "DOE-Energy Ventures Analysis Coal Unit Retirements – Historical + Announced March 1, 2019" is available in the docket for this rulemaking.
~~and are available in the docket to this action.~~

closed because they do not have publicly accessible websites posted as required by the 2015 CCR rule. Some of these facilities may have been small power plants that did not generate electricity (or electricity and heat) for sale to the public, so any impoundments at those facilities would not be covered under 40 CFR 257, subpart D-the current CCR rule [please provide citation for 2105 rule]. by a future rule regulating legacy CCR surface impoundments unless after reviewing comments. However, EPA could determine to expand the definition of legacy CCR surface impoundment unit to cover these facilities.type of small power plant facilities- that did not generate electricity for the sale to the public. However, CCR surface impoundments (if they exist) at the other facilities could potentially be considered legacy CCR surface impoundments.

In this same DOE database, approximately 110 coal units were listed as retired or otherwise not burning coal but are located at facilities that have posted a publicly accessible website containing CCR compliance data and information. Given the existence of those websites, any potential surface impoundments at facilities with closed units would already be regulated as inactive impoundments at active facilities and would not be considered legacy CCR surface impoundments.

D. Applicable regulations and time to come into compliance.

The Agency specifically requests comment on which of the requirements of the 2015 CCR rule should apply to legacy CCR surface impoundments and whether other new requirements should apply to legacy CCR surface impoundments. EPA has tentatively identified certain requirements from the 2015 CCR rule that should apply to legacy CCR surface impoundments.

For instance, the establishment of a publicly accessible CCR website(s) by the companies or States would may be appropriate to give the Agency and public the ability to track

groundwater monitoring and closure progress for these units. The 2015 CCR rule requires that owners and operators of CCR units establish a publicly accessible Internet website where they are required to post compliance information. The posting requirements include, for example, compliance information related to location restrictions, type of liner system, surface impoundment structural integrity information including hazard potential classification structural stability and safety factor assessments, fugitive dust control plans and annual reports, run-on and run-off controls for landfills, hydrologic and hydraulic capacity plans for surface impoundments, periodic inspections of CCR units, groundwater monitoring information including the annual groundwater monitoring and corrective action reports, and information related to closure or retrofit of a CCR unit and post-closure care. EPA is requesting comment on the establishment of publically accessible CCR website(s), and specifically seeking input of who should establish and host these websites, such as owners or operators, state or local governments, or EPA. EPA is also interested in any the burden, costs and potential liabilities associated with generating and maintaining a public website by owners or operators and local governments.

Also, because the Agency anticipates that many or all legacy CCR surface impoundments will be found to be unlined, and thus will be required to close, the groundwater monitoring, corrective action, closure and post-closure care requirements would be appropriate. EPA is requesting comment on who should be responsible for complying bear the costs associated with existing requirements such as -groundwater monitoring, corrective action, closure and post-closure care requirements.

Another technical requirement that may be appropriate for legacy CCR surface impoundments would be the fugitive dust requirements. This is because CCR could become

airborne during closure of the unit and thus effectively minimizing releases would be appropriate.

However, some CCR rule requirements may not be necessary to apply to legacy CCR surface impoundments given that the legacy surface impoundments are no longer receiving waste. For example, certain location restrictions demonstrations (e.g., whether the legacy surface impoundment is located in a fault area or seismic impact zone) may not be a necessary requirement for unlined legacy CCR surface impoundments because unlined surface impoundments would likely be subject to a requirement to close.

Another CCR rule requirement that may not be warranted for unlined legacy CCR surface impoundments is the provision to provide specific design and construction information pertaining to the CCR unit. One example in this provision is to provide area-capacity curves for the CCR unit, which show the reservoir water surface area at different water levels and the volume of the water contained in the unit at these different water elevations. It may not be warranted to require owners of legacy CCR surface impoundments to expend resources to compile this information for units likely to be subject to closure.

There may be additional standards or controls that are not required under the 2015 CCR rule that may be appropriate for legacy CCR surface impoundments. For instance, the posting of general information on the legacy CCR surface impoundment such as size, location, applicable state requirements, plant information, etc., could be useful.

The Agency could also consider a site security requirement for the facility to restrict access to the area containing the legacy CCR surface impoundment, since active facilities generally have guards and fencing. The Agency solicits comment on which additional standards or controls may be appropriate for legacy CCR surface impoundments.

In addition, EPA will need to determine the compliance deadlines for CCR surface impoundment regulations. The Agency would likely consider that a publicly accessible website would be required to be activated by the effective date of the rule. For other requirements, the Agency could base the timing on the timeline laid out in the 2015 CCR rule or from subsequent CCR rulemakings,^{6,7,8} allowing approximately the same amount of time for legacy CCR surface impoundments to come into compliance as the active CCR surface impoundments. However, the timeline specified in the 2015 CCR rule was based in part on the owner or operator of the unit having to go through a series of steps to determine if the unit would be required to close. In the case of unlined ~~legacy-inactive~~ CCR surface impoundments at inactive facilities, it may be reasonable to assume that ~~the some~~ owners and operators of these units have known that they ~~would-may~~ need to close such units since October 15, 2018 (i.e., the date the Court issued its mandate for the August 21, 2018 *USWAG* decision). Because of this, and because neither the unit nor the power plant are operating, ~~they-some owners and operators may could~~ have begun preparing for closure and thus could close in less time than was EPA has provided for active surface impoundments. The Agency specifically requests comment on the issue of appropriate compliance deadlines for the applicable requirements for legacy CCR surface impoundments. In addition, EPA is requesting comment on the establishment of publically accessible websites, and specifically seeking input of who should establish and host the website, such as an owner or operator, a state or local government, or EPA.

In cases where significant vegetation or sensitive ecosystems are in place, should EPA take into account the impacts of disrupting that ecosystem when determining what actions should

⁶ 81 FR 51807, Aug. 5, 2016

⁷ 83 FR 36452, July 30, 2018

⁸ 85 FR 53516, Aug. 28, 2020

be imposed? Can the agency simply require notice and no further action under some circumstances? If so, what would those be, and why?

V. Request for Comment and Additional Information

EPA is seeking comment on all ~~information questions and topics outlined described~~ in this ANPRM, ~~EPA specifically invites public comment and any additional information in response to including~~ the questions and issues identified in Unit IV, ~~and requests that you submit any other~~ information, which may not be included in this notice, ~~but which that~~ you believe is important for EPA to consider in connection with these questions and topics. At the same time, EPA does not plan to consider comments that are beyond the scope of the questions and topics described in this ANPRM.

~~EPA specifically invites public comment and any additional information in response to the questions and issues identified in Unit IV.~~ Instructions for providing written comments are provided under **ADDRESSES**, including how to submit any comments that contain CBI. ~~No one is obliged to respond to these questions, and anyone may submit any information and/or comments in response to this request, regardless of whether or not it responds to one or more questions in this notice.~~

VI. What are the next steps EPA will take?

EPA intends to carefully review all the comments and information received in response to this ANPRM, ~~additional data and information that becomes available through other avenues, as well as previously collected and assembled information.~~ Once that review is completed, EPA may supplement the collected information, as appropriate, to determine which regulatory criteria should apply to legacy CCR surface impoundments. ~~Should EPA decide to move forward with this action,~~ ~~†~~ The next step will be to submit an information collection request to OMB, or if EPA

determines that additional information is not needed, EPA will publish a proposed rule- with the input from this ANPRM and other publically available information. The anticipated date for issuing the proposed rule is July 2021. At that time, the public will have the opportunity to comment on EPA's proposal.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. Because this action does not impose or propose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, other statutory and Executive Order reviews that apply to rulemaking do not apply to this action. Should EPA subsequently determine to pursue a rulemaking, EPA will address the statutes and Executive Order as applicable to the rulemaking.

Nevertheless, the Agency welcomes comments and/or information that would help the Agency to assess any of the following: the potential impact of a rule on small entities pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.); potential impacts on federal, state, or local governments pursuant to the Unfunded Mandates Reform Act ((UMRA) (2 U.S.C. 1531-1538); federalism implications pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, November 2, 1999); availability of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113; tribal implications pursuant to Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000); environmental

health or safety effects on children pursuant to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997); energy effects pursuant to Executive Order 13211, entitled *Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001); Paperwork burdens pursuant to the Paperwork Reduction Act (PRA) (44 U.S.C. § 3501); or human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). The Agency will consider such comments during the development of any subsequent proposed rulemaking.

List of Subjects in 40 CFR Part 257

Environmental protection, Coal combustion products, Coal combustion residuals, Coal combustion waste, Disposal, Hazardous waste, Landfill, Surface impoundment.

Dated: _____.

Andrew R. Wheeler,
Administrator.