

January 28, 2020

**Attn: Docket ID NO. EPA–HQ–OLEM–2019–0172**

Attention: Kirsten Hillyer  
Office of Resource Conservation and Recovery  
Materials Recovery and Waste Management Branch  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

**Comments on Proposal to Revise the Coal Combustion Residuals Rule**

America's Power submits the following comments on the Environmental Protection Agency's (EPA's) proposal to revise the current federal rules to regulate the disposal of coal combustion residuals (CCR) under Subtitle D of the Resource Conservation and Recovery Act (RCRA).<sup>1</sup>

America's Power is the only national trade organization whose sole mission is to advocate at the federal and state levels on behalf of coal-fired electricity and the nation's coal fleet. Our members represent all facets of the coal-fired electricity industry: electricity generators, coal producers, railroads, barge operators, and equipment and supply manufacturers. A list of our members is attached.

The main focus of EPA's proposal is to establish new deadlines for closing unlined and clay-lined surface impoundments. America's Power supports EPA's proposed approach for setting reasonable closure deadlines. While not the purpose of the proposal, we also urge EPA to adopt rules that would allow CCR requirements to be tailored to the conditions at each site.

**Flexible closure deadlines are needed to avoid idling and retirement of coal-fired generation.**

There are a number of compelling reasons to preserve coal-fired generation. In particular, the coal fleet provides fuel security, supports grid reliability and resilience, produces affordable electricity, contributes to fuel diversity, provides electricity when other fuels are not available or are too expensive, and promotes national security.

The importance of the coal fleet has been recognized by the Department of Energy, Federal Energy Regulatory Commission, North American Electric Reliability Corporation, and grid operators, to name just a few. These entities have recognized the important attributes the coal fleet provides to the electric grid and have expressed concerns about the impact of the changing electricity mix on grid reliability and resilience.<sup>2</sup>

Unfortunately, U.S. power plant owners have announced the retirement of a staggering number of coal-fired electric generating units (EGUs) since 2010.<sup>3</sup> Almost 700 coal-fired EGUs in 43 states—totaling 133,200 megawatts (MW) of generating capacity—have retired or announced plans to retire. These retirements now exceed 42 percent of the

coal fleet that was operating in 2010. Through the end of 2019, approximately almost 98,000 MW of coal-fired generating capacity had retired. Between 2020 and 2025, an additional 23,000 MW are expected to retire.

This disturbing trend in coal plant retirements would be exacerbated with the imposition of inflexible deadlines for unlined and clay-lined surface impoundments to stop receiving CCR and non-CCR wastestreams and initiate closure. Therefore, it is imperative that EPA take reasonable steps to ensure CCR regulations do not cause the retirement or idling of even more coal-fired generating capacity and jeopardize the reliability and resilience of the grid.

**Deadline extensions are essential because the August 31, 2020 deadline for closure would be unachievable for all unlined and clay-lined surface impoundments.**

EPA is proposing to move up the closure deadline from October 31, 2020 to August 31, 2020 based on a determination that August 31 is the earliest possible date that it is “technically feasible” to build alternate CCR and non-CCR disposal capacity at an existing coal-fired facility.<sup>4</sup> Based on a technical review of construction and engineering data for developing alternate disposal capacity, the Agency concluded this length of time “represents the fastest technically feasible timeframe to construct alternate capacity and for CCR surface impoundments to cease receipt of waste.”<sup>5</sup>

EPA’s proposed closure deadline of August 31 is unachievable for many coal-fired EGUs. Due to site-specific constraints and despite best efforts, it is likely that owners and operators of many coal-fired EGUs will be unable to design, permit, procure, and construct replacement disposal facilities by the new deadline of August 21. The following are reasons why the proposed closure deadline would be infeasible for many coal-fired EGUs and deadline extensions will be essential.

First, EPA set the proposed new closure deadline based on an average construction time of 22.5 months for completing all engineering and construction work needed to cease placement of CCR and non-CCR wastestreams into an unlined or clay-lined surface impoundment. Some affected coal-fired EGUs will be unable to meet the proposed deadline due to site-specific construction schedules that will require more time than the average of 22.5 months calculated by EPA. As the Agency itself acknowledged in the preamble to the proposed rule, the average timeframe provides only “enough time for a substantial portion of facilities to comply” and would not be sufficient time for many of “the largest impoundments and smaller surface impoundments with unique design situations or in locations that will require more time.”<sup>6</sup>

Second, some EGU owners and operators will encounter unexpected delays that are beyond their control. For example, additional time for building alternate disposal capacity may be necessary due to extreme weather events, permitting delays, and other unforeseen circumstances. In such cases, the proposed closure deadline would not provide sufficient time even in the case of those coal-fired EGUs for which the construction of the alternate disposal capacity was initially projected to be completed within 22.5 months.

And finally, the proposed new closure deadline does not apply solely to unlined surface impoundments that were subject to the 2015 closure requirements. Notably, the original forced closure requirements imposed by the 2015 CCR rule applied only to leaking

unlined impoundments that violate a groundwater protection standard and to impoundments failing to meet the location restrictions. By contrast, the proposed new closure deadline would apply to all clay-lined and unlined impoundments even though they are not leaking and can comply with location restrictions. Operators of these unlined and clay-lined impoundments did not anticipate having to design and build new disposal capacity for their CCR and non-CCR wastestreams by the proposed August 31, 2020 deadline.

### **Unachievable closure deadlines could threaten grid reliability.**

CCR surface impoundments serve many functions related to the disposal and management of both CCR and non-CCR wastestreams that are generated as a necessary by-product of electricity production. For example, plant owners and operators rely on the impoundments to manage the following non-CCR wastestreams that are necessary for plant operations: cooling tower blowdown; coal pile runoff; and various low-volume wastes, such as wastewaters from ion exchange water treatment systems, water treatment evaporator blowdown, boiler blowdown, floor drains, cooling tower basin cleaning wastes, and recirculating house service water systems.<sup>7</sup>

For these reasons, it will not be possible for many existing coal-fired EGUs to generate electricity without being able to rely on their surface impoundments for disposal and management of their CCR and non-CCR wastestreams. Moreover, the design and construction of alternate systems for disposing of the wastestreams and treating the wastewater typically require extensive retrofit of existing plant facilities that can take many years to complete. Lacking additional capacity to manage these wastestreams elsewhere at their plant sites, owners and operators of many coal-fired EGUs would be forced to cease operation and stop generating electricity if the CCR rules do not provide adequate time to construct and bring online alternate means for properly managing these wastestreams.

If EPA were to establish unachievable closure deadlines that resulted in the forced idling of existing coal-fired generation, electric reliability could be jeopardized in regions where the idled plants are located. In the recent CCR litigation in response to which EPA is advancing this proposed rule,<sup>8</sup> the court acknowledged the potential “disruptive” consequences of imposing an unreasonably short deadline and, as result, directed EPA on remand to establish closure deadlines that will assure an orderly transition away from the disposal of CCR and non-CCR wastestreams in unlined and clay-lined impoundments.<sup>9</sup>

### **Establishing a flexible framework to extend closure deadlines is essential.**

To avoid potential disruptions to the electric power grid, EPA has two choices. One option is to set a single closure deadline that is achievable for all coal-fired EGUs with unlined and clay-lined surface impoundments. The other is to establish a flexible framework for extending the proposed deadline of August 31. In the proposed rule, EPA is proposing to adopt the second option and establish variance procedures that will serve as a safety valve for coal-fired EGUs that need additional time, despite best efforts, to build alternate disposal capacity for either their CCR or non-CCR wastestreams.

It is critically important for EPA to have in place variance procedures that can extend the proposed new deadline for ceasing receipt of the wastestreams. The law cannot compel the impossible<sup>10</sup> and that, as the Agency acknowledges in the preamble to the

proposed rule, it will in fact be impossible for many EGU owners and operators to build and bring online alternate disposal capacity for their CCR and non-CCR wastestreams by the new August 31 deadline due to site-specific circumstances.<sup>11</sup> If EPA fails to provide reasonable and workable variance procedures, many owners and operators of affected generating facilities could be left in the untenable position of having to either continue operating in violation of the closure deadlines or cease generating electricity.

For these reasons, workable variance procedures are essential if EPA elects to adopt the proposed new deadline of August 31. EPA must establish a mechanism for providing additional time to construct and bring online alternate disposal capacity due to extenuating circumstances. In addition, such a mechanism is needed to provide extra time for those coal-fired EGUs for which, despite best efforts, it is technically infeasible to design, procure, and construct the necessary replacement disposal facilities and processes due to the size of the impoundment or unique, site-specific conditions. Finally, it is critically important that the extensions available under these variance procedures apply to both CCR and non-CCR wastestreams, given that existing unlined impoundments typically handle both wastestreams and additional time may be needed to install either new dry handling systems with new CCR landfill capacity or new wastewater treatment systems for non-CCR wastestreams.

**The procedures for extending the August 31  
closure deadline would be effective and workable.**

EPA has proposed two variance procedures for extending the proposed August 31 deadline. One would establish an expedited, self-implementing process for securing a short-term extension of up to three months (from August 31 to November 30) to bring online alternate disposal capacity. This variance provision is intended to provide extensions in cases where extra time is needed due to short-term technical problems that are beyond the control of the plant operator, such as extreme weather, delay in material fabrication, or other unexpected short-term difficulties.<sup>12</sup> The other proposed variance procedure would allow EPA (or states) to provide a site-specific extension longer than the three-month extension when it is not technically feasible to bring online alternate disposal capacity by the short-term extension deadline of November 30.

For the reasons discussed below, America's Power strongly supports the adoption of these two extensions for both CCR and non-CCR wastestreams, and not limit the extensions to only CCR wastestreams as the current CCR rule does.

First and foremost, the proposed new deadline for initiating closure is workable only if EPA also adopts the two proposed variance mechanisms. The proposed variance procedures establish a necessary safety valve for coal-fired EGUs that cannot design, procure, permit, and construct the necessary replacement facilities and processes by the August 31 deadline despite best efforts. In such cases, the imposition of an inflexible mandatory closure deadline with no opportunity for securing additional time could force the idling of existing coal-fired EGUs until they can install and operate the new disposal capacity for their CCR and non-CCR wastestreams. The idling of major generation facilities would not only impose unreasonably burdensome costs on affected facilities without a corresponding environmental benefit but also could pose electric reliability risks by forcing the idling of coal-fired generating facilities that serve critical load centers.

Second, a self-implementing variance procedure is needed for quickly securing short-term extensions due to unexpected minor delays which typically result from short-term technical problems that are beyond the control of the plant operator. The importance of EPA adopting an expedited process for securing short-term extensions cannot be overstated in light of the many complexities and technical challenges that EGU owners and operators typically face in installing alternative disposal capacity for both CCR and non-CCR wastestreams even under the best of circumstances. Furthermore, America's Power agrees with EPA's proposal to make the extension self-implementing, given that it is of short duration and thus will have negligible incremental groundwater impacts.

And third, a variance procedure for providing longer extensions is critically important for generating facilities for which it is not technically feasible to complete construction and bring online alternative disposal capacity by the short-term extension deadline of November 30. As noted above, EPA determined that the timeframe used to set the new deadline was a "calculated average" for constructing alternate storage capacity and that some facilities will need considerably more than three months for their surface impoundments to cease receipt of waste. If an EGU owner or operator can demonstrate that it is not technically feasible to complete installation of the alternate disposal capacity prior to November 30, the deadline for ceasing placement of wastestreams in the impoundment should be extended to a later date when it is possible to do so. This approach is consistent with both the relevant statute and case law. Section 4004(a) of RCRA requires only that the plant owner and operator do what is possible in the shortest time achievable. And as noted above, the Agency cannot impose more protective measures than can be technically feasibly implemented, as the law cannot compel the impossible.<sup>13</sup>

**In addition, EPA should adopt risk-based alternatives for tailoring CCR requirements to account for site-specific conditions.**

Although not included as part of the proposed rule, America's Power urges EPA to incorporate into the CCR regulations many of the risk-based alternatives that are codified at 40 C.F.R. Part 258 of the Municipal Solid Waste Landfill Regulations (MSWLF). The incorporation of these alternatives into the federal CCR program is important because they allow for the tailoring of federal CCR requirements to take into account site-specific conditions and risks of each CCR disposal facility. As EPA itself has recognized many times,<sup>14</sup> allowing for plant operators to tailor many of these inflexible and prescriptive requirements of the CCR rule makes good policy sense. For example, tailoring groundwater monitoring and corrective action requirements will avoid imposing one-size-fits-all, overly-conservative requirements that can impose unnecessary costs on coal-fired EGUs and cause the premature closure of CCR disposal facilities in many cases.

At the time EPA promulgated the CCR rule in 2015, EPA declined to adopt site-specific, risk-based provisions of the MSWLF program due to statutory limitations placed on the regulation of CCR waste streams under Subtitle D of RCRA. These limitations precluded EPA from implementing the CCR requirements through state or federal permit programs. As a result, EPA was forced to establish a self-implementing regulatory scheme in which plant operators themselves were required to administer and comply with the CCR requirements without any direct regulatory oversight by either EPA or states. Due to this lack of regulatory oversight, EPA concluded that it was "impossible to include some of the alternatives available in [the MSWLF program], which establish



alternative standards that allow a state, as part of its permit program, to tailor the default requirements to account for site specific conditions at the individual facility.”<sup>15</sup>

EPA’s decision not to adopt these risk-based alternatives has resulted in inflexible and unnecessarily prescriptive CCR requirements reflecting worst-case risk assumptions, rather than tailoring those requirements to the actual risks posed by each CCR disposal facility.<sup>16</sup> Moreover, these inflexible and overly conservative requirements of the 2015 CCR rule are imposing unnecessary costs on coal-fired EGUs and threatening to cause the premature closure of CCR disposal units.

To correct this problem, America’s Power urges EPA to adopt the following MSWLF risk-based alternatives for ensuring flexible, site-specific implementation of the CCR requirements:

- Establishment of risk-based groundwater protection standards for constituents without maximum contaminant levels;
- Selection of modified correction action remedies that do not require closure of the impoundment or other such corrective action measures that would not result in any meaningful environmental benefit;
- Modification of various groundwater monitoring requirements to reflect site-specific factors, such as the suspension of groundwater monitoring requirements where there is no potential for migration of contaminants;
- Use of an alternate period of time for demonstrating compliance with corrective action based on regulatory criteria that take into account site-specific conditions; and
- Allow for a decrease in the length of the post-closure period to reflect risk-based considerations at specific sites.

America’s Power appreciates the opportunity to submit these comments. If you have any questions, please contact me at [mbloodworth@americaspower.org](mailto:mbloodworth@americaspower.org).

Sincerely,



Michelle Bloodworth  
President and CEO

Attachment: Members of America’s Power

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<sup>1</sup> See *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure*, 84 Fed. Reg. 65,941 (December 2, 2019).

<sup>2</sup> See e.g., Perry, Rick, “Secretary of Energy’s Direction ...,” Received by Neil Chatterjee, Cheryl LaFleur, and Robert Powelson, September 28, 2017; Federal Energy Regulatory Commission, Department of Energy, “Grid Resiliency Pricing Rule,” Notice of Proposed Rulemaking, 82 Fed. Reg. 46940 (October 10,

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2017); NERC, “Comments of the North American Electric Reliability Corporation in Response to Notice of Proposed Rulemaking,” October 23, 2017; NERC, *2017 Long Term Reliability Assessment*.

<sup>3</sup> In 2010, according to EIA, the U.S. coal fleet was comprised of 1,396 electric generating units located at 580 power plants for a total electric generating capacity of approximately 317,000 MW.

<sup>4</sup> 84 Fed. Reg. at 65,944.

<sup>5</sup> 84 Fed. Reg. at 65,951.

<sup>6</sup> 84 Fed. Reg. at 65,951.

<sup>7</sup> See *Response of USWAG and Luminant/Dynegy Companies in Support of Respondents’ Motion for Voluntary Remand without Vacatur and in Opposition to Petitioners’ Motion for Partial Stay or, in the Alternative, for Partial Summary Vacatur*, Exhibit A at A18-19 (D.C. Circuit, Case No. 18-1289).

<sup>8</sup> The Agency is advancing its proposal in response to the court decision in the case *Utility Solid Waste Activities Group, et al. v. EPA* (“USWAG decision”) and the subsequent remand of CCR closure issues in light to the USWAG decision pursuant to a court order in *Waterkeeper Alliance, et al. v. EPA* (“Waterkeeper”).

<sup>9</sup> Waterkeeper. See also, 84 Fed. Reg. at 65,945.

<sup>10</sup> See USWAG at 448; *Hughey v. MS Development Corp*, 78 F.3d 1523 (11th Cir 1996); *Cherry-Burrell Corp v. US*, 367 F.2d 669 (8<sup>th</sup> Cir 1966). See also, 80 Fed. Reg. at 21,423.

<sup>11</sup> 84 Fed. Reg. at 65,951.

<sup>12</sup> 84 Fed. Reg. at 65,953.

<sup>13</sup> 84 Fed. Reg. at 65,945.

<sup>14</sup> See 83 Fed. Reg. at 11,597; 75 Fed. Reg. at 2524-25. See also 56 Fed. Reg. 50978, 50,095-96 (October 9, 1991) (final MSWLF regulations).

<sup>15</sup> 80 Fed. Reg. at 21,396-97.

<sup>16</sup> EPA readily acknowledged this point when it removed the risk-based alternatives from the 2015 final CCR rule. For example, the Agency recognized that it may be possible at certain sites to engineer an alternative to closure of the unit that would adequately control the source of the contamination and would otherwise protect human health and the environment.” 80 Fed. Reg. at 21,371. However, the Agency concluded that “the regulatory structure under which this rule is issued effectively limits the Agency’s ability to develop those types of risk-based requirements that can be individually tailored to accommodate particular site conditions.” *Id.*

## **2020 Membership**

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