



July 17, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Environmental Protection Agency
Washington, DC 20460

Re: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, Docket ID: EPA-HQ-OLEM-2020-010

Dear Administrator Regan:

On May 18, 2023, the Environmental Protection Agency (EPA) published a proposed rule entitled “Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy is concerned that EPA has improperly certified two unrelated regulations as one proposed rulemaking under the RFA. Advocacy is also concerned that the proposed compliance timeframes do not provide flexibility for small entities based on their ability to comply with the proposed requirements. In addition, Advocacy is concerned that EPA’s existing risk assessment does not support the proposed requirements for inactive sites in this proposal.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do

¹ 88 Fed. Reg. 31982 (May 18, 2023).

not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

B. The Proposed Rule

In 2015, EPA finalized a national minimum criteria for the disposal of coal combustion residuals (CCR) as solid waste under Subtitle D of the Resource Conservation Recovery Act (RCRA).⁷ The rule established regulations for existing and new CCR landfills and surface impoundments. The rule also imposes requirements on inactive surface impoundments at active facilities. The rule, however, does not impose any requirements on inactive facilities. The requirements for the rule include location restrictions, design and operating criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, recordkeeping requirements, notification requirements, and internet posting requirements.

In 2018, the Circuit Court of Appeals for the District of Columbia (D.C. Circuit) rejected EPA's 2015 decision not to regulate inactive CCR surface impoundments at inactive facilities, also known as legacy CCR surface impoundments.⁸ The court ordered EPA to revisit whether these units warranted regulation.⁹ Subsequently, EPA issued an Advanced Notice of Proposed Rulemaking (ANPRM) on October 14, 2020 to request information on legacy CCR surface impoundments to inform a future rulemaking.¹⁰

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ *Id.*

⁷ Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21302 (Apr. 17, 2015).

⁸ *USWAG v. EPA*, 901 F.3d 414 (D.C. Cir. 2018).

⁹ *Id.*

¹⁰ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals - 2 -rom Electric Utilities; Legacy CCR Surface Impoundments, 85 Fed. Reg. 65015 (Oct. 14, 2020).

On May 18, 2023, EPA published a proposed rule to establish regulatory requirements for legacy CCR surface impoundments, which include many of the same requirements as the 2015 national minimum criteria.¹¹ EPA proposes to define legacy CCR surface impoundments as those located at coal-fired power plants that ceased operations before October 19, 2015, and were not subject to the requirements of the 2015 CCR rule governing CCR impoundments at active power plants.¹²

In addition, unrelated to the court's order, EPA is also proposing similar requirements for a new category the agency refers to as CCR Management Units (CCRMUs).¹³ EPA defines CCRMUs as surface impoundments and landfills that closed prior to the effective date of the 2015 CCR Rule, inactive CCR landfills, and other areas where CCR is managed directly on the land, regardless of method and date.¹⁴ This part of the proposal would apply to all existing CCR facilities and all inactive facilities with legacy CCR surface impoundments subject to the proposed rule.¹⁵

Rather than conducting an RFA analysis for each proposed action separately, EPA combined the small entity impacts from both proposed actions to provide a factual basis to support its certification that the rule will not have a significant economic impact on a substantial number of small entities under the RFA.¹⁶

II. Advocacy's Small Business Concerns

Advocacy believes that EPA has improperly certified two unrelated regulations as one proposed rulemaking under the RFA. Advocacy is also concerned that the proposed compliance timeframes do not provide flexibility for small entities based on their ability to comply with the proposed requirements. In addition, Advocacy is concerned that EPA's existing risk assessment developed to support the 2015 final CCR rule does not support the proposed requirements for inactive sites in this proposal.

A. EPA has improperly certified the two unrelated regulations as one proposal under the RFA.

If, after conducting an analysis for a proposed or final rule, an agency determines that a rule will not have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify. The certification must include a statement providing the factual basis for this determination, and the certification must be published in the *Federal Register* at the time the proposed or final rule is published for public comment. Agency certifications of final rules are subject to judicial review¹⁷ and courts evaluate

¹¹ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31982 (May 18, 2023).

¹² *Id.* at 31,989.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 32,301.

¹⁷ 5 U.S.C. § 611.

them by determining whether the statement of basis and purpose accompanying the rule identifies a “factual basis” to support the certification.¹⁸

However, if an agency covered by Section 609 of the RFA, such as EPA, is unable to certify, then the agency must conduct a SBREFA panel to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.¹⁹ In addition, the agency must produce an initial regulatory flexibility analysis (IRFA) in the *Federal Register* at the same time it publishes the proposed rulemaking. The IRFA must include specific elements, including a description of any significant alternatives to the proposed rule that minimize significant economic impacts on small entities while accomplishing the agency’s objectives.²⁰

The agency improperly certified the two proposals included in this rulemaking. The two agency actions should be bifurcated and proposed as separate agency proposals. Each action should include an RFA certification that is supported by a factual basis discussing the impacts on small entities for the specific requirements associated with it. Most importantly, Advocacy believes that EPA cannot certify the proposed rule under the RFA because EPA has underestimated the impacts of the rule on the small entities subject to the rule. Moreover, EPA’s factual basis does not meet the standard set by the agency’s own guidance for how to conduct a threshold analysis under the RFA.

1. EPA should bifurcate the two agency actions into separate proposals.

EPA is proposing two significant but unrelated actions in this proposal. The first part of the proposal to regulate legacy CCR surface impoundments is in response to a court order. The second part of the proposal to regulate CCRMUs, on the other hand, is not subject to the court’s decision. Moreover, each set of requirements affect a different universe of facilities and units. EPA acknowledges this and explains that entities subject to its proposal include distinct universe of units that differ based on both features of the units and by the facilities at which they are located.²¹ Specifically, the first universe includes legacy CCR surface impoundments that are located at power plants that ceased generating power prior to October, 19, 2015 and were therefore not regulated by the 2015 final CCR rule.²² The second universe includes the CCRMUs, which is a new category of CCR accumulations at facilities with CCR units regulated under the 2015 final rule.²³

In addition, because EPA determined that it had limited information on legacy CCR surface impoundments, EPA issued an ANPRM to request more information on legacy CCR surface

¹⁸ 5 U.S.C. § 605(b).

¹⁹ *Id.* § 609(d)(2).

²⁰ *See* § 603(b)-(c).

²¹ U.S. Env’t. Prot. Agency, Off. of Land & Emergency Mgmt., Regulatory Impact Analysis, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, ES-5 (May 2023), <https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0107-0164> [hereinafter RIA].

²² *Id.* at 2-1.

²³ *Id.* at 2-2. EPA also discusses a third universe that includes CCR landfills that are already subject to regulation under the 2015 final CCR rule but have waste in contact with groundwater.

impoundments. On the other hand, EPA did not take the time to solicit feedback on a potential proposal to regulate CCRMUs despite acknowledging that data uncertainties and limitations exist.²⁴

As discussed, the requirements and basis to regulate legacy CCR surface impoundments and the requirements and (lack of) basis to regulate CCRMUs are two different agency actions on different rule development timelines and therefore should be bifurcated. Therefore, Advocacy recommends EPA finalize the requirements for the legacy CCR surface impoundments in a separate action and repropose the requirements for CCRMUs after addressing other small entity concerns included in this letter and any submitted by other small entities.

2. EPA underestimates the impact of both proposed actions presented in the rule.

EPA only identified eleven small entities that would be subject to its proposal. Furthermore, EPA determined that only three of those entities will be impacted by the legacy CCR surface impoundment requirements of the proposal, and the remaining eight will be subject to the CCRMU requirements of the rule. Based on feedback from small entity stakeholders, Advocacy is concerned that the agency has underestimated the number of small entities impacted by the rule. EPA's own concerns about the uncertainty of its data and its use of representative data to support its count and characteristics of the actual affected universes²⁵ clearly demonstrates that the agency's accounting of the small entity impacts may need further analysis.

The statement of the factual basis for the agency's RFA certification (per 5 USC § 605(b)) should include sufficient information to factually demonstrate that the agency has:

- 1) accurately counted the number of small entities that would be impacted (*i.e.*, who are these small entities),
- 2) accurately assessed the economic impact on these small entities (*i.e.*, estimate the cost impact related to its operations such as to revenue), and
- 3) properly determined as a matter of fact that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

Advocacy is particularly concerned about the agency's estimated impact for small entities subject to the CCRMU requirements, especially given the broad scope in the catch-all phrase, "other areas where CCR is managed directly on the land." Advocacy recommends that EPA account for the missing impacts to support its RFA certification with an accurate counting of the number of entities that would be impacted and accurately assess the economic impacts on these small entities for each proposed action (*i.e.*, legacy CCR surface impoundments and CCRMU), separately.

²⁴ See RIA at ES-7.

²⁵ *Id.* at ES-8.

3. EPA’s certification for the proposed regulation of CCRMUs does not meet the standard set by the agency’s own guidance for how to conduct a threshold analysis under the RFA.

Because EPA combines the number of entities impacted by both provisions, the agency believes that the proposal can be certified under the RFA as not having a significant impact on a substantial number of small entities. Since the RFA does not define the terms significant or substantial as they pertain to the extent of economic impact and the number of small entities affected, EPA’s guidance provides that the agency considers certain numerical thresholds to determine whether a rule can be certified under the RFA.²⁶ These include:

- 1) “(1) magnitude of economic impact that may be experienced by regulated small entities;
- 2) (2) total number of regulated small entities that may experience the economic impact; and
- 3) (3) percentage of regulated small entities that may experience the economic impact.”²⁷

The first numerical threshold relates to significance of the economic impact.²⁸ The second and third numerical thresholds relate to the substantial number of small entities impacted.²⁹

In the RFA certification for this proposal, EPA presents that two out of eleven entities will have an impact of 1 percent of revenue or greater, which means that the percentage of impacted entities is around 18 percent. Based on the agency’s guidance,³⁰ it can certify the rule because the agency can presume no significant impact on a substantial number of small entities since it is less than 20 percent for less than 100 entities.

However, if the two actions are separated into their own separate proposals, based on the existing threshold analysis and its own guidance, EPA could not certify its proposed regulation of CCRMUs under the RFA. This is because its analysis provides that 25 percent of the estimated eight impacted small entities will have an impact of 1 percent of revenue or greater, including one with an impact of three percent of revenue or greater.³¹ Based on EPA’s guidance, this rule falls into the “Uncertain - No Presumption” of significant economic impact on a substantial number of small entities category.³² In this case, the agency directs itself to conduct additional analysis such as an analyzing cost pass-through, using or examining profits or profit margins, measuring the financial health of entities, or comparing the relative impacts on small entities versus large entities.³³ The agency did not conduct or provide any such additional analyses, per its own guidance, to account for the uncertainty regarding its presumption for a significant

²⁶ U.S. Env’t Prot. Agency, Off. of Policy, Regul. Mgmt. Div., *EPA’s Action Development Process: Final Guidance for EPA Rulewriters: Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act*, 23 (Nov. 2006), <https://19january2021snapshot.epa.gov/sites/static/files/2015-06/documents/guidance-regflexact.pdf> [hereinafter *EPA Rule Guidance for RFA*].

²⁷ *Id.* at 23.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* 24 tbl. 2.

³¹ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31982, 33935 (May 18, 2023).

³² *EPA Rule Guidance for RFA*, *supra* note 28, at 24.

³³ *Id.* at 28.

economic impact on a substantial number of small entities. For this reason, the agency cannot certify the requirements for CCRMUs under the RFA. Therefore, Advocacy urges the agency to use the information provided during the public comment period for this proposed action to assess the impacts on small entities to establish a factual basis to properly support an RFA certification in a re-proposal of the CCRMU requirements.

B. EPA should reconsider its compliance timeframes to provide small entities flexibility based on their ability to comply.

Advocacy is concerned that the proposed expedited compliance timeframes provided will not be feasible for small entities because of their limited resources. For example, EPA recognized the concerns regarding shortages of contractor and lab resources due to the fact that many facilities would need to come into compliance at the same time.³⁴ The agency, however, dismissed these as invalid concerns, reasoning that there will be fewer facilities and units that will need to come into compliance.³⁵ According to small entity stakeholders, these shortages will affect a small entity's ability to comply with the proposed rule within the timeframe provided. For instance, the proposed requirements will impact all small entities in this sector because all will be required to undertake the due diligence to determine if their facility contains any CCRMUs or has a legacy CCR surface impoundment. This burdensome activity will require an extensive facility evaluation review.

Finally, the costs for both the determination and demonstration of compliance will be burdensome because of limited personnel or other experts. For instance, since the proposed compliance timeline requires closures, if any, to be completed within the same timeframe, the availability of contractors and professional engineers may be constrained. Moreover, small entity stakeholders also emphasized the importance of approved state permit programs for the implementation of the CCR program to allow for site-specific determination of risk and a flexible compliance approach to address those risks.

Therefore, Advocacy urges the agency to reconsider its proposed compliance deadlines based on the feasibility of small entities to meet the proposed compliance timeframes for the rule. Advocacy recommends that the agency provide extended compliance timelines that are site-specific and based on the feedback and outreach with the affected small entities.

C. EPA should develop a risk assessment to support its regulation of inactive CCR units.

Advocacy is also concerned that the agency's 2014 Risk Assessment does not support its proposed regulations because it "characterized potential risks to human and ecological receptors associated with leakage from CCR surface impoundments and landfills *in operation at that time*."³⁶ In other words, the agency's 2014 Risk Assessment for CCR units only evaluated active

³⁴ 88 Fed. Reg. 31,196.

³⁵ *Id.*

³⁶ *Id.* at 32008 (citing U.S. Env'l Prot. Agency, Off. of Solid Waste & Emergency Response, *Human and Ecological Risk Assessment of Coal Combustion Residuals* (Dec. 2014) <https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0107-0126> [emphasis added]).

CCR units and did not identify specific risks for any inactive CCR units. In the preamble, the agency references additional data obtained more recently that may be informative about the risks associated with inactive CCR units. Advocacy recommends that the agency use the new information to develop a risk assessment to support its regulation of inactive CCR units.

III. Conclusion

Advocacy believes that EPA has improperly certified two unrelated regulations as one proposed rulemaking under the RFA. Advocacy is also concerned that the proposed compliance timeframes do not provide flexibility for small entities based on their ability to comply with the proposed requirements. In addition, Advocacy is concerned that EPA's 2014 Risk Assessment does not support the proposed requirements for inactive sites in this proposal.

Advocacy recommends that the agency pursue its regulation of legacy CCR surface impoundments and CCRMUs in separate rulemakings each with its own RFA analysis, including either a certification supported with a factual basis or an IRFA (followed by a SBREFA panel), if necessary. Advocacy also urges the agency to consider flexibilities for small entities to provide reasonable timelines for compliance. Finally, Advocacy recommends that the agency provide an appropriate risk assessment that supports the regulation of inactive CCR units to support its proposed actions. Advocacy urges the agency to consider feedback from small entities on these important issues.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Tayyaba Zeb at (202) 798 -7405 or by email at tayyaba.zeb@sba.gov.

Sincerely,

/s/

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Office of Advocacy
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/s/

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Copy to: Richard L. Revesz, Administrator
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