U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

April 27, 2018

VIA ELECTRONIC SUBMISSION

The Honorable Scott Pruitt
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

Re: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One) (Docket ID. EPA–HQ–OLEM-2017-0286)

Dear Administrator Pruitt:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments in response to the Environmental Protection Agency's (EPA) proposed rule, "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals (CCR) From Electric Utilities; Amendments to the National Minimum Criteria (Phase One)."[1] Advocacy is concerned about the impact of the changes on small businesses. Advocacy recommends that EPA address its concerns by extending the upcoming October 2018 deadlines and by allowing the risk-based alternative performance standards to be applicable to the existing self-implementing rule. Advocacy further recommends that the agency provide flexibilities to manage non-CCR wastestreams and for the use of CCR for final cover systems. Finally, Advocacy suggests that the agency leave boron off the list of constituents in Appendix IV. Advocacy urges EPA to carefully address these small business concerns and to consider providing appropriate and timely regulatory flexibilities to small businesses while still accomplishing the agency's regulatory objective.

The Office of Advocacy

Congress established 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

[1] 83 Fed. Reg. 11584 (March 15, 2018).

Business Administration (SBA); as such the views expressed by Advocacy do 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, federal agencies are required by the RFA 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, in any explanation or discussion accompanying the final rule's publication in the *Federal Register,* the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[5]

Background

EPA published a final rule to regulate the disposal of coal combustion residuals (CCR) as solid waste under subtitle D of the Resource Conservation and Recovery Act (RCRA) on April 17, 2015.[6] In the rule, EPA finalized national minimum criteria for landfills and surface impoundments that include location restrictions, groundwater monitoring and corrective action among a host of other requirements.[7] In the final rule, the agency was limited to promulgating a self-implementing rule for CCR because existing laws at the time did not provide EPA any authority to enforce the minimum criteria or establish permit programs for it or delegate such authority to states. [8] As a result, the finalized standards were designed to be protective for all sites, regardless of risk.[9]

That final rule, however, included flexibilities and exemptions in limited circumstances. For example, EPA's regulation allow a facility to install a final cover system on inactive units that still contain CCR instead of requiring compliance with the closure requirements.[10] The rule also established alternative closure procedures in situations where there is a limitation on the disposal capacity of CCR waste.[11] The regulations also include an exemption for CCR that is beneficially used.[12]

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[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] See Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302 (April 17, 2015).
[7] Subpart D - Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments, 40 C.F.R. § 257.50 – 257.107 (2016).
[8] 80 Fed. Reg. at 21311.
[9] *Id.*
[10] 40 C.F.R. § 257.100(b).
[11] 40 C.F.R. § 257.103.
[12] *Id.* at § 257.53.

On December 16, 2016, the Water Infrastructure Improvements for the Nation (WIIN) Act was enacted.[13] The WIIN Act amended RCRA to provide for state CCR permit programs.[14] The law also provided EPA with the authority to establish its own federal permit program.[15] Most notably, the WIIN Act provided EPA with the authority to use its information gathering and enforcement authorities under RCRA to enforce the CCR rule or permit provisions.[16]

Most recently, on March 15, 2018, EPA published a proposed rule to revise the existing regulations (promulgated in the 2015 final rule).[17] The agency is proposing four changes in response to a judicial remand; these changes include adding boron to the list of constituents in Appendix IV and modifying the alternative closure provisions.[18] EPA is also proposing new provisions, as a result of the WIIN Act, to establish alternative performance standards for CCR units located in states that will have approved CCR permit programs or will be otherwise subject to oversight through an EPA permit program.[19] Finally, the agency is proposing to allow the use of CCR in the final cover system of units that are being closed.[20]

Advocacy's comments

I. The October 2018 Compliance Deadlines Must Be Extended Immediately.

Advocacy is concerned that the upcoming October 2018 compliance deadlines under the existing rule will render the alternative performance standards being considered in the proposal useless when finalized. The agency is proposing to provide alternative risk-based performance standards, which include allowing the use of an alternative risk-based groundwater protection standard for constituents where no Maximum Contaminant Level (MCL) exists, modification of corrective action remedy in certain cases, suspension of groundwater monitoring requirements if migration cannot be demonstrated, establishing an alternate period of time to demonstrate compliance with the corrective action remedy, modifying the post-closure period and allowing state directors to issue technical certifications in place of the existing requirement of a certification by a professional engineer.[21]

For small businesses, there are two important upcoming compliance deadlines in October: an October 17, 2018 deadline for location restrictions[22] and an October 12, 2018 deadline for the groundwater water monitoring program.[23] In its proposal, EPA is seeking comments only on whether the October 17, 2018 compliance deadline for the location restrictions should be extended in light of the WIIN Act or whether an alternative deadline during an interim period would be appropriate to facilitate the implementation of the WIIN Act and any changes as a

[13] Pub. L. 114-322, § 2301, 130 Stat. 1736 (2016) (amending 42 U.S.C. § 6945).
[14] *Id.* at § 2301(d).
[15] *Id.* at § 2301(d)(2)(B).
[16] *Id.* at § 2301(d)(4)(A).
[17] 83 Fed. Reg. 11584.
[18] *Id.* at 11585.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] 40 C.F.R. §§ 257.60 – 257.64.
[23] *Id.* at § 257.95.

result of this rulemaking.[24] Advocacy believes that an alternative deadline in the interim is appropriate for location restriction requirements and should be provided immediately so that regulated entities can take advantage of the flexibilities being considered in the proposal.

Advocacy, however, is also concerned about the October 12, 2018 deadline for the groundwater monitoring program, which will require affected facilities to complete their statistical evaluation to determine whether there is a statistically significant exceedance of groundwater protection standards, the result of which can lead to closure if exceedance of the groundwater protection standard is confirmed.[25] For constituents that do not have a MCL, the groundwater protection standard must be set at background, which is likely to be the case for most CCR units and thus would lead to closure. Under the proposed rule, however, the agency will allow the use of an alternative risk-based groundwater protection standard for constituents where no MCL exists. This can prevent unnecessary, irrevocable and expensive closures.

Small businesses emphasized that without an extension for the October 2018 deadlines for both the location restriction and groundwater monitoring program, the changes being considered will be futile because the regulated entities will have to make irreversible decisions that involve significant and costly undertakings based on the existing one-size-fits-all criteria available today. Therefore, Advocacy believes that it is essential for EPA to extend the upcoming compliance dates for the groundwater monitoring program and location restriction, immediately, to allow the regulated entities adequate notice and time to comply with the proposed risk-based performance standards when they are finalized. Advocacy urges the agency to act expeditiously to address this issue.

II. Risk-based Alternative Standards Must Extend to the Existing Self-implementing Rule.

Advocacy is concerned that EPA has unjustifiably limited the application of the alternative performance standards to permit programs; EPA must extend their application to the existing self-implementing rule. When the current regulations were finalized, RCRA Subtitle D provisions did not provide EPA with any authority to issue rules that could require permits, require states to adopt or implement these requirements, or allow EPA to enforce these requirements directly.[26] Instead, enforcement of the rule was only available via citizen suits and under a state's independent enforcement authority.[27] In the 2015 final rule, EPA also highlighted that although Congress developed the statutory structure to create incentives for states to implement and enforce the federal criteria, it did not require them to do so.[28] EPA further explained that, as a consequence, regulations under subtitle D were restricted to be self-implementing.[29] This means that the requirements in the existing rule apply directly to facilities without any oversight or enforcement from EPA. Due to the self-implementing nature of the

[24] 83 Fed. Reg. at 11598.
[25] See 40 C.F.R. § 257.95(g)(3).
[26] 80 Fed. Reg. at 21310.
[27] *Id.*
[28] *Id.*
[29] *Id.*

regulations, EPA's existing regulations are based on standards that are protective of all sites, "including those that are highly vulnerable."[30]

In the proposed rule, EPA is making alternative performance standards available to states (or EPA where it has permitting authority) with approved permitting authority under the WIIN Act.[31] At this time, there are no approved state permit programs. In addition, EPA also does not currently have a permit program in place. In the proposed rule, the agency is requesting comments on whether and how these alternatives standards could be implemented by facilities directly, even in states without a permit program, since the WIIN Act provided authority for EPA oversight and enforcement.[32] The compliance dates in the existing rule that the risk-based alternative performance standards are designed to replace will have passed long before state CCR permit programs are approved by EPA or before EPA issues its own permits. During this time, the regulated entities will have to make irrevocable and expensive commitments under the existing self-implementing rule.

Advocacy believes that because the WIIN Act provides EPA with direct oversight and enforcement authority,[33] the agency must allow the alternative standards to be implemented directly by the facilities. The WIIN Act dispels the concerns that formed the basis of a non-risk-based and overly protective standard in the 2015 rule. The flexibilities being provided for the state and EPA permit programs are both appropriate and necessary in the self-implementing rule. To avoid the expenditure of unnecessary compliance costs and reduce the regulatory burden on small entities, Advocacy recommends that the risk-based alternative performance standards being considered in this proposal are included as part of the existing self-implementing rule.

III. Non-CCR Wastestreams Disposal Should be Managed Based on Alternative Disposal Capacity Considerations and Should be Allowed in Units Qualified for Delayed Closure.

Advocacy is concerned that the agency's clarification of a provision in the existing rule is an inaccurate interpretation that is not supported by the rulemaking record. The existing rule provides alternative closure procedures in two specific situations where an owner or operator is closing a CCR unit: one, where there no alternative CCR disposal capacity and two, when interim storage of CCR is necessary until a plant is permanently closed.[34] To qualify for the alternative closure procedures under both sets of circumstances, an owner and operator must make a certification with regard to a lack of alternative disposal capacity.[35]

In its discussion of these alternative closure requirements in the 2015 rule, the agency does not mention or address non-CCR wastes at all in this context.[36] In this proposal, however, the agency mischaracterizes the existing requirement by stating that "[e]xisting regulations require

[30] 80 Fed. Reg. at 21310.
[31] 83 Fed. Reg. at 11585.
[32] *Id.*
[33] Pub. L. 114-322 at § 2301(d)(4)(A).
[34] 40 C.F.R. § 257.103.
[35] *Id.* at §§ 257.103(a) and (b).
[36] See 80 Fed. Reg. at 21423 – 21427.

an owner or operator to cease placing CCR *and non-CCR* wastestreams in the unit…."[37] Moreover, also in this proposal, the agency further explains that the under either of these exemption scenarios, "owners or operators may continue to place CCR, *and only CCR*, in a unit designated to close for cause for an extended period of time."[38]

Neither the regulatory text nor the preamble of the 2015 final rule makes any reference to non-CCR wastestreams in the context of these requirements. EPA's attempt to exclude the disposal of non-CCR wastestream in units by offering these new additions in its description of the existing law is contrary to the current understanding of the law and current practice. Because the existing regulations do not address non-CCR waste on this issue, the regulated entities have relied on the understanding that the placement of the non-CCR waste was not subject to the general prohibition under the closure procedures. They would therefore have no need to be part of the discussion in the alternate closure provisions.

EPA's 'clarification' in this proposal with regard to non-CCR waststreams is significant because the regulated entities have operated under a contrary understanding of the law for the past three years. Under this new interpretation, small businesses representatives have identified that many coal-based power plants will have no option for the management of non-CCR wastestreams and will have to cease operation, triggering reliability concerns. Advocacy believes that this issue must be resolved as soon as possible because the agency's statements with regard to non-CCR wastestreams change the understanding of the existing law and therefore, likely has had an immediate impact (i.e. upon the publication of this proposed rule).

Furthermore, based on the agency reinterpretation (discussed above) and out of its concern for the lack of disposal capacity for non-CCR wastestreams, the agency proposes to provide an exemption to facilities to be able to place non-CCR wastestreams in one of the three North American Electric Reliability Corporation (NERC) regions that an Edison Electric Institute (EEI) reliability analysis concluded to be likely to suffer substantial reliability impacts.[39] There is some concern among small businesses that the agency has misconstrued the results of the EEI analysis to limit the exemption to only three NERC regions. Advocacy urges the agency to work with small business to resolve the issues involving the review of the data presented in the EEI analysis and to consider expanding the exemption beyond the three regions.

IV. Use of CCR for the Construction of Final Cover Systems Should be Expanded and Allow the Beneficial Use of CCR.

Advocacy is concerned that EPA has designed an overly restrictive criteria for the use of CCR in the construction of final cover systems and has failed to address the role of beneficial use for this purpose. The existing regulations exempt CCR that is beneficially used.[40] The agency has

[37] 83 Fed. Reg. at 11594. [emphasis added].
[38] *Id.* [emphasis added].
[39] 83 Fed. Reg. at 11595.
[40] 40 C.F.R. § 257.53.

specified criteria to qualify as a beneficial use of CCR.[41] EPA generally defines beneficial use as the recycling or reuse of coal ash in lieu of disposal.[42]

Under the existing regulations, EPA allows the closure of a CCR unit to be completed by leaving the CCR in place and installing a cover system.[43] In this action, the agency has proposed to impose certain criteria that a facility satisfies in order to use CCR in a final cover system.[44] Specifically, the agency set forth four conditions for allowing the use of CCR in construction of final cover, which include a requirement that the CCR to be used must be generated on site and to be present on the site at the time of closure.[45] Advocacy believes that the proposed conditions are too restrictive, as these conditions EPA would restrict the use of CCR that meets the beneficial use criteria.

Advocacy believes that the agency should conduct a thorough evaluation to determine whether the proposed restrictions truly support the agency's goal in encouraging a speedy closure.[46] More importantly, the agency must clarify why the use of CCR in this case is not a reuse of CCR and therefore not considered a beneficial use. Alternatively, EPA should delete the proposed conditions and allow the use of CCR for the construction of a cover system in this case as long as it meets beneficial use criteria.

V. Boron Should Not be Added Back on the List of Appendix IV Constituents.

Advocacy is concerned that EPA's decision to add boron to Appendix IV is not supported by the rulemaking record. In the 2015 rule, EPA deleted boron from Appendix IV by supporting that it is "…on appendix III and therefore will continue to be monitored throughout assessment monitoring."[47] In this proposal, the agency has proposed to add boron back to Appendix IV, which can trigger corrective action and potentially the requirement to retrofit or close the CCR unit.[48] The addition of boron to the list of contaminants in Appendix IV means that its detection will trigger more extensive monitoring and cleanup requirements. EPA supports its decision to add boron back to Appendix IV by reinterpreting information, from a 2014 risk assessment, it already evaluated for its decision in the 2015 rule to support the deletion of boron from

[41] The definition of beneficial use consists of four criteria: "(1) The CCR must provide a functional benefit; (2) The CCR must substitute for the use of a virgin material, conserving natural resources that would otherwise need to be obtained through practices such as extraction; (3) the use of CCR must meet relevant product specifications, regulatory standards, or design standards when available, and when such standards are not available, CCR are not used in excess quantities; and (4) when unencapsulated use of CCR involves placement on the land of 12,400 tons or more in non-roadway applications, the user must demonstrate and keep records, and provide such documentation upon request, that environmental releases to groundwater, surface water, soil and air are comparable to or lower than those from analogous products made without CCR, or that environmental releases to groundwater, surface water, soil and air will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use." 40 C.F.R. § 257.53.

[42] See Frequent Questions about the Beneficial Use of Coal Ash, available at https://www.epa.gov/coalash/frequent-questions-about-beneficial-use-coal-ash.

[43] 40 C.F.R. § 257.100(b).

[44] *Id.* at 11605.

[45] *Id.*

[46] 83 Fed. Reg. at 11605.

[47] 80 Fed. Reg. at 21403.

[48] 83 Fed. Reg. at 11589.

Appendix IV.[49] It is not apparent whether and what new information has been identified to support the decision to add boron back to Appendix IV.

The addition of boron, a constituent without an MCL, to the Appendix IV will replace arsenic, a constituent with an MCL, as the risk driver for cleanup. As a result, there will be an enormous increase in compliance costs because boron will trigger more extensive monitoring and cleanup requirements.

Advocacy believes that EPA should carefully examine the basis for reversing its decision to delete boron off of Appendix IV by addressing the issues with the risk assessment and by identifying any relevant new information. EPA should carefully evaluate the consequences, specifically the costs of compliance, of its decision to add boron to Appendix IV.

Conclusions and Recommendations

Advocacy urges EPA to extend the upcoming October 2018 deadlines for the groundwater monitoring program and location restrictions, in the interim and as soon as possible, to facilitate the implementation of the WIIN Act and of any changes as a result of this rulemaking. Advocacy further recommends that the risk-based alternative performance standards provided to the state and EPA permit programs should be applicable to the current self-implementing rule. Advocacy also suggests that EPA allow for the consideration of alternative disposal capacity for non-CCR wastestreams and allow non-CCR wastestreams to be placed in units that qualify for delayed closure. Moreover, EPA's exclusion for non-CCR wastestreams should not be restricted to the three specific regions. Advocacy also suggests that the conditions proposed for the use of CCR in closure of a CCR Unit with CCR-in-place should be reevaluated. Alternatively, Advocacy recommends that the agency replace the conditions on the CCR use with the flexibility to allow the beneficial use of CCR. Finally, Advocacy suggests that the agency reevaluate its basis for reversing its decision to delete boron to Appendix IV, identify any relevant new information and examine the increase of costs of compliance that will result from adding boron to Appendix IV.

Advocacy urges EPA to give full consideration to the above issues and recommendations. We look forward to working with you to reduce the regulatory burden on small businesses.

If you have any questions or require additional information please contact me or Assistant Chief Counsel Tayyaba Waqar at (202) 205-6790 or by email at twaqar@sba.gov.

Sincerely,

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Acting Chief Counsel
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[49] 83 Fed. Reg. at 11588-89.

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