

## SCS TECHNICAL BULLETIN

### EPA SEEKS FEEDBACK ON INACTIVE SURFACE IMPOUNDMENTS AT INACTIVE ELECTRIC UTILITIES

February 3, 2021

The U.S. Environmental Protection Agency (EPA) is seeking comment and information until February 12, 2021, on inactive surface impoundments at inactive electric utilities (legacy units) that it will consider as it develops proposed regulations for these coal combustion residuals (CCR) units. The regulations, once finalized, will amend the April 17, 2015, CCR Rule. An advanced notice of proposed rulemaking (ANPR) soliciting the comments was established following the August 21, 2018 decision of the U.S. Court of Appeals for the District of Columbia Circuit [Utility Solid Waste Activities Group (USWAG), et al. v. EPA, 901 F.3d 414 (D.C. Cir. 2018)] to vacate the exemption of inactive impoundments at inactive facilities from the 2015 CCR Rule.

The CCR rule, 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,” finalized national regulations around disposal of CCRs. But while it imposed requirements on inactive surface impoundments at active facilities, it set no requirements for inactive impoundments at inactive facilities. Active impoundments are those that receive waste after the regulation’s effective date; inactive impoundments are those that stopped taking waste before the effective date.

*In response to the Court’s remanding of the legacy units provision back to the EPA, the agency is asking the industry for the following information:*

- Number of legacy units.
- Current status of legacy units (capped, dry, closed according to state requirements, holding water).
- Names and locations of former power plants where these units may preside and the plants’ closure dates.

*In addition, EPA is asking for comments on the following:*

- Suggestions for regulatory approach and for timeframes to come into compliance.
- Feedback on a potential definition for a legacy CCR impoundment.
- Comment on whether the EPA should reinterpret its authority under RCRA Subtitle D in response to the remand of provisions to the CCR Rule. (This may enable EPA to consider if there is a basis to opt not to regulate inactive impoundments).
- Comment on whether EPA’s authority should apply only to units that were in operation after November 1980 or to other smaller units.

- The agency requests comment on whether it should regulate units differently based on dates they became inactive. And it requests feedback on whether regulations should only apply to active units at former plants that sold power to the grid or whether it should also regulate units at former plants that provided power to one site or facility.
- The EPA is asking for the technical, policy, and legal rationales with respect to the topics subject to this advance notice of proposed rulemaking, which could provide insight into the EPA's scope of authority.

*For a history on the 2015 CCR Rule and the events leading up to its current review:*

The CCR Rule, codified in Subpart D of Part 257 of Title 40 of the Code of Federal Regulations, established regulations for CCR landfills, CCR surface impoundments, and lateral expansions of CCR units. It established location restrictions, requirements around design and operations, as well as around groundwater monitoring/corrective actions, closure and post-closure care, recordkeeping, notification, and posting compliance data on the internet.

EPA originally exempted inactive units at inactive sites (§ 257.50(e)), partially out of concern that current owners of the land where these sites preside may have no ties to the prior disposal practices and should not have to invest in their management.

Several parties challenged two CCR Rule provisions relevant to the EPA's current ANPR. The first allowed unlined surface impoundments to operate until they exceeded the groundwater protection standard. Challengers asserted that EPA did not confirm that these sites met RCRA's requirement that solid waste disposal sites pose "no

reasonable probability of adverse effects on health or the environment." [\[42 U.S.C. 6944\(a\)\]](#)

The second challenged provision was the exemption of inactive surface impoundments at inactive power plants from regulation. Petitioners argued that these impoundments could have unmonitored leaks and catastrophic structural failures.

While the U.S. Court of Appeals upheld most of the finalized CCR Rule, it found in favor of the challengers on these two provisions, concluding that the EPA acted "arbitrarily and capriciously and contrary to RCRA" not mandating the closure of unlined surface impoundments and by exempting legacy units from regulation. In support of its opinion, it referenced data showing that legacy units are usually unlined, unmonitored, and pose more risk for leaks than units at active utilities.

*Who any forthcoming rules may apply to:*

Operators and owners who may be affected by forthcoming decisions around inactive CCR surface impoundments include electric utilities and independent power producers who generate CCR within the North American Industry Classification System (NAICS) code 221112. And importantly, EPA states "other types of entities ... could also be regulated" and advises those wanting to confirm if the regulation applies to them to read the applicability criteria in [§ 257.50 of title 40 of the Code of Federal Regulations](#).

Landowners, with a legacy surface impoundment on their property purchased from a utility, will want to review the proposed definitions for a legacy impoundment.

Currently, EPA is visiting several definitions for a legacy CCR surface impoundment. For instance, a surface impoundment at a power plant that stopped generating power before October 19, 2015, and either:

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- Contained CCR and liquids on the effective date of the 2015 CCR rule (October 19, 2015) or,
- Contained CCR and liquids on the date the Court issued its mandate for its August 21, 2018 decision (October 15, 2018) or,
- Contains CCR and liquids on the date EPA will issue a final rule on legacy CCR surface impoundments.

Until the agency finalizes pending amendments to the CCR Rule, operators are not required to take action to ensure compliance.

Moving forward, the agency plans to review all comments and information received in response to the ANPRM. Following that review, EPA may supplement the information to determine which regulatory criteria should apply to legacy CCR impoundments.

If EPA decides it has sufficient information, it will publish a proposed rule incorporating responses to the ANPRM and other publicly available information. The proposed rule is slated to be issued in July 2021. Then it will be open for public comment.

### *How to file comments:*

Comments in response to the current ANPRM must be identified by Docket ID No. EPA-HQ-OLEM-2020-0107 and can be submitted [online](#).

*For specific questions concerning the ANPRM, contact EPA's [Michelle Long](#)*

*Or, for more information, contact these professionals at SCS:*

[Michael McLaughlin](#), Senior Vice President and National Expert on Brownfields, Landfill Redevelopment, Electric Utilities

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