COMMENTS OF THE CROSS-CUTTING ISSUES GROUP ON EPA'S REQUEST FOR COMMENTS ON THE "EVALUATION OF EXISTING REGULATIONS"

EPA Docket No. EPA–HQ–OA–2017–0190

I. INTRODUCTION

On April 13, 2017, the U.S. Environmental Protection Agency ("EPA" or "Agency") published in the *Federal Register*, at 82 Fed. Reg. 17,793, a notice entitled "Evaluation of Existing Regulations" ("Notice"), requesting public comment on regulatory reform issues. The Notice was published in response to Executive Order 13777 ("EO"), entitled "Enforcing the Regulatory Reform Agenda," which directed federal agencies to establish Regulatory Reform Task Forces ("Task Forces") to evaluate existing regulations and make recommendations regarding their repeal, replacement, or modification, with the goal of alleviating "unnecessary regulatory burdens."[1] The EO directed the Task Forces to seek input from entities significantly affected by federal regulations in their efforts to identify regulations for reform. EPA's Notice specifically requested comments on EPA regulations "that may be appropriate for repeal, replacement, or modification."[2]

The Cross-Cutting Issues Group ("CCIG" or "Group")[3] respectfully submits these comments in response to the Notice. CCIG is a group of electric generating companies with a diverse portfolio of generating assets located throughout the country. CCIG members are subject to a diverse set of regulatory requirements established and implemented by EPA offices, including the Office of Water and the Office of Land and Emergency Management. CCIG urges EPA to make several revisions to its waste management regulations to facilitate compliance and reduce burdens associated with recordkeeping and reporting, all while maintaining environmental protections. Specifically, the Group recommends that EPA undertake narrow reforms to the Coal Ash Rule[4] pertaining to coal combustion residuals ("CCR"), as well as to the regulations under the Resource Conservation and Recovery Act ("RCRA") that streamline management standards for categories of hazardous waste considered "universal wastes." [5]

First, CCIG urges EPA to take the following actions with respect to the Coal Ash Rule:

- Revise the alternative closure provision to expressly include CCR units that receive both CCR *and non-CCR* waste. EPA may have inadvertently limited this existing exception to units that receive only CCR, as there is no environmental basis for this limitation.

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[1] 82 Fed. Reg. 12,285 (Mar. 1, 2017).

[2] 82 Fed. Reg. 17,793, 17,793 (Apr. 13, 2017).

[3] The CCIG members who support these comments are Alliant Energy Corporation, Entergy Services, Inc., Florida Power and Light, Louisville Gas & Electric/Kentucky Utilities, National Grid, NextEra Energy, Inc., OGE Energy Corp., Public Service Company of New Mexico, Talen Energy, and Salt River Project.

[4] 80 Fed. Reg. 21,302 (Apr. 17, 2015).

[5] *See* 40 C.F.R. § 273.

- Revise the rule to include provisions allowing owners or operators of CCR units to adopt risk-based groundwater protection standards and corrective action remedies. The proposed rule contained such provisions, but the final rule did not retain them. EPA's expressed concerns about including these provisions in the final rule are no longer relevant.

- Continue the Agency's efforts to develop guidance on state coal ash permitting programs, and release a draft guidance document as soon as practicable. EPA also should begin developing its own federal coal ash permitting program. The efficient development of coal ash permitting programs and guidance would prevent expensive and time-consuming litigation, while providing clarity to regulated entities regarding their compliance obligations.

Second, the Group urges EPA to expand the list of universal wastes to include aerosol cans. Aerosol cans are similar to the other waste products that EPA already regulates as universal waste, as they are commonly used and pose a lower risk to people and the environment than hazardous wastes. This change would create significant cost savings with no negative impacts on public health or the environment.

CCIG appreciates EPA's consideration of these targeted edits to regulatory requirements that impose administrative costs without corresponding environmental benefits. The Group looks forward to continuing to work with the Agency in the coming months to achieve broader, programmatic regulatory reforms that would achieve even greater cost reductions costs while continuing to maintain environmental protections. For example, the Group intends to propose concrete suggestions for improvements to the Clean Water Rule[6] through outreach in the form of letters, white papers, and comments, as appropriate.

II. COMMENTS

A. EPA Should Expand the Alternative Closure Provision in the Coal Ash Rule.

The Coal Ash Rule establishes nationally applicable minimum criteria for the disposal of CCR in landfills and surface impoundments. The rule requires an owner or operator of an existing CCR surface impoundment that fails to meet Coal Ash Rule requirements to retrofit or close the unit.[7] However, it also specifically provides an exception, known as the "alternative closure" provision: if an owner or operator can demonstrate that there is no alternative disposal capacity for a surface impoundment otherwise required to close, the impoundment may continue to operate, in compliance with applicable provisions of the rule, for a limited time.[8] Specifically, the provision states that the "owner or operator of a CCR landfill, CCR surface impoundment, or any lateral expansion of a CCR unit that is subject to closure . . . may continue to *receive CCR* in

[6] 80 Fed. Reg. 37,054 (June 29, 2015).

[7] 40 C.F.R. § 257.101.

[8] *Id.* at § 257.103.

the unit . . . ."[9] EPA should revise the alternative closure provision to expressly include units that receive *both* CCR and non-CCR waste.

The current phrasing of the provision, which explicitly refers to the receipt of CCR but is silent on the receipt of non-CCR waste, could be interpreted to mean that a unit operating under the alternative closure provision may receive *only* CCR, instead of being able to receive both CCR and non-CCR waste. The Coal Ash Rule provides no rationale for why a unit utilizing the alternative closure provision should be limited to accepting only CCR. EPA has acknowledged that CCR surface impoundments were "designed to hold an accumulation of CCR and [non-CCR] liquids," such as storm water runoff.[10] The Agency also has recognized that there may be times when a specific CCR unit "will only receive non-CCR wastes or perform other forms of active waste management in the unit."[11] Further, EPA "is aware of no risks that would warrant cessation of such activities simply because the unit is no longer receiving CCR."[12] As this statement recognizes, impoundments that receive non-CCR waste do not pose a greater risk to human health or the environment than impoundments that receive only CCR.

Prohibiting surface impoundments that accept non-CCR wastes from using the alternative closure provision creates the very scenario EPA sought to avoid. EPA established the alternative closure exception because it understood that a unit might not have anywhere else to properly dispose of its waste.[13] Without the exception, a "facility may be faced with either violating the closure requirements in § 257.101 by continuing to place CCR in a unit that is required to close, or having to cease generating power at that facility because there is no place in which to dispose of the resulting waste."[14] Facilities that stop generating power to comply with the rule would create a significant risk to human health by leaving communities without electricity. As EPA recognizes, "the risks to the wider community from the disruption of power over the short-term outweigh the risks associated with the increased groundwater contamination from continued use of [CCR] units."[15]

CCIG urges EPA to modify the Coal Ash Rule to explicitly allow units that otherwise qualify for the alternative closure option to accept both CCR *and non-CCR* wastes when no alternative capacity is available. This modification could easily be made by revising the first paragraph of 40 C.F.R. § 257.103, as well as 40 C.F.R. § 257.103(a)(1) and (b)(1), to state that owners and operators "may continue to receive CCR and non-CCR wastes." This change would reduce regulatory burdens and advance environmental and public health goals.

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[9] *Id.* (emphasis added).

[10] *Id.* at § 257.53; *see also id.* at § 257.101(a)(1) ("[T]he owner or operator of the existing unlined CCR surface impoundment must cease placing *CCR and non-CCR* wastestreams into such CCR surface impoundment . . ." (emphasis added)); *id.* at § 257.53 ("Active portion means that part of the CCR unit that has received or is receiving *CCR or non-CCR* waste . . . ." (emphasis added)).

[11] 80 Fed. Reg. at 21,416.

[12] *Id.*

[13] *Id.* at 21,423.

[14] *Id.*

[15] *Id.*

B. EPA Should Revise the Coal Ash Rule to Allow for the Adoption of Risk-Based Groundwater Protection Standards and Corrective Action Remedies.

Between proposing and finalizing the Coal Ash Rule, EPA made several changes to provisions concerning groundwater protection standards and corrective action remedies. CCIG requests that EPA readopt the proposed provisions, as EPA's concerns that formed the Agency's justification for abandoning this language have been rendered irrelevant by subsequent developments.

EPA made the following changes between the proposed and final rule with respect to groundwater protection standards and corrective action remedies:

- **Risk-based groundwater protection standards.** The proposed rule would have specifically allowed the owner or operator of a CCR unit to establish an alternative groundwater protection standard for constituents for which maximum contaminant levels ("MCLs") have not been established, provided that (1) the alternative groundwater protection standard has been certified by an independent registered professional engineer; (2) the state has been notified that the alternative groundwater protection standard has been placed in the operating record and on the owner's or operator's publicly accessible internet site; and (3) the alternative standard is an "appropriate health based level[]" that satisfies specified criteria.[16] In the proposal, EPA stated that it believed including the requirement for certification by an independent registered professional engineer in this approach would provide "an important independent validation of the particular route chosen."[17]

  The final Coal Ash Rule, in contrast, does not allow for alternative groundwater protection standards for constituents for which MCLs have not been established, instead providing that such standards must be set at the background concentration.[18] EPA indicated it made this change because the original approach would be "inappropriate in a self-implementing rule, as it was unlikely that a facility would have the scientific expertise necessary to conduct a risk assessment, and was too susceptible to potential abuse."[19]

- **Corrective Action Remedies.** The proposed rule would have provided:

  > The owner or operator of the CCR landfill or surface impoundment may determine that remediation of a release of an Appendix IV constituent from a CCR landfill or surface impoundment is not necessary if the owner or operator of the CCR landfill or surface impoundment demonstrates [several factors], and notifies the state that the demonstration, certified by an independent registered

[16] 75 Fed. Reg. 35,128, 35,249 (June 21, 2010); Proposed 40 C.F.R. § 257.95(h).

[17] *Id.* at 35,205.

[18] Final 40 C.F.R. § 257.95(h)(2).

[19] 80 Fed. Reg. 21,405.

> professional engineer or hydrologist, has been placed in the operating record and on the owner's or operator's publicly accessible internet site.[20]

> The final Coal Ash Rule did not retain this provision.[21] EPA indicated that it made the change because it was concerned that in a self-implementing program without direct regulatory oversight, "there is no…guarantee that an individual facility will act in the public interest."[22]

CCIG urges EPA to modify the Coal Ash Rule to include the proposed versions of 40 C.F.R. § 257.95(h) and § 257.97(e). These provisions would decrease regulatory burdens by increasing the rule's flexibility. EPA has articulated no reason for eliminating these two provisions that is still relevant, as EPA's concerns about potential abuse were rectified when former President Obama signed into law the Water Infrastructure Improvements for the Nation ("WIIN") Act on December 16, 2016. This law contains provisions reforming the Coal Ash Rule,[23] including authorization for states to directly regulate coal ash through permitting programs rather than leaving primary enforcement of the Coal Ash Rule to citizen suit actions. If a state does not create its own permitting program, or if its program is rejected by EPA, then EPA "shall implement a permit program" in that state.[24] Thus, EPA's concerns about potential abuse in a self-implementing program are no longer warranted because there will be state or federal oversight, in the form of a state or federal permitting program, over implementation of the Coal Ash Rule.

Furthermore, concerns about potential abuses by facilities are inconsistent with statements by the Agency that professional engineers can act in an unbiased manner even when acting for their employer. For example, EPA states it is "convinced that an employee of a facility, who is a qualified professional engineer and who has been licensed by a state licensing board would be no more likely to be biased than a professional engineer who is not an employee of the owner or operator."[25] EPA provides no explanation for why a certified professional engineer would be susceptible to bias in some instances but not others.

At minimum, CCIG recommends that EPA modify the Coal Ash Rule to specifically allow states to add those provisions to their own permitting programs. The WIIN Act provides that a state program must either directly implement the federal criteria applicable to coal ash units or utilize "such other state criteria . . . determin[ed] to be at least as protective" as the federal criteria provided in the Coal Ash Rule."[26] CCIG encourages EPA to make clear that state provisions allowing an owner or operator to tailor aspects of a facility's groundwater monitoring and corrective action program, through certification by a qualified professional engineer, to site-

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[20] 75 Fed. Reg. at 35,251; Proposed 40 C.F.R. § 257.97(e).

[21] *See* 80 Fed. Reg. at 21,406-07.

[22] *Id.* at 21,407.

[23] *See* WIIN Act, Pub. L. No. 114-322, Sec. 2301.

[24] *Id.* at Sec. 2301.

[25] 80 Fed. Reg. at 21,336.

[26] WIIN Act, Pub. L. No. 114-322, Sec. 2301.

specific considerations are "at least as protective" as the federal Coal Ash Rule standards. The enactment of a state permitting program would be fundamentally more protective than the original federal plan because it would establish agency monitoring and enforcement that would provide more consistent oversight than a self-implementing regime. Accordingly, allowing states to add these provisions to their permitting programs would provide regulated entities with more flexibility in adapting groundwater monitoring and corrective action programs to site-specific conditions, while ensuring the same level of protection as the federal program.

C. EPA Should Continue its Efforts to Implement Coal Ash Permitting Programs.

As discussed above, the WIIN Act authorizes states to regulate coal ash directly through permitting programs.[27] States may submit to EPA permitting program proposals, and EPA has 180 days to approve the state programs.[28] The state programs must either directly implement the federal criteria applicable to coal ash units or utilize "such other state criteria . . . determin[ed] to be at least as protective" as the federal criteria provided in the Coal Ash Rule.[29] If a state does not create its own permitting program, or if its program is rejected by EPA, then the Agency "shall implement a permit program" in that state.[30] However, there is no specified time frame for the federal government to establish its own permitting program.

The Group supports Administrator Pruitt's efforts to develop EPA guidance on state coal ash permitting programs.[31] CCIG encourages EPA to release a draft of this guidance document as soon as practicable. The guidance will provide states with crucial information on the criteria EPA will use when determining whether to approve state permitting programs, which will facilitate the states' development of approvable programs. CCIG also encourages EPA to begin developing its own federal coal ash permitting program. The federal permitting program would be implemented in states that do not submit approvable plans and on tribal lands.[32]

EPA's work to facilitate the establishment of state and federal coal ash permitting programs would reduce regulatory burdens under the Coal Ash Rule and increase regulatory certainty. The establishment of EPA-approved state permitting programs would provide clarity to regulated entities regarding their coal ash obligations. Further, because units operating under a coal ash permit should not be subject to citizen suit enforcement of Coal Ash Rule requirements,[33] the efficient development of coal ash permitting programs could prevent expensive and time-consuming litigation.

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[27] *See id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See* Letter from Scott Pruitt, EPA, to Governor Brian Sandoval (Apr. 28 2017), https://www.epa.gov/sites/production/files/2017-05/documents/sandoval-april282017.pdf.

[32] CCIG looks forward to engaging with EPA in the process of developing the federal coal ash permitting program.

[33] *See* WIIN Act, Pub. L. No. 114-322, Sec. 2301.

D. EPA Should Expand its List of Universal Wastes Under RCRA to Include Aerosol Cans.

EPA's RCRA regulations streamline hazardous waste management standards for categories of hazardous waste considered "universal wastes" that are commonly generated and that pose a lower risk to people and the environment than other hazardous wastes.[34] These streamlined regulations ease the regulatory burden on generators and transporters of these wastes.[35] Currently, EPA classifies four types of waste as universal waste: (1) batteries, (2) pesticides, (3) mercury-containing equipment, and (4) mercury lamps.[36] CCIG urges EPA to expand this list of universal wastes to include aerosol cans.

Aerosol cans are similar to the other waste products that EPA already regulates as universal waste. Like those products, aerosol cans are commonly and widely used, which makes disposal as hazardous waste difficult to control.[37] Non-residential sources of all sizes, including businesses, industry, government agencies, and schools, use aerosol cans for a multitude of purposes, ranging from painting to cleaning. Aerosol cans are discarded for a number of reasons, including when the spray mechanism no longer operates as designed, the propellant is spent, or the product is no longer used.

Aerosol cans also pose a lower risk to people and the environment than hazardous wastes.[38] California and Colorado already have added aerosol cans to their universal waste regulations because of this lower risk.[39] According to EPA, "[f]eedback from state programs thus far indicates that management of items such as aerosol cans . . . as universal wastes works well."[40] Further, EPA has indicated that aerosol cans may be safely managed as universal waste and "that aerosol cans are likely to be good candidates for management under federal universal waste regulations."[41]

Adding aerosol cans to the list of universal wastes would result in significant cost savings. One CCIG member disposes of between 65,000 and 70,000 aerosol cans *per year*. It currently costs between $0.75 and $1.00 to dispose of each can, largely because of the increased transportation costs associated with the disposal of waste under RCRA. Classifying aerosol cans as universal waste would save the company between $48,750 and $70,000 per year. This type of cost savings would benefit not just electric generating companies, but all entities that use aerosol cans. For instance, aerosol cans comprise a large percentage of the retail sector's hazardous waste stream.[42]

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[34] *See* 40 C.F.R. § 273.

[35] *See, e.g.*, 60 Fed. Reg. 25,492, 25,501-02 (May 11, 1995).

[36] *See* 40 C.F.R. § 273.2-273.5.

[37] *See id.* at § 273.81(a).

[38] *See id.* at § 273.81(e).

[39] *See* 22 CA ADC § 66273.1; Colorado Hazardous Waste Regulations, 6 CCR 1007-3 Part 261.

[40] EPA, *Strategy for Addressing the Retail Sector under RCRA's Regulatory Framework* at 9 (Sept. 12, 2016).

[41] *Id.* at 7.

[42] *See id.* at 3.

In sum, CCIG urges EPA to promptly draft and publish for public comment a proposed regulation classifying aerosol cans as universal waste. Adding aerosol cans to the list of universal waste products would create significant cost savings, with no significant increase in the risk of harm to people or the environment.

III. CONCLUSION

CCIG appreciates the opportunity to comment on existing regulations and make recommendations regarding their repeal, replacement, or modification. The Group urges EPA to follow its recommendations, which would alleviate "unnecessary regulatory burdens," without negatively impacting the overarching goals of each regulation.

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