Recommendations for Updating the Federal Coal Combustion Residual (CCR) Regulations

A white paper from the Cross-Cutting Issues Group

I. Introduction and Executive Summary

The Cross-Cutting Issues Group is a group of electric generating companies with a diverse portfolio of generating assets located throughout the country ("CCIG" or "Group").[1] The Group urges the federal government to re-evaluate its extensive CCR regulations and undertake certain actions to address the issues identified below.

The landscape of CCR regulation has changed significantly since the promulgation of the original 2015 Rule.[2] When the 2015 Rule was originally drafted, it was designed to be "self-implementing," without direct EPA enforcement and without any state or federal permitting program. As a result, many of the original rule requirements were designed to apply uniformly nationwide without regard to site-specific circumstances. The regulatory text identified the analysis and judgment of qualified professional engineers ("QPE") as the keystone of the program.

Shortly after the 2015 Rule became effective, however, Congress passed the 2016 Water Infrastructure Improvements for the Nation ("WIIN") Act. The WIIN Act broadened the potential application and enforcement of the 2015 Rule from a solely self-implementing regulation to a rule under which EPA can approve state permitting programs to operate in lieu of federal regulations, develop a federal permitting program, and in certain circumstances, directly enforce the 2015 Rule provisions.[3] Since the passage of the WIIN Act, EPA has approved three state programs (Oklahoma,[4] Georgia,[5] and Texas[6]) and proposed approval of another (North Dakota),[7] and has proposed (but not finalized) a federal permitting program.[8]

Between 2022 and early 2025, EPA issued over a dozen proposed (and two final) Part A and Part B decisions to facilities, opining in many cases that despite rigorous QPE certifications, facilities were out of compliance with any number of requirements pertaining to groundwater monitoring, groundwater analysis, alternate source demonstrations, closure performance and timing, and

[1] CCIG members who support this paper are AES Corporation, Arizona Public Service, Alliant Energy Corporation, Basic Electric Power Cooperative, CenterPoint Energy, Cleco Corporate Holdings LLC, Cooperative Energy, Deseret Generation and Transmission Co-operative, Dominion Energy, DTE Energy, Duke Energy, Entergy Services, LLC, Evergy, Louisville Gas & Electric/Kentucky Utilities, Minnesota Power, OGE Energy Corp., Public Service Company of New Mexico, Rainbow Energy Center, Salt River Project, Southern Company, Talen Energy, Tucson Electric Power Company, and Western Farmers Electric Cooperative.

[2] 80 Fed. Reg. 21,301 (Apr. 17, 2015) ("2015 Rule").

[3] 42 U.S.C. § 6945(d).

[4] Oklahoma: Approval of State Coal Combustion Residuals Permit Program, 83 Fed. Reg. 30,356 (June 28, 2018).

[5] Georgia: Approval of State Coal Combustion Residuals Permit Program, 85 Fed. Reg. 1,269 (Jan. 10, 2020).

[6] Texas: Approval of State Coal Combustion Residuals Permit Program, 86 Fed. Reg. 33,892 (June 28, 2021).

[7] North Dakota: Approval of State Coal Combustion Residuals Permit Program, 90 Fed. Reg. 20,985 (May 16, 2025).

[8] *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program, 85 Fed. Reg. 9,940 (Feb. 20, 2020).

reporting. During the same time period, EPA also directly pursued enforcement at numerous facilities, resulting in eight facilities entering into administrative settlements, for various alleged violations of the 2015 Rule. In 2024, EPA also promulgated the Legacy/CCRMU Rule, which significantly expanded the universe of regulated facilities and regulated units beyond EPA's statutory authority to include past placement of CCR and long-closed disposal units.[9]

At the tenth anniversary of the original promulgation of the 2015 Rule, EPA accordingly has an opportunity to re-examine both the original 2015 Rule and the 2024 CCRMU/Legacy Rule in light of these developments: the opportunities for permitting and enforcement, the regulatory expansion, a decade of compliance and enforcement experience, and President Trump's recent executive orders directing the revision or repeal of regulations that are unduly burdensome to the energy industry.[10] Based on member experience, CCIG believes there are significant opportunities to reform these regulations to achieve environmental protection while also reducing administrative burdens. As discussed in this paper, key priorities for revision include the following (subject to the caveat in the subsequent paragraph):

- Refine the scope of CCRMUs and legacy surface impoundments subject to regulation, including exemptions for units previously closed in accordance with state or federal law;
- Clarify the beneficial use exemption, especially as it pertains to potential CCRMUs;
- Revise closure timeframes under both Rules and clarify performance standards related to "free liquids" and "infiltration";
- Incorporate site-specific approaches into the regulations; and
- Prioritize and streamline approval of state permitting programs.

While some of the above items will take longer for EPA to accomplish, CCIG suggests the following near-term requests:

- Extend CCRMU compliance deadlines and timeframes while EPA undertakes its review of the CCRMU regulations;
- Issue interim guidance addressing on-site beneficial use of CCR; and
- Rescind EPA's Free Liquids Memorandum.

The Legacy/CCRMU Rule is currently subject to challenge in the D.C. Circuit, with the case currently in abeyance at EPA's request so that EPA can review the Rule. CCIG supports EPA withdrawing or vacating the entire CCRMU portion of the Legacy/CCRMU Rule for reasons stated in the Group's prior comments, which would address several of the concerns and priorities

[9] 89 Fed. Reg. 38,950 (May 8, 2024) ("Legacy/CCRMU Rule").
[10] Executive Order 14154, 90 Fed. Reg. 8,353 (Jan. 29, 2025); Executive Order 14219, 90 Fed. Reg. 10,583 (Feb. 25, 2025).

identified above.[11] However, should EPA decide to revise the CCRMU regulations instead, the Group urges EPA to consider the suggested actions and revisions as discussed in this paper.

II. NEAR-TERM REQUESTS

The following outlines near-term requests that are time-critical and that CCIG believes EPA can accomplish through targeted regulatory extensions and/or guidance. As noted above, CCIG supports EPA vacating or remanding the entire CCRMU portion of the Legacy/CCRMU Rule. If the Rule remains in place in some form, these near-term actions are proposed in the interim to alleviate compliance deadlines while EPA reconsiders the Legacy/CCRMU Rule in light of the developments above and the information submitted in this paper. Broader-scale and longer-term revisions to the federal CCR regulations that EPA should consider as part of these reconsideration efforts are discussed in Sections III and IV of this submission.

A. Immediately in a standalone rulemaking, extend near-term compliance deadlines under the 2024 Legacy/CCRMU Rule.

In light of EPA's ongoing reconsideration of the Legacy/CCRMU Rule, the Group respectfully requests that EPA act promptly to postpone the compliance deadlines in the CCRMU provisions of the Legacy/CCRMU Rule.[12] The first of these deadlines—the Facility Evaluation Report ("FER") Part 1 deadline—is February 9, 2026, just months away. Given EPA's ongoing review of the requirements contained in the CCRMU provisions, it does not make sense for companies to expend time and resources to meet these deadlines when the requirements may be revoked or substantially altered based on EPA's review.

At a minimum, EPA should extend the Facility Evaluation Report ("FER") Part 1 and Part 2 deadlines of February 9, 2026 and February 8, 2027 by one year each to make FER Part 1 due on February 8, 2027 and FER Part 2 due on February 8, 2028 at the very earliest. To the extent EPA anticipates taking longer than December 2025 to revise the Legacy/CCRMU Rule (or does not meaningfully narrow the universe of newly regulated units), however, CCIG supports further deadline extensions to allow facilities to evaluate the new regulations and complete the FER Part 1 and Part 2 reports. We recommend doing so immediately and separately from other reforms to the Legacy/CCRMU Rule to allow for relief while additional items are addressed in a subsequent rulemaking.

FER Part 1 is the most imminent deadline for the CCRMU portion of the Legacy/CCRMU Rule. Companies are already undertaking investigations and expending time and resources preparing to meet the February 2026 deadline now, despite the uncertainty regarding the future of the Rule. Thus, in order to prevent the needless continued expenditure of resources, the Group respectfully

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[11] Comments of the Cross-Cutting Issues Group on Proposed Legacy CCR Surface Impoundments Rule, EPA-HQ-OLEM-2020-0107 (Feb. 18, 2021) https://www.regulations.gov/comment/EPA-HQ-OLEM-2020-0107-0063, at 3–11.

[12] To the extent practicable, the Group also urges EPA to consider aligning federal CCR compliance deadlines with the power plant effluent limitation guidelines ("ELGs") compliance deadlines.

requests that the Agency extend both the FER Part 1 and 2 deadlines by at least one year, respectively.[13]

Additionally, while the deadline to install groundwater monitoring networks is not until May 8, 2028, meeting this deadline requires companies to begin work now (even before the FER reports have been submitted). As explained in further detail in Section III.A, the groundwater monitoring timeline should be extended to accommodate sufficient time for delineation, well placement decisions, and retention of contractors. The Group respectfully requests that EPA also extend the groundwater monitoring deadlines to January 8, 2031 at the very earliest so that companies can both understand their compliance obligations under any regulatory revisions as well as the full extent of regulated units/areas, which will depend both on the final rule provisions and on the outcome of the FER work. Requiring the installation of wells prior to the completion of FER Part 2 would be nonsensical, as power producers will not know where to place wells until the unit boundaries have been confirmed.

Without an extension, companies will face significant (in some circumstances, infeasible) obligations to comply with the current regulatory text while EPA undertakes its reconsideration. For instance, one company in the southern United States estimates that background sampling costs alone, based on nine sampling events for all CCRMUs, could be as high as $1,140,000 per site. This company also anticipates needing to install between 25 and 150 new groundwater monitoring wells at each site to satisfy CCRMU requirements. Another company in the midwestern United States has identified 49 areas that will be evaluated further as potential CCRMUs, with approximately one-third of these areas likely to be CCRMUs. This would double the number of regulated CCR units managed by this company. Evaluating the 39 areas of interest to confirm and delineate existing CCRMUs will require up to 10 weeks of drilling time across the company's facilities. An additional 8 to 10 weeks of drilling time would then be required for the approximately 80 new monitoring wells that will be needed to meet federal groundwater monitoring requirements. Companies should not be required to incur these potentially unnecessary costs before EPA completes any reconsideration of the CCR regulations, and likewise should not require installation of wells before the delineation work is complete. Considering the potentially high costs and substantial amount of work that regulated companies face, these deadlines should be extended to facilitate a logical, cost-effective approach to compliance.

B. Issue interim guidance addressing on-site beneficial use of CCR.

The Group requests that EPA clarify through guidance that 40 C.F.R. §§ 257.50(b) and (g) mean exactly what they say: the federal CCR regulations (including the original 2015 rule and the newer 2024 regulations addressing CCRMUs and legacy units) do not "apply to practices that meet the definition of beneficial use of CCR," and this exemption does not distinguish between on-site and off-site beneficial use placement. Further, the exemption for beneficial use in 40 C.F.R. § 257.50 should now also be read to apply to the definition of CCRMUs in light of the 2024 promulgation of the Legacy/CCRMU Rule.

[13] As discussed in Section III.A, further deadline extensions may be warranted. For example, the site-specific and fact-intensive nature of CCRMU regulation is most amenable to a permit program, and incorporating CCRMU regulation directly into the permitting program would necessarily mean extending these deadlines until EPA has actually established a permitting program.

The plain text of 40 C.F.R. §§ 257.50(b) and (g) can and should be read to include all CCR placement that meets the definition of beneficial use in 40 C.F.R. § 257.53, regardless of whether such placement is on-site or off-site. First, this exemption is broad and without any identified exceptions. There is no distinction between on-site or off-site placement; nor is there any such distinction in the definition of beneficial use in 40 C.F.R. § 257.53. Further, EPA did not revise this threshold scope provision in 2024 when it promulgated a new definition of CCRMU, so the beneficial use exemption should now be read to apply to any pre-2015 placements that would otherwise meet the definition of CCRMU. Accordingly, EPA should issue guidance clarifying that all on-site and off-site CCR placement – as long as it meets the beneficial use definition – is not subject to the federal CCR regulations.

Second, EPA did not revise this exemption in 40 C.F.R. § 257.50(g) or the beneficial use definition in 257.53 when it finalized the 2024 CCRMU/Legacy Rule. Accordingly, this exemption should be read to apply not just to the 2015 regulations but also the newer CCRMU regulations – if any placement can be shown to meet the beneficial use definition, "this subpart does not apply."[14]

Prior EPA statements have created confusion as to the plain reading of this exemption that warrants clarification. Further, with the near-term CCRMU FER deadlines approaching as early as February 2026, guidance confirming that this exemption applies regardless of location and regardless of when the CCR placement occurred is critical to establish regulatory certainty and help companies understand their upcoming compliance obligations.

In addition, EPA should clarify that the exemption of "roadbed and associated embankments" in the CCRMU definition in 40 C.F.R. § 257.53 should be interpreted under a plain language meaning to include all use of CCR in construction of roads, railbeds,[15] and embankments and similar uses (unless, as is currently stated in the definition, "the roadbed is causing or contributing to a statistically significant level above the groundwater protection standard"). These clarifications are consistent not only with the regulatory text as currently drafted, but also RCRA generally and policy goals to reduce disposal and waste footprints.

As discussed in greater detail in Section III.B, this interim guidance should be codified and expanded in subsequent regulatory action by EPA to revise select definitions in 40 C.F.R. §257.53 to ensure consistency, but interim guidance will provide critical near-term clarity to facilities assessing potential CCRMUs for purposes of the upcoming FER requirements.

C. Rescind EPA's Free Liquids Memorandum.

As discussed further in Section III.C, EPA should rescind the Free Liquids Memorandum[16] released in advance of the 2024 Legacy/CCRMU Rule. EPA's reinterpretation of "free liquids" creates significant logistical challenges and does not align with standard closure practices or risk considerations. The closure in place performance standards should focus on whether the unit is

[14] 40 C.F.R. § 257.50(g).

[15] *See* Merriam-Webster, *Roadbed*, https://www.merriam-webster.com/dictionary/roadbed (last visited April 21, 2025). (general definition of "roadbed" includes "the bed on which the ties, rails, and ballast of a railroad rest").

[16] EPA Memorandum, "Considerations for the Identification and Elimination of Free Liquids in Coal Combustion Residuals (CCR) Surface Impoundments and Landfills (40 C.F.R. Part 257, Subpart D)," Docket No. EPA-HQ-OLEM-2020-0107 (Apr. 22, 2024) ("Free Liquids Memorandum").

dewatered enough to stabilize the unit, which is consistent with the regulatory text that makes clear that the purpose of removing free liquids is to ensure stability.[17] EPA's latest reinterpretation of "free liquids," which suggests full removal of all liquids prior to placing a cap, is not only unsupported by the regulatory text, but is also infeasible and counterproductive in many cases. Such a stringent interpretation could require companies to be compelled to continue dewatering units for decades prior to placing a cap, which prevents companies from meeting the closure deadline. As such, the Free Liquids Memorandum should be rescinded and EPA should return to the original, commonsense interpretations of "free liquids," "infiltration," and the closure in place performance standards.

III. Substantive Requests for Revisions to Existing CCR Regulations

A. Revisions specific to CCRMUs (under the 2024 Legacy/CCRMU Rule)

The CCRMU portion of the Legacy/CCRMU Rule is a significant, retroactive expansion of the 2015 Rule that is not a valid exercise of EPA's authority under RCRA and imposes infeasible, impracticable, and overly burdensome requirements on energy companies with significant costs (previously discussed) that would eventually be placed on consumers. Consequently, the CCRMU Rule is the very type of rule that should be suspended, revised, or rescinded pursuant to the "Unleashing American Energy" and "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative" executive orders.[18]

If EPA declines to withdraw or vacate the CCRMU portion of the Legacy/CCRMU Rule entirely, substantial overhaul of the CCRMU regulations is necessary, including refining the scope of the CCRMUs subject to regulation and revising the applicable regulatory requirements.

In the Legacy/CCRMU Rule, EPA vastly expanded the scope of federal CCR regulations to a new class of units: CCR management units ("CCRMUs"), which are defined exceptionally broadly and should be tailored to a more limited universe. To the extent EPA retains the retroactive applicability of the Legacy/CCRMU Rule, EPA should limit the CCRMU definition to past placements that pose identified present risks and, at minimum, should exclude past beneficial use placements and units closed in accordance with state programs. EPA should also undertake a new risk assessment to establish new CCRMU thresholds, as well as revise the groundwater monitoring timeline for CCRMUs.

1. <u>The CCRMU definition is overly broad, beyond EPA's RCRA authority, and at odds with important public policy concerns.</u>

The Legacy/CCRMU Rule defines CCRMUs as "any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit. This includes inactive CCR landfills and CCR units that closed prior to October 19, 2015," and excludes roadbeds and associated embankments in which CCR is located unless the CCR is

[17] *See* 40 C.F.R. § 257.102(d)(2).
[18] Executive Order 14154, 90 Fed. Reg. 8,353 (Jan. 29, 2025); Executive Order 14219, 90 Fed. Reg. 10,583 (Feb. 25, 2025).

contributing to groundwater contamination at a statistically significant level above the groundwater protection standard.[19]

This definition is overly broad and unmoored from both statutory authority and reasonable policy and environmental objectives. First, RCRA limits EPA's ability to impose requirements on the management of solid waste such as CCR to only those activities that present a *reasonable* probability of causing adverse effects on health or the environment.[20] EPA's after-the-fact risk assessment, released months after the original proposed rule, does not support the overly broad CCRMU definition, and the definition therefore exceeds EPA's authority and the intent of RCRA by seeking to regulate areas for which there is no reasonable probability of adverse effects on health or the environment. EPA failed to show that CCRMUs —as EPA has broadly defined them in 2024—pose a reasonable probability of adverse effects on health or the environment.

Second, EPA's existing definition of CCRMUs imposes excess burdens on energy production that are not required to address risk and are inconsistent with the policy goals of promoting energy production. The 2024 CCRMU/Legacy Rule therefore runs afoul of several recent executive orders: "Unleashing American Energy,"[21] "Declaring a National Energy Emergency,"[22] and "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative."[23] EPA should take action consistent with those directives to reduce the impact of these regulations on power generation.

Third, EPA's failure in the 2024 CCRMU/Legacy Rule to explicitly exclude most beneficial uses from the CCRMU definition both discourages beneficial use and threatens to upend ongoing facility operations. Beneficial placement of ash on-site was a common industry practice to reduce waste and recycle material on-site, and the administrative record reflects that EPA was well aware of this when it promulgated the 2015 Rule.[24] Indeed, EPA expressly noted that the regulation did not encompass pre-2015 beneficial use. Rather, EPA was regulating beneficial use prospectively only, post-October 2015.[25] Historically, ash was used for roads, railbeds, grading/soil stabilization for infrastructure, barriers to protect liners, fill projects, and other on-site uses. Requiring companies to identify, document, and monitor every historic placement—and potentially remove the placement if not deemed to be under critical infrastructure—significantly complicates plant operations and energy production. Additional disruptions, delays, and adverse legal outcomes could occur if CCR is beneficially used under critical infrastructure, as there remains potential for

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[19] 40 C.F.R. § 257.53.

[20] 42 U.S.C. § 6944(a)

[21] Executive Order 14154, 90 Fed. Reg. 8,343 (Jan. 29, 2025) (directs agency actions that "impose an undue burden" on domestic energy sources, including coal, to be suspended, revised, or rescinded).

[22] Executive Order 14156, 90 Fed. Reg. 8,433 (Jan. 30, 2025) (declares a "national energy emergency" related to energy resources and costs, directing agencies to exercise any available "lawful emergency authorities" to facilitate development of domestic energy resources).

[23] Executive Order 14219, 90 Fed. Reg. 10,583 (Feb. 25, 2025) (requires agencies to identify for rescission or modification regulations that conflict with national interests by "significantly and unjustifiably" impeding energy production).

[24] 2015 Rule, 80 Fed. Reg. at 21,303 ("In 2012, approximately 40 percent of the CCR generated was beneficially used"), 21,309 ("293 of the 478 plants supply CCR for beneficial uses in at least 14 industries. As of 2012, CCR beneficial uses (*i.e.*, industrial applications) involved about 52 million tons annually.").

[25] 2015 Rule, 80 Fed. Reg. at 21,302 ("Beneficial uses that occur after the effective date of the rule need to determine if they comply with the criteria contained in the definition of 'beneficial use of CCRs.' This rule does not affect beneficial uses (*i.e.*, uses completed before the effective date of the rule.)").

confusion regarding the location delineation requirements, monitoring, boundaries, and subjective interpretations. For example, CCIG members have beneficially used CCR on key transportation routes, in active CCR and non-CCR units that are critical to operation, and as structural fill for key systems and equipment such as treatment facilities, beneficial use loading areas, transmission facilities, ash handling systems, and even under active generation facilities.

Select specific examples of the disruptions that the current CCRMU requirements will cause include the following:[26]

- A member has a rail embankment constructed with CCR components. Closure of this embankment would prevent the facility from being able to transport fuel to another power plant and, as such, would have effects beyond just the facility at issue. Monitoring would pose significant logistical challenges due to the long narrow/lateral placement of the CCR.

- A member, due to the stable and protective nature of CCRs, has used CCR as drainage layers above composite liners and as protective layers on embankments in their evaporation ponds. These ponds are critical to ongoing operations and cannot be retrofitted or replaced without significant disruption to ongoing energy production operations.

- A member has multiple sites with over 10 miles of roads that are entirely constructed of ash or blended with ash. Requiring the removal of such ash would significantly disrupt facility operations. For another member, the removal of the beneficial use exemption for roads creates a CCRMU that is 30 miles long. Groundwater monitoring and replacement of existing embankments with other natural resources would be expensive, complicated, time-consuming, and resource-intensive, and would also risk contamination.

- A member has ash impoundments at active generating sites that were previously closed under state law. These ash impoundments are below a cooling tower, below an active scrubber and stack, and below a wastewater treatment plant. Due to the location of these impoundments, it would be extremely difficult to delineate the placements as CCRMUs while the plant is operational.

- A member has an active CCR landfill that exists on top of a unit that was previously closed in accordance with state law but remains in contact with the uppermost aquifer. Under the new regulations, the member would be required to re-close the underlying unit, ultimately resulting in the closure of the overlying active CCR landfill. At this site, there is no other available land to build or create new landfill space, and the facility would be required to purchase nearby agricultural fields to create new landfill space.

- A member has a facility with potential units under a natural gas pipeline. Identifying potential units under a natural gas pipeline feeding a nearby combined cycle gas plant

[26] Multiple examples provided below were included in the Group's comments on the Proposed Rule. *See, e.g.,* Comments of the Cross-Cutting Issues Group on Proposed Legacy CCR Surface Impoundments Rule, EPA-HQ-OLEM-2020-0107 (Feb. 18, 2021) https://www.regulations.gov/comment/EPA-HQ-OLEM-2020-0107-0063, at 22.

would be extremely challenging with significant risk to personal safety, public safety, and risk to the grid if damaged.

- A member has used CCR material as fill for the construction of a facility that processes and encapsulates CCR for beneficial use. During the construction of the facility, a cement pad was placed on top of the CCR material. It will be extremely difficult to accurately characterize the extent of the waste boundary when the area has been covered by a cement pad with infrastructure on top. If the underlying CCR material requires removal in the future, then the on-site beneficiation process would likely have to cease and would impact the cement industry and would result in more unencapsulated ash requiring disposal.

- A member potentially has an unknown volume of CCR material along a railroad. Only a portion of the railroad is within the facility boundary. Due to fencing, emphasizing the plant's boundary line and obscuring access to the rest of the railroad, it would be difficult not only to assess the presence of CCR in the area, but also access the area the plant does not own.

- Closure and remediation of the former Navajo Generating Station was near completion when EPA finalized the 2024 Legacy/CCRMU Rule. The uncertainty regarding additional remediation and monitoring obligations for pre-2015 beneficial use of CCR at the site (which was previously unregulated prior to 2024) is preventing the economic redevelopment of the site.

Requiring the removal and replacement of the wide range of uses of CCR that fall under the broad CCRMU definition, including those described above, will end up causing cascading issues that potentially could impact reliability, force the use of virgin resources, and impose burdensome, unnecessary costs on energy companies.

2. <u>If EPA retains the CCRMU Rule, it should narrow the focus back to original intent—older landfill placements seen to be impacting groundwater.</u>

The original target of the CCRMU regulations, and much of the basis for the regulations, were older landfills. Specifically, certain traditional landfills ceased waste receipt prior to October 2015 and therefore were not subject to the original 2015 CCR regulations, but the CCR groundwater monitoring network identified potential contamination coming from some of these units. In the proposed Legacy/CCRMU Rule, EPA emphasized its review of multiple Alternate Source Demonstrations ("ASDs") where closed CCR landfills were identified as contaminating groundwater.[27] EPA listed these examples of old landfills as support for the potential risk that CCRMUs pose in order to justify the expansion of CCR regulations to this new type of regulated unit.

EPA has drastically expanded CCRMU regulations beyond this original purpose, targeting almost any placement of CCR at a power plant site in excess of one ton. This extraordinary extension of the regulations is without basis. If EPA decides to retain the CCRMU Rule, it should narrow the

[27] 88 Fed. Reg. 31,982, 32,013 (May 18, 2023) ("Proposed Legacy/CCRMU Rule").

CCRMU requirements to focus on traditional landfills and surface impoundments with identified groundwater impacts that are not already being addressed under state law.

3. Alternatively, EPA should (a) exempt landfills closed under state law subject to limited exceptions, (b) exempt beneficial uses as discussed below, and (c) redo its risk assessment in order to change the CCRMU threshold amounts.

In the alternative, if EPA retains the CCRMU regulations and does not limit them to the traditional landfills described in Section III.A.2, EPA should undertake other revisions to tailor the scope and substance of the regulation to identified risks. These revisions should include exemptions for landfills regulated under state law, exemptions for beneficial use, and reevaluation of threshold amounts triggering CCRMU regulation.

a. Exempt from federal regulation units that have begun or completed closure under state oversight or otherwise in accordance with state law.

EPA should recognize the reduction of risk where units have been cleaned up and/or closed under state oversight or otherwise in accordance with applicable state or federal regulation. The Group urges EPA to exempt from regulation as a legacy surface impoundment or a CCRMU (1) units that have closed consistent with state or other federal programs that existed at the time, (2) units that have started closure or have had a closure plan approved prior to the effective date of the 2015 Rule under such programs or consistent with any applicable regulations existing at the time, and (3) units that have closed by removal before the FER Part 2 is due.

Like units closed consistent with the federal requirements, units closed consistent with state requirements—which seek to address the same risks as those addressed by RCRA—or other federal programs were deemed by the relevant agencies not to pose a risk to health or the environment. Similarly, units undergoing groundwater monitoring and corrective action pursuant to a state program should not be subject to duplicative federal requirements. Furthermore, exempting such units supports this Administration's prioritization of cooperative federalism.

The Group reiterates its prior request included in the Group's comments on the proposed Legacy/CCRMU Rule,[28] and asks EPA to consider prior cleanup or closure under state or federal programs as it reconsiders the requirements of the Legacy/CCRMU Rule. Additional feedback on closure requirements that apply to both CCRMUs and CCR units is discussed in Section III.C.

b. Clarify that on-site beneficial uses are exempt from CCRMU regulations.

As discussed further in Section III.B, EPA should, at minimum, apply a plain reading of the regulations and explicitly clarify that CCRMUs do not include on-site beneficial use. For pre-October 2015 beneficial use, EPA should further clarify that CCRMUs do not include CCR that meets any of the following conditions:

[28] Comments of the Cross-Cutting Issues Group on Proposed Legacy CCR Surface Impoundments Rule, EPA-HQ-OLEM-2020-0107 (Feb. 18, 2021) https://www.regulations.gov/comment/EPA-HQ-OLEM-2020-0107-0063, at 47 – 48.

1) The CCR was used in construction of a road, embankment, or railbed;

2) The CCR placement meets the definition of beneficial use in 40 C.F.R. § 257.53;

3) The CCR placement was done in accordance with state regulations, approval, and/or oversight;

4) The CCR placement was done in accordance with standard industry and good engineering practices existing at the time of placement; or

5) The CCR was used in an encapsulated manner or utilized to make a cement-like product.

These clarifying revisions are critical to ensuring that plant operations are not disrupted and necessary to avoid needless removal of prior beneficially used CCR that does not pose any identified risk.

c. EPA should redo its risk assessment underlying the CCRMU regulations and adjust the threshold amounts accordingly.

Additionally, EPA should undertake a new risk assessment to replace EPA's flawed 2024 "risk assessment" completed in between the proposed and final Legacy/CCRMU Rule, and reexamine the threshold criteria used, including specifically the 1-ton and 1,000-ton thresholds. These current thresholds, which determine applicable obligations for CCRMUs, are not data driven. The Group urges EPA to undertake a new risk assessment that enables the Agency to set scientifically based thresholds.

1,000 tons is a very low threshold for compliance with CCRMU requirements, especially given that the Legacy/CCRMU Rule allows permitting authorities to assess uses below 1,000 tons on a case-by-case basis but mandates *all* uses in excess of 1,000 tons comply with the full suite of CCRMU requirements. Increasing this threshold would still allow permitting authorities to evaluate smaller uses (that are in excess of 1,000 tons) on a case-by-case basis to assess whether there is any actual risk. If supported by the findings of a new risk assessment, a 12,400-ton threshold would be consistent with the current beneficial use definition threshold.[29]

The 1-ton threshold for identification of CCRMUs in the FER should likewise be increased. One ton of CCR amounts to what could fit in the back of a small pickup truck or a single front end loader bucket. There is no evidence that CCR in such a low amount poses a risk and imposing the regulatory burdens for such small amounts is thus not justified. Further, identification of such small historical placements poses significant logistical challenges. Challenges include the review and assessment of small amounts of commingled materials and conservatively overestimating the volume of CCR that makes up each CCRMU. While identifying and delineating large volumes of CCR may be generally possible, doing the same for the smallest CCRMUs will take the most amount of effort and provide little to no environmental benefit.

4. Revisions to the groundwater monitoring timeline.

[29] *See* 40 C.F.R. § 257.53.

The Group also requests that the Agency revise the groundwater monitoring timeline for CCRMUs under the Legacy/CCRMU Rule by extending the deadline to initiate detection monitoring from May 8, 2028 to January 8, 2031 at the earliest. Facilities should not have to install wells before fully delineating the units that require monitoring. Instead, regulated facilities should be permitted to complete the delineation of CCRMUs under FER Part 2 *before* installing wells, which requires revision of the current groundwater monitoring timeline.

The Legacy/CCRMU Rule's current FER Part 2 deadline is February 8, 2027, and the deadline to install wells and initiate detection monitoring is May 8, 2028. In order to initiate detection monitoring, owners/operators must hire contractors, establish work plans, install wells, and complete sampling and analysis of a minimum of eight independent samples for each background and downgradient well, as required by 40 C.F.R. § 257.94(b), by the May 8, 2028 deadline. If the FER Part 2 deadline is extended to February 8, 2028, the Group asks EPA to extend the deadline to initiate detection monitoring to at least thirty-five months after FER Part 2 is due, which would be January 8, 2031.

Such an extension is warranted because facilities should be permitted to (1) complete delineation of CCRMUs under FER Part 2 *before* installing wells, and (2) complete the required sampling events on a quarterly basis. Thirty-five months would provide owners/operators eight months to conduct groundwater modeling to accurately establish flow pathways, create work plans, conduct any necessary permitting, receive all approvals, contact drilling companies, and install the wells and prepare for detection monitoring. It would then provide twenty-four months to complete eight quarterly baseline samples, and three months to compile a statistical evaluation report, all by the groundwater monitoring initiation deadline.

First, owners/operators cannot install wells at the waste boundary until they have identified where the waste boundary is, which is not due until the FER Part 2 deadline. Second, at that point, owners/operators will need time to identify suitable locations (i.e., identify flow direction and choose appropriate well locations that avoid conflicts and are appropriately spaced), obtain permits for drilling, procure a driller, drill the wells, and then develop the wells before collecting the first sample. Accordingly, the additional time is critical to allow time on the front end to install wells, and on the back end to initiate detection monitoring and begin evaluating the data for statistically significant increases ("SSIs") and SSLs as contemplated in 40 C.F.R. § 257.90(b)(3).

Third, this limited additional time is also critical for companies that will face logistical challenges that are out of their control in order to meet the current deadlines. For instance, some members live in states with a limited number of well drillers, and it is likely infeasible for all facilities in those given states to meet the stringent deadline with limited drilling resources, particularly facilities with unique geology and deep groundwater. Based on feedback from EPA since implementation of the 2015 Rule, companies may be installing more wells per unit or foot than they did under the original rule, compounding availability and resource restraints. Some members also face logistical challenges due to weather in their area. Cold weather, including frozen conditions and snow, may cause delays for everything from mobilization to drilling to sampling.

Fourth, providing the additional time for sampling in advance of the installation deadline is necessary to ensure all facilities are able to complete the required minimum of eight independent samples for each well. This timing is consistent with the 2015 Rule, which acknowledged that

companies need two years to conduct eight samples on a quarterly basis. Quarterly sampling is a general industry standard necessary to ensure statistical independence of the background samples. The current, shorter deadline does not allow for eight quarterly samples, which will force facilities to collect samples on an abbreviated timeline, thereby skewing statistical results. While some sites can maintain the assumption of statistical independence of the samples with a sampling interval shorter than quarterly, it depends on the site-specific geology and groundwater flow rates. Some facilities require quarterly sampling; anything sooner would essentially be sampling the same groundwater and thereby violate the assumptions of statistical independence of the samples.

Quarterly sampling also allows for seasonal impacts to be observed. For example, at one member's site, farm pumps change the direction of groundwater flow throughout the calendar year. This causes the same parameters to be elevated in one quarter but non-detect in the following quarter. Quarterly sampling reduces the potential for false statistically significant levels above the groundwater protection standard that would erroneously trigger the corrective action process.

As a result of moving the initiation of groundwater monitoring deadline to January 8, 2031, the initial groundwater monitoring and corrective action report deadline should then also be moved from January 31, 2029 to January 31, 2032.

Any further extensions to the groundwater monitoring deadline would warrant commensurate change in the groundwater report deadline. Further extensions for groundwater monitoring may be warranted if (1) EPA takes longer than this year to finalize revisions to the Legacy/CCRMU Rule and/or (2) EPA does not finalize the revisions indicated above, in which case, the large number of CCRMUs will impose logistical challenges, including constraints on driller resources. EPA should provide, at minimum, an additional six months (i.e., 35 months total after FER Part 2 is due) to allow sufficient time for the vast number of new units requiring monitoring. In the alternative, EPA should also consider delaying the groundwater monitoring requirements until a federal (or approved state) permitting program is in place that can establish commonsense, site-specific deadlines.

B. Revisions Related to Beneficial Use (under both the 2015 Rule and 2024 Legacy/CCRMU Rule)

1. Apply a plain-reading interpretation of 257.50(b) and (g) that exempts beneficial use that meets the 2015 Rule's four criteria.

As discussed in Section II.B, EPA should apply a plain-reading interpretation of 40 C.F.R. §§ 257.50(b) and (g). Section 257.50(g) is an overarching provision that generally exempts beneficial use of CCR that meets either three or four criteria articulated in the 2015 Rule: "This subpart does not apply to practices that meet the definition of a beneficial use of CCR." The plain text of this provision can and should be read to include all CCR placement that meets the definition of beneficial use in 40 C.F.R. § 257.53, regardless of whether such placement is pre- or post-October 2015, and regardless of whether such placement is on-site or off-site.

With the near-term CCRMU FER deadlines approaching as early as February 2026, guidance confirming that this exemption applies regardless of location and regardless of when the CCR placement is made is critical to establish regulatory certainty and help companies understand their

upcoming compliance obligations. Such guidance should also indicate that EPA will pursue changes in forthcoming regulations. As discussed in the following section, CCIG also urges EPA to revise certain other definitions in 40 C.F.R. § 257.53 to ensure regulatory consistency and adapt the beneficial use exemption for placements made before the 2015 beneficial use definition was promulgated.

2. Revise the definitions of "CCR pile" and "CCR management unit."

In addition to issuing guidance, and for the reasons discussed in Sections II and III.A, EPA should also make the following definitional revisions in the regulatory text to clarify that the regulations do not extend to beneficial use, whether on-site or off-site:

> **"CCR pile or pile"** should be revised as follows: "means any non-containerized accumulation of solid, non-flowing CCR that is placed on the land. CCR that is beneficially used ~~off-site~~ is not a CCR pile."
>
> **CCR management unit** should be revised as follows: "means any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit. This includes inactive CCR landfills and CCR units that closed prior to October 19, 2015, but does not include road, roadbed, railbed, and ~~associated~~ embankments in which CCR is used unless the facility or a permitting authority determines that placement is causing or contributing to a statistically significant level above the groundwater protection standard established under § 257.95(h). CCR that was placed prior to October 19, 2015 and meets any of the following conditions is considered beneficial use and not a CCR management unit: (1) the CCR placement meets the definition of beneficial use in 40 C.F.R. § 257.53, (2) the CCR placement was done in accordance with state regulations, approval, and/or oversight, (3) the CCR placement was done in accordance with standard industry and/or good engineering practices existing at the time of placement, or (4) CCR units in an encapsulated or a cement-like product."

These revisions would recognize and maintain facilities' longstanding practice to beneficially use ash within an existing industrial footprint, including the examples of historical use described in Section III.A.1, and continue incorporating considerations of limited risk in these applications. For roads, roadbeds, railbeds, and embankments, this revision would still require companies to address any impacts that are determined to cause or contribute to an SSL.

This revision otherwise allows companies to either demonstrate that (1) a past beneficial use meets the four EPA criteria that were not promulgated until 2015 or (2) that the usage was done in accordance with state approval, oversight, and/or regulations, while recognizing the limited risk in these applications.

C. Revisions related to Closure (under both the 2015 Rule and 2024 Legacy/CCRMU Rule)

1. Extend closure deadlines and recognize additional two-year extension bases.

The Group asks the Agency to extend the outermost deadlines for units to complete closure and add additional bases where two-year extensions are appropriate. First, EPA should extend the outer 15-year (for CCR surface impoundments larger than 40 acres) and 7-year (for smaller impoundments) caps on completing closure to a 30-year cap for units that (1) contain ash being harvested for beneficial use,[30] (2) are being consolidated into a smaller footprint as part of closure activities, and/or (3) are very large (e.g., 100+ acres).

Second, EPA should add additional examples of bases for a two-year extension under 40 C.F.R. §257.102(f)(2)(i). Currently, EPA has four non-exclusive bases for a two-year extension.[31] EPA should rely on recommendations from the QPE and approval by state regulators, as well as add two additional examples where a two-year extension is appropriate: (1) if ash is being harvested from the unit for beneficial use and (2) if the unit's ash is being consolidated into a smaller footprint for closure-in-place.

A member's facility in the Northeastern region of the country has a 60-acre impoundment that illustrates why extensions for beneficial use are appropriate and in alignment with EPA's goals. The impoundment is currently undergoing excavation for beneficial use in the cement industry. Currently, the beneficial use contractor cannot take the ash fast enough to meet the closure deadlines under the Rule. While there is the opportunity to beneficially use all of the material in an encapsulated manner, at least a portion would need to be permanently disposed of into a CCR landfill unless the currently stringent timeframes are extended. In short, the stringent closure timeline can unnecessarily create *more* disposal sites, which could be avoided with more flexible deadlines. Instead, the facility should be allowed to continue to completion, provided groundwater monitoring and corrective action continue as appropriate. Hastening closure and leaving CCR in place provides no environmental benefit.

2. Return to the original meanings of "free liquids" and "infiltration" as used in the closure performance standards.

Additionally, EPA should utilize the originally understood —and commonly accepted in the scientific community—definitions of the terms "infiltration" and "free liquids" used in the closure performance standards.[32] Long after the promulgation of the 2015 Rule, EPA released written re-interpretations of these terms so as to suggest a waste-below-the-water-table prohibition within the requirements for closing a unit in place.[33] EPA's new position ultimately led to legal challenges in the D.C. Circuit, which were dismissed.[34] In the course of determining that the D.C. Circuit lacked jurisdiction, the Court discussed EPA's post-hoc interpretation of "infiltration" and "free liquids" under the Biden administration and held that such interpretation was not an amendment

[30] In addition or in the alternative, EPA should consider revised closure language specifically for units that are in the process of closing but have limited open areas for harvesting for beneficial use. Some member facilities have or will have capped in place a significant portion of a unit such that most of the unit is effectively closed, but a limited area remains uncapped where ash is being harvested for beneficial use.
[31] 40 C.F.R. § 257.102(f)(2)(i).
[32] 40 C.F.R. § 257.102(d).
[33] *See, e.g.,* EPA January 11, 2022 Press Release ("EPA's consistently held position that surface impoundments or landfills cannot be closed with coal ash in contact with groundwater"); EPA, Final Decision: Denial of Alternative Closure Deadline for General James M. Gavin Plant, EPA-HQ-OLEM-2021-0590-0100, at 19 (Nov. 18, 2022).
[34] *Electric Energy, Inc. v. EPA*, No. 22-1056 (D.C. Cir. 2024); *Electric Energy, Inc. v. EPA*, No. 23-1035 (D.C. Cir. 2024).

of the 2015 Rule, but did not conclude that it was the only interpretation of these definitions. In light of recent Supreme Court decisions and executive orders, EPA should return to the common understanding of these terms and clarify that "infiltration" means vertical infiltration, and "free liquids" does not include interstitial pore water.

First, the regulatory text supports CCIG's interpretation of "infiltration" and "free liquids". The plain language of the CCR Rule does not support the Biden administration's position that "infiltration" refers to both vertical and horizontal infiltration. "Infiltration" is referenced multiple times in 40 C.F.R. § 257.102(d), and in several instances, such as 40 C.F.R. § 257.102(d)(3), it is clear that EPA was referring to vertical rather than horizontal infiltration—i.e., the kind of infiltration that can be addressed with the final cover system required for units being closed in place.[35] Additionally, the plain language of the CCR Rule does not support the Biden administration's position that "free liquids" includes groundwater. The plain language of the 2015 Rule does not require facilities to address contact between CCR and groundwater as part of the closure performance standards under 40 C.F.R. § 257.102(d). Rather, groundwater protection is addressed through groundwater monitoring and corrective action, similar to other RCRA programs.

Furthermore, the regulatory text certainly does not support a waste-below-the-water-table prohibition. The 2015 Rule allows closure of a CCR unit to be completed "*either* by leaving the CCR in place and installing a final cover system *or* through removal of the CCR and decontamination of the CCR unit."[36] EPA clarified in the 2015 Rule preamble that the 2015 Rule does not "establish restrictions on the situations in which clean closure would be appropriate." Consequently, the regulatory text and EPA's contemporaneous explanation of the text do not support a waste-below-the-water-table prohibition. Despite this, EPA departed from the plain meaning of the closure-in-place performance standards in 2022, reinterpreting "free liquids" and "infiltration" so as to prohibit closure with waste in contact with groundwater.

Second, this interpretation is the only feasible interpretation from a practical standpoint. For instance, it is impossible in some circumstances to remove all liquids—as the Biden administration's EPA interpretation requires—before placing a cap, even if the unit can be sufficiently dewatered to stabilize. To require the removal of all liquids prior to placing a cap may cause companies to have to continue dewatering units for decades or even indefinitely, and facilities cannot wait that long to place a cap on a unit while also meeting the current deadlines to complete closure. For example, one member began closing a very large impoundment in place several years ago in order to meet the 15-year closure deadline. While the member has been dewatering the unit to provide a stable subgrade for final closure construction, the fine-grained CCR materials yield water very slowly, thus making it impossible to remove all liquid prior to placing the cover system within the allotted closure timeframe. This interpretation is also better from a practical standpoint because placement of a cap as soon as a unit is sufficiently dewatered, in many cases, yields significant benefits to the overall closure plan. The cap itself minimizes the

[35] *See, e.g.*, 40 C.F.R. § 257.102(d)(3)(i)(B) ("The infiltration of liquids through the closed CCR unit must be minimized by the use of an infiltration layer that contains a minimum of 18 inches of earthen material.").
[36] 40 C.F.R. § 257.102(a) (emphasis added).

amount of additional liquids entering the unit through precipitation and also helps lower the groundwater table around the unit much faster than would occur otherwise without a cap.

Third, the D.C. Circuit decision does not constrain EPA from returning to a commonsense interpretation. The D.C. Circuit only ruled that the Biden administration's interpretations did not constitute amendments to the 2015 regulations, thus determining that the Court did not have jurisdiction over the Administrative Procedure Act claims presented, not that EPA's new interpretations were the only plausible interpretations. In light of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and recent executive orders, EPA should consider the best interpretation.[37] Accordingly, EPA should return to the commonsense interpretations of "free liquids" and "infiltration," and rescind the Free Liquids Memorandum that was published in advance of the publication of the Legacy/CCRMU Rule. EPA should further revise the regulatory language to confirm that "infiltration" means "vertical infiltration."

In the alternative or in addition, the Agency should revise the closure in place performance standards, or allow for the use of alternative standards, to account for practical and risk considerations. First, the Agency should not require full removal of all liquids prior to placing a cap. The key issue should be whether the unit is dewatered enough to stabilize the unit. This is supported by the regulatory text – the closure in place performance standards make clear that the purpose of removing free liquids is to ensure stability.[38] Provided that the unit is sufficiently stable, companies should be able to proceed with placement of a cap while dewatering continues.

Second, the Agency should reiterate that engineering controls to "control" or "minimize" post-closure infiltration to the extent feasible under 40 C.F.R. § 257.102(d)(1) are appropriate. Third, as discussed in Section III.D below, the Agency should incorporate additional site-specific approaches to closure in place that incorporate monitoring data, ongoing corrective action (as appropriate), and other site-specific information in assessing appropriate dewatering standards and approaches. Included in a more site-specific analysis should be consideration of exposure pathways. Without a complete exposure pathway, there is no reasonable probability of impact to human health or the environment. Accordingly, using common-sense interpretations of "free liquids" and "infiltration," EPA should incorporate, and allow states to incorporate, evaluations of exposure pathways as part of the analysis of whether closure in place is appropriate or complete, even if some fraction of liquid remains in the unit. The focus should be on actual environmental and human health risks, not solely the amount of liquid remaining.

D. Incorporation of Site-Specific Approaches (under both the 2015 Rule and 2024 Legacy/CCRMU Rule)

In EPA's reconsideration of the Legacy/CCRMU Rule, the Group also urges more consideration of site-specific circumstances and risk, consistent with the WIIN Act. EPA should consider site-specific approaches and alternative criteria that are adaptable for certain circumstances consistent

[37] Although the Supreme Court's decision in *Loper Bright* concerned *statutory* interpretation, it provides important direction for regulatory guidance as well. EPA should not proceed with a "permissible" re-interpretation and should instead implement the "best reading" of the regulation. *See Loper Bright*, 603 U.S. at 373.

[38] *See* 40 C.F.R. § 257.102(d). This applies to EPA's regulatory authority regarding overfills as well. EPA should revise the definition of overfill to allow new units to be built on top of existing units, regardless of contact with liquids, so long as there is no risk to human health or the environment.

with longstanding practices under Subtitle C. As EPA explains in the preamble to the 2015 Rule, "[t]here is no basis in the current record to impose provisions for the remediation of CCR units that are more stringent than those imposed on hazardous wastes."[39]

Companies are operating under a different regulatory landscape than 2015 when the CCR regulations were self-implementing. The WIIN Act's inclusion of enforcement authorities and permitting programs allows EPA and facilities to utilize more tailored approaches. EPA does not have to regulate to the lowest common denominator and utilize such a rigid and prescriptive approach. Instead, it is now appropriate for EPA to develop standards that allow permit writers to use discretion and consider site-specific risks. The following are potential examples of site-specific approaches EPA could adopt in potential revisions to existing CCR regulations:

1. Alternative Closure Performance Standards.

If there are no incremental impacts to groundwater and/or no exposure pathway or risk impacts and the unit is sufficiently stable to support a cap, then no further dewatering should be required in order to close in place. Groundwater monitoring networks established under the CCR Rule can help demonstrate that there have been no incremental impacts. EPA should give companies sufficient time to demonstrate that there have been no incremental impacts (some sites experience a temporary spike in groundwater constituents due to the closure process itself, especially if the closure involves partial removal or consolidation of ash).

Additionally, if there are no potential users of affected groundwater or nearby surface waters, then EPA should provide companies the option of meeting a less prescriptive general closure performance standard that takes into account the probability of adverse effects to human health and the environment. For example, the standards for closure of hazardous waste surface impoundments (e.g., 40 C.F.R. §§ 264.111 and 265.111) do not require units to control, minimize, or eliminate infiltration. Instead, the focus is on managing the release of constituents necessary to protect human health and the environment. EPA should create an alternative general closure performance standard that accounts for site-specific conditions and risk.

2. Site-wide Monitoring and Corrective Action.

EPA should allow facilities to use area-wide or site-wide monitoring and corrective action in situations where (1) a facility has a large number of units such that it is not practical to monitor and/or clean up individually, or (2) the facility demonstrates that no contaminants are migrating offsite or otherwise causing off-site impacts. Area-wide or site-wide approaches should be allowed as an alternative means of compliance with the groundwater monitoring and corrective action requirements (without replacing current unit-specific compliance options). Area-wide and site-wide approaches would provide facilities the option to take a more holistic approach to CCR compliance where appropriate.

For example, one Group member has detected SSLs adjacent to an on-site landfill; however, the SSLs only exist in close proximity to the unit. Further, there are no offsite impacts, and the nearest potential receptors are upgradient from the unit. In such a scenario, a more holistic approach to monitoring and corrective action would be more logical and appropriate, where monitoring and/or

[39] 2015 Rule, 80 Fed. Reg. at 21,412.

cleaning up the unit individually is not necessary to sufficiently protect human health and the environment.

Another member has facilities with units and potential CCRMUs adjacent to one another. Area and site-wide monitoring would significantly streamline groundwater monitoring and reduce costs, while providing equivalent protection to the environment.

3. Risk-Based Corrective Action.

EPA should adopt a risk-based approach to corrective action, similar to corrective action programs implemented by numerous states. The WIIN Act's provision of direct enforcement mechanisms and permitting programs supplies a framework for utilization of more site-specific and risk-based approaches, rather than the one-size-fits-all approach promulgated in the original self-implementing regulations.

For example, Florida has a robust risk-based corrective action program, which is designed to provide a flexible, site-specific remediation process. Florida's program allows for alternative cleanup target levels with institutional and engineering controls, if needed, if the company can demonstrate "human health, public safety, and the environment are protected to the same degree" as provided under established groundwater quality standards.[40]

Wisconsin is another example of a state with a remedial response framework that includes risk-based considerations.[41] Parties obligated to undertake a remedial action may submit a risk assessment for purposes of developing environmental standards when "[a]ttaining compliance with the applicable residual contaminant levels… is not practicable."[42] Such risk assessments, subject to approval by the Department, may serve as the basis for alternative contaminant levels or performance standards.

Louisiana's Department of Environmental Quality ("LDEQ") developed its own risk-based corrective action program, called the "Risk Evaluation/Corrective Action Program" ("RECAP"). RECAP is designed to address risks to human health and the environment through a tiered framework that uses a risk evaluation to "(1) determine if corrective action is necessary for the protection of human health and the environment, and (2) identify constituent levels in impacted media that do not pose unacceptable risks to human health or the environment, i.e., RECAP Standards."[43]

EPA's implementation of CERCLA also supports a risk-based approach. For instance, under CERCLA, EPA recognizes "technical impracticability waivers" [44] for situations where cleaning

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[40] F.S. 376.30701(1)(g), http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0376/Sections/0376.30701.html.

[41] *See generally* Wis. Admin. Code Ch. NR 722.

[42] Wis. Admin. Code NR § 722.11(1)(b).

[43] LDEQ, "Risk Evaluation/Corrective Action Program (RECAP)" (Oct. 20, 2003).

[44] *See* OLEM Directive 9200.3-117, *Clarification of the Consultation Process for Evaluating the Technical Impracticability of Groundwater Restoration at CERCLA Sites* (Dec. 28, 2016).

up to MCLs is impossible or would cause severe environmental or other consequences.[45] Allowing facilities (and permitting authorities, as appropriate) to examine the site-specific conditions and consequences is critical to ensuring protective and holistic remedies.

4. Reliance on State Determinations.

To further recognize cooperative federalism while still ensuring the protection of human health and the environment, the Agency should allow companies to rely on prior state determinations related to CCR management and disposal.

For instance, beneficial uses both pre- and post-promulgation of the 2015 Rule were and are in many instances regulated and approved by state authorities. Specifically, many states oversaw and continue to oversee beneficial uses under their state waste regulations, further ensuring that such uses do not pose a reasonably anticipated risk to human health or the environment.[46] Where a state has determined that a beneficial use, on or off-site, does not pose a reasonable risk to human health or the environment, further federal regulation is not necessary.

EPA should exempt from CCR regulations legacy CCR surface impoundments and CCRMUs that have closed—by removal or in place—consistent with a state or federal program from further regulation and should not require those units to re-close. Like the federal CCR program, state solid waste regulations and federal programs like CERCLA or RCRA Subtitle C/Subtitle D are also designed to protect human health and the environment.[47]

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[45] *See, e.g.,* EPA, OSWER Directive 9230.2-24, *Summary of Technical Impracticability Waivers at National Priorities List Sites* (Aug. 2012) at A-73 (technical impracticability waiver appropriate where attaining the MCLs for arsenic, cadmium, lead, copper, and sulfate would require removal of 27 billion cubic yards and "eliminate the historic city of Butte," and other potentially applicable remediation technologies were not proven), A-18 (technical impracticability waiver appropriate where attaining state groundwater quality standards for a variety of VOCs, PAHs, and inorganics would require all operating facilities on the property to be "demolished to allow access to the contaminated area underneath," and it is "technically impracticable to excavate an area this large"), A-20 (technical impracticability waiver appropriate where attaining state groundwater quality standards for DNAPL where removal would require excavation of over 1 million cubic yards of landfill materials and there are no technologies currently available to completely remove DNAPL from fractured bedrock).

[46] *See* Memorandum from Rita Chow, EPA, to EPA Docket No. EPA-HQ-OLEM-2018-0524 regarding Information Sources from U.S. EPA's State Beneficial Use Programs Research (July 29, 2019), https://www.regulations.gov/document/EPA-HQ-OLEM-2018-0524-0025 (excerpting beneficial use regulations from nine states).

[47] *See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment."); Steven J. Tillotson, North Dakota Department of Health, *Coal Combustion Waste: North Dakota Regulatory Perspective* 1 (Apr. 2002) ("In the past 21 years, North Dakota developed modern standards and facilities for management of various types of solid waste including coal combustion waste. With eight major coal-fueled energy facilities within the state, **North Dakota's requirements address location restrictions, operating criteria, facility design, ground water monitoring and corrective action, closure and post-closure care and financial assurance**. The state's Solid Waste Program has worked with the energy industry to investigate and solve past disposal issues and develop long-term solutions. **The North Dakota Solid Waste Management Rules for coal combustion waste disposal follow the general model of the Resource Conservation Recovery Act Subtitle D criteria for municipal waste**; however, the specific requirements are tailored for North Dakota's geology and the coal combustion waste materials.") (emphasis added).

For example, one Group member has a Florida landfill that was closed under Florida Department of Environmental Protection ("Florida DEP") oversight prior to the promulgation of the 2015 Rule. Since the inception of that site, Florida DEP required semi-annual groundwater monitoring, and 40 years' worth of monitoring from site boundary wells did not show any offsite impacts. Florida DEP then oversaw the closure of the landfill, which had to satisfy state requirements.

Pennsylvania is another example of a state with an extensive residual waste program. Starting in 1993, the Pennsylvania Department of Environmental Protection ("PADEP") regulated CCR units under RCRA through its extensive program. The regulations require approval upon completion of closure and a 30-year post-closure monitoring period. Due to the state's program, many units have been able to successfully close and are currently ongoing post-closure groundwater monitoring on a quarterly basis.

EPA should not subject such units to a duplicative layer of regulation when their respective state agency or EPA has previously determined that the unit at issue has met appropriate closure requirements.[48] These closed units do not present a reasonably anticipated risk to human health or the environment and should not be subject to further regulation under RCRA.

5. Flexibilities Identified by EPA in 2017 State Permitting Guidance.

EPA acknowledged that many of the flexibilities from the existing 40 C.F.R. part 258 regulations (Criteria for municipal solid waste landfills) were permissible. These flexibilities, which include the following, should be incorporated into the revised regulated text:[49]

- Allowing the Administrator or State Director to determine that remediation of a release of an Appendix IV constituent is not necessary under certain conditions (*see* 40 C.F.R. § 258.57(e)).

- Allowing the Administrator or State Director to determine an alternative point of compliance under certain conditions (*see* 40 C.F.R. § 258.40(d)).

- Allowing the Administrator or State Director to establish health-based groundwater protection standards for constituents for which MCLs have not been established (*see* 40 C.F.R. § 258.55(i)).

IV. PRIORITIZING APPROVAL OF STATE PERMIT PROGRAMS AND DEVELOPMENT OF A FEDERAL PERMIT PROGRAM

The Group supports the Agency's prioritization of cooperative federalism through the review and approval of state CCR permit programs, as announced in EPA's March 12, 2025 press release. The Group supports EPA's efforts to streamline and prioritize state program approval and

[48] In the alternative, EPA should consider an exemption for units that were closed pursuant to a state or federal program.

[49] EPA, "CCR State Permit Program Guidance Document; Interim Final," at 2-9–10 (Aug. 2017) ("2017 State Permit Program Guidance").

recommends that EPA reconsider the approach utilized under the prior administration in its review of state programs to better align with the WIIN Act.

The WIIN Act expressly requires EPA to approve a state permitting program within 180 days of receiving a complete application if the program requires each CCR unit in the state to achieve compliance with the applicable criteria for CCR units under the federal CCR regulations or with State criteria that are "at least as protective as" the federal CCR regulations.[50] The Group urges EPA to reconsider its interpretation of the "at least as protective as" standard, and recognize that "at least as protective" does not mean "identical to" the federal regulations. The Agency should focus on the overall protectiveness of the state program when determining whether the state permit program is "at least as protective" as federal CCR regulations.

Further, in evaluating state applications, EPA should focus on the plain text of a state's application and not the implementation of the program. The approach used to deny Alabama's proposed permit program was inappropriate and not prescribed by the WIIN Act. EPA explicitly recognized that "ADEM adopted regulations that largely mirror the Federal CCR regulations"[51] and that "the terms of the permit program provide ADEM with the authority necessary to issue permits that will ensure each CCR unit in the State achieves the minimum required level of control (i.e., the State has the authority to issue permits that require compliance with standards that are at least as protective as those in the Federal CCR regulations)."[52] EPA, however, denied the application because, after reviewing several CCR permits issued in Alabama, EPA found that the program "does not require each CCR unit in the State to achieve compliance with either the minimum requirements in the Federal CCR regulations or with alternative State requirements that EPA has determined to be at least as protective as the Federal provisions."[53]

The plain text of Alabama's regulations requires CCR units in the state to comply with all the substantive federal CCR Rule requirements, including those related to closure, corrective action, and groundwater monitoring, and EPA has determined that ADEM's standards are at least as protective as the federal CCR Rule. Because ADEM's application fulfills the requirements of 42 U.S.C. § 6945(d) to require compliance with the CCR Rule's criteria or state-specific criteria that are as protective as the federal regulations, EPA must approve the application.

EPA should not consider information beyond the four corners of the application when evaluating a state CCR permit program application. The WIIN Act lays out a specific process for reconsidering a permit program approval in the event there are issues with implementation.[54] For example, the WIIN Act directs EPA to provide a notice of deficiencies and an opportunity for a public hearing if "the State has not *implemented* an adequate permit program"[55] or if "the State has, at any time, approved or failed to revoke a permit for a coal combustion residuals unit, a release from which adversely affects or is likely to adversely affect the soil, groundwater, or

[50] 42 U.S.C. § 6945(d)(1)(B).
[51] 88 Fed. Reg. 55,220, 55,225 (Aug. 14, 2023).
[52] *Id.*
[53] 89 Fed. Reg. 48,774 (Jun. 7, 2024).
[54] 42 U.S.C. § 6945(d)(1)(D).
[55] 42 U.S.C. § 6945(d)(1)(D)(ii)(II) (emphasis added).

surface water of another State."[56] In short, EPA must approve an application first before addressing any alleged issues with implementation.

Further, this approach is inequitable and inconsistent because not all states had permits issued (e.g., Texas) at the time of permit program application submission. This leads to disparate treatment of states (i.e., two states could have adopted and implemented functionally identical programs, but if one state begins implementation prior to EPA approval and the other after, one state may be approved and the other denied).

The Group urges EPA to adopt a streamlined application approach, as mentioned in EPA's 2017 State Permit Program Guidance. EPA noted that the applications for state programs that adopt the CCR Rule by reference and implement it through an existing permit program could be streamlined because such programs meet the statutory standard for approval.[57] The guidance further states that if a state wants to provide certain flexibilities, a state could seek approval for such provisions at the same time the State seeks approval for a program that otherwise incorporates the federal CCR regulations by reference or through a subsequent program modification.[58]

Additionally, EPA should continue to work towards finalizing a federal permitting program for states that do not have approved state permit programs but should prioritize review and approval of final or near-final state permitting program applications in the first instance. Ultimately, all facilities should have the opportunity to apply for a permit that can account for site-specific circumstances and risk factors.

V. CONCLUSION

CCIG appreciates EPA's careful consideration of this white paper. The above-mentioned actions would provide relief from the regulatory inconsistency and flaws in the CCR program that currently burden energy companies and are supported by law and this Administration's policy. The Group looks forward to engaging with EPA on these important issues.

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Respectfully,

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[56] 42 U.S.C. § 6945(d)(1)(D)(ii)(III).
[57] 2017 State Permit Program Guidance at 1-5.
[58] *Id.* at 2-7.