July 17, 2023

Ms. Michelle Lloyd
U.S. Environmental Protection Agency
Office of Resource Conservation and Recovery
Materials Recovery and Waste Management Division
1200 Pennsylvania Avenue, NW, MC 5304T
Washington, DC 20460

Submitted via Email and to the Federal eRulemaking Portal, www.regulations.gov

Re: Docket ID No. EPA-HQ-OLEM-2020-0107 – Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982 (May 18, 2023)

Dear Ms. Lloyd:

The National Rural Electric Cooperative Association ("NRECA") respectfully submits these comments in response to the U.S. Environmental Protection Agency ("EPA" or "Agency") proposed rule to amend the regulations governing the disposal of "coal combustion residuals" ("CCR") and establish requirements for legacy CCR surface impoundments and CCR management units.[1] NRECA is the national trade association representing nearly 900 not-for-profit electric cooperatives ("co-ops") and other rural electric utilities.

America's electric cooperatives are owned by the people that they serve and comprise a unique sector of the electric industry. From growing exurban regions to remote farming communities, electric cooperatives power one in eight Americans and serve as engines of economic development for 42 million people across 56 percent of the nation's landscape. Electric cooperatives are focused on providing affordable, reliable, and safe electric power in an environmentally responsible manner and support common sense solutions to environmental impacts.

NRECA members rely on a diverse suite of energy resources, including coal-fired generation, and thus are affected by EPA and state regulations governing the management of CCR. NRECA appreciates the opportunity to comment on the Proposed Rule. NRECA is also a member of the Utility Solid Waste Activities Group ("USWAG") and endorses the comments that USWAG has submitted on this proposal.

I. Executive Summary

EPA is proposing to establish regulatory requirements for two new classes of CCR units, inactive CCR surface impoundments at inactive power plants ("legacy CCR surface impoundments" or "legacy impoundments") and accumulations of CCR directly placed on the land at any time ("CCR management

[1] 88 Fed. Reg. 31,982 (May 18, 2023) (the "Proposed Rule").

units" or "CCRMUs"). NRECA is concerned that EPA's Proposed Rule, which takes a one-size-fits all approach, relies on broad and unclear definitions, and proposes unrealistic compliance timelines, will impose unnecessary and duplicative costs on co-ops and their member-consumers. Instead of proposing a tailored approach to addressing the management of CCR that takes into account the diverse characteristics, sizes and relative risk of particular sites, EPA has proposed an overly broad approach that will not be cost-effective and threatens to exacerbate challenges to the reliable delivery of electricity and upend the beneficial reuse of CCR.

It is also concerning that EPA has not finalized a federal CCR permit program rule and moved more expeditiously to approve state permit programs. The 2016 Water Infrastructure Improvements for the Nation ("WIIN") Act amended section 4005 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6945, to allow states to establish CCR permit programs for EPA approval and to require EPA to implement a federal CCR permit program in Indian country and in "nonparticipating states," subject to the availability of appropriations.[2] Congress has appropriated funding to implement a federal CCR permit program every year since 2018,[3] and EPA proposed a federal CCR permit program rule in 2020 that three years later has not been finalized. Only a handful of states have EPA-approved state CCR permit programs but many more are in the pipeline. NRECA believes that a federal permit program and state permit programs will allow for a more effective way to regulate CCR units as they will allow for tailoring of requirements based on an individual site's characteristics, size, and relative risk, which would be superior to the current self-implementing regulatory approach.

In addition, EPA's 60-day comment period on the Proposed Rule has been inadequate to evaluate EPA's proposal and the supporting documents and analyses and develop meaningful responses to EPA's requests for comment. An inadequate comment period is particularly challenging for co-ops, all but two of which are small entities. Many have small staffs that are focused on their normal environmental compliance duties and EPA has not provided sufficient time to review this voluminous rulemaking proposal and others simultaneously.[4] Given the substantial potential costs and impacts of the Proposed Rule on co-ops and their consumer-members, NRECA requested a 60-day extension of the comment period[5] which EPA declined to grant.[6]

NRECA has significant concerns with the Proposed Rule and urges EPA to revise it in the following ways: separate the legacy surface impoundments and CCRMU proposals into two separate actions; address

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[2] *Id*. at § 6945(d).

[3] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. G, Tit. II (2022); Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Div. G. Tit. II, 136 Stat. 49, 380 (2022); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. G, Tit. II, 134 Stat. 1182, 1508 (2020); Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. D, Tit. II, 133 Stat. 2534, 2715 (2019); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. E, Tit. II, 133 Stat. 13, 234 (2019); and Consolidated Appropriations Act, 2018, Pub. L. No. 11-141, Div. G, Tit. II, 132 Stat. 348, 662 (2018).

[4] In addition to the Proposed Rule, NRECA and its members have been reviewing and responding to other complex EPA proposed rules directly affecting cooperatives, with overlapping comment periods specifically, the Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category; the National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review; and New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule. Cooperatives also have an interest in grid reliability and electric infrastructure impacts of the greenhouse gas emissions standards proposed rules for both heavy duty and light duty vehicles with their emphasis on increasing uptake of electric vehicles.

[5] Letter from Viktoria Seale, Regulatory Affairs Dir., NRECA, to Michelle Lloyd, EPA (May 31, 2023), https://www.regulations.gov/comment/EPA-HQ-OLEM-2020-0107-0170.

[6] E-mail from Michelle Lloyd, EPA to Viktoria Seale, Regulatory Affairs Dire., NRECA (June 2, 2023, 08:45 EDT) (on file with author).

the practical, legal, economic, and electric reliability concerns raised in these comments; and reconsider proceeding to a final rule without significant changes.

II. Background on NRECA and Its Electric Cooperative Members

NRECA's member cooperatives include 63 generation and transmission ("G&T") cooperatives and 832 distribution cooperatives. Each cooperative is governed by a board of directors elected from its membership. The G&Ts generate and transmit power to distribution cooperatives that provide it to the end of line co-op consumer-members. Collectively, G&T cooperatives generate and transmit power to nearly 80 percent of distribution cooperatives, which in turn provide power directly to consumer-members at the end of the line.[7] The remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their consumer-members by providing safe, reliable, and affordable electric service.

Electric cooperatives rely on a diverse suite of resources to reliably and affordably meet their consumer-members' energy needs and are accelerating energy innovation to power a brighter future. Electric cooperatives continue to increase the use of renewable energy resources, add distributed energy resources and storage, adopt energy efficiency programs, monitor and explore developments related to nuclear energy, and work to enable electrification against the challenges of increased energy demand reliably. Co-ops have also been at the forefront of exploring carbon capture technologies. In 2021, two-thirds of the electricity delivered by co-ops came from low- or zero-carbon sources.[8]

III. Cost-Effective Regulations are Critical to America's Electric Cooperatives

Cost-effective federal regulations that minimize unnecessary burdens are very important to co-ops' ability to provide affordable and reliable electricity to their consumer-members. Rural electric cooperatives serve large expanses of the United States that are primarily residential and typically sparsely populated. Those characteristics make it comparatively more expensive for rural electric cooperatives to operate than the rest of the electric sector, which traditionally serves more compact, industrialized, and densely populated areas.

Since electric cooperatives serve areas with low population density, costs are borne across a base of fewer consumers and by families that spend more of their limited resources on electricity than do comparable municipal-owned or investor-owned utility customers. Using data from the U.S. Energy Information Administration ("EIA") and other sources, NRECA estimates that rural electric cooperatives serve an average of eight consumers per mile of line and collect annual revenue of approximately $19,000 per mile of line. In contrast, for the rest of the industry, the averages are 32 customers and $79,000 in annual revenue per mile of line.[9]

Many cooperative consumers are among those least able to afford higher electricity rates. In 2022, the average (mean) household income for electric cooperative consumers was 12 percent below the national

[7] Co-ops own and maintain 2.7 million miles, or 42 percent, of the nation's electric distribution lines. NRECA, AMERICA'S COOPERATIVE ELECTRIC UTILITIES FACT SHEET, at 2 (Mar. 2023) [hereinafter "NRECA Fact Sheet"], https://www.cooperative.com/programs-services/bts/Documents/Data/Electric-Co-op-Fact-Sheet.pdf.

[8] In 2021, electric co-ops fuel mix included 22 percent renewables, 15 percent nuclear, 29 percent natural gas, 32 percent coal, and 2 percent oil and other resources. NRECA, ELECTRIC CO-OP FACTS & FIGURES (Apr. 2023) [hereinafter "NRECA Facts & Figures"], https://www.electric.coop/electric-cooperative-fact-sheet.

[9] NRECA Fact Sheet , *supra* note 7, at 2. Information taken from U.S. Department of Energy, Energy Information Administration EIA Form 861; Platts UDI Directory of Electric Power Producers and Distributors, 2017.

average. That is unsurprising, given that electric cooperatives serve 92 percent of persistent poverty counties in the United States.[10]

More generally, the electricity supplied by rural cooperatives is vital to rural economies and an essential element of modern residential, rural life. Rural development requires access to affordable and reliable electric power. Regulations that are not cost-effective and increase the cost of producing that electricity, or threaten its availability, thus pose serious threats to maintenance and growth in large segments of rural America.

Electric cooperatives have no investor equity shareholders who can bear the costs of stranded generation assets or investment in new or alternative generation resources. Co-ops do not have a rate of return on equity as do investor-owned utilities. Cooperatives receive a return *of* capital as opposed to a return *on* capital. That is why cooperatives operate on a not-for-profit basis. For that reason, all costs are passed through directly to their member-consumers that already spend more of their limited incomes on electricity. Consequently, electric cooperatives must ultimately pass along capital costs directly to their consumer-members through increased electric rates.

Given that the cooperatives maintain only marginal cash reserves for unforeseen events and anticipated operating expenses, financing for many capital projects necessarily require reliance on debt investors such as the United States Department of Agriculture's Rural Utilities Service ("RUS"), National Rural Utilities Cooperative Finance Corporation ("CFC"), and CoBank. The costs of borrowing, too, are necessarily passed on to cooperatives' consumer-members. Ultimately, then, it is the cooperatives' consumer-members at the end of the line who bear the cost of regulations through increased electric rates.

All but two of NRECA's member cooperatives are "small entities" under the U.S. Small Business Administration's size standards. By virtue of their size and resources, small entities such as co-ops are disproportionately burdened by the cost of regulations in comparison to their larger counterparts. Cost-effective federal regulations that minimize unnecessary burdens are very important to co-ops' ability to provide affordable and reliable electricity to their consumer-members. For that reason, it is extremely important that EPA comply with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, and properly assess the costs of the Proposed Rule on small entities, work to reduce any disproportionate burdens, and provide compliance flexibility.

IV. Policy Decisions and Other Challenges Are Threatening the Reliable Delivery of Electricity in the United States

A resilient and reliable electric grid that affordably keeps the lights on is the cornerstone of American social, economic, energy security, and national security needs. However, the United States is facing a number of challenges to maintaining reliable electricity. This includes a series of EPA regulations which are being issued in rapid succession and will make it too costly and difficult to operate always available, fossil fuel-fired power plants, which threatens the stability of America's electric grid.

As a nation, we are heading towards a future that depends on electricity to power more of the economy. Recent modeling by the Electric Power Research Institute concluded that achieving net-zero economywide emissions by 2050 could require generation capacity to increase by as much as 480 percent compared to what is in place today.[11] Electrifying other sectors of the economy could require a three-fold expansion of the

[10] NRECA Facts & Figures, *supra* note 8, at 1.
[11] Elec. Power Research Inst., *LCRI Net-Zero 2050: Ex U.S. Economy-Wide Deep Decarbonization Scenario Analysis, Executive Summary* (Dec. 6, 2022), https://lcri-netzero.epri.com/en/executive-summary.html.

transmission grid and up to 170 percent more electricity supply by 2050, according to the National Academies of Sciences.[12]

While the United States' electricity demand is increasing, always available power plants are being driven to retire at too rapid a pace without adequate replacement capacity. The North American Energy Reliability Corporation's ("NERC") recent reliability assessments have "pointed to the disorderly retirement of traditional generation (with its inherent ability to provide essential reliability services and balance energy reserves) as one of the biggest challenges facing the grid."[13] NERC's *2023 Summer Reliability Assessment* shows that two-thirds of North America is at elevated risk of energy shortfalls this summer due to conventional generation retirements, a substantial increase in forecast peak demand, and an increasing threat from a wide-spread heat event.[14] That Assessment also identifies EPA's recently finalized ozone transport rule as one that will contribute to reliability challenges.[15]

In a recent report, PJM, the regional transmission organization that serves parts of 13 states and the District of Columbia, identified three EPA regulations – the steam electric effluent limitations guidelines rule, the CCR rule, and the transport rule – as ones that have "the potential to result in a significant amount of generation retirements within a condensed time frame."[16] In addition, EPA's recently proposed CAA Section 111 greenhouse gas ("GHG") standards for fossil fuel-fired electric generating units will make it more difficult to operate existing fossil fuel-fired power plants and make it exceedingly difficult to permit, site, and build new natural gas plants.

Completing federal environmental reviews and obtaining permits for infrastructure projects also takes too long and is another challenge to build new electric generating assets and other electric infrastructure, including transmission lines. On average, it takes federal agencies four and a half years simply to complete the environmental review process, while one quarter of projects take more than six years.[17] And those timelines do not account for any litigation that may ensue. While Congress has recently enacted amendments to NEPA to speed up federal environmental reviews, this Administration continues to pursue policies that make the environmental review and permitting process more complex and less efficient.[18]

Interconnection queue wait times also are increasing for projects seeking to connect to the grid. The timeline from the initial connection request to having a fully built and operational project has increased from

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[12] NAT'L ACADS. OF SCI., ENG'G, AND MED., ACCELERATING DECARBONIZATION OF THE U.S. ENERGY SYSTEM (2021), *available at* https://nap.nationalacademies.org/catalog/25932/accelerating-decarbonization-of-the-us-energy-system.

[13] NERC, 2022 ANNUAL REPORT, at 13 (Feb. 2023), https://www.nerc.com/gov/Annual%20Reports/NERC_Annual%20Report_2022.pdf.

[14] NREC, 2023 SUMMER RELIABILITY ASSESSMENT INFOGRAPHIC (May 2023), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_SRA%20Infographic_2023.pdf and NERC, 2023 SUMMER RELIABILITY ASSESSMENT (May 2023), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_SRA_2023.pdf.

[15] *Id*. at 6.

[16] PJM, ENERGY TRANSITION IN PJM: RESOURCE RETIREMENTS, REPLACEMENTS & RISKS 7 (Feb. 24, 2023), *available at* https://www.pjm.com/-/media/library/reports-notices/special-reports/2023/energy-transition-in-pjm-resource-retirements-replacements-and-risks.ashx. PJM's analysis shows that a total of 40 gigawatts (GW) of existing generation are at risk of retirement by 2030, including 25 GW of potential policy-driven retirements. *Id*. at 2.

[17] EXEC. OFFICE OF THE PRESIDENT, COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010-2018), at 4 (2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf; *see also* NAT'L ASS'N OF ENVTL. PROF'L, 2021 ANNUAL NEPA REPORT 8 (2022), https://naep.memberclicks.net/assets/annual-report/NEPA_Annual_Report_2021.pdf. In 2021, the average preparation time for a final EIS, as measured from notice of intent to final EIS, was 4.6 years.

[18] Comments of the National Rural Electric Cooperative Association and the American Public Power Association on the Council on Environmental Quality's National Environmental Policy Act Interim Guidance on Consideration of Greenhouse Gas Emissions and Climate Change (April 10, 2023), https://www.regulations.gov/comment/CEQ-2022-0005-0307.

less than two years for projects built in 2000-2007 to nearly four years for those built in 2018-2022. In 2022, the typical project built took five years from the interconnection request to commercial operations. Furthermore, connection requests grew by 40 percent in 2022, reaching over 2,000 GW of total generation and storage capacity in queues. Ultimately, many projects will not be built. From 2000 to 2017, only 21 percent of projects (14 percent of capacity) seeking connection to the grid reached commercial operations by the end of 2022.[19]

On top of the aforementioned challenges, electric utilities are facing significant challenges and delays in their supply chains, which are contributing to an unprecedented shortage of the most basic machinery and components essential to ensure continued reliability of the electric grid. Electric cooperatives are waiting a year, on average, to receive distribution transformers. Additionally, lead times for large power transformers have grown to more than three years. And orders for electrical conduit have been delayed five-fold to 20 weeks with costs ballooning by 200 percent year-over-year. As a result, new projects are being deferred or canceled, and electric cooperatives are concerned about their ability to respond to major storms due to depleted stockpiles.

In addition, utilities are facing natural gas shortages, which can cause particularly acute challenges during periods of peak demand.[20] Natural gas is becoming even more important for electric reliability with retirement of dispatchable generation. However, the growth of interstate pipelines has slowed in recent years, reaching a new low in 2022.[21] Extreme winter weather events like Winter Storm Uri in 2021 and Winter Storm Elliot in December 2022 showed that natural gas infrastructure is vulnerable to freezing during extreme cold, reducing supply when demand is highest, especially in regions that have historically not experienced extreme cold temperatures and where this equipment is not winterized. All of these challenges pose a serious threat to electric reliability, and EPA should consider how to avoid exacerbating those risks with overly burdensome rules that do not provide a commensurate environmental benefit.

V. Comments on the Legacy CCR Surface Impoundments Proposal

A. The applicability date should be the effective date of any final rule.

EPA is proposing to define "legacy CCR surface impoundment" as "a CCR surface impoundment that no longer receives CCR but contained both CCR and liquids on or after October 19, 2015, and that is located at an inactive electric utility."[22] NRECA is concerned that this retrospective proposed definition is not practical, fails to account for how these sites may have changed over the past eight years, will impose unnecessary burdens and costs, and unlawfully asserts jurisdiction over units that no longer contain CCR.

While EPA explains that it believes that October 19, 2015, the effective date of the 2015 CCR Rule, is the most consistent with the opinion by the U.S. Court of Appeals for the District of Columbia Circuit in *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. 2018) ("*USWAG*" or "*USWAG* decision"), nothing in that decision requires EPA to use that applicability date. The *USWAG* decision found that EPA's

[19] LAWRENCE BERKELEY NATIONAL LABORATORY, QUEUED UP: CHARACTERISTIC OF POWER PLANTS SEEKING TRANSMISSION INTERCONNECTION AS OF THE END OF 2022 (Apr. 2023), https://emp.lbl.gov/sites/default/files/queued_up_2022_04-06-2023.pdf.
[20] Letter from Gordon van Welie, President and Chief Exec. Officer, ISO New England to the Hon. Jennifer Granholm, Sec'y, U.S. Dep't of Energy (Aug. 29, 2022), https://www.iso-ne.com/static-assets/documents/2022/08/isone_energy_security_letter_to_us_doe_and_statement_for_ferc_winter_forum_2022_08_29.pdf (describing the challenges New England faces as it requires natural gas generation to sustain reliability, particularly as policymakers seek to increase electrification, and how the region's lack of sufficient pipeline infrastructure and uncertainty surrounding the global market for liquefied natural gas has the potential to stress electric grid reliability).
[21] EIA, *The least U.S. interstate natural gas pipeline capacity on record was added in 2022* (Mar. 2, 2023), https://www.eia.gov/todayinenergy/detail.php?id=55699.
[22] 88 Fed. Reg. at 32,034.

2015 rule record did not support distinguishing inactive impoundments at inactive facilities from inactive impoundments at active facilities and vacated the legacy impoundments exemption.[23] The *USWAG* court did not provide direction to EPA on how to regulate legacy impoundments.

In its 2020 Advance Notice of Proposed Rulemaking ("ANPRM"), EPA solicited comment on three options for defining a legacy CCR surface impoundment. In response to the ANPRM, NRECA supported Option 3, under which the applicability date would be the effective date of a final rule bringing legacy CCR surface impoundments under the federal regulations. NRECA continues to believe that the effective date of any final rule is the best approach because it avoids the practical challenges of requiring facilities to look back in time to 2015 to determine the historic status of a unit and would account for the proactive actions that facilities have taken to properly close impoundments.

EPA asserts that owners and operators of inactive plants will be able rely on operating records to determine whether a surface impoundment *previously* contained both CCR and liquids *on or after* October 19, 2015, however, that oversimplifies the task of looking back retroactively. Operating records that provide that kind of information may not be available, particularly if a site was not continuously manned and monitored (which is more likely than not for an inactive impoundment at an inactive facility) or if ownership has been purchased or transferred. Owners and operators may need to use third-party sources to track down relevant information, including information held by state agencies, which would require additional time. More importantly, this kind of retroactive application of a regulatory requirement fails to account for actions that facilities have taken to properly close impoundments, including by removal of CCR under state requirements.

In the 2015 CCR rule, EPA determined that it was not appropriate to impose requirements any CCR surface impoundments that closed before the rule's effective date because a closed surface impoundment would no longer contain water.[24] As EPA explained, its concern was with inactive surface impoundments, those that "contain both CCR and water" and could leak or be susceptible to structural failure.[25] By contrast, the risk a CCR unit may pose diminishes as the unit takes steps to properly manage and close a unit. In particular, a site that is closed by removal of CCR could no longer leak or fail.

For example, in accordance with a closure plan approved by the Kentucky Division of Waste Management ("KDWM") on July 14, 2014, East Kentucky Power Cooperative ("EKPC") has proactively closed three former ash ponds at its Dale Station facility by removing all CCR to eliminate any potential environmental risks. The approved closure plan required removal of all CCR from the ponds to the level of existing soils, certification of ash removal by a third-party professional engineer ("P.E."), and verification by visual inspection performed by KDWM representatives. KDWM did not require groundwater monitoring as long as complete removal of CCR was verified and the CCR was properly disposed off-site. The removed CCR was transported from Dale Station and disposed of in EKPC's J.K. Smith CCR landfill, a state permitted, lined landfill that is regulated under EPA's CCR rule. EKPC met all the plan requirements, and KDWM issued a letter on January 17, 2019, accepting EKPC's report and certification of closure by removal for all three ponds.

[23] 901 F.3d at 432-34, 449. EPA states that the court vacating rather than remanding the provision back to the Agency "made it clear that its intent was for these units to immediately be subject to regulation." 88 Fed. Reg. at 33,190. While that could have been the court's intent, the EPA did not immediately regulate these units. Furthermore, it does not mean that EPA must select the 2015 CCR rule effective date as the applicability date.

[24] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,343 (Apr. 17, 2015).

[25] *Id.*

While EPA proposes that owners of sites that have removed all CCR may file a closure certification by the date of the final rule that documents that all closure requirements in 40 C.F.R. § 257.102(c) have been met, proposed 40 C.F.R. § 257.100(f)(1)(ii) provides no relief to an owner like EKPC. EKPC was not required to perform groundwater monitoring for the Dale ash ponds. Thus, it should not be required to retroactively comply with the groundwater monitoring requirements of 40 C.F.R. § 257.102(c). EPA's assertion that such information should by readily available is unfounded. And even sites that do have groundwater monitoring data may not have sufficient data to meet the current regulatory requirements.

Requiring an owner like EKPC, that has properly closed a site by removal of CCR under a state-approved plan certified by a P.E. and verified by the state agency, to now comply with all the other requirements of the CCR rule is unfair, unnecessary, and does not account for the proactive, environmentally beneficial actions it has taken. In EKPC's case, a lack of groundwater monitoring requirements at the time of closure would now subject those *former* ash ponds, which would be considered legacy CCR surface impoundments under the Proposed Rule, to all the other requirements of the CCR rule, including performance of groundwater monitoring, preparation of plans, filing of reports, and completion of closure and post-closure activities. EKPC certified and KDWM verified the complete removal of CCR by 2019; therefore, requiring compliance with the CCR rule's current requirements is not necessary to protect the environment. Furthermore, it will impose unnecessary, duplicative costs on EKPC and its consumer-members, who have already incurred the costs of removing all CCR from the former Dale Station ponds. As discussed above, many cooperative consumers are among those least able to afford higher electricity rates, particularly low-income households that have been disproportionately hurt by recent high inflation.

In addition, while the *USWAG* court explained that RCRA gives EPA the authority to regulate past disposal of CCR, it made clear that the current presence of solid waste is what provides EPA its authority to regulate a solid waste unit.[26] The court stated that "[a] garbage dump is a garbage dump until the deposited garbage is gone."[27] Furthermore, under the Proposed Rule, "legacy CCR surface impoundment" is defined by reference to the existing definition of "CCR surface impoundment" which is defined as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, *and the unit treats, stores, or disposes of CCR*."[28] This regulatory definition, which uses the present tense, demonstrates that EPA understands its jurisdiction is tied to the presence of CCR in a unit. A unit that no longer contains CCR is not treating, storing, or disposing of CCR. Consequently, if the CCR has been removed from a unit, the unit is no longer a subject to RCRA and EPA's jurisdiction.

For these reasons, NRECA urges EPA to reconsider the proposed applicability date of October 19, 2015, and instead establish an applicability date based on the effective date of any final rule. Doing so is the most practical approach, better accounts for actions that facilities have taken to properly close impoundments, is consistent with RCRA and EPA's existing regulations, and will avoid imposing unnecessary and duplicative costs, which co-ops and their consumer-members can least afford.

B. EPA should reconsider the proposed changes to the scope of active facilities.

Currently, 40 C.F.R. § 257.50 describes the purpose and scope of the CCR rule and in describing the scope of "active facilities" that are subject to the rule states that it applies to "inactive CCR surface impoundments at active electric utilities or independent power producers, *regardless of the fuel currently used at the facility to produce electricity*." EPA claims that this text does not state or imply that there is a fuel use limitation. However, the plain language of the regulatory provision clearly states that in order to be

[26] 901 F.3d at 440.
[27] *Id*. at 441.
[28] 40 C.F.R. § 257.53 (emphasis added).

considered an active facility, a facility must *use a fuel* to produce electricity. Furthermore, in the preamble to the 2015 CCR rule where EPA explains what types of CCR units are covered by the rule, EPA clearly indicates there is a fuel use limitation by listing coal, natural gas, and oil as examples of what it meant by "fuel."[29]

To "avoid any confusion," EPA proposes to amend 40 C.F.R. § 257.50 to specify that the subpart applies to inactive impoundments at active electric utilities or independent power producers, "*regardless of how electricity is currently being produced at the facility*."[30] However, there is no confusion for EPA to clarify. Rather, EPA is proposing a significant change that appears to be designed to pull facilities with renewable generation into the ambit of the CCR rule. While EPA is suggesting that these sites have always been subject to the CCR rule, this clearly is a change in position and would newly regulate certain sites.

This change is not necessary, and EPA should not proceed with finalizing this proposed text. If EPA does proceed with change, it must explain this change. "When an agency changes its existing position, it . . . must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[31] "[The] agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[32] Failure to do so would be arbitrary and capricious.[33]

For example, inactive CCR surface impoundments at inactive facilities that have subsequently had new renewable generation built at those facilities would be considered active facilities under this change in position. This raise a number of important issues such as what the compliance timeframe would be for these sites, and other practical issues, such as how the CCR rule's requirements should be applied if structures supporting ongoing renewable generation are located on top of an inactive impoundment. EPA must take these reliance interests into account, and if the Agency still decides to proceed, it must carefully consider how to apply the CCR rule to these sites, given the potential practical challenges these sites may have.

C. The closure standard for legacy CCR surface impoundments is unclear.

Proposed 40 C.F.R. § 257.101(e) states the legacy CCR surface impoundments are subject to the closure criteria of 40 C.F.R. § 257.102. However, legacy CCR surface impoundments are not included in the list of units in § 257.102(a). While a "CCR unit" is included in 40 C.F.R. § 257.102(a), CCR unit is not defined under 40 C.F.R. § 257.53 to include legacy CCR surface impoundments. EPA should clarify the closure standard that applies to legacy CCR surface impoundments.

Furthermore, EPA should consider an alternative approach to the groundwater monitoring requirements for legacy CCR surface impoundments or CCRMUs that previously completed closure by removal. Requiring at least eight independent background samples and subsequent statistical calculation of background is unreasonable for those sites. For such sites, EPA should consider a performance standard that requires the evaluation of the presence or absence of Appendix IV constituents at concentrations greater than groundwater protection standards ("GWPS"). In most cases, collection of the eight independent samples and

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[29] 80 Fed. Reg. at 21,303 ("In addition, the rule applies to certain inactive CCR surface impoundments (i.e., units not receiving CCR after the effective date of the rule) at active electric utilities' or independent power producers' facilities, *regardless of the fuel currently used at the facility to produce electricity (e.g. coal, natural gas, oil)*, if the CCR unit still contains CCR and liquids.") (emphasis added).

[30] 88 Fed. Reg. at 31,996 (emphasis added).

[31] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[32] *Encino Motorcars*, 579 U.S. at 221-22.

[33] *Id*. at 222. *See also DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

performance of the statistical evaluations of the data will not be needed. Utilizing this approach would help expedite a final closure completion decision.

D. Legacy CCR surface impoundments that have closed under state requirements should not be required to reclose.

EPA is proposing to require legacy CCR surface impoundments to close irrespective of whether those sites have already been closed under state requirements. Requiring co-ops to reclose already closed sites will impose duplicative costs on co-ops and their consumer-members and may increase risks to human health and the environment. Furthermore, sites such as these have been regulated by the states, in some cases for decades. Reclosing sites would require disturbing or excavating areas that are stable, capped, and have vegetation; building new landfills to place the CCR; permitting for new sites (including state or Army Corps of Engineers permits); and increasing truck traffic, potentially through nearby communities if there is not an available location at the facility. These types of duplicative actions should not be required.

Moreover, a site that has been closed by removal of CCR does not meet the definition of "CCR surface impoundment," which is included in the definition of "legacy CCR surface impoundment." Under the existing regulations, a "CCR surface impoundment" means "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR."[34] A site where all CCR has been removed does not have these characteristics. While it may have previously been designed to hold CCR and liquids, it no longer has that design and no longer treats, stores, or disposes of CCR and should not be required to close.

VI. Comments on the CCRMU Proposal

A. EPA should reconsider moving forward with the CCRMU proposal.

EPA is proposing to bring a broad, amorphous new class of sites, CCR management units, into the scope of units regulated under the CCR rule. The CCRMU proposal would capture a broad array of dissimilar sites, many of which may pose little or no risk, yet seeks to impose the existing requirements in part 257 for groundwater monitoring, corrective action, closure, and post-closure care on all these sites. EPA is proposing that CCRMUs would include everything from CCR surface impoundments and landfills that closed prior to the effective date of the 2015 CCR Rule and inactive CCR landfills *to* any area at a facility where solid waste management involving the past or present placement or receipt of CCR directly on the land has or is occurring.

Not only does the proposal sweep a broad array of different sites into one class of units, but it also does not sufficiently account for the complex realities of many of these sites. NRECA believes that this proposal has multiple legal and practical flaws, would impose enormous costs by taking a one-size-fits all approach, threatens the beneficial use of CCR, and should be reconsidered.

B. The proposed definition of CCRMU is overly broad, lacks clarity, and threatens to subject exempt beneficial uses to the CCR rule's requirements.

EPA proposes to define CCRMUs as "*any* area of land on which *any* non-containerized accumulation of CCR is received, placed, or otherwise managed at *any* time, that is not a CCR unit. This includes inactive CCR landfills and CCR units that closed prior to October 17, 2105."[35] It is a basic premise of that the law (in this case, a regulation) should be sufficiently clear so that those subject to the rule know what is regulated

[34] 40 C.F.R. § 257.53.
[35] 88 Fed. Reg. at 32,034 (emphasis added).

and how to comply.[36] This proposed definition, which uses "any" multiple times and is not temporally bound, is extremely broad, imprecise, unclear, and not consistent with the preamble.

In the preamble, EPA attempts to provide some assurances that the definition is bounded but the conflicting, vague statements provide no clarity. Moreover, there is no language in the regulatory definition that clearly delimits what would constitute a CCRMU. EPA states that it "recognizes that this is a broad definition, but the Agency does not intend that the placement of *any* amount of CCR would *necessarily* constitute a CCRMU."[37] However, the proposed definition plainly states that "*any* non-containerized accumulation of CCR" is a CCRMU. While the Agency provides some examples of what would be considered CCRMUs asserting that the examples cited have "sufficient quantities" of CCR, it is not clear what EPA would consider to be "sufficient quantities." EPA also states that it does not expect facilities to "identify *truly de minimis* quantities of CCR,"[38] however, again the proposed definition states that "*any* non-containerized accumulation of CCR" on "*any* area of land" would constitute a CCRMU. Without a clearer definition or a threshold amount, it is unclear where EPA will draw the line as to what is and what is not a CCRMU. The proposed definition must be revised, appropriately bounded (consistent with the current law and regulations) and clarified. The broad, vague proposed definition is already creating significant confusion for NRECA members, who are seeking to understand whether they have sites that would constitute CCRMUs under EPA's Proposed Rule.

As currently crafted, EPA's broad proposed definition of CCRMU threatens to unlawfully regulate exempt beneficial uses. While the current CCR rule exempts the "beneficial use" of CCR,[39] the broad, unclear proposed definition puts owners and operators at risk of their beneficial use sites being reclassified as CCRMUs. Further, in the examples that EPA provides of sites that would be considered CCRMUs, it includes structural fill sites.[40] This is particularly concerning as EPA recognized in the 2015 CCR rule that unencapsulated CCR can be beneficially used in a variety of applications including structural fill[41] and provided no indication that the beneficial use of structural fill was limited only to off-site projects. CCR has historically been beneficially used on-site at generating stations for many years as a substitute for the use of a virgin material, thereby conserving natural resources. It has been used as structural fill, including for utility line bedding, under site infrastructure (such as switchyards, buildings, and generating units), and other uses that qualified as beneficial use under applicable state regulations and the 2015 CCR rule.

If beneficial use sites are reclassified as CCRMUs, there would be significant, costly and harmful impacts. Owners and operators would immediately be required to install costly groundwater monitoring systems and begin both detection and assessment monitoring. Designing and installing groundwater monitoring systems for these beneficial use sites that may include multiple, discrete, and geographically separate sites would be particularly challenging. Defining waste boundaries, determining whether one or more system is required at each site, and closing these sites (particularly those under existing infrastructure

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[36] *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012 ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."; *Landsgraf v. Usi Film Prods*., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ."); *Grayned v. City of Rockford* , 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

[37] 88 Fed. Reg. at 32,018 (emphasis added).

[38] *Id*. at 32,018-19.

[39] 40 C.F.R. § 257.50(g) ("This subpart does not apply to practices that meet the definition of a beneficial use of CCR.").

[40] 88 Fed. Reg. at 32,018.

[41] 80 Fed. Reg. at 21,353. In the 2015 CCR rule, EPA included a fourth criterion in its definition of "beneficial use of CCR", the 12,400-ton threshold, to distinguish between whether an activity is a beneficial use or disposal. 40 C.F.R. § 257.53. The 2015 CCR rule preamble discussion makes clear that structural fill is an appropriate unencapsulated use and that larger applications of structural fill may need to demonstrate compliance with the environmental standards in the fourth criterion. 80 Fed. Reg. at 21,353.

or active CCR landfills) within 12 months of the effective date of the final rule would be extremely difficult if not impossible. Meeting the closure in place standards would be nearly impossible and performing closure by removal could have disastrous impacts on plant operations and impose massive costs on co-ops and their consumer-members.

EPA cannot now retroactively regulate these beneficial use sites. If EPA proceeds with the CCRMU proposal as currently crafted, it will have significant, negative consequences. Should EPA decide to finalize a CCRMU proposal, it should not include those numerous areas of legitimate beneficial use that pose no meaningful risk to human health and the environment and were utilized in full compliance with applicable laws and regulations.

C. EPA has not considered the reliance interest of CCRMU owners and operators.

EPA's Proposed Rule seeks to cover a whole new dissimilar array of sites, which in some cases have been closed or remediated under state requirements. The Subtitle D program is designed to be primarily a state implemented regime, as EPA has long recognized and the *USWAG* court reiterated. "Subtitle D . . . envisions that states are primarily responsible for regulating disposal of nonhazardous wastes in landfills and dumps. The EPA's principal role under Subtitle D is to announce federal guidelines for state management of non-hazardous wastes; Subtitle D leaves it up to the states to 'use federal financial and technical assistance to develop solid waste management plans in accordance with [the] federal guidelines.'"[42]

In some cases, co-ops and other utilities have incurred significant costs to close these sites, including by closing by removal, under applicable state regulatory requirements. EPA has not accounted for the reliance interests that have been engendered by this regulatory structure. Ignoring the serious reliance interests the prior regulatory scheme engendered, by failing to properly account for them, would be arbitrary and capricious.[43]

D. EPA does not fully appreciate the complexity or challenges associated with applying existing regulatory requirements to sites located under active CCR landfills or existing infrastructure.

Sites that are located under active CCR landfills or existing generation and transmission infrastructure pose complex and potentially cost-prohibitive challenges that EPA does not appear to fully understand or account for in the Proposed Rule. For example, EKPC has a formerly closed surface impoundment that is located beneath its active CCR landfill at its John Sherman Cooper Power Station ("Cooper Station"). That former surface impoundment, which was the initial impoundment used to manage CCR at Cooper Station and has not been used for decades, has been effectively capped and closed by the placement of a permitted, federally regulated CCR landfill above it. The underlying former impoundment is effectively isolated from exposure to stormwater runoff and other sources of water infiltration by the collective effect of the CCR landfill liner and leachate collection system, runoff controls, and engineered cap. There is no evidence that this former impoundment is impounding or otherwise contains any significant amount of free liquids, and such a condition is unlikely given the overlying landfill infrastructure.

Designing, installing, and operating a groundwater monitoring system and designing and implementing a closure plan at sites such as a former impoundment underlying an active CCR landfill could be extremely challenging, costly, and disruptive due to the unique characteristics of a facility. As EKPC's

[42] *USWAG*, 901 F.3d at 423-24 (quoting *Envt'l Def. Fund v, EPA*, 852 F.2d 1309, 1310 (D.C. Cir. 1988)).
[43] *Fox Television*, 556 U.S. at 515 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *DHS*, 140 S. Ct. at 1915 (When an agency is changing prior policy, it must assess whether reliance interests exist, determine their significance, and weigh such interests against competing policy concerns.).

comments describe, attempting to build a new landfill at Cooper Station would be extremely challenging due to the site topography, location of the former impoundment under the active landfill, and lack of available physical space at the facility. If closure by removal is necessary at Cooper Station, the cost of such facility modifications would likely rise above $300-400 million once the costs of removing CCR from the active landfill and underlying impoundment and the siting, permitting, construction, and operation of another landfill to receive all the removed CCR is taken into account.

Similarly, installing groundwater monitoring systems, implementing the full suite of the CCR rule's corrective action requirements, and then closing or reclosing sites under existing infrastructure, in particular generation and transmission infrastructure that supports an operating unit, would be extremely challenging. Particularly at active power plants, requiring closure would not only be extremely costly to owners and operators and their customers but would cause massive ripple effects that need to be more carefully considered. Closure would be incredibly disruptive for these type of sites – particularly given the inadequate time for electricity resource planning – and exacerbate the grid reliability challenges that co-ops and other utilities are already facing as described in Section IV of these comments. Moreover, EPA must consider and allow for power plant owners to follow the mandated procedures put in place by the relevant balancing authority, such as regional transmission organizations or electric utilities, and by state authorities which have a role in ensuring the reliability of the local grid.

EPA must reconsider moving forward with its CCRMU proposal. If EPA does choose to proceed with some version of the CCRMU proposal, it should handle this through a separate rulemaking and give full consideration to the ramifications of regulating sites located under active CCR landfills or existing generation and transmission infrastructure. EPA must take into account the complexities, challenges, and potential impacts on electric reliability that imposing the existing requirements, without modification, would impose.

In the absence of any evidence of significant environmental risk or harm posed by these sites and considering the significant costs and negative ramifications of requiring groundwater monitoring and closure, EPA should modify its Proposed Rule and eliminate regulating these former sites as CCRMUs. Alternatively, it should not require closure. Requiring closure of sites that do not pose a meaningful risk will simply impose unnecessary costs and burdens on utilities and their customers.

E. EPA has significantly underestimated the number of sites that would constitute CCRMUs under the proposed definition and therefore the costs and timeframes for compliance.

Given that EPA has proposed such a broad definition, many more sites could be considered CCRMUs than EPA has identified, and EPA acknowledges as much in its Regulatory Impact Analysis ("RIA"). In the RIA, EPA states that the CCRMUs (and legacy CCR surface impoundments and CCR landfills) the Agency has identified "are intended to be *representative* of the count and characteristics of the actual affected universes, rather than a full accounting of the actual CCR accumulations that will be subject to the Proposed Rule."[44] In the RIA, EPA states that the 277 facilities regulated under the 2015 CCR rule represent the set of facilities for the universe of CCRMUs.[45] While the universe of facilities is 277, EPA only estimates that there are 134 CCRMUs at 82 facilities in 29 states.[46] Further, the EPA only has acreage

[44] EPA, Regulatory Impact Analysis, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, EPA-HQ-OLEM-2020-0107-0164, at 2-4 (May 2023) [hereinafter "RIA"].
[45] *Id*. at 2-3.
[46] *Id*. at 2-8, 2-9.

information for nine units.[47] It is unsurprising that EPA has incomplete information on the potential universe of CCRMUs as it did not request comment on CCRMUs in the ANPRM.

Under the overly broad, vague definition many more sites could be deemed CCRMUs. For that reason, NRECA believes that EPA has significantly underestimated the costs associated with the CCRMU proposal. *Moreover, and at a minimum, all 277 facilities would have to undertake the two-step facility evaluation process and incur those costs, whether or not they identify an CCRMUs.* Instead, EPA only estimated costs related to the facility evaluation report process for the 134 identified CCRMUs at 82 facilities.[48] EPA has not accounted for those costs. Before it proceeds with any version of the CCRMU proposal, it must gather more data about the potential universe of CCRMUs and properly estimate the costs associated with the proposed requirements.

F. The proposed CCRMU definition is not representative of the risk posed by the variety of sites it would capture, particularly state-regulated inactive landfills and relatively small amounts of CCR.

As detailed in the USWAG comments, EPA has not established the record evidence to support regulating the diverse universe of sites that would constitute CCRMUs under the broad proposed definition. EPA did not conduct a risk assessment for legacy CCR surface impoundments or CCRMUs in support of the Proposed Rule. Nor has EPA appropriately considered how the risk of certain sites may have been mitigated by compliance with state regulatory requirements. Instead, EPA has assumed that the risks posed by all inactive sites, regardless of their size or status (including whether they are subject to state regulatory requirements), are similar to risks posed by currently regulated sites.[49]

Some inactive landfills have been constructed, operated, monitored, and closed under rigorous state standards. For example, the Indiana Department of Environmental Management's ("IDEM") current solid waste program regulates disposal of coal ash in restricted waste site landfills under Title 329 of the Indiana Administrative Code. The requirements cover municipal landfills, Type I and Type II Restricted Waste Sites, and Type III Restricted Waste Sites and Construction/Demolition Landfills and include location restrictions, liner standards, operational requirements, groundwater monitoring and corrective action, closure requirements and post-closure requirements, along with financial responsibility.[50] In 2016, IDEM incorporated some of the federal CCR regulatory requirements into their regulations and they have already initiated the rulemaking process to establish a state permit program under § 2301 of the WIIN Act[51] and are working with EPA.[52] Clearly the risks posed by a landfill that is already subject to rigorous state regulatory requirements is not the same as one that is not regulated at the state-level. Before proceeding, EPA must evaluate the risks of legacy CCR surface impoundments and the wide range of CCRMUs that would be subject to the regulation.

Additionally, the proposed definition of CCRMU does not distinguish between areas where CCR is clearly being managed as waste such as CCR landfills and CCR surface impoundments and areas where

[47] *Id*. at ES-10.
[48] *Id*. at 3-31.
[49] 88 Fed. Reg. at 32,010.
[50] 329 IND. CODE § 10.
[51] INDIAN DEP'T OF ENVIRONMENTAL MANAGEMENT, FACT SHEET: COAL COMBUSTION RESIDUALS (COAL ASH), COAL COMBUSTION RESIDUALS (CCR) CLOSURE PLAN, https://www.in.gov/idem/files/factsheet_olq_regulated_ccr.pdf.
[52] 88 Fed. Reg. at 32,028.

CCR is clearly being used as construction material such as roads, storage pads, and minor structural fill.[53] These areas, where relatively small amounts of CCR material are used, do not present the same risk as CCR landfills and impoundments. For example, one NRECA member has historically used hardened CCR for construction material throughout their site. This member conducts routine groundwater monitoring of multiple wells downgradient of these areas in compliance with state groundwater monitoring requirements.

The requirements for CCRMUs should be based on site assessed risk instead of a one-size-fits all approach. Groundwater quality should be assessed at the property boundary, not the waste boundary. The expansive definition of CCRMUs will pull in significantly more units than EPA has estimated. Groundwater quality at the property boundary is more representative of public risk than at the waste boundary.

G. The proposed two-step facility evaluation process is extremely burdensome and should be revised to provide more flexibility and adequate time to complete.

EPA proposes a two-step facility evaluation process to identify and delineate any CCRMUs that all owners and operators of active or inactive facilities with one or more CCR units must undertake. The first step would be a thorough review of available records akin to a litigation-style document review in combination with a physical inspection and any necessary field work. The second step would be the generation of a facility evaluation report documenting the findings. The report would then be certified by a qualified P.E. and certified by the owner or operator or an authorized representative under penalty of law. The facility evaluation must be initiated on the effective date of the final rule and the report must be completed within three months the effective date of the final rule.

Collecting data from multiple areas and in multiple formats and reviewing that information will take more time than EPA estimates. While EPA says that it "expects the amount of available written information and documentation that will be available for review during the document review phase may vary by facility,"[54] the Agency does not seem to appreciate the time or resources involved in the process. It is likely that facilities will need to review thousands of pages of documents, and the information that is identified may be fragmented and will need to be pieced together. Even if documents are readily available, this will be extremely time-consuming and will need to take place before any field work is initiated. Moreover, even if a facility identifies no CCRMUs through its document review, under proposed 40 C.F.R. § 257.75(b), it will still need to perform the *mandatory* physical inspection of the facility.[55] The physical inspection will also be extremely time-consuming. Unless each site has its own dedicated P.E., which would create an instant labor shortage, they will not be able to efficiently evaluate multiple sites with consistency.

EPA also proposes that owners and operators conduct meetings and interviews with current and former staff, and state and local officials to gather information. Identifying, locating, and scheduling interviews will take time. Because the proposed definition of CCRMU includes historical uses, it will likely require significant exploration to identify the boundary and extent of material or to even confirm the existence of material.

If the physical inspection requires additional field investigation activities, that will also require more time. The process to procure engineering support to develop a soil boring plan, conduct the drilling, and perform soil analysis could easily take months to complete. Due to the broad, vague proposed CCRMU definition, it is likely that a facility would need to conduct this process at multiple areas, thereby extending

[53] While EPA does state that "any CCR used in roadbed and associated embankments would not be considered CCRMU" and explains that it does not have information that demonstrates that these activities present similar risks to CCR landfills, *Id*. at 32,019-10, this exemption is not included in the regulatory text.
[54] *Id*. at 32,021.
[55] "EPA is proposing to require that facility conduct a physical site inspection of the entire facility in all cases." *Id*. at 32,034.

the time required to complete all activities. Drilling resources will be stretched when multiple facilities with a state require the same resources within a similar time frame.

In the preamble, EPA indicates that it expects an owner or operator to examine areas even if no evidence of CCR management was determined by the document review stating that "the physical inspection must consist of a visual inspection of the *entire facility*."[56] Because 40 C.F.R. § 257.53 defines "facility" as "*all contiguous land, and structures, other appurtenances, and improvements on the land*, used for treating, storing, disposing, or otherwise conducting solid waste management of CCR," this appears to mean that all contiguous property must be inspected, even if it is clearly not an area where CCR has been managed.

Visual inspection of an entire property may not be reasonable in all cases. The facility's acreage could easily be over several hundred acres. Many sites have large portions of undeveloped and unimproved land within their property boundary or areas that are inaccessible. For example, one NRECA member's property includes approximately 450 acres of wetlands that are unreachable by vehicle and some portions may not be reasonably walkable due to natural conditions. Historical documents and aerials clearly show these areas remain undeveloped and do not meet the definition of improvements on the land. Furthermore, there will be seasonal limitations – winter weather will not allow the physical inspection and exploration of a site.[57]

Finally, the final report, containing 13 categories of information, must be carefully drafted and reviewed. It then must be reviewed and certified, first by a qualified P.E. certifying the plan and second by the owner or operator or an authorized representative certifying the plan under penalty of law. These reviews must happen sequentially and will also be time-consuming – if information gaps or issues are identified during the final review, additional field exploration and sampling may be required.

NRECA encourages EPA to revise the two-step facility evaluation process to provide more flexibility and much more time to complete. If the document review does not reveal any evidence of CCRMUs, EPA should not require an inspection of the entire facility. On the other hand, for some facilities, it may make more sense to conduct a physical inspection instead of a document review to identify sites. NRECA encourages EPA to provide owners and operators with additional flexibility to complete the facility evaluation process, including the discretion to determine whether a document review, physical inspection, or some combination of the two is appropriate. Additionally, EPA should grant the owner or operator discretion to forego evaluations on specific portions of land when the owner or operator knows that certain areas of a facility have absolutely never received CCR. Further, EPA should consider eliminating the requirement that facilities that identify no CCRMUs should have to post a report documenting the steps taken during the facility evaluation. Posting a statement from a qualified P.E. that no CCRMUs were identified should be sufficient under the current regulatory framework.

H. CCRMUs should not be required to close.

As discussed, due to the broad proposed CCRMU definition, these sites will be very different from each other and should not be required to close. Sites that are located below active CCR units or infrastructure pose particular challenges. EPA has not demonstrated they demonstrate risk to human health or the environment. It is also unclear what the closure requirements would be for a unit where there is no liquid.

[56] *Id.* at 32,022.

[57] In some parts of the United States, the construction season may only be a few months long. Depending on the rule's effective date, it may be impossible to conduct certain activities within the proposed timeframes due to short construction seasons.

EPA indicates in the preamble that no further closure would be required for such a site but would cover requirements be applicable to such units?

Requiring final covers would be overly burdensome for CCRMUs and ignores alternative solutions to preventing groundwater impacts such as installation of hydraulic barriers. For example, one NRECA member operates an interceptor drain along perimeters of its original landfill and recycles collected groundwater back into plant systems. Assessing permeability of the landfill with the potential requirement of installing a liner would seemingly trigger significant costs in return for no environmental or health benefits.

Installing a liner on an existing landfill could also require significant re-grading. CCR landfills are generally constructed with hardened slopes. Keying in liners can be difficult and costly due to the need to dig into hardened, concrete like, surfaces. In addition, installing a liner could also require modifications to stormwater collection and treatment systems. Increased runoff could require larger stormwater collection ponds. Modification of stormwater systems requires permitting and could delay construction. Further, there is limited space available for new stormwater management in already closed systems.

Moreover, many areas that would be classified as CCRMUs have already been properly and safely closed, including under rigorous state requirements. It defies common sense to require a P.E. certified and state approved closed landfill to undergo additional closure procedures under the CCR rule if it is already meeting closure standards under a state program and will be monitored for decades. EPA should not require sites such as these to reclose.

VII. Comments on the Proposed Compliance Timeframes

EPA's unrealistic proposed timeframes will not allow for the use of the state and federal permitting programs that Congress authorized under the WIIN Act nearly seven years ago. Under the WIIN Act, Congress directed EPA to implement a federal CCR permit program and approve, in whole or in part, state permit program applications in a timely manner. EPA has been yet to finalize the Federal CCR Permit Program rule that it proposed over three years ago. Because EPA has been slow to act, states have been slow to apply for approval of their programs to operate in lieu of the federal program. While NRECA is pleased to learn that EPA is working with 18 states on drafting CCR regulations or a draft state CCR permit program, only three states (Georgia, Oklahoma, and Texas) have approved programs.[58]

NRECA urges EPA to finalize its Federal CCR Permit Program rule as soon as possible. However, even if EPA finalizes its federal program by October of this year, as indicated in the Spring 2023 Unified Agenda, the unrealistic timeframes that EPA has proposed will not allow co-ops to obtain permits under either the yet to be finalized Federal CCR Permit Program or state CCR permit programs, which will need to be approved or updated consistent with any final rule.[59]

Moreover, the proposed unrealistic schedules are inadequate to comply with the Proposed Rule's requirements for legacy CCR surface impoundments or CCRMUs. EPA should revise the proposed timeframes to ensure there is adequate time to comply. In addition, it should move expeditiously to finalize its Federal CCR Permit Program and approve state CCR permit programs so that sites can be regulated under permit programs, which will provide a more tailored, effective way of managing CCR sites than the current self-implementing rule scheme allows.

[58] 88 Fed. Reg. at 32,028.
[59] *Id.*

A. The proposed compliance timeframes for legacy CCR surface impoundments are unrealistic and unachievable.

EPA has proposed compliance timeframes for legacy CCR surface impoundments that will be difficult if not impossible to meet and place most owners and operators at immediate risk of non-compliance. As an initial matter, EPA has proposed expedited timeframes, many of which fall on or shortly after the effective date of the final rule. This will necessarily require facilities to begin complying with the rule's requirements before the rule is finalized. It is unreasonable and unfair to require facilities to begin devoting time and resources to comply with requirements that are only proposed, not final, and may change significantly. This will prove particularly challenging in states where the public service commission's regulations prevent cost recovery through electric rates on the basis of proposed rules. For co-ops, which maintain only marginal cash reserves for unforeseen events and anticipated operating expenses, use debt financing for projects, and must ultimately pass on all costs to their consumer-members in the former of higher electricity costs, this creates a very difficult situation.

The Agency explains that it believes that the expedited timeframes that it proposes are achievable because, among other things, "most facilities are already familiar with these requirements," "fewer facilities and units will need to come into compliance" and it "no longer has concerns about shortages of contractors and lab resources."[60] However, many co-ops have had workforce turnover with recent retirements and employees pursuing other opportunities for various reasons.[61] New staff members may need training to become familiar with the intricacies of the CCR rule and certainly will need to become familiar with the sites at their facilities. Furthermore, if EPA finalizes the rule as proposed, there will a large number of facilities with either legacy CCR surface impoundments or CCRMUs that will need to comply with the aggressive compliance timeframes. In particular, because the broad proposed definition for CCRMUs, there will likely be far more CCRMUs than EPA has identified. In addition, with numerous companies seeking the same services at the same time, it is far from clear that there will be adequate contractors and lab resources as well as P.E.'s.

EPA has made a number of unrealistic assumptions to support its proposed timeframes and appears to have given little or no consideration to site location, size, and complexity; weather; finding documents; P.E. and owner and operator reviews; and review of other documents related to previous closures or consent decrees. For example, EPA estimates that the contracting process takes 1-2 weeks. However, 1-2 weeks is not even enough time to prepare a complex scope of work, much less seek evaluate bids and select a contractor. A more realistic time frame is 8-10 weeks, and more time may be needed depending on the complexity of the scope of work.[62] Of particular concern is EPA proposing to accelerate the compliance time frames by 15 months for completing the initial structural stability assessment and completing the initial safety factor assessment by requiring those requirements be met three months after the effective date of the

[60] 88 Fed. Reg. at 31,996.

[61] "In 2020, co-ops had the youngest workforce, with 16% of their employees under the age of 32. Among all co-ops, turnover also rose considerably—6,570 workers left in 2021 compared to 5,032 in 2020." NRECA, Survey: Energy Workers Are Getting Younger, But Their Turnover is Highest (Aug. 2, 2022), https://www.electric.coop/survey-energy-workers-are-getting-younger-but-their-turnover-is-highest.

[62] A sample schedule for hiring a contractor is provided below.

Task	Time Required
Develop scope, draft request for proposal ("RFP")	1 week
Receive proposals from qualified contractors	2 weeks
Review proposals	1 week
Clarifications/revisions	2 weeks
Final review/select bidder/submit requisition	2 weeks
Receive purchase order	3 weeks

final rule. These timeframes cannot be met and therefore should be reconsidered and revised. EPA estimates that a stability assessment can be completed in 8-12 weeks, however, this is not a sufficient amount of time to complete the necessary geotechnical investigations and receive the reports back from laboratory testing. Subsurface investigations and geotechnical studies also need to be scoped, bid, and awarded with substantial time to schedule drillers and get testing and receive reports back from laboratories before the required engineering analysis can proceed.

The proposed timeframe of six months for designing and installing the groundwater monitoring system for legacy CCR surface impoundments are similarly unrealistic. Site characterization should not occur simultaneously with well installation. And while EPA found flaws with facilities' groundwater monitoring systems for currently regulated sites, it now proposes that facilities must install these systems in 18 months faster than was provided in the 2015 CCR rule. EPA also asserts that the list of monitoring wells to be sampled can only be determined after installation of the groundwater monitoring system, however, under the proposed compliance timeframe, the sampling and analysis program must also be completed in six months.[63] It is clearly impossible for both these tasks, which must occur sequentially, to both be completed within six months.[64] EPA also requires that the sampling and analysis plan ("SAP") include selection of statistical methods. However, this is not possible because such selection requires at least eight independent samples to provide defensibility of the data, and as EPA has acknowledged, a period of up to 24 months is needed to generate such sample results.[65] For that reason, the requirement to include selection of statistical methods in the SAP should be removed, and allowance for a separate statistical evaluation plan should be added.

Under the Proposed Rule, closure for legacy CCR surface impoundments and CCRMUs must be initiated within 12 months of the effective date of the final rule. However, owners and operators will not have the results of groundwater monitoring at that time. It is unclear how adequate closure plans can be designed and implemented under such an aggressive schedule and without complete information. EPA should reconsider these timeframes to ensure that plans are designed after owners and operators have complete groundwater monitoring data.

B. The compliance timeframes for CCRMUs are unrealistic and unachievable.

In addition to proposing an overly broad, vague definition of CCRMUs, EPA has also proposed that all CCRMUs meet certain requirements regardless of whether units are in contact with water or pose a risk. Instead of this broad approach, which will impose significant burdens for potentially minimal benefit, EPA should tailor the requirements. Furthermore, EPA should not require units to close. Rather, EPA should address any risk through remedial action, using Subtitle C corrective action or CERCLA as a model.

Under CCRMU proposal, EPA will require facilities to conduct a facility evaluation to identify and delineate any CCRMUs and document those findings in a facility evaluation report. For any facility with CCRMUs, those facilities must comply with the existing requirements for groundwater monitoring, corrective action, closure, and post-closure care.

The proposed timeframe for completing the facility evaluation and facility evaluation report, three months after the effective date of the final rule, is simply not sufficient. As discussed above, the two-step facility evaluation process could be extremely time-consuming depending on the volume of documents that must be reviewed, the size of the facility, and the potentially expansive fieldwork that may be required. If

[63] 88 Fed. Reg. at 31,997.
[64] As indicated in Table 1, a prerequisite to groundwater sampling and analysis is installation of the groundwater monitoring system. *Id*.
[65] *Id*. at 32,004-05.

EPA decides to proceed with any CCRMU proposal, it should provide 24 months for completion of the facility evaluation and facility evaluation report.

EPA proposes that facilities install a groundwater monitoring system no later than six months after the effective date of the final rule. EPA estimates that it will take a total of 9.5 to 11 months to develop a sampling and analysis program and install a groundwater monitoring network.[66] Based on EPA's own calculations, the facility would need to initiate work on the groundwater network within three months of publication of the final rule, which is 3 months prior to the effective date and six months prior to completion of the facility evaluation report. It clearly will be impossible to determine where to install the groundwater monitoring network without completing the facility evaluation and EPA's timing, by its own calculations, is inadequate here.

> EPA's estimate of 7-9 weeks to develop the number, location and depths of monitor wells is inadequate. For example, for the 2015 CCR rule, one NRECA member's consultant required three months to complete the evaluation of the groundwater network and development of a monitoring system. That report only evaluated one facility and utilized an existing well network for compliance wells. Another NRECA member noted a timeframe of 110 days (almost 16 weeks) is needed just to drill and develop a monitoring well network with the minimum number of required monitoring wells at two existing CCR units. This timeframe does not account for the time needed for procurement of consultants and contractors, or preliminary aquifer characterization that is requisite to field work. The Proposed Rule's expansive definition of CCRMU will require evaluation of multiple sites and development of a more complicated and expansive monitoring network. Because of the significant expansion of regulated units at each facility and the additional time necessary to determine the existence of CCRMUs and vertical and horizontal bounds of those units, even the 2015 CCR rule timeframes for groundwater monitoring may not be adequate.

With regard to closure, which EPA should not require for CCRMUs, the proposed 12-month timeframe for initiating closure is completely unrealistic. As described above, because the CCRMU proposed definition is so broad and imprecise, many more sites will be subject to its requirements and are likely to present significant complexity, particularly sites that underly active CCR units or infrastructure.

VIII. Comments on Other Proposed Definitions

In addition to the problems with the proposed definitions of legacy surface impoundment and CCRMU discussed above, several of the Proposed Rule's new or revised definitions are defined by reference to other definitions, muddying the distinctions between different types of CCR units. For example, "CCR landfill," "CCR management unit," and "CCR unit" are defined by reference to each other. A "CCR landfill" is "not a surface impoundment" and not a "CCRMU," while a CCRMU is "not a CCR unit" but includes "inactive CCR landfills" and "CCR units that closed prior to October 17, 2015." Similarly, a "CCR unit" is not a CCRMU but includes CCR landfills and CCR surface impoundments.[67] Similar circular references are included in the proposed definitions of "inactive CCR landfill," "inactive facility," and "legacy surface impoundment." Definitional clarity is essential for regulatory clarity. NRECA urges EPA to clarify the definitions by defining these terms by their essential characteristics, not by circular references to each other.

EPA's proposed definition of "inactive facility or inactive electric utility or independent power producer" tries to combine two terms together that are not the same. Moreover, "inactive facility" and

[66] *Id*. at 32,004.
[67] *Id*. at 32,034.

"inactive electric utility or independent power producer" are not used consistently throughout the Proposed Rule. For example, proposed 40 C.F.R. § 257.50(d) says the CCR rule applies to CCRMUs located at active or inactive facilities with a CCR unit. However, the intent of the Proposed Rule appears to be to regulate CCR units or CCRMUs at active or inactive generating sites. EPA should clarify this confusion, separate these terms into two definitions, ensure it has evaluated the costs and burdens of extending the rule to non-generation sites, if it intends to do so, and ensure any potentially affected entities are notified about the Proposed Rule and have opportunity to provide input before EPA proceeds to a final rule.

The revised definition of "closed" in 40 C.F.R. § 257.53 should be clarified to state that a unit is closed, among other things, if the owner or operator "has initiated post-closure care in accordance with § 257.105, if applicable." Post-closure care is not applicable to closure by removal pursuant to 40 C.F.R. § 257.104(a)(2).

The revised definition of "operator" in 40 C.F.R. § 257.53 is too broad and may be interpreted to impose CCR rule liability on individuals or contractors who are retained by owners or operators to "actively engage" in CCR waste management. This definition should be revised to reflect the standard principles for "operator" liability under environmental laws, which should not include employees, individuals, or contractors operating under the direction of a responsible owner or operator.

IX. EPA's Regulatory Flexibility Act Analysis is Flawed

A. The Regulatory Flexibility Act's Requirements

The Regulatory Flexibility Act, 5 U.S.C. §§ 60-12 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act, requires federal agencies to assess the impacts of rules on small entities.[68] Before an agency issues a proposed rule, it must conduct a threshold analysis of the economic impact of the proposed rule. The EPA refers to this threshold analysis as "screening analysis" in its RFA compliance guide.[69] The threshold analysis is the process by which the agency determines and documents whether it has sufficient information to certify that a proposed rule does not require it to prepare an initial regulatory flexibility analysis ("IRFA").[70]

If the agency determines that the proposed rule will have a "significant economic impact on a substantial number of small entities," it must prepare an IRFA.[71] An IRFA must describe the small entities that will be affected, the impact of the proposed rule on small entities, the compliance burdens imposed, and any significant alternatives which accomplish the applicable statute's stated objectives and minimize any significant economic impacts.[72] If the agency determines the proposed rule will not have a "significant economic impact on a substantial number of small entities," the agency head may certify to such a conclusion and need not prepare an IRFA.[73] The certification statement mush include a "factual basis for the certification."[74]

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[68] The RFA uses the term "small entities," which includes small businesses, small not-for-profit organizations, and small governmental jurisdictions. *See* 5 U.S.C. § 601(6).

[69] EPA'S ACTION DEVELOPMENT PROCESS: FINAL GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT AS AMENDED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT 9-30 (2006), *available at* https://www.epa.gov/system/files/documents/2021-07/guidance-regflexact.pdf (the "EPA RFA Guidance").

[70] 5 U.S.C. § 605(b).

[71] *Id*. at § 603, 605(b).

[72] *Id*. at § 603(a)-(c).

[73] *Id*. at § 605(b).

[74] *Id*. An agency is required to prepare a final regulatory flexibility analysis ("FRFA") if it determines that a final rule will have a "significant economic impact on a substantial number of small entities." The FRFA must describe the small entities that will be

The RFA also requires agencies to conduct outreach to small entities when a proposed rule will have a "significant economic impact on a substantial number of small entities."[75] EPA has an additional outreach requirement for any proposed rule that requires preparation of an IRFA. Pursuant to § 609(b) of the RFA, EPA[76] must convene a Small Business Advocacy Review ("SBAR") Panel[77] *before* the rule is proposed to receive input from small entities.[78] Agency certifications of final rules are subject to judicial review.[79]

B. EPA's certification lacks the required factual basis.

Pursuant to § 605 of the RFA, EPA certified that the Proposed Rule would not have a "significant economic impact on a substantial number of small entities."[80] However, the certification is incorrect and suffers from several serious flaws. Among other infirmities, EPA has undercounted the number of small entities that are subject to the Proposed Rule's requirements, significantly underestimated the number of CCRMUs (and it concedes as much in the RIA), and underestimates the costs that will be imposed.

As EPA explains in the preamble, the CCRMU proposal would apply to all existing facilities and all inactive facilities with legacy CCR surface impoundments subject to the Proposed Rule.[81] In the RIA, EPA states that 277 facilities are regulated under the 2015 CCR rule.[82] However, it only assesses the economic impacts of the CCRMU proposal on 82 facilities,[83] nine of which it identifies as facilities owned by small entities.[84] Under the Proposed Rule, at a minimum, all 277 facilities (including those owned by small entities) would have to undertake the two-step facility evaluation process and incur those costs, whether or not they identify any CCRMUs. Moreover, NRECA believes that EPA has grossly underestimated the number of sites that would constitute CCRMUs under EPA's broad proposed CCRMU definition and the compliance costs.

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affected, the compliance burden imposed, the significant issues raised in public comments in response to the IRFA, any comments by the Small Business Administration ("SBA") Chief Counsel for Advocacy on the proposed rule, and any changes the agency made to the rule in response to the Chief Counsel's comments. *Id*. at § 604(a)(1)-(5). It also must describe the steps the agency has taken to minimize the significant economic impacts on small entities, including adoption of an alternative in the final rule, and why it rejected each other significant alternative. *Id*. at 604(a)(6). A certification at the proposed rule stage does not mean the agency is entitled to certify at the final rule stage. Data and information obtained during the notice and comment process may compel an agency to reconsider its decision to certify. If sufficient data and information is submitted to the agency that demonstrates there will be a "significant economic impact on a substantial number of small entities," the agency is required to prepare a FRFA.

[75] *Id*. at § 609(a).

[76] *Id*. at § 609(d)(1).

[77] The panel is comprised of representatives from EPA, the SBA's Office of the Chief Counsel for Advocacy, and the Office of Management and Budget's Office of Information and Regulatory Affairs. *Id*. at § 609(b).

[78] *Id*. There is nothing in the statute that precludes EPA from conducting a SBAR Panel after it proposes a rule. EPA has conducted panels after issuing proposed rules because it determined, based on the input it received, that a rule would in fact have a significant economic impact on a substantial number of small entities. For example, after proposing the TSCA Section 8(a)(7) Rule: Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, EPA found additional data and received feedback via public comments to update its economic analysis and small entity impact analysis. This led EPA to determine that the proposed rule would have a significant economic impact on a substantial number of small entities. Subsequently, it conducted the SBAR Panel process. EPA, SBAR PANEL: TSCA SECTION 8(A)(7) RULE: REPORTING AND RECORDKEEPING REQUIREMENTS FOR PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES KEY DATES AND DOCUMENTS FOR THIS SBAR PANEL, https://www.epa.gov/reg-flex/sbar-panel-tsca-section-8a7-rule-reporting-and-recordkeeping-requirements-perfluoroalkyl (last visited July 13, 2023).

[79] *Id*. at § 611.

[80] 88 Fed. Reg. at 32,031.

[81] *Id*. at 31,984, 31,989.

[82] RIA, at 2-3

[83] *Id*. at 3-31.

[84] *Id*. at 5-13.

C. The Proposed Rule will impose significant and disproportionate burdens and costs on small entities.

Without citing any supporting data, EPA states that "The universe of facilities affected by the CCR management unit provisions of the proposed rule is likely to be smaller than the total array of 277 facilities regulated under the 2015 final CCR rule . . . ."[85] However, one NRECA member has identified as many as eight potential CCRMUs under the broad proposed definition and it is possible more could be identified during the facility evaluation. EPA has estimated that there are only 11 CCRMUs owned by all affected small entities.[86] Given the information NRECA has received from just one co-op and EPA's undercounting of affected small entities, it seems highly unlikely that the estimate of 11 CCRMUs is accurate. In addition, NRECA believes that the compliance costs for some CCRMU sites, particular those underlying active CCR units or electric utility infrastructure, would be far higher than EPA's estimates. As discussed earlier in these comments, EKPC estimates that it would likely cost over $300-400 million to comply with the Proposed Rule's requirements for its former impoundment underlying the active landfill at Cooper Station.

Small entities such as co-ops have fewer resources than their larger counterparts and therefore will face more substantial compliance burdens. In the rush to comply with the Proposed Rule given the aggressive compliance timeframes, small entities will face the challenge of competing with larger entities for a finite number of engineering and environmental consultants and contractors to help them develop a compliance plan and implement the rule's requirements. In addition, the Proposed Rule, as discussed above, could disrupt power plant operations, which would not only affect a particular co-op's ability to provide safe, reliable, and affordable electricity to its consumer-members but may have greater impacts on grid reliability. Moreover, as noted above, co-ops operate at cost and without a profit incentive. Because co-ops do not have investor equity shareholders, any regulatory compliance costs will be borne by co-ops' consumer-members at the end of the line.

Had EPA conducted outreach to small entities regulated under the 2015 CCR rule through a SBAR panel and developed an IRFA, it could have uncovered these flaws and resolved problems with the Proposed Rule before it was published. Prior to finalizing any rule, EPA must reassess the impacts of the CCRMU proposal on small entities and indeed on all facilities. It must gather more data about the potential universe of CCRMUs and properly estimate the costs associated with the proposed requirements. EPA's certification has significant flaws and lacks a factual basis. NRECA urges EPA to convene a SBAR panel, complete the panel report, prepare an IRFA, and publish the IRFA for public notice and comment prior to issuing any final rule and FRFA.

[85] *Id*. at 2-3.
[86] *Id*. at 5-13.

X. Conclusion

NRECA appreciates EPA's consideration of its comments on this Proposed Rule and encourages EPA to reconsider proceeding with this rulemaking. If EPA proceeds, NRECA urges EPA to bifurcate the legacy surface impoundments and CCRMU proposals and make revisions to address the practical, legal, economic, and electric reliability concerns raised in these comments. NRECA looks forward to further engagement with EPA on the proposal. Should you have any questions, please contact me at viktoria.seale@nreca.coop or (703) 907-5805.

Sincerely,

Viktoria Z. Seale
Regulatory Affairs Director