



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 257

[EPA-HQ-OLEM-2016-0274; FRL-9949-44-OLEM]

### **Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Extension of Compliance Deadlines for Certain Inactive Surface Impoundments; Response to Partial Vacatur**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is taking direct final action to extend for certain inactive coal combustion residuals (CCR) surface impoundments the compliance deadlines established by the regulations for the disposal of CCR under subtitle D of the Resource Conservation and Recovery Act (RCRA). These revisions are taken in response to a partial vacatur ordered by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on June 14, 2016.

**DATES:** This rule is effective on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** without further notice, unless EPA receives adverse comment by **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If EPA receives adverse comment, we will publish a timely withdrawal notice in the Federal Register informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2016-0274, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may

publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** For information concerning this direct final rule, contact Steve Souders, Office of Resource Conservation and Recovery, Environmental Protection Agency, 5304P, Washington DC 20460; telephone number: (703) 308-8431; email address: [souders.steve@epa.gov](mailto:souders.steve@epa.gov). For more information on this rulemaking please visit <https://www.epa.gov/coalash>.

## **SUPPLEMENTARY INFORMATION**

### **I. General Information**

#### *A. Does this action apply to me?*

This direct final rule applies only to those owners or operators of inactive CCR surface impoundments that meet all three of the following conditions: (1) complied with the requirement at 40 CFR 257.105(i)(1) by placing in their facility's written operating record a notification of intent to initiate closure of the CCR unit as required by 40 CFR 257.100(c)(1), no later than December 17, 2015; (2) complied with the requirement at 40 CFR 257.106(i)(1) by providing notification to the relevant State Director and/or appropriate Tribal authority by January 19,

2016, of the intent to initiate closure of the CCR unit; and (3) complied with the requirement at 40 CFR 257.107(i)(1) by placing the notification of intent to initiate closure of the CCR unit on the owner or operator's publicly accessible CCR Web site no later than January 19, 2016.

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. Why is EPA issuing a direct final rule?*

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. This direct final rule merely extends the deadlines for the owners and operators of those inactive CCR surface impoundments that had taken advantage of the "early closure" provisions of 40 CFR 257.100, who became newly subject to the rule's requirements for existing CCR surface impoundments on June 14, 2016 when the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ordered the vacatur of those provisions. This rule provides time for these owners and operators to bring their units into compliance with the rule's substantive requirements, but does not otherwise amend the rule or otherwise impose new requirements on those units. However, in the "Proposed Rules" section of this Federal Register, we are publishing a separate document that will serve as the proposed rule to provide new compliance deadlines if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

If EPA receives adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

## **II. Statutory Authority**

These regulations are established under the authority of sections 1006(b), 1008(a), 2002(a), 4004, and 4005(a) of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6906(b), 6907(a), 6912(a), 6944, and 6945(a).

## **III. Background**

On April 17, 2015 EPA finalized national regulations to regulate the disposal of coal combustion residuals (CCR) as solid waste under subtitle D of the Resource Conservation and Recovery Act (RCRA) titled, “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities,” (80 FR 21302) (“CCR rule”). The CCR rule established national minimum criteria for existing and new CCR landfills and existing and new CCR surface impoundments and all lateral expansions consisting of location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, and recordkeeping, notification and internet posting requirements. The rule also required any existing unlined CCR surface impoundment that is contaminating groundwater above a regulated constituent’s groundwater protection standard to stop receiving CCR and either retrofit or close, except in limited circumstances. It also established requirements for inactive CCR surface impoundments, i.e., those units that did not receive CCR after October 15, 2015 but still contain water and CCR. Under the rule as promulgated, inactive CCR surface impoundments must comply with the same requirements as existing CCR surface impoundments, unless the owner or operator of the facility closes the units no later than April 17, 2018. See 80 FR 21408-21409, April 17, 2015; 40 CFR 257.100(b). If an inactive CCR surface impoundment

had completely closed by this date, no other requirements applied to that unit (i.e., the “early closure” provisions). The effect of these “early closure” provisions was that no groundwater monitoring or other post-closure care requirements (such as the requirement to take corrective action for any releases) would apply to these units.

On June 14, 2016 the United States Court of Appeals for the D.C. Circuit ordered the vacatur of these “early closure” provisions in 40 CFR 257.100. The effect of the vacatur is that all inactive CCR surface impoundments must now comply with all of the requirements applicable to existing CCR surface impoundments.

#### **IV. What Action is EPA Taking in this Rule?**

As a consequence of the order issued by the United States Court of Appeals for the D.C. Circuit on June 14, 2016, EPA is removing certain provisions of the CCR rule at 40 CFR 257.100(b), (c), and (d) related to the “early closure” of inactive CCR surface impoundments by April 17, 2018.

As a result of this order, owners and operators of inactive CCR surface impoundments that had relied on these “early closure” provisions must now comply with all of the requirements for existing CCR surface impoundments. These technical requirements are found in the following sections of the CCR rule: location criteria; design and operating requirements, air criteria, inspection requirements, groundwater monitoring and corrective action; closure and post-closure care; and recordkeeping, notification and publicly accessible internet site requirements. Each of these requirements contained associated compliance deadlines, which must also be met. But the owners and operators of these units would have substantially less time than EPA had originally determined was needed to come into compliance; indeed some of these deadlines have already passed, prior to the issuance of the court’s order. In the absence of an

extension, these units would, through no fault of their own, become “open dumps” under the statute.

Accordingly, EPA is extending the compliance deadlines associated with these newly applicable regulatory requirements to allow the owners or operators of these units adequate time to come into compliance. The Agency is extending each of these compliance deadlines by 547 days, which is the amount of time between the signature date of the final rule and the last business day of the week during which the order from the court granting the motion to vacate 40 CFR 257.100 (b), (c), and (d) was signed. Thus, the 547 days represents the amount of time between December 19, 2014, and June 17, 2016.<sup>1</sup> In essence, this represents the amount of time that would have been available to these facilities had 40 CFR 257.100 not been included in the final rule; i.e., this rule provides the same amount of time EPA granted to existing CCR surface impoundments in the final rule.

EPA defines the units subject to this extension rule as exclusively those units whose owners and operators of inactive CCR surface impoundments have complied with the following three requirements: (1) the requirement at 40 CFR 257.105(i)(1), by placing in their facility’s written operating record a notification of intent to initiate closure of the CCR unit as required by 40 CFR 257.100(c)(1), by no later than December 17, 2015; (2) the requirement at 40 CFR 257.106(i)(1), by providing notification to the relevant State Director and/or appropriate Tribal authority no later than January 19, 2016, of the intent to initiate closure of the CCR unit; and (3) the requirement of 40 CFR 257.107(i)(1) by placing the notification of intent to initiate closure

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<sup>1</sup> The EPA selected June 17, 2016 (the end of the week the vacatur order was signed by the court) instead of June 14, 2016 (the actual date the court signed the order) to limit any potential confusion. Had EPA extended the compliance period based on the June 14 date, any facility that completed closure of their inactive surface impoundment by the original deadline in the vacated provisions would have been subject to certain rule requirements for one day. EPA concluded that no environmental or health protection would be achieved by requiring facilities to comply with requirements that are relevant only to active or inactive impoundments (because they determine whether the unit must close), when the unit would complete closure a single day later.

of the CCR unit on the owner or operator's publicly accessible CCR Web site, by no later than January 19, 2016.<sup>2</sup> EPA is not revising the regulation to require additional notification or postings from facilities to document that they have a unit(s) subject to the longer compliance deadlines in this extension rule. As noted previously, facilities were required to generate and post documents demonstrating their intent to take advantage of the "early closure" provisions by December 2015 and January 2016, pursuant to provisions that were not affected by the court order. Continued maintenance of these documents would be sufficient to establish that a particular unit is eligible for the extended compliance deadlines in this rule.

A brief discussion of the requirements with which these inactive CCR surface impoundments must comply is presented below for the ease of the reader. However, EPA is not soliciting comment on any of these requirements, including the original deadlines associated with these requirements, and is not otherwise reopening any aspect of the final CCR rule. EPA will not consider any comment on any topic other than the extension of the deadlines for the newly subject inactive CCR surface impoundments to be part of the record for this rule, and will not respond to such comments.

*A. Location criteria – Deadline to complete the demonstrations for compliance with the location restrictions*

To ensure that CCR surface impoundments are appropriately sited, the CCR rule established location restrictions, including restrictions relating to placement of CCR above the uppermost aquifer, in wetlands, within fault areas, in seismic impact zones, and in unstable areas.

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<sup>2</sup> Inactive CCR surface impoundments that are not affected by this rule: i.e., inactive CCR surface impoundments without a notice of intent to close dated between April 17, 2015 and December 17, 2015, and placed in the facility's operating record and on the facility's publicly accessible internet site by January 19, 2016, remain subject to all of the requirements for existing CCR surface impoundments under 40 CFR part 257, subpart D (see § 257.100(a)), including the original timeframes in 40 CFR 257, subpart C, and are not subject to the new compliance timeframes discussed in this direct final rule.

See 40 CFR 257.60 through 257.64. As discussed in the CCR rule, all of these location restrictions require the owner or operator of a CCR surface impoundment to demonstrate that they meet the specific criteria, as well as providing a deadline by when the demonstrations must be completed. In addition, the CCR rule requires existing CCR surface impoundments that cannot make the required demonstrations to close the unit. However, owners or operators of certain inactive CCR surface impoundments – those owners or operators that elected to comply with the now-vacated “early closure” provisions under 40 CFR 257.100(b) – were exempt from the location restrictions finalized in the CCR rule. With the vacatur of the exemption, these inactive CCR surface impoundments become subject to the location restrictions. This direct final rule provides owners or operators of eligible inactive CCR surface impoundments until April 16, 2020 to comply with the requirements for location restrictions; otherwise, the CCR unit must be closed. See also 80 FR 21359 -21368, April 17, 2015.

*B. Design criteria – Deadline to document whether the CCR surface impoundment is lined or unlined*

Owners or operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(3)(i) must by April 17, 2018 comply with the requirements at 40 CFR 257.71(a) and (b) and document, certified by a qualified professional engineer, whether their inactive CCR surface impoundment is constructed with any one of the three liner types: (1) a liner consisting of a minimum of two feet of compacted soil with a hydraulic conductivity of no more than  $1 \times 10^{-7}$  cm/sec; (2) a composite liner that meets the requirements of 40 CFR 257.70(b); or (3) an alternative liner that meets the requirements of 40 CFR 257.70(c). See also 80 FR 21370-21371, April 17, 2015.

*C. Design criteria – Deadline to install permanent markers*

Except for incised CCR surface impoundments as defined in 40 CFR 257.53, owners or operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(3)(ii) are subject to 40 CFR 257.73(a)(1) that requires the placement of a permanent identification marker, at least six feet high on or immediately adjacent to the CCR unit with the name associated with the CCR unit and the name of the owner or operator. The placement of the permanent marker must be completed by the owner or operator of the inactive CCR surface impoundment no later than June 16, 2017.

*D. Design criteria - Deadline to complete the initial hazard potential classification and prepare an Emergency Action Plan*

Except for incised CCR surface impoundments as defined in 40 CFR 257.53, owners or operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(3)(v) must complete the initial periodic hazard potential classification assessment as required by 40 CFR 257.73 (a)(2) no later than April 17, 2018. Section 257.73(a)(3) requires any CCR surface impoundment that is determined by the owner or operator, through the certification by a qualified professional engineer, to be either a high hazard potential or a significant hazard potential CCR surface impoundment to prepare and maintain a written Emergency Action Plan (EAP). An EAP is a document that identifies potential emergency conditions at a CCR surface impoundment and specifies actions to be followed to minimize loss of life and property damage. In order to prepare an EAP, the owner or operator must accurately and comprehensively identify potential failure modes and at risk developments. Inactive surface impoundments that have been identified as having either a high hazard potential or a significant hazardous potential are subject to the provisions of the new 40 CFR 257.100(e)(3)(iii) and must prepare and maintain an EAP as

required by 40 CFR 257.73 no later than October 16, 2018. See also 80 FR 21377-21379, April 17, 2015.

*E. Design criteria – Deadline to document the CCR surface impoundments history of construction*

CCR surface impoundments that either have: (1) a height of five feet or more and a storage volume of 20 acre feet or more; or (2) have a height of 20 feet or more are required to document the design and construction of the CCR surface impoundment as required in 40 CFR 257.73(b) and (c). Owners or operators of inactive CCR surface impoundments that meet this size threshold and are subject to the provisions of the new 40 CFR 257.100(e)(3)(iv) must document the construction history of the CCR unit no later than April 17, 2018. See also 80 FR 21379-21380, April 17, 2015.

*F. Design criteria – Deadline to complete the initial structural stability assessment and initial safety factor assessment*

CCR surface impoundments meeting the size threshold discussed in section IV.E of this preamble, are also subject to two different types of technical assessments: (1) a structural stability assessment; and (2) a safety factor assessment. Owners or operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(3)(v) are required to conduct an initial assessment addressing both structural stability and safety factors by April 17, 2018. These requirements can be found at 40 CFR 257.73(b), (d), (e), and (f). See also 80 FR 21380-21386, April 17, 2015.

*G. Operating criteria – Deadline to prepare a fugitive dust control plan*

The owner or operator of a CCR unit is required under 40 CFR 257.80(b) to adopt measures that will effectively minimize CCR from becoming airborne at the facility, including

CCR fugitive dust originating from CCR units, roads, and other CCR management and material handling activities. To meet this requirement, the owner or operator of the CCR unit must prepare and operate in accordance with a fugitive dust control plan. Owners or operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(4)(i) must complete this plan no later than April 18, 2017. See also 80 FR 21386-21388, April 17, 2015.

*H. Operating criteria – Deadline to prepare an initial inflow design flood control system plan*

Owners or operators of all CCR surface impoundments are required to design, construct, operate, and maintain hydraulic and hydrologic capacity to adequately manage flow both into and from a CCR surface impoundment during and after the peak discharge resulting from the inflow design flood, which is based on the Hazard Potential Classification of the CCR surface impoundment (40 CFR 257.82(a)). The rule requires the preparation of an initial inflow design flood control system plan (40 CFR 257.82(c)). Owners and operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(4)(ii) must complete the inflow design flood control system plan by April 17, 2018. See also 80 FR 21390- 21392, April 17, 2015.

*I. Operating criteria – Deadline to initiate weekly inspection of the CCR surface impoundment and monthly monitoring of the CCR unit's instrumentation*

Under 40 CFR 257.83(a) all CCR surface impoundments must be examined by a qualified person at least once every seven days for any appearance of actual or potential structural weakness or other conditions that are disrupting or that have the potential to disrupt the operation or safety of the CCR unit. The results of the inspection by a qualified person must be recorded in the facility's operating record. Weekly inspections are intended to detect, as early as

practicable, signs of distress in a CCR surface impoundment that may result in larger more severe conditions. Inspections are also designed to identify potential issues with hydraulic structures that may affect the structural safety of the unit and impact its hydraulic and hydrologic capacity. 40 CFR 257.83(a) also requires the monitoring of all instrumentation supporting the operation of the CCR unit to be conducted by a qualified person no less than once per month. Owners and operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(4)(iii) must initiate the inspection requirements set forth in 40 CFR 257.83(a) no later than April 18, 2017. See also 80 FR 21394-21395, April 17, 2015.

*J. Operating criteria – Deadline to complete the initial annual inspection of the CCR surface impoundment*

Any CCR surface impoundment exceeding the size threshold discussed in section IV.E of this preamble, is required to conduct annual inspections of the CCR unit throughout its operating life (40 CFR 257.83(b)). These inspections are focused primarily on the structural stability of the unit and must ensure that the operation and maintenance of the unit is in accordance with recognized and generally accepted good engineering standards. Each inspection must be conducted and certified by a qualified professional engineer. Owners and operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(4)(iv) must conduct this initial annual inspection by July 19, 2017. See also 80 FR 21395, April 17, 2015.

*K. Groundwater monitoring and corrective action – Deadline to install the groundwater monitoring system and begin monitoring*

Owners and operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(5)(i) are required to comply with the provisions of 40 CFR 257.90(b) no later than April 17, 2019. These provisions require the installation of a

groundwater monitoring system as required by 40 CFR 257.91 and the development of a groundwater sampling and analysis program. This program is to include selection of the statistical procedures to be used for evaluating groundwater monitoring data as required by 40 CFR 257.93. It also includes the initiation of the detection monitoring program and includes obtaining a minimum of eight independent samples for each background and downgradient wells as required by 40 CFR 257.94(b) and to begin evaluating the groundwater monitoring data for a statistically significant increase over background levels for the constituents listed in appendix III as required by 40 CFR 257.94. See also 80 FR at 21396-21407, April 17, 2015.

*L. Groundwater monitoring and corrective action – Deadline to prepare an initial groundwater monitoring and corrective action report*

Owners and operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(5)(ii) are required to comply with the provisions of 40 CFR 257.90(e) no later than August 1, 2019 (and annually thereafter) that require the preparation of an annual groundwater monitoring and corrective action report. The report must contain specific information identified in the regulations including but not limited to maps, aerial images or diagrams showing the CCR unit and all upgradient (background) and downgradient wells, identification of any monitoring wells installed or decommissioned in the previous year; monitoring data collected under 40 CFR 257.90 - 257.98 and a narrative discussion of any transition between monitoring programs (i.e., detection and assessment monitoring).

*M. Detection monitoring program – Deadline for collection and analyses of eight independent samples*

Consistent with the groundwater monitoring requirements previously discussed in section IV.K of this preamble, no later than April 17, 2019, owners or operators of inactive CCR surface

impoundments subject to the provisions of the new 40 CFR 257.100(e)(5)(i) must collect a minimum of eight independent samples from each background and down gradient well and analyze for constituents listed in appendix III and IV of this part as required under 40 CFR 257.94(b).

*N. Closure and post-closure care – Deadline to prepare a written closure plan*

The closure plan describes the steps necessary to close a CCR unit at any point during the active life of the unit based on recognized and generally accepted good engineering practices. Owners and operators of inactive CCR surface impoundments subject to the provisions of the new 40 CFR 257.100(e)(6)(i) are required to comply with the requirements of 40 CFR 257.102, including 40 CFR 257.102(b) requiring the preparation of a written closure plan no later than April 17, 2018. A written closure plan includes information that sets out how the closure of the unit will be conducted. It includes information such as a narrative description of the closure process, whether the closure of the CCR unit will be accomplished by leaving CCR in place or through clean closure. If the CCR is left in place, the closure plan must provide a description of the final cover system and how the final cover system will achieve the regulatory performance standards. The written closure plan must also provide a schedule for completing all activities necessary to satisfy the closure criteria of the rule. See also 80 FR 21410 – 21425, April 17, 2015.

*O. Closure and post-closure care – Deadline to prepare a written post-closure care plan*

40 CFR 257.104(d) requires that an owner or operator of a CCR unit prepare a written post-closure plan. The content of the plan includes among other things, a description of the monitoring and maintenance activities required for the unit and the frequency that these activities will be performed. Owners and operators of inactive CCR surface impoundments subject to the

provisions of the new 40 CFR 257.100(e)(6)(ii) are required to comply with the requirements of 40 CFR 257.104, including 40 CFR 257.104(d) requiring the preparation of a written post-closure plan no later than April 17, 2018.

*P. Recordkeeping, notification and publicly accessible internet site requirements*

Inactive CCR surface impoundments subject to the revised compliance deadlines being finalized in this direct final rule are also subject to the recordkeeping, notification and publicly accessible internet reporting requirements. The CCR rule requires the owner or operator of a CCR unit(s) to maintain files of all required information (e.g., demonstrations, plans, notifications, and reports) that supports implementation and compliance with the rule. Each file must be maintained in the operating record for a period of at least 5 years following submittal of the file into the operating record. Submittal into the operating record is required at the time the documentation becomes available or by the specific compliance deadline. Section 257.105 contains a comprehensive listing of each recordkeeping requirement.

Owners or operators are also required to notify State Directors and/or the appropriate Tribal authority when specific documents have been placed in the operating record and on the owner or operators publicly accessible internet site. In most instances, these notifications must be certified by a qualified professional engineer and may, in certain instances, be accompanied with additional information or data supporting the notification. Notification requirements can be found at 40 CFR 257.106, and are required for location criteria, design criteria, operating criteria, groundwater monitoring and corrective action and closure and post-closure care.

Owners and operators of CCR units are also required to establish and maintain a publicly accessible Internet site, titled “CCR Rule Compliance Data and Information.” Unless provided otherwise in the rule, information posted to the Internet site must be available for a period no less

than 3 years from the initial posting date. Posting of information must be completed no later than 30 days from the submittal of the information to the operating record. Owners and operators of inactive CCR surface impoundments subject to the new provisions of § 257.100(e) have 30 days from the revised compliance deadlines to post applicable information on their publicly accessible internet site.

The preceding discussion provides an abbreviated summary of the compliance deadlines for owners or operators of inactive CCR surface impoundments affected by this direct final rule. These inactive CCR surface impoundments are now also subject to all applicable requirements under 40 CFR part 257, subpart D for existing CCR surface impoundments. The new compliance deadlines for inactive CCR surface impoundments have been collected in a new paragraph (e) under § 257.100.

## **V. What is the Effect of this Rule on State Programs**

The CCR rule established minimum federal criteria for existing and new CCR surface impoundments and CCR landfills. The regulations promulgated under subtitle D of RCRA require owner or operators of these units to comply with the requirements of the rule without any additional action by a state or federal regulatory agency. As discussed at length in the CCR rule preamble (80 FR 21429-21433, April 17, 2015), under the provisions of subtitle D applicable to solid waste, states are not required to adopt or implement these regulations, to develop a permit program, or submit a program covering these units to EPA for approval and there is no mechanism for EPA to officially approve or authorize a state program to operate “in lieu of” the federal regulations. In the CCR rule, however, EPA strongly encouraged states to adopt at least the federal minimum requirements into their regulations. EPA further acknowledged that some states have already adopted requirements that go beyond the minimum federal requirements; for

example, some states currently impose financial assurance requirements for CCR units, and require a permit for some or all of these units. The federal criteria promulgated in the CCR rule are minimum requirements and do not preclude states' from adopting more stringent requirements where they deem to be appropriate. EPA also encouraged states to revise their solid waste management plan (SWMP) to address the issuance of the revised federal requirements and to submit the revisions of these plans to EPA for review, using the provision contained in 40 CFR part 256.

This rule amends the final CCR rule to reflect the vacatur of specific provisions of that rule applicable to certain CCR surface impoundments (i.e., 40 CFR 257.100(b), (c), and (d)). This vacatur will likely affect those states that have begun the process of either revising their state programs (and regulations) to be consistent with the federal requirements or those states that have or are in the process of adopting the federal minimum requirements into their state regulations by reference. These states must now ensure that their regulations take into account this vacatur by ensuring that their regulations provide that inactive CCR surface impoundments are subject to all of the requirements in part 257 applicable to existing CCR surface impoundments regardless of their intent to close by a certain date.

## **VI. Statutory and Executive Order (EO) Reviews**

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action is not a "significant regulatory action" and is therefore not subject to OMB review. Because this action is not subject to notice and comment requirements under the Administrative Procedures Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) or Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub. L. 104-4). In addition, this action does not

significantly or uniquely affect small governments. This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994). This action does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

#### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 257**

Environmental protection, Beneficial use, Coal combustion products, Coal combustion residuals, Coal combustion waste, Disposal, Hazardous waste, Landfill, Surface impoundment.

Dated: July 26, 2015.

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Gina McCarthy,  
Administrator.

For the reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

**PART 257—CRITERIA FOR CLASSIFICATION OF SOLID WASTE DISPOSAL FACILITIES AND PRACTICES**

1. The authority citation for part 257 continues to read as follows:

**Authority:** 42 U.S.C. 6907(a)(3), 6912(a)(1), 6944(a), and 6949a(c); 33 U.S.C. 1345(d) and (e).

2. Section 257.90 is amended by revising paragraph (a) to read as follows:

**§ 257.90 Applicability.**

(a) All CCR landfills, CCR surface impoundments, and lateral expansions of CCR units are subject to the groundwater monitoring and corrective action requirements under §§ 257.90 through 257.98.

\* \* \* \* \*

3. Section 257.100 is amended by:

- a. Revising paragraph (a);
- b. Removing and reserving paragraphs (b) through (d); and
- c. Adding paragraph (e).

The revisions and additions read as follows:

**§ 257.100 Inactive CCR surface impoundments.**

(a) Inactive CCR surface impoundments are subject to all of the requirements of this subpart applicable to existing CCR surface impoundments.

\* \* \* \* \*

(e) Timeframes for certain inactive CCR surface impoundments. (1) An inactive CCR surface impoundment for which the owner or operator has completed the actions by the deadlines specified in paragraphs (e)(1)(i) through (iii) of this section is eligible for the alternative timeframes specified in paragraphs (e)(2) through (6) of this section. The owner or operator of the CCR unit must comply with the applicable recordkeeping, notification, and internet requirements associated with these provisions. For the inactive CCR surface impoundment:

(i) The owner or operator must have prepared and placed in the facility's operating record by December 17, 2015, a notification of intent to initiate closure of the inactive CCR surface impoundment pursuant to § 257.105(i)(1);

(ii) The owner or operator must have provided notification to the State Director and/or appropriate Tribal authority by January 19, 2016, of the intent to initiate closure of the inactive CCR surface impoundment pursuant to § 257.106(i)(1); and

(iii) The owner or operator must have placed on its CCR website by January 19, 2016, the notification of intent to initiate closure of the inactive CCR surface impoundment pursuant to § 257.107(i)(1).

(2) Location restrictions. (i) No later than April 16, 2020, the owner or operator of the inactive CCR surface impoundment must:

(A) Complete the demonstration for placement above the uppermost aquifer as set forth by § 257.60(a), (b), and (c)(3);

(B) Complete the demonstration for wetlands as set forth by § 257.61(a), (b), and (c)(3);

(C) Complete the demonstration for fault areas as set forth by § 257.62(a), (b), and (c)(3);

(D) Complete the demonstration for seismic impact zones as set forth by § 257.63(a), (b), and (c)(3); and

(E) Complete the demonstration for unstable areas as set forth by § 257.64(a), (b), (c), and (d)(3).

(ii) An owner or operator of an inactive CCR surface impoundment who fails to demonstrate compliance with the requirements of paragraph (e)(2)(i) of this section is subject to the closure requirements of § 257.101(b)(1).

(3) Design criteria. The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 17, 2018, complete the documentation of liner type as set forth by § 257.71(a) and (b).

(ii) No later than June 16, 2017, place on or immediately adjacent to the CCR unit the permanent identification marker as set forth by § 257.73(a)(1).

(iii) No later than October 16, 2018, prepare and maintain an Emergency Action Plan as set forth by § 257.73(a)(3).

(iv) No later than April 17, 2018, compile a history of construction as set forth by § 257.73(b) and (c).

(v) No later than April 17, 2018, complete the initial hazard potential classification, structural stability, and safety factor assessments as set forth by § 257.73(a)(2), (b), (d), (e), and (f).

(4) Operating criteria. The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 18, 2017, prepare the initial CCR fugitive dust control plan as set forth in § 257.80(b).

(ii) No later than April 17, 2018, prepare the initial inflow design flood control system plan as set forth in § 257.82(c).

(iii) No later than April 18, 2017, initiate the inspections by a qualified person as set forth by § 257.83(a).

(iv) No later than July 19, 2017, complete the initial annual inspection by a qualified professional engineer as set forth by § 257.83(b).

(5) Groundwater monitoring and corrective action. The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 17, 2019, comply with groundwater monitoring requirements set forth in §§ 257.90(b) and 257.94(b); and

(ii) No later than August 1, 2019, prepare the initial groundwater monitoring and corrective action report as set forth in § 257.90(e).

(6) Closure and post-closure care. The owner or operator of the inactive CCR surface impoundment must:

(i) No later than April 17, 2018, prepare an initial written closure plan as set forth in § 257.102(b); and

(ii) No later than April 17, 2018, prepare an initial written post-closure care plan as set forth in § 257.104(d).

#### **§ 257.102 [Amended]**

4. Section 257.102 is amended by removing and reserving paragraph (e)(4)(i).

5. Section 257.104 is amended by revising paragraph (a)(1) and removing paragraph (a)(3) to read as follows:

#### **§ 257.104 Post-closure care requirements.**

(a) \* \* \*

(1) Except as provided by paragraph (a)(2) of this section, § 257.104 applies to the owners or operators of CCR landfills, CCR surface impoundments, and all lateral expansions of CCR units that are subject to the closure criteria under § 257.102.

\* \* \* \* \*

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