



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 257

[EPA-HQ-OLEM-2020-0508; FRL-10017-69-OLEM]

### Texas: Approval of State Coal Combustion Residuals Permit Program

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

**ACTION:** Notice of availability; request for comment.

**SUMMARY:** Pursuant to the Resource Conservation and Recovery Act (RCRA), the Environmental Protection Agency (EPA or the Agency) is proposing to approve in part the Texas Coal Combustion Residuals (CCR) permit program. After reviewing the state CCR permit program application, submitted by the Texas Commission on Environmental Quality (TCEQ), EPA has preliminarily determined that the Texas CCR permit program meets the standard for partial approval under RCRA. If approved, the Texas CCR permit program will operate in lieu of the federal CCR program, with the exception of the specific provisions noted below. This document announces that EPA is seeking comment on this proposal during a 60-day public comment period and will be holding a virtual public hearing on EPA's preliminary approval of the Texas partial CCR permit program.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. *Public Hearing:* EPA will hold a virtual public hearing on February 2, 2021.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0508, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method).

Follow the online instructions for submitting comments.

- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Land and Emergency Management (OLEM) Docket, Mail Code 28221T, 1200 Pennsylvania Ave. N.W., Washington, DC 20460.

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

EPA will hold a virtual public hearing. EPA will announce further details on the public hearing website (<https://www.epa.gov/coalash>) in advance of the hearing. The hearing will convene on February 2, 2021 at 9 a.m. (ET) and conclude at 6 p.m. (ET). If necessary, the hearing may go later to accommodate all those wishing to speak. For additional information on the public hearing, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Michelle Long, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, MC: 5304P, Washington, DC 20460; telephone number: (703) 347–8953; e-mail address: [long.michelle@epa.gov](mailto:long.michelle@epa.gov). For more information on this document please visit <https://www.epa.gov/coalash>.

## **SUPPLEMENTARY INFORMATION:**

Throughout this document “we,” “us,” and “our” means the U.S. EPA.

### **I. Public Participation**

#### *A. Written Comments*

Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0508, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA’s docket at <https://www.regulations.gov> 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. 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 <https://www.epa.gov/dockets/commenting-epa-dockets>.

EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov/> as there may be a delay in processing mail and faxes. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

## *B. Participation in Virtual Public Hearing*

Please note that EPA is deviating from its typical approach because the President has declared a national emergency. Because of current CDC recommendations, as well as State and local orders for social distancing to limit the spread of COVID-19, EPA cannot hold in-person public hearings at this time.

EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please use the online registration form available on EPA's CCR website (<https://www.epa.gov/coalash>) or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to register to speak at the hearing. The last day to pre-register to speak at the hearing will be January 29, 2021. On January 29, 2021, EPA will post a general agenda for the hearing on EPA's CCR website (<https://www.epa.gov/coalash>).

EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule. Additionally, requests to speak will be taken the day of the hearing according to the procedures specified on EPA's CCR website (<https://www.epa.gov/coalash>) for this hearing. The Agency will make every effort to accommodate all speakers who arrive and register, although preferences on speaking times may not be able to be fulfilled.

Each commenter will have five (5) minutes to provide oral testimony. EPA encourages commenters to provide EPA with a copy of their oral testimony electronically (via email) to the person listed in the **FOR FURTHER INFORMATION CONTACT** section. If EPA is anticipating a high attendance, the time allotment per testimony may be shortened to no shorter than 3 minutes per person to accommodate all those wishing to provide testimony and who have pre-registered. While EPA will make every effort to accommodate all speakers who do not preregister, opportunities to speak may be limited based upon the number of pre-registered speakers. Therefore, EPA strongly encourages anyone wishing to speak to preregister.

Participation in the virtual public hearing does not preclude any entity or individual from submitting a written comment.

EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Verbatim transcripts of the hearings and written statements will be included in the docket for this action.

Please note that any updates made to any aspect of the hearing will be posted online on EPA's CCR website at <https://www.epa.gov/coalash>. While EPA expects the hearing to go forward as set forth above, please monitor our website or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the service of a translator, please pre-register for the hearing and describe your needs on the registration form by January 19, 2021. If you require special accommodations such as audio description or closed captioning, please pre-register for the hearing and describe your needs on the registration form by January 26, 2021. Alternatively, registrants may notify the person listed in the **FOR FURTHER INFORMATION CONTACT** section of any special needs. We may not be able to arrange accommodations without advanced notice.

## **II. General Information**

### *A. Overview of Proposed Action*

EPA is proposing to approve the Texas CCR permit program, in part, pursuant to RCRA 4005(d)(1)(B). 42 U.S.C. 6945(d)(1)(B). The fact that Texas is seeking a partial program approval does not mean it must subsequently apply for a full program approval. However, Texas could apply for a revised partial program approval or a full program approval at some point in the future if it chooses to do so. If approved, the Texas CCR permit program would operate in lieu of the federal CCR program, codified at 40 CFR part 257, subpart D, with the exception of

the provisions specifically identified below for which the State is not seeking approval.

However, even for the approved provisions, EPA would retain its inspection and enforcement authorities under RCRA sections 3007 and 3008, 42 U.S.C. 6927 and 6928. *See* 42 U.S.C. 6945(d)(4)(B).

EPA has also engaged federally-recognized tribes within the State of Texas in consultation and coordination regarding the program authorizations for the TCEQ. EPA has established opportunities for formal as well as informal discussion throughout the consultation period, beginning with an initial conference call on October 19, 2020. Tribal consultation has been and will continue to be conducted in accordance with the EPA policy on Consultation and Coordination with Indian Tribes (<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>).

#### *B. Background*

CCR are generated from the combustion of coal, including solid fuels classified as anthracite, bituminous coal, subbituminous coal, and lignite, for the purpose of generating steam to power a generator to produce electricity or electricity and other thermal energy by electric utilities and independent power producers. CCR, commonly known as coal ash, include fly ash, bottom ash, boiler slag, and flue gas desulfurization materials. CCR can be sent offsite for disposal or beneficial use, or disposed of in on-site landfills or surface impoundments.

On April 17, 2015, EPA published a final rule, creating 40 CFR part 257, subpart D, that established a comprehensive set of minimum federal requirements for the disposal of CCR in landfills and surface impoundments (80 FR 21302) (“federal CCR regulations”). The rule created a self-implementing program which regulates the location, design, operating criteria, and groundwater monitoring and corrective action for CCR units, as well as the closure and post-closure care of CCR units. It also requires recordkeeping and notifications for CCR units. The federal CCR regulations do not apply to “beneficial use” of CCR, as that term is defined in 40 CFR 257.53.

On August 5, 2016, EPA published a direct final rule (81 FR 51802), responding to an order issued by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Utility Solid Waste Activities Group, et al. v. EPA*, No. 15-1219 (DC Cir. 2015). The direct final rule removed certain provisions of the federal CCR regulations at 40 CFR 257.100(b), (c), and (d) related to the “early closure” of inactive CCR surface impoundments by April 17, 2018, that had been vacated by the D.C. Circuit’s June 14, 2016, order.<sup>1</sup> The direct final rule extended the deadlines for owners and operators of inactive CCR surface impoundments who had taken advantage of the “early closure” provisions of 40 CFR 257.100 to bring the units into compliance with the federal CCR regulations’ substantive requirements, but did not otherwise amend the federal CCR regulations or impose new requirements on those units.

On July 30, 2018, EPA published a final rule, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One)*, which finalized additional revisions to the federal CCR regulations (83 FR 36435) (“July 2018 Final Rule”). Specifically, EPA amended the CCR regulations to (1) provide states with approved CCR permit programs under the WIIN Act or EPA, when EPA is the permitting authority, the ability to use alternative performance standards; (2) revise the groundwater protection standards for four constituents in Appendix IV to 40 CFR part 257 for which maximum contaminant levels (MCLs) under the Safe Drinking Water Act have not been established; and (3) provide additional time to facilities, triggered by 40 CFR 257.101(a)(1) and (b)(1)(i), to cease receiving waste and initiate closure.

On August 28, 2020, EPA published a final rule *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure* (85 FR 53516) (“Part A Final Rule”).

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<sup>1</sup> The D.C. Circuit’s June 14, 2016, order also vacated the phrase “not to exceed a height of 6 inches above the slope of the dike” within 40 CFR 257.73(a)(4), 257.73(d)(1)(iv), 257.74(a)(4), and 257.74(d)(1)(iv). EPA proposed slope protection requirements in its Phase One Proposed Rule (83 FR 11584, March 15, 2018) but has not yet finalized such requirements.

The rule revises portions of the federal CCR regulations to (1) accurately reflect the D.C. Circuit's *Util. Solid Waste Activities Group v. Env'tl. Protec. Agency*, 901 F.3d 414 (D.C. 2018) ("USWAG decision" or "USWAG"), which vacated and remanded to EPA the provisions at 40 CFR 257.101(a), 257.71(a)(1)(i) and 257.50(e); (2) address the October 31, 2020 deadline and finalize a new deadline of April 11, 2021 in 40 CFR 257.101(a) and (b)(1)(i), by which CCR surface impoundments must cease receipt of waste in light of the 2018 *USWAG* decision and the 2019 *Waterkeeper* decision (See *Waterkeeper Alliance Inc. v. EPA*, No. 18-1289 (D.C. Cir. 2019)); (3) finalize alternative closure provisions at 40 CFR 257.103 in order to allow facilities to request additional time to develop alternative capacity to manage their waste streams (both CCR and/or non-CCR) to achieve cease receipt of waste and initiate closure of their CCR surface impoundments; and (4) finalize two of the proposed amendments from the August 14, 2019 rule (84 FR 40353): the addition of an executive summary to the annual groundwater monitoring and corrective action reports under 40 CFR 257.90(e); and amend the requirements for posting to the publicly accessible CCR Internet sites under 40 CFR 257.107.

### *C. Statutory Authority*

EPA is issuing this proposed action pursuant to sections 4005(d) and 7004(b)(1) of RCRA. See 42 U.S.C. 6945(d) and 6974(b)(1). Section 2301 of the 2016 Water Infrastructure Improvements for the Nation (WIIN) Act amended section 4005 of RCRA, creating a new subsection (d) that establishes a federal permitting program similar to those under RCRA subtitle C and other environmental statutes. See 42 U.S.C. 6945(d).

Under RCRA section 4005(d)(1)(A), 42 U.S.C. 6945(d)(1)(A), states seeking approval must submit to the Administrator "in such form as the Administrator may establish, evidence of a permit program or other system of prior approval and conditions under State law for regulation by the State of coal combustion residuals units that are located in the State." EPA shall approve a state permit program if the Administrator determines that the state program will require each CCR unit located in the state to achieve compliance with either: (1) the federal CCR

requirements at 40 CFR part 257, subpart D; or (2) other state criteria that the Administrator, after consultation with the state, determines to be “at least as protective as” the federal requirements. *See* 42 U.S.C. 6945(d)(1)(B). The Administrator must make a final determination, after providing for public notice and an opportunity for public comment, within 180 days of receiving a state’s complete submittal of the information in RCRA section 4005(d)(1)(A). *See* 42 U.S.C. 6945(d)(1)(B). EPA may approve a state CCR permit program in whole or in part. *Id.* Once approved, the state permit program operates in lieu of the federal requirements. *See* 42 U.S.C. 6945(d)(1)(A). In a state with a partial program, only the state requirements that have been approved operate in lieu of the federal requirements, and facilities remain responsible for compliance with all remaining requirements in 40 CFR part 257.

RCRA section 7004(b) applies to all RCRA programs, directing that “public participation in the development, revision, implementation, and enforcement of any...program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” 42 U.S.C. 6974(b)(1).

Once a program is approved, the Administrator must review the approved state CCR permit program not less frequently than every 12 years, as well as no later than three years after a revision to an applicable section of 40 CFR part 257, subpart D or one year after any unauthorized significant release from a CCR unit located in the state. EPA also must review an approved program at the request of another state alleging that the soil, groundwater, or surface water of the requesting state is or is likely to be adversely affected by a release from a CCR unit in the approved state. *See* 42 U.S.C. 6945(d)(1)(D)(i)(I)-(IV).

In a state with an approved state CCR permit program, EPA may commence administrative or judicial enforcement actions under section 3008 of RCRA, 42 U.S.C. 6928, if the state requests assistance or if EPA determines that an EPA enforcement action is likely to be necessary to ensure that a CCR unit is operating in accordance with the criteria of the state’s permit program. *See* 42 U.S.C. 6945(d)(4). EPA can enforce any federal requirements that

remain in effect (i.e., those for which there is no corresponding approved state provision). EPA may also exercise its inspection and information gathering authorities under section 3007 of RCRA, 42 U.S.C. 6927.

### **III. The Texas Application**

On September 11, 2020, the TCEQ submitted its state CCR permit program application to EPA Region 6 requesting approval of the State's partial CCR permit program. After receiving comments from EPA, Texas provided revisions to its Program Description on November 9, 2020, and November 23, 2020.<sup>2</sup> The Texas application package documents included (1) State statutes and regulations, (2) the Attorney General Statement, and (3) a Program Description which provides details about the State's CCR permit program, including the (a) State agency with the authority for the CCR permit program; (b) scope and coverage of the program, (c) TCEQ responsibilities; (d) structure and processes of TCEQ to implement the CCR program; (e) applications, public notice, hearing, and appeal procedures for CCR registrations; (f) technical requirements for the CCR program; (g) a list of CCR facilities in Texas; and (h) a description of State resources to implement the CCR program.

Throughout this document, EPA interchangeably uses the Texas terms of "registration" and "permit" and "Program Description" to mean the "Narrative" document as described in the Guidance Document (82 FR 38685, August 15, 2017).

### **IV. EPA Analysis of the Texas Application**

RCRA section 4005(d) requires EPA to evaluate two components of a state program to determine whether it meets the standard for approval. First, EPA is to evaluate the permit program itself (or other system of prior approval and conditions). *See* 42 U.S.C. 6945(d)(1)(A), (B). RCRA section 4005(d)(1)(A) directs the state to provide evidence of a state permit program,

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<sup>2</sup> The revised narrative (Program Description), dated November 23, 2020, shall be substituted for the original program description, dated September 2, 2020, and November 9, 2020, as well as Attachment IV- Facility Unit Summary and CCR Units Map, Replacement of Attachment II with Attachment II- 30 TAC Chapter 352, and the Texas Water Code- Chapter 26. All other documents submitted as part of the original September 11, 2020 application remain unchanged and are available in the docket for this action.

in such form as EPA may determine. In turn, RCRA section 4005(d)(1)(B) directs EPA to approve the state program based upon a determination that the program “requires each coal combustion residuals unit located in the State to achieve compliance with the applicable [federal or state] criteria.” In other words, the statute directs EPA to determine that the state has sufficient authority to require compliance from all CCR units located within the state. See also, 42 USC 6945(d)(1)(D)(ii)(I). To make this determination EPA evaluates the state’s authority to issue permits and impose conditions in those permits, as well as the state’s authority for compliance monitoring and enforcement.

EPA also determines during this portion of the review whether the state permit program contains procedures consistent with the directive in RCRA section 7004(b). RCRA section 7004(b) applies to all RCRA programs, directing that “public participation in the development, revision, implementation, and enforcement of any...program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” 42 U.S.C. 6974(b)(1). To make this determination EPA evaluates the state provisions governing the procedures for issuing permits and for intervention in civil enforcement proceedings.

Although 40 CFR part 239 applies to the approval of State Municipal Solid Waste Landfill (MSWLF) programs under RCRA section 4005(c)(1) rather than EPA’s evaluation of CCR permit programs under RCRA section 4005(d), the specific criteria outlined in 40 CFR part 239 provide a helpful framework to examine the relevant aspects of a state’s permit program. In addition, states are familiar with these criteria as a consequence of the MSWLF program (all States have MSWLF programs that have been approved pursuant to these regulations) and the regulations are generally regarded as protective and appropriate.

Consequently, EPA relied on the four categories of criteria outlined in 40 CFR part 239 as guidelines to evaluate the Texas permitting requirements: requirements for compliance monitoring authority, requirements for enforcement authority, and requirements for intervention in civil enforcement proceedings.

Second, EPA is to evaluate the technical criteria that will be included in each permit, to determine whether they are the same as the federal criteria, or to the extent they differ, whether the modified criteria are “at least as protective as” the federal requirements. *See* 42 U.S.C. 6945(d)(1)(B). Only if both components meet the statutory requirements may EPA approve the program. *See* 42 U.S.C. 6945(d)(1).

EPA has preliminarily determined that the Texas CCR permit program includes all the elements of an adequate state CCR permit program as discussed in more detail below. It also contains all the technical criteria in 40 CFR part 257, except for the provisions specifically discussed below. Consequently, EPA is proposing to approve the Texas permit program “in part.” 42 USC 6945(d)(1)(B). EPA’s analysis and findings are discussed in greater detail below and in the Technical Support Document, which is available in the docket supporting this preliminary determination.

EPA’s full analysis of the Texas CCR permit program, and how the Texas regulations differ from the federal requirements, can be found in the Technical Support Document. EPA determined that the Texas CCR permit program application was complete and notified Texas of its determination by letter dated on December 3, 2020.<sup>3</sup>

#### *A. Adequacy of the Texas Permit Program*

Section 4005(d)(1)(A) of RCRA, 42 U.S.C. 6945(d)(1)(A), requires a state seeking state CCR permit program approval to submit to EPA, “in such form as the Administrator may establish, evidence of a permit program or other system of prior approval and conditions under State law for regulation by the State of coal combustion residuals units that are located in the State.” Although the statute directs EPA to establish the form of such evidence, the statute does not require EPA to promulgate regulations governing the process or standard for determining the adequacy of such state programs. EPA, therefore, developed the *Coal Combustion Residuals*

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<sup>3</sup> The Texas application, EPA’s completeness determination letter, and the Technical Support Document are available in the docket supporting this action.

*State Permit Program Guidance Document; Interim Final* (82 FR 38685, August 15, 2017) (the “Guidance Document”). The Guidance Document provides recommendations on a process and standards that states may choose to use to apply for EPA approval of its CCR permit programs, based on the standards in RCRA section 4005(d), existing regulations at 40 CFR part 239, and the Agency’s experience in reviewing and approving state programs.

EPA evaluated the Texas CCR permit program using the process, statutory and regulatory standards discussed in the Units II.C and IV.A. EPA’s findings are summarized below and provided in more detail in the Technical Support Document located in the docket supporting this preliminary determination.

### *1. Guidelines for Permitting*

It is EPA’s judgment that an adequate state CCR permit program will ensure that: (1) existing and new facilities are permitted or otherwise approved and in compliance with either 40 CFR part 257 or other state criteria; (2) the state has the authority to collect all information necessary to issue permits that are adequate to ensure compliance with relevant 40 CFR part 257, subpart D requirements; and (3) the state has the authority to impose requirements for CCR units adequate to ensure compliance with either 40 CFR part 257, subpart D or such other state criteria that have been determined and approved by the Administrator to be at least as protective as 40 CFR part 257, subpart D.

EPA has preliminarily determined that the Texas approach to CCR registration applications and approvals is adequate. At Title 30 of the Texas Administrative Code (TAC) sections 352.101 through 352.141, Texas has State-specific provisions imposing requirements for CCR registration, registration characteristics and conditions, registration duration, registration amendments, and the issuance and transfer of registrations. 30 TAC section 352.101 specifically requires registration for the management or disposal of CCR in an existing landfill, in an existing or inactive surface impoundment, and for a new or lateral expansion of a landfill or surface impoundment. Such registrations are subject to the state’s standard permit characteristics

and conditions established in 30 TAC Chapter 305, Subchapter F (See 30 TAC section 352.111). Under 30 TAC section 352.121, a registration may be issued for the active life of the unit, as well as any post-closure care period, as needed; however, the registration may be revoked or amended at any time that the owner or operator fails to meet the minimum standards of the CCR regulations, or for any other good cause.

Texas also requires that a change in a term, condition or provision of a registration requires an amendment pursuant to 30 TAC section 352.131. An application requesting an amendment is processed as a major amendment or a minor amendment in accordance with 30 TAC section 305.62. At 30 TAC section 305.62(c)(1), Texas describes a major amendment as “an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.” At 30 TAC section 305.62(c)(2), Texas describes a minor amendment as “an amendment to improve or maintain the permitted quality or method of disposal of waste,…” and which includes any other change “that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state.” Under 30 TAC section 305.62(d), the executive director may initiate a major amendment or a minor amendment if good cause exists.

The Texas provision at 30 TAC section 352.141 prohibits the transfer of a registration from one person to another without complying with provisions of 30 TAC section 305.64 relating to the transfer of permits. Under 30 TAC section 305.64, the registrant or the transferee must submit an application to the executive director at least 30 days before the proposed transfer date and receive approval of the application from the commission before the registration can be transferred. The Texas regulations provide that a registration cannot be transferred from one facility to another. The specific CCR registration application requirements are established in 30 TAC sections 352.201 through 352.311 where Texas has State-specific provisions addressing CCR registration application contents and information requirements. Under 30 TAC sections 352.241 through 352.301, Texas requires sufficient information to ensure that all the 40 CFR

part 257, subpart D technical requirements will be followed. Specifically, a registration application shall include sufficient information and reports to: (1) characterize the geology and hydrogeology at the facility; (2) demonstrate compliance with location restrictions; (3) demonstrate compliance with design criteria; (4) demonstrate compliance with operating criteria; (5) demonstrate compliance with applicable groundwater monitoring and corrective action requirements; and (6) demonstrate compliance with applicable closure and post-closure requirements. The provision at 30 TAC section 352.311 requires the owner or operator to keep records of data used to complete the application and any supplemental information or material throughout the term of the registration.

At 30 TAC sections 352.401 through 352.481, Texas adopted State-specific provisions addressing procedures for registration application deficiencies, public notifications, and registration decisions by the executive director. As part of the State's evaluation of the completeness of a registration application, 30 TAC section 352.401 requires the executive director to notify an applicant of any additional information or application materials required to complete the application by transmitting a notice of deficiency (NOD) to the applicant. The NOD specifies a deadline for the NOD response of up to 60 days from the executive director's transmittal of the NOD. If the executive director does not receive an adequate and timely response to a notice of deficiency by the response deadline, the executive director may return the incomplete application to the applicant (30 TAC section 352.421).

EPA has preliminarily determined that the Texas approach to CCR registration applications and approvals is adequate, and that this aspect of the Texas CCR permit program meets the standard for program approval.

## *2. Guidelines for Public Participation*

Based on RCRA section 7004, 42 U.S.C. 6974, it is EPA's judgment that an adequate state CCR permit program will ensure that: (1) documents for permit determinations are made available for public review and comment; (2) final determinations on permit applications are

made known to the public; and (3) public comments on permit determinations are considered. Texas has adopted public participation opportunities for the CCR program that can provide an inclusive dialogue, allowing interested parties to talk openly and frankly about issues within the CCR program and search for mutually agreeable solutions to differences. An overview of the Texas public participation provisions is provided below.

*a. Public Participation in the CCR Registration Application Process*

Under 30 TAC section 39.418, the TCEQ requires that no later than 30 days after the executive director declares an application to be complete, the applicant must publish a Notice of Receipt of Application and Intent to Obtain Permit in a newspaper of largest circulation in the county in which the facility is located, or, if a newspaper is not published in the county, the notice must be published in any newspaper of general circulation in the county in which the facility is located or proposed to be located. Registration applications are also made available to the public on the applicant's publicly accessible CCR Internet site. Under 30 TAC section 352.461(a)(1), the applicant is also required to make a copy of the application available for review and copying at a public place in the county in which the facility is located. Upon completion of the application review, the TCEQ publishes a public notice of the TCEQ's receipt of the registration application, the executive director's initial decision on the application, and provides an opportunity for public comments or for the public to request a public meeting in accordance with the procedures contained in 30 TAC sections 39.503(c), 39.405(f) and 39.405(h).

30 TAC section 352.471 gives the executive director the authority to prepare a draft registration upon a preliminary determination that an application for a new registration or a major amendment of a registration meets the regulatory requirements for issuance of a registration. When the executive director has prepared a draft registration, copies of it are also made available to the public, along with a technical summary. The technical summary provides information regarding the application, staff review, and agency contacts available to assist

members of the public in answering questions about the application. In addition, the commission records are open to the public for review subject to statutory privileges and claims of confidentiality consistent with the Texas Public Information Act. See Texas Government Code Annotated, Chapter 552 and 30 TAC 1.5.

*b. Public Notice*

30 TAC section 352.461 subjects all public notices to the requirements in (1) 30 TAC section 39.405 (relating to General Notice Provisions); (2) 30 TAC section 39.407 (relating to Mailing Lists); (3) 30 TAC section 39.409 (relating to Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing); (4) 30 TAC section 39.411 (relating to Text of Public Notice); (5) 30 TAC section 39.413 (relating to Mailed Notice); and (6) 30 TAC section 39.420 (relating to Transmittal of the Executive Director's Response to Comments and Decision). 30 TAC section 352.431(c) requires that the text of the public notices on the application include the internet address required by 30 TAC section 352.1321 for the publicly accessible website for that facility. Under 30 TAC sections 39.503(c) and 39.405(f), Texas applicants must publish the notice in the newspaper of largest general circulation that is published in the county in which the facility is located or is proposed to be located. In certain instances, Texas applicants may be required to publish notice in a language other than English in a newspaper predominately published in that alternative language. In certain circumstances, Texas requires that notices are mailed to select individuals such as adjacent landowners, State and local government officials, and anyone who asks to be included in the mailing list, among others. In addition to the 30 TAC section 352.431(c) requirements, the provision at 30 TAC section 352.441 requires that a revised notice be published if changes to an application constitute a major amendment under 30 TAC section 352.131 (relating to Amendments) after notice of receipt of application has been mailed and published.

*c. Public Comments and Response to Comments*

Texas requires a minimum of a 30-day public comment period for CCR registration applications pursuant to 30 TAC section 352.431(d). Pursuant to 30 TAC section 352.431(e), the executive director shall consider all public comments received before the close of the public comment period. 30 TAC section 352.461(c) requires the executive director to prepare a response to all timely, relevant and material, or significant public comment. The executive director's response and decision are sent to the mailing list, including all commenters, as required under 30 TAC section 39.420.

*d. Public Meeting*

Under 30 TAC section 352.451(a), the owner or operator and the commission may hold a public meeting under 30 TAC section 55.154 for a new CCR registration application or a major amendment to a CCR registration in the county in which the facility is located, based on the criteria of 30 TAC sections 39.503(e), 55.154(c) or 352.961(c), as cited in 30 TAC section 352.461(b). The purpose of a public meeting is to provide information and receive public comment. Under 30 TAC sections 39.503(e)(1) and 55.154(c)(1) through (2), the TCEQ is required to hold a public meeting upon request of a member of the legislature who represents the general area in which the facility is proposed to be located for an application for a new facility or when the executive director determines that there is substantial public interest in the application or proposed facility. 30 TAC section 39.503(e)(3) provides, for example, that a "substantial public interest" is demonstrated when a request for a public meeting is filed by a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located. Finally, under 30 TAC section 352.961(c), a public meeting must be held on applications for registrations that authorize corrective action and selection of a remedy as provided in 40 CFR 257.96(e). 30 TAC section 352.451(c) requires that a notice of the public meeting must be provided in accordance with the procedures contained in

30 TAC section 39.503(e)(6), including newspaper publication and mailed notice from the chief clerk to persons listed in 30 TAC section 39.413.

*e. Challenges to Executive Director's Action on a Registration Application*

30 TAC section 352.481 provides that the executive director's action on a CCR application for a new registration or an amendment of a registration is subject to 30 TAC sections 50.139 and 80.272 which provide the public with a right to file a rehearing request for decisions made in administrative hearing and a right to file a motion to overturn the executive director's action on an application decision.

EPA has preliminarily determined that the Texas approach to public participation requirements provides adequate opportunities for public participation in the permitting process sufficient to meet the standard for program approval.

*3. Guidelines for Compliance Monitoring Authority*

It is EPA's judgment that an adequate permit program should provide the state with the authority to gather information about compliance, perform inspections, and ensure that information it gathers is suitable for enforcement. The TCEQ has compliance monitoring authority under its Texas Health and Safety Code (THSC) and the Texas Water Code (TWC). Specifically, THSC section 361.032 provides the authority for environmental investigators to enter public or private property and conduct inspections or investigate solid waste facilities, including CCR units. In addition, TWC section 5.102 gives the commission the powers to perform any acts specifically authorized by this code, another law, implied by this code, or other law necessary and convenient to the exercise of its jurisdiction, as provided by the laws of the state rules, orders and permits. The TCEQ Enforcement Division maintains compliance schedules and reviews the schedules regularly to determine whether a facility is complying with its schedule. If a facility fails to meet its compliance schedule, the facility is deemed to be in violation of the TWC, the THSC, or TCEQ rules.

EPA has preliminarily determined that these compliance monitoring authorities are adequate, and that this aspect of the Texas CCR permit program meets the standard for program approval.

#### *4. Guidelines for Enforcement Authority*

It is EPA's judgment that an adequate state CCR permit program should provide the state with adequate enforcement authority to administer its state CCR permit program, including the authority to: (1) restrain any person from engaging in activity which may damage human health or the environment, (2) sue to enjoin prohibited activity, and (3) sue to recover civil penalties for prohibited activity.

The TCEQ has adequate enforcement authority for its existing programs under TWC sections 5.512, 7.002, 7.032, 7.051, 7.052, 7.101, 7.103 and 7.105 – 7.110. Under TWC section 7.002, the state has the authority to initiate an enforcement action to enforce the provisions of the Texas Water Code, the Texas Health and Safety Code within the commission's jurisdiction, and rules adopted under those provisions. Under TWC section 5.512, the TCEQ has specific authority to issue an emergency order concerning an activity of solid waste management under its commission's jurisdiction, even if that activity is not covered by a permit, if it finds that an emergency requiring immediate action to protect the public health and safety exists.

The state also has the authority to sue in a court of competent jurisdiction and may enforce a state rule or a provision of a permit by injunction or other appropriate remedy that may include corrective action. (TWC section 7.032). On request of the executive director, the attorney general may initiate a suit in the name of the state for injunctive relief. (TWC section 7.032(e)).

The TCEQ may assess administrative penalties and civil penalties for solid waste violations under TWC section 7.051, 7.101, 7.103 and 7.105 through 7.110. Under TWC section 7.052(c) and (d), the TCEQ may seek administrative penalties of up to \$25,000 per day for each violation for solid waste management violations. TWC section 7.105(a) specifically provides authority for the Attorney General to initiate a suit to recover a civil penalty, or for both

injunctive relief and a civil penalty. The Attorney General may represent the State in civil judicial actions that may seek penalties from \$50 to \$25,000 per day for each violation. (TWC section 7.102).

EPA has preliminarily determined that this aspect of the Texas CCR permit program meets the standard for program approval.

#### *5. Intervention in Civil Enforcement Proceedings*

Based on section 7004 of RCRA, it is EPA's judgment that an adequate State CCR permit program should provide an opportunity for citizen intervention in civil enforcement proceedings. Specifically, the state must either: a) provide for citizen intervention as a matter of right or b) have in place a process to (1) provide notice and opportunity for public involvement in civil enforcement actions, (2) investigate and provide responses to citizen complaints about violations, and (3) not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation.

Under TWC sections 7.075, and 7.110, Texas has specific authorities and the TCEQ rules that provide opportunity for public participation in state enforcement proceedings by allowing persons to comment or intervene in certain administrative and civil actions. Notice of the opportunity to comment on the action is published in the Texas Register. Specifically, TWC sections 7.075(a) and 7.110(a) and (b) allow for a 30-day public comment period for administrative enforcement actions and civil enforcement actions. The commission, under TWC section 7.075(b) and the Office of Attorney General under TWC section 7.110(c), must consider any written comments and may withdraw or withhold consent to a proposed order, judgment or other agreement if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the commission's statutes, rules, or permits.

The TCEQ rules also provide at least two other opportunities for public participation in enforcement actions, including, (1) when an agreement is reached in an enforcement action

between a respondent and the executive director, by providing public notice in the Texas Register and a 30-day public comment period (30 TAC section 70.10(c)); and (2) by providing opportunity for public comments at commission meetings on enforcement orders, pursuant to the Texas Open Meetings Act under 30 TAC Chapter 10. Texas Water Code sections 5.176 through 5.1773 provides for a public process for submitting and participating in complaints about a matter within the commission's jurisdiction. If a complaint relating to an entity regulated by the commission is filed with the commission, the commission must notify the parties to the complaint at least quarterly of the status of the complaint until the complaint reaches final disposition. Additionally, in accordance with TWC section 5.176 through 5.1765, the commission maintains a public website that contains public education materials informing the public about the commission's complaint policies and procedures, the collection and preservation of citizen collected evidence, and the status of environmental complaints and pending enforcement actions, as well as administrative and judicial orders. Under TWC section 7.110(d), the Office of the Attorney General may not oppose intervention by a person who has standing to intervene as provided by Rule 60, Texas Rules of Civil Procedure.

EPA has preliminarily determined that these authorities provide for an adequate level of citizen involvement in the enforcement process, and that this aspect of the Texas CCR permit program meets the standard for program approval.

#### *B. Adequacy of Technical Criteria*

EPA conducted an analysis of the Texas CCR Permit Program Application, including a thorough analysis of Texas statutory authorities for the CCR program, as well as its regulations at 30 TAC Chapter 352. As noted, Texas has requested partial program approval of its CCR permit program.

##### *1. Texas CCR regulatory authority*

On May 6, 2020, the TCEQ adopted 30 TAC Chapter 352 - Coal Combustion Residuals Waste Management, which in general are identical or analogous to the requirements of the self-

implementing 40 CFR part 257, subpart D. The TCEQ's CCR regulations were effective as of May 28, 2020.<sup>4</sup> The commission adopted Chapter 352 under: (1) TWC section 5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by the TWC and other laws; TWC section 5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the State; and TWC, section 5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and (2) THSC, Solid Waste Disposal Act, sections 361.017 and 361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC; and THSC section 361.090(d), which allows the commission to adopt rules to control the collection, handling, storage, processing, and disposal of industrial solid waste to protect the property of others, public property and rights-of-way, groundwater, and other rights requiring protection.

The TCEQ has identified 58 units that are currently or have been used for disposal of CCR (17 landfills and 41 surface impoundments) in Texas.<sup>5</sup> The TCEQ demonstrated that it has the personnel and funding to administer a registration program that is at least as protective as the Federal requirements.<sup>6</sup>

## *2. Texas CCR regulations*

EPA has preliminarily determined that the portions of the Texas CCR permit program that were submitted for approval meet the standard for approval under RCRA section 4005(d)(1)(B)(i), 42 U.S.C. 6945(d)(1)(B)(i). To make this preliminary determination, EPA compared the technical requirements in the Texas CCR regulations at 30 TAC Chapter 352 to the

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<sup>4</sup> The Texas CCR Regulations are included in Attachment II of Texas' application and which is available in the docket supporting this preliminary determination.

<sup>5</sup> For more information on the specific facilities covered by the Texas CCR Permit Program, see Section VII of the Texas Program Description and Attachment IV of the Texas application which are available in the docket for this action.

<sup>6</sup> The discussion on State personnel and funding is included in Section VIII of the Program Description, which is included in the docket for this action.

Federal CCR regulations at 40 CFR part 257, subpart D to determine whether they differed from the Federal requirements, and if so, whether those differences met the standard in RCRA sections 4005(d)(1)(B)(ii) and (C), 42 U.S.C. 6945(d)(1)(B)(ii) and (C).

At 30 TAC Chapter 352, the TCEQ largely adopted by reference the requirements of 40 CFR part 257, subpart D, and implements procedural requirements for a registration and compliance monitoring program to authorize CCR units subject to the Federal CCR regulations. Specifically, Texas adopted by reference 40 CFR 257.52, 40 CFR 257.53, 40 CFR 257.60 through 257.107, and the 40 CFR part 257 Appendices, as amended through August 5, 2016 (81 FR 51807), and as modified by the *USWAG* decision. Texas did not adopt by reference 40 CFR 257.71, 257.95(h) and 257.101(a). See 30 TAC sections 352.2 and 352.3(a), 30 TAC sections 352.601 through 352.981 and 352.1200 through 352.1431.<sup>7</sup> With these exceptions, the technical requirements are identical to the Federal regulations.

In addition to the technical criteria in 30 TAC Chapter 352, Texas has adopted State-specific registration for CCR units and public participation requirements in 30 TAC sections 352.101 through 352.481; State financial assurance requirements in 30 TAC sections 352.1101 and 352.1111; and for certain activities, Texas has additional requirements for State notifications by owners and operators of CCR units, and State approvals by the executive director employed by the commission.

Specifically, in addition to what is required by 40 CFR part 257, the State CCR regulations contain additional State-specific requirements for the use of licensed professional engineers and geoscientists in 30 TAC section 352.4; use of laboratories accredited and certified by the State in 30 TAC section 352.5; State notifications and approvals for specific CCR activities by owners and operators in 30 TAC sections 352.731(b), 352.741(b), 352.831(b), 352.841(b), 352.902, 352.911(b) and (c), 352.931(b), 352.941(b) through (d), 352.951(c) through

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<sup>7</sup> A reference crosswalk comparison of 40 CFR part 257, subpart D and 30 TAC Chapter 352 provided by Texas is also available in the docket as Attachment I.

(e), 352.981(b) and (c), 352.1221(b) and 352.1241(b) and (c); pre-opening inspection requirements for new and lateral expansions of CCR landfills and surface impoundments in 30 TAC section 352.851; groundwater monitoring and corrective action in 30 TAC sections 352.911(d), 352.951(b) and 352.991; recordkeeping in 30 TAC section 352.1301(b); and posting of information on the publicly accessible website in 30 TAC section 352.1321(c) and (d).

### 3. *Texas partial program*

The TCEQ is seeking approval of its state CCR permit program, in part, pursuant to RCRA section 4005(d). The TCEQ's rules implement the Federal regulations promulgated through August 5, 2016, and as modified by the *USWAG* decision. The TCEQ has not amended state CCR program rules to implement the Part A Final Rule. Accordingly, Texas is not seeking approval for the following five provisions of its regulations, which are described in more detail below:

1. 30 TAC section 352.1(b)(2); this state provision is the analog to the Federal exclusion of inactive impoundments at inactive facilities, found at 40 CFR 257.50(e), that was vacated in *USWAG*;
2. The state provision that is the analog to the Federal requirement that multiunit groundwater monitoring systems with unlined CCR surface impoundments must retrofit or close, found at 40 CFR 257.91(d)(2), which is no longer relevant, as all unlined CCR surface impoundments must close;
3. The state provision that is the analog to the Federal requirement that unlined CCR surface impoundments must retrofit or close after an assessment of corrective measures is required, found at 40 CFR 257.95(g)(5), which references a provision that was vacated in *USWAG*;
4. 30 TAC sections 352.711(a)(4) and 352.1211(b); these state provisions relate to the date for unlined surface impoundments to cease receipt of waste. EPA has since

- revised the Federal regulation and the state has not adopted the Federal revision, found at 40 CFR 257.101(a)(1) or 257.101(b)(1)(i);
5. 30 TAC section 352.1231; this state provision is the analog to the Federal alternative closure requirements of CCR units, found at 40 CFR 257.103. EPA has since revised the Federal regulation and the state has not adopted the Federal revision.

With the exception of the five provisions noted above, EPA has preliminarily determined that the Texas CCR regulations contain all of the technical elements of the Federal CCR regulations, including requirements for location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, recordkeeping, notification and publicly accessible CCR Internet site posting requirements. The Texas CCR permit program also contains State-specific language, references, definitions, and State-specific requirements that differ from the Federal CCR regulations, but which EPA has determined to be “at least as protective as” the Federal criteria.

The effect of granting a partial approval is that, except for the five provisions for which EPA has not granted approval, the Texas CCR permit program will apply in lieu of the Federal regulations. For the five state provisions that were not approved, the corresponding Federal requirements will continue to apply directly to facilities, and therefore facilities must comply with both the Federal requirements and the state requirements.

## **V. Proposed Action**

EPA has preliminarily determined that the Texas partial CCR permit program meets the statutory standard for approval. Accordingly, in accordance with 42 U.S.C. 6945(d), EPA is proposing to approve the Texas partial CCR permit program.

Andrew Wheeler,  
Administrator.

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