



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 257

[EPA-HQ-OLEM-2020-0508; FRL-10024-75-OLEM]

Texas: Approval of State Coal Combustion Residuals Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final approval.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA), the Environmental Protection Agency (EPA) is approving the Texas Commission on Environmental Quality's partial State Coal Combustion Residuals (CCR) Permit Program, which will now operate in lieu of the Federal CCR program, with the exception of certain provisions for which the State did not seek approval. EPA has determined that the Texas partial CCR permit program meets the standard for approval under RCRA. Facilities operating under the State's program requirements and resulting permit provisions are also subject to EPA's information gathering and inspection and enforcement authorities under RCRA and other applicable statutory and regulatory provisions.

DATES: The final approval of the Texas partial CCR Permit Program is effective on **[INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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. For more information on this notice please visit <https://www.epa.gov/coalash>.

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" means the EPA.

1. *Docket.* EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2020-0508. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Docket Center is (202) 566-1742.

2. *Electronic Access.* You may access this *Federal Register* document electronically from the Government Printing Office under the “*Federal Register*” listings at <https://www.govinfo.gov/app/collection/fr>.

I. General Information

A. Overview of Final Approval

EPA is approving, in part, the Texas CCR permit program, pursuant to RCRA section 4005(d)(1)(B). 42 U.S.C. 6945(d)(1)(B). The Texas CCR permit program authorizes the Texas Commission on Environmental Quality (“TCEQ” or the “commission”) to enforce state regulations related to CCR activities as well as to handle permit applications and to enforce permit violations. The Texas CCR permit program will operate in lieu of the Federal CCR program, (40 CFR part 257, subpart D) with the exception of the provisions for which the state did not seek approval, as further explained in Unit III.B. of this document. For the state provisions for which the state did not seek EPA approval, 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.

The fact that Texas is receiving partial program approval does not mean the state must subsequently apply for a full program approval. However, Texas could choose to revise its CCR permit program at some point in the future and to apply for another partial or full program approval (as appropriate) based on its revisions at that time. EPA retains its inspection and

enforcement authorities under RCRA sections 3007 and 3008, 42 U.S.C. 6927 and 6928, in the case of both partial and full program approvals. *See* 42 U.S.C. 6945(d)(4)(A),(B).

EPA also engaged federally-recognized tribes within the State of Texas in consultation and coordination regarding the program authorizations for the TCEQ. EPA 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 was 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” or “2015 CCR rule”). 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.¹ 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). Specifically, EPA amended the CCR regulations to: (1) Provide states with approved CCR permit programs under the 2016 Water Infrastructure Improvements for the Nation (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”). The rule revises portions of the Federal CCR regulations to (1) accurately reflect the D.C.

¹ 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.

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 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 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 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, subpart D.

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) through (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.

II. 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, 2020.² 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 (a) the 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 *Coal Combustion Residuals State Permit Program Guidance Document; Interim Final* (82 FR 38685, August 15, 2017) (the "Guidance Document").

III. EPA Analysis of the Texas Application

As discussed in Unit I.C. of this document, RCRA section 4005(d) requires EPA to evaluate two components of a CCR state permit program to determine whether it meets the standard for approval. RCRA section 4005(d)(1)(A) directs the state to provide evidence of a state permit program, in such form as EPA may determine. In turn, RCRA section 4005(d)(1)(B)

² The revised narrative (Program Description), dated November 23, 2020, shall be substituted for the original program description, dated September 2, 2020, and first revision of the program description from November 9, 2020. Other substitutions include 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.

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 U.S.C. 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 an adequate permit program: 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 adequacy of 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).

On that basis, EPA conducted an analysis of the Texas CCR permit program as described in its State CCR Permit Program Application, including a thorough analysis of the Texas CCR regulations and their adoption by reference of portions of 40 CFR part 257, subpart D. As noted, Texas has requested approval of its partial CCR permit program.

Based on this analysis, EPA has determined that the portions of the Texas CCR permit program that have been submitted for approval meet the standard in sections 4005(d)(1)(A) and (B) of RCRA. The Texas CCR permit program includes all the elements of an adequate CCR state permit program as discussed in more detail in Unit III.A. It also contains all of the technical criteria in 40 CFR part 257, subpart D, except for the provisions specifically discussed in Unit III.B. Consequently, EPA approves the Texas CCR permit program “in part.” 42 U.S.C. 6945(d)(1)(B). EPA’s analysis and findings are discussed in greater detail in Unit III.B and in the Technical Support Document, which is available in the docket supporting this Action.

A. Adequacy of the Texas Registration Program

RCRA section 4005(d)(1)(A), 42 U.S.C. 6945(d)(1)(A), requires a state seeking program approval to submit to EPA an application with “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 Guidance Document (82 FR 38685, August 15, 2017). 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. 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). In general, EPA considers that a state CCR permit program would meet the RCRA section 7004(b)(1) directive regarding public participation if the state program is consistent with the 40 CFR part 239 provisions. Although 40 CFR part 239 applies to approval of state MSWLF programs under RCRA 4005(c)(1), rather than EPA's evaluation of CCR permit programs under RCRA 4005(d), 40 CFR part 239 provides a helpful framework to more broadly examine the various aspects of the Texas CCR permit program. States are familiar with these criteria through the MSWLF permit program (all states with approved MSWLF permit programs have been approved pursuant to these regulations) and the regulations are generally regarded as protective and appropriate.

To complete its evaluation process, EPA relied on information contained in the Texas Application, as well as all materials submitted during the public comment period and at the public hearing. A summary of EPA's findings is provided in this Unit, organized by the program elements identified in the 40 CFR part 239 regulations and EPA's Guidance Document.

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 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 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 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 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 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 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 has determined that the technical portions of the Texas CCR permit program that were submitted for approval meet the standard for partial program approval under RCRA section 4005(d)(1)(B)(i), 42 U.S.C. 6945(d)(1)(B)(i). To make this determination, EPA compared the technical requirements in the Texas CCR regulations submitted for approval to their analogs in 40 CFR part 257 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). The Texas CCR regulations are contained in 30 TAC Chapter 352, which in general are identical or analogous to the requirements of 40 CFR part 257, subpart D. 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 352.1431.³ With these exceptions, the technical requirements are identical to the Federal CCR 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

³ 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.

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 (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). The TCEQ is seeking EPA approval of its partial state CCR permit program, pursuant to RCRA section 4005(d). The TCEQ's rules implement the Federal regulations promulgated through August 5, 2016, and as modified by *USWAG*. 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 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 approval of a partial program is that the Texas CCR permit program will apply in lieu of the Federal regulations, with the exception of the five provisions for which the State did not seek EPA approval. For those provisions for which the State did not seek EPA approval, 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.

EPA has therefore determined that the technical criteria in the Texas partial CCR permit program submitted for approval meet the standard for partial program approval under RCRA section 4005(d)(1)(B), 42 U.S.C. 6945(d)(1)(B).

C. Public Comment Period

EPA announced its proposal to approve, in part, the Texas CCR permit program, and a 60-day public comment period on December 8, 2020 (85 FR 78980). EPA also held a virtual public hearing on February 2, 2021. The public hearing provided interested persons the opportunity to present information, views, or arguments concerning EPA's proposal. Oral comments received during the public hearing are documented in the transcript of the hearing, which, along with the written comments received during the public comment period, is included in the docket for this Action.

D. EPA Responses to Major Comments on the Proposed Determination

EPA received 14 written public comments and 2 comments from the virtual public hearing during the comment period. The major comments received by EPA focused on five primary topics: 1. Lifetime Registrations, 2. Citizen Suit or Civil Intervention Provisions, 3. Partial Program and Texas Adoption of the Federal Regulations, 4. Groundwater Contamination, and 5. Issues with the Federal CCR Regulations. For several of these issues, EPA sent follow-up questions on March 23, 2021, to TCEQ; a copy of the TCEQ responses to the EPA questions⁴ and more detailed summary of all comments received and EPA's responses to those comments are provided in the Response to Comments document included in the docket for this Action.

1. Lifetime Registrations

Comment Summary: The Agency received several comments about the Texas program's registration authorization "for the active life of the unit as well as any post-closure period." In sum, commenters said that a "permit for life" is inconsistent with the WIIN Act's mandate that

⁴ See *EPA Follow-up Questions for Texas on the CCR permit program based on public comments, March 23, 2021*, document from April 7, 2021, in the docket for this Action.

state CCR programs ensure that CCR units located therein meet standards “at least as protective as” the Federal CCR regulations. Commenters recommended that periodic review be required at least every 5 years by Texas. Commenters also said that permits must include provisions requiring them to be periodically reopened or renewed to incorporate any changes to the state program necessary to ensure that the CCR unit “continues to achieve compliance” with standards “at least as protective as” those in any revised Federal CCR standards.

Comment Response: EPA disagrees with the assertion that it is unlawful for a registration issued under 30 TAC Chapter 352 to be issued for the active life of the unit including the post closure care period. Permits for life are not prohibited by RCRA or the 40 CFR part 257 regulations. RCRA section 4005(d)(1)(A) provides only that states may create a permitting program or other system of prior approval, that if approved by EPA, would operate in lieu of the Federal CCR regulations. 42 U.S.C. section 6975(d)(1)(A). This provision establishes no requirement regarding the length of the permit term. Nor do any of the provisions cited by the commenter establish such a limitation on state programs. Provided the state has the authority to require modifications to the permit, there is no need for the permit to expire to ensure that the unit “continues to achieve compliance” with any revised Federal standards. And as discussed below, Texas has the authority to require modifications to the registration, where necessary. Neither do the Federal CCR regulations prohibit permits for the life of a CCR unit. EPA’s position is consistent with the recent decision in *Waterkeeper Alliance, Inc. v. Wheeler, et al.* in which the U.S. District Court for the District of Columbia held that “so-called ‘permits for life’ are acceptable” under RCRA section 4005(d). No. 18-2230, 2020, WL 1873564, at *11 (D.C. Dist. Apr. 5, 2020). EPA therefore disagrees that this aspect of the Texas program is not at least as protective as the Federal requirements.

Furthermore, permits for the life of a CCR unit remain subject to periodic review by both Texas and EPA. First, 30 TAC section 352.131 (relating to registration amendments) contemplates review of registrations as part of the registration modification or amendment

process. Additionally, facility-initiated amendment applications related to administrative, technical and/or operational changes would require a review of the application that may result in revisions to the CCR registration. TCEQ's EPA-approved MSWLF programs provides a helpful example of how this process may play out in the CCR program. In Texas, MSWLF permits are also issued for the life of the facility and approximately 70% of MSWLF submit a modification or amendment application each year for changes to their permit. Similarly, CCR facilities may seek modifications on a regular basis that would result in revisions to their permit to maintain compliance with the state CCR program. Moreover, public participation is required for major amendments, defined in 30 TAC section 305.62, and a major amendment of a registration is subject to the same opportunities for public participation as an application for a new registration under 30 TAC section 352.431, as discussed in Unit III.A.2 of this document. Examples of major and minor amendments are included in 30 TAC sections 352.131(b) and 305.62(c).

Second, RCRA section 4005(d) requires EPA to periodically review state CCR permit programs or other system of prior approval; RCRA section 4005(d)(1)(D)(i)(I) requires review no less frequently than once every 12 years. Moreover, RCRA section 4005(d)(1)(D)(i)(II) provides that the Administrator shall review a state permit program not later than 3 years after the date on which the EPA revises the regulations for CCR units under 40 CFR part 257, subpart D. As a result, the state would be expected to submit a revised state CCR permit program application for elements of its program that are no longer as protective as the Federal CCR program. If the state fails to submit a revised permit program, the statute provides for EPA to issue a notice of deficiency and potentially to withdraw the program. 42 U.S.C.

6945(d)(1)(D)(ii), (iii). Additionally, RCRA 4005(d)(1)(D)(i)(III), provides that EPA will review a state program "not later than 1 year after the date of a significant release . . . that was not authorized at the time the release occurred, from a [CCR] unit located in that state."

2. Citizen Suit or Civil Intervention Provisions

Comment Summary: EPA received several comments about citizen suits or civil intervention provisions related to the Texas CCR registrations. The commenters were not aware of any citizen enforcement mechanisms, contested case or administrative evidentiary hearing under Texas law that would provide legal recourse for citizens affected by violations of the Texas program, including violations of registrations issued pursuant to the program. The commenters explained that because the Texas program substantially reduces the role of the public, and eliminates the role of citizen enforcement, it is less protective than the Federal CCR regulations.

The comments suggest that during the approval process of a specific CCR registration, the public will not be able to present evidence of harm and malpractice as a reason or basis for rejection of a registration application. As a result of the inability to present such evidence, public participation in the registration application process will be severely restricted. Citizens will not be able to offer testimony and supporting evidence to demonstrate the need for more vigorous enforcement within a registration application. In sum, Texas' appears to sidestep or limit the community involvement process.

Furthermore, commenters said making registration applications that are not subject to a contested case or evidentiary administrative hearing conflicts with the General Notice Provisions found at 30 TAC section 352.461, which outlines the requirements for public notices such as mailing lists, established deadline for public comments, and the process for contested case hearings.

Comment Response: EPA disagrees that the Texas CCR permit program does not provide for adequate civil enforcement of CCR regulatory requirements. From the Guidance Document, a state program provides adequate opportunities for civil enforcement when it (a) provides for citizen intervention as a matter of right or b) has 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. As described in Unit III.A.2 through 5, EPA has determined that Texas' program provides those opportunities. Furthermore, EPA disagrees that a State equivalent to the citizen suit provision in RCRA section 7002 is required for program approval because the right to file a RCRA citizen suit pertaining to CCR facilities in Texas is unaffected by EPA's approval. Finally, EPA disagrees that Texas provides limitations on the types of comments the public can submit such that comments regarding harm or malpractice cannot be presented to TCEQ for consideration in evaluating a registration application.

Texas has specific authorities that provide for public participation in state enforcement proceedings. First, Texas' program provides for notice and comment in enforcement actions. TWC sections 7.075(a) and 7.110(a) and (b) require a 30-day public comment period for administrative and civil enforcement actions. Furthermore, Texas 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 settlement is inappropriate, improper, inadequate, or inconsistent with the requirements of the commission's statutes, rules, or permits. See TWC sections 7.075(b), and 7.110(c). Texas also allows public comments at commission meetings on enforcement orders, pursuant to the Texas Open Meetings Act under 30 TAC Chapter 10.

Second, TWC section 5.176 through 5.1773 provides a process for investigating and responding to citizen complaints. Citizens have a right to file complaints with TCEQ regarding facility's regulated by TCEQ, and TCEQ must provide the complainant with status updates on the complaint at least quarterly until the complaint reaches final disposition. Additionally, in accordance with TWC section 5.176(b), TCEQ maintains a public website⁵ that contains materials informing the public about TCEQ's complaint policies and procedures, the collection

⁵ For more information, please visit TCEQ's Make an Environmental Complaint webpage, available at <https://www.tceq.texas.gov/compliance/complaints>.

and preservation of citizen collected evidence, and the status of environmental complaints and pending enforcement actions, as well as administrative and judicial orders.

Third, Texas has opportunities for citizen intervention in civil procedures. 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.

In addition to Texas' specific authorities providing for civil enforcement of state CCR regulations, citizens are provided enforcement opportunities under RCRA's citizen suit provisions. Citizen suits are authorized by RCRA section 7002(a). Citizens' ability to file RCRA citizen suits are not affected by RCRA section 4005(d), establishing a process for approving state CCR programs. *See* 42 U.S.C. 6945(d)(7). Likewise, EPA's approval of the Texas CCR permit program does not affect citizens' ability to file RCRA citizen suits. For those reasons, Texas' CCR permit program does not need to include a standalone citizen suit provision as suggested by commenters.

Finally, EPA disagrees that the Texas CCR permit program severely restricts citizen participation in the registration process by precluding the presentation of evidence with respect to alleged harm or malpractice. As a general matter, Texas' program provides for public notice and comment in the registration process and for major amendments as described in Unit III.A.2.a. More specifically, Texas' regulations pertaining to CCR units or public participation in state environmental permitting decisions do not include limitations on the type of comments the public can submit in response to a registration application. Additionally, TCEQ is required to consider all public comments received and prepare a response to all timely, relevant and material, or significant public comments. 30 TAC sections 352.431(e), 352.461(c). Citizens may also request a public meeting or contested case hearing pertaining to the registration application pursuant to 30 TAC sections 55.201, 55.154, and 352.451(a). Furthermore, citizens also have a right to seek judicial review of TCEQ's final decision on a registration application. A person

affected by a final ruling, order, or decision of TCEQ may file a petition for judicial review within 30 days after the effective date of the decision (TWC section 5.351).

3. Partial program and Texas Adoption of the Federal Regulations

Comment Summary: A few commenters mentioned the fact that Texas is seeking a partial program approval because of revisions in the Federal program but it was unclear to the commenters about what TCEQ adopted, what was excluded from the state program approval, and what the effect of the partial program would be for Texas. Other commenters said that Texas met the necessary criteria for a partial program approval.

Comment Response: EPA has determined that partial program approval is appropriate, in part because Texas' regulations include some provisions that are inconsistent with current federal CCR regulations. Texas's state CCR regulations reflect the Federal CCR program through August 5, 2016; however, the Federal CCR regulations have changed since then as a result of the *USWAG* decision and the Part A Final Rule. As such, Texas submitted to EPA for approval only those aspects of its CCR program that are consistent with current Federal CCR regulations. Consequently, even after EPA's approval of the partial Texas CCR permit program, owners and operators of CCR units in Texas remain responsible for complying with Federal requirements in 40 CFR 257.50(e), 257.91(d)(2), 257.95(g)(5), 257.101(a)(1), 257.101(b), and 257.103.

4. Groundwater Contamination

Comment Summary: Other comments were about general groundwater contamination in Texas that could be due to CCR facilities. Some commenters described the human health and environmental impacts of certain constituents present in groundwater and surface water. Commenters were concerned about closure of CCR units with waste in place, especially if the CCR unit is unlined, near a water body, or if there is groundwater contamination from the CCR unit detected from the groundwater monitoring and corrective action program.

Comment Response: Texas has adopted CCR regulations at 30 TAC Chapter 352 which in general are identical or analogous to the requirements of 40 CFR part 257, subpart D,

including groundwater monitoring requirements that adopted the Federal regulations at 40 CFR 257.90 through 257.98 by reference. EPA is not making any determinations regarding the compliance status of individual facilities or CCR units based on the public comment process for this final Action. However, some commenters raised concerns about compliance issues in the broader context of program approval and questioned whether Texas has the ability and inclination to fully implement an approved program. Given that Texas is in the early stages of implementing its new CCR regulations, it is not unexpected that compliance with those regulations across the State may be evolving.

The Texas CCR permit program will require each CCR unit located in the state to achieve compliance with the regulations that are part of their approved program as well as the Federal CCR requirements that were mentioned above that are not being approved as part of the Texas CCR permit program.

5. Issues with the Federal CCR Regulations

Comment Summary: The Agency received a number of questions or concerns saying that the Federal CCR regulations were not adequately protective of human health and the environment and since Texas adopted the Federal regulations by reference, the Texas regulations were also not protective. Most of these questions and concerns related to issues regarding groundwater monitoring and corrective action, closure, and unlined surface impoundments. The commenters suggested these issues were reasons to not approve the Texas CCR permit program.

Comment Response: Comments regarding the Federal CCR regulations at 40 CFR part 257 are beyond the scope of this action. For the issues raised above, TCEQ regulations are identical to the Federal regulations. Therefore, based on RCRA section 4005(d), EPA has determined that the Texas regulations submitted for EPA's approval will ensure that all the CCR units in the state will achieve compliance with the Federal CCR regulations at 40 CFR part 257, subpart D.

IV. Approval of the Texas CCR Permit Program

Upon signature of today's notice, the partial Texas CCR permit program, as described in its Application and Units II and III, is approved. Because this is a partial program approval, only the state requirements that have been approved will operate in lieu of the analogous Federal requirements. Accordingly, owners and operators of CCR units in Texas will remain responsible for compliance with all applicable requirements in 40 CFR part 257 for which Texas did not seek approval listed in Unit III.B. EPA will implement such provisions under the Federal CCR program, until and unless Texas submits a revised CCR permit program application and receives approval for these provisions. A permit, or registration, issued by a state is not a shield for noncompliance with these 40 CFR part 257 provisions. For those CCR units that do not yet have CCR registrations, the Federal regulations at 40 CFR part 257 will remain in effect until such time that TCEQ registrations under its approved CCR permit program are in effect for those units.

RCRA section 4005(d)(1)(D) specifies that EPA will review a state CCR permit program:

- From time to time, as the Administrator determines necessary, but not less frequently than once every 12 years;
- Not later than 3 years after the date on which the Administrator revises the applicable criteria for CCR units under part 257 of title 40, CFR (or successor regulations promulgated pursuant to RCRA sections 1008(a)(3) and 4004(a));
- Not later than 1 year after the date of a significant release (as defined by the Administrator), that was not authorized at the time the release occurred, from a CCR unit located in the state; and
- In request of any other state that asserts that the soil, groundwater, or surface water of the state is or is likely to be adversely affected by a release or potential release from a CCR unit located in the state for which the program was approved.

RCRA section 4005(d)(4)(B) also provides that in a state with an approved CCR permitting program, the Administrator may commence an administrative or judicial enforcement action under section 3008 if:

- The state requests that the Administrator provide assistance in the performance of an enforcement action; or
- After consideration of any other administrative or judicial enforcement action involving the CCR unit, the Administrator determines that an enforcement action is likely to be necessary to ensure that the CCR unit is operating in accordance with the criteria established under the state's permit program.

V. Action

In accordance with 42 U.S.C. 6945(d), EPA is approving the Texas partial CCR state permit program.

Dated: June 1, 2021

Michael S. Regan,
Administrator.

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