COMMENTS OF THE CROSS-CUTTING ISSUES GROUP ON PROPOSED LEGACY CCR SURFACE IMPOUNDMENT AND CCRMU RULE NOTICE OF DATA AVAILABILITY

EPA-HQ-OLEM-2020-0107

I. INTRODUCTION

On November 14, 2023, the U.S. Environmental Protection Agency ("EPA" or "Agency") published in the *Federal Register*, at 88 Fed. Reg. 77,941, a Notice of Data Availability ("NODA") announcing the availability of new information and data pertaining to the May 18, 2023 proposed rule, "Disposal of Coal Combustion Residuals (CCR) from Electric Utilities; Legacy CCR Surface Impoundments," 88 Fed. Reg. 31,982 ("Proposed Rule" or "Proposal"). As part of the NODA, EPA released a supplemental draft risk assessment in support of the Proposed Rule, as well as additional information on the potential universe of legacy CCR surface impoundments and CCR management units ("CCRMUs").

The Cross-Cutting Issues Group ("CCIG" or the "Group")[1] respectfully submits these comments on the NODA. CCIG is a group of electric generating companies with a diverse portfolio of generating assets throughout the country. CCIG members own and/or operate units currently subject to the CCR Rule as well as units potentially subject to regulation under the Agency's proposed expansion of the CCR Rule and included in EPA's potential universe of legacy CCR surface impoundments and CCRMUs. As such, CCIG members have a strong interest in the Proposed Rule and the NODA.

CCIG appreciates the opportunity to provide feedback on the NODA but strongly urges EPA to, at a minimum, reopen or extend the comment period to allow stakeholders the opportunity to review and provide meaningful comments on the new information. EPA should not let the May 2024 judicial deadline for only one aspect of the sweeping Proposed Rule limit public input on the NODA. By requesting comment on "the accuracy of the information that was submitted,"[2] EPA has effectively requested that facilities, in just 25 days, conduct the type of fulsome facility evaluation proposed by EPA in the Proposed Rule, yet has denied stakeholder requests for additional time.[3] Such an evaluation is premature and, regardless, requires significantly more time than the comment period allows. Yet, even in the limited comment period, CCIG members were able to identify obvious and systematic errors in EPA's potential universe of legacy CCR surface impoundments and CCRMUs, as well as flaws in EPA's draft risk assessment. In particular, the

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

[2] NODA, 88 Fed. Reg. at 77,944.

[3] *See* EPA, NODA Comment Period Extension Response, December 4, 2023, Docket No. EPA-HQ-OLEM-2020-0107-0915.

potential universe of legacy CCR surface impoundments and CCRMUs incorrectly identifies potential legacy CCR surface impoundments and CCRMUs that were not identified by commentors, incorrectly lists legacy CCR surface impoundments at active facilities, incorrectly identifies the number and type of potential legacy CCR surface impoundments or CCRMUs at facilities, and misleadingly identifies CCRMUs at sites without a CCR unit. The draft risk assessment likewise fails to address the full scope of potential CCRMUs, at least as EPA has proposed to define them, and makes several unreasonable assumptions about unit characteristics and future risk. As such, EPA cannot rely on either document to support the Proposed Rule or any other modifications to the CCR Rule.

II. BACKGROUND

EPA promulgated the "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities" rule ("2015 CCR Rule" or "CCR Rule") under Resource Conservation and Recovery Act ("RCRA") Subtitle D in 2015 and provided various design, operating, and closure criteria for CCR units.[4] The 2015 CCR Rule treated CCR as solid waste (rather than hazardous waste under Subtitle C) and regulated new and existing CCR landfills, new and existing CCR surface impoundments, and lateral expansions of CCR units. The 2015 CCR Rule imposed requirements on inactive surface impoundments at active facilities (*i.e.*, facilities that continued to use fuel to produce electricity after October 19, 2015) but exempted inactive surface impoundments at inactive facilities (which are referred to as legacy ponds or legacy impoundments). The 2015 CCR Rule also exempted inactive landfills.[5]

Because CCR was regulated under RCRA Subtitle D, the CCR Rule initially was "a self-implementing rule with no direct federal oversight,"[6] and enforceable primarily by citizen suit. As EPA discussed, in 2015, EPA lacked the authority to establish state or federal permitting programs for CCR management, and similarly lacked direct enforcement authority.[7] As a result, the CCR Rule contained prescriptive nationally applicable standards with limited ability to take into account site-specific circumstances.

In 2016, however, Congress enacted the Water Infrastructure Improvements for the Nation ("WIIN Act") which authorized EPA to (1) approve state permitting programs for the management of CCR that would operate in lieu of the federal CCR Rule, (2) develop a federal permitting program for non-participating states, and (3) in certain circumstances, directly enforce CCR Rule provisions. Since the passage of the WIIN Act, EPA has approved three state programs,[8] proposed (but not finalized) a federal permitting program,[9] and entered into two enforcement consent

[4] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,301 (Apr. 17, 2015) ("2015 CCR Rule").
[5] *See* 40 C.F.R. §§ 257.50(d), (e).
[6] 2015 CCR Rule, 80 Fed. Reg. at 21,303, 21,335.
[7] *Id.* at 21,332
[8] EPA has approved state permitting programs in Oklahoma, Georgia, and Texas.
[9] *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program, 85 Fed. Reg. 9,940 (Feb. 20, 2020).

decrees for alleged non-compliance with the federal CCR Rule. Accordingly, CCR Rule compliance is now subject to direct federal and (in some instances) state oversight.

In August 2018, the U.S. Court of Appeals for the D.C. Circuit in *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018) ("*USWAG*"), vacated and remanded parts of the 2015 CCR Rule, including the provision exempting legacy ponds from regulation.[10] In response to the *USWAG* decision, on October 14, 2020, EPA published an advance notice of proposed rulemaking ("ANPRM") soliciting comments and data on legacy ponds.[11] The Notice sought information, including feedback on potential definitions and data associated with legacy impoundments, to assist the Agency with its development of regulations for those impoundments in response to the *USWAG* decision. The ANPRM did not seek information regarding other potential CCR management areas, including inactive landfills or other areas not regulated by the 2015 CCR Rule.

Separately, in August 2022, a coalition of environmental groups filed a complaint in the U.S. District Court for the District of Columbia, under the RCRA citizen suit provision at 42 U.S.C. § 6972, alleging that EPA has a non-discretionary duty pursuant to 42 U.S.C. § 6912(b) of RCRA to review and, if necessary, revise regulations promulgated under RCRA at least every three years. Specifically, the environmental groups alleged that EPA failed to review 40 C.F.R. § 257.50(d) which exempts inactive CCR landfills, *i.e.*, CCR landfills that ceased receiving CCR prior to October 19, 2015, from the CCR Rule.[12] In response to the environmental groups' challenge to the exemption of inactive landfills from the 2015 CCR Rule, the D.C. Circuit entered a consent decree between environmental groups and EPA on May 3, 2023, committing the Agency to complete a review of the inactive CCR landfills exemption and either determine that no revision is necessary or sign a proposed rule by May 5, 2023 and, if proposing a rule, take final action as to the inactive CCR landfill exemption by May 6, 2024.

EPA signed the Proposed Rule on May 5, 2023, and released the pre-publication version of the proposed rule on May 17, 2023. The Proposal was published in the *Federal Register* the following day on May 18, 2023. The Proposed Rule would significantly expand the scope of units regulated under the federal CCR regulations to include both legacy CCR surface impoundments (inactive surface impoundments at inactive generating facilities) as well as new "CCR management units" at active or inactive facilities otherwise subject to federal CCR regulations.[13]

On July 17, 2023, CCIG submitted extensive comments on the Proposed Rule.[14] Along with other stakeholders, CCIG identified serious concerns with the scope and basis for the Proposed Rule. Specifically, as to CCRMUs, the Group commented that EPA has not provided adequate support under RCRA for its proposal to regulate CCRMUs. The Group noted that EPA's

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[10] *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 426–32 (D.C. Cir. 2018).
[11] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 85 Fed. Reg. 65,015 (Oct. 14, 2020) ("ANPRM").
[12] *Statewide Organizing for Community eMpowerment v. EPA*, No. 1:22-cv-02562 (D.D.C.).
[13] *See generally* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,082 (May 18, 2023) ("Proposed Rule").
[14] Comments of the Cross-Cutting Issues Group, Docket No. EPA-HQ-OLEM-2020-0107-0369 (July 17, 2023) ("CCIG Comments on Proposed Rule").

proposed definition of CCRMU lacks any spatial or temporal limitations, does not require a physical management structure, and does not expressly exclude beneficially used CCR. This broad definition is "divorced from a showing of reasonably anticipated risk to human health or the environment as required by RCRA."[15] To the extent CCIG's prior comments—available at Docket No. EPA-HQ-OLEM-2020-0107-0369—remain pertinent to the NODA, they are incorporated here by reference.

III. COMMENTS

A. EPA's Information on the Potential Universe of Legacy CCR Surface Impoundments and CCRMUs is Flawed and Incomplete.

As part of the NODA, EPA announced the availability of new information about legacy CCR surface impoundments and CCRMUs.[16] EPA included in the docket an updated spreadsheet purporting to show potential legacy CCR surface impoundments and CCRMUs (the "Potential CCRMU and Legacy Unit Spreadsheet" or "Spreadsheet"), largely based on comments received on the Proposed Rule.[17] The Spreadsheet appears to show a list of all such areas/units potentially falling under the Proposed Rule but the information contained in the Potential CCRMU and Legacy Unit Spreadsheet is flawed and, in fact, lists "potential" legacy CCR surface impoundments and CCRMUs that were not actually identified by commenters and, in many instances, cannot or do not exist. It is unclear what EPA's intended purpose for the Spreadsheet is—particularly when EPA is proposing to require facilities to identify legacy CCR surface impoundments and CCRMUs through the applicability documentation or facility evaluation, respectively—and such unverified information from third parties cannot be used to provide any basis for EPA's Proposed Rule. By asking the public—and facilities specifically—to confirm the accuracy of the information in the Spreadsheet,[18] EPA has effectively asked facilities to identify areas potentially subject to the Proposed Rule (as well as related information), as would be required by a facility evaluation or applicability report under the Proposed Rule, within only 25 days and has denied stakeholder requests for more time. Such a request is premature and the 25-day timeframe is inadequate.[19]

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[15] CCIG Comments on Proposed Rule at Section II.A.

[16] NODA, 88 Fed. Reg. at 77,943–44.

[17] Summary of Potential Universe Comments for Legacy CCRMU NODA, October 2023, Docket No. EPA-HQ-OLEM-2020-0107-0892 (Oct. 30, 2023) ("October 2023 Potential CCRMU and Legacy Unit Universe").

[18] *See* NODA, 88 Fed. Reg. at 77,944 ("EPA also requests comment on the accuracy of the information that was submitted regarding potential legacy CCR surface impoundments or potential CCRMU."); EPA, NODA Comment Period Extension Response, December 4, 2023, Docket No. EPA-HQ-OLEM-2020-0107-0915 at 3 ("Second, the EPA is requesting that facilities comment on information on their individual facilities that was provided by other commenters in response to the May 2023 proposal.").

[19] EPA therefore cannot interpret an owner/operator's decision not to comment on the NODA as confirmation of the accuracy of the information related to its facilities; any such determination must be reserved for the applicability documentation (for legacy CCR surface impoundments) and the facility evaluation report (for CCRMUs), if such requirements are finalized. EPA cannot rely on unverified third-party information when facilities are in the best position to determine whether a unit or area meets any final definition of legacy CCR surface impoundment or CCRMU nor can the Agency expect facilities to correct every error in the Spreadsheet before EPA has finalized the Proposed Rule and facilities have conducted the necessary evaluations.

As a preliminary matter, EPA has not finalized the definition of CCRMU or legacy CCR surface impoundment. EPA proposed in May 2023 to define CCRMU as "any area of land on which any non-containerized accumulation of CCR is received, placed, or otherwise managed at any time, that is not a CCR unit. This includes inactive CCR landfills and CCR units that closed prior to October 17, 2015."[20] As CCIG noted in its comments on the Proposed Rule, there are significant flaws in the definition of CCRMU, including that it is overbroad and lacks any temporal limitation, that render it inappropriate to use in any future regulation.[21]

EPA also proposed to define legacy CCR surface impoundment as "a CCR surface impoundment that no longer receives CCR but contained both CCR and liquids on or after October 19, 2015, and that is located at an inactive electric utility."[22] EPA sought comment, however, on defining a "legacy CCR surface impoundment" as: "A CCR surface impoundment at a power plant that ceased generating power prior to October 19, 2015, and the surface impoundment contains both CCR and liquids on or after the effective date of the legacy CCR surface impoundment final rule."[23] As CCIG noted in its comments on the ANPRM and the Proposed Rule, adopting the proposed definition "would represent a significant retroactive application of regulations and fundamentally inapplicable requirements to units that are no longer surface impoundments."[24]

Because neither definition has been finalized (and should not be finalized as proposed), it is impossible to know what areas or units would ultimately fall under the definition of CCRMU or legacy CCR surface impoundment. Yet, even based on the overly broad and unsupported proposed definitions of CCRMU and legacy CCR surface impoundment, EPA's Potential CCRMU and Legacy Unit Spreadsheet contains, at a minimum, several errors and numerous inconsistencies between comments received on the Proposed Rule and the information shown in the Spreadsheet.[25] In addition to the errors noted below, the Spreadsheet incorrectly lists wastewater treatment units and other units that manage non-CCR wastes within the universe of potential legacy CCR surface impoundments and CCRMUs[26] and, as discussed in Section III.B, includes units that EPA has not demonstrated pose a reasonable probability of risk to human health or the environment.

The list of potential legacy CCR surface impoundments and CCRMUs contained in the Spreadsheet is largely drawn from public comments. In particular, 1,088 of the nearly 1,500 entries are from comments submitted by a coalition of environmental groups led by Earthjustice

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[20] Proposed Rule, 88 Fed. Reg. at 32,034.
[21] *See* CCIG Comments on Proposed Rule at Section II.C.
[22] Proposed Rule, 88 Fed. Reg. at 32,034.
[23] *Id.* at 31,995. EPA also previously sought comment on a third option based on the date the D.C. Circuit issued the mandate in *Utility Solid Waste Activities Group v. EPA*. Proposed Rule, 88 Fed. Reg. at 31,989–90.
[24] *See* CCIG Comments on Proposed Rule at Section IV.A.
[25] As discussed below, evaluating the accuracy of the Potential CCRMU and Legacy Unit Spreadsheet is a time-consuming and complicated endeavor due to the number of documents referenced and the need to cross-reference information across multiple sources. Additional time is needed to allow stakeholders sufficient time to evaluate the nearly 1,500 entries.
[26] *See* Proposed Rule, 88 Fed. Reg. at 32,018 ("EPA recognizes that this is a broad definition, but the Agency does not intend that the placement of any amount of CCR would necessarily constitute a CCRMU. Accordingly, EPA is proposing that the following would not be considered CCRMU: consistent with the current regulations, closed or inactive process water ponds, cooling water ponds, wastewater treatment ponds, and storm water holding ponds or aeration ponds. These units are not designed to hold an accumulation of CCR, and in fact, do not generally contain a significant amount of CCR.").

on the Proposed Rule. Another 89 entries also are linked to Earthjustice comments submitted prior to the publication of the Proposed Rule.[27] The remaining entries are from comments of other environmental groups or concerned citizens, or EPA's previous spreadsheets listing the potential universe of CCRMUs and legacy CCR surface impoundments. These commentors lack a direct or first-hand basis to describe the facilities of third parties, and they do not hold themselves out to be neutral, unbiased sources of information.

EPA does not appear to have considered information from industry submitted on the Proposed Rule nor does the information provided via public comment appear to have been reviewed or verified by EPA or any independent third-party. EPA appears to have included all sites identified via comments, even if the commentor ultimately concluded that the site did not have a legacy CCR surface impoundment or CCRMU.[28] This is concerning because the Spreadsheet is presented as if every entry is a separate potential legacy CCR surface impoundment or CCRMU identified by commentors or EPA. As discussed below, many of the sites included on the Spreadsheet do not have identified legacy CCR surface impoundments or CCRMUs, and it is incorrect for EPA to have included them in the Potential CCRMU and Legacy Unit Spreadsheet in the first instance. Such an overly inclusive "list" is unreliable and confusing to both the regulated community and the public without further verification and explanation.[29]

First, the Potential CCRMU and Legacy Unit Spreadsheet lists certain facilities as having a legacy CCR surface impoundment and/or a CCRMU when the referenced source (typically Earthjustice's comments) states that legacy CCR surface impoundments or CCRMUs were *not* identified at the facility. Based on CCIG's limited review of a few plants identified in the Spreadsheet as having legacy CCR surface impoundments and CCRMUs, the Group determined that only a fraction of these Spreadsheet entries accurately reflect the information presented in the Earthjustice comments. For example, EPA lists Ames Electric Services Power Plant, Big Fork Ranch, Bonanza, White Bluff, and Navajo, among many other facilities, as having both legacy CCR surface impoundments and CCRMUs and refers to Appendix III of Earthjustice's comments as the source of the information.[30] Appendix III, however, indicates that Earthjustice did not identify either legacy CCR surface impoundments or CCRMUs at these sites.[31] The repeated, erroneous identification of sites in the Spreadsheet as having legacy CCR surface impoundments

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[27] See Legacy Surface Impoundments Sensitivity Analysis, Docket No. EPA-HQ-OLEM-2020-0107-0160 (Apr. 20, 2023), noting in Column K that the information stemmed from Earthjustice comments. See also October 2023 Potential CCRMU and Legacy Unit Universe, Column G citing to Earthjustice comments for 1,177 entries.

[28] If this was not EPA's intention, then the Spreadsheet contains numerous, systematic errors that render the document entirely unreliable.

[29] EPA's statement in the NODA that "EPA also requests comment on the accuracy of the information that was submitted regarding potential legacy CCR surface impoundments or potential CCRMU" implies that the Spreadsheet accurately reflects the comments received. *See* NODA, 88 Fed. Reg at 77,944. That is not the case. If it is EPA's intention for commentors to correct and/or verify the information in the Spreadsheet, EPA should have (1) clearly indicated that the information contained in the Spreadsheet includes sites for which neither EPA nor prior commentors have found legacy CCR surface impoundments or CCRMUs and (2) allowed stakeholders adequate time to evaluate the accuracy of all 1,480 entries and submit comments to EPA with "verifiable sourcing information." *See* 88 Fed. Reg. at 77,944.

[30] *See, e.g.*, October 2023 Potential CCRMU and Legacy Unit Universe at rows 31, 112, 120, 1104, & 738.

[31] *See, e.g.*, Comments of Earthjustice et al., Docket No. EPA-HQ-OLEM-2020-0107-0119 (July 17, 2023) at Appendix III on the "Plant-Level Summary" sheet, rows 13, 34, 40, 408, & 274.

and CCRMUs, with references to Earthjustice's comments,[32] underscores the significant issues with the document. Accordingly, the information purportedly presented in the Spreadsheet does not accurately reflect the potential universe of legacy units or CCRMUs, and EPA cannot rely upon it for the Proposed Rule or any other action.

Second, the Potential CCRMU and Legacy Unit Spreadsheet erroneously lists legacy CCR surface impoundments at active facilities. EPA has proposed to define "legacy CCR surface impoundment" as "a CCR surface impoundment that no longer receives CCR but contained both CCR and liquids on or after October 19, 2015, and that is located at an *inactive electric utility*."[33] An "inactive electric utility" is further defined as

> any facility with a legacy CCR surface impoundment subject to the requirements of this subpart that ceased operation prior to October 19, 2015. An electric utility or independent power producer is no longer in operation *if it has ceased generating electricity provided to electric power transmission systems or to electric power distribution systems before October 19, 2015*. An inactive facility does not include an off-site disposal facility that ceased operation prior to October 19, 2015.[34]

By EPA's proposed definition, legacy CCR surface impoundments cannot exist at active facilities and, as such, should not be identified at active sites in the Spreadsheet. Yet, even in CCIG's limited evaluation of the Potential CCRMU and Legacy Unit Spreadsheet, we identified multiple instances where EPA has listed active facilities as having potential legacy CCR surface impoundments. For example:

- EPA lists Bonanza Power Plant as having both potential legacy CCR surface impoundments and CCRMUs in row 120.
- EPA lists J. T. Deely Power Plant as having potential legacy CCR surface impoundments in rows 1325 through 1330.
- EPA lists George Neal Center South as having both potential legacy CCR surface impoundments and CCRMUs in row 411.
- EPA lists White Bluff Plant as having both potential legacy CCR surface impoundments and CCRMUs in row 1104.
- EPA lists Cooper Station as having both potential legacy CCR surface impoundments and CCRMUs in row 242.

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[32] In addition to the examples cited above, EPA lists Twin Oaks Power One as having potential legacy CCR surface impoundments and CCRMUs in row 1029 and refers to Appendix III of Earthjustice's comments as the source of that information. Again, Earthjustice's comments indicate that the organization did not find evidence of either legacy ponds or CCRMUs at the site. See Comments of Earthjustice et al., Docket No. EPA-HQ-OLEM-2020-0107-0119 (July 17, 2023) at Appendix III on the "Plant-Level Summary" sheet, row 383.

[33] Proposed Rule, 88 Fed. Reg. at 32,034 (emphasis added).

[34] *Id.* (emphasis added).

- EPA lists Ghent Generating Station as having both potential legacy CCR surface impoundments and CCRMUs in row 413.

- EPA lists H.L. Spurlock Station as having both potential legacy CCR surface impoundments and CCRMUs in row 441.

- EPA lists J.K. Smith Power Station as having both potential legacy CCR surface impoundments and CCRMUs in row 512.

- EPA lists Dale Station as having potential legacy CCR surface impoundments in rows 278 through 281.

- EPA lists Kenneth C. Coleman Generating Station as having both potential legacy CCR surface impoundments and CCRMUs in rows 568 through 571 and rows 1177 through 1179.

- EPA lists HMP&L Station Two Henderson as having potential legacy CCR surface impoundments in rows 1288 through 1290.

- EPA lists Navajo Generating Station as having a potential legacy surface impoundment in row 738.

- EPA lists Cheswick Generating Station as having both potential legacy CCR surface impoundments and CCRMUs in row 189.

- EPA lists Genoa Power Plant as having potential legacy CCR surface impoundments in rows 401 through 404.

Bonanza Power Plant, J.T. Deely Power Plant, George Neal Center South, White Bluff Plant, Cooper Station, Ghent Generating Station, H.L. Spurlock Station, and J.K. Smith Power Station are active generating facilities and, by definition, cannot have legacy CCR surface impoundments. Likewise, while Cheswick Generating Station, Genoa Power Plant, Dale Station, Kenneth C. Coleman Generating Station, HMP&L Station Two Henderson, and Navajo Generating Station have ceased generation, none are inactive electric utilities within EPA's proposed definition and cannot have legacy CCR surface impoundments. Once again, this appears to be either a systematic and clear error EPA made with respect to numerous facilities or the intentional, but unexplained and unreasonable, inclusion of facilities that cannot have legacy CCR impoundments. In either case, EPA should not identify sites as having a potential legacy CCR surface impoundment when they cannot. Identifying such sites as having potential CCR surface impoundments is clearly incorrect and confusing, particularly to any members of the public who are not familiar with the details of the Proposed Rule.

Third, the Potential CCRMU and Legacy Unit Spreadsheet incorrectly identifies the type and number of potential CCRMUs and/or legacy units at facilities. For example, the Spreadsheet indicates that there are five potential CCRMUs at the Hugo Plant (the spreadsheet has five rows dedicated to Hugo Plant) and cites to entries in Earthjustice's Appendix III "Plant-Level Summary" sheet and "CCRMU" sheet as the basis for that listing. The first error made by EPA—

which again appears to be a systematic flaw in how EPA extracted information from Earthjustice's comments—is that the Hugo entry in the "Plant-Level Summary" sheet duplicates the more specific entries in the "CCRMU" sheet. Accordingly, row 477 in EPA's Potential CCRMU and Legacy Unit Spreadsheet (which refers to Earthjustice Appendix III, Sheet Plant-Level Summary, Row 183) does not refer to any separate alleged CCRMU at the Hugo Plant and should be deleted. Likewise, EPA lists Coronado Generating Station as having potential CCRMUs in both rows 244 and 245. However, row 245 refers to the Earthjustice Appendix III "Plant-Level Summary" sheet—this row does not refer to a separate potential CCRMU at Coronado and should be deleted. Second, with respect to the four entries on Earthjustice's "CCRMU" sheet for Hugo Plant, Earthjustice incorrectly identifies four alleged CCRMUs as surface impoundments.[35] Two of these alleged CCRMU ponds are, in fact, one landfill. No other impoundments exist at the Hugo Plant. As such, there should be only one entry in the Spreadsheet for Hugo Plant.[36]

Fourth, the Spreadsheet misleadingly identifies CCRMUs at sites that do not have a currently regulated CCR unit or a proposed legacy CCR surface impoundment, or that are not located at a current or former generating site. EPA is proposing to only require owners/operators of active or inactive generating facilities with one or more CCR units to complete a facility evaluation to identify CCRMUs.[37] As such, the Proposed Rule would not apply to areas that meet the CCRMU criteria but are located at sites without a CCR unit and/or that are not at power plant site. The Spreadsheet nonetheless lists potential CCRMUs at sites that do not have a CCR unit or that are not co-located at a power plant site.

Furthermore, evaluating the potential universe of legacy CCR surface impoundments and CCRMUs is complicated by the limited amount of information included in the Potential CCRMU and Legacy Unit Spreadsheet. Many of the potential CCRMUs and CCR surface impoundments listed in the Spreadsheet are attributed to appendices of Earthjustice's comments or to EPA's prior spreadsheet of potential CCRMU and legacy units,[38] which then refer to other documents, including the 2007 EPA Draft Risk Assessment,[39] information collection requests, EPA's 2014 Risk Assessment, and prior comments. Because the ultimate citation appears to be several steps removed from the information presented in the Potential CCRMU and Legacy Unit Spreadsheet,

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[35] *See* Comments of Earthjustice et al., Docket No. EPA-HQ-OLEM-2020-0107-0119 (July 17, 2023) at Appendix III on the "CCRMU" sheet, rows 183–86.

[36] As noted above, CCIG believes that the proposed definition of CCRMU is overly broad and unsupportable. As such, CCIG is not commenting that it is appropriate or correct for any of the alleged CCRMUs or legacy CCR surface impoundments to be listed here. CCIG's comments are only intended to identify where EPA made clear errors in its potential universe of legacy CCR surface impoundments and CCRMUs based on the definitions the Agency proposed in the Proposed Rule.

[37] *See* Proposed Rule, 88 Fed. Reg. at 32,034.

[38] *See* October 2023 Potential CCRMU and Legacy Unit Universe, Column E.

[39] Notably, Earthjustice's comments refer to EPA's 2007 draft Human and Ecological Risk Assessment of Coal Combustion Wastes, the "2007 EPA Draft Risk Assessment," in multiple instances. The 2007 EPA Draft Risk Assessment, however, relied in part on blinded industry data that was then matched to a specific electric utility facility by "applying professional judgment in comparing the state, waste quantity, and waste management practice information in the EPRI database with similar data from responses to the U.S. Department of Energy's Energy Information Administration (EIA) Form EIA-767 (Steam-Electric Plant Operation and Design Report) for the same year as the EPRI survey (1995)." *See* 2007 Draft Risk Assessment at B-2, available at https://grist.org/wp-content/uploads/2011/02/epa-coal-combustion-waste-risk-assessment.pdf. In short, this data was not received directly from facilities nor was its accuracy verified by facilities.

it is difficult to evaluate why any listed unit is included in the potential universe of CCR units and where the information allegedly supporting such a characterization originated. Interested stakeholders must evaluate not only EPA's Spreadsheet but multiple referenced comments, appendices, and other supporting documents. EPA has not provided the public the time to fully evaluate the accuracy of the information. EPA must allow more time to evaluate the nearly 1,500 entries and provide comments.

Finally, it is not always clear which units or areas commentors and/or EPA allege are legacy CCR surface impoundments or CCRMUs. The Potential CCRMU and Legacy Unit Spreadsheet only lists the plant name and the corresponding reference (*i.e.*, Earthjustice comments, prior EPA spreadsheet, etc.). It does not identify the specific alleged legacy CCR surface impoundment or CCRMU. For example, several potential units are listed with a citation to the comments of a coalition of organizations led by the Western Organization of Resource Councils.[40] However, those comments do not identify specific alleged legacy CCR surface impoundments or CCRMUs; instead, the comments simply state that the commentors believe that certain listed facilities have varying numbers of unregulated landfills or ponds.[41] The comments do not provide any information on the names of these alleged unregulated landfills or ponds or where they are located at the respective facilities. It is impossible to verify the accuracy of including any alleged units from these facilities within the potential universe of legacy CCR surface impoundments and CCRMUs without additional information.[42]

In sum, EPA's potential universe of legacy CCR surface impoundments and CCRMUs is unverified, inaccurate, and based on incomplete information. In particular, it is concerning that EPA has incorrectly included numerous sites in the Spreadsheet, whether intentionally or unintentionally, given the publicly available information that clearly contradicts the information in the Spreadsheet. As discussed above, the Spreadsheet is not an accurate list of potential legacy CCR surface impoundments and CCRMUs based on our limited review—EPA cannot rely on such information in any manner. If EPA intends to use the Potential CCRMU and Legacy Unit Spreadsheet, the Agency must re-evaluate the list, verify the accuracy the information, and provide a more thorough and complete assessment for proper public review and comment.

B. EPA's Draft Risk Assessment is Flawed and Cannot Be Used to Support the Proposed Rule.

EPA released a supplemental draft risk assessment, "Risk Assessment of Coal Combustion Residuals: Legacy Impoundments And CCR Management Units" ("Draft Risk Assessment"), that

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[40] *See, e.g.*, October 2023 Potential CCRMU and Legacy Unit Universe, rows 250–52 (identifying alleged CCRMUs at Coal Creek Station); *id.* at rows 627–28 (identifying alleged CCRMUs at Coyote Station); *id.* at 701–07 (identifying alleged CCRMUs at Jim Bridger Power Plant, Leland Olds Power Plant, Lewis & Clark Station, and Milton R. Young Power Plant).

[41] *See* Comments of Western Organization of Resource Councils et al., Docket No. EPA-HQ-OLEM-2020-0107-0275 (July 17, 2023).

[42] Additionally, as discussed above, there are numerous entries that appear to refer to legacy CCR surface impoundments or CCRMUs but no such unit has been identified. Listing such a site as having a potential legacy CCR surface impoundment or CCRMU but failing to indicate in the Spreadsheet that no specific unit was identified is unnecessarily confusing and makes it appear as if many more potential units were identified in comments than were actually identified.

is intended "to evaluate the potential for risk from placement of CCR in legacy impoundments and CCRMUs, which fell outside the scope of the 2014 Assessment."[43] Based on the Draft Risk Assessment, EPA concluded that "leaching from both legacy surface impoundments and CCRMUs has the potential [to] adversely affect groundwater quality and cause risks to future receptors."[44] The Draft Risk Assessment, however, has several major flaws that call into question the validity of EPA's conclusions. Such a flawed assessment is unreliable and would be improper for EPA to rely on.

First, the NODA is deficient because it does not identify *how* EPA intends to use the Draft Risk Assessment or what the Draft Risk Assessment purportedly supports. As such, stakeholders cannot fully comment on the Draft Risk Assessment. Especially if the Draft Risk Assessment is being used or is used to support any modifications to the Proposed Rule, stakeholders have not had an opportunity to comment on specific modifications.

Second, the Draft Risk Assessment does not appear to evaluate the full scope of potential CCRMUs, as EPA has broadly defined them under the Proposed Rule. As recognized in the Draft Risk Assessment, CCRMUs "consist of a broad array of units"[45]; yet, EPA only used generic conceptual models for closed landfills and CCRMU fills. These models do not capture, much less characterize and distinguish among, the variety of risks that may derive from the diversity of possible CCR uses and placements (for instance, beneficial use placements as part of liner, embankment, dam, and road construction[46]) across the range of possible site-specific circumstances and cannot be used as support for regulating every kind of CCRMU that would be captured under EPA's broad proposed definition. Additionally, EPA's proposed definition of CCRMU does not have a clear minimum threshold.[47] Potential CCRMUs, therefore, could include placement of relatively small amounts of CCR.[48] EPA's Draft Risk Assessment does not adequately evaluate risks (or lack thereof) from these types of units.[49]

And, in fact, the Draft Risk Assessment shows that small "CCRMU disposal units" pose little to no risk, noting that "modeled landfill risks start to consistently decline only beyond a certain size, falling below the 10^{-5} around 15 acres."[50] While the Draft Risk Assessment notes that "[i]t is possible based on these findings that smaller placement of CCR would not pose risk within the OLEM risk range for receptors up to a mile away from these units," it goes on to state without

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[43] EPA, Risk Assessment of Coal Combustion Residuals: Legacy Impoundments and CCR Management Units 1-2 (Oct. 2023) ("Draft Risk Assessment").
[44] *Id.* at 7-2.
[45] *Id.* at 2-6.
[46] *See* CCIG Comments at Section II.C.2.ii.c (pages 20–24).
[47] While EPA stated in the preamble to the Proposed Rule that it does not intend to include truly de minimis quantities of CCR, this language is not included in the definition nor did EPA define de minimis quantity. If EPA finalizes the Proposed Rule, EPA must clarify what a de minimis quantity is. As CCIG commented on the Proposed Rule, "[a]t a minimum, de minimis must mean more than 12,400 tons." CCIG Comments on Proposed Rule at Section II.C.3.
[48] As noted in in footnote 47, if EPA finalizes the Proposed Rule, EPA should not regulate small quantities of CCR. EPA should establish a minimum threshold of at least 12,400 tons.
[49] As noted below, the Draft Risk Assessment makes unreasonable assumptions about CCRMU characteristics that call into question EPA's findings about alleged CCRMU risk.
[50] Draft Risk Assessment at 3-5.

any evaluation that "this does not mean such placements are without any risk."[51] As noted below, EPA does not have authority to regulate units that do not pose a reasonable probability of causing adverse effects on human health or the environment. EPA's evaluation of only CCR landfills and CCRMU fills presents an incomplete picture of risk from the full range of potential CCRMUs under the Proposed Rule.

Third, the Draft Risk Assessment is based on unreasonable assumptions about future risks. RCRA § 4004 requires that EPA's criteria for sanitary landfills ensure that "there is no *reasonable probability* of adverse effects on health or the environment from disposal of solid wastes at such facility."[52] As EPA has stated, "under section 4004(a) EPA is charged with issuing regulations to address all 'reasonable probabilities of adverse effects' (*i.e.*, all reasonably anticipated risks) to health and the environment from the disposal of solid waste."[53] Therefore, EPA's ability to impose CCR management requirements is limited to activities that present a *reasonable* probability of causing adverse effects on human health or the environment. EPA's evaluation of alleged risks from legacy CCR surface impoundments and CCRMUs goes far beyond reasonably anticipated risks.

EPA evaluated alleged groundwater concentrations up to 10,000 years in the future.[54] In fact, the Draft Risk Assessment states that "[w]hether receptors are presently exposed has no bearing on the need to address the contamination potential identified for these units, as it may not be feasible to fully remove contamination from groundwater once released."[55] This approach, however, does not assess whether there is a *reasonable* probability of causing adverse effects. If there are no receptors in the vicinity of a CCR unit, there is no risk. It is unreasonable for EPA to regulate CCR units for risks that may occur thousands of years in the future.[56]

The Draft Risk Assessment also does not consider that many legacy CCR surface impoundments and potential CCRMUs are closed and, in many instances, were closed consistent with state regulations. Such units have been determined to not pose a risk to human health or the environment. EPA cannot assume that simply because a unit did not close pursuant to the federal standards that it poses a risk.

Additionally, EPA determined that "future residential land use is considered to be appropriate when identifying relevant exposure pathways" for CCRMUs.[57] It is unreasonable for EPA to assume that all CCRMUs would be uncontrolled and used for any type of activity.[58] Like surface impoundments, landfills, or other waste sites, CCRMU sites can be controlled through a

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[51] *Id.*
[52] 42 U.S.C. § 6944(a) (emphasis added).
[53] 2015 CCR Rule, 80 Fed. Reg. at 21,310.
[54] *See* Draft Risk Assessment at 4-9 ("In cases where the ground water concentration was found to still be increasing after 10,000 years, EPACMTP stopped modeling and used the ground water concentration at that final year as the peak concentration.")
[55] *Id.* at 3-6.
[56] Such a broad view of future risks also is inconsistent with EPA's current CCR regulations for post-closure care which only require post-closure care for 30 years unless a site is in assessment monitoring. *See* 40 C.F.R. § 257.104.
[57] Draft Risk Assessment at 2-7.
[58] As CCIG noted in its comments on the Proposed Rule, potential CCRMUs may be located under existing infrastructure

variety of methods and institutional controls, including deed restrictions. Consistent with the RCRA statutory standard, EPA's risk assessment should instead focus on reasonably anticipated future land uses rather than *any* potential land use.[59]

The Draft Risk Assessment also unreasonably assumes that groundwater is being consumed by the public. Wellhead protected areas are well documented by states and EPA for sources of drinking water and only 15 percent of the U.S. population relies on private wells for drinking water. EPA should not assume that all units could cause well contamination. Evaluation of the potential for groundwater contamination and any impacts to wells should be site-specific.

Finally, the Draft Risk Assessment unreasonably assumes that CCRMU characteristics are similar to soil, particularly for hydraulic conductivity. For example, the Draft Assessment states that:

> The infiltration rate through disturbed CCRMU fill is assumed be equivalent to the overlying soil, as a substantially lower hydraulic conductivity could result in undesirable drainage issues. This assumption is considered reasonable because the reported hydraulic conductivity of CCRs have considerable overlap with natural soils. For example, the default values for uncompacted ash in the HELP model are 3.0×10^{-5} cm/s for fly ash, 4.1×10^{-3} cm/s for bottom ash, and 4.1×10^{-2} cm/s for boiler slag.[60]

Uncompacted fly ash, however, is more similar to sand than native soils. Fly ash in a CCRMU also would require compaction for stability and would be compacted to some extent by the overlying soil. EPA's assumptions about hydraulic conductivity are unreasonable and overstate the potential risk from CCRMUs.

EPA's Draft Risk Assessment does not provide a reliable evaluation of potential risks from units potentially subject to the Proposed Rule. The Draft Risk Assessment makes several unreasonable assumptions that result in significantly overestimated risks from legacy CCR surface impoundments and CCRMUs in particular, while also failing to assess the full scope of potential CCRMUs or existing regulation of such units.

C. EPA Cannot Rely on the New NODA Information to Support the Proposed Rule.

EPA cannot now, months *after* proposing a rule to regulate legacy CCR surface impoundments and CCRMUs, attempt to retroactively develop a basis for its Proposal, particularly when (1) it is not clear if or how EPA intends to use the NODA information and (2) EPA has only provided a 25-day comment period. Any attempts by EPA to use the information announced in

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[59] *See, e.g.*, Memorandum from Elliott P. Laws, EPA Assistant Administrator, to EPA Regional Directors regarding Land Use in the CERCLA Remedy Selection Process, OSWER Directive No. 9355.7-04 (May 25, 1995), https://www.epa.gov/sites/default/files/documents/landuse.pdf (outlining consideration of land uses for remedy selection).

[60] Draft Risk Assessment at 4-7.

the NODA as post-hoc rationalization for the Proposed Rule runs afoul of the Administrative Procedure Act.

As noted above, EPA's intended use for the NODA information is unclear. According to the NODA, "EPA cannot definitively state whether this information will provide support for any provision of the final rule, or that the Agency has determined that it is appropriate to rely on this information in developing the final rule."[61] However, if EPA does intend to rely on the NODA information as a basis for finalizing any aspect or aspects of the Proposed Rule, EPA cannot do so. As noted throughout CCIG's comments on the Proposed Rule, EPA has not provided adequate support under RCRA for its proposal to regulate CCRMUs.[62] For all the reasons noted in Section III.B above, EPA's flawed Draft Risk Assessment does not address this gap in support.

D. EPA Provided Inadequate Opportunity for Public Comment.

EPA is only allowing a 25-day comment period on the NODA and has denied multiple requests for an extension of the comment period.[63] Such a limited timeframe for public comment is insufficient to allow stakeholders a meaningful opportunity to review EPA's new materials, which include an 89-page risk assessment, multiple lengthy appendices, and seventy-six referenced technical documents and reports, as well as information on nearly 1,500 potential legacy CCR surface impoundments and CCRMUs, and offer comments. Additionally, two of the appendices were not available when the *Federal Register* notice was published, and the docket was opened. Stakeholders had even less time to evaluate these technical appendices.

EPA cannot limit the opportunity for public comment on the NODA—which pertains to both legacy CCR surface impoundments and a wide range of CCRMUs—because of the pending judicial deadline in *Statewide Organizing for Community eMpowerment v. EPA*. The consent decree in that case only establishes a May 2024 deadline for EPA to take final action on proposed revisions to the inactive CCR landfill exemption in the CCR Rule (40 C.F.R. § 257.50(d)).[64] Inactive CCR landfills are only one type of unit/area that would be subject to EPA's Proposed Rule. A deadline for only one portion of a broad rulemaking potentially affecting hundreds, if not thousands, of facilities cannot override EPA's obligation to allow the public a meaningful opportunity to provide comments.

Executive Order 12866 directs agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." While CCIG understands that the NODA is not a new proposed rule, the NODA presents significant new and technical information related to a proposed rule and should be afforded a comparable public comment period. CCIG urges EPA to provide additional time to

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[61] NODA, 88 Fed. Reg. at 77,942.
[62] *See* CCIG Comments on Proposed Rule at Section II.
[63] NODA, 88 Fed. Reg. at 72,941 (noting that comments must be submitted by December 11, 2023); EPA, NODA Comment Period Extension Response, December 4, 2023, Docket No. EPA-HQ-OLEM-2020-0107-0915.
[64] Consent Decree at 2, ¶3, *Statewide Organizing for Community eMpowerment v. EPA*, No. 1:22-cv-02562 (May 3, 2023 D.D.C.) ("If EPA has issued a proposed rule in accordance with paragraph 2, on or before May 6, 2024, EPA shall sign for publication in the Federal Register *a notice taking final action regarding EPA's proposed revision of 40 C.F.R. § 257.50(d)*.") (emphasis added).

allow stakeholders, including CCIG members, a meaningful opportunity to provide comments on the new information.[65]

IV. CONCLUSION

CCIG appreciates the opportunity to submit comments on the NODA and strongly urges EPA to reopen the comment period to allow stakeholders adequate time to evaluate the new information announced in the NODA. As discussed above, even with a limited period for review, several errors, inconsistencies, and faulty assumptions have been identified in EPA's potential universe of legacy CCR surface impoundments and CCRMUs and Draft Risk Assessment rendering them incomplete, inaccurate, and unreliable.

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Respectfully submitted,

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[65] While additional time is critical to evaluating the NODA, it does not address the fundamental issue that the definitions of legacy CCR surface impoundment and CCRMU are not final. Facilities cannot fully evaluate whether they have a legacy CCR surface impoundment or CCRMU or whether the information in the Spreadsheet is correct until such definitions are finalized.