

# Proposed Rules

Federal Register

Vol. 85, No. 246

Tuesday, December 22, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 257

[EPA-HQ-OLEM-2020-0463; FRL-10015-45-OLEM]

RIN 2050-AG98

#### Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Reconsideration of Beneficial Use Criteria and Piles; Notification of Data Availability

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule; notice of data availability; request for comment.

**SUMMARY:** The Environmental Protection Agency (EPA) is announcing the availability of new information and data pertaining to the agency's August 14, 2019 proposed rule **Federal Register** publication. EPA is seeking public comment on whether this additional information may inform the Agency's reconsideration of the beneficial use definition and provisions for coal combustion residuals (CCR) accumulations. Moreover, the Agency will accept additional information and data from the public that may further help inform the Agency's reconsideration of these two issues. The Agency is requesting comment only on those two issues. EPA is not reopening any other aspect of the proposal, the CCR regulations, or the underlying support documents that were previously available for comment.

**DATES:** Comments must be received on or before February 22, 2021.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0463, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you

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

**Instructions:** All submissions received must include the Docket ID No. EPA-HQ-OLEM-2020-0463 for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning this document, contact Rita Chow, Office of Resource Conservation and Recovery, Resource Conservation and Sustainability Division, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Mail Code 5306-P, Washington DC 20460; telephone number: (703) 308-6158; email address: [Chow.Rita@epa.gov](mailto:Chow.Rita@epa.gov). For more information on this

action please visit <https://www.epa.gov/coalash>.

## SUPPLEMENTARY INFORMATION:

### I. Public Participation

#### A. Docket

EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2020-0463. EPA has previously established dockets for the April 17, 2015, CCR final rule (80 FR 21302) under Docket ID No. EPA-HQ-RCRA-2009-0640; and for the August 14, 2019, CCR proposed rule (84 FR 40353) under Docket ID No. EPA-HQ-OLEM-2018-0524. All documents in the docket are listed in an index at <https://www.regulations.gov/> under Docket ID No. EPA-HQ-OLEM-2018-0524. Publicly available docket materials are available electronically at <https://www.regulations.gov/> or in hard copy at the EPA Docket Center. The EPA Docket Center hours of operation are 8:30 a.m.–4:30 p.m., Monday through Friday (except Federal Holidays). The telephone number for the EPA Docket Center is (202) 566-1742.

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

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

#### B. Written Comments

Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0463 at <https://www.regulations.gov/> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment

received to its public docket. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>. Comments submitted on any issues other than those specifically identified in this document will be considered “late comments,” and EPA will not respond to them, nor will they be part of the administrative record.

### C. Submitting CBI

Do not submit information that you consider to be CBI electronically through <https://www.regulations.gov/> or email. Send or deliver information identified as CBI to only the following address: ORCR Document Control Officer, Mail Code 5305-P, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; Attn: Docket ID No. EPA-HQ-OLEM-2020-0463.

Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or a CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit a CD-ROM or disk that does not contain CBI, mark the outside of the disk or CD-ROM clearly that it does not contain CBI. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

## II. General Information

### 1. Does this document apply to me?

This document applies to the electric utilities and independent power producers that fall within the North

American Industry Classification System (NAICS) code 221112 that generate CCR for disposal and beneficial use, and it may affect the following entities: Electric utility facilities and independent power producers that fall under the NAICS code 221112; Concrete batch plant manufacturing facilities under NAICS codes 327320, 32733, and 327390; Cement kiln manufacturing facilities under NAICS code 327310; Highway construction projects under NAICS code 237310; and Wallboard manufacturing plants under NAICS code 327420. It also may be of interest to CCR beneficial use stakeholders such as coal ash marketers and the agricultural industry; public interest groups, and citizens potentially impacted by CCR disposal and beneficial use. This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be interested in this document. This list includes the types of entities that EPA is now aware could potentially be interested in this document. Other types of entities could also be interested. To determine whether your entity is potentially impacted by this document, you should carefully examine this document, as well as the applicability criteria found in § 257.50 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

### 2. What is the purpose of this NODA?

With this document, EPA is accepting comment on data and information EPA received during the comment period on the “Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles” (84 FR 40353, Aug., 14, 2019) (hereinafter referred to as “August 2019 proposed rule”) and in follow-up meetings held with stakeholders between the end of May 2020 and August 2020, which may inform the Agency’s reconsideration of the beneficial use definition in 40 CFR.257.53 and the provisions for CCR accumulations. In this document, EPA uses the phrase “CCR accumulations” to capture any and all such accumulations, including those with CCR destined for beneficial use or disposal, and those that constitute disposal (such as a “CCR pile or pile” as defined in 40 CFR 257.53).<sup>1</sup> In making a decision on the

<sup>1</sup> During the development of the 2019 proposed rule, the Agency had not considered the compliance

beneficial use definition and provisions for CCR accumulations, EPA may consider information received as part of the initial comment period for the August 2019 proposed rule, information obtained after the close of the initial comment period in stakeholder meetings and added to the docket, and future information that may be submitted to EPA as a result of this document.

Some of the information included in this document was received during the comment period for the August 2019 proposed rule, such as information about the CCR compliance websites mandated by the rule titled, “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities,” (80 FR 21302) (“2015 CCR rule” or “CCR rule”) being a potential data source. Other information included in this document was obtained after the close of the comment period, such as information from stakeholder meetings EPA held between the end of May 2020 and August 2020. Therefore, the information about the compliance websites mandated by the 2015 CCR rule as a data source and information from stakeholder meetings was not available for public comment during the initial comment period on the August 2019 proposed rule.<sup>2</sup> EPA is placing that information in the docket for this document and making it available for public comment.

EPA is still in the process of evaluating information contained in the docket for this document as potentially relevant to the two issues that the Agency is reconsidering—the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal. Therefore, EPA cannot definitively state whether this information will provide support in the reconsideration of the beneficial use definition or the provisions for CCR accumulations or that the Agency has determined that it is appropriate to rely on this information to inform the Agency’s decision-making process on these issues. In addition, the specific

websites mandated by the 2015 CCR rule as a potential data and information source for EPA’s reconsideration of the provisions for CCR accumulations. However, several of the public comments EPA received on the August 2019 proposed rule referred to data on the utility CCR compliance websites.

<sup>2</sup> During the development of the 2019 proposed rule, the Agency had not considered the compliance websites mandated by the 2015 CCR rule as a potential data and information source for EPA’s reconsideration of the provisions for CCR accumulations. However, several of the public comments EPA received on the August 2019 proposed rule referred to data on the utility CCR compliance websites.

information contained in the docket for this document may not necessarily reflect all potentially relevant information available to support the Agency's reconsideration of the two issues. However, the Agency's intent is to ensure that the public has had a full and complete opportunity to comment on the information contained in the docket for this document, which EPA identified has the potential to be considered by the Agency. Therefore, EPA is, in this document, accepting the public's comment on the validity and suitability of using the information and data contained in the docket for this document. Moreover, through this document the Agency will accept additional data and information from the public that may help inform the reconsideration of the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal.

In sum, by this action, EPA is providing public notice of information the Agency received in response to the initial comment period for the August 2019 proposed rule, providing notice of information that EPA obtained after the close of the initial comment period from stakeholder meetings, and accepting additional data and information that the public has that may help inform the reconsideration of the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal. EPA is not reopening any existing regulations through this document.

### 3. What is the Agency's authority for taking this action?

EPA is publishing this document under the authority of sections 1008(a), 2002(a), 4004, and 4005(a) and (d) of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) and the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016, 42 U.S.C. 6907(a), 6912(a), 6944, and 6945(a) and (d).

### III. Background

On April 17, 2015, in the CCR rule EPA finalized national regulations to regulate the disposal of CCR as solid waste under subtitle D of the Resource Conservation and Recovery Act (RCRA). The CCR rule established national minimum criteria for existing and new CCR landfills, existing and new CCR surface impoundments, and all lateral expansions of these types of CCR units that are codified in Subpart D of Part 257 of Title 40 of the Code of Federal

Regulations (CFR). The 2015 CCR rule also established a beneficial use definition to distinguish legitimate beneficial use from disposal. The beneficial use definition is comprised of four criteria, with criterion 4 establishing a requirement to perform an environmental demonstration to address any potential risks associated with unencapsulated uses of CCR that are in excess of 12,400 tons. See 80 FR 21351–52 (April 15, 2015). The 2015 CCR rule also provided provisions for piles and CCR that is currently being used beneficially off-site. For example, the CCR rule provided a definition of “CCR pile or pile,” as well as provided that CCR that is beneficially used off-site is not a CCR pile. However, the CCR being used off-site must be stored temporarily and comply with all of the criteria in the beneficial use definition. See 80 FR 21356. The rule also provided that a CCR landfill as defined in 40 CFR 257.53, includes CCR piles.

On August 14, 2019, EPA proposed a rule to address two provisions of the 2015 CCR rule remanded back to EPA on August 21, 2018, by the U.S. Court of Appeals for the District of Columbia Circuit: The 12,400-ton threshold in the beneficial use definition for unencapsulated uses; and the requirements for piles located on-site of a utility and off-site but destined for beneficial use. With respect to the mass-based numerical threshold, EPA proposed to eliminate the 12,400-ton numerical threshold and replace it with specific location-based criteria for CCR disposal units. In addition, EPA accepted comment on whether to retain a mass-based numerical threshold, and if so, what the appropriate threshold should be; whether a combination of the mass-based threshold and location-based criteria would be an appropriate trigger to require an environmental demonstration for unencapsulated uses; and whether the environmental demonstration required under the beneficial use definition's criterion 4 should be conducted for all unencapsulated CCR uses. For piles, EPA proposed a single approach to consistently address the potential environmental and human health issues associated with piles, regardless of the location of the pile and whether the CCR is destined for disposal or beneficial use. For more information on the history of EPA's CCR beneficial use definition and requirements for piles on-site and off-site, please refer to the August 2019 proposed rule and 2015 CCR rule.

Responding to concerns raised about the proposed rule during the public comment period by industry,

environmental groups, private citizens and states, EPA is continuing to reconsider these issues by evaluating existing data and accepting additional information.

### IV. What information has EPA received to date that is potentially relevant to reconsidering the definition of beneficial use and its provisions for CCR accumulations destined for beneficial use or disposal?

EPA is considering whether to use the following additional information sources in support of the reconsideration of the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal: Select 2019 proposed rule data and comments and information obtained in stakeholder meetings. The information that EPA is noticing for comment can be found in EPA's annotated bibliography titled, “U.S. Environmental Protection Agency Beneficial Use and Accumulations of Coal Combustion Residuals Rulemaking, Notice of Data Availability: Annotated Bibliography of Information Being Noticed,” which is in the docket supporting this document, EPA–HQ–OLEM–2020–0463. Some documents listed or referenced in the annotated bibliography are also in the docket, while others can be accessed from websites at internet addresses provided in the bibliography.

#### A. 2019 Proposed Rule Data and Comments Received

Several of the public comments EPA received on the August 2019 proposed rule referred to data on the utility CCR compliance websites. Other comments referred to a court case related to a CCR accumulation at the Midwest Generation Utility, LLC (Powerton Station in Tazewell County, Illinois) as well as a case study about CCR accumulations on-site at Duke Energy in Noblesville, Indiana.

#### 1. Comments on Using Publicly Accessible Data From the Utility CCR Compliance Websites on the Management of CCR Accumulations and Potential Environmental Releases

The Agency has been and continues to be interested in obtaining information about the management of CCR accumulations and data about environmental releases from CCR accumulations. The management of CCR accumulations includes any practices which provide for the staging and storage of CCR destined for beneficial use or disposal, onsite or offsite, including the accumulation size, duration and recurrence; designs related

to placement and mounding of CCR; and practices related to dust control or minimization of releases to soil, groundwater and surface water. Data about environmental releases from CCR accumulations of different size, duration, recurrence and practices to control releases to soil, groundwater and surface water may aid the Agency in identifying the measures sufficient to protect human health and the environment. EPA intends to review and use the information on the utility compliance websites to obtain data on the management of CCR accumulations and instances of environmental releases from the CCR accumulations.

EPA has reviewed the documents posted on utility CCR compliance websites linked from the Agency's CCR compliance web page (<https://www.epa.gov/coalash/list-publicly-accessible-internet-sites-hosting-compliance-data-and-information-required>) to identify electric utilities and independent power producers that manage CCR accumulations. EPA's review focused on the following documents:

- Fugitive dust control plans;
- Annual CCR landfill inspection reports;
- CCR landfill run-on/run-off control system reports; and
- Annual groundwater monitoring and corrective action reports (sometimes power plant-wide, sometimes specific to individual CCR units at the facility).

Based on that review, EPA identified the presence of CCR accumulations at several power plants.

EPA intends to confirm the presence of CCR accumulations for staging or storing CCR on power plant sites identified on the CCR utility websites, by contacting the state environmental agencies that correspond to facility locations. Furthermore, EPA expects to review the utility website documents for information on the characteristics of identified CCR accumulations, the protective measures taken to prevent or mitigate releases, and the data about environmental releases attributable to these CCR accumulations. More specifically, the Agency intends to review available information on the characteristics of these accumulations, such as size, duration, recurrence and design; protective measures, such as dust suppression, compaction, use of liners and berms; and incidences of environmental releases. The Agency intends to use such information to analyze the incidences of environmental releases from the CCR accumulations as a function of the accumulation characteristics and protective measures used, to inform the Agency's next steps

on the remanded issues. EPA expects this analysis may indicate the conditions likely to cause environmental releases and may aid the Agency in identifying the measures/controls/practices sufficient to protect human health and the environment.

EPA is taking comment on whether the utility compliance websites should be used as a data source for information and data pertaining to the management of CCR accumulations. EPA is also seeking comment on whether environmental release data attributable to CCR accumulations at utility sites can be used to estimate environmental releases from CCR accumulations at intermediary (e.g., marketer and retailer) and beneficial use sites. EPA is also requesting approaches (e.g., surveys) the public would consider appropriate to understand environmental releases from intermediary and beneficial use sites if the public finds the data from the utility compliance websites is not applicable. EPA is also seeking comment on the Agency's approach to use the information on the utility compliance websites to identify management of CCR accumulation practices that could be part of CCR regulations to prevent a reasonable probability of adverse effects on human health and the environment. Finally, EPA is requesting comment on other approaches (e.g., surveys) to collect data on characteristics of CCR accumulations that are not publicly available.

## 2. Case Studies and Court Case Related to CCR Accumulations and Fill Projects

A few comments on the August 2019 proposed rule referenced several fill projects and cases of environmental releases caused by unencapsulated CCR.

In response to the August 2019 proposal to change the beneficial use definition, the Hoosier Environmental Council (Hoosier) referenced several fill projects that did not incorporate protections for groundwater and surface water. Hoosier provided these examples to illustrate that lack of oversight and regulation of CCR beneficial use can result in CCR disposal being incorrectly characterized as beneficial use, leading to environmental contamination. Among those examples, Hoosier included a possible project that, while not executed, could have resulted in environmental issues had it gone unchallenged by county officials and nearby residents, because of its proposed location. Another example that Hoosier referenced relates to the extensive use of CCR for landscaping and road embankments throughout the town of Pines, Indiana.

Furthermore, to argue that requirements are needed to prevent environmental releases from CCR accumulations, Hoosier provided an example case study of unencapsulated CCR at a Duke Energy site in Noblesville, Indiana. According to Hoosier, the presence of unencapsulated CCR in the same location results in groundwater contamination and impacts on private water wells regardless of the distance to the groundwater table. Specifically, the presence of unencapsulated CCR from the start of the facility's operation in the 1950s resulted in impacts despite the groundwater table being more than 15 feet below the surface.

Similarly, Earthjustice provided information to illustrate that even when present for a short period of time, unencapsulated CCR has the potential to result in environmental releases. Earthjustice referenced a court case involving coal ash cinders deposited directly upon the land<sup>3</sup> at the Midwest Generation Utility, LLC (Powerton Station in Tazewell County) identified in a report<sup>4</sup> prepared for Earthjustice by Mark Hutson at Geo-Hydro Inc. Specifically, the Illinois Pollution Control Board found that the coal ash cinders that were deposited directly upon the land and that were present for two to three months, contributed to exceedances of state groundwater standards.

## B. Stakeholder Meetings

From the end of May 2020 to August 2020, EPA held ten stakeholder meetings with the trade associations and their members, encompassing utilities, agricultural, wallboard, cement and concrete beneficial uses; CCR marketers; state environmental and transportation agencies; environmental organizations and private citizens. EPA and stakeholders discussed technical information and data on beneficial use applications and the specific practices facilities use to manage their CCR accumulations (e.g., the specific practices facilities use to control CCR releases). These discussions were designed to inform the Agency's reconsideration of the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal. EPA identified topics of interest which included:

<sup>3</sup> See document, *Illinois Pollution Control Board Court Order for Midwest Generation Utility*, dated June 20, 2019, in the docket for this Notice.

<sup>4</sup> See document, *Responses to EPA Solicitation for Comments Hutson Expert Report Phase II dated 10/14/2019*, at <https://beta.regulations.gov/document/EPA-HQ-OLEM-2019-0173-0197>.

- Various CCR beneficial use applications,
- CCR generation specifically for beneficial use (e.g., wallboard-grade flue-gas desulfurization (FGD) gypsum) and any associated specifications,
- CCR accumulation management throughout the CCR distribution system,
- Applicable state beneficial use and storage provisions and regulations of CCR, and
- Environmental and risk data, including documented environmental and public health impacts.

#### V. What information is EPA seeking?

As explained, EPA is today noticing the data and information received from the 2019 proposed rule and the stakeholder discussions held from the end of May 2020 to August 2020. The Agency will accept additional data and information that may help inform the reconsideration of the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal.

Specifically, EPA is today seeking information about how CCR is beneficially used, including any use of particular measures to control environmental releases that can help the Agency distinguish among the different types of beneficial use applications (e.g., structural fill, flowable fill, waste stabilization and solidification, agricultural applications, snow and ice control, soil stabilization, fly ash used as a substitute for portland cement in concrete, flue-gas desulfurization (FGD) gypsum in wallboard manufacture). EPA is also seeking information on the management of CCR accumulations at each point in its distribution system, from its generation at the utility to its destination, including management at CCR retailers, distributors/marketers, beneficial use facilities/sites, and landfills. EPA is seeking information about the use of controls to prevent and minimize CCR releases from CCR accumulations and environmental data for CCR accumulations.

As part of this request, EPA is specifically interested in site-specific information that pertains to the practices used for the handling of wallboard-grade FGD gypsum. As explained in the 2015 rule preamble, some FGD gypsum has never been discarded and is treated as a valuable product throughout its entire lifecycle; when managed in this way, it is not a waste that would be regulated under part 257. See 80 FR 21348. EPA is interested in obtaining information on: The investment in special additional systems to generate wallboard-grade FGD gypsum; the investment in co-

location of wallboard manufacturing plants with utilities; the inventorying and tracking procedures for the transfer and use of wallboard-grade FGD gypsum in the intended manufacturing process; the handling of CCR accumulations to prevent the loss of valuable material; other ways of handling the wallboard-grade FGD gypsum as a product rather than something that is intended to be discarded.

Lastly, EPA is seeking specific information on federal, state and local program provisions and regulations related to CCR beneficial use applications and provisions for CCR accumulations, such as example state permits or other beneficial use approvals. EPA is particularly interested in hearing from regulated entities that comply with the different regulations and can therefore, provide the full picture of requirements with which they comply.

#### A. Beneficial Uses of CCR

EPA is reevaluating CCR beneficial uses that may be considered encapsulated beneficial use. In the 2015 rule preamble, the Agency defined encapsulated beneficial use as applications that bind the CCR into a solid matrix that minimizes mobilization into the surrounding environment. Examples of encapsulated uses include replacement for, or raw material used in production of, cementitious components in concrete; and raw material in wallboard production. See 80 FR at 21328. In addition, the Agency provided examples of unencapsulated uses to include: Flowable fill; structural fill; waste stabilization/solidification; and use in agriculture as a soil amendment. See 80 FR at 21353. The Agency is considering revising the designation of flowable fill and waste stabilization from unencapsulated to encapsulated uses and therefore, redefining the scope of beneficial uses that are subject to compliance with criterion 4 of the beneficial use definition which applies to unencapsulated uses. EPA is further considering whether criterion 4 should apply only to a subset of remaining unencapsulated uses. For example, as appropriate, certain uses could potentially be excluded if there are sufficient regulations at the federal, state, and local level that provide for engineering controls of the beneficial use application. Such beneficial uses may include agricultural applications. Other options the Agency is considering include developing guidance such as a best practice guide for using CCR in fill, structural fill, or other unencapsulated uses. To help inform EPA's next steps,

the Agency is seeking comments, data and information on the following:

- What are the different types of CCR?
- What are the environmental and economic tradeoffs among the CCR beneficial use and its alternatives, e.g., disposal?
- What are the typical beneficial use applications for each type of CCR?
- How much CCR is used per typical beneficial use application?
- What are the chemical and physical characteristics of the CCR that make it suitable for beneficial use application?
- What is the virgin material the CCR is replacing?
- What are the product specifications and design standards the CCR must meet?
- What are examples of measures used to control releases for CCR destined for beneficial use?
- For structural fill projects, what are the site and location characteristics and the design and construction requirements for CCR used in such projects?
- What state and local policies/regulations pertain to specific unencapsulated uses of CCR for beneficial use?
- How do state and local policies/regulations distinguish beneficial use from disposal?
- What data, documented damage cases, or other information pertaining to beneficial use applications have become available since 2010?
- What are the environmental and economic tradeoffs among CCR beneficial use applications, e.g., agricultural use vs. roadway use?

#### B. CCR Distribution System

EPA is seeking information on the generation and management of CCR at each point in its distribution system, from the utility, to any intermediaries or final destinations, such as CCR retailers, distributors/marketers, beneficial use facilities, sites, or landfills. EPA is considering developing a best practice guide on the appropriate environmental controls that should be utilized for various storage and staging situations. EPA is also specifically interested in site-specific information and data demonstrating how utilities and beneficial use facilities manage wallboard-grade FGD gypsum as a valuable product. The Agency is considering whether to incorporate into the regulations a specific exemption for wallboard-grade FGD gypsum that has not been discarded and is continually managed as a valuable product from the point of generation at the utility to the manufacturing of the wallboard. EPA is also considering whether to develop

additional guidance on the specific indicators to demonstrate when wallboard-grade FGD gypsum is not discarded and therefore not subject to regulation under the 2015 rule.

To help inform the Agency's reconsideration of the beneficial use definition and provisions for CCR accumulations, EPA is seeking the following information pertaining to the generation and *on-site management* of CCR accumulations at the electric utility:

- How is the CCR generated and processed if it is destined for beneficial use?
- What are the specifications to which the CCR is processed?
- What type of testing is performed on the CCR (*e.g.*, to meet the required specifications) and which entity performs the testing?
- What material safety data sheets are available for CCR destined for beneficial use?
- What are the design and engineering standards for CCR accumulations, *e.g.*, shape, slope, circumference, height?
- What controls are utilized to manage environmental releases from on-site CCR accumulations?
- How is CCR destined for beneficial use staged compared to CCR destined for disposal?
- How is CCR destined for beneficial use accumulated, *e.g.*, continuously replenished; first spent and then resupplied; etc.?
- How long does a CCR accumulation stay on the utility property before it is disposed of or transferred for beneficial use?
- What is the average size of a CCR accumulation before it is disposed of or transferred for beneficial use?
- Which entity is responsible for the transfer of CCR, either for beneficial use or disposal?
- What additional environmental monitoring data are available for on-site CCR accumulations?
- If in the past there have been on-site environmental releases that exceeded state limits, what corrective actions were implemented?

The Agency is also interested in information pertaining to the *off-site management* of CCR, such as at CCR distribution/marketer centers, beneficial use construction projects, agricultural retail facilities; wallboard, cement, and concrete manufacturing sites; and other beneficial use sites. Specifically, the Agency is seeking information on:

- What additional testing is performed by intermediaries or beneficial users on the CCR to ensure it meets the required specifications?

- What happens to deliveries rejected by beneficial users and what entity is responsible for them?

- What are the types of units used for the staging of CCR by intermediaries and beneficial users?

- What are the design and engineering standards for CCR accumulations at intermediaries and beneficial users, *e.g.*, shape, slope, circumference, height?

- What controls are utilized by intermediaries and beneficial users to manage environmental releases from CCR accumulations? How long does the CCR accumulation stay at the intermediaries before it is transferred for beneficial use?

- How is CCR accumulated at beneficial use sites, *e.g.*, continuously replenished; first spent and then resupplied; etc.?

- How long does the CCR accumulation stay at the beneficial use site before it gets beneficially used?

- What state and local policies/regulations pertain to one-time short-term storage at intermediaries and beneficial use sites?

- What state and local policies/regulations pertain to indefinite recurring storage at intermediaries and beneficial use sites?

- What environmental monitoring data are available for CCR accumulations at intermediaries and beneficial use sites?

- If in the past there have been environmental releases that exceeded state limits at intermediaries and beneficial use sites, what corrective actions were implemented?

- What material safety data sheets are available for CCR being used in the manufacturing process and the products incorporating it?

- What are the inventorying and tracking procedures for the transfer and use of CCR in the intended manufacturing process or for beneficial use?

- What additional business or financial information is available to show that the CCR is a valuable commodity for the intended manufacturing process or beneficial use?

### C. Applicable and Relevant Federal, State, and Local Programs and Provisions

The Agency is reviewing federal, state and local requirements and provisions for CCR beneficial use applications and CCR accumulations to consider whether those standards could inform the Agency's reconsideration of the beneficial use definition and provisions for CCR accumulations. The Agency is

also considering whether, and which, particular beneficial use applications are sufficiently regulated at the federal, state or local levels (*e.g.*, by the United States Department of Agriculture or state departments of transportation), such that additional federal regulation under RCRA would not be required for these applications. Furthermore, the Agency is seeking detailed information on whether the management of CCR accumulations is uniformly and sufficiently regulated at all points in the CCR distribution system, by existing federal, state and local regulations (*e.g.*, Clean Air Act, Clean Water Act, etc.), such that additional provisions under RCRA would not be required.

Specifically, the Agency is seeking detailed and specific information about facilities and sites to which existing regulations apply (*e.g.*, cement and concrete manufacturing plants, wallboard manufacturing plants, agricultural retail facilities and farms, or utilities). The Agency is also seeking specific examples of these regulations and requirements (*e.g.*, leachate controls, surface water runoff sampling, area groundwater monitoring in the form of permits, beneficial use determinations, or other documentation of compliance).

### VI. What are the next steps EPA will take?

EPA intends to carefully review all the comments and information received in response to this document specific to the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal. EPA may also consider any previously collected and assembled information pertaining to the two specific issues addressed in this NODA. In determining how to proceed with reconsidering the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal, EPA may consider any relevant information and data available to the Agency. Future action with respect to the Agency's reconsideration of the 2019 proposed rule on the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal will be made through notice-and-comment rulemaking.

### List of Subjects in 40 CFR Part 257

Environmental protection, Coal combustion products, Coal combustion residuals, Coal combustion waste,

Beneficial use, Disposal, Hazardous waste, Landfill, Surface impoundment.

**Peter Wright,**

*Assistant Administrator, Office of Land and Emergency Management.*

[FR Doc. 2020-27525 Filed 12-21-20; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Parts 270 and 271

[Docket No. FRA-2015-0122, Notice No. 1]

RIN 2130-AC54

#### Fatigue Risk Management Programs for Certain Passenger and Freight Railroads

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** Pursuant to the Rail Safety Improvement Act of 2008, FRA proposes to issue regulations requiring certain railroads to develop and implement a Fatigue Risk Management Program, as one component of the railroads' larger railroad safety risk reduction programs.

**DATES:** Written comments must be received by February 22, 2021. Comments received after that date will be considered to the extent practicable without incurring additional expense or delay.

**ADDRESSES:** Comments related to Docket No. FRA-2015-0122 may be submitted by going to <http://www.regulations.gov> and follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130-AC54). Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information on any submitted comments or materials.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Miriam Kloeppe, Staff Director, Audit Management Division, at 202-493-6224

or [miriam.kloeppe@dot.gov](mailto:miriam.kloeppe@dot.gov); Amanda K. Emo, Ph.D., Fatigue Program Manager, at 202-281-0695 or [amanda.emo@dot.gov](mailto:amanda.emo@dot.gov); or Colleen A. Brennan, Deputy Assistant Chief Counsel, at 202-493-6028 or [colleen.brennan@dot.gov](mailto:colleen.brennan@dot.gov).

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#### I. Introduction and Executive Summary

##### A. Purpose of Rulemaking

This proposed rule is part of FRA's efforts to improve rail safety continually and to satisfy the statutory mandate of Section 103 of the Rail Safety Improvement Act of 2008 (RSIA).<sup>1</sup> That section, codified at 49 U.S.C. 20156, requires Class I railroads; railroad carriers with inadequate safety performance (ISP), as determined by the Secretary; and railroad carriers that provide intercity rail passenger or

commuter rail passenger transportation to develop and implement a safety risk reduction program to improve the safety of their operations. The section further requires a railroad's safety risk reduction program to include a "fatigue management plan" meeting certain requirements.

This proposed rule, if finalized, would fulfill RSIA's mandate for railroads to include fatigue management plans in their safety risk reduction programs by requiring railroads to develop and implement Fatigue Risk Management Programs (FRMPs).<sup>2</sup> As proposed, a railroad would implement its FRMP through an FRMP plan.

Under this proposed rule, consistent with the mandate of Section 20156, an FRMP is a comprehensive, system-oriented approach to safety in which a railroad determines its fatigue risk by identifying and analyzing applicable hazards and takes action to mitigate, if not eliminate, that fatigue risk.<sup>3</sup> As proposed, a railroad would be required to prepare a written FRMP plan and submit it to FRA for review and approval. A railroad's written FRMP plan would become part of its existing safety risk reduction program plan. A railroad would also be required to implement its FRA-approved FRMP plan, conduct an internal annual assessment of its FRMP, and consistent with Section 20156's mandate, update its FRMP plan periodically. As part of a railroad safety risk reduction program, a railroad's FRMP would also be subject to assessments by FRA.

##### B. Summary of Costs and Benefits

FRA estimated the costs and benefits of this proposed rule using discount rates of 3 and 7 percent over a ten-year time horizon. FRA presents monetized costs and benefits where possible and discusses those non-quantifiable elements qualitatively where data is

<sup>2</sup> Section 20156 uses the term "fatigue management plans" so sections of this preamble discussing the statutory requirements likewise use this term, as do the sections discussing the Railroad Safety Advisory Committee task statement on fatigue and Fatigue Working Group. However, because section 20156 requires fatigue to be addressed as part of a railroad's safety risk reduction program, for consistency with the terminology used in FRA's final rules governing those programs (81 FR 53849 (Aug. 12, 2016) and 85 FR 9262 (Feb. 18, 2020)), elsewhere throughout this proposed rule, FRA uses the terms "fatigue risk management program" (FRMP) and "FRMP plan."

<sup>3</sup> Risk is defined as a combination of the probability of an adverse event occurring and the potential severity of that adverse event. Fatigue increases the likelihood of certain negative events occurring. Therefore, reducing fatigue helps reduce fatigue-related risks. See United States Department of Transportation, *Partnering in Safety: Managing Fatigue: A Significant Problem Affecting Safety, Security, and Productivity*, 1999.

<sup>1</sup> Section 103, Public Law 110-432, Division A, 122 Stat. 4848 *et seq.*