Need for Correction to Preamble Statement in CCR Remand Proposal Regarding the Beneficial Use of CCR in Units Undergoing Mandatory Closure

- EPA made an erroneous statement in the preamble to the CCR remand proposal (Proposal) regarding the beneficial use of CCR that requires correction. Under the rule, the use of CCR that meets the beneficial use criteria is excluded from regulation.[1]

- Notwithstanding this exemption, in the Proposal, EPA interpreted the rule as not allowing beneficial use of CCR in units subject to forced closure under § 257.101. EPA's rationale was that § 257.101 prohibits further "placement" of CCR six months after a unit has triggered forced closure and that the term "placement" does not distinguish between the "disposal" of CCR and the "beneficial use" of CCR.[2] Under this reading, an owner/operator is unable to use CCR during the closure process, even if such use meets the rule's beneficial use conditions.

- EPA's broad reading of the word "placement" is at odds with RCRA statutory text and the Agency's historical use of that term. Under RCRA, the term "disposal" *encompasses* the term "placing."[3] Thus, while disposal can be (and is) broader than "placement" of waste materials, placement can never be broader than the term "disposal." Placement *is* disposal. Since the statute was enacted, EPA has always (and correctly) viewed placement as disposal.[4]

- EPA's position is also contrary to the plain language of the rule itself. As explained above, the current rule exempts *all* beneficial uses from *all* provisions of the CCR rule, irrespective of whether such uses can be viewed as "placement." Specifically, the rule provides that "this subpart [*i.e.*, the CCR rule] does *not* apply to practices that meet the definition of a beneficial use of CCR."[5] Thus, if the use of CCR meets all applicable beneficial use conditions, the prohibition on "placement" of CCR found in § 257.101 "does not apply" to that use. EPA's interpretation reads an exception into this blanket exclusion—namely, that CCR cannot be beneficially used for units undergoing forced closure—that simply does not exist.

- This exemption makes sense. EPA has specifically found that any use meeting the conditions of beneficial use would not pose a risk to human health or the environment.[6] This finding was not based on where or how the CCR is being used. Where EPA found a specific use of CCR to pose a risk to human health and the environment—placement in sand and gravel pits and quarries—it explicitly precluded such use from qualifying as a

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[1] 40 C.F.R. § 257.50(g)
[2] 83 Fed. Reg. at 11605.
[3] 42 U.S.C. § 6903(3) ("the term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or *placing* of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters") (emphasis added).
[4] *See, e.g.*, "National Oil and Hazardous Substances Pollution Contingency Plan," 55 Fed. Reg. 8666, 8759-60 (Mar. 8, 1990).
[5] 40 C.F.R. § 257.50(g) (emphasis added).
[6] 80 Fed. Reg. at 21329-30, 21348-49.

beneficial use under any circumstances.[7] But no other uses are de facto precluded from meeting the beneficial use conditions. In fact, EPA recognized that waste stabilization—which necessarily occurs in a waste disposal unit such as a CCR surface impoundment—can be a valid beneficial use so long as the conditions are met.[8]

- The preamble discussion also wrongly suggests that the use of CCR in units undergoing forced closure may, in certain circumstances, pose an unreasonable risk to human health and the environment because "placement of CCR for [waste stabilization or structural fill] would involve the placement of substantial volumes of CCR into a leaking or otherwise deficient unit, and EPA lacks information that such further placement would be protective."[9] But this is precisely what the rule's beneficial use criteria are designed to protect against. If it can be demonstrated that the CCR (1) provides a functional benefit; (2) substitutes for the use of a virgin material; (3) meets relevant product specifications or is not used in excess quantities; and (4) will not result in environmental releases greater than those from analogous products or relevant regulatory and health-based benchmarks, then EPA has already determined that the use is protective of human health and the environment.

- While it will vary from site to site whether the use of CCR to close a unit subject to forced closure meets the beneficial use criteria, nothing in the rule precludes a facility from attempting to make this demonstration. If successfully made, the beneficial use of CCR in these circumstances is protective of human health and the environment.

- Given the plain language of the rule exempting all beneficial uses from all provision of the current rule—and the fact that the current beneficial use conditions ensure adequate protection of human health and the environment—EPA should make clear that CCR can be used for purposes of closing a unit undergoing forced closure, without limitation, if the use meets the beneficial use conditions.

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[7] *See id.* at 21354.
[8] *Id.* at 21353.
[9] 83 Fed. Reg. at 11605-06.