



April 30, 2018

VIA ELECTRONIC SUBMISSION

Environmental Protection Agency

Attn: Office of Resource Conservation and Recovery

Re: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One), 83 Fed. Reg. 11,584 (Mar. 15, 2018); RIN 2050-AG88

The Institute for Policy Integrity (Policy Integrity) at New York University School of Law¹ respectfully submits the following comments to the United States Environmental Protection Agency (EPA) regarding its proposal to amend the regulations for the disposal of coal combustion residuals in landfills and surface impoundments (Proposed Rule).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

We write to offer the following comments:

- EPA fails to provide an adequate justification for ignoring regulatory benefits that will be forgone due to the Proposed Rule;
- EPA must assess the Proposed Rule's effect on all benefits identified in the regulatory impact analysis for the 2015 coal combustion residuals rule ("2015 Rule");
- EPA should clarify who will have the authority to determine whether a non-groundwater release may be addressed with modified corrective action procedures;
- EPA fails to provide an adequate justification for its proposed alternative closure requirements.

I. EPA's Justifications for Ignoring Forgone Benefits Are Flawed

The 2015 Rule established nationally applicable minimum criteria for the safe disposal of coal combustion residuals (CCR), which EPA projected would result in substantial health

¹ This document does not purport to present New York University School of Law's views, if any.

² Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One); Proposed Rule, 83 Fed. Reg. 11,584 (Mar. 15, 2018) (to be codified at 40 C.F.R. pt. 257) [hereinafter "Proposed Rule"].

and environmental benefits.³ EPA now proposes to weaken the requirements of the 2015 Rule in a variety of ways but insists that the Proposed Rule “will not change risks to human health and the environment” and thus will not result in any forgone benefits.⁴ None of the agency’s justifications for this position are persuasive.

First, EPA argues that provisions allowing states to set “alternative performance standards” under the Water Infrastructure for Improvements to the Nation (“WIIN”) Act will not affect benefits, because the WIIN Act requires state permit programs to be at least as protective as federal regulations.⁵ But this reasoning ignores the fact that the Proposed Rule weakens federal CCR regulations and thus reduces the benchmark for state programs as well. For example, the Proposed Rule allows for the waiver of groundwater monitoring requirements that are currently unwaivable.⁶ By lowering the bar for both federal and state CCR regulations, the Proposed Rule can reasonably be expected to reduce the total benefits of those regulations.

The flaws of EPA’s first justification are compounded in the second: the agency argues that the Proposed Rule will not reduce the projected benefits of the 2015 Rule because the WIIN Act requires EPA to periodically review state programs to ensure that “maintain an appropriate level of stringency.”⁷ Again, EPA overlooks the fact that the Proposed Rule does not merely facilitate the delegation of enforcement authority to states, but also reduces the stringency of CCR regulations. Arguing that the Proposed Rule will not increase health and environmental risks because EPA will still review the sufficiency of state programs is akin to arguing that raising blood alcohol level limits for drivers will not increase traffic fatalities because police will still pull drivers over to perform field sobriety tests. Even if they are subjected to a sobriety test, some drivers who were previously deemed too intoxicated to operate a vehicle will be permitted to do so under the new, laxer standard. Similarly, even if EPA reviews state programs to ensure that they are “appropriately” stringent, the fact remains that the Proposed Rule lowers the bar for appropriateness by permitting conduct that would have been deemed impermissible under the 2015 Rule.

³ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302, 21,303, 21,459–60 (Apr. 17, 2015) [hereinafter “2015 Rule”].

⁴ EPA, Regulatory Impact Analysis: EPA’s 2018 RCRA Proposed Rule: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One), p. 2-5 (2018) [hereinafter “2018 RIA”].

⁵ *Id.*

⁶ See Proposed Rule, 83 Fed. Reg. at 11,601–03.

⁷ 2018 RIA at 2–5.

Thus, the Proposed Rule can reasonably be expected to reduce the projected benefits of the 2015 Rule.⁸

EPA's third justification for assuming that the Proposed Rule will result in no forgone regulatory benefits is that the Proposed Rule still requires plumes from leaking impoundments to be identified and remediated.⁹ But the Proposed Rule weakens monitoring obligations under the 2015 Rule, and EPA cannot reasonably assume that reducing the frequency with which firms are required to look for groundwater contamination will have no effect on the rate at which groundwater contamination is detected.¹⁰ Furthermore, even if the Proposed Rule did not reduce leak detection, the proposed changes to corrective action procedures might nevertheless reduce the health and environmental benefits achieved by leak remediation efforts.¹¹

Finally, even if the Proposed Rule did not directly increase health and environmental risks from disposal facilities, it might still result in forgone regulatory benefits. In the RIA for the 2015 Rule, EPA predicted that the 2015 Rule would induce increased beneficial use of CCR simply by making disposal of CCR in a landfill more expensive.¹² Substituting CCR for virgin materials in industrial processes like concrete or wallboard production was expected to yield substantial environmental benefits and offset some of the cost of CCR disposal.¹³

By reducing compliance costs associated with the 2015 Rule, the Proposed Rule can be expected to reduce the economic appeal of beneficial use of CCR. Accordingly, even if EPA could reasonably conclude that the Proposed Rule will have no direct effect on health and environmental risks from disposal facilities, the agency would still need to estimate forgone benefits associated with reduced beneficial use of CCR.

⁸ It is also worth noting that, under the WIIN Act, EPA is required to review state programs only every 12 years, or not later than 3 years after a revision of CCR regulations. 42 U.S.C. § 6945(d)(1)(D)(i). Thus, even if EPA review of state programs *could* mitigate the loss of regulatory benefits, this mitigation might be delayed by over a decade, and benefits forgone in the interim would still need to be considered by EPA in the RIA for the Proposed Rule.

⁹ 2018 RIA at 2-5.

¹⁰ The 2015 Rule's monitoring requirements led to a substantial increase in groundwater contamination detection. Natasha Geiling, *Coal ash is polluting groundwater across the country, according to new utility data*, Think Progress (Mar. 5, 2018), <https://thinkprogress.org/coal-ash-polluting-groundwater-utility-data-b60093030a0a>.

¹¹ See Proposed Rule, 83 Fed. Reg. at 11,592-94, 11,600-01.

¹² EPA, Regulatory Impact Analysis: EPA's 2015 RCRA Final Rule Regulating Coal Combustion Residual (CCR) Landfills and Surface Impoundments at Coal-Fired Electric Utility Power Plants, p. 5-3 ex.5-A (2014) (explaining that "[i]ncreased cost of CCR disposal provides an incentive for power plants to find alternative ways of managing their CCR, including beneficial use") [hereinafter "2015 RIA"].

¹³ *Id.* at 5-25 to 5-31.

II. EPA Must Assess the Proposed Rule's Effect on All Benefits Identified in the RIA for the 2015 Rule

In the absence of a compelling justification for ignoring forgone benefits, EPA must estimate the Proposed Rule's effect on all benefits, quantified and unquantified, that were expected to result from the 2015 Rule. The RIA for the 2015 Rule quantified the following benefits:

- reduced CCR impoundment structural failure releases;
- reduced CCR landfill & impoundment groundwater contamination;
- induced increase in future annual CCR beneficial uses;
- reduced incidence of cancer from CCR exposure;
- avoided IQ losses from mercury in CCR;
- avoided IQ losses from lead in CCR;
- reduced need for specialized education;
- non-market surface water quality benefits.¹⁴

Further, the RIA for the 2015 Rule identified an additional set of benefits that could not be quantified at that time due to lack of data:

- financial market benefits;
- reduced community dread of CCR impoundment structural failure releases;
- reduced health and property nuisance impacts from CCR fugitive dust;
- cancer and non-cancer human health benefits from reduced CCR contamination of fish consumed by recreational anglers and subsistence fisher households in surface waters near power plants (additional to monetized avoided health effects);
- cancer and non-cancer human health benefits from reduced CCR exposure by other recreational users of surface waters near power plants (additional to monetized avoided health effects);
- avoided CCR contamination of sediments in surface waters near power plants;
- water quality benefits from avoided CCR contamination treatment costs for use of surface waters for drinking and irrigation water supply;
- commercial fisheries benefit in surface waters near power plants discount rate present value;
- increased participation in water-based recreation near power plants;
- avoided fish impingement and entrainment mortality from power plant water;
- intakes (induced conversion to dry CCR handling reduces future water demand for CCR sluicing);

¹⁴ 2015 Rule, 80 Fed. Reg. at 21,459.

- increased property values surrounding electric utility plants (from closure capping and re-vegetation of CCR surface impoundments).¹⁵

As explained in the previous section, the Proposed Rule is likely to reduce the magnitude of at least some of these beneficial effects. Accordingly, for previously quantified benefits, EPA must quantify reductions anticipated to result from the Proposed Rule. For previously unquantified benefits, EPA should consider whether sufficient data now exists to quantify these benefits and the Proposed Rule's effect on them. For benefits that remain unsusceptible to quantification, EPA must provide a qualitative discussion of the Proposed Rule's effects, as required by Executive 12,866 and the Office of Management and Budget's (OMB) Circular A-4.¹⁶

III. EPA Should Clarify Who Will Have the Authority to Determine Whether a Non-Groundwater Release May Be Addressed with Modified Corrective Action Procedures

EPA proposes adding 40 CFR § 257.99, which will provide modified corrective action procedures for non-groundwater releases that can be completely remedied within 180 days.¹⁷ But neither the preamble to the Proposed Rule nor the language of the Proposed Rule explains who will have the authority to determine whether a non-groundwater release can be remedied within this timeframe. EPA should clarify that only a qualified professional engineer can make such a determination.

The preamble states that "EPA anticipates that these [non-groundwater] releases will typically be detected by qualified personnel or qualified professional engineers during weekly or annual inspections."¹⁸ But this language does not clearly state that a determination that corrective action can be completed in 180 days may *only* be made by such qualified personnel or a qualified professional engineer. Furthermore, the proposed § 257.99(a) dictates that "[i]f the owner or operator determines, at any time, that the release will not be completely remediated within [the] 180-day timeframe, the owner or operator must comply" with the full corrective action procedures.¹⁹ This language may be read to indicate that the owner or operator, rather than qualified personnel or a qualified

¹⁵ *Id.* at 21,460.

¹⁶ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 § 1(a) (Oct. 4, 1993) ("In deciding whether and how to regulate, agencies should assess all costs and benefits . . . Costs and benefits shall be understood to include . . . qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."); Office of Mgmt. & Budget, Circular A-4, p. 27 (Sept. 17, 2003) ("You should carry out a careful evaluation of non-quantified benefits and costs.") [hereinafter "Circular A-4"].

¹⁷ See Proposed Rule, 83 Fed. Reg. 11,592–94, 11,614.

¹⁸ *Id.* at 11,593.

¹⁹ See *id.* at 11,614.

professional engineer, is responsible for making the initial determination that the release can be remedied within 180 days.

EPA should clarify this point in order to reduce confusion and allow for the smooth implementation of any regulatory changes. Additionally, EPA should not give owners and operators the power to make the initial determination, as such a system would create the opportunity for abuse. The existing corrective action procedures ensure transparency and public participation in both the selection and implementation of a corrective action remedy. For example, facilities must publish an assessment of the release within ninety days of the initial detection, including an assessment of the effectiveness of the potential corrective action remedies.²⁰ Facilities must also hold a public meeting to discuss the results of the assessment thirty days prior to the selection of a remedy.²¹ Under the Proposed Rule, however, an owner or operator could avoid this transparency and public participation by following the modified corrective action procedures. In the absence of (1) any criteria for determining whether a non-groundwater release can reasonably be expected to be remedied within 180 days and (2) any third-party review of such a determination, there is nothing to prevent an owner or operator from using the modified procedures to avoid public participation and transparency in the initial handling of a release.

While a facility must comply with the full corrective action procedures if the release is not remedied within 180 days,²² the full procedures may be meaningless after having been delayed for approximately six months. In attempting to complete corrective action within the 180-day timeframe, a facility will presumably already have selected a remedy, potentially rendering superfluous any subsequent assessment of possible remedies or public meeting with interested parties. Additionally, the facility's initial remedy selection and attempted implementation may have involved steps that limit its ability to pursue a different remedy at a later date, further reducing the effectiveness of public participation after 180 days.

To avoid the potentially significant harms associated with a mistaken determination that a non-groundwater release can be remedied within 180 days, EPA should clarify that such a determination must be made by a qualified professional engineer. Furthermore, EPA should consider ways to ensure that the proposed modified procedures are not abused by facilities seeking to avoid transparency and meaningful participation by affected parties in the selection and implementation of a corrective action remedy.

²⁰ 40 CFR § 257.96.

²¹ *Id.*

²² Proposed Rule, 83 Fed. Reg. at 11,614.

IV. EPA Fails to Provide an Adequate Justification for Its Proposed Alternative Closure Requirements

EPA proposes expanding the alternative closure requirements to allow a facility to continue to use a unit set to close for cause under 40 CFR § 257.101 if the facility can demonstrate a lack of alternative disposal capacity for a non-CCR wastestream.²³ EPA's primary justification for these new exemptions is that the harms of power disruption that would result from the closure of affected units outweigh the risks of increased groundwater contamination.²⁴ Because the exemptions are based on reliability concerns, EPA has suggested limiting the availability of the new exemptions to three energy regions identified by an Edison Electric Institute (EEI) report as areas in which a boiler shut down would have a "substantial impact."²⁵ But the agency's proposal is flawed for at least two reasons. First, a single report from an interested industry group is insufficient evidence of reliability concerns that would justify broad exemptions from important environmental protections. Second, even if EPA's reliability concerns are valid, the agency has failed to consider whether they are adequately addressed by other regulatory schemes.

EPA Has Not Provided Sufficient Evidence of a Reliability Risk

EPA proposes limiting the new exemptions so that they apply only in three North American Electric Reliability Corporation (NERC) regions: Southeastern Electric Reliability Council-North (SERC-N), Southeastern Electric Reliability Council-East (SERC-E), and Midcontinent Independent System Operator (MISO).²⁶ These regions were selected based on information from a single report by EEI, an electric utility trade association, which identified the regions as areas in which a boiler shut down would have a "substantial impact."²⁷ A single report from an interested party, however, does not provide sufficient evidence of a reliability risk—let alone a risk large enough to outweigh the costs of continued groundwater contamination from unsafe disposal facilities.

EPA does not cite any other evidence to support its claim that there are reliability concerns in the SERC-E, SERC-N, and MISO regions. This is notable for three main reasons. First, as EPA, has already noted, the EEI report provides a "worst case" review of the impacts of boiler closures.²⁸ Second, there is ample information on reliability from non-industry sources. For example, NERC has conducted its own reliability assessments on all three of

²³ See *id.* at 11,594–97, 11,615.

²⁴ *Id.* at 11,595.

²⁵ *Id.* at 11,594–97.

²⁶ *Id.* at 11,596.

²⁷ *Id.*

²⁸ *Id.*

the relevant regions.²⁹ NERC's assessment of reliability is especially relevant as it is the entity designated by Congress and the Federal Energy Regulatory Commission (FERC) to ensure the continued reliability of the bulk power system.³⁰ Finally, recent analysis from NERC contradicts EEI's claim that there are reliability risks in MISO, SERC-N, and SERC-E. For MISO, NERC notes that the region "is projected to have 2.7 GW to 4.8 GW resources in excess of the regional requirement" in 2018 and will have sufficient "regional surpluses and potential resources . . . for all zones to serve their deficits while meeting local requirements" through 2022.³¹ Additionally, NERC determines that SERC-N has "a sufficient amount of anticipated Reserve Margin levels" through 2027.³² While NERC has expressed some concerns regarding SERC-E, it has ultimately concluded that "anticipated nuclear and natural gas generation additions" will offset loss in coal-fired capacity over the next eight years.³³

Especially in light of this contrary evidence from NERC, EPA cannot justify the proposed exemptions based on a single, worst case industry report.

EPA Must Consider Alternative Regulatory Schemes

Both Executive Order 12,866 and OMB's Circular A-4 instruct agencies to consider available regulatory alternatives.³⁴ This process provides the agency "with a clear indication of the most efficient alternative," or the one which "generates the largest net benefits to society."³⁵ One such alternative an agency must consider is whether an existing regulatory scheme adequately addresses the issue underlying the agency's proposed action. In this case, EPA must consider whether existing regulatory systems for addressing reliability concerns eliminate the need to create additional alternative closure requirements.

Today, there are various systems in place to address reliability concerns. First, the Department of Energy (DOE) has the authority to permit a facility to continue to operate in violation of environmental regulations in order to provide sufficient time to remedy a

²⁹ See North American Electric Reliability Corporation, 2017 Long-Term Reliability Assessment (2017); North American Electric Reliability Corporation, State of Reliability 2017 (June 2017).

³⁰ See 16 U.S.C. § 824o(c) (authorizing FERC to certify an Electric Reliability Organization); Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing, 116 FERC ¶ 61,062 (July 20, 2006); see also 16 U.S.C. § 824o(a)(2) (stating that the purpose of the Energy Reliability Organization is "to establish and enforce reliability standards for the bulk-power system").

³¹ North American Electric Reliability Corporation, 2017 Long-Term Reliability Assessment 41 (2017).

³² *Id.* at 61, 63.

³³ *Id.* at 61–61.

³⁴ See Exec. Order No. 12,866 § 1(a), (b)(8); Circular A-4 at 1–2.

³⁵ Circular A-4 at 2.

reliability concern.³⁶ For example, on April 14, 2017, the Secretary of Energy authorized the Grand River Dam Authority to continue to operate a unit—which was set to close due to its non-compliance with the Mercury and Air Toxic Standards—in light of the energy shortage that would result from the unit’s closing.³⁷ Additionally, FERC, NERC, and the NERC regional electric reliability councils all monitor electric reliability and have procedures in place to avoid power emergencies.³⁸ Most significantly, there are mechanisms employed to avoid reliability issues caused by a plant’s closure. For example, any plant in the MISO region seeking to retire must first secure approval from MISO.³⁹ Should the retirement raise reliability concerns, MISO will either identify alternative energy sources that remedy those concerns or deny the plant’s retirement request.⁴⁰

EPA must consider whether these regulatory schemes adequately address reliability concerns. If they do, there is no need for EPA to provide additional exemptions to the important protections established in the 2015 Rule. Furthermore, EPA must consider the advantages of these existing schemes for addressing reliability concerns as compared to its proposed alternative closure requirements. For example, the DOE, FERC, and NERC schemes have the advantage of addressing reliability issues on an individualized and short-term basis. EPA’s proposed alternative closure requirements, on the other hand, create open-ended, blanket exemptions based on a region’s existing reliability conditions—conditions that may improve in the future. Thus, it is likely that existing regulatory schemes address reliability issues in a more tailored and efficient way than would the alternative closure requirements in the Proposed Rule.

Respectfully,

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³⁶ See 16 U.S.C. § 824a(c) (2016); 10 C.F.R. 205.370–379 (2013).

³⁷ See Department of Energy Order No. 202-17-1 (Apr. 14, 2017).

³⁸ See *generally* Federal Energy Regulatory Commission, Reliability Primer (discussing FERC and NERC’s role and responsibilities in ensuring electric reliability).

³⁹ See, e.g., Federal Energy Regulatory Commission, Division of Energy Market Oversight, Energy Primer: A Handbook of Energy Market Basics 85 (Nov. 2015) (discussing the reliability analysis conducted when a plant applies to retire or suspend operation in the MISO region).

⁴⁰ See *id.*; MISO, System Support Resources Process Overview and Compensation/Cost Issues (Jan. 28, 2015).