



Institute for
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

January 31, 2020

Attn: Kirsten Hillyer, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, EPA

Re: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure, 84 Fed. Reg. 65,941 (proposed on Dec. 2, 2019)

Docket ID: EPA-HQ-OLEM-2019-0172

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits the following comments to the Environmental Protection Agency (“EPA”) regarding the proposed amendments (“Proposed Rule”) to the regulation of surface impoundments for coal ash residuals (“CCR”) waste.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.

The Proposed Rule amends the regulatory framework (the “Current Rule”) created by rules finalized in 2015 (the “2015 CCR Rule”)³ and 2018 (the “2018 CCR Rule”).⁴ These comments argue that EPA’s failure to analyze the forgone benefits caused by the Proposed Rule is arbitrary and capricious.

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

² See EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure, 84 Fed. Reg. 65,941 (proposed Dec. 2, 2019) [hereinafter Proposed Rule].

³ See EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) [hereinafter 2015 CCR Rule]. In the *Utility Solid Waste Activities Group v. EPA* decision, the court vacated the provisions of the 2015 CCR Rule that allowed unlined surface impoundments to operate until leaking, classified clay-lined impoundments as lined, and exempted inactive surface impoundments at inactive facilities from regulation. See *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 449 (D.C. Cir. 2018). The court also remanded to EPA the provisions covering the definitions of “Coal Residuals Piles,” the tonnage threshold for beneficial use, and the alternative groundwater standards. See *id.*

⁴ See EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36,435 (July 30, 2018). In *Waterkeeper Alliance, Inc. v. EPA*, the court granted EPA’s motion to remand the 2018 CCR Rule back to the agency. See *Waterkeeper All., Inc. v. EPA*, No. 18-1289 (D.C. Cir. Mar. 13, 2019).

I. EPA’S FAILURE TO EVALUATE THE FORGONE BENEFITS CAUSED BY THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS

Executive Order 12,866 instructs agencies to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs,” and after considering “all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”⁵ The Office of Management and Budget’s longstanding guidance document on regulatory analysis, Circular A-4, instructs agencies to attempt to “quantif[y] and express[] in monetary units” all costs and benefits, as this “provides decision makers with a clear indication of the most efficient alternative.”⁶ The Circular further explains that when it is “not . . . possible to express in monetary units all of the important benefits and costs,” the agency must still perform a sufficient analysis to “determin[e] how important the non-quantified benefits or costs may be in the context of the overall analysis.”⁷ Here EPA failed to analyze any of the forgone benefits in the form of environmental damage and health risks that might result from the Proposed Rule.

By failing to assess the forgone benefits caused by the Proposed Rule, EPA violates not only Executive Order 12,866 but also the Administrative Procedure Act (“APA”). Under the APA, agency decisions must be “based on consideration of the relevant factors,”⁸ and “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate.”⁹ Costs that must be considered include any forgone benefits that are important aspects of the regulatory problem,¹⁰ and failure to analyze such forgone benefits renders the rule arbitrary and capricious.¹¹ Accordingly, EPA has “failed to consider an important aspect of the problem,” and the proposed action is arbitrary and capricious.¹²

The Proposed Rule contains at least two changes to the Current Rule that will cause important forgone benefits that EPA does not analyze. First, the Proposed Rule extends the closure deadline by a month for facilities without alternative disposal capacity. Second, EPA also proposes to expand the availability of the longer-term alternative closure provisions by extending eligibility to facilities that lack alternative disposal capacity for non-CCR waste. Accordingly, the Proposed Rule would allow eligible facilities to receive non-CCR waste in addition to CCR waste.

The Proposed Rule would effectively delay the closure deadline for surface impoundments subject to closure. While EPA proposes August 31, 2020 as the new deadline for

⁵ Exec. Order No. 12,866 § 1(a), (b)(6), 58 Fed. Reg. 51,735, 51,735-36 (Oct. 4, 1993).

⁶ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, at 2 (2003), *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> [hereinafter CIRCULAR A-4].

⁷ *Id.*

⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

⁹ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

¹⁰ *See State Farm*, 463 U.S. at 43; *Air All. Houston v. EPA*, 906 F.3d 1049, 1067-68 (D.C. Cir. 2018) (holding that EPA failed to explain how the harms that the Chemical Disaster Rule would have prevented were now only “speculative”).

¹¹ *See California v. BLM*, 277 F. Supp. 3d 1106, 1122-23 (N.D. Cal. 2017) (holding that failure to consider forgone benefits was arbitrary and capricious); *cf. Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1039-41 (finding that the agency properly calculated the costs of amending a regulation); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (considering the costs of a repeal “is common sense and settled law.”).

¹² *State Farm*, 463 U.S. at 43.

ceasing the receipt of waste¹³ (seemingly two months earlier than the October 31 deadline of the Current Rule), EPA would permit facilities without alternative capacity to operate until November 30, 2020.¹⁴ The Regulatory Impact Analysis for the Proposed Rule characterizes this new provision as providing “automatic extensions,”¹⁵ and EPA’s analysis assumes that all facilities with units that are unlined or in violation of location standards will receive the 90-day extension on compliance from August 31 to November 30.¹⁶ EPA ultimately estimates that 167 surface impoundments will close in November 2020, rather than October 2020, due to the Proposed Rule.¹⁷

In the alternative closure provisions of the Current Rule, facilities may continue to use impoundments to receive CCR waste in two circumstances, even when the units would otherwise be subject to closure because they were leaking and unlined or in violation of the location standards.¹⁸ EPA proposes an expansion of both provisions. First, under the Current Rule, if the operator certifies an absence of alternative disposal capacity for CCR waste, surface impoundments may receive CCR waste for an additional five years after the certification.¹⁹ Under the Proposed Rule, facilities without alternative disposal capacity for CCR *or* non-CCR waste would be eligible to continue operating until 2023, and these facilities would also be newly allowed to receive CCR *and* non-CCR waste over that period.²⁰ Second, under the Current Rule, surface impoundments without alternative disposal capacity that are 40 acres or smaller may continue receiving CCR waste if the impoundment and the facility’s coal-fired boiler close by October 17, 2023; for surface impoundments over 40 acres, the respective deadline is October 17, 2028.²¹ The Proposed Rule would permit facilities eligible for the extended closure deadlines under these provisions to receive CCR *and* non-CCR waste.²²

Even though these changes extend compliance deadlines and increase the volume of waste that facilities may store, EPA fails to analyze the forgone benefits of these provisions. The 2015 CCR Rule quantified many benefits that can be attributed to stricter management of surface impoundments, including fewer structural failure releases, reduced groundwater contamination, reduced cancer incidence, and avoided IQ losses from mercury and lead exposure.²³ By delaying the compliance deadline by one month for units that are unlined or in violation of location standards, and by expanding the number of facilities eligible for the longer-term alternative closure deadlines, the Proposed Rule will delay the realization of these benefits. Additionally, the Proposed Rule will expand the volume of waste that surface impoundments may store when operating subject to the alternative closure provisions. Because EPA’s most recent data also indicates that “[m]ore surface impoundments are unlined and leaking than was modeled in

¹³ See Proposed Rule, 84 Fed. Reg. at 65,942.

¹⁴ See *id.* at 65,953-54.

¹⁵ EPA, REGULATORY IMPACT ANALYSIS: HAZARDOUS AND SOLID WASTE MANAGEMENT SYSTEM: DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES; A HOLISTIC APPROACH TO CLOSURE PART A: DEADLINE TO INITIATE CLOSURE at 2-4 (Oct. 2019) [hereinafter PROPOSED RULE RIA].

¹⁶ See *id.* at 3-8.

¹⁷ See *id.* at 3-10.

¹⁸ 40 C.F.R. § 257.103.

¹⁹ § 257.103(a).

²⁰ See Proposed Rule, 84 Fed. Reg. at 65,954.

²¹ § 257.103(b).

²² See Proposed Rule, 84 Fed. Reg. at 65,956.

²³ See 2015 CCR Rule, 80 Fed. Reg. at 21,459.

2015,”²⁴ the forgone benefits of the delay can reasonably be expected to be even larger than EPA’s prior analysis would suggest.

In the Regulatory Impact Analysis for the Proposed Rule, EPA defends its failure to analyze forgone benefits by arguing that without the “resources and time” needed to update the analysis conducted for the 2015 CCR Rule, “development of a fully revised cost and benefit estimate is not feasible within the current regulatory schedule.”²⁵ In the Proposed Rule, EPA similarly blames an “expedited timeframe”²⁶ and a lack of “data and time”²⁷ for its inability to analyze the forgone benefits caused by the Proposed Rule. However, neither the court decisions in *Utility Solid Waste Activities Group v. EPA* nor *Waterkeeper Alliance, Inc. v. EPA* require the agency to adopt the amendments proposed in this regulatory action.²⁸ EPA acknowledges that the expansion of the alternative closure provision to permit facilities to receive non-CCR waste is a “new requirement.”²⁹ EPA cannot use court decisions that vacate illegal agency action or that grant voluntary remands to circumvent basic requirements of administrative law.

EPA’s argument that time pressure required the agency to forgo analysis of forgone benefits appears specious given the agency’s ability to update the 2015 CCR Rule’s analysis in order to calculate the cost savings to industry of delaying impoundment closures.³⁰ EPA also conducts extensive surveys of industry to evaluate how quickly facilities can implement alternative waste management systems.³¹ Agency decisions that consider the benefits of its preferred action (here, the alleged cost savings) but that ignore important costs of its action (here, the forgone benefits) are arbitrary and capricious.³² In the Regulatory Impact Analysis for the Proposed Rule, EPA calculates the costs attributable to additional documentation requirements³³ and also to the facility closures required by the *USWAG* decision,³⁴ which vacated provisions of the 2015 CCR Rule and mandated EPA to require some impoundments to close earlier than scheduled.³⁵ But EPA fails to analyze the forgone benefits of the Current Rule provisions that would be amended under the agency’s voluntarily proposed deregulatory measures. Because EPA impermissibly “put[s] a thumb on the scale” by undervaluing key effects, its lopsided analysis that quantifies cost savings while ignoring major forgone benefits of the Proposed Rule is arbitrary and capricious.³⁶

²⁴ PROPOSED RULE RIA at 1-1.

²⁵ *Id.* at 3-14.

²⁶ Proposed Rule, 84 Fed. Reg. at 65,945.

²⁷ *Id.* at 65,956.

²⁸ *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 449 (D.C. Cir. 2018) (remanding and vacating sections of the 2015 CCR Rule); *Waterkeeper All., Inc. v. EPA*, No. 18-1289 (D.C. Cir. Mar. 13, 2019) (remanding the 2018 CCR Rule). *See supra* text accompanying notes 3 & 4.

²⁹ Proposed Rule, 84 Fed. Reg. at 65,956.

³⁰ *See* PROPOSED RULE RIA at 3-8 to 3-11.

³¹ *See* Proposed Rule, 84 Fed. Reg. at 65,945-52.

³² *See California*, 277 F. Supp. 3d at 1123 (agencies impermissibly considered only “one side of the equation” by calculating benefits and ignoring costs).

³³ *See* PROPOSED RULE RIA at 3-11 to 3-12.

³⁴ *See id.* at 3-6 to 3-7.

³⁵ *See USWAG*, 901 F.3d at 430, 432.

³⁶ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

Additionally, an agency's uncertainty about the precise magnitude of a regulatory effect does not justify assigning that effect no weight in the agency's cost-benefit analysis.³⁷ While there may be "a range of values" for the forgone benefits caused by the Proposed Rule, the value "is certainly not zero."³⁸ Both *Circular A-4* and EPA's own *Guidelines for Economic Analysis* provide ample guidance on how EPA can account for uncertainty in its presentation of costs and benefits.³⁹ What EPA cannot do is abdicate responsibility to assess a primary consequence of its action, as it does in the Proposed Rule. EPA asserts that "the proposed rule is expected to result in net cost savings of an annualized \$39.5 million."⁴⁰ But EPA fails to even qualitatively analyze the forgone benefits caused by the Proposed Rule, making this quantification misleading and incomplete.

The Proposed Rule will delay the closure of surface impoundments by expanding the availability of alternative closure deadlines and will increase the volume of waste stored in these impoundments. Because EPA did not analyze the forgone benefits of these regulatory actions, the agency failed to consider an important aspect of the problem. The Proposed Rule is therefore arbitrary and capricious.

Sincerely,

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³⁷ See *id.* at 1192, 1200 (finding agency reasoning arbitrary and capricious where agency argued that benefits of carbon dioxide reductions were "too uncertain to support their explicit valuation and inclusion" in a regulatory cost-benefit analysis).

³⁸ *Id.* at 1200.

³⁹ See EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSES, at 11-1 to 11-12 (Dec. 2010), available at <https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>; CIRCULAR A-4, *supra* note 6, at 38-42.

⁴⁰ Proposed Rule, 84 Fed. Reg. at 65,959.