



Institute for
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

April 17, 2020

Attn: Jesse Miller, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, EPA

Re: Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure, 85 Fed. Reg. 12,456 (proposed on Mar. 3, 2020)

Docket ID: EPA-HQ-OLEM-2019-0173

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 Part B amendments (“Proposed Rule”) to the regulation of coal combustion residuals (“CCR”). 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.

These comments focus on EPA’s failure to assess the forgone benefits caused by the proposed alternative liner demonstration option. Specifically, the process proposed by EPA will delay closure by unsuccessful applicants and permit additional CCR releases by successful applicants, leading to forgone environmental and health benefits.

I. EPA Fails to Consider the Forgone Benefits Caused by the Alternative Liner Demonstration Option

Despite a lack of evidence that any alternative lining systems will replicate the control provided by a composite liner,² EPA proposes to allow facilities to seek approval for alternative liners. By doing so, EPA will permit unsuccessful applicants to substantially delay facility closure and may permit successful applicants to continue receiving CCR even when the unit’s

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

² The Proposed Rule itself presents no evidence that facilities will be able to successfully meet the standards required under the proposal. EPA explains that it is proposing the alternative liner demonstration process in response to “claim[s]” from industry groups and companies that some surface impoundments have “an engineered liner or underlying soils that are equivalent or even superior to the performance of the liners required by the 2015 CCR rule.” EPA, Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure, 85 Fed. Reg. 12,456, 12,458 (proposed Mar. 3, 2020) [hereinafter Proposed Rule]. EPA does not discuss specific liner designs and instead directs commenters to the reports submitted by industry in the docket. *Id.* at 12,458 n.2. EPA states only that it “agrees it is possible” for alternative lining mechanisms to protect human health and the environment. *Id.* at 12,458. EPA provides no further evidence that the comparable lining systems contemplated by this rule exist.

releases exceed groundwater protection standards. Under current regulations, these units would close earlier and perform activities like CCR removal or dewatering that reduce the risk of future CCR releases.³ By delaying such closure activities, the Proposed Rule will permit additional CCR releases that threaten the environment and human health. But even though CCR releases may contain “arsenic and other toxic metals,”⁴ EPA fails to address how the Proposed Rule will forgo the benefits provided by a more protective standard. This violates EPA’s duties under Executive Order 12,866 and the Administrative Procedure Act.

Agencies are required to consider forgone benefits. Executive Order 12,866 explicitly instructs agencies to consider all important unquantified effects of regulatory actions.⁵ Guidance from the Office of Management and Budget on conducting Executive Order 12,866 cost-benefit analyses further cautions agencies against ignoring the potential magnitude of unquantified benefits.⁶ Ignoring forgone benefits, quantified or not, also violates the Administrative Procedure Act (“APA”). A regulation is arbitrary and capricious under the APA if the issuing agency fails to “examine the relevant data” or “consider an important aspect of the problem,”⁷ and “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate.”⁸ Furthermore, the costs that an agency must consider “include[] more than the expense of complying with regulations”; instead, “any disadvantage could be termed a cost.”⁹ In the context of a repeal, relevant disadvantages include forgone benefits.¹⁰ By ignoring these effects, EPA has “failed to consider an important aspect of the problem” and rendered the Proposed Rule arbitrary and capricious.¹¹

³ See generally 40 C.F.R. § 257.102 (describing actions required to close CCR units).

⁴ EPA, 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 Fed. Reg. 40,353, 40,368 (proposed Aug. 14, 2019).

⁵ See Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (“Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”); see also Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (allowing agencies, “where appropriate and permitted by law,” to “consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts”).

⁶ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, at 2-3 (2003), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> (“It will not always be possible to express in monetary units all of the important benefits and costs. When it is not, the most efficient alternative will not necessarily be the one with the largest quantified and monetized net-benefit estimate. . . . When there are important non-monetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs.”).

⁷ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

⁸ *Michigan v. EPA*, 135 S. Ct. 2699, 2707–08 (2015).

⁹ *Id.*

¹⁰ 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); see also *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1039-41 (D.C. Cir. 2012) (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”).

¹¹ *State Farm*, 463 U.S. at 43.

A. *EPA fails to address the forgone benefits caused by compliance delays permitted under the alternative liner demonstration process.*

EPA unreasonably fails to address how the alternative liner demonstration process will forgo health and environmental benefits by delaying the closure of surface impoundments that apply but ultimately cannot make successful demonstrations.

The Proposed Rule sets the deadline for an operator to submit an initial application at “30 days after the effective date of a final rule.”¹² EPA must determine whether the facility is eligible to continue with the application process within 60 days.¹³ Submission of a complete application tolls the deadline to cease receipt of waste until a decision is reached on the unit’s eligibility.¹⁴ If the unit is deemed eligible, the deadline for submitting a complete demonstration package is “no later than one year after the deadline for the initial application.”¹⁵ EPA must then decide whether the facility has successfully made an alternative liner demonstration within four months of receiving the demonstration package, and a facility’s deadline to cease receipt of waste is tolled until that decision.¹⁶ Unsuccessful applicants must then cease receipt of waste and initiate closure within six months of the denial or by the deadline mandated by § 257.101(a), whichever is later.¹⁷

These provisions will delay facility closure, and such compliance delays are likely to result in higher CCR releases than under the current regulatory baseline. In the RIA, EPA acknowledges that applicants that submit complete alternative liner demonstrations will “receive a modest closure deadline extension.”¹⁸ In response, EPA states only that the “effect of such a time extension . . . on groundwater contamination is unknown, but expected to be minimal” because EPA will issue a decision on a demonstration package “within four months.”¹⁹ EPA’s characterization of the Proposed Rule’s effect is unreasonable because the proposed timeline permits compliance delays of over a year and a half, omits additional sources of delay, and relies on unsupported assertions about EPA’s ability to process applications. Because the Proposed Rule will permit unsuccessful applicants to substantially delay their compliance deadlines, EPA must address the forgone benefits caused by these delays.

First, the timeline proposed by EPA will allow some unsuccessful applicants to delay compliance for at least 21 months. Current regulations require unlined surface impoundments to cease receipt of waste by August 2020.²⁰ If EPA finalizes the Proposed Rule by June 2020,

¹² Proposed Rule, 85 Fed. Reg. at 12,459.

¹³ *See id.* at 12,476. Note that the review process may be conducted by either EPA or a state agency managing an EPA-approved CCR permitting program. *Id.* at 12,469 n.29.

¹⁴ *See id.* at 12,476.

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ EPA, REGULATORY IMPACT ANALYSIS: EPA’S 2019 RCRA PROPOSED RULE HAZARDOUS AND SOLID WASTE MANAGEMENT SYSTEM: DISPOSAL OF CCR; A HOLISTIC APPROACH TO CLOSURE PART B: ALTERNATE DEMONSTRATION FOR UNLINED SURFACE IMPOUNDMENTS; IMPLEMENTATION OF CLOSURE at 4-5 (Feb. 2020) [hereinafter PROPOSED RULE RIA].

¹⁹ *Id.*

²⁰ *See id.* at ES-6. If EPA finalizes the changes proposed in Part A, the closure deadline will change, but EPA still fails to address the forgone benefits associated with closure delays under any timeline. *See generally* EPA,

facilities that apply but are deemed ineligible to make an alternative liner demonstration should receive a decision from EPA by September 2020, providing a month-long extension.²¹ But applicant facilities deemed eligible to submit a demonstration package that is ultimately rejected by EPA will potentially delay their compliance until May 2022 – over a year and a half after the current August 2020 compliance deadline for unlined surface impoundments. This timing again assumes that EPA finalizes the Proposed Rule in June 2020, making the initial application due in July 2020 and the alternative demonstration package due in July 2021. If EPA then takes four months to evaluate demonstration packages, EPA will reject unsuccessful applicants in November 2021, automatically setting the closure initiation deadline six months later in May 2022. The agency must address the risks posed by allowing unlined surface impoundments to continue operating while moving through the application process.

Second, the rule itself permits an additional extension during the application period. The Proposed Rule allows facilities that cannot meet the one-year deadline for the alternative demonstration package to request “an alternate timeline for completion that has been certified by the laboratory” analyzing samples necessary for the demonstration.²² EPA proposes this extension, because “[i]t is possible that analysis of some low conductivity soils may take a considerable amount of time.”²³ Specifically, EPA notes that “[l]aboratory analysis of the hydraulic conductivity of some clay have taken nearly 400 days to reach equilibrium.”²⁴ Accordingly, EPA acknowledges that projects may need longer than a year to complete the alternative demonstration package, but fails to address the risk that unsuccessful applicants will release CCR into the environment during this extended period.

Finally, EPA may be unable to evaluate applications and demonstration packages in the respective 60 day and four month timeframes promised by the Proposed Rule. If more facilities apply than EPA anticipates, the agency provides no assurances that reviewing authorities will have the capacity to review all applications under the timeframes indicated. The RIA assumes that between 10 and 20 units will submit an application, but EPA concedes that an “additional 65 units could join this universe if they provide evidence of passing all location restrictions and installing a certified groundwater monitoring system.”²⁵ Units will be highly incentivized to apply, because EPA estimates that completing the application process will cost \$118,000²⁶ but a successful application will save the average unit \$12.5 million.²⁷ Ultimately the compliance tolling provided to facilities is based on EPA’s response times to the initial application and the final demonstration package. If EPA cannot meet its self-imposed deadlines, these delays will further push back surface impoundment closure and risk additional CCR releases from facilities that would otherwise have initiated closure proceedings.

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).

²¹ If the Proposed Rule is finalized in June 2020, the initial application will not be due until July 2020, and EPA will have 60 days until September 2020 to respond to the application.

²² Proposed Rule, 85 Fed. Reg. at 12,476.

²³ *Id.* at 12,462.

²⁴ *Id.* at 12,462 n.12.

²⁵ PROPOSED RULE RIA at 3-4 & n.25.

²⁶ EPA estimates the cost of the initial application at \$10,700 and the cost of the demonstration package at \$107,413. *See id.* at 3-4 to 3-5.

²⁷ *See id.* at 3-5.

B. EPA fails to consider the forgone benefits caused by allowing leaking units to operate pursuant to alternative liner demonstrations.

Units with approved alternative liner demonstrations will be permitted to operate indefinitely. However, because some of these units may then leak, EPA must consider the forgone benefits of permitting such facilities to continue operating.

Once an alternative liner demonstration is approved, the approval is “effective for the remaining active life of the unit.”²⁸ But although a successful applicant must demonstrate, “with a reasonable degree of certainty,” that the surface impoundment will not result in exceedances of groundwater protection standards (GWPS),²⁹ EPA recognizes that leaks may occur. Once a unit has been approved, if there “is evidence that the unit may exceed” GWPS standards before control measures are put in place, EPA indicates only that “authorization would be reconsidered.”³⁰ Therefore, this provision expands the number of leaking units that may be permitted to continue operating.

EPA does not address the forgone benefits that will be caused by the Proposed Rule when units approved for operation after an alternative liner demonstration begin leaking. Under current regulations, these unlined surface impoundments would be required to close.³¹ But under the Proposed Rule, these units would be considered *lined* surface impoundments. As EPA explains, “lined CCR surface impoundments . . . that impact groundwater above the specified GWPS are not required to close and could continue operations while corrective action was performed, and the source of the leak was addressed.”³² Accordingly, these units could now continue receiving CCR during the remediation period, potentially exacerbating the harm caused by the groundwater exceedances.

And, of course, there is no guarantee that leaks can be remedied. EPA recognizes that soil-based lining systems like clay are “permeable by nature”³³ and that “heterogeneity within these soils may result in preferential flow pathways that effectively negate the low [hydraulic] conductivity of the remaining soil.”³⁴ In other words, soil variation can allow fluids to pass through the soil layer more easily in certain areas than in others. While the alternative demonstration materials must provide information that addresses the variability of the soil,³⁵ EPA cannot ensure uniformity in a natural geologic formation. If, for example, a clay-lined surface impoundment leaks due to such natural variation, a unit may not be able to prevent the site from exceeding GWPS.

Because current regulations do not require lined surface impoundments to close, even when their releases exceed GWPS,³⁶ such units operating pursuant to alternative liner demonstrations may be permitted to continue operating and releasing CCR indefinitely. While

²⁸ Proposed Rule, 85 Fed. Reg. at 12,462.

²⁹ *Id.* at 12,475.

³⁰ *Id.* at 12,462.

³¹ See 40 C.F.R. § 257.101(a)(1).

³² Proposed Rule, 85 Fed. Reg. at 12,458; see also 40 C.F.R. § 257.97; § 257.98.

³³ Proposed Rule, 85 Fed. Reg. at 12,459.

³⁴ *Id.* at 12,460.

³⁵ See *id.* at 12,460-61.

³⁶ See 40 C.F.R. § 257.97; § 257.98; § 257.101. These provisions require an active surface impoundment to act to prevent exceedances of GWPS, but they do not require a facility’s closure if the releases do not stop.

the Proposed Rule authorizes EPA to revoke a unit's authorization to operate subject to an alternative liner demonstration if the unit's releases exceed GWPS, it does not require EPA to do so.³⁷ Because EPA recognizes that units with successful alternative liner demonstrations may nonetheless release CCR in exceedance of GWPS, perhaps indefinitely, the agency must address the forgone benefits caused by these releases.

The Proposed Rule will lead to closure delays and may permit CCR releases by facilities otherwise required to close. EPA's failure to address the forgone benefits to the environment and human health caused by these changes is arbitrary and capricious.

Sincerely,

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³⁷ Proposed Rule, 85 Fed. Reg. at 12,477 ("If there is evidence that the unit may exceed the groundwater protection standard for any constituent within the operational life of the unit, EPA or the Participating State Director will reevaluate the authorization, and may revoke it if source control measures cannot be put in place while the unit continues to operate.").