

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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May 5, 2020

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Wheeler:

I write with concern about two rules recently proposed by the Environmental Protection Agency (EPA) that will adversely impact public health, particularly for low-income communities and communities of color. Published in the Federal Register on February 20, 2020 and March 3, 2020 respectively,^{1,2} the *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities*, and the *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* rules would roll back elements of a rule finalized by EPA on April 17, 2015 to regulate the management of coal combustion residuals (CCRs), also known as coal ash.³

As Chairwoman of the Committee on Science, Space, and Technology and a former registered nurse, I feel obligated to remind EPA of the health risks associated with coal ash. EPA's own 2014 risk assessment of coal combustion residuals found that leaching from CCR units poses risk to human health.⁴ The greatest risks come from the presence of arsenic, lithium, and molybdenum in surface impoundments, and arsenic in landfills.⁵ A brief list of the health impacts from these toxic chemicals include increased risk of cancer, neurological damage, decreased thyroid function, cardiovascular system damage, and anemia.⁶

¹ <https://www.federalregister.gov/documents/2020/02/20/2019-28440/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric>

² <https://www.federalregister.gov/documents/2020/03/03/2020-04033/hazardous-and-solid-waste-management-system-disposal-of-ccr-a-holistic-approach-to-closure-part-b>

³ <https://www.federalregister.gov/documents/2015/04/17/2015-00257/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric>

⁴ <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-11993>

⁵ <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-11993>

⁶ <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-11993>

The proposed rules would allow hundreds of leaking and unlined impoundments, required to close under the 2015 rule, to continue to accept millions of tons of toxic ash for up to fifteen years.⁷ This is troubling, as EPA’s regulatory impact analysis for the 2015 CCR rule indicates that the lifetime risk of groundwater contamination from an unlined CCR unit ranges from 12.2 to 36.2 percent.⁸

Newly released industry data from groundwater monitoring wells shows that the 2015 Final CCR Rule underestimated the risk of groundwater contamination. In 2019, a comprehensive report by Earthjustice and the Environmental Integrity Project compared the data with EPA’s own health standards and found “unsafe levels of contamination at 92 percent of ash ponds and 76 percent of ash landfills.”⁹ EPA required owners and operators of CCR units to collect, analyze, and publish this data under the 2015 CCR Rule.¹¹

Environmental Justice and Coal Ash

Since 2015, U.S. government and nongovernmental entities alike have raised concerns about the environmental justice implications of leaking coal ash ponds. In September 2016, the U.S. Commission on Civil Rights issued a report on EPA’s regulation of coal ash which revealed that “approximately 30 percent of all coal ash landfills and ponds were located in a zip code where the minority population exceeded the national average.”¹² Furthermore, a 2019 analysis conducted by Earthjustice and the Environmental Integrity Project used EPA’s own EJSCREEN Tool to determine that six of the top ten most contaminated sites in the United States are located within three miles of minority communities and/or low-income communities.¹³

EPA is required to “develop an agency-wide environmental justice strategy” under the 1994 Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.¹⁴ EPA’s version of this strategy, *EJ 2020 Action Agenda*, states that in the rulemaking process, EPA “will implement the *Guidance on Considering Environmental Justice during the Development of a Regulatory Action* and *Technical Guidance on Assessing for Environmental Justice in Regulatory Analysis*, two fundamental foundation documents developed over the past several years.” The latter document directs EPA to analyze “whether EJ concerns exist prior to the rulemaking and whether such concerns are exacerbated or mitigated for each regulatory option under consideration.”¹⁵¹⁶

Despite the preponderance of recent data on contamination levels and the potential environmental justice issues around CCR contamination, EPA ignores its obligation to conduct

⁷ <https://www.epa.gov/newsreleases/epa-proposes-additional-amendments-regulations-coal-combustion-residuals>

⁸ <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-12034>

⁹ <https://earthjustice.org/sites/default/files/files/National%20Coal%20Ash%20Report%203.4.19.pdf>

¹⁰ <https://earthjustice.org/news/press/2019/first-comprehensive-national-study-of-coal-ash-pollution-finds-widespread-groundwater-contamination>

¹¹ <https://www.federalregister.gov/documents/2015/04/17/2015-00257/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric>

¹² https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf

¹³ <https://earthjustice.org/sites/default/files/files/National%20Coal%20Ash%20Report%203.4.19.pdf>

¹⁴ <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>

¹⁵ https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf

¹⁶ <https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis>

fresh environmental justice assessments for the two proposed rules. Both of the proposed rules state that the Agency’s risk assessments “did not separately evaluate either minority or low-income populations.”¹⁷¹⁸ Both address the requirement to assess environmental justice impacts with the platitude that “this action does not have disproportionately high and adverse human health or environmental health effects on minority populations, low-income populations and/or indigenous peoples.”¹⁹ EPA cites the environmental justice analysis from the 2015 rule, but doesn’t show calculations for how the proposed changes to the original 2015 rule would alter the outcomes of the 2015 environmental justice analysis.

Not only does EPA fail to demonstrate that this rule will not disproportionately and unfairly harm vulnerable communities under its obligation in EO 12898 and the guidance outlined by the *EJ 2020 Action Agenda*, EPA concedes that the rule *is* likely to have negative impacts on these communities. In Section 5.3 of the Regulatory Impact Analysis for the second rule, released on February 20th, EPA briefly discusses the “Potential Impacts to Minority and Low-Income Populations” as required by EO 12898:

“In the absence of an updated risk assessment identifying the impact of the larger number of unlined and leaking units than were originally modeled (including the role and timing of corrective action), the impact of the Part B rule on risks to human health and the environment is unclear relative to the updated baseline. Moreover, because the 2015 CCR Rule demographic screening assessment determined that coal-fired power plants tend to be located in areas characterized by low-income populations, the likely increased disposal of CCR on site at coal-fired power plants under this rule may have a disproportionate impact on those populations.”²⁰

EPA also predicts that its rollbacks will have negative impacts on health and the environment in the U.S. more broadly. In the draft Regulatory Impact Analysis that EPA sent to the Office of Management and Budget (OMB) for approval, in language that OMB subsequently struck, EPA stated:

“Because the proposed Part B rule provisions enable more placement of CCR in existing units (including units that are leaking and have existing ground water contamination), the impacts are generally expected to increase the risk of releases of CCR into the environment, and therefore reduce the human health and environmental benefits of the 2015 CCR Rule.”²¹

Moreover, the 2015 assessment cited in the proposed rules did not go far enough in its examination of potential disproportionate impacts to environmental justice communities. The 2015 assessment examined potential adverse impacts to minority and low-income communities located within one mile of coal ash facilities, but did not conduct extensive outreach to

¹⁷ <https://www.govinfo.gov/content/pkg/FR-2020-02-20/pdf/2019-28440.pdf>

¹⁸ <https://www.govinfo.gov/content/pkg/FR-2020-03-03/pdf/2020-04033.pdf>

¹⁹ <https://www.federalregister.gov/documents/2020/02/20/2019-28440/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric>

²⁰ <https://www.regulations.gov/docket?D=EPA-HQ-OLEM-2019-0173>

²¹ <https://www.regulations.gov/document?D=EPA-HQ-OLEM-2019-0173-0021>

stakeholder communities to inform this number and the assessment broadly.²² In contrast, for the 2014 *Definition of Solid Waste Rule*, which also involved groundwater contamination, EPA did extensive outreach to minority and low-income communities to determine a safe distance from facilities to be used in analysis. After this outreach, EPA determined that the analysis should assess whether EJ populations within a distance of three kilometers, or almost two miles, from facilities were disproportionately impacted.²³ This distance is almost double the distance used in the two proposed coal ash rules.

Beyond inadequate environmental justice analysis for the proposed rules, EPA ignores other obligations under EO 12898 and its *EJ 2020 Action Agenda*. Since the proposed rules put the onus on communities to bring actions against non-compliant facilities, the capacity of communities near coal ash sites to evaluate compliance is critical. However, outside of the requirement to post compliance on the internet, the rule includes no provisions that would help provide the necessary information and evaluation tools to these communities. These types of measures are required under EO 12898 and the *EJ 2020 Action Agenda*, and may include: funding mechanisms for technical advisors to work with impacted communities, as in the Technical Assistance Grant program under the Superfund program,²⁴ proactive communication requirements to ensure that communities are informed of nearby pollution, requirements for community involvement activities such as public meetings, and obligations for bridging language barriers.^{25,26}

Inadequacy of Public Comment Periods

EPA recently extended the comment period for the Part A rule proposed on February 20, 2020 another 30 days in addition to the original 60 day comment period.²⁷ However, EPA still allowed only 45 days for submission of public comments for the Part B rule proposed on March 3, 2020.^{28,29} This was an inadequate amount of time for vulnerable communities to evaluate and form a comment on a highly technical rule. EPA also is not holding in-person public hearings for either of these rules. The lack of public hearings further limits effective avenues for community participation.

Now that our country is in a state of emergency due to COVID-19, communities are faced with even higher burdens that inhibit their ability to submit comments. Participation in this rulemaking, particularly for environmental justice communities, will be very difficult during this emergency if the short comment periods are retained. EPA appears to recognize the burden that this public health crisis represents for some of its stakeholders: In late March, you extended leniency to industrial facilities by suspending indefinitely the reporting requirements,

²² https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf

²³ <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2010-0742-0371>

²⁴ <https://www.epa.gov/superfund/technical-assistance-grant-tag-program>

²⁵ <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>

²⁶ https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf

²⁷ <https://www.epa.gov/coalash/extension-comment-period-disposal-coal-combustion-residuals-electric-utilities-federal-ccr>

²⁸ <https://www.federalregister.gov/documents/2020/02/20/2019-28440/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric>

²⁹ <https://www.federalregister.gov/documents/2020/03/03/2020-04033/hazardous-and-solid-waste-management-system-disposal-of-ccr-a-holistic-approach-to-closure-part-b>

enforcement and penalties associated with our bedrock environmental laws.³⁰ But EPA expects communities and public interest groups to respond to proposed rulemakings that may affect their health and well-being under business-as-usual timeframes, without the in-person benefits of public hearings. This posture is hypocritical at best.

Disruptions caused by COVID-19 will deprive citizens, local communities, and other stakeholders the opportunity to engage with EPA. I request that EPA promptly postpone public hearings on its coal ash rulemakings and reschedule when it again becomes feasible to hold public meetings. I also request that EPA extend the remaining public comment periods on all pending rulemakings by at least 45 days beyond the end of the declared national emergency, including comment periods which closed between March 13 to the present, as well as those that are still open. I also ask EPA to reconsider this proposed rule's impacts on minority and low-income populations, particularly its analysis pertaining to Executive Order 12898 and the EJ 2020 Action Agenda.

I also request a staff-level briefing from the following offices:

- The Safe and Sustainable Water Resources Research Program, to discuss the potential research gaps related to coal ash contamination, groundwater, and drinking water.
- The Office of Environmental Justice, to discuss what tools and data are used to assist communities suffering from proximity to toxic chemicals and sites.

I appreciate your prompt attention to this issue. Please work with Committee staff to identify a date for the briefings above by May 15, 2020. If you have any questions about this request, please contact Aria Kovalovich of the Subcommittee on Environment at (202) 225-6375.

Thank you for your attention to this matter.

Sincerely,



Eddie Bernice Johnson
Chairwoman
Committee on Science, Space, and Technology

³⁰ <https://www.nytimes.com/2020/03/26/climate/epa-coronavirus-pollution-rules.html>