

January 14, 2020



Kate Strom Hiorns
Wisconsin Department of Natural Resources
Waste and Materials Management Program
PO Box 7921
Madison, WI 53707-7921

RE: Revisions to chapters NR 500 to 520 related to coal combustion residual landfills and surface impoundments (WA-17-18)

Dear Ms. Hiorns,

On behalf of Milwaukee Riverkeeper, we provide the following comments on WDNR's Statement of Scope for a proposed rule to amend portions of chapters NR 500 – 520, which would address new federal rules for the regulation of coal combustion residual (CCR) landfills and surface impoundments. The proposed rule would also allow Wisconsin to seek approval from the U.S. EPA for a state CCR permit program to oversee regulation of coal ash placed in landfills. Proposed rule changes would update federal requirements and also allow for creation of state rules, as long as they are at least as protective as the federal rule. Wisconsin does not regulate CCR stored in surface water impoundments currently. The proposed rule may also include federal requirements for CCR surface impoundments, such as: groundwater monitoring and corrective action; post-closure care; and recordkeeping, notification and posting of information. This would require Wisconsin to seek approval from EPA for a partial state CCR permit program for surface impoundments. Feedback provided by industry representatives to WDNR indicated that all surface impoundments will be closed within the next several years and no new surface impoundments are currently planned for Wisconsin, so DNR will evaluate whether it makes sense for Wisconsin to regulate impoundments.

While we support the WDNR's efforts to update current state regulations to be compliant with changes in federal rules, we have some concerns regarding Wisconsin seeking approval for a state CCR program. Given the lack of funding and staff at WDNR, we question whether Wisconsin, or any other state seeking similar approval, can do a better job than EPA in regulating these sites with no additional financial resources allocated. The scoping statement notes that 1 additional staff person would likely need to be hired to manage the oversight of 12 existing surface water impoundments (at a cost of \$100,000), and that existing staff could manage 18 existing and new proposed CCR landfills.

It seems that one additional staff person is not enough to diligently oversee these toxic pond sites, which pose a major risk to our state's waters. According to Earth Justice (<https://earthjustice.org/sites/default/files/wi-coal-ash-factsheet-1111.pdf>):

"None of Wisconsin's coal ash ponds are less than 24 years old, and 15 ponds are over 30 years old. One pond at the Nelson Dewey Generating Station is over 50 years old. The age of these ponds makes it unlikely that they have safeguards like liners and leachate collection. According to a 2010 EPA risk assessment, four coal ash ponds and landfills in

Wisconsin are currently unlined and three are only clay-lined. Of these sites four have no leachate collection systems at all. “

Many states are seeking this CCR authority to allow for exemptions to new federal requirements, such as the NEW federal requirement to line coal ash ponds. Clearly, this will be an issue in Wisconsin as most of our ponds and landfills are old, and with questionable containment systems. In fact, according to EPA, WI has the distinction of having the most documented sites contaminated by coal ash in the U.S. (U.S. EPA, Office of Solid Waste. Coal Combustion Waste Damage Case Assessments (July 9, 2007)). Maybe this is a non-issue in Wisconsin, as the Statement of Scope notes that any new state requirements would be *at least as stringent* as federal requirements. However, it does seem that closure of many of these sites could be complicated and require significant state resources. It is important that historic or current sites without liners or leachate collection systems are analyzed to ensure that there is no ongoing water contamination, and that modifications are made. Sites with clay liners should also be evaluated to ensure that they are still functional. Non-functional sites should be rebuilt or relocated to ensure protection of our water resources. Wisconsin should also require monitoring after closure at CCR landfills and ponds.

Other states have used CCR authority to limit the ability of citizens to sue regarding cleanup of these sites, and have reduced public comment opportunities on landfill and impoundment facilities by only permitting these facilities at construction only. As a case in point, we have “legacy” coal ash sites in Wisconsin, which many residents are concerned about, but there is often no structured way for residents or communities to have their concerns addressed. For example, the WEPCO Cedar Sauk landfill site is still a concern for many as we know that CCR was placed in an unlined sand and gravel pit, which contaminated groundwater with selenium, boron, and sulfate. This landfill likely continues to contaminate groundwater and surface water in the Milwaukee River Basin.

With these concerns in mind, we offer the following scoping suggestions for this proposed rule change:

1. WDNR should ensure that as part of any state CCR program that there is an increased public role in permitting and enforcement. It is essential that permitting be a public process and that landfill and pond permits not be for the life of the facility, which shuts the public out of permit review and revision processes. Permits should be for a set duration, such as 5 years, which allows for the public to stay engaged in the operation and cleanup of these facilities. In addition, all essential data (such as groundwater monitoring data, inspections, etc.) should be made available on a publicly posted website.
2. The Statement of Scope notes that industry representatives have told DNR that CCR ponds or surface impoundments are likely to disappear in the next few years, and thus there might not be a need for state regulation. This notion that ponds will disappear in a few years may be misplaced. The operating life of most CCR ponds will likely be extended to Oct 2023 under the new CCR rollback proposed by the Trump Administration, and then operators will have up to 15 years to complete closure of these facilities that pose a serious risk to our groundwater and surface water. It is possible that some of these facilities will not be closed until at least 2038, and then closed facilities will need to be

monitored. WDNR should consider this when deciding whether to take over the CCR responsibility for these ponds.

3. Wisconsin regulations should close gaps in dangerous reuse practices of CCR, which is allowed under federal law. This would be allowed, because imposing regulations on these practices would go above and beyond federal requirements. These reuse practices include structural fills, agricultural use of coal ash, and any filling or unencapsulated uses of CCR products. While coal ash reuse has been advocated for by most if not all of our State's energy companies, these products are a source of heavy metals and other contaminants to our groundwater and surface water, and any monitoring and cleanup costs from these so called "beneficial" reuses will be borne by the taxpayers. Puerto Rico just banned the use of coal ash as fill anywhere on the island due to these concerns. We Energies is placing coal ash/gypsum as an agricultural amendment onto fields adjacent to Ulao Creek, a tributary of the Milwaukee River, which they were authorized to do with very little water quality monitoring and data provided documenting the practice was "safe".
4. Wisconsin regulations should require testing of drinking water wells, as well as off-site surface waters in close proximity to any landfill or surface impoundment facilities. In our area, there are documented drinking water issues near the We Energies Oak Creek facility, which are likely caused by a CCR landfill facility. There has also been documented well contamination in Waukesha near the Highway 59 landfill (e.g. with molybdenum and other heavy metals) from an adjacent CCR facility, necessitating that an entire subdivision switch from individual wells to Waukesha city water. And these cases are a "drop in the bucket" with cases documented statewide. A good model that requires well testing can be found in the North Carolina Coal Ash Management Act.
5. Wisconsin regulations should strengthen the federal closure requirements by clearly banning any capping of landfills or ponds that have ash in contact with groundwater.
6. Wisconsin regulations should include financial assurance, which requires the operator of the coal ash dump to set aside sufficient funds to complete a safe closure and to remediate the site, if necessary.

Thank you for your consideration of these comments to your Statement of Scope for proposed rules to manage CCR landfills and surface water impoundments or ponds. Please let me know if I can answer any questions related to these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Cheryl Nenn", with a long horizontal flourish extending to the right.

Cheryl Nenn
Riverkeeper

Cc: Jennifer Bolger Breceda, Executive Director
Lisa Evans, Earthjustice