

Delivered via electronic mail

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Re: Comments on Economic Impact Analysis for Coal Combustion Residual Landfills and Surface Impoundments (WA-17-18)

Dear Valerie Joosten:

The undersigned public interest organizations submit the following comments on the Wisconsin Department of Natural Resources' draft economic impact analysis of the proposed permanent administrative rule for Coal Combustion Residual Landfills and Surface Impoundments, WA-17-18. Please let us know if you have any questions or concerns.

Sincerely,

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COMMENTS ON DRAFT ECONOMIC IMPACT STATEMENT OF ADMINISTRATIVE RULE WA-17-18 FOR COAL COMBUSTION RESIDUAL LANDFILLS AND SURFACE IMPOUNDMENTS

This comment highlights important considerations regarding the proposed economic impact statement, draft rule, and proposed takeover of the EPA permitting program. Coal Combustion Residuals (CCR) are coal ash or sludge that are disposed of as solids in landfills or as liquids in coal ash ponds (impoundments) as a byproduct of coal burning, primarily in coal-powered power plants. Coal ash is “one of the largest industrial waste streams generated in the U.S.”¹ CCR poses pollution risks because it contains toxic substances including mercury, lead, and arsenic.² Improper management or unlined or inadequately lined ponds can contaminate groundwater and drinking water.³ Given these risks and how costly and difficult groundwater cleanup can be once contamination or leaks have occurred, it is vital to get these CCR regulations right.

I. Regulation of Coal Combustion Residual Landfills and Surface Impoundments

a. Comparing the Proposed Administrative Rule with Federal Regulations

CCR disposal is regulated by the EPA under the Resource Conservation and Recovery Act.⁴ In 2015, the EPA promulgated the Disposal of Coal Combustion Residuals from Electric Utilities regulation, commonly known as the Coal Ash Rule.⁵ In 2016, the Water Infrastructure Improvements for the Nation Act authorized the EPA to approve state permitting programs to oversee Coal Ash Rule requirements.⁶ In 2020, the Wisconsin Natural Resources Board approved the development of a state permitting program for CCR.⁷ The federal regulations governing CCR disposal were first revised in 2018 and then again in 2020,⁸ in response to *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018). These revisions are now under review pursuant to Executive Order 13,990, though the federal rulemaking process takes years.⁹

Importantly, WA-17-18 is equally or more stringent than current federal law when it comes to the regulation of coal ash landfills. We support the decision to require more than the federal

¹ 80 Fed. Reg. 21,301, 21,303.

² Id. at 21,311.

³ Katherine Clements, *The Coal Ash Rule Trilogy Spanning Obama, Trump, and the D.C. Circuit* (Jan. 28, 2020), <https://eelp.law.harvard.edu/2020/01/the-coal-ash-rule-trilogy-spanning-obama-trump-and-the-d-c-circuit/>.

⁴ See 42 U.S.C. §§ 6907(a), 6944(a), 6945(a).

⁵ 80 Fed. Reg. 21,301 (Apr. 17, 2015) (codified at 40 C.F.R. pts. 257, 261).

⁶ Pub. Law No. 114-322, § 2301, 130 Stat. 1628, 1736-1740 (2016).

⁷ Coal Combustion Residuals Landfills and Surface Impoundments, WA-17-18, available at <https://p.widencdn.net/ebi33s/2020-02-4B-Scope-WA-17-18-re-coal-combustion-res-landfills-and-surface-impoundments>.

⁸ 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, 85 FR 53516 (Sep. 28, 2020) (codified at 40 CFR 257).

⁹ See Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, Exec. Order 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

minimum safety requirements in coal ash landfill disposal. For instance, the proposed regulation requires more than 18 inches in pond covers and 4 feet thick clay liners on any new landfills instead of the federal requirement of 2 feet.¹⁰ DNR should retain these and other more stringent regulations and also ensure that rule is drafted such that updates to federal regulations imposing more stringent requirements that would render DNR's program non-compliant are automatically incorporated into the rule. To prevent de-delegation, DNR should not have to go through the rulemaking process every time the EPA updates its rules.

Currently, the proposed rule declines to regulate CCR impoundments. DNR states that the dozen coal ash ponds in the state will continue under EPA regulation because they are scheduled to close before the new permitting program would come into effect. However, under current EPA regulation any impoundment owner that can prove both a lack of capacity for alternate storage sites, and that the associated plant is closing, is eligible for an "alternate closure" extension of closure until either 2023 or 2028 depending on its size.¹¹ Additionally, once closure has been initiated coal ash ponds could have as many as 15 years to finish closure, leaving toxic metals at risk of leaking into Wisconsin air and water until 2038. Even given the years until DNR's permit program would begin, any coal ash pond that receives an extension until 2028 will likely continue leaking into the groundwater in the coming years. This contradicts DNR's statement that regulation of impoundments is economically irrelevant and not timely. Without state regulation mandating safe impoundment closure, changes to regulations at the federal level may continue to jeopardize Wisconsin groundwater and waterways. Nor is this at all unlikely: coal ash closure deadlines have already been revised at the federal level in 2015, 2018, and 2020, and there is every indication from the current administration that they might change again. DNR should reconsider its decision to leave coal ash pond permitting in the hands of the EPA, and, if not, further explain its determination that it is in the best interests of the citizens of Wisconsin to leave coal ash landfills and coal ash impoundments under different regulatory frameworks.

II. Economic Impact Analysis

We strongly support the economic, environmental, and public health benefits that improved CCR regulations will bring. Stricter CCR regulation can be expected to benefit the citizens of Wisconsin through lowered health and groundwater cleanup costs. As an example of the benefits of careful coal ash disposal, the 2015 Coal Ash Rule was projected to cost industry \$480 million while saving the public the same in health care and cleanup costs, preventing 1.4 billion pounds of toxic metals and pollution from entering U.S. waterways.¹² However, there are areas of the economic impact statement that could be improved and clarified.

¹⁰ CCR Public Feedback Meeting Presentation, DNR, (Dec. 1, 2020)

<https://dnr.wi.gov/topic/waste/documents/CCRPublicFeedbackMeetingPresentation.pdf>.

¹¹ 40 C.F.R. § 257.103(b) (2016).

¹² Reid Frazier, *Trump Administration Proposes Relaxing Rules On Waste From Coal Plants*, NPR (Nov. 4, 2019), <https://www.npr.org/2019/11/04/776174139/trump-administration-proposes-relaxing-rules-on-waste-from-coal-plants>.

a. Impacts of the Proposed Rule on the State Budget and Jobs

DNR should seek to clarify the budgetary and staffing impact of the proposed rule. DNR states that “[i]t is difficult to estimate the additional costs at this time,” and only specifically states that one additional staffer will be added to address the takeover of EPA responsibilities for CCR permitting, a hydrogeologist budgeted at under \$100,000.¹³ DNR states that this will be paid for with one-time plan review fees amounting to under \$200,000. DNR further states that twelve existing staff will be able to cover the permitting responsibilities, but does not clarify what would be done if that was found to be inadequate, or what other responsibilities those staff members would no longer be spending time on. DNR already requires operating licenses for coal ash landfills and impoundments, which it cites as justification for this not being a measurable increase in staff resources.¹⁴ It states that plan review fees, including review fees for the new annual reporting requirements, will cover the department’s costs.¹⁵ This does not account for the staff time and costs associated the new monitoring and enforcement requirements, or the expansion of the groundwater monitoring program. It appears that DNR has made no provision for the time and costs associated with expanded monitoring responsibilities or responding to leaks and emergencies. Wisconsin leads the country in documented coal ash contamination sites.¹⁶ In order to ensure the best protection for Wisconsin citizens, DNR should carefully assess the staffing needs of the revised permitting program as part of the economic impact analysis before making a commitment to take on these additional responsibilities.

b. Economic Impacts of Specific Alternatives to the Proposed Rule

DNR should include an analysis assessing the economic impact of regulating both CCR landfills and CCR impoundments. While DNR states that taking over regulation of impoundments would not be timely given that all impoundments have scheduled to close before DNR’s permitting program would begin, extensions to closure dates to as far as 2028 may be available to impoundments under current federal law, so DNR should consider what the economic impact would be of regulating those sites under its own permitting program as a viable alternative. Additionally, it should more clearly explain the expected economic impact of bringing the regulations into parity or better with federal regulations without applying for permit oversight authority with the U.S. EPA. This would allow the public to better understand this important issue.

¹³ WA-17-18 Statement of Scope, DNR, (May 30, 2019)

<https://dnr.wi.gov/news/input/documents/rules/WA1718ScopeStatement.pdf>.

¹⁴ See Wis. Stat. ch. 289.

¹⁵ WA-17-18 Draft Rule Language, DNR, (May 20, 2021)

<https://dnr.wisconsin.gov/sites/default/files/topic/Rules/WA1718DraftRule.pdf>.

¹⁶ Wisconsin Coal Ash Factsheet, EarthJustice, <https://earthjustice.org/sites/default/files/wi-coal-ash-factsheet-1111.pdf>; U.S. EPA, Office of Solid Waste. Coal Combustion Waste Damage Case Assessments (July 9, 2007).