

February 12, 2021

The Honorable Jane Nishida  
Acting Administrator  
Environmental Protection Agency  
1300 Pennsylvania Ave NW  
Washington, DC 20460

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**Re: Comments on Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, Advanced Notice of Proposed Rulemaking, Docket ID No. EPA-HQ-OLEM-2020-0107**

Dear Acting Administrator Nishida:

The undersigned 69 public interest groups from 28 states, Puerto Rico, Navajo Nation and the District of Columbia write to express our great disappointment in the Environmental Protection Agency's ("EPA's") failure to establish protective requirements for the nation's legacy coal ash ponds. Legacy ponds are the walking dead of the coal ash universe – toxic waste sites that live long after coal plants have closed-- slipping through regulatory cracks as they continue to poison communities. After years of delay and in clear violation of a court order, the EPA still has not addressed this urgent issue.

Two and a half years ago, in August 2018, the U.S. Court of Appeals for the District of Columbia ordered EPA to establish stringent safeguards requiring the safe closure and cleanup of more than 100 "legacy" ash ponds located at retired power plants.<sup>1</sup> But the Trump administration refused, focusing instead on proposing rollback after rollback intended to strip essential health protections from the 2015 Coal Combustion Residuals ("CCR" or "coal ash") Rule.<sup>2</sup> Having failed to even *propose* safeguards for legacy ponds, EPA is in clear violation of the court's landmark order designed to tackle the cleanup and containment of millions of tons of coal ash dumped throughout the United States.

In fact, in October 2020, EPA published a grossly inadequate and illegal response to the court's 2018 order – an Advance Notice of Proposed Rulemaking ("ANPRM"), which is a far cry from the rule required by the court's order. The Court made clear that EPA already has the information it needs to regulate legacy ponds. The ANPRM, however, simply seeks more information: it solicits information on the universe of legacy ponds and opinions regarding

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<sup>1</sup> *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018).

<sup>2</sup> Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015); *see* Earthjustice, CCR Rulemaking Index, Trump Administration Wages Multifront Assault on Coal Ash Protections (last updated Dec. 7, 2020), [https://earthjustice.org/sites/default/files/files/rulemaking\\_index\\_multifront\\_assault\\_on\\_coal\\_ash\\_protections\\_12-07-2020\\_0.pdf](https://earthjustice.org/sites/default/files/files/rulemaking_index_multifront_assault_on_coal_ash_protections_12-07-2020_0.pdf).

possible safeguards. Further, despite the clear ruling of the D.C. Circuit, EPA took the extraordinary measure of questioning its own legal authority to regulate legacy ponds. The ANPRM was simply a ploy by the Trump Administration to stall the establishment of regulations essential to protecting America's drinking water and waterways.

EPA must immediately address the damage from decades-old legacy ash ponds that have escaped maintenance, monitoring and inspections, while the pits deteriorate and leak toxic chemicals. The massive 2014 spill at Duke Energy's Dan River Station, which fouled 70 miles of river in two states, was caused by a coal ash pond no longer in use. Approximately 100 legacy ash ponds across the U.S. similarly threaten water supplies and scenic rivers. It is well past time to ensure that another catastrophic spill does not occur. Communities downstream of coal ash ponds are disproportionately poor and non-white. The Biden EPA cannot allow this environmental injustice to persist.

We urge EPA to move swiftly to a proposed rule and to end the ongoing environmental damage and injustice. To meet the environmental protection standards set by the Resource Conservation and Recovery Act, EPA's new rule must impose protections at least as stringent as the requirements currently in place for active and inactive surface impoundments. In addition, in light of the unique and heightened threat posed by abandoned and unmaintained leaking pits, EPA must:

1. Regulate *all* legacy impoundments that threaten health and the environment, including impoundments that no longer contain visible liquids, because ash in such impoundments may be in contact with groundwater and still leaching toxic contaminants and/or the legacy impoundment may be sited in a floodplain or other dangerous location that could cause the release of hazardous substances;
2. Require owners of legacy impoundments to identify potentially impacted residents, test drinking water sources and provide safe drinking water if contamination is found.
3. Require owners of legacy impoundments to identify impacted surface waters and test those water bodies for contamination.
4. Require owner or operators to conduct more frequent structural stability analyses to prevent catastrophic failure.
5. Prohibit closure-in-place for legacy impoundments that cannot meet the location restrictions of the CCR rule.
6. Require immediate diversion of surface water around legacy impoundments to reduce risk of catastrophic failure.
7. Require minimization and monitoring of coal ash fugitive dust at the impoundment and along routes of transport during excavation of coal ash.
8. Require accelerated closure of legacy CCR surface impoundments to address their unique risks.

9. Require financial assurance to ensure funds are available for safe closure and cleanup.
10. Establish a groundwater protection standard for manganese and require groundwater cleanup if exceedances are found.

Taking action to stop toxic contamination from legacy ponds is an important component of President Biden's commitment to address environmental justice. We ask that EPA make establishing these protections for toxic coal ash among its highest priorities in 2021.

Respectfully submitted,

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