

Attorneys General of Maryland, Illinois, and Michigan

April 17, 2020

Via Electronic Transmission

Administrator Andrew R. Wheeler
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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 (EPA-HQ-OLEM-2019-0173; FRL-10005-81-OLEM)

Dear Administrator Wheeler:

The undersigned Attorneys General respectfully submit these comments on the proposed rule titled A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure (EPA-HQ-OLEM-2019-0173; FRL-10005-81-OLEM) (“the Part B Proposal”).¹ As explained below, we oppose any effort to weaken or roll back the closure and lining requirements applicable to coal ash impoundments. We therefore urge the Environmental Protection Agency (“EPA”) to retreat from those aspects of the Part B Proposal that would ease existing requirements or provide unwarranted extensions of compliance deadlines.

Although federal law generally allows states to regulate the activities at issue more stringently than federal law, EPA’s proposed rollbacks will harm our interests in multiple respects. Each of our states is threatened by pollution from coal ash impoundments, either within our borders or in neighboring states. Groundwater and surface waters within our respective borders are interconnected to upstream out-of-state waters, and thus vulnerable to pollution discharged outside our boundaries. Leaking and overflowing coal ash impoundments have contaminated groundwater and surface waters alike. Our states thus rely on federal regulation to ensure a stable nationwide regulatory floor protecting against pollution crossing our borders. Further, state law may pose impediments to regulating more stringently than EPA, so that the agency’s actions, in practical terms, serve not just as a regulatory floor but also as a regulatory ceiling.

In multiple respects, the Part B Proposal is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). EPA’s proposal to allow certain inadequately lined impoundments to avoid closure is inconsistent with RCRA and flouts the risks of allowing their continued operation. Its proposal to allow more time for owners and operators of certain impoundments to take corrective action may create undue delay in remediation that could and should be undertaken earlier. The proposal to allow the placement of additional coal ash in closing impoundments would increase post-closure risks, not to mention making a mockery

¹ 85 Fed. Reg. 12,456 (Mar. 3, 2020).

of the concept of “closure.” And it fails to address the closure of legacy ponds in a manner consistent with the D.C. Circuit’s decision in *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018) (“*USWAG*”).

I. THE POLLUTANTS AND ACTIVITIES AT ISSUE

When power plants burn coal, the resulting waste—coal combustion residuals (CCR), or coal ash—includes a host of toxic chemicals, such as arsenic, lead, and mercury. *USWAG*, 901 F.3d at 421. These chemicals pose numerous dangers to human health, including cancer, cardiovascular effects, and neurological effects. *Id.* The risks to infants are particularly acute. *Id.* Coal ash and its constituents are also dangerous to fish, birds, amphibians, and plants. *Id.* And the amounts of coal ash generated by coal-fired power plants are staggering: 110 million tons in 2012, by EPA’s calculation. *Id.* at 420.

Historically, power plants have disposed of coal ash in surface impoundments—but surface impoundments are prone to leak or rupture, endangering soil, groundwater, and surface water. By way of one example, in 2008 a release of coal ash sludge from an impoundment in Kingston, Tennessee contaminated the Emory River, made fish unsafe to eat, and polluted hundreds of acres of land. *Id.* at 423. Impoundments without a lining separating the coal ash from the soil are especially prone to leaks. *Id.* at 422.

So are impoundments with an insufficient lining. *Id.* Clay-lined impoundments, for instance, are “dangerous,” with “a 9.1 per cent chance of causing groundwater contamination at drinking water wells at a one-mile distance from the impoundment perimeter. *Id.* at 431. That risk “is much higher closer to the impoundment perimeter.” *Id.*

Also posing particular dangers are “legacy ponds,” or inactive impoundments at inactive power plants. Legacy ponds generally are unlined, so that they are prone to leak. They also generally are unmonitored, so that leaks are less likely to be detected. *Id.* at 422-23.

II. THE PART B PROPOSAL CONTRAVENES RCRA AND *USWAG* BY ALLOWING INADEQUATELY LINED IMPOUNDMENTS TO REMAIN OPEN.

In *USWAG*, the D.C. Circuit rejected EPA’s attempt to treat clay-lined impoundments as lined despite their lacking a composite liner. 901 F.3d at 431-32. The Part B Proposal is an unlawful end-run around that holding.

Subtitle D of RCRA prohibits the disposal of “nonhazardous” solid waste in open dumps. 42 U.S.C. § 6945(a). To enable implementation of this prohibition, the statute requires EPA to promulgate criteria for determining whether particular solid waste disposal facilities are “sanitary landfills” (which are allowed) or “open dumps” (which are prohibited). *Id.* §§ 6907(a)(3), 6944(a). Categorization as a sanitary landfill, rather than an open dump, requires—at a minimum—that there be “no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.” *Id.* § 6944(a). Thus, for a surface impoundment to be classified as a sanitary landfill, there must be “no reasonable probability” of such effects. Otherwise, it is an impermissible open dump.

In 2015, EPA issued a final rule governing disposal of coal ash in landfills and surface impoundments, effectively determining which such facilities are open dumps. *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (“the 2015 Coal Ash Rule”). Among other things, the rule established location restrictions for coal ash impoundments; requirements relating to impoundments’ lining and structural integrity; compliance deadlines; and procedures for closing noncompliant impoundments. *See* 40 C.F.R. §§ 257.50 to .107. It also required unlined impoundments to initiate closure (or retrofitting) within six months after detecting leaks into groundwater. *Id.* § 257.101(a)(1).

Emphasizing the “no reasonable probability of adverse effects” standard, the D.C. Circuit concluded that the 2015 Coal Ash Rule was insufficiently protective in multiple respects. *See USWAG*, 901 F.3d at 449-50. The court repeatedly faulted EPA for understating or ignoring overwhelming evidence of the dangers to the environment and public health posed by unlined or leaking coal ash impoundments. *See id.* at 429, 431-32. It also held that EPA’s approach to unlined impoundments—requiring closure or retrofitting only after detection of leaks—was “arbitrary and contrary to RCRA” because, among other things, EPA had not shown that harmful leaks would be promptly detected and stopped, or that contamination can be remedied once it occurs. *Id.* at 429.

Of particular relevance here, the court in *USWAG* held that EPA had acted unlawfully in treating clay-lined impoundments as if they were lined, rather than unlined, and allowing their owners to attempt to repair them in the event of leakage. *Id.* at 431-32. Clay-lined impoundments, the court observed, had a 9.1 percent chance of contaminating groundwater at drinking water wells within one mile of the impoundment’s perimeter, and a much higher chance closer to that perimeter—belying the notion that their operation would have “no reasonable probability of adverse effects on health or the environment.” *Id.* at 431. The court also stressed that the notion that “that leaking clay liners, unlike leaking unlined impoundments, can be repaired” was merely an “unsupported supposition.” *Id.* The court continued: “There is no evidence in the record supporting the EPA’s assumption that clay liners are reasonably susceptible of repair, nor any explanation or account of how the risks of harm during the lengthy response periods the Rule allows comport with the ‘no reasonable probability’ standard.” *Id.* at 432; *see id.* at 431 (explaining that EPA “has failed to show how unstaunched leakage while a response is pending” can be squared with that standard). Indeed, the court expressed particular concern about undue delay in closing clay-lined impoundments, criticizing EPA for allowing owners of leaking impoundments to explore repair even before the close-or-retrofit clock starts running. *Id.* at 431.

In spite of the foregoing, EPA now proposes to create a process that would allow some clay-lined impoundments to continue operating, upon making particular showings through a two-part application process. EPA’s proposal circumvents *USWAG*, violates RCRA, and is otherwise arbitrary and capricious.

Most glaringly, the proposed exception violates RCRA’s “no reasonable probability” standard. EPA’s own data from 2014, relied upon by the D.C. Circuit in *USWAG*, have shown that 9.1 percent of clay-lined impoundments will leak. 901 F.3d at 431. EPA has not even updated the risk assessment it conducted in 2014 as a foundation for the Coal Ash Rule. Indeed, the agency

has admitted, with respect to all regulated impoundments, that “more recent data suggest that a greater number of units are leaking than EPA originally estimated during the [2015] rulemaking.” 84 Fed. Reg. at 65,945.

To be sure, EPA proposes to require applicants to show, as a condition of authorization, that “continued operation of the unit would pose no reasonable probability of adverse effects to human health or the environment in the future.” 85 Fed. Reg. at 12,459. In these circumstances, though—where 9.1 percent of clay-lined impoundments will leak, and where EPA has pointed to no evidence that leaking clay-lined impoundments can be repaired—that is a negative that cannot be proven.

Indeed, the proposal flies in the face of what *USWAG* said about repairing clay-lined impoundments that are found to leak. As noted, *USWAG* rejected, as an “unsupported supposition,” EPA’s premise that “leaking clay liners . . . can be repaired.” 901 F.3d at 431; *see id.* at 432 (stressing that “[t]here is no evidence in the record supporting the EPA’s assumption that clay liners are reasonably susceptible of repair”). The Part B Proposal, like the provision that the D.C. Circuit rejected in *USWAG*, rests on the premise that leaking clay-lined impoundments can be repaired: if such an impoundment satisfies EPA’s alternate lining criteria, then it can operate until “there is evidence that the unit may exceed the groundwater protection standard for any constituent within the operational life of the unit.” Fed. Reg. at 12,477. At that point, its authorization “may [be] revoke[d]” in the event that “source control measures cannot be put in place while the unit continues to operate.” *Id.* The Part B Proposal thus contemplates repair of clay-lined impoundments. Yet EPA has pointed to no evidence elevating reparability of such impoundments beyond an “unsupported supposition,” 901 F.3d at 431, nor has it even proposed to require evidence of reparability in order for a facility to operate with an alternate lining in the first place. In this respect, too, the Part B Proposal flouts *USWAG* and is thus unlawful.

The proposal appears to rest on yet another unsupported assumption, moreover. EPA states that the owner or operator’s demonstration “would require that, at a minimum, that the owner or operator demonstrate that the surface impoundment has not and will not result in groundwater concentrations above relevant GWPS at the unit boundary (health-based or background, whichever is higher).” 85 Fed. Reg. at 12,459. The proposal then explains that “[t]his is the standard used to trigger corrective action for lined surface impoundments *and is considered equally appropriate in this context.*” *Id.* (emphasis added). In other words, EPA believes that the standard controlling when *lined* impoundments should take corrective action is “equally appropriate” for use in determining whether to treat impoundments as lined in the first place. EPA does not explain why compliance with the standard used to trigger corrective action in lined impoundments should determine *whether* to treat clay-lined impoundments as lined in the first place—*i.e.*, why this standard is “equally appropriate.” The absence of such an explanation makes the proposal arbitrary and capricious.

The proposed exception does not even respond to any real need. EPA states that it “believes that it is likely only a small fraction of non-composite lined surface impoundments currently in operation will be able to apply successfully” under the proposed exception. 85 Fed. Reg. at 12,459. That few impoundments are expected to qualify undermines any claim that the exception is necessary, and highlights that the potential for abuse outweighs any theoretical benefit.

And the potential for abuse is significant. If finalized, the proposal would give EPA and state agencies considerable discretion to authorize the continued operation of clay-lined impoundments. States may be ill-equipped to evaluate and respond to complex modeling submitted by impoundment operators. The public, for its part, lacks the sort of information that impoundment operators possess, and thus will be ill-equipped to oppose or challenge authorization requests. Once the possibility of an alternate-liner authorization exists, the path of least resistance for agencies may be to grant such authorization, regardless of whether it is truly justified under regulatory criteria.

Further, the proposal would improperly delay closure even for facilities that do not ultimately satisfy the alternate-lining requirements. EPA states that it anticipates that all initial applications will be approved. Regulatory Impact Statement, at 3-4. Facilities need not submit their complete alternate-liner demonstration packages until one year after the deadline for initial applications. *Id.* at 12,476. EPA (or an implementing state) must then spend considerable time evaluating complex arrays of data, as well as hydrogeological modeling, in order to determine whether the impoundment's operation will "result in groundwater concentrations above the relevant groundwater protection standard at the unit boundary." *Id.* at 12,475. Even if the agency ultimately rejects the demonstration, the impoundment will be able to continue operating throughout the period when the demonstration is under review. The regulations do not even give the reviewing agency a deadline for approving or disapproving a submitted demonstration, so that such a demonstration can remain pending indefinitely. *See id.* Not only that, but submission of a complete demonstration—even an inadequate one—will, under EPA's proposal, toll the deadline for the impoundment to cease receipt of waste. *Id.* at 12,476. The upshot is that the Part B Proposal extends the time for clay-lined impoundments to continue operating, perhaps indefinitely, even if they do not meet the alternate-lining criteria.

Continued operation of these impoundments is dangerous. *See USWAG*, 901 F.3d at 431-32. Even though EPA asserts that "there is currently no evidence that units that can clear the initial application are leaking or have adversely affected surrounding media," 85 Fed. Reg. at 12,461, that assertion is beside the point. Regardless of whether they *already* leak, 9.1 percent of clay-lined impoundments *will* leak. *USWAG*, 901 F.3d at 431. This risk underscores the illegality of EPA's proposal.

III. THE EXTENDED CORRECTIVE-ACTION TIMELINE FOR IMPOUNDMENTS CLOSING BY REMOVAL OF CCR SHOULD BE LESS FLEXIBLE.

For impoundments closing by removal of CCR, EPA has proposed to allow owners and operators to "complete groundwater corrective action during a post-closure care period," after "first complet[ing] all other removal and decontamination activities within the timeframes provided for completing closure." 85 Fed. Reg. 12,469. The proposal states that "it is now evident that many CCR units have released CCR constituents into the surrounding soils and groundwater," so that "the closure activity . . . will likely require a significant undertaking to remediate impacted soil and groundwater in order to achieve the current CCR removal and decontamination standards." *Id.* The proposal also states EPA's "concern[] that the current CCR regulations may create a disincentive to close a unit by removal of CCR."

We agree that, as a general matter, the CCR regulations should not create disincentives for owners and operators to close impoundments by removal of CCR: all other things being equal, closure by removal is the safest way to close impoundments. We are concerned, however, that EPA's proposal may permit undue delay in remediation that could and should be completed earlier. In particular, we are concerned that impoundment operators may seek to adopt a wait-and-see approach, in hopes that contamination of soil and groundwater will abate on its own over time. At a minimum, EPA should expressly provide that an impoundment closing under this newly proposed option must undertake prompt and proactive remediation measures, and cannot simply hope that the passage of time will obviate the need for remediation.

IV. THE PART B PROPOSAL CONTRAVENES RCRA AND USWAG BY UNLAWFULLY ALLOWING IMPOUNDMENTS THAT CLOSE TO CONTINUE RECEIVING CCR.

EPA's Part B Proposal puts forward two options for removing the prohibition on placing additional CCR into impoundments that are closing for cause. 85 Fed. Reg. at 12,463. Each would require, among other things, that the CCR be placed "in a closing unit for the purpose of supporting closure of the CCR unit." *Id.* Each of EPA's proposed options is irrational and unlawful.

First, allowing placement of additional CCR in impoundments that are closing for cause would be environmentally harmful. The impoundments at issue are, by definition, ones that cannot operate safely, whether because they are inadequately lined or because they fail the geographic location requirements. Yet EPA is now proposing to allow owners and operators to fill those impoundments with *additional* CCR, every bit as toxic as the CCR previously placed there. Allowing owners and operators to place additional CCR in these impoundments would result in vastly more CCR in "closing" impoundments, and fewer sites from which CCR has truly been removed. Indeed, EPA expects that these provisions will be employed at *all* eligible sites—meaning that *no* eligible impoundments closing for cause will actually be free of CCR. Regulatory Impact Statement, at 3-12.

Second, and relatedly, the proposal makes a mockery of the concept of closure, as well as the concept of cessation of receipt of waste. An impoundment is not truly "closing" if, for years after initiating closure, it is continuing to receive CCR. Nor has it ceased the receipt of waste if, for years after purporting to do so, it is continuing to receive CCR.

Third, even if *some* amount of CCR placement in closing impoundments were sensible, EPA's proposal contains too few limits on this practice. For instance, it appears to allow operators to continue placing CCR in closing impoundments for as long as fifteen years after initiating the closure process. *See* 40 C.F.R. § 257.102(f)(1)(ii), (2)(ii)(B). And it includes no absolute limits on the volume of CCR that may be placed, other than requiring that it "not exceed the volume of soil or borrow material that otherwise would be used to achieve the subgrade elevations necessary to support the final cover system." 85 Fed. Reg. at 12,463. The illogical consequence is that the larger the impoundment that is closing, the more CCR can be placed in it as part of the closure process. Thus, the impoundments likely to pose the greatest danger in the first place are also the

ones allowed to receive the most additional CCR under EPA’s proposal, resulting in increased risks associated with any leak. These results are arbitrary and capricious.

V. THE PART B PROPOSAL VIOLATES RCRA AND CONTRAVENES *USWAG* BY FAILING TO ADDRESS LEGACY PONDS.

Finally, we are troubled by EPA’s continued failure to revise its regulations to reflect the *USWAG* decision’s treatment of the 2015 rule’s exemption for “legacy ponds,” or inactive impoundments at inactive power plants. *See* 40 C.F.R. § 257.50(e). *USWAG* vacated that exemption, which applied regardless of the impoundments’ lined or leaking status, as “unreasoned, arbitrary, and capricious.” 901 F.3d at 434. The court recognized that these impoundments “pose the same substantial threats to human health and the environment as the riskiest Coal Residuals disposal methods, compounded by diminished preventative and remediation oversight due to the absence of an onsite owner and daily monitoring.” *Id.* at 432; *see id.* at 433 (“Simply hoping that somehow there will be last-minute warnings about imminent dangers at sites that are not monitored, or relying on cleaning up the spills after great damage is done and the harm inflicted[,] does not sensibly address those dangers.”); *see also id.* at 422 (noting EPA’s acknowledgment that “it will not always be possible to restore groundwater or surface water to background conditions after a contamination event”). Especially in light of these threats, the court held that “EPA’s decision to shrug off preventative regulation makes no sense.” *Id.*

Having been vacated, the legacy ponds exemption retains no legal force—*i.e.*, unlined legacy ponds are unlawful open dumps, just like other unlined coal ash impoundments. In spite of that vacatur, however, the exemption remains on the books. To forestall any claim of confusion on the part of responsible parties, EPA must remove the legacy ponds exemption from the codified regulations immediately, just as it has previously proposed to remove the other provisions vacated by the *USWAG* decision. *See* A Holistic Approach to Closure Part A: Deadline to Initiate Closure, 84 Fed. Reg. 65,941, 65,941 (Dec. 2, 2019).

In addition, EPA must adopt procedures to affirmatively facilitate the prompt closure of legacy ponds. EPA has previously stated that legacy ponds “will be addressed in a subsequent proposal.” *Id.* at 65,943 n.1. In light of that statement, one would have expected some discussion of legacy ponds in the Part B Proposal—yet the proposal does not even mention the issue, choosing instead to focus largely on deregulation. EPA must act promptly to adopt regulations specifically addressing and facilitating the closure of legacy ponds.

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EPA’s Part B Proposal is irrational and unlawful in multiple respects. We appreciate the opportunity to submit these comments and urge the Administrator to remedy the legal defects described above.

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