



February 7, 2020

**Via Registered Mail, Return Receipt Requested**

Andrew Wheeler, Administrator  
United States Environmental Protection Agency  
Office of the Administrator (1101A)  
William Jefferson Clinton Federal Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: 60-Day Notice of Intent to Sue for Failure to Perform Nondiscretionary Duties under the Resource Conservation and Recovery Act**

Dear Administrator Wheeler:

This letter provides notice that the Labadie Environmental Organization (“LEO”), Diné Citizens Against Ruining our Environment (“Diné CARE”), Waterkeeper Alliance, Inc. (“Waterkeeper Alliance”), Hoosier Environmental Council (“HEC”), and Sierra Club intend to file a citizen suit against the United States Environmental Protection Agency (“EPA”) and the Administrator of the EPA based on the Administrator’s failure to perform nondiscretionary duties under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972 *et seq.* As further specified below, you have failed to fulfill your duties under 42 U.S.C. §§ 6907, 6944(a), 6974(b) to hold “public hearings” and ensure “public participation” on EPA’s proposal to revise closure deadlines for Coal Combustion Residuals (“CCR” or “coal ash”) impoundments. 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, 84 Fed. Reg. 65,941 (Dec. 2, 2019) (hereinafter “Part A Proposal”).

The Part A Proposal is major rulemaking that will have adverse impacts on the environment and the health of individuals throughout the United States. Published on December 2, 2019, the Proposal revises the 2015 CCR Rule. 84 Fed. Reg. 65,941 (Dec. 2, 2019). The 2015 CCR Rule provides safeguards for coal ash disposal and critically protects communities from the hazardous threat posed by coal ash. The Part A Proposal would roll back some of those protections by giving utilities a significantly longer period of time than was given under the 2015 rule to initiate closure of coal ash surface impoundments (also known as “ponds”) which are leaking and unlined or which are located in dangerous and prohibited areas. The Part A Proposal would therefore allow millions of tons of additional toxic coal ash waste to



be dumped into leaking and/or dangerously-sited ponds. In some instances, closure deadlines would be extended to October 2028.

When it published the Part A Proposal, EPA stated vaguely that it would hold a public hearing on January 7, 2020, either virtually or in-person in the Washington, DC metro area. 84 Fed. Reg. 65,941 (Dec. 2, 2019). EPA later made clear on its website that the hearing would be virtual – a hearing that required speakers to first register online and then call in to a webinar to provide oral testimony. The decision to only have a virtual public hearing and registration instructions were announced only on EPA’s website. *Virtual Public Hearing on the Proposal: A Holistic Approach to Closure Part A*, <https://www.epa.gov/coalash/forms/virtual-public-hearing-proposal-holistic-approach-closure-part>. To make matters worse, EPA announced it would only have a 60-day comment period on the proposed rule, with this comment period running through the Christmas, Hanukkah, Kwanzaa, New Year’s Day, and Martin Luther King, Jr.’s Day holidays, and that the deadline for registration for the virtual public hearing would be January 3, 2020, a day when many would still be celebrating the winter holidays.

On December 4, 2019, eighty-seven public interest organizations, including noticing parties herein, requested that EPA hold an in-person public hearing on the Part A Proposal and extend the comment period to 120 days to ensure that the public has a meaningful opportunity to express their concerns to EPA. In a letter dated December 16, 2019, received by Earthjustice electronically on December 23, 2019, Assistant Administrator Peter Wright responded that EPA would not extend the comment period or hold an in-person public hearing. See Exhibit A, Letter from EPA, (Peter Wright) to Earthjustice (Lisa Evans), Docket ID No. EPA-HQ-OLEM-2019-0172-0028 (Dec. 16, 2019).

**I. UNDER RCRA, EPA AND THE ADMINISTRATOR HAVE NONDISCRETIONARY DUTIES TO HOLD “PUBLIC HEARINGS” AND TO ENSURE “PUBLIC PARTICIPATION” ON THE PART A PROPOSAL**

RCRA imposes nondiscretionary duties on the Administrator to hold public hearings and to ensure public participation in promulgating regulations such as the Part A Proposal. RCRA requires the Administrator to hold public hearings prior to developing and publishing CCR regulations. 42 U.S.C. §§ 6907(a) and 6944(a). RCRA further mandates that “[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator.” *Id.* § 6974(b). The mandatory language of 42 U.S.C. §§ 6907(a), 6944(a), and 6974(b), coupled with references to fixed events, make it clear that these duties are nondiscretionary.

These RCRA provisions plainly apply to the Part A Proposal. Indeed, EPA cites to 42 U.S.C. §§ 6907(a) and 6944(a), among others, as its statutory authority for the Part A Proposal. 84 Fed. Reg. 65,941, 65,943 (Dec. 2, 2019). These nondiscretionary duties are designed to ensure that citizens have a meaningful opportunity to express their views and concerns, thus enhancing EPA’s ability to identify environmental impacts and helping EPA to make better policy decisions.



## **II. EPA HAS FAILED TO HOLD “PUBLIC HEARINGS” ON THE PART A PROPOSAL AS REQUIRED BY RCRA**

### **A. RCRA’s Public Hearing Requirement Necessarily Includes an “In-Person” Public Hearing**

RCRA’s public hearing requirement is not satisfied by EPA holding a virtual hearing in lieu of an in-person public hearing. In-person hearings offer the public invaluable and distinct benefits that virtual hearings simply cannot provide. The dynamics of virtual hearings, conducted over the telephone or online, are fundamentally different from in-person hearings. While virtual hearings have many benefits, they should supplement, and may not replace, in-person public hearings.

Impacted community members have an enormous interest in effectively conveying their concerns about coal ash to those responsible for drafting its regulations. Face-to-face interactions foster an atmosphere of comfort and candidness that promotes meaningful communication and encourages participants to ask questions and engage in dynamic dialogue. Commenters can speak directly to EPA representatives physically present in the same room and observe how their comments are being received. They are able to enhance their testimony with visual aids, such as maps, pictures, and samples of contaminated water or soil. Commenters can also draw on support from community members or family members physically present in the same room as they deliver their testimony. These are benefits that virtual public hearings simply do not offer. Unable to see either EPA officials or other members of the public connected electronically via the internet, virtual commenters must speak into a phone or computer microphone without knowing who, if anyone, is listening.

Moreover, many people are not comfortable with the technology associated with a virtual public hearing and many do not have access to the technology, which can prevent or discourage testimony. And because information about the hearing was only available online on EPA’s website, those with limited internet access had difficulty receiving notice of the virtual public hearing. Even registering for the hearing required access to the internet, which posed an obstacle for those without the required technology. This is especially true for individuals located in rural areas, low-income communities, or communities of color, where people are more likely to face barriers to internet access. Coal ash ponds, however, are also more likely to be located in these communities. Consequently, reliance on virtual public hearings exacerbates environmental justice impacts, as Black and Latino communities are both disproportionately without internet access and disproportionately affected by coal ash pollution. EPA’s failure to consider these accessibility issues is a violation of Executive Order 12,898, which directs EPA to conduct its programs, policies, and activities in a way that promotes environmental justice and does not exclude people in a discriminatory manner. 59 Fed. Reg. 7629 (Feb. 1, 1994), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>.

In-person hearings are an essential means for EPA to obtain relevant data to inform their decision-making. At in-person hearings, EPA officials are able to observe the body language of



speakers, appreciate the urgency behind their testimony, and view the visual aids speakers may bring to enhance their testimony. EPA officials can also question speakers and engage in dialogue with them. This better equips EPA to identify the full range of environmental impacts and develop an adequate record necessary for reasoned and well-informed rulemaking. Virtual hearings necessarily restrict the number, range, and impact of individuals commenting because of limitations posed by access to and comfort with technology, as well as limitations posed by the technology itself.

That RCRA requires holding an in-person public hearing is supported by EPA’s own policy, practice, and precedent. EPA’s Public Participation Regulations, for example, defines “public participation” as “providing ample opportunity for interested and affected parties to communicate their views” and “providing access to the decision-making process, seeking input from and conducting dialogue with the public.” 40 C.F.R. § 25.3(b). According to former EPA official responsible for promulgating these Regulations, the Public Participation Regulations envisioned hearings to be in-person, which was also the “common understanding at EPA.” See Exhibit B, Lee Daneker, Comment Letter submitted to Docket ID No. EPA-HQ-OLEM-2019-0172-0027 (Jan. 7, 2020), [www.regulations.gov](http://www.regulations.gov). EPA has not amended its Public Participation Regulations since promulgating them in 1979. EPA’s guidance documents further support that EPA is at least required to hold an in-person public hearing. EPA’s 2016 RCRA Public Participation Manual indicates EPA’s preference for in-person meetings, advising that virtual hearings are valuable when face-to-face meetings with affected communities are not feasible. Resource Conservation and Recovery Act Public Participation Manual, EPA 530-R-16-013, at 25 (2016), available at [https://www.epa.gov/sites/production/files/2019-09/documents/final\\_rcra\\_ppm\\_updated.pdf](https://www.epa.gov/sites/production/files/2019-09/documents/final_rcra_ppm_updated.pdf). EPA’s 2003 Public Involvement Policy also maintains that virtual hearings should not replace in-person hearings. It states that the “development of new tools for public involvement,” which includes internet-based options, “should not limit the degree or types of public involvement already in use at EPA.” EPA, Notice of New Public Involvement Policy, 68 Fed. Reg. 33,946, 33,946-47 (June 6, 2003).

Offering only a virtual public hearing for the Part A Proposal deviates from EPA’s actual practice of holding in-person hearings on CCR issues. The initial 2015 CCR Rule was finalized only after eight in-person hearings that included over 1300 speakers. 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015). Upon proposing amendments to the CCR Rule in 2018, EPA held one in-person hearing. 83 Fed. Reg. 36,435, 36,438 (July 30, 2018). Most recently, EPA held an in-person public hearing on October 2, 2019, as well as an online hearing on October 10, 2019, for additional proposed revisions to the CCR Rule. <https://www.epa.gov/coalash/coal-ash-rule#July2019proposal>. EPA’s past practice illustrates not only that holding an in-person public hearing is feasible, but also that EPA understands that it is obligated to hold an in-person hearing on proposed revisions like the Part A Proposal.



## **B. Participation at the January 7, 2020 Virtual Public Hearing Establishes That It Does Not Satisfy RCRA’s Public Hearing and Public Participation Requirements**

Participation and comments made at the January 7, 2020 virtual public hearing on the Part A Proposal further support that virtual hearings are no substitute for in-person public hearings. Over seventy-five percent of commenters at the hearing used their limited speaking time to highlight their dismay over the format of the virtual public hearing, citing it as a deterrent to public participation and expressing that they felt constrained by the format. Many stressed that they did not feel heard or seen by EPA through the virtual format, and some questioned whether anyone was listening to them at all while testifying. These commenters uniformly called upon EPA to hold an in-person hearing on the Part A Proposal.

At times, the testimony itself was muffled and was disrupted by technological or phone problems. In some cases, EPA simply asked the commenter to submit their written testimony. EPA also abruptly muted several commenters who went over their speaking time, notwithstanding the fact that there were multiple open periods with no scheduled testimony. In doing so, EPA stripped away the public’s ability to hear valuable testimony and the speaker’s ability to connect with a larger public audience.

Participation itself at the January 7, 2020 hearing was sparse. No one commented at all during several of the eight hearing hours. This can largely be attributed to the technological difficulties associated with virtual hearings. Indeed, several commenters from communities impacted by coal ash pollution in rural West Virginia, Virginia, Missouri, and the Ohio River Valley explained that many of their community members have limited access to the internet. This lack of accessibility is a barrier to registering for the virtual public hearing in the first place. Several people noted that the technology discouraged elderly community members from participating in the virtual hearing. Jason Flickner from Indiana used his speaking time to read the statement of a 70-year old member of his organization who was too intimidated by the hearing’s technology to participate himself, but who would be willing to drive 300 miles to attend a public meeting in person. And 92-year-old Ruth Campbell from Labadie, Missouri spoke about how challenging participating in the virtual public hearing was for her, explaining that she wasn’t as comfortable using the technology as younger people.

The January 7, 2020 hearing does not satisfy RCRA’s public hearing and public participation requirements. Had the meeting been held in-person, public participation would assuredly have been more robust and meaningful.

### **III. PUBLIC PARTICIPATION**

EPA has been resolute in its decision to limit and discourage public participation on the Part A Proposal. This stands in sharp contrast to 42 U.S.C. § 6974(b)’s mandate that the Administrator provide for, encourage, and assist public participation. As described above, failing to hold an in-person public hearing strips the public of their ability to communicate their



concerns on the Part A Proposal to EPA officials and fellow concerned citizens. Moreover, EPA has undermined the public’s ability to submit meaningful written comment by offering only the 60-day comment period that included the Christmas, Hanukkah, Kwanzaa, New Year’s Day, and Martin Luther King, Jr.’s Day holidays. The many holidays effectively shortened the available working days that concerned parties had to submit comments on the Part A Proposal.

To make matters worse, the comment period for the Part A Proposal almost entirely overlaps with the comment period for EPA’s proposed revisions to the Steam Electric Power Generating Effluent Limitations Guidelines and Standards. 84 Fed. Reg. 64,620 (Nov. 22, 2019). These two proposals involve many of the same impacted communities, public interest groups, and experts, thereby severely taxing their ability to comment on both proposals simultaneously.

The refusal to hold an in-person public hearing and to extend the comment period runs counter to the Administrator’s nondiscretionary duty to provide for and encourage meaningful public participation. EPA has clearly failed to perform that which is required of it under 42 U.S.C. § 6974(b).

#### **IV. INTENT TO FILE A CITIZEN SUIT AGAINST EPA AND THE ADMINISTRATOR OF THE EPA UNDER RCRA**

RCRA authorizes citizen suits “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 6972(a)(2); *see also* 40 C.F.R. §§ 254.2, 254.3. Citizens must provide notice to the Administrator at least sixty days prior to bringing such a suit. 42 U.S.C. § 6972(c).

Accordingly, LEO, Diné CARE, Waterkeeper Alliance, HEC, and Sierra Club hereby notify EPA and the Administrator of the EPA of their intent to file suit against them for failing to perform the nondiscretionary duties under 42 U.S.C. §§ 6907, 6944(a), 6974(b) of holding a public hearing and encouraging public participation on the Part A Proposal. If these violations remain unresolved at the end of the 60-day notice period, LEO, Diné CARE, Waterkeeper Alliance, HEC, and Sierra Club intend to seek an order (a) finding that EPA has failed to perform the nondiscretionary duties described herein; (b) ensuring compliance with these duties; (c) recovering attorneys’ fees and other costs of litigation; and (d) granting other appropriate relief.

#### **V. NOTICE**

This notice letter is submitted on behalf of the following organizations (“Noticing Parties”):

Labadie Environmental Organization  
2322 Highway 100  
Labadie, MO 63055



Diné Citizens Against Ruining our Environment  
HC 63 Box 272  
Winslow, AZ, 86047

Hoosier Environmental Council  
3951 N Meridian St., Suite 100  
Indianapolis, IN 46208  
(317) 685-8800

Waterkeeper Alliance, Inc.  
180 Maiden Lane, Suite 603  
New York, NY 10038  
(212) 747-0622, ext. 122

Sierra Club  
50 F. St., NW, 8th Floor  
Washington, D.C. 20001  
(845) 323-5493

LEO, Diné CARE, Waterkeeper Alliance, HEC, and Sierra Club are represented by the undersigned legal counsel in this matter. If you would like to discuss the matters identified in this letter or offer a proposal for resolving these issues, please contact the undersigned counsel.

Respectfully,

*/s/ Shubra Ohri* \_\_\_\_\_

Shubra Ohri, Lisa Evans  
Thomas Cmar, Jennifer Cassel  
Earthjustice  
311 S. Wacker Drive, Suite 1400  
Chicago, IL 60606  
Phone: 312-500-2196  
sohri@earthjustice.org

**Enclosure (Exhibits A and B)**

Copy: William Barr  
Attorney General



United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001



# **Exhibit A**



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC 16 2019

OFFICE OF  
LAND AND EMERGENCY  
MANAGEMENT

Ms. Lisa Evans  
Senior Counsel  
Earthjustice  
21 Ocean Avenue  
Marblehead, Massachusetts 01945

Dear Ms. Evans:

Thank you for your letter of December 4, 2019, from Earthjustice on behalf of 87 public interest groups, to David Ross, Assistant Administrator, Office of Water, and me. In that letter you requested the following:

- An in-person public hearing for both the Coal Combustion Residuals Part A and Revision of Steam Electric Power Generating Effluent Limitations Guidelines proposed rules; and
- An extension of the public comment periods for both the Coal Combustion Residuals Part A and Revision of Steam Electric Power Generating Effluent Limitations Guidelines proposed rules from 60 days to 120 days.

I have discussed your request with Mr. Ross and, as explained below, we have determined that they are not in the public's interest.

The United States Environmental Protection Agency (EPA) agrees that public hearings serve many important functions and finds that online public hearings fulfill all of those functions. Contrary to your statement that these online public hearings are "unprecedented and contrary to law," the agency has issued guidance on,<sup>1</sup> and conducted, such hearings previously.<sup>2</sup> The EPA has determined that online public hearings are more accessible than in-person hearings. Earthjustice has previously requested additional public hearings<sup>3</sup> to be able to reach more people, and the EPA believes holding online public hearings fulfills the request for more accessibility.

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<sup>1</sup> U.S. EPA (Environmental Protection Agency). 2019. *Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 CFR 25.5*. EPA 823-F-19-005. Office of Water. June. Available online at:

[https://www.epa.gov/sites/production/files/2019-05/documents/modernizing\\_public\\_hearings\\_for\\_wqs\\_decisions\\_consistent\\_with\\_40\\_cfr\\_25.5\\_.pdf](https://www.epa.gov/sites/production/files/2019-05/documents/modernizing_public_hearings_for_wqs_decisions_consistent_with_40_cfr_25.5_.pdf)

<sup>2</sup> EPA held a virtual public hearing on October 10, 2019 over the proposed rule "Enhancing Public Access to Information and Reconsideration of Beneficial Use Criteria and Piles".

<sup>3</sup> Earthjustice submitted requests to EPA for more accessible public hearings March 16, 2018 "Re: Request for a 45-day Extension of the Comment Period for Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One)" and July 15, 2019 "re: Request for 120-Day Comment Period for Phase 2 Coal Combustion Residuals Proposal and for a Public Hearing in Guayama, Puerto Rico".

The agency disagrees that a 60-day comment period for each proposal is inadequate for meaningful public comment. Many of the facts and issues in these rulemakings have been presented in previous rulemakings, which have already received public comment. While supplemental information and analysis has been included in both rulemakings, there is nothing novel to warrant an extension of an additional 60 days. While your letter points out that both rules are out concurrently, which makes commenting on each challenging, the agency finds that simultaneous public comment periods furthers both transparency and the ability of interested stakeholders to meaningfully understand and provide comment on the interactions between these two proposals.

I appreciate your concern and interest in both the Coal Combustion Residuals Part A and Revision of Steam Electric Power Generating Effluent Limitations Guidelines proposed rules. If you have any questions, please contact Kirsten Hillyer, of my staff, in EPA's Office of Resource Conservation and Recovery at [Hillyer.Kirsten@epa.gov](mailto:Hillyer.Kirsten@epa.gov) or at (703) 347-0369.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter C. Wright".

Peter C. Wright  
Assistant Administrator

December 4, 2019

*By Email*

Peter Wright  
Assistant Administrator  
Office of Land and Emergency Management  
Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, NW, Mail Code 5101T  
Washington, DC 20460  
[Wright.Peter@epa.gov](mailto:Wright.Peter@epa.gov)

David Ross  
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**Re: Request for Public Hearings and 120-Day Comment Periods for Proposed Rules regarding Coal Combustion Residuals Closure Deadlines (Part A) and Revision of Steam Electric Power Generating Effluent Limitations Guidelines**

Dear Assistant Administrators Wright and Ross:

On behalf of the 87 undersigned public interest groups, we request that the U.S. Environmental Protection Agency (“EPA”) provide an in-person public hearing and 120 days for public comment for each of the following two proposed rules: the proposal to revise closure deadlines for Coal Combustion Residuals (“CCR” or “coal ash”) impoundments (referred to by EPA as the “Part A” proposed rule) and the proposed revision of Effluent Limitations Guidelines (“ELG”) for steam electric power plants.

Coal combustion residuals are one of the largest toxic waste streams in the U.S., and the failure to establish disposal standards for CCR and associated wastewaters has resulted in widespread contamination of the nation’s waters and damage to human health. Coal-fired power plants burn more than 800 million tons of coal every year, producing more than 110 million tons of industrial waste in the form of fly ash, bottom ash, scrubber sludge and boiler slag. Coal ash is a deadly brew of carcinogens, neurotoxins, and poisons—including arsenic, boron, hexavalent chromium, lead, radium, selenium and thallium. Hundreds of millions of tons of this toxic waste has been dumped in unlined and leaking pits (manmade impoundments or “ponds”) for decades harming nearby communities and fouling water resources.

A recent report by the Environmental Integrity Project and Earthjustice found that 92 percent of the coal plants reporting groundwater monitoring data from coal ash ponds pursuant to the 2015 CCR Rule<sup>1</sup> have contaminated groundwater with toxic pollutants exceeding federal health standards. Toxic pollution exceeding safe levels at the 246 plants, often by orders of magnitude, include arsenic, cobalt, lead, lithium, molybdenum, radium 224 and 226, selenium and other harmful pollutants.

Power plants are also by far the largest dumpers of toxic wastewater into rivers, lakes and streams across the country, responsible for 30% of all toxic pollution dumped into surface waters. Coal plant water pollution has made it unsafe to eat fish from many rivers, lakes, and reservoirs across the country, especially for children and women of childbearing age. EPA conservatively estimated that the 2015 ELG rule would create about half a billion dollars each year in benefits from improved human health, economic and recreational opportunities, and ecological conditions. Cleaner water also creates many incalculable benefits.

Consequently, there is widespread public opposition to EPA's recent proposals to delay closure of deadly, leaking coal ash ponds<sup>2</sup> and to weaken the critical protections established in the 2015 CCR and ELG rules.<sup>3</sup> Correspondingly, there is intense public interest in participating in the rulemaking process – both through attending public hearings and submitting written comments. Thus we request that EPA facilitate such public engagement by holding true public hearings that affected communities can attend and by providing an extension to the written comment periods.

### Request for Public Hearings

The 87 undersigned groups, on behalf of their millions of members, ask EPA to hold an in-person public hearing on each proposed rule. EPA has announced it intends to hold no in-person public hearings. EPA's failure to hold public hearings is unprecedented and contrary to law and public policy.

In lieu of public hearings, EPA is offering an opportunity to the public to call-in on a specified day to offer a comment for each proposal. While this is useful for those who cannot attend a public hearing, it cannot substitute for an in-person hearing.

A genuine public hearing serves many critical functions. It offers any member of the public the opportunity to speak directly to agency representatives, who are physically present in the room. It provides the public with opportunities to bring visual aids, such as maps, photos, contaminated water and soil, etc. The speaker also has the opportunity to

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<sup>1</sup> *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities*, Final Rule, 80 Fed. Reg. 21,302 (Apr. 17, 2015).

<sup>2</sup> *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*, Proposed Rule, 84 Fed. Reg. 65,941 (Dec. 2, 2019).

<sup>3</sup> *Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, Proposed Rule, 84 Fed. Reg. 64,620 (Nov. 22, 2019).

have family members or other representatives from the impacted community present as support. The agency, in turn, has the immeasurable and irreplaceable benefit of seeing the speakers and hearing their testimonies directly, which may be filled with emotion and urgency that cannot be conveyed in a phone call. Members of government agencies, elected officials, the press, and the general public similarly have the opportunity to gain such knowledge during a genuine public hearing. A call session is not an appropriate or legal substitute for in-person public hearings.

The CCR and ELG proposals are major rulemakings that will have long-term impacts on the health and environment of hundreds of communities across the nation. For decades, EPA, pursuant to statutory mandates, has held public hearings on rules such as these as a critical part of its rulemaking process. In fact, for the CCR rule proposed in 2010, EPA held a total of eight public hearings, including seven in impacted communities outside of the Washington, D.C. area.

#### Request for 120-Day Comment Period

A 60-day comment period for each proposal does not provide adequate time for meaningful public comment. These comment periods will run over the Thanksgiving and Christmas holidays, which shorten substantially the available working days. In addition, the two proposals involve many of the same impacted communities, public interest groups and experts, thereby severely taxing their ability to comment on both proposals simultaneously. In addition, the rules will also involve the same staff at regulated facilities and state agencies. EPA's expressed desire for the best and most comprehensive information possible to inform its final rules is not served by an abbreviated comment period. An adequate public comment period will foster robust and informed comment from all stakeholders, and thus result in better rulemaking.

In sum, we ask EPA to hold two true public hearings, in addition to call-in sessions, and provide 120-day comment periods for each proposal. This is essential to allow the public to describe the harms endured from coal ash pollution, to voice their views on how they can best be protected from toxic waste and to provide meaningful input. We ask EPA to take these reasonable steps and not deliberately silence the voices of Americans nationwide.

Thank you in advance for your prompt consideration of this request. We ask that EPA respond to this letter by December 11, 2019 by contacting Lisa Evans at Earthjustice, [levans@earthjustice.org](mailto:levans@earthjustice.org), 781-631-4119.

Respectfully submitted,

Lisa Evans & Thomas Cmar  
Earthjustice

Larissa Liebmann  
Waterkeeper Alliance

Jennifer Peters  
Clean Water Action

Dalal Aboulhosn  
Sierra Club

Jennifer Peters  
Clean Water Action

Rebecca Hammer  
Natural Resources Defense Council

Cindy Lowry  
Alabama Rivers Alliance

John Zippert  
Alabama State Association of  
Cooperatives

Timmy Boyle  
Alianza Comunitaria Ambiental del  
Sureste (ACASE)

Fletcher Sams  
Altamaha Riverkeeper

Beverly Collins-Hall  
American Indian Mothers Inc. (AIMI)

Thomas Oppel  
American Sustainable Business Council

Georgia Ackerman  
Apalachicola Riverkeeper

Amy Adams  
Appalachian Voices

Dean A. Wilson  
Atchafalaya Basinkeeper

Susan K. Holmes  
BECAUSE

Eugene Pickett  
Black Farmers & Ranchers New Mexico

Charles Scribner  
Nelson Brooke  
Black Warrior Riverkeeper

David Caldwell  
Broad Riverkeeper

Kemp Burdette  
Cape Fear River Watch

Brandon Jones  
Catawba Riverkeeper Foundation

Kevin Jeselnik  
Chattahoochee Riverkeeper, Inc.

Anne Havemann  
Chesapeake Climate Action Network

Mary Ellen DeClue  
Citizens Against Longwall Mining

Ellen Rendulich  
Citizens Against Ruining the  
Environment

Amanda Strawderman  
Clean Water for North Carolina

Lisa Rider  
Coastal Carolina Riverwatch

Víctor Alvarado Guzmán  
Ruth Santiago  
Comité Diálogo Ambiental, Inc.

Lydia M. Díaz Rodríguez  
Comité Yabucoeño Pro-Calidad de Vida,  
Inc. (YUCAE)

Kathy Selvage  
Committee for Constitutional and  
Environmental Justice

Clark Bullard  
Committee on the Middle Fork  
Vermilion River

Mabette Colon Perez  
Comunidad Guayamesa Unidos Por Tu  
Salud

Susan Wind  
Concerned Parents

Jesse Demonbreun-Chapman  
Coosa River Basin Initiative/Upper  
Coosa Riverkeeper

Larry Baldwin  
Crystal Coast Waterkeeper

Carol Davis  
Diné CARE

Lan Richart & Pamela Richard  
Eco-Justice Collaborative

Bart Johnsen-Harris  
Environment America

Jacqueline Patterson  
Environmental and Climate Justice,  
NAACP

Jeffrey Hammons  
Environmental Law & Policy Center

R. John Dawes  
Foundation for PA Watersheds

Kristy Meyer  
Freshwater Future

Beth Porter  
Green America

Julian Gonzalez  
GreenLatinos

Henry S. Cole, Ph.D.  
Henry S. Cole Environmental  
Associates, Inc.

Indra Frank  
Hoosier Environmental Council

Patricia Schuba  
Labadie Environmental Organization  
(LEO)

Yvonne Taylor  
Lake Guardian, a Waterkeeper Alliance  
Affiliate

Madeleine Foote  
League of Conservation Voters

Angie Shugart  
Little River Waterkeeper

Terry Miller  
Lone Tree Council

Ted Evgeniadis  
Lower Susquehanna Riverkeeper  
Association

Cheryl Nenn  
Milwaukee Riverkeeper

Edward Smith  
Missouri Coalition for the Environment

Rachel Bartels  
Missouri Confluence Waterkeeper

Casi Callaway  
Mobile Baykeeper

Anne Hedges  
Montana Environmental Information  
Center

Gray Jernigan  
MountainTrue

Rigoberto Delgado  
National Immigrant Farming Initiative



Rudy Arredondo  
National Latino Farmers & Ranchers  
Trade Association

Naeema Muhammad  
NC Environmental Justice Network

Carrie Clark  
NC League of Conservation Voters

Richard Lawton  
New Jersey Sustainable Business  
Council

Gregory Remaud  
NY/NJ Baykeeper

Damon L Mullis  
Ogeechee Riverkeeper

Vivian Stockman  
Ohio Valley Environmental Coalition  
(OVEC)

Phillip Musegaas  
Potomac Riverkeeper Network

Andrew Rehn  
Prairie Rivers Network

Ward Archer  
Protect Our Aquifer

Angel González, MD  
Public Health and Environmental  
Committee, Puerto Rico College of  
Physicians

Arthur Norris  
Quad Cities Waterkeeper, Inc.

Georgia Good  
Rural Advancement Fund of the  
National Sharecroppers Inc.

Lorette Picciano  
Rural Coalition

Natalie Wasek  
Seventh Generation, Inc.

Jake Faber  
SouthWings

John S. Quarterman  
Suwannee Riverkeeper

Kathy Hawes  
Tennessee Clean Water Network

David Whiteside  
Tennessee Riverkeeper

Pedro Saade Llorens  
University of Puerto Rico School of Law

Megan Chase  
Upstate Forever

Kelsey Hillner  
Virginia Conservation Network

Cara Schildtknecht  
Waccamaw Riverkeeper

Betsy Nicholas  
Waterkeepers Chesapeake

Bob LaResche  
Western Organization of Resource  
Councils

Larry Baldwin  
White Oak-New Riverkeeper Alliance

Christine Ellis & Cara Schildtknecht  
Winyah Rivers Alliance

cc: Barry Breen, OLEM  
Barnes Johnson, OLEM  
Deborah Nagle, OW  
Robert Wood, OW

# **Exhibit B**

RE: Docket ID No. EPA-HQ-OLEM-2019-0172

My name is Lee Daneker, and I am a retired employee of the US Environmental Protection Agency (EPA or the Agency).

I appreciate the opportunity to comment on the proposed revisions to EPA's coal combustion residuals regulations, "Holistic Approach to Closure Part A," 84 Federal Regulations 65941 (2 December 2019) and on the process which the Agency proposes for public review and comment upon these proposed revisions.

My comments are organized as follows:

- I. My service at EPA
- II. My involvement in developing the EPA 40 CFR Part 25 public participation regulations
- III. My involvement in implementing the Part 25 regulations
- IV. The Part 25 requirements for Public Hearings
- V. Internet access and use in the United States omits over 30 million Americans
- VI. Face-to-face communications are superior to virtual communications
- VII. EPA and Environmental Justice
- VIII. Observations regarding the shortcomings of the proposed Public Hearing to comply with the 40 CFR Part 25 requirements and EPA Environmental Justice Standards
- IX. Recommendations

## **I. My Service at EPA:**

I served in EPA Headquarters in Washington DC from 1978 to 1984 during which time I held positions as the Deputy Director of the Permits and State Programs Division, Office of Solid Waste; Director of the Office of Policy and Program Management, Superfund; Branch Chief of the Policy Analysis Branch, Office of Analysis and Program Development, Superfund; and as a policy analyst in the Office of Water and Waste Management. After a period of time in which I worked in the private sector, I served in the EPA Region 10 from 1992 until 2004 during which time I held positions as the Wetlands Protection Unit Supervisor and as an Environmental Protection Specialist. My work in Region 10 frequently required that I interact with local, state, and federal agencies and with the public

## **II. My Involvement in Developing the EPA 40 CFR Part 25 Public Participation Regulations:**

My responsibility at EPA Headquarters in 1978 was to develop public participation requirements for programs managed by the Office of Water and Waste Management under the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Clean Water Act. I managed the writing, review, and promulgation of these requirements as federal regulations.

Upon proposal of these requirements in the Federal Register on 7 August 1978, I oversaw a public review process that included the receipt of written comments, a public hearing on the proposed regulations held in Washington, DC on 26 September 1978, and a toll free public comment line that was open from 5 to 8 September, 25 through 29 September, and 2 through 6

October 1978. During those dates, I personally stationed the public comment line along with other EPA staff. Thus, in addition to the in person public hearing, EPA offered a total of 70 hours of opportunity to comment by telephone. Toll free calling was the state-of-the-art medium in 1978 to afford opportunity for verbal comment from remote locations, and the Agency it used it as a supplement to other opportunities including acceptance of written comments and a face-to face public hearing.

Following the process of receiving public input, I oversaw the revision of the proposed regulations to reflect comments received at the public hearing, in writing, and via the toll free line. The final public participation requirements were promulgated on 16 February 1979 as 40 CFR, Chapter 1, Part 25, Public Participation Requirements in Programs under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act. They currently remain in force.

EPA's stated commitment with regard to public participation is plainly reflected in Part 25 where it states that it is the duty of the agency to "...provide for, encourage, and assist the participation of the public [25.3(a)]."

Part 25 further makes it clear that this benefits the Agency as well as the public because, "Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views [(25.3(b))."

Part 25.3(c) indicates that the Agency should be energetic in its pursuit of a full understanding of the public's views. Please see particularly the following subsections (emphasis added):

- (1) *To assure that the public has the opportunity to understand official programs and proposed actions, and that the government **fully considers the public's concerns**;*
- (2) *To assure that the government does not make any significant decision on any activity covered by this part without consulting **interested and affected segments** of the public;*
- (4) *To **encourage** public involvement in implementing environmental laws;*
- (7) *To use all **feasible means** to create opportunities for public participation, and to stimulate and support participation.*

### **III. My Involvement in Implementing the Part 25 Regulations:**

Following the promulgation of Part 25 Public Participation Requirements, I managed the writing and issuance policy guidance on public participation under Part 25 and the development and delivery of public participation training programs in all ten EPA Regions. I also planned and carried out an evaluation of the implementation of these requirements in all EPA Regional Offices.

### **IV. The Part 25 Requirements for Public Hearings:**

Part 25 was innovative at the time, because it provided for and fostered opportunities for public involvement that went beyond traditional public hearings. These included requirements that

address such issues as public consultation, responsiveness summaries, and advisory committees among others

Nevertheless, the regulations recognized that public hearings would continue to play a pivotal role, and therefore the regulations set forth specific standards that public hearings are required to meet stating, “Any non-adjudicatory public hearing, whether mandatory or discretionary, under the three Acts **shall** (emphasis added) meet the following minimum requirements.” Among those minimum the hearing requirements of Part 25 are the following:

Hearing Location and Time: “Hearings must be held at times and places which, to the maximum extent feasible, facilitate attendance by the public [Part 25.5(c)].”

Scheduling and Presentations: “The agency holding the hearing shall schedule witnesses in advance, when necessary, to ensure maximum participation and allotment of adequate time for all speakers. [Part 25.5(d)].”

Part 25 Public Participation regulation expected hearings to be in-person hearings and that was the common understanding at EPA.

#### V. **Internet Access and Use in the United States Omits over 30 Million Americans:**

The 7 January online hearing does not provide for face-to-face communications, but rather depends entirely on virtual communications. Moreover, it seems that the only way a member of the public would learn about the online hearing is through the internet. And in order to participate in the hearing, whether by speaking or just listening to others speak, one must register online - <https://www.epa.gov/coalash/forms/virtual-public-hearing-proposal-holistic-approach-closure-part#special>

Internet use in the United States is quite high by world standards; nevertheless, an April 2019 Pew Research study estimates that over 30 million residents cannot or do not use the internet. This includes the most vulnerable segments of the population. The Pew Research study states (emphasis added):

*...seniors are much more likely than younger adults to say they never go online. Although the share of non-internet users ages 65 and older has decreased by 7 percentage points since 2018, 27% still do not use the internet, compared with fewer than 10% of adults under the age of 65. Household income and education are also indicators of a person’s likelihood to be offline. Roughly three-in-ten adults with **less than a high school education** (29%) do not use the internet in 2019, compared with 35% in 2018. But that share falls as the level of educational attainment increases. Adults from **households earning less than \$30,000 a year** are far more likely than the most affluent adults to not use the internet (18% vs. 2%).*

***Rural Americans** are more likely than those who live in urban or suburban settings to never use the internet, but the share who do not use the internet has dropped 7 points since 2018. And due in part to the share of offline whites declining since 2018, **blacks and Hispanics** are more likely than whites to report that they never go online.*

<https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>

According to the Pew Research study, vulnerable or disadvantaged groups are significantly over represented among those who do not use the internet. This is particularly concerning because coal ash disposal facilities are likely to be in rural areas and/or neighborhoods where low income households predominate. The location of coal ash disposal facilities is particularly concerning because rural residents are more likely to derive their drinking water from wells than from piped municipal water supplies, and well water is particularly subject to contamination from ground water contaminated by releases from coal ash disposal units, which the proposed regulations would allow to continue operating for longer than under current regulations.

The demographics of coal ash disposal place an added burden on EPA to assure that those likely to be most affected by coal ash facilities are afforded at least an equal opportunity to participate in a public hearing on this issue. The proposed hearing notice procedures and format do not meet this responsibility because they may mean that these individuals could have great difficulty even learning about, let alone participating in, the online public hearing concerning the proposed weakening of regulations governing the closure of those facilities.

## **VI. Face-to-face Communications are Superior to Virtual Communications:**

The agency would receive better information as part of this rulemaking process if it were to include face-to-face communications as part of its process to receive feedback on the proposed regulations from the public.

It is widely acknowledged that face-to-face communications are superior to virtual. I could provide supporting references, but in the interest of brevity I will not, because I don't think this point is subject to debate. EPA has always held in-person hearings and continues to do so for other proposed regulations. An online hearing is not the Agency's sole option in this case.

Just as a personal note, I will add that I currently serve as the chair of an NGO board whose members are geographically dispersed, thus compelling us to hold monthly meetings by video conference. While we have no other options for regular monthly meetings, we are keenly aware of the shortcomings of virtual interaction, and therefore board members go to extensive trouble and significant expense to hold face-to-face meetings periodically.

## **VII. Environmental Justice:**

The EPA website addressing Environmental Justice states (emphasis added):

*Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys:*

- *the same degree of protection from environmental and health hazards, and*
- *equal access to the decision-making process to have a healthy environment in which to live, learn, and work.*

<https://www.epa.gov/environmentaljustice>

### **VIII. Observations Regarding the Shortcomings of the Proposed Public Hearing to comply with 40 CFR Part 25 Requirements and EPA Environmental Justice Standards:**

- (1) The proposed online hearing does not meet the Part 25.3 requirement to encourage public involvement by all feasible means because it does not include the common and very feasible opportunity for face-to-face interaction between the public and the Agency.
- (2) The proposed online hearing does not meet the Part 25.5(c) requirement that hearings must be held at times and places which, to the maximum extent feasible, facilitate attendance by the public because the internet, as a “place“ does not afford access to the more than 30 million US residents who do not have internet access.
- (3) The proposed public hearing does not meet the Part 25.5(d) scheduling requirement because its sole dependence on the internet does not maximize access by the more than 30 million US residents who do not have internet access.
- (4) The 5 minute limitation on comments does not meet the Part 25.5(d) scheduling requirement for the “...allotment of adequate time for all speakers.” Nor does it meet the Part 25.5(e) conduct of hearing requirement that, “Procedures should not unduly inhibit free expression of views.” Five minutes will not be adequate for some commenters to fully express their views and concerns and therefore this overly restrictive limitation does unduly inhibit the free expression of views.
- (5) Given the deficiencies in meeting the requirements of Part 25.5(c), (d) , and (e) the proposed online hearing does not meet the overriding requirement of Part 25.5(a) to, “provide for, encourage, and assist the participation of the public.”
- (6) The proposed online hearing does not meet the EPA Environmental Justice standard that all people regardless of race, color, national origin, or income have the equal access with respect to the **development** (emphasis added), implementation, and enforcement of environmental laws because, per the Pew Research Report, these populations do not have the same access to the internet as other residents.

### **IX. Recommendations:**

- (1) Schedule and publicize a national public hearing to be held in Washington DC that would include opportunities for both face-to-face comment and virtual participation. In providing opportunity for comment at this hearing, the Agency should take into account the fact that when Part 25 was proposed each speaker was allotted 10 minutes for comments as opposed to the 5 minutes allotted for the 7 January 2020 hearing.
- (2) Schedule face-to-face public hearings in all EPA regions with significant numbers of coal ash disposal facilities. Provide adequate notice and select locations in that can be conveniently attended by individuals who are likely to be affected by the adverse environmental impacts of coal combustion residual disposal. The Agency should take care to assure that it encourages, facilitates, and maximizes attendance by residents who are rural, low income, and people of color.



- (3) Open a public comment toll free number that will afford an opportunity to comment to those who cannot attend the regional hearings and/or do not have internet access. The toll free number should be open for an adequate period of time. In determining the adequacy, the Agency should take into account the fact that when Part 25 was proposed the Agency provided 80 hours of toll-free access to the public.