

Via First-Class Mail and Electronic Mail

November 24, 2014

The Honorable Gina McCarthy, Administrator
Office of the Administrator, Mail Code: 1101A
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
mccarthy.gina@epa.gov

Re: EPA-HQ-RCRA-2009-0640, EPA Confirmation of Coal Ash Damage Cases

Dear Administrator McCarthy:

EPA must publish an up-to-date evaluation of harm from leaks, breaches, and other releases from coal ash disposal sites when it finalizes its “Coal Combustion Residuals” rule. As you know, coal ash contains toxic pollutants such as arsenic, cadmium, selenium, and hexavalent chromium that poison our rivers, lakes, and streams, foul the air around coal ash disposal sites, and put the public in harm’s way. EPA has a statutory duty to review coal ash damage cases to health and the environment,¹ has acknowledged this duty,² and has confirmed and updated its lists of “proven”³ and “potential” damage cases many times, including in its preamble to the 2010 proposed coal ash rule and in a list released in 2012.⁴

EPA’s final rule must, at a minimum, confirm that the 74 coal ash dumps in Attachment 1 are proven damage cases. EPA cannot ignore the mounting evidence of damage that has only grown in the four years since the rule was proposed. Pollution and other data documenting damage at these coal ash dumps are already in the docket for the majority of sites. Industry submitted much of these data in response to EPA’s Information Collection Request (“ICR”) for

¹ 42 U.S.C. § 6982(n).

² See, e.g., EPA, *Report to Congress: Wastes from the Combustion of Fossil Fuels* (Mar. 1999), http://www.epa.gov/osw/nonhaz/industrial/special/fossil/volume_1.pdf; EPA, *Coal Combustion Waste Damage Case Assessments* (July 9, 2007) (EPA-HQ-RCRA-2006-0796); EPA, *Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule*, 75 Fed. Reg. 35,128 (proposed June 21, 2010) (to be codified at 40 CFR Parts 257, 261, 264 et al.) [hereinafter 2010 Proposed Rule].

³ “*Proven damage case* means those cases with (i) Documented exceedances of primary maximum contaminant levels (MCLs) or other health-based standards measured in ground water at sufficient distance from the waste management unit to indicate that hazardous constituents have migrated to the extent that they could cause human health concerns, and/or (ii) where a scientific study provides documented evidence of another type of damage to human health or the environment (e.g., ecological damage), and/or (iii) where there has been an administrative ruling or court decision with an explicit finding of specific damage to human health or the environment. In cases of co-management of CCRs with other industrial waste types, CCRs must be clearly implicated in the reported damage.” 2010 Proposed Rule, 75 Fed. Reg. at 35,132.

⁴ EPA, *Final Determination of Identified Proven Damage and Recently Alleged Damage Cases* [DCN SE01966], *Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category* Docket No. EPA-HQ-OW-2009-0819-2212 (Sept. 18, 2012) [hereinafter 2012 Confirmed Damage Cases].

its Steam Electric Effluent Limitations Guidelines (“ELG”) rulemaking and these responses were noticed by EPA in the 2013 Notice of Data Availability (“NODA”) for the coal ash rule. Data for many other sites are in the docket because they are contained in a 2011 report prepared by the Environmental Integrity Project (“EIP”) that was cited in EIP’s comments to the NODA and mentioned by EPA in a damage case document in the docket for the related ELG rulemaking. EPA can and should confirm the remaining coal ash damage cases because they are located at Tennessee Valley Authority (“TVA”) plants owned by a federal corporation or are high-profile enforcement actions to clean up pollution. Thus, the data documenting damage at these sites are both readily available to EPA and directly relevant to the rulemaking.

EPA cannot turn a blind eye to evidence of harm from coal ash disposal sites simply because the information was not submitted during a public comment period. Indeed, review of an EPA rulemaking decision must be based on review of the “whole record,”⁵ which “includes everything that was before the agency pertaining to the merits of its decision.”⁶ “At a minimum, the record should contain . . . written or oral comments.”⁷ However, the rulemaking record is not limited to documents received during the comment period, but includes relevant information from after the close of the comment period until the release of a final rule.⁸ EPA’s own guidance states, “[a]t times, the close of the public comment period may be said to begin a new round of data accumulation into the administrative record as the agency considers its final decision.”⁹

Specifically, the data documenting damage at the 74 coal ash dumps can be found in one or more of the following sources:

1. **ICR Response Data**. Damage data for most sites were contained in industry’s responses to EPA’s ELG rulemaking’s ICR. These responses were publicly noticed and made available for comment by EPA in the 2013 NODA for the coal ash rule.¹⁰ EPA expressly noted that it “will work to harmonize the use of these data, to the extent possible, in the development of this final rule.”¹¹ Data sent to EPA by industry and noticed by EPA for public comment as part of a rulemaking are part of the record before EPA.¹²

⁵ 5 U.S.C. § 706.

⁶ *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993).

⁷ Charles Alan Wright and Charles H. Koch, Jr, *Judicial Review of Administrative Action*, 32 Fed. Prac. & Proc. Judicial Review § 8183 (1st ed.) (updated Sept. 2014). See 5 U.S.C. § 553(c) (requiring Agency consideration of the relevant material presented in the public comments).

⁸ *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1402 (9th Cir. 1995) (“An agency may use ‘supplementary’ data, unavailable during the notice and comment period, that ‘expand[s] on and confirm[s]’ information contained in the proposed rulemaking and addresses ‘alleged deficiencies’ in the pre-existing data, so long as no prejudice is shown” (*citing Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C.Cir.1991) and *Community Nutrition Inst. v. Block*, 749 F.2d 50, 57–58 (D.C.Cir.1984)). See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (review of an agency decision under the Administrative Procedure Act is not limited to the docket but is based on information “that was before the Secretary at the time he made his decision”).

⁹ EPA, EPA’s Action Development Process, Administrative Records Guidance (Sept. 2011), <http://www.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Records Guidance].

¹⁰ EPA, NODA and Request for Comment, Hazardous and Solid Waste Management System: Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities, 78 Fed. Reg. 46,940 (Aug. 2, 2013), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2012-0028-0001>.

¹¹ *Id.*

¹² See, e.g., EPA Records Guidance.

2. **2011 Damage Case Report.** A 2011 report prepared by EIP provided evidence of 19 new damage cases and provided updated data for some previously submitted sites.¹³ This document is part of the record before EPA because EIP cited this report our comments on the 2013 NODA.¹⁴ Information referenced in public comments is part of the administrative record for a rulemaking.¹⁵ In addition, EPA acknowledged this report by name in a 2012 document made available in the docket for the ELG rulemaking, noting it had not yet made a determination on these damage cases.¹⁶ This report is attached here as Attachment 3 for your reference.
3. **TVA Sites.** Several sites are operated by TVA, “a corporation owned by the U.S. government.”¹⁷ EIP presented evidence of damage from a number of TVA coal ash sites in a November 2013 report that is attached here as Attachment 4. However, all pollution data in this report are from public files for TVA plants that are readily available to EPA for review. EPA should consider this information, and cannot ignore evidence of damage at a federal corporation, especially given the high-profile coal ash dam collapse at the TVA Kingston plant that spearheaded this rulemaking effort by EPA.
4. **Enforcement Actions.** Finally, some of these sites have been the subject of enforcement actions for cleanup of contamination caused by coal ash pollution. Many of these have garnered significant media attention, such as the spill of 39,000 cubic yards of coal ash and 27 million gallons of ash pond water waste from an impoundment at Duke Energy’s Dan River Steam Station into the Dan River in Eden, North Carolina.¹⁸ EPA cannot ignore directly relevant data or high-profile disasters like the Dan River spill simply because they may have happened outside of a public comment window. There is no doubt these coal ash dumps are proven damage cases based on EPA’s criteria, and they are directly relevant to EPA’s rulemaking efforts. EPA’s record would not be complete if EPA were to ignore these significant cleanup orders and the pollution that spurred them.

Evidence of damage has grown despite the fact that EPA never undertook a targeted effort to survey states, companies, or the public for damage data aside from a general request for comment on damage cases in the preamble to the 2010 rule. Citizens had to gather much of the data from state files or pour through data submitted to EPA as part of the ELG rule. For EPA to refuse to weigh these data on procedural grounds, especially when it has the discretion and statutory direction to solicit and consider them, would undermine the statute and be a disservice

¹³ EIP, Risky Business: Coal Ash Threatens America's Groundwater Resources at 19 More Sites (Dec. 12, 2011), <http://www.environmentalintegrity.org/documents/121311EIPThirdDamageReport.pdf>.

¹⁴ Comments of Earthjustice, EIP, Sierra Club, and Natural Resources Defense Council in Response to Notice of Data Availability (Docket ID EPA-HQ-RCRA-2012-0038), at Attachment 9 (Sept. 3, 2013).

¹⁵ See, e.g., *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453, 463 (C.A.D.C. 2004) (citing *U.S. Lines v. Federal Maritime Comm.*, 584 F.2d 519, 534-35 & 534 n44 (D.C.Cir. 1978)) (“The Secretary may rely on publicly available information so long as it is referenced, thereby enabling ‘meaningful adversarial comment and judicial review;’ such material need not be directly introduced into the record. A footnote is enough.”).

¹⁶ See 2012 Confirmed Damage Cases.

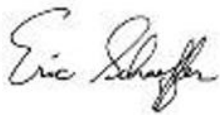
¹⁷ Tennessee Valley Authority, “About TVA,” <http://www.tva.com/abouttva/index.htm> (last accessed Nov. 5, 2014).

¹⁸ Administrative Settlement Agreement and Order on Consent for Removal Action, *EPA v. Duke Energy Carolinas, LLC*, In Re: Eden Ash Spill, CERCLA Docket 04-2014-3762 (May 22, 2014) https://www.duke-energy.com/pdfs/Duke_EPA_Agreement.pdf.

to the many communities in danger from coal ash pollution who have had to spend their own time, effort, and resources to provide these data to EPA and the public over the years.

The nation is looking to EPA to set strong federal standards for coal ash disposal to protect public health from the patchwork of state regulations that have resulted in widespread damage. In order to fulfill its statutory obligation, EPA's rule must reflect consideration of evidence of proven damage cases that is before it. Thus, the undersigned groups submit this letter because EPA must publish an up-to-date list of proven damage cases and include the 74 coal ash dumps listed in Attachment 1.

Sincerely,



Eric Schaeffer
Executive Director
Environmental Integrity Project
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005
(202) 296-8800

Alabama Environmental Council
Alabama Rivers Alliance
American Indian Movement of Indiana and Kentucky
Appalachian Faith and Ecology Center, Wise County, VA
Appalachian Voices
B.E. Cause, Bokoshe, OK
Bastrop County Environmental Network, Bastrop, TX
Blue Ridge Environmental Defense League, NC
Canton Area Citizens for Environmental Issues, Canton Lake and Its Watershed, IL
Cahaba Riverkeeper
Cape Fear RIVERKEEPER, Wilmington, NC
Center for Biological Diversity
Central Illinois Healthy Community Alliance
Citizens Against Longwall Mining (CALM), Montgomery County, IL
Citizens Against Ruining the Environment (C.A.R.E.), Lockport, IL
Citizens Coal Council
Clean Air Carolina
Clean Water Action
Clean Wisconsin
Comite Dialogo Ambiental, Inc., Salinas, PR
Committee for Constitutional and Environmental Justice, Dickenson County, VA
Concerned Residents of Portland, NY + People Like Us (CROP PLUS)

Earthjustice
Environmental Health Trust, Berkeley, CA
Environment North Carolina
Friends of the Earth
Henry S. Cole Environmental Associates, Inc.
Katy Land Trust, St Louis, MO
Kentuckians For The Commonwealth
Kentucky Alliance Against Racist and Political Repression
Kentucky Environmental Foundation
Kentucky Jobs With Justice
Labadie Environmental Organization
Lehigh-Pocono Committee of Concern (LEPOCO Peace Center), Bethlehem, PA
Little Blue Regional Action Group, PA and WV
Lower Neuse Riverkeeper
Mid-Missouri Peaceworks/Missourians for Safe Energy
Missouri Coalition for the Environment
Moms Clean Air Force
Mountain Watershed Association
NC WARN
New Energy Economy, Santa Fe, NM
Ohio Citizen Action
Ohio Valley Environmental Coalition, Huntington, WV
Portland Now-Neighborhood Association, Louisville, KY
Prairie Rivers Network
Representative Pricey Harrison, North Carolina House of Representatives
Rubbertown Emergency Action (REACT)
Show Me Solar
Sierra Club
Sierra Club, Cumberland Chapter
Sierra Club, Illinois Chapter
Sierra Club, Tennessee Chapter
Southern Alliance for Clean Energy
Southern Environmental Law Center
Statewide Organizing for Community eMpowerment, Knoxville, TN
West Virginia Highlands Conservancy
Western North Carolina Alliance
Winyah Rivers Foundation

Enclosures

- Attachment 1: Proven Damage Cases Requiring Confirmation
- Attachment 2: Enforcement Action List
- Attachment 3: EIP, Risky Business: Coal Ash Threatens America's Groundwater Resources at 19 More Sites (Dec. 12, 2011)
- Attachment 4: EIP, TVA's Toxic Legacy: Groundwater Contaminated by Tennessee Valley Authority Coal Ash (Nov. 2013)
- Attachment 5.1.A: TVA Colbert Consent Decree Order
- Attachment 5.1.B: TVA Colbert Consent Decree Motion
- Attachment 5.1.C: TVA Colbert Complaint
- Attachment 5.2: Crystal River Consent Order
- Attachment 5.3.A: Joliet 29 Compliance Commitment Acceptance
- Attachment 5.3.B: Joliet 29 Notice of Violation
- Attachment 5.4.A: Powerton Compliance Commitment Acceptance
- Attachment 5.4.B: Powerton Notice of Violation
- Attachment 5.5.A: Waukegan Compliance Commitment Acceptance
- Attachment 5.5.B: Waukegan Notice of Violation
- Attachment 5.6.A: Will County Compliance Commitment Acceptance
- Attachment 5.6.B: Will County Notice of Violation
- Attachment 5.7: Brandywine, Faulkner, Dickerson Consent Decree
- Attachment 5.8: JH Campbell Agreement
- Attachment 5.9: Wateree Settlement Agreement