EARTHJUSTICE

September 27, 2019

*SUBMITTED VIA REGULATIONS.GOV*

Charlotte Mooney, Chief
Cleanup Programs Branch
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency
Mail Code 5303P
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: **Docket ID No. EPA-HQ-SFUND-2019-0085**
**Comments Letter on Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry**

These comments are submitted on behalf of Sierra Club, Earthworks, Environmental Integrity Project, and Western Organization of Resource Councils. Earthworks is a national non-profit organization that works to protect communities and the environment against the adverse effects of mineral and energy development, while seeking sustainable solutions. Sierra Club is a nonprofit, membership organization incorporated in California with nearly 800,000 members in all fifty states and the District of Columbia. Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. The Environmental Integrity Project ("EIP") is a nonpartisan, nonprofit organization that advocates for effective enforcement of environmental laws. EIP's goals are to illustrate through objective facts and figures how the failure to enforce or implement environmental laws increases pollution and harms public health; to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and to help local communities obtain the protections of environmental laws. The Western Organization of Resource Councils is a network of grassroots community organizations that include over 15,000 members and 35 local chapters across seven western states. Our network works to build sustainable environmental and economic communities that balance economic growth with the health of people and stewardship of their land, water, and air resources.

Earthworks advocates for rigorous financial assurance requirements to ensure that adequate funding will be available to cover the full cost of hazardous waste cleanups in the event

that companies file for bankruptcy or otherwise fail to complete reclamation. For over ten years, Sierra Club has worked at both the local and national levels to address the ongoing problem of water and air quality impairment from coal ash landfills and impoundments. The Club's advocacy has involved efforts to close and clean up existing impoundments as well as litigation involving discharges from coal ash waste sites into ground or surface water. EIP has been at the forefront of exposing pollution from and ensuring cleanup of coal ash disposal sites for more than a decade through releasing detailed pollution reports, challenges to federal rules, permitting, and enforcement to clean up individual sites. Finally, members of Western Organization of Resource Councils are already living with the devastation of abandoned coal waste sites throughout the West, and we see it is imperative that coal ash cleanup is fully funded by the companies who are financially and morally responsible.

## INTRODUCTION

Coal ash is the waste product of coal combustion at coal-fired electrical power generation plants, and has different chemical and physical properties depending on the type of coal used and how it was burned. **Ex. A**, B. Gottlieb, et al., *Coal Ash: The Toxic Threat to Our Health and Environment*, Physicians for Social Responsibility & Earthjustice at vii (Sep. 2010). Coal naturally contains trace amounts of many toxic chemicals, and these chemicals are concentrated in the solid waste when the coal is burned. Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule, 75 Fed. Reg. 35,128, 35,138 (June 21, 2010). In addition, Clean Air Act regulations have required coal plants to capture increasing amounts of toxic emissions at the smokestack, like mercury and other heavy metals, and these pollutants, particulates and sludge end up in the resulting solid waste. *Id*. at 35,139. Consequently, coal ash is a toxic brew of carcinogens, neurotoxins, and poisons—including arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium and thallium. See 75 Fed. Reg. at 35,139, 35,153, 35,168. "The risks to humans associated with exposure to the identified contaminants include elevated probabilities of 'cancer in the skin, liver, bladder, and lungs,' as well as non-cancer risks such as 'neurological and psychiatric effects,' 'cardiovascular effects,' 'damage to blood vessels,' and 'anemia.'" *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 421 (D.C. Cir. 2018) (quoting 80 Fed. Reg. at 21,449). When this dangerous waste is not disposed of properly, the toxic chemicals are re-released to air, groundwater, surface water and soil.

EPA's proposed final action finds that the Electric Power Generation, Transmission, and Distribution Industry does not pose sufficient risk to require financial assurance. Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry, 84 Fed. Reg. 36,535, 36,535 (Jul. 29, 2019). Coal-fired power plants, and dumpsites that process waste from these plants, are included within this sector.

Coal ash is a major source of hazardous pollution generated by coal-fired power plants that poses substantial risks to human health and drinking water sources. EPA's no-action proposal places the public at risk of exposure to toxic pollutants, and at risk of paying for the cost of cleaning up these facilities. EPA's decision is based on a flawed interpretation of Section 108(b) of the CERCLA statute that narrowly focuses on financial risks to the Superfund trust, while ignoring CERCLA's broader goals of making the polluter pay and protecting human health and the environment. EPA also arbitrarily relies on recently issued regulations to ignore evidence of existing groundwater contamination at the majority of coal ash dumpsites. Given significant risks of groundwater contamination, and in some cases catastrophic dam failure at coal ash dump sites, as well as the high risk of default for companies that own and operate coal plants—EPA should issue financial assurance requirements for this sector.

Failing to impose financial assurances for coal-fired power plants places children at greater risk, because children are more susceptible to toxic pollution emitted from coal ash storage facilities. **Ex. A**, B. Gottlieb, *et al*, at 8 ("Children are . . . [a] susceptible population. . . . any exposure they suffer is more significant for their small bodies than it would be for an adult."). Further, coal-fired power plants are disproportionately located in low-income communities—making this an environmental justice issue. *Id.* Failure to regulate, and thereby ensure timely, speedy cleanup, and prevention of hazardous waste at coal-fired power plants places the health and safety of these communities at disproportionately higher risk.

Finally, EPA's no-action proposal is especially troubling because email records from February of 2017 obtained through the Freedom of Information Act suggest newly installed Trump Administration appointees decided not to take action well in advance of the current rulemaking. An email exchange between David Schnare, a former member of Trump's EPA beachhead team; Charles Dankert of the White House Office of Management; and Donald Benton, then-senior White House Advisor to the EPA, shows Dankert urging Schnare to suggest "recommended actions" on proposed EPA rules long before the agency even started the rulemaking process. **Ex. B**, Email from C. Dankert, OMB Beachhead Team, to D. Schnare, (Feb. 16, 2017). Internal EPA correspondence shows EPA staff taking this advice, and recommending a "no action-proposal" on "proposed financial assurance rulemakings" for the "electric power generation industries" pursuant to CERCLA § 108(b). **Ex. C**, Email from S. Rees, US EPA Director of Office of Policy, to David Schnare (Feb. 24, 2017); **Ex. D**., Attachment, Email from S. Rees, US EPA Director of Office of Policy, to David Schnare (Feb. 24, 2017). This suggests EPA appointees arbitrarily determined at the outset not to regulate—without any data or analysis.

ANALYSIS

## I. CONGRESS ENACTED CERCLA TO GUARD AGAINST POLLUTION RISKS SUCH AS THOSE POSED BY COAL ASH DISPOSAL SITES.

Congress enacted CERCLA as a "response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). CERCLA mitigates the harm caused by industrial pollution by "promot[ing] the 'timely cleanup of hazardous waste sites'" and by "ensur[ing] that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Id*. (*quoting Consol. Edison Co. v. UGI Utils., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005)). CERCLA enacts measures to clean up contaminated sites and reduce the risk of future disasters. It makes polluters liable for the cost of cleanup, 42 U.S.C. § 9607, authorizes EPA to conduct cleanups, *id*. § 9604, and provides public funding through the Superfund for cleanups at abandoned sites, *id*. § 9611.

### A. CERCLA sought to prevent and remediate unsafe storage of large volumes of hazardous waste that threatened public health and the environment.

In enacting CERCLA, Congress sought to guard against exactly the type of public health and ecological disasters currently occurring at coal ash facilities. In legislative history reports, Congress described the disasters facing the nation that propelled passage of CERCLA. Although Congress enacted strong environmental laws, such as the Clean Water Act and Clean Air Act, to protect human health and the environment, these laws failed to deal with "the tragic consequences of improper[], negligen[t], and reckless[] hazardous waste disposal practices[.] . . . existing law is clearly inadequate to deal with this massive problem." H. Rep. No. 96-1016(I). The House Oversight Committee found that these sites presented a "serious risk to public health" and identified four common characteristics of hazardous waste dump sites: (1) the sites contain large quantities of hazardous waste, (2) unsafe design and disposal methods are widespread, (3) danger to the environment is substantial, and (4) these sites pose major health hazards. H. Rep. No. 96-1016, pt. 1, at 2-3 (1980). By enacting CERCLA, Congress sought to guard against these risks. *See also* S. Rep. 96-848, at 3 (1980) (expressing concern that "the potential impact of toxic chemicals on the general public and environment through unsound hazardous disposal sites and other releases of chemicals is tremendous.").

### B. Congress was especially concerned with groundwater contamination.

One of the major problems identified by Congress was that hazardous waste sites caused contamination of groundwater and polluted local sources of drinking water. S. Rep. 96-848 at 4 ("The effects of poor disposal methods and abandoned waste disposal sites can be the contamination of surface water and groundwater, causing contamination of drinking water supplies[.]"). Congress was concerned with unsafe disposal methods where hazardous waste was "discharged directly into pits . . . [and] [s]amples of sediment from a water treatment plant only a few hundred feet from the site suggest that chemicals from the dumpsite have entered the water."

H. Rep. No. 96-1016, pt. 1, at 3; *see id*. (describing Hooker's Montague, Michigan site where hazardous waste was dumped in an area that "affords no geological protection against wastes reaching local groundwater."); *id*. (describing site in Lathrop, California where waste products were "placed in lagoons" and allowed to percolate into permeable soil that threatened the area's drinking and irrigation water); S. Rep. 96-848 at 4 ("In 1978, the Cedar River, near Charles City, Iowa, was found to contain poisons leached from a nearby dumpsite. . . . This river and the aquifer underlying the dump supply drinking water to 10% of the State's population."); *id*. ("At Toone, Tennessee, a chemical company dumped pesticide wastes for years in an area close to groundwater supplies. In 1978, after continued assurances to the community from government officials that their water was safe to drink, the water supply of Toone was found to be contaminated[.]"); S. Rep. 96-848 at 4 ("32 [hazardous waste] sites which have resulted in the closure of public and private drinking water wells, [and] 130 sites with contaminated groundwaters[.]").

Congress found that where "contaminated groundwater has rendered unusable the local water supplies[,]" the danger to the environment is "substantial" and requires regulation. H. Rep. No. 96-1016, pt. 1, at 3. The Senate Committee on Environment and Public Works found that these "national environmental problems caused by dangerous chemicals" could not be addressed under TSCA or RCRA, and recommended Congress enact CERCLA to address "the pollution of our people and our land by improper disposal, by accidents or misuse of [toxic chemicals]." S. Rep. 96-848 at 2.

C. Industry practices of storing large volumes of coal ash waste in an unsafe manner threatens public health and the environment.

Coal-fired power plants in the United States burn more than 800 million tons of coal every year, producing more than 110 million tons of solid waste in the form of fly ash, bottom ash, scrubber sludge and boiler slag. Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302, 21,303 (Apr. 17, 2015). Coal ash is the second-largest industrial waste stream in the United States, after mining wastes. **Ex. A**, B. Gottlieb, et al., at vi. In the U.S., there are at least 310 landfills and 885 surface impoundments storing coal ash. U.S. Envtl. Prot. Agency, Regulatory Impact Analysis (RIA) for EPA's Final Coal Combustion Residuals (CCR) Rule, Doc. No. EPA-HQ-RCRA-2009-0640-12034 at 2-3, 9-27 (Dec. 2014) ("RIA").[1]

Coal-fired power plants dispose of coal ash primarily in two ways: by placing coal ash in dry landfills or by using water to facilitate the transport of ash to surface impoundments that store the mixture of water and ash. 80 Fed. Reg. at 21,303. Surface impoundments hold their toxic sludge behind earthen dikes, often dozens of stories tall, with pits spanning hundreds of acres, impounding tens of millions of tons of liquid industrial waste. *See id*. at 2-19 n.79. In wet

[1] https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-12034.

impoundments, the great pressure (hydraulic head) of ash and water can rapidly drive contaminated leachate into underlying soils or water. Both coal ash landfills and impoundments can cause harmful contamination if operated without effective engineering controls, like impermeable liners, groundwater monitoring systems and proper construction and maintenance to ensure structural stability. 80 Fed. Reg. at 21,327-28.

The catastrophic collapse of coal ash impoundments has caused great harm, including environmental destruction and substantial economic loss. 75 Fed. Reg. at 35,147. From 1999 through 2009, there were 35 coal ash spills at 25 different coal plants. 80 Fed. Reg. at 21,327. At least 50 coal ash impoundments are so large that EPA has classified their dikes as "high hazard," meaning that failure or mis-operation is likely to result in loss of life. *See* U.S. Envtl. Prot. Agency, *Coal Combustion Residuals Impoundment Assessment Reports*, Doc. No. EPA-HQ-RCRA-2009-0640-3916 (2015)[2]; 80 Fed. Reg. at 21,318. EPA has classified another 250 coal ash impoundments as "significant hazard," which means that their failure is likely to cause economic loss, environment damage, or disruption of lifeline facilities. *See id*.

On December 22, 2008 a dike ruptured at a coal ash impoundment at the Tennessee Valley Authority's Kingston Fossil Plant. The disaster flooded 300 acres of a riverfront community with more than a billion gallons of toxic sludge. 80 Fed. Reg. at 21,313, 21,457 n.219; *see also* EPA-HQ-RCRA-2009-0640-12034, Attachment at P-16, [RIA Appendices]. The disaster swept houses off their foundations, necessitated a multi-year cleanup costing more than $1.2 billion, and permanently displaced scores of families. RIA at 1-14. Workers who cleaned up the spill suffer from debilitating illnesses and many have died. Of the hundreds of workers that cleaned up the site, 36 passed away from brain cancer, leukemia, and other diseases, and many "bore blisters from the arsenic buried in their skin." J. Bourne, "Coal's other dark side; Toxic ash that can poison water and people," *National Geographic*, Feb. 19, 2019.[3] Describing the experience of one worker:

> For Jeff Brewer, 44, of New Market, Tennessee, he and his coal-ash coworkers were little more than expendable guinea pigs. He started working on the Kingston cleanup as a healthy man in his mid-30s, and after four years in the pit he was on two blood-pressure pills, a fluid pill, and a steroid inhaler; he was getting a testosterone shot every two weeks. He's been diagnosed with liver dysfunction and obstructive lung disease. Every few minutes he's racked by a harsh barking cough.

*Id*.

[2] https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-3916.
[3] https://www.nationalgeographic.com/environment/2019/02/coal-other-dark-side-toxic-ash/.

There have been at least four other major coal ash spills involving the rupture of earthen dikes or pipe failures. 80 Fed. Reg. at 21,457, n.219. The largest of the four spills occurred in 2014, when a pipe at an inactive impoundment at Duke Energy's Dan River Steam Station ruptured, causing a spill of approximately 39,000 tons of coal ash and 27 million gallons of wastewater into the Dan River. *Id*. at 21,327, 21,343, 21,457 n.219; EPA-HQ-RCRA-2009-0640-12118, -12119, -12120, -12121, Volume I at 79 [Damage Case Compendium]. The most recent spill occurred during Hurricane Florence when a flooding river caused a coal ash impoundment to release coal ash to Sutton Lake and the Cape Fear River near Duke Energy's Sutton Steam Station in Wilmington, NC. A. Vengosh et al., "Evidence for unmonitored coal ash spills in Sutton Lake, North Carolina: Implications for contamination of lake ecosystems," Sci Total Environ., Vol. 686, at 1090-1103 (Oct. 10, 2019).[4] The increase in storm frequency and intensity due to climate change significantly increases the risk of spills, particularly in the southeastern U.S.

D. Coal ash dumpsites contaminate groundwater and threaten public drinking water supplies.

While catastrophic failures of coal ash impoundments often generate headlines, slow-moving coal ash disasters are more common. *See* 80 Fed. Reg. at 21,457; *see also* Damage Case Compendium; **Ex. E**, A. Russ, et al., Coal's Poisonous Legacy: Groundwater Contaminated by Coal Ash Across the U.S., Environmental Integrity Project (Mar. 2019). Disposal of coal ash in landfills and impoundments that lack composite liners to prevent leaking is a recipe for disaster because hazardous chemicals leak out of landfills and wet impoundments, poisoning underlying groundwater and nearby surface waters. 80 Fed. Reg. at 21,325. Until recently, most ash impoundments were constructed without a liner on the bottom that could prevent toxic chemicals from leaking into underlying groundwater. *Id*. at 21,324. As of this year, over 95% of sites had failed to demonstrate that they have liners in compliance with the Coal Combustion Residuals Rule ("CCR Rule"). **Ex. F**, Declar. of Flora Champenois, Case No. 18-1289 (Feb. 8, 2019).

Leakage of toxic metals into groundwater from coal ash dumps time and time again has poisoned drinking water supplies. EPA has documented 157 sites in 32 states where coal ash mismanagement caused damage to human health and the environment. 80 Fed. Reg. at 21,327. EPA notes that over 90 percent of the damage cases occurred at dumps with inadequate liners, and most of the harm occurred at impoundments with no liner at all. *Id*. at 21,458. The National Groundwater Association estimates that 38% of America's population regularly depends upon groundwater for its drinking water. Nat'l Groundwater Ass'n, *Groundwater Facts*, last accessed Sep. 26, 2019.[5] EPA notes that the current number of damage cases underestimates the present risks because the majority of coal ash disposal sites are not monitored and there is a lag time between the disposal of coal ash and the migration and detection of hazardous chemicals. 80

[4] https://www.ncbi.nlm.nih.gov/pubmed/31200305.
[5] https://www.ngwa.org/what-is-groundwater/About-groundwater/groundwater-facts.

Fed. Reg. at 21,458. In fact, recent publication of groundwater monitoring data by electric utilities for 265 plants regulated by the 2015 Coal Combustion Residuals Rule reveals that 91 percent of the plants are contaminating groundwater above federal health standards. *See* **Ex. E**, A. Russ, et al., at 4.

One local resident testified to Congress in 2009 about his experience living and operating a ranch next to a coal ash disposal facility in Waterflow, New Mexico. After the plant opened up and began dumping coal ash in a nearby dry streambed, he and his family, who relied upon local well water, became sick. He described his experience: "I was diagnosed with heavy metal poisoning with extremely high arsenic, iron, lead, and selenium levels. I lost nearly 100 pounds in less than a year. I was so weak I couldn't stand or work, and wasn't expected to live." **Ex. A**, Gottlieb, *et al.*, at 18. Further, all 1,400 of his sheep sickened and died. *Id.*

In Gambrills, Maryland, coal ash dumps contaminated private wells of local residents, such that 34 of 83 private wells exceeded Maximum Contaminant Levels of toxins allowed in drinking water. *Ex. A*, Gottlieb, *et al.*, at 10. Pollution of waterways can also cause toxic fish contamination—eliminating an important source of subsistence food for local residents, and potentially exposing the public to health hazards due to fish consumption. In North Carolina, coal ash contamination in Belews Lake killed 19 of 20 fish species present in the lake, including all primary sport fish, and the state issued public advisories warning the public against fish consumption for at least seven years. **Ex. A**, Gottlieb, *et al.*, at 12.

Groundwater monitoring data made public through the recent Coal Combustion Residuals Rule documents widespread contamination of groundwater at the majority of coal ash dumpsites:

> 91 percent of coal plants have unsafe levels of one or more coal ash constituents in groundwater, even after we set aside contamination that may be naturally occurring or coming from other sources. The groundwater at a majority of coal plants (52 percent) has unsafe levels of arsenic, which is known to cause multiple types of cancer. Arsenic is also a neurotoxin, and, much like lead, can impair the brains of developing children. The majority of coal plants (60 percent) also have unsafe levels of lithium, a chemical associated with multiple health risks, including neurological damage. The contamination at a given site typically involves multiple chemicals. The majority of coal plants have unsafe levels of at least four toxic constituents of coal ash.

**Ex. E**, A. Russ, et al., at 4.

Monitoring data revealed "unsafe levels of contamination at 92 percent of ash ponds and 76 percent of ash landfills." *Id*. at 5. In Illinois, "90 percent (22 of 24) of Illinois' reporting coal-fired power plants have contaminated groundwater with unsafe levels of one or more toxic pollutants." **Ex. G**, Envtl. Integrity Project, et al., "Cap and Run: Toxic Coal Ash Left Behind by Big Polluters Threatens Illinois Water," at 3. In Georgia, "92 percent (11 of 12) of Georgia's

coal-fired power plants have contaminated groundwater with one or more toxic pollutants." **Ex. H**, A. Russ & L. Evans, "Georgia at a Crossroads: A Report," Envtl. Integrity Project & Earthjustice, at 1.

Coal ash substantially threatens human health. Living next to a coal ash disposal site can increase a person's risk of cancer or other diseases. This is especially the case if a person lives near an unlined wet ash pond containing coal ash comingled with coal wastes, and relies on a private well for drinking water. **Ex. A**, Gottlieb, et al., at vii. Residents living near coal ash dumps can also be exposed to dangerous levels of fugitive dust, which contains fine particulate matter that can cause cardiopulmonary disease and lung problems. Ex. A at 12. One resident living near a coal ash dump in Gambrills, Maryland, was told by her doctor that breathing fugitive dust from coal ash destroyed her lungs. **Ex. A**, Gottlieb, et al., at 19.

Rather than take action in light of these serious risks posed by coal ash dumpsites, EPA turns a blind eye to the very problems that Congress enacted CERCLA to guard against. Instead of placing the risk on industry to pay for extensive contamination of ground water, and catastrophic releases of coal ash from dams, EPA places this risk on the public.

## II. EPA'S ACTION IGNORES EVIDENCE OF RISK AND FAILS TO PROTECT THE PUBLIC FROM DANGEROUS COAL ASH WASTE CONTAMINATION.

Congress' core purpose in enacting CERCLA was to "respon[d] to the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55–56 (1998). This purpose is evident, for example, in CERCLA's direction that EPA designate substances as hazardous "which, when released into the environment may present substantial danger to public health or welfare or the environment." 42 U.S.C. § 9602(a). Following a release of hazardous substances, CERCLA authorizes EPA to take response measures "necessary to protect the public health or welfare or the environment." *Id*. § 9604(a). EPA may conduct abatement actions based on "endangerment to the public health or welfare or the environment," *id*. § 9606(a), sites must be cleaned up to a degree that ensures "protection of human health and the environment," *id*. § 9621(d), and EPA must prioritize protection of drinking water, *id.* § 9618.

CERCLA's legislative history confirms that Congress enacted the statute not only to make polluters pay, but also to prevent harm to human health and the environment such as "contamination of surface water and groundwater, causing contamination of drinking water supplies, destruction of fish, wildlife and vegetation, and threats to public safety due to health hazards and threats of fires and explosions." S. Rep. No. 96-848 at 4; s*ee also id*. at 2 ("[T]he potential impact of toxic chemicals on the general public and environment through unsound hazardous disposal sites and other releases of chemicals is tremendous").

CERCLA achieves this goal by ensuring that sufficient funds are available to rapidly clean up hazardous waste sites, and to ensure that the polluter pays for response costs, not the federal government, states, or other public parties.[6] Since the Superfund tax lapsed in the late 1990s, resources of the fund continue to dwindle, and the trust is now funded exclusively by general revenue taxes. Financial assurances are one of the few tools remaining, to ensure that polluting companies pay to clean up hazardous wastes they create.[7]

To reduce the risk of future contamination, CERCLA directs EPA to adopt "financial responsibility" rules to ensure that companies are incentivized to avoid hazardous releases and that they remain financially viable to address them promptly if they occur. 42 U.S.C. § 9608(b)(1). "To ensure that responsible parties have the wherewithal either to reimburse the Superfund or to finance their own response actions, CERCLA mandates that the EPA require certain classes of facilities identified by the EPA to 'establish and maintain evidence of financial responsibility' by obtaining, inter alia, insurance, surety bonds or letters of credit." *Idaho*

---

[6] [F]ive basic elements are included in legislation to broadly address the problems. These are: First, assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions; Second, providing a fund to finance response action where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation; Third, basing the fund primarily on contributions from those who have been generically associated with such problems in the past and who today profit from products and services associated with such substances; Fourth, providing ample Federal response authority to help clean up hazardous chemical disasters; and Fifth, providing adequate compensation to those who have suffered economic, health, or other damages.

S. Rep. No. 96-848 at 12-13.

[7] Financing the Fund primarily from fees paid by industry is the most equitable and rational method of broadly spreading the costs of past, present and future releases of hazardous substances among all those industrial sectors and consumers who benefit from such substances. The concept of a fund financed largely by appropriations was not adopted. *A largely appropriated fund establishes a precedent adverse to the public interest—it tells polluters that the longer it takes for problems to appear, the less responsible they are for paying the consequences of their actions, regardless of the severity of the impacts.* Too often, the general taxpayer is asked to pick up the bill for problems he did not create; when costs can be more appropriately allocated to specific economic sectors and consumers, such costs should not be added to the public debt.
S. Rep. 96-848 at 68.

*Conservation League v. Wheeler*, 930 F.3d 494, 500 (D.C. Cir. 2019) (*quoting* 42 U.S.C. § 9608(b)).

To this end, Section 108(b) requires EPA to promulgate financial assurance requirements for classes of facilities that "present the highest level of risk of injury." 42 U.S.C. § 9608(b)(1). These facilities must maintain evidence of financial responsibility "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." *Id.* Financial assurance requirements should "effectuate the purposes of [CERCLA]." 42 U.S.C. § 9608(b)(1).

EPA's proposed action exempting coal ash facilities from regulation under § 108(b) is flawed because EPA solely focuses on risks of a payout from the Superfund trust rather than the broader purposes of CERCLA to protect human health and the environment and make the polluter pay. Additionally, EPA arbitrarily relies on the "modern regulatory framework" as a reason to ignore evidence even though current laws do not eliminate risk, nor do they eliminate existing toxic contamination at coal ash dumpsites.

A. <u>EPA ignored evidence relevant to achieving the purposes of CERCLA.</u>

*1. EPA improperly considers cost factors before looking at industry risks.*

Section 108(b) sets out a two-step process for developing financial assurances. First, "the level of financial responsibility shall be initially established" based on the "degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." 42 U.S.C. § 9608(b). If necessary, this financial responsibility requirement may be "adjusted" taking into account "the payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction." 42 U.S.C. § 9608(b)(2).

In the statutory interpretation section of proposed action, EPA ignores this two-step process, and instead considers the cost factors outlined in § 108(b)(2), at the outset in determining whether financial assurances are required in the first instance. Section 108(b) does not countenance such an approach. The statute clearly sets out a process by which EPA must first determine set the level of assurances based on the risks posed by industry practices. EPA can then ratchet down or up this level of financial responsibility based on additional cost considerations such as the payment experience of the fund. EPA cannot bypass this process and preemptively determine it need not analyze the risks associated with industry practice based on limited evidence of Superfund payments. *See* 84 Fed. Reg. at 36,540 (looking solely at the "risk of taxpayer liability for response actions under CERCLA").

*2. EPA ignores evidence of risk that did not involve a payout from the Superfund trust.*

Relying on this flawed interpretation of the statute, EPA ignored evidence of risk that did not result in costs to the Superfund trust. By defining the purpose of CERCLA in this manner, EPA's analysis narrowed the relevant evidence to myopically focus on evidence of hazardous releases that "required taxpayer expenditures." 84 Fed. Reg. at 36,544; *id.* at 36,543 ("[T]o evaluate the need for financial responsibility regulations in the Electric Power Generation, Transmission and Distribution industry, EPA sought examples of pollution that occurred under a modern regulatory framework and that required a taxpayer funded CERCLA cleanup."). This eliminated essentially all relevant evidence from consideration. EPA's interpretation of the statute to focus solely on the risk of a taxpayer bailout of insolvent companies is contrary to law, because this is not the purpose of CERCLA. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 416 (D.C. Cir. 1994) (holding the court need not defer to an agency's policy judgments that are unsupported by or conflict with the statutory scheme).

EPA's sole focus on federal costs runs counter to the purpose of the financial responsibility requirement, because it ignores important goals of protecting the public from harm and making the polluter pay. Financial assurances are not intended to solely account for risks to the federal fisc, but rather to advance all the purposes of CERCLA. 42 U.S.C. § 9608(b)(2) ("In promulgating requirements under this section, the President is authorized to . . . establish[] such evidence of financial responsibility in order to effectuate the *purposes* of this chapter.") (emphasis added). These purposes include helping to prevent harmful releases of hazardous substances by providing incentives for maximum care. As described by Congress:

> [A] major goal of the financial responsibility requirements is to enlist insurers to provide additional policing and incentives to monitor the behavior of their insureds. . . It is often policy terms and conditions, as well as inspection and rate-making,that form the basis of the insurer's ability to influence the insured to act carefully and responsibly.

S. Rep. No. 99-11, at 47 (1985).

Financial assurances also promote rapid cleanup when releases occur, limiting the time that the public and the environment are exposed. *See* S. Rep. No. 96-848, at 11-13. When assurances are absent or inadequate, funding shortfalls lead to delayed, and incomplete cleanups and prolonged injury to human health and the environment. **Ex. I**, U.S. Envtl. Prot. Agency, *Significant Data Quality Deficiencies Impede EPA's Ability to Ensure Companies Can Pay for Cleanups*, at 2 (Mar. 2016) ("Site cleanup delays from a lack of sufficient financial assurance create a risk of longer exposures to unsafe chemicals or longer periods where natural resources are restricted and unavailable for use."). EPA's narrow interpretation of Section 108(b) frustrates these purposes.

Where significant releases have occurred, and funding is obtained through after-the-fact enforcement orders or consent decrees, it is too late to prevent the releases by providing a strong incentive for best practices. Similarly, funding that must be obtained through consent decrees or enforcement orders does not promote immediate and thorough cleanup, because consent decrees and enforcement orders take time and resources to obtain. *But see* 84 Fed. Reg. 36,544-5 (dismissing proven damage cases from coal ash dumpsites as irrelevant if a "responsible party" led the cleanup). Finally, dismissing instances where states paid for unfunded liabilities also runs afoul of CERCLA's goal of making the polluter pay. 84 Fed. Reg. at 36,545 (ignoring evidence of a $30 million cleanup by the State of Connecticut to clean up an abandoned coal-fired power plant because expenditures from the Superfund were "not deemed significant").

By narrowly focusing on risks to the federal fisc, EPA dismissed as irrelevant the vast majority of data showing that toxic contamination at numerous coal ash dumpsites contaminates drinking water, kills fish, and poisons families. EPA's approach contradicts purpose of CERCLA generally, and Section 108(b) specifically, which is to protect the public from these harms by preventing their occurrence, and ensuring that polluters pay to quickly clean up toxic waste sites.

B. <u>EPA cannot screen out releases that occurred before the "modern regulatory framework" if they occurred at currently operating facilities.</u>

*1. EPA's "modern regulatory framework" interpretation is contrary to the purpose of Section 108(b).*

In the proposed action, EPA interprets 42 U.S.C. § 108(b) in a manner that limits the evidence the agency may consider such that only "records of releases of hazardous substances from facilities operating under a current regulatory framework" are relevant to the agency's decision. 84 Fed. Reg. 36,540. EPA used this interpretation of the statute as a basis for ignoring all evidence of risk that occurred before 2015, when EPA adopted a new regulation governing the disposal of coal combustion residuals. 84 Fed. Reg. 36,544-45. EPA's statutory interpretation is arbitrary and capricious because:

- This is not an objective standard. The "currently regulatory framework," 84 Fed. Reg. 36,540, will change any time any new federal or state law is adopted. In effect, under this approach, if a new law is adopted tomorrow, EPA can use that law as a basis for ignoring all relevant evidence, without regard to whether the new law meaningfully addresses the risk of contamination.

- Hazardous environmental contamination currently exists at electric utility facilities. EPA cannot ignore evidence of existing environmental liabilities because the actual release occurred before adoption of a particular regulation. Furthermore, leaking of hazardous substances from unlined coal ash disposal units is continuous. Evidence of

leaking prior to 2015 usually indicates evidence of continuing and worsening environmental damage.

- The Coal Combustion Residuals Rule, relied upon by EPA, does not protect against a myriad of existing risks, including risks of water contamination and catastrophic failure at inactive impoundments located at coal-fired power plants that are no longer generating electricity. *See infra*, § II(C). Thus, this rule cannot be the basis for disregarding relevant evidence of existing environmental contamination and future liability.

- Companies that own coal-fired power plants operate at high risk of default, and EPA presents no evidence that the Coal Combustion Residuals Rule, nor other state laws require financial responsibility to cover the cost of cleanup where an owner or operator defaults and is unable to comply with rule standards.

- Lastly, EPA is actively trying to undermine existing regulations, including the Coal Combustion Residuals Rule, as evidenced by several regulatory proposals in 2018 and 2019 that would weaken the existing rule. EPA cannot base its finding of safety on a regulation that the agency is attempting to weaken.

By narrowly interpreting § 108(b) to limit the types of evidence that the agency can consider when developing financial assurance requirements, EPA severely hamstrings its ability to evaluate the degree and duration of risk associated with the electric power generation, transmission, and distribution industry by blinding itself to evidence of environmental cleanup liabilities. EPA's statutory interpretation thereby prevents the agency from effectuating the purpose of CERCLA, i.e. making the polluter responsible for cleaning up its own mess, and ensuring funds are available to quickly respond and protect public health.

*2. Relying on its flawed interpretation of the statute, EPA ignored evidence of risk.*

EPA's analysis focused on the "risk posed by facilities operating under *modern conditions*, *i.e.*, the types of facilities to which financial responsibility requirements would apply[.]" 84 Fed. Reg. 36,540 (emphasis added). Using this analytical framework, EPA repeatedly relied on the CCR Rule as a basis for ignoring evidence of hazardous release and cleanup actions at electric utility facilities. EPA also used this rationale to ignore releases that occurred prior to 1980. 84 Fed. Reg. 36,540. EPA ignored 22 non-NPL CERCLA removal action sites, 27 proven coal combustion residual-related damage cases, 4 national priority list cases, and a Superfund Alternative approach case, because they did not result in expenditure of taxpayer funds or because they occurred prior to adoption of the CCR Rule. 84 Fed. Reg. 36,544; see also *id.* at 36,545 (disregarding as irrelevant 10 proven damage cases because they "occurred prior to promulgation of the 2015 CCR Rule[.]"); *id.* (disregarding 19 sites "because

environmental releases occurred before 1980 or PRPs lead the response action."). By ignoring this evidence based on an erroneous interpretation of the statute, "the EPA looks at too narrow a subset of risk information and applies the wrong legal test." *Util. Solid Waste Activities Grp.*, 901 F.3d at 429.

To determine the "degree and duration of risk" posed by existing facilities, EPA must look at the risk of existing environmental contamination posed by the production, transportation, treatment, storage, or disposal of hazardous substances at electric utilities. EPA acknowledges that § 108(b) applies to existing facilities. 84 Fed. Reg. 36,540 ("Any financial responsibility requirements imposed under Section 108(b) would apply to currently operating facilities."). EPA cannot ignore evidence of hazardous risks at currently operating facilities:

> The EPA is aware of at least 50 surface impoundments that are a "high" hazard, . . . which the [CCR] Rule defines to mean that "failure or mis-operation will probably cause loss of human life" in addition to other harms . . . The EPA has tagged another 250 impoundments as posing a "significant" hazard, . . . where failure or mis-operation is unlikely to kill people, but would probably cause economic loss, environmental damage, or disruption of lifeline facilities, or impact other concerns. . . . Structural risk is exacerbated at sites located in geologically unstable areas, such as those with poor foundation conditions, areas susceptible to earthquakes or other mass movements, or those with karst terrains.

*Util. Solid Waste Activities Grp.*, 901 F.3d at 422 (citations and internal quotations omitted). This evidence is directly relevant to the financial risk that the operator will be unable to pay for a response action and leave the public exposed to toxins and responsible for cleanup costs.

With regard to the CCR Rule, prospective regulation does not eliminate currently existing risk. Groundwater contamination at currently operating coal ash dumpsites and power plants is an existing environmental liability. The CCR Rule may require existing coal ash dumpsites to close in the future because they fail to meet regulatory requirements. *See* 40 CFR 257.101. Such closure may involve considerable remediation/ash removal activities to reduce or eliminate current damage and long-term risk, and could be very expensive. Associated Press, "Colstrip ash cleanup uses more wells to capture fouled water," Sep. 22, 2019 ("The ash pond cleanup at Colstrip could cost an estimated $400 million to $700 million and was expected to last decades.")[8] The CCR Rule also requires plants that are polluting groundwater to remediate the contamination, which may also involve significant expenditures. 40 C.F.R. § 257.96(a).

However, while the CCR Rule sets out criteria for shutting down and remediating coal ash dumpsites, it does not require companies to keep financial assurances to ensure that they can perform adequate closure or remediation of hazardous substances. 84 Fed. Reg. at 36,546 n. 42.

[8] https://www.apnews.com/bbaf8896909445bbb9ffea0d35e210e3

EPA states that it "expects . . . units are closed in accordance with prescribed standards and corrective actions taken." *See* 84 Fed. Reg. 36,547. However, without financial assurances, EPA's expectation is unfounded. As such, EPA cannot rely on the CCR Rule, which has not even yet been fully implemented, to reduce risk of a Superfund response action at coal ash dumps or coal-fired power plants.

EPA also acts arbitrarily by refusing to consider evidence of groundwater contamination documented in mandatory groundwater monitoring reports newly required under the rule. 84 Fed. Reg. 36,543 n. 31. EPA cannot both rely on the CCR Rule to ignore evidence of risk, while simultaneously refusing to look at groundwater contamination revealed by the rule's mandatory monitoring requirements. **Ex. E**, A. Russ, et al., at 4 ("91 percent of coal plants have unsafe levels of one or more coal ash constituents in groundwater[.]").

EPA claims that it can ignore this evidence because it is "too early to discern if any impact to taxpayer[s] may result." *Id*. This is false. Risk is the "*possibility* of loss or injury[.]" "Risk," *Merriam Webster*, (emphasis added) https://www.merriam-webster.com/dictionary/risk. Injury or loss does not have to occur in order for EPA to evaluate the risk of its occurrence. EPA's failure to do so is arbitrary. Using groundwater monitoring reports, EPA can evaluate the cost to remediate groundwater contamination at currently operating facilities. It can then assess the risk that these facilities may declare bankruptcy or otherwise be unable to pay for response and remediation costs. EPA should rely upon available and relevant groundwater monitoring data that companies reported pursuant to the CCR Rule to assess the risks of groundwater contamination at existing coal ash dumpsites, and estimate costs to remediate pollution.

In its recent 2018 opinion, the D.C. Circuit documented significant health hazards caused by groundwater contamination from coal ash dumpsites:

- "'EPA has confirmed a total of 157 cases in which [Coal Residual] mismanagement has caused damage to human health and the environment.'" *Util. Solid Waste Activities Grp.*, 901 F.3d at 423 (*quoting* 80 Fed. Reg. at 21,325).

- "Groundwater contamination is more likely to occur at sites that are unlined or lack adequate lining between the coal ash and the soil beneath it. . . . However, most existing coal ash disposal sites—70% of landfills and 65% of surface impoundments—have no liner at all." *Id*. at 422.

- "Impoundment leakages pose substantial risks to humans and the environment." *Id.* at 428.

- "Every leakage the EPA record treated as material exceeded regulatory thresholds." *Id.* at 429.

- "The EPA found that unlined impoundments are dangerous: It concluded that, among the studied disposal methods, putting Coal Residuals 'in unlined surface impoundments and landfills presents the greatest risks to human health and the environment.'" *Id.* at 427 (*quoting* 80 Fed. Reg. at 21,451).

- "The EPA has acknowledged that it 'will not always be possible' to restore groundwater or surface water to background conditions after a contamination event." *Id.* at 422.

The Court also found these risks significant in light of pervasive industry practice to use unlined impoundments for coal ash storage:

> The number of unlined impoundments is large. The EPA identified 735 existing active surface impoundments throughout the country. Of the 504 sites for which the EPA was able to collect liner data, approximately 65 per cent were completely unlined, with most of the rest lined only with compacted soil or other partial or high-permeability liners. . . . Only 17 per cent of surface impoundments for which the EPA has liner data had composite liners—the sole liner type that the EPA found to be effective in reducing the risk of toxic chemical leakage to the level that the Agency found acceptable.

*Util. Solid Waste Activities Grp.*, 901 F.3d at 427–28.

Further, new data reported pursuant to the CCR Rule demonstrates an even bleaker picture than the court envisioned. An analysis prepared by Earthjustice this year using newly reported data shows that over 95% of coal ash storage facilities lack liners to prevent groundwater contamination that met the CCR Rule standard. **Ex. F**, Champenois Decl. ¶ 3.

C. <u>The Coal Combustion Residuals Rule does not eliminate all risks.</u>

EPA's reliance on the CCR rule to ignore evidence of risk is also arbitrary because this rule does not eliminate risk, as the D.C. Circuit recently found. The District of Columbia Circuit held that EPA acted arbitrarily by allowing "continued operation of existing, unlined surface impoundments[,]" because "EPA failed to show" how operation of these facilities meets RCRA's requirement that a solid waste disposal site pose "'no reasonable probability of adverse effects on health or the environment.'" *Id.* (*quoting* 42 U.S.C. § 6944(a)). This requirement of RCRA is known as the protectiveness standard. The CCR Rule allows existing unlined impoundments to receive coal ash indefinitely until operators detect that these facilities are leaking. *Util. Solid Waste Activities Grp.*, 901 F.3d at 427. Only once a leak is found must the operator either retrofit the unit with a composite liner or close down the facility—a process that may take up to 15 years. *Id.*

"The EPA found that unlined impoundments are dangerous." *Id.* Further, the Court found that "the vast majority of existing impoundments are unlined," and that "unlined impoundments have a 36.2 to 57 per cent chance of leakage at a harmfully contaminating level during their foreseeable use[.]" *Id.* As a result, the threat of contamination from unlined units "exceeds the EPA's cancer risk criteria" and therefore poses a "'substantial present or potential hazard to human health and the environment[.]'" *Id.* (*quoting* 80 Fed. Reg. at 21,449–21,450).

Specifically, the Court held that even though impoundments are not yet leaking, the risk of leakage still poses a "reasonable probability of adverse effects on health or the environment[.]" *Id.* Further, the Court found that EPA also acted arbitrarily by allowing facilities to use clay liners, which fail to adequately guard against groundwater contamination. *Id.* at 432. EPA has yet to issue a proposed rule to comply with the court's order. In light of the D.C. Circuit's findings that the CCR Rule must be strengthened in order to comply with RCRA's protectiveness standard, EPA's proposed rule here is arbitrary and capricious in finding that the CCR Rule eliminated risk at coal ash dumpsites because these sites are dangerous, and present a continuing risk of adversely affecting to human health and the environment.

D. <u>State laws and enforcement actions do not eliminate risk.</u>

EPA relies on state laws that govern "design/siting, and/or inspection requirements" to find that these regulations reduce risk—but does not identify specific state laws or regulations. 84 Fed. Reg. at 36,548. Nor does EPA nor explain how these laws eliminate risk. *Id.* This makes it impossible for the public to respond to or address this conclusion. The report prepared by EPA analyzing state laws and regulations simply summarizes these laws and does not analyze how these laws reduce risk. In fact, EPA's report states that "this document *does not endeavor to develop a formal risk assessment* of facilities operating in the electric power generation, transmission, and distribution industry, and does not attempt to assess the impact of such regulations subsequent to their enactment." U.S. Envtl. Prot. Agency, *Summary Report: Federal and State Environmental Regulations and Voluntary Programs in Place to Address CERCLA Hazardous Substances at Facilities in the Electric Power Generation, Transmission, & Distribution Industry*, at 5 (Jun. 2019), Doc. No. EPA-HQ-OLEM-2019-0085-0004 (emphasis added). The document only summarizes existing federal and state laws, "without interpretation of outcomes." *Id*. Accordingly, EPA's reliance on this report to make a finding of reduced risk is arbitrary. For the same reason, EPA's reliance on this same report to conclude that state financial responsibility programs reduce risk is also misplaced. *See* 84 Fed. Reg. at 36,549.

Further, EPA summarily concludes that some states require financial assurance, but again fails to cite specific state laws. 84 Fed. Reg. at 36,549. EPA also provides no analysis regarding the amount of financial responsibility required. *Id.* Nor does EPA describe whether these requirements cover the risk of potentially prohibitive costs of remediation. *Id.*; *See* J. Fernandez, "5 years after Dan River coal ash spill, Duke Energy close to finishing state-mandated cleanup at site," *Greensboro News & Record*, Feb. 1, 2019 (Duke Energy spent at least $260 million to

remediate coal ash contamination at its Dan River site).[9] Additionally, the fact that some states require financial assurances does not eliminate risk in other states that do not have these requirements.

Finally, EPA's reliance on enforcement of federal environmental laws as a basis for finding reduced risk is also misplaced. Enforcement actions did not prevent contamination of groundwater at coal ash dumpsites industry-wide. *See supra*. Likewise, enforcement actions did not prevent catastrophic dam failures at these sites. EPA has not presented any evidence showing that enforcement activities reduced these risks of environmental contamination. While the CCR Rule may reduce risk, EPA presented no data showing how enforcement of the CCR Rule reduced risk. Further, EPA's reliance on enforcement is especially misplaced in light of the drastic drop in its enforcement and inspection activities. R. Marsh, "New report from environmental group details reduced enforcement at EPA," *CNN*, Feb. 26, 2019.[10] Successful efforts by industry to quash enforcement actions by appealing to political appointees further undermines EPA's conclusion that enforcement can reduce risk. **Ex. J**, C. Hiar & M. Soraghan, "Facing fines, polluters turn to Trump's enforcement fixer," *Energy & Environment News*, Sep. 18, 2019.[11]

E. Coal-fired power plants will continue to shutdown, causing financial risk in this sector.

Finally, EPA's own analysis finds that coal-fired power plants pose significant financial risks—and should thus merit regulation under § 108(b). EPA's economic sector analysis found that "coal and nuclear generation pose the greatest default risk[,]" and that "high dependency on coal and nuclear generation" threatens financial stability for firms. U.S. Envtl. Prot. Agency, *CERCLA 108(b) Economic Sector Profile*, Record No. EPA-HQ-OLEM-2019-0085-0002, at 2 (Jun. 2019) ("*Economic Sector Profile*"). In recent years, growth in renewable fuel sources such as wind, and solar as well as stagnant energy demand electricity prices are squeezing profit margins and intensifying price competition. *Economic Sector Profile* at 4.

Coal generation peaked in the early 2000s at half of the total energy generation, but since that time, has dropped to approximately a quarter of energy generation. *Id.* Since 2010, approximately 40% of U.S. coal-fired power plant capacity has been shut down or designated for closure. *Id.* at 13. Further, with low gas prices, plants are converting into gas-fired generation

[9] https://www.greensboro.com/news/state/years-after-dan-river-coal-ash-spill-duke-energy-close/article_de8d0fa9-43e8-5b83-85d1-b253683a0548.html

[10] https://www.cnn.com/2019/02/26/politics/epa-report-enforcement-environmental-integrity-project-eip/index.html.

[11] https://www.eenews.net/greenwire/stories/1061135015/.

plants. *Id*. Cheap gas is pushing electricity prices down and diminishing profit margins for power generation companies leading to debt default. *Id.* at 15. Between 2014 and 2017, the ten largest energy companies that own the most coal plants, shuttered 23% of those plants or converted those plants to a new energy type. *Economic Sector Profile* at 20. Coal-fired power plants will continue to close, and no new units are proposed at this time. *Id.* at 13 at Fig. 7; *see also id.* at 15-16 (describing large electricity company's plan to continue retiring coal plants).

Unlike the electric transmission and distribution sectors, coal-fired power plants are largely owned by private firms.[12] EPA's own risk report found "relatively high default risk among firms that rely on coal-fired power generation." *Economic Sector Profile* at 22. The median fossil-fuel electric power generation firm lacks "sufficient funds to satisfy short-term obligations." *Id*. Further 8 of the 10 largest parent companies that own one-third of all coal-fired generation plants, "generally have insufficient liquid assets to cover their short-term debt[.]" *Id.* Further, companies owning coal-fired power plants that operate in deregulated markets face greater financial risks because market-driven prices set the rates in these markets. As a result companies risk their own capital when making investments, and as such, suffer losses in unfavorable conditions due to high exposure to price volatility—making bankruptcy more likely. *Economic Sector Profile* at 7.

Ironically, EPA relies on Chapter 11 bankruptcy protections as a basis for finding that the sector poses low financial risk. 84 Fed. Reg. at 36543; *Economic Sector Profile* at 16. Cases cited to by EPA show that companies remain on the hook for existing cleanup actions. *In re Tronox Inc.*, 503 B.R. 239 (Bankr. S.D.N.Y. 2013) (preventing the company from discharging costs associated with a cleanup action in bankruptcy); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494 (l986) (preventing abandonment of contaminated property when the State of New York objected this would violate state and federal law). However, while companies that emerge out of Chapter 11 bankruptcy may remain responsible for CERCLA costs, *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992), nothing in the bankruptcy code ensures that a company will have sufficient funds to pay for cleanup of environmental liabilities if they arise after bankruptcy proceedings. Further, affirmative action by the state is necessary to ensure that claims survive, and states may not take this action. This is exactly why financial assurances are needed—to ensure funds are available to pay for future CERCLA liabilities. *See* K. Kowalski, "Coal, nuclear cleanup costs central to FirstEnergy's rejected bankruptcy plan," *Energy News Network*, Apr. 11, 2019 (documenting FirstEnergy's attempt to discharge future environmental liabilities at coal-fired and nuclear power plants through bankruptcy proceedings).[13]

---

[12] Publicly owned utilities generate only 15% of electricity in the United States, and the federal government accounts for 7% of net generation. *Economic Sector Profile* at 5-6.

[13] https://energynews.us/2019/04/11/midwest/coal-nuclear-cleanup-costs-central-to-firstenergys-rejected-bankruptcy-plan/.

Failing to set aside financial assurances can also leave destitute local communities that rely on coal companies as a principal source of income. *See* C. McKim, "As The Energy Market Changes, Another Coal Company Declares Bankruptcy," *Nat'l Pub. Radio*, Jul. 4, 2019 ("[A] few hours after the [Blackjewel, a coal mining company,] entered bankruptcy on Monday morning, managers told about 600 people at both the mines here that everyone had to go home.").[14] Setting aside funds can ensure that coal ash facilities are rapidly cleaned up—preventing these areas from becoming economic dead zones where hazardous waste contamination prevents redevelopment. Further, it will create a readily available source of funds that can be used to transition and train workers once the coal plant closes. Coal ash remediation at "cleanup operations at sites in North Carolina and South Carolina employed 50% - 90% of the plant's operating workforce." N. Plains Res. Council, *Colstrip Jobs Study: Executive Summary*, at 7 (2018).[15] "While some of these jobs are shorter-term in nature, like the construction jobs associated with building a landfill, others are highly-skilled professions that will be needed for decades, such as a water treatment plant operator." At 8. Furthermore, effective remediation results in positive economic impacts for local communities. *Id.* at 9 ("A recent analysis of 797 brownfield sites showed that remediation resulted in an average 5% to 11.5% increase in property values, with increases up to 15% observed.") *Id.* at 9.

///

///

///

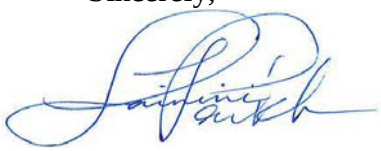
[14] https://www.npr.org/2019/07/04/738791537/as-the-energy-market-changes-another-coal-company-declares-bankruptcy.

[15] https://northernplains.org/colstrip-jobs-study/.

## CONCLUSION

The vast majority of coal ash ponds are unlined, and most have contaminated groundwater. Groundwater remediation of contamination at coal ash ponds can be prohibitively expensive. Financial analysis conducted by EPA reveals a high risk of default amongst companies that own coal-fired power plants, and insufficient funds to pay short-term debt obligations. These facts alone indicate the need for financial assurance requirements to ensure cleanup of these toxic waste sites. EPA's overly narrow reading of the statute that permits the agency to ignore almost all evidence relevant to risk is contrary to the purpose of CERCLA because it places communities at risk of exposure to toxic contamination at coal ash ponds, and fails to ensure that polluters will pay for cleanups.

Sincerely,



Jaimini Parekh
Jan Hasselman
*Attorneys for:*
Sierra Club
Earthworks
Environmental Integrity Project
Western Organization of Resource Councils