TRUMP ADMINISTRATION’S PROPOSED ROLLBACK ALLOWS DUMPING INTO DANGEROUS COAL PONDS AND CHANGES DEFINITION OF WHAT A “LINED” POND IS TO CIRCUMVENT COURT ORDER TO CLOSE UNLINED PONDS

The Trump Administration is expected to soon finalize another rollback of the 2015 Coal Ash Rule, dubbed “Part B,” that will significantly weaken the safeguards required at coal ash ponds. A draft of “Part B” was published on March 3, 2020, and the final rule is likely to be similar to the draft. The proposal weakens the rule’s critical protections to end the dumping of toxic waste into dangerous coal ash impoundments that are unlined, leaking, unstable, and located in high risk areas in a timely manner. Swift closure of dangerous coal ash impoundments is required to save lives by ending water pollution and preventing catastrophic spills, like the ones that devastated Kingston, Tennessee and Eden, North Carolina in 2008 and 2014.

Trump’s proposed Part B rule constitutes an illegal end-run around critical closure requirements, permitting operators to continue to dump millions of tons of toxic waste in unlined, leaking ponds, including pits that are currently required to close due to leaking, instability, or dangerous siting (within five feet of groundwater or near wetlands, seismic zones, and fault areas). The Part B proposal violates the 2018 order of the U.S. Court of Appeals, which requires EPA to strengthen, not weaken, the 2015 rule and to close unlined coal ash ponds. The proposed Part B Rule places communities near toxic coal ash pits at great risk and ensures the continued degradation of the nation’s water by toxic coal ash. The Part B Rollback contains two very dangerous provisions:

1. THE PROPOSAL ALLOWS SOME UNLINED COAL ASH PONDS TO OPERATE INDEFINITELY BY CHANGING THE DEFINITION OF “LINED.”

A 2018 order of the U.S. Court of Appeals required the closure of all unlined coal ash ponds due to the high risk of groundwater contamination posed by such toxic pits. The Trump administration came up with a mind-boggling strategy to get around the ruling by changing the definition of “lined.” These changes potentially allow the EPA to determine that unlined coal pits have an “alternate liner” when no liner exists at all, as long as a list of specific toxic chemicals are not (yet) contaminating waterways at levels above human health standards, and utilities claim the soil under them is not porous.

The outrageous definition potentially allows EPA to exempt leaking ponds from closing that are contaminating waterways with any other toxins, such as boron. Even when it comes to just the specific list of chemicals that would theoretically be impacted, we expect the Trump administration will look the other way. Ultimately, this rollback will allow any utilities that apply for closure reconsideration to remain open during a very long assessment process, and the EPA estimates about half will never be ordered to close at all.

Continued operation of these unlined pits directly contradicts EPA’s 2014 risk assessment that found a high risk of arsenic contamination from unlined units and monitoring data that revealed 92 percent of the industry’s coal ash pits are leaking toxic
contaminants, such as arsenic, cobalt, lithium, molybdenum and radium, above federal health standards.

EPA’s proposed demonstration process would allow unlined ponds to remain open for an unlimited time while EPA or state regulators evaluate complex information submitted by industry, including models purporting to show hydrologic impact, laboratory analyses, and other paper demonstrations. Neither EPA nor state regulators, however, have the necessary expertise to evaluate such highly technical demonstrations, nor is there an opportunity for meaningful public review. The proposal includes a two-step process, with the first step involving minimal information from the operator. EPA estimates that all initial applications will be approved, thereby delaying, at least temporarily, the requirement to close the unlined impoundments.

2. THE PROPOSAL ALLOWS LARGE VOLUMES OF COAL ASH TO BE DUMPED IN HUNDREDS OF DANGEROUS PITS THAT WERE REQUIRED TO CLOSE BY THE 2015 RULE.

In Provision 2 of the Part B rollback, EPA removes the 2015 rule’s prohibition on dumping additional toxic waste in pits after their mandated closure dates. The ponds required to close in the 2015 rule were deemed dangerous because of the leaking of hazardous chemicals, instability, or dangerous location (within five feet of groundwater or near wetlands, seismic zones, fault areas and unstable areas). This rollback constitutes a devious and dangerous end-run around the whole concept of mandatory closure. Provision 2 would allow operators to continue to dump toxic ash in these pits (even high-hazard ponds) for up to 15 additional years past what was supposed to be their date to cease accepting waste if the ponds are 40 acres or more and up to 7 additional years if less than 40 acres. The provision allows operators to substitute coal ash for the clean fill needed for closure (to bring the pits up to grade and construct the cap).

The purpose of the new provision is to save utilities over $1 billion by allowing the continued disposal of ash in the existing pits while the site undergoes closure. EPA estimates that operators will place an average of nearly 700,000 tons of additional coal ash in each closing pit. According to EPA itself, this provision will likely:

- Increase harm to health and the environment;
- Disproportionately harm low-income communities and communities of color;
- Result in fewer sites where coal ash is completely removed (i.e., resulting in more units closing with waste in place); and
- Reduce safe recycling of coal ash into products like concrete, because enormous volumes of ash will be dumped in closing pits and thus be unavailable for reuse.

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