

Congress of the United States
Washington, DC 20515

November 16, 2023

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Administrator Regan:

We write to express opposition to the Environmental Protection Agency's ("EPA") proposal to expand existing federal regulations on coal combustion residuals ("CCR") under the Resource Conservation and Recovery Act ("RCRA"). We urge the EPA to withdraw the proposed rule, as it runs counter to congressional intent and direction, is beyond the scope of EPA's existing legal authority, and does not adequately consider risks to human health and the environment.

As you are aware, the EPA first promulgated its CCR regulations in 2015 after an extensive risk assessment and administrative process, one where EPA proactively put all the relevant regulatory and supporting materials in the public sphere at the time of rule's initial proposal. The final regulations contain requirements for groundwater monitoring, assessment, corrective actions, and closure of CCR units, which are defined as "any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR unit, or a combination of more than one of these units, based on the context of the paragraph(s) in which it is used." Congress recognized the diligent approach taken to develop these initial regulations, and thus incorporated them – including the scope of those regulations as applicable to CCR units – into the *Water Infrastructure Improvements for the Nation* ("WIIN") Act, which was signed into law by President Obama on December 16, 2016.

In particular, the *WIIN* Act authorized states to establish their own permit programs regarding CCR in lieu of the EPA's CCR regulations. It is only for states that do not adopt their own program that the EPA may implement a permit program to bring CCR units into compliance with the regulations. Additionally, the 2016 amendments grant EPA the authority to enforce the prohibition on open dumping under RCRA, but that authority only extends to coal combustion residuals units. The 2016 amendments very clearly adopt the EPA's definition of "a coal combustion residuals unit" and use that definition to determine a facility's compliance status under RCRA.

It is our understanding that the EPA's current proposal would expand the scope of the CCR regulations to include "CCR management units." Such action would directly contradict the intent and specific language of the amendments enacted in 2016 that limited EPA's authority to regulate CCR under RCRA to CCR units—that is, CCR landfills, CCR surface impoundments, or lateral

expansions of a CCR unit. EPA's draft rule acknowledges that "CCR management units" are not CCR units.

In addition, even if EPA did have such authority, EPA's proposal to extend the regulatory reach of its CCR regulations to a category as broad and ill-defined as "CCR management units" was not – to the best of our and the public's knowledge – developed based on an adequate assessment of risk, a requirement of RCRA. As noted above, the 2015 regulations were proposed only after EPA first conducted a risk assessment for CCR units, which EPA used to determine that the requirements for monitoring, assessment, corrective action, and closure in those regulations were sufficiently protective of human health and the environment. Notably, the draft and final risk assessment did not contemplate CCR management units.

In the most recently proposed rule, EPA did not conduct a new risk assessment before this proposed rule's issuance, and we understand that EPA has attempted to publish a risk analysis only after-the-fact – depriving the public of a key set of information on which to fully assess and comment on this proposal. EPA should not abuse its discretion and must, consistent with the Administrative Procedures Act, first allow for public input on its proposed risk analysis before it proposes new requirements for "CCR management units."

We also find this ex post facto practice inappropriate, considering EPA offered only 25 days for comments on the new risk analysis and has declined seeking a "good cause" extension of its consent decree deadline. Given the complexity of this proposal, twenty-five days is too short of a time period for any meaningful public review and comment. As such, this proposal fails to satisfy RCRA's prerequisites to regulation, and should be withdrawn until such a time that these requirements can be fulfilled.

Further, EPA's proposal would place an unwarranted burden on our Nation's already strained energy infrastructure by requiring facilities to identify an area of land with any amount of CCR – even where used for beneficial purposes such as road-building or infrastructure development – and potentially disturb and remove the material even though EPA has not demonstrated it presents a risk to human health or the environment. This proposal is not based on sound science, extensive study, or demonstrated risks and benefits of regulatory compliance.

EPA's proposal is legally flawed, stands against congressional direction, and does not properly consider its associated costs and benefits. Therefore, we respectfully ask the EPA to rescind its proposal immediately. Thank you for the opportunity to comment on the EPA's proposed rule.

Sincerely,



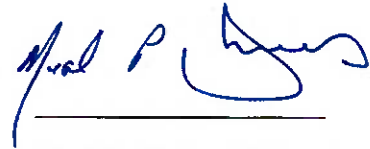
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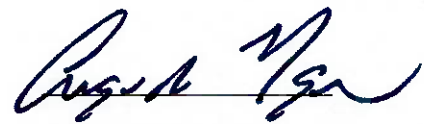
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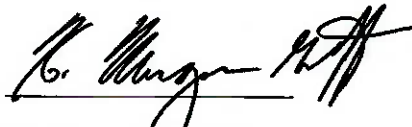
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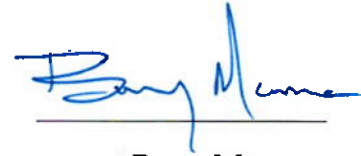
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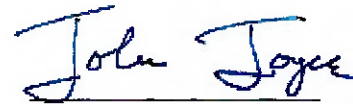
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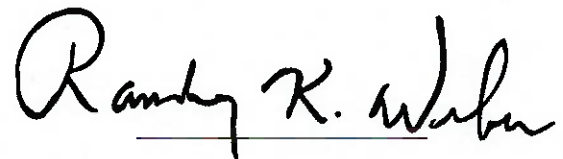
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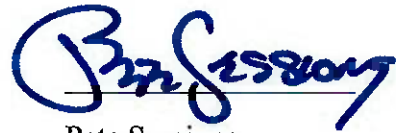
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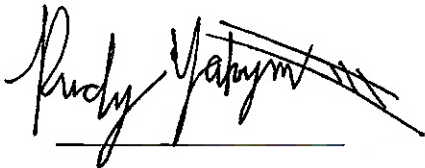
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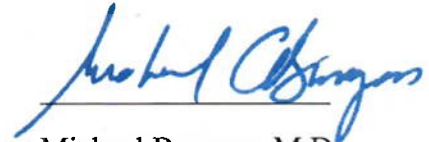
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