

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

LABADIE ENVIRONMENTAL ORGANIZATION,  
DINÉ CITIZENS AGAINST RUINING OUR  
ENVIRONMENT, HOOSIER ENVIRONMENTAL  
COUNCIL, WATERKEEPER ALLIANCE, INC.,  
and SIERRA CLUB,

Plaintiffs,

v.

ANDREW WHEELER, ADMINISTRATOR, U.S.  
ENVIRONMENTAL PROTECTION AGENCY, in  
his official capacity,

and

U.S. ENVIRONMENTAL PROTECTION  
AGENCY,

Defendants.

Civil Action No. 1:20-cv-1819

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

## INTRODUCTION

1. Plaintiffs Labadie Environmental Organization, Diné Citizens Against Ruining our Environment, Waterkeeper Alliance, Inc., Hoosier Environmental Council, and Sierra Club (collectively “Plaintiffs”) assert violations of the Resource Conservation and Recovery Act (“RCRA”) by Defendants Andrew Wheeler, Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively “EPA” or “Defendants”) for refusing to hold an in-person public hearing and ensure adequate public participation on EPA’s proposed rollback to the 2015 Coal Ash Rule entitled: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure, 84 Fed. Reg. 65,941 (Dec. 2, 2019) (“Part A Proposal”).

2. EPA refused Plaintiffs’ repeated requests for an in-person hearing and a longer comment period on the Part A Proposal, thereby impairing Plaintiffs’ and their members’ ability to effectively communicate their grave concerns about the Part A Proposal which would allow millions of tons of additional toxic coal ash to be dumped into leaking, unlined, and/or dangerously-sited ponds.

3. Coal ash generated by coal-fired power plants is one of the largest and most toxic solid waste streams in the United States. It contains contaminants that can cause cancer and other adverse health impacts including reproductive, neurological, respiratory, and developmental harm.

4. For decades, in the absence of national standards requiring safe disposal, coal ash was dumped in thousands of unlined and unmonitored lagoons, landfills, pits, and mines. The

result was the widespread release of dangerous pollutants from coal ash to water, air, and soil, endangering human health and the environment.

5. In 2015, after concluding that the “current management practice of placing [coal ash] waste in surface impoundments and landfills poses risks to human health and the environment,” EPA promulgated the Coal Ash Rule pursuant to the Resource Conservation and Recovery Act, creating the first-ever national regulations specifying environmental and public health protections from coal ash disposal after a long history of regulatory delay. *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302, 21,451 (Apr. 17, 2015) (“2015 Rule” or “2015 Coal Ash Rule”).

6. Just a few years after the 2015 Rule was promulgated, at industry’s urging and contrary to a 2018 D.C. Circuit decision requiring more stringent regulation, EPA commenced a vigorous effort to weaken the 2015 Rule.

7. Within the eight-month period from July 2019 to March 2020, EPA proposed five significant new rulemakings that would weaken the environmental and public health protections in the 2015 Coal Ash Rule, as well as a related proposal that would roll back Clean Water Act treatment standards for coal ash discharges.

8. The Part A Proposal is EPA’s third set of amendments seeking to weaken the critical protections set forth in the 2015 Coal Ash Rule. The Part A Proposal would have adverse impacts on the environment and the health of individuals throughout the United States by allowing utilities to delay closing and therefore to dump millions of tons of additional toxic coal ash into leaking, unlined, and/or dangerously-sited ponds.

9. Plaintiffs' members derive recreational, scientific, aesthetic, commercial, life-sustaining, and spiritual benefits from groundwater, rivers, waterways, and other areas affected by EPA's Part A Proposal.

10. Despite the grave threats posed by the Part A Proposal to Plaintiffs and their members, and other communities impacted by coal ash pollution, EPA refused to hold an in-person hearing and only offered the public a "virtual," audio-only public hearing on the Part A Proposal. EPA's refusal to have an in-person public hearing on the Part A Proposal marks a clear reversal of its longstanding position that RCRA requires EPA to hold in-person public hearings on proposed coal ash regulations and amendments thereto.

11. While virtual public hearings can be an important supplement to in-person public hearings, they alone do not satisfy EPA's nondiscretionary duty under RCRA to hold a public hearing on regulatory changes and to provide for, assist, and encourage adequate public participation.

12. EPA further curtailed opportunities for public comment on the Part A Proposal by offering an insufficient comment period that ran over the winter holidays and coincided with the comment period for a separate but related coal ash regulatory rollback proposal.

13. Plaintiffs seek a declaratory judgment that EPA's refusal to hold an in-person public hearing and to provide sufficient participation opportunities on the Part A Proposal violated RCRA. Plaintiffs also seek injunctive relief compelling EPA to hold an in-person public hearing when it is safe to do so and to re-open the comment period on the Part A Proposal.

#### **JURISDICTION AND VENUE**

14. This action arises under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(2).

15. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 6972(a), 28 U.S.C. § 1331, and 28 U.S.C. § 1361.

16. Plaintiffs have standing to bring this action on behalf of their members.

17. This Court may award Plaintiffs all necessary relief pursuant to 42 U.S.C. § 6972(a) and 28 U.S.C. §§ 2201-02.

18. Venue is proper because the RCRA citizen suit provision expressly provides that any action under 42 U.S.C. § 6972(a)(2) may be brought in the District Court for the District of Columbia.

19. By registered letter posted on February 7, 2020, and received on February 10, 2020, Plaintiffs gave notice of their intent to sue Defendants for their failure to perform mandatory duties under RCRA and have thereby complied with the sixty-day notice requirement of the RCRA citizen suit provision. *See* 42 U.S.C. § 6972(c); Notice Letter (attached as Ex. 1).

### **PARTIES**

20. Plaintiff LABADIE ENVIRONMENTAL ORGANIZATION (LEO) is a grassroots, non-profit, non-partisan citizens group in Franklin County, Missouri focused on addressing public concerns related to coal ash and coal-fired power plant pollution. It was established in 2009, when electricity utility company Ameren Missouri proposed to build a coal ash landfill in the floodplain of the Missouri River at its Labadie power plant. LEO's mission is to inform and educate the community about environmental issues impacting their health and well-being, to inspire positive change, and to encourage practices for sustainability.

21. LEO members live, work and recreate near Ameren's coal ash ponds. LEO members are concerned about the unlined coal ash ponds at the Labadie plant which are leaking

and contaminating groundwater and the threat such contamination presents to the groundwater that they drink and rely on for other domestic purposes.

22. Plaintiff DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT (Diné C.A.R.E.) is an all-Navajo organization comprised of grassroots community members active on Navajo Nation lands in and around the Four Corners region of Arizona, New Mexico, Colorado, and Utah. Diné C.A.R.E. advocates for traditional teachings by protecting and providing a voice for all life within and beyond the Four Sacred Mountains. Diné C.A.R.E promotes regenerative and sustainable uses of natural resources consistent with the Diné philosophy of life. It empowers local and traditional people to organize and determine their own destinies, in ways that protect the health of their communities, their long held subsistence practices and way of life.

23. Diné C.A.R.E. members are deeply concerned about coal ash pollution from leaking, unlined coal ash ponds at the Four Corners Generating Station on Navajo Nation lands and the impact this toxic pollution has on nearby groundwater, major rivers, waterways and nearby Navajo communities as well as culturally significant sites. This pollution detrimentally threatens Diné C.A.R.E. members' food security. It adversely impacts their cultural and spiritual practices connected to Chaco Wash and the San Juan River and hinders their ability to enjoy and recreate on the San Juan and Animas Rivers.

24. Plaintiff HOOSIER ENVIRONMENTAL COUNCIL, INC. (HEC) is an Indiana non-profit organization dedicated to shaping Indiana's environmental future. It is one of the state's largest environmental advocacy organizations and uses education and advocacy to secure a healthier environment for all Hoosiers and protection of Indiana's forests, lakes, rivers, native fish and wildlife, and groundwater.

25. HEC members live and work near unlined coal ash ponds in Indiana where there is evidence of contamination of groundwater on which they rely. The coal ash ponds are also located within floodplains and next to major rivers, which HEC members recreate on or near, and which are also threatened with coal ash contamination.

26. Plaintiff WATERKEEPER ALLIANCE, INC. is a non-profit organization headquartered in New York, New York, uniting more than 350 Waterkeeper member and affiliate organizations that are on the frontlines of the global water crisis and patrolling and protecting more than 2.5 million square miles of waterways on six continents. From the Great Lakes to the Himalayas, Alaska to Australia, the Waterkeeper movement defends the fundamental human right to drinkable, fishable, and swimmable waters, and combines firsthand knowledge of local waterways with an unwavering commitment to the rights of communities. Within the United States, Waterkeeper Alliance, Inc. works with more than 175 Waterkeeper member organizations and affiliates.

27. Members of Waterkeeper Alliance work and recreate in waterways that are threatened by coal ash pollution from unlined coal ash ponds nationwide. They are concerned about their health and well-being as they work to protect these waterways from new threats and clean up existing pollution. As a result of this concern, they limit their recreational activity on the waterways to avoid prolonged contact with water contaminated by coal ash pollution.

28. Plaintiff SIERRA CLUB is America's largest grassroots environmental organization, with more than 3 million members and supporters nationwide. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth, practice and promote the responsible use of the Earth's resources and ecosystems, educate and enlist humanity to protect and restore the quality of the natural and human environment, and use all lawful means to carry

out those objectives. Its activities include public education, advocacy, and litigation to enforce environmental laws.

29. Sierra Club members recreate near and on rivers which are threatened by coal ash contamination from nearby unlined, leaking coal ash ponds. They are deeply concerned about the impacts this toxic pollution has on the rivers, their riparian habitat, and aquatic life. This concern diminishes their ability to enjoy and recreate on or near the rivers they so value.

30. Plaintiffs' members use and enjoyment of their property, groundwater, and local waterways have been, and/or are threatened to be, diminished due to coal ash pollution that will be exacerbated by the Part A Proposal. These members have an interest in protecting their own health, the health of their children and families, and the health of their communities.

31. Defendants' refusal to provide an in-person public hearing and adequate public participation opportunities on the Part A Proposal, as required by RCRA, denied Plaintiffs' members the opportunity to effectively communicate to EPA their concerns about increased exposure to contamination associated with coal ash waste.

32. Although Plaintiffs' members participated in the January 7 virtual public hearing, they found it to be an inadequate substitute for an in-person hearing and were denied the opportunity to speak directly to and engage in dialogue with EPA representatives, to use visual aids, and to draw support from others physically present in the same room. As a result of the meeting format, they were unable to effectively communicate their concerns about the Part A Proposal.

33. Particularly when combined with EPA's refusal to extend the sixty-day comment period on the Part A Proposal that overlapped with the winter holidays, EPA's refusal to hold an



in-person hearing deprived Plaintiffs' members of the opportunity to adequately provide comment on the Part A Proposal.

34. EPA's refusal to provide an in-person hearing and extend the comment period on the Part A Proposal (a) deprives Plaintiffs' members of opportunities to effectively communicate their concerns to EPA and provide input about the Part A Proposal; (b) increases the risk to Plaintiffs' members of exposure to contaminants in coal ash waste; and (c) in some cases, increases and prolongs Plaintiffs' members' ongoing exposure to such contaminants and their associated risk of adverse health effects accordingly.

35. Plaintiffs' members would like to, and if given the opportunity when public health conditions related to COVID-19 allow for safe travel and public congregation, would testify in-person to express their concerns about the Part A Proposal.

36. Plaintiffs' members have been and, unless the relief prayed for herein is granted, will continue to be adversely affected by EPA's failure to comply with RCRA.

37. Defendant Andrew Wheeler is the Administrator of the United States Environmental Protection Agency. He is being sued in his official capacity only.

38. Defendant United States Environmental Protection Agency is an agency of the federal government. EPA's mission is "to protect human health and the environment."

## **LEGAL FRAMEWORK**

### **I. The Resource Conservation and Recovery Act and the 2015 Rule**

39. RCRA is the principal federal statute governing the handling, storage, treatment, transportation, and disposal of solid and hazardous waste. In enacting RCRA, Congress recognized that "disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment." 42 U.S.C. § 6901(b)(2). RCRA also articulates Congress's recognition that "inadequate and

environmentally unsound practices” for the disposal of solid waste create greater amounts of air and water pollution and other problems for the environment and health. 42 U.S.C. § 6901(b)(3).

40. The goal of RCRA is to protect health and the environment by, among other things, requiring open dumps to convert to facilities which do not pose a danger to the environment or health. *See id.* § 6902(a)(3).

41. In 2015, pursuant to a court order, EPA established the first-ever federal regulations governing coal ash disposal under RCRA. *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 54-56 (D.D.C. 2013) (directing EPA to comply with statutory duty to promulgate coal ash disposal regulations); 42 U.S.C. §§ 6907(a), 6944(a); 80 Fed. Reg. 21,302. The 2015 Rule established national minimum criteria for coal ash ponds and landfills including location restrictions, design and operating criteria, groundwater monitoring, corrective action, post-closure care, recordkeeping, notification, and public disclosure requirements. *Id.*

42. Because in 2015, RCRA neither authorized EPA to directly implement minimum national criteria for solid waste disposal facilities nor to enforce such criteria, EPA established the 2015 Coal Ash Rule as a “self-implementing rule” enforced by members of the public via citizen suits. *Id.* at 21,331.

43. RCRA authorizes citizen suits “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 6972(a)(2).

44. RCRA imposes a clear-cut, nondiscretionary duty on Defendants to hold public hearings when it promulgates coal ash regulations. 42 U.S.C. §§ 6907(a) and 6944(a). EPA has cited both of these statutory provisions as its legal authority for the Part A Proposal.

45. RCRA also imposes a clear-cut, nondiscretionary duty on Defendants to ensure that the public has meaningful opportunities to provide input into regulations governing the disposal of coal ash waste. RCRA provides that “[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter *shall* be provided for, encouraged, and assisted by the Administrator.” *Id.* § 6974(b) (emphasis added). Prior to departing from this practice for the Part A Proposal, EPA had routinely held in-person public hearings in implementing these nondiscretionary duties, as supported by EPA regulations and guidance going back to 1979.

46. EPA’s public participation regulations commit the Agency to “provide for, encourage, and assist the participation of the public,” “foster a spirit of openness and mutual trust among EPA . . . and the public,” and “use all feasible means to create opportunities for public participation, and to stimulate and support participation.” 40 C.F.R. § 25.3(a), (c).

## **FACTUAL BACKGROUND**

### **I. The Toxic Threats Posed by Coal Ash**

47. Coal ash is one of the largest industrial wastestreams in the United States. Coal-fired power plants in the United States produce more than 100 million tons of coal ash each year. Coal ash contains “myriad carcinogens and neurotoxins” and utilities dispose of it in “massive” disposal sites including hundreds of landfills and ash ponds throughout the country, which are “generally . . . at varying degrees of risk of protracted leakage and catastrophic structural failure.” *See Util. Solid Waste Activities Grp. v. Env’tl. Prot. Agency*, 901 F.3d 414, 420-21 (D.C. Cir. 2018).

48. When coal ash is not disposed of in properly sited, constructed, and operated facilities, toxic contaminants can be released to air, groundwater, surface water, and soil.

49. There are hundreds of leaking, unlined, and improperly sited coal ash ponds in the U.S. polluting groundwater as well as bays, lakes, rivers, and streams. These coal ash ponds release toxic and radioactive substances into the water, including large quantities of heavy metals and metal compounds such as arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium, and thallium.

50. The toxic contaminants in coal ash can cause cancer and other adverse health impacts including reproductive, neurological, respiratory, and developmental harm.

51. Arsenic is a known human carcinogen that causes cancer of the skin, liver, bladder, and lungs. 80 Fed. Reg. at 21,451. Boron “can pose developmental risk to humans when released to groundwater and can result in stunted growth, phytotoxicity, or death to aquatic biota and plants when released to surfacewater bodies.” Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One); Proposed Rule, 83 Fed. Reg. 11,584, 11,589 (Mar. 15, 2018). Lead is a very potent neurotoxin that can cause “kidney disease, lung disease, fragile bone[s], decreased nervous system function, high blood pressure, and anemia.” Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule, 75 Fed. Reg. 35,128, 35,169 (June 21, 2010). Exposure to mercury, another neurotoxin, can “permanently damage the brain, kidneys, and developing fetus.” *Id.* Molybdenum exposure can result in “higher levels of uric acid in the blood, gout-like symptoms, and anemia.” 80 Fed. Reg. at 21,451.

52. In 2015, EPA promulgated regulations to begin to address the longstanding threats posed by coal ash. *See* 80 Fed. Reg. 21,302. The 2015 Coal Ash Rule provides safeguards for coal ash disposal and protections for communities threatened by coal ash contamination.

53. On September 13, 2017, EPA announced that it would initiate rulemaking to reconsider provisions of the 2015 Rule as requested in petitions submitted by the Utility Solid Waste Activities Group and AES-Puerto Rico. Since promulgating the 2015 Coal Ash Rule, EPA has proposed five different revisions to the Rule that significantly blunt important protections.

54. One of those proposals is the Part A Proposal, which was published in the *Federal Register* on December 2, 2019. *See* Part A Proposal, 84 Fed. Reg. 65,941.

55. The Part A Proposal would enable utilities to delay closing ash ponds for a significantly longer period of time than the deadline provided in the 2015 Rule, notwithstanding the D.C. Circuit's 2018 ruling that the existing provisions of the rule are insufficiently protective.

56. The Part A Proposal would therefore allow millions of tons of additional toxic coal ash waste to be dumped into leaking, unlined, and/or dangerously-sited ponds and would prolong the risk to neighboring communities of groundwater contamination, catastrophic spills, or other harms from those ponds.

57. Nationwide, risk of harm from coal ash pollution is borne disproportionately by communities of color and low-income communities.

58. Members of the Plaintiff organizations are adversely affected by the closure delays and increased risks of harm due to EPA's Part A Proposal.

59. Plaintiffs' members were also harmed by Defendants' decision not to hold an in-person public hearing and to curtail opportunities for public comment because it undermined their ability to express their concerns about the Part A Proposal.

## **II. Public Hearing and Participation on the Part A Proposal**

60. Upon publishing the Part A Proposal on December 2, 2019, EPA announced a sixty-day comment period on the proposed rule. This comment period ran through the winter holiday season, including Christmas, Hanukkah, Kwanzaa, New Year's Day, and Martin Luther

King, Jr. Day, which substantially shortened the available working days for Plaintiffs and the public in general. Part A Proposal, 84 Fed. Reg. 65,941 (Dec. 2, 2019).

61. In addition, the comment period for the Part A Proposal almost entirely overlapped with the comment period for a related EPA proposal which would roll back Clean Water Act treatment requirements for coal ash wastewater dischargers, which was also of great concern to and would adversely impact Plaintiff organizations and their members. Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category. 84 Fed. Reg. 64,620 (Nov. 22, 2019).

62. Plaintiffs were therefore required to comment on two concurrently-pending, highly-technical regulatory proposals during an abbreviated comment period. This served to inhibit rather than encourage public participation and undermined Plaintiffs' and their members' ability to adequately comment on the Part A Proposal.

63. EPA's December 2, 2019 proposal stated that it would hold one public hearing on the Part A Proposal, to be held on January 7, 2020 with a registration deadline of January 3, 2020. EPA did not specify whether the hearing would be held virtually or in person. *Id.*

64. EPA later indicated that the public hearing on the Part A Proposal would be virtual. Speakers were required to first register online and then to call in to a webinar to provide oral testimony.

65. EPA announced its decision to have a virtual rather than an in-person hearing, and provided registration instructions, only electronically and did not publish notice of the virtual hearing decision in the Federal Register or in any other official print publications. *Virtual Public Hearing on the Proposal: A Holistic Approach to Closure Part A,*

<https://www.epa.gov/coalash/forms/virtual-public-hearing-proposal-holistic-approach-closure-part>.

66. EPA's decision to hold only a virtual hearing on the Part A Proposal, and its refusal to hold an in-person public hearing, was a clear reversal of its longstanding position that RCRA requires EPA to hold in-person public hearings on proposed regulatory changes. Indeed, prior to the Part A rulemaking EPA had held at least one, if not multiple, in-person hearings for every proposed coal ash regulation and amendments thereto.

67. As evidenced by EPA's 2016 RCRA Public Participation Manual, 1979 Part 25 Public Participation Regulation, and 2003 Public Involvement Policy, EPA's longstanding interpretation of a public hearing is that it is an in-person event and that virtual public hearings should supplement, but not replace, in-person hearings, which are the bedrock of public participation in the rulemaking process.

68. Former long-time EPA staff who were directly involved in promulgating the Agency's public participation regulations and in other public participation efforts submitted comments to EPA on the Part A Proposal urging it to hold an in-person public hearing. These former EPA staff stated that hearing directly, in-person, from affected citizens is a crucial part of the decision-making process and that the "Part 25 Public Participation regulation expected hearings to be in-person hearings and that was the common understanding at EPA." *See* Comment of Lee Daneker, Docket ID. No. EPA-HQ-OLEM-2019-0172-0027 (Jan. 7, 2020); Comment of Environmental Protection Network, Docket ID. No. EPA-HQ-OLEM-2019-0172 (Jan. 31, 2020). As one former EPA staff member explained, in-person hearings promote dialogue and encourage questioning that elicits useful information, which is much harder to do

when contact is a “disembodied voice.” *See* Comment of Steven Silverman, Docket ID. No. EPA-HQ-OLEM-2019-0172-0026 (Jan. 2, 2020).

69. Despite being contrary to EPA’s own regulations and guidance, EPA has now offered only virtual hearings, and refused requests for in-person public hearings, for three major proposals regarding coal ash disposal. This dramatic change in position, which began with EPA’s refusal to have an in-person hearing on the Part A Proposal, does not reflect EPA’s authoritative, expert-based, or fair and considered judgment, and violates RCRA.

70. On December 4, 2019, eighty-seven public interest organizations, including Plaintiffs, requested that EPA hold an in-person public hearing on the Part A Proposal in addition to the virtual public hearing, and extend the comment period to 120 days to ensure that the public has a meaningful opportunity to express its concerns about the Part A proposal to EPA.

71. EPA refused these requests in a letter dated December 16, stating that it would neither hold an in-person public hearing nor extend the comment period.

72. EPA held a virtual hearing on the Part A Proposal on January 7, 2020.

73. Participation at the hearing was sparse. No one commented at all during nearly half of the eight hour hearing.

74. Participants had to call in at a designated time to deliver their testimony. Because they could only call in and not participate by video, participants could not share any visual aids to supplement their verbal testimony. Nor could they see who, if anyone, was listening and could therefore not gauge how their testimony was being received.

75. Participants did not have the opportunity to make eye contact or otherwise connect on a human-to-human basis with the regulators. Nor did participants, including those who provided testimony and those who listened, have an opportunity to connect with other



members of the public who may share their concerns. Participants lost the ability to organize and draw support from others physically present in the same room.

76. At times, the testimony itself was muffled and was disrupted by technological or telephonic problems. In some cases, EPA simply cut off the testimony of a participant when such problems arose and asked the participant to submit written copies of their remarks instead.

77. EPA also abruptly muted several participants as they were delivering their testimony because EPA's predetermined five-minute time limit had expired, notwithstanding the fact that there were multiple open periods with no scheduled testimony.

78. The hearing format discouraged dialogue between EPA and participants. EPA panelists did not ask any participants clarifying questions and there was no opportunity for informal conversation.

79. Over seventy-five percent of participants at the hearing used part of their limited speaking time to highlight their dismay over the virtual format of the hearing, citing it as a deterrent to public participation and expressing that they felt constrained by the format.

80. Many participants stressed that they did not feel heard or seen by EPA through the virtual format, and some questioned whether anyone was listening to them at all while testifying. These commenters uniformly called upon EPA to hold an in-person hearing on the Part A Proposal.

81. Several participants from communities impacted by coal ash pollution in rural West Virginia, Virginia, Missouri, and the Ohio River Valley explained that many of their community members had limited access to the internet, thereby impairing their ability to participate or deterring them from participating in the January 7 hearing.

82. Participants also noted that the technology required to receive notice of and participate in the hearing specifically discouraged elderly community members from participating. A member of Plaintiff Waterkeeper Alliance read aloud the testimony of another member, a seventy-year-old man who was too intimidated by the required technology to participate directly but would have driven hundreds of miles to participate at an in-person hearing. A ninety-two-year-old member of Plaintiff Labadie Environmental Organization needed help from others in order to participate because she did not have access to the appropriate technology.

83. The technology required to receive notice of and participate in the January 7 hearing served as a barrier for environmental justice communities, including members of Plaintiff organizations, who disproportionately lack internet access and are disproportionately affected by contaminated coal ash ponds.

84. The January 7, 2020 virtual hearing on the Part A Proposal was not an adequate substitute for an in-person public hearing and was held before the United States reported its first confirmed case of COVID-19.

85. Defendants made it clear that EPA would not offer an in-person hearing or a longer comment period on the Part A Proposal because it determined that they were “not in the public interest.” The comment period on the Part A Proposal ended on January 31, 2020.

86. Defendants’ refusal to hold an in-person hearing and to extend the comment period on the Part A Proposal deprived members of the Plaintiff organizations of the opportunity to meaningfully express their concerns to EPA decision-makers about the Part A Proposal. This in turn undermined EPA’s ability to identify the full range of environmental and health impacts and develop an adequate record necessary for reasoned and well-informed rulemaking.

87. EPA's inability to identify and document the full range of impacts from the Part A Proposal increases the risk to Plaintiffs' members of exposure to coal ash contaminants and associated adverse health effects.

CLAIMS FOR RELIEF

**COUNT I**

**Defendants Unlawfully Failed to Hold an In-Person Public Hearing on the Part A Proposal**

88. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

89. RCRA requires Defendants to hold in-person public hearings prior to developing and publishing coal ash regulations. *See* 42 U.S.C. §§ 6907(a) and 6944(a).

90. Defendants' aforementioned duties under 42 U.S.C. §§ 6907(a) and 6944(a) are nondiscretionary.

91. The January 7, 2020 virtual hearing did not satisfy Defendants' nondiscretionary duty to hold a public hearing as required by RCRA.

92. Defendants have breached their mandatory, nondiscretionary duty to hold an in-person public hearing on the Part A Proposal.

93. Unless Defendants perform their nondiscretionary duty to have an in-person public hearing, Plaintiffs and their members will suffer irreparable harm.

94. There exists an actual controversy regarding whether or not Defendants' actions and inactions described are lawful pursuant to RCRA. Plaintiffs are interested parties because they were subject to those described actions and inactions.

95. Plaintiffs have no adequate remedy at law, and therefore equitable relief is warranted.

**COUNT II**  
**Defendants Unlawfully Failed to Ensure Adequate Public Participation on the Part A Proposal**

96. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

97. EPA's refusal to hold an in-person hearing on the Part A Proposal, together with the inadequate comment period, did not provide Plaintiffs with an adequate opportunity to participate in the Part A rulemaking.

98. RCRA requires that "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." 42 U.S.C. § 6974(b)(1).

99. Defendants' duty under 42 U.S.C. § 6974(b) is nondiscretionary.

100. Defendants failed to "provide[] for, encourage[], and assist[]" public participation on the Part A Proposal-as required by 42 U.S.C. § 6972(a)(2) and. § 6974(b). Defendants therefore breached their mandatory, nondiscretionary duty.

101. Unless Defendants perform their nondiscretionary duty to hold an in-person hearing and provide an adequate public comment period regarding the Part A Proposal, Plaintiffs and their members will suffer irreparable harm.

102. There exists an actual controversy regarding whether or not Defendants' actions and inactions described are lawful pursuant to RCRA. Plaintiffs are interested parties because they were subject to those described actions and inactions.

103. Plaintiffs have no adequate remedy at law, and therefore equitable relief is warranted.

**PRAYER FOR RELIEF**

Plaintiffs respectfully request this Court grant the following relief:

- a. Declare that Defendants violated the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6907(a) and 6944(a), by refusing to hold an in-person public hearing on the Part A Proposal;
- b. Declare that Defendants violated the Resource Conservation and Recovery Act, 42 U.S.C. § 6974(a), by refusing to hold an in-person public hearing and failing to provide an adequate comment period on the Part A Proposal;
- c. Order Defendants to hold an in-person public hearing on the Part A Proposal before finalizing it, as required by the Resource Conservation and Recovery Act;
- d. Order Defendants to offer an adequate comment period on the Part A Proposal, as required by the Resource Conservation and Recovery Act;
- e. Award Plaintiffs their litigation costs and reasonable attorneys' fees in this action; and,
- f. Provide any other necessary and appropriate relief.

DATED: July 6, 2020

Respectfully,

/s/ Jennifer Cassel

Jennifer Cassel  
Shubra Ohri (to be admitted *pro hac vice*)  
Thomas J. Cmar (to be admitted *pro hac vice*)  
Lisa Evans (to be admitted *pro hac vice*)  
Earthjustice  
311 S. Wacker Drive, Suite 1400

Chicago, IL 60606  
Phone: (312) 500-2196

*Counsel for Plaintiffs*

# **Exhibit 1**



February 7, 2020

**Via Registered Mail, Return Receipt Requested**

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

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

Dear Administrator Wheeler:

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

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





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

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

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

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

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

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



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

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

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

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

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

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



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

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

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



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

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

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

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

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

## **III. PUBLIC PARTICIPATION**

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



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

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

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

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

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

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

#### **V. NOTICE**

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

Labadie Environmental Organization  
2322 Highway 100  
Labadie, MO 63055  
(636) 392-0018



Diné Citizens Against Ruining our Environment  
HC 63 Box 272  
Winslow, AZ, 86047  
(928) 221-7859

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

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

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

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

Respectfully,

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

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

**Enclosure (Exhibits A and B)**

Copy: William Barr  
Attorney General



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

# Exhibit A





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC 16 2019

OFFICE OF  
LAND AND EMERGENCY  
MANAGEMENT

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

Dear Ms. Evans:

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

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

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

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

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

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

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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Peter C. Wright", written in a cursive style.

Peter C. Wright  
Assistant Administrator

December 4, 2019

*By Email*

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

David Ross  
Assistant Administrator  
Office of Water  
Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, NW, Mail Code 4101M  
Washington, DC 20460  
[Ross.David@epa.gov](mailto:Ross.David@epa.gov)

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

Dear Assistant Administrators Wright and Ross:

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

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

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

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

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

### Request for Public Hearings

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

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

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

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

<sup>2</sup> *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure*, Proposed Rule, 84 Fed. Reg. 65,941 (Dec. 2, 2019).

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



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

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

#### Request for 120-Day Comment Period

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

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

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

Respectfully submitted,

Lisa Evans & Thomas Cmar  
Earthjustice

Larissa Liebmann  
Waterkeeper Alliance

Jennifer Peters  
Clean Water Action

Dalal Aboulhosn  
Sierra Club

Jennifer Peters  
Clean Water Action

Rebecca Hammer  
Natural Resources Defense Council

Cindy Lowry  
Alabama Rivers Alliance

John Zippert  
Alabama State Association of  
Cooperatives

Timmy Boyle  
Alianza Comunitaria Ambiental del  
Sureste (ACASE)

Fletcher Sams  
Altamaha Riverkeeper

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

Thomas Oppel  
American Sustainable Business Council

Georgia Ackerman  
Apalachicola Riverkeeper

Amy Adams  
Appalachian Voices

Dean A. Wilson  
Atchafalaya Basinkeeper

Susan K. Holmes  
BECAUSE

Eugene Pickett  
Black Farmers & Ranchers New Mexico

Charles Scribner  
Nelson Brooke  
Black Warrior Riverkeeper

David Caldwell  
Broad Riverkeeper

Kemp Burdette  
Cape Fear River Watch

Brandon Jones  
Catawba Riverkeeper Foundation

Kevin Jeselnik  
Chattahoochee Riverkeeper, Inc.

Anne Havemann  
Chesapeake Climate Action Network

Mary Ellen DeClue  
Citizens Against Longwall Mining

Ellen Rendulich  
Citizens Against Ruining the  
Environment

Amanda Strawderman  
Clean Water for North Carolina

Lisa Rider  
Coastal Carolina Riverwatch

Víctor Alvarado Guzmán  
Ruth Santiago  
Comité Diálogo Ambiental, Inc.

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

Kathy Selvage  
Committee for Constitutional and  
Environmental Justice

Clark Bullard  
Committee on the Middle Fork  
Vermilion River

Mabette Colon Perez  
Comunidad Guayamesa Unidos Por Tu  
Salud

Susan Wind  
Concerned Parents

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

Larry Baldwin  
Crystal Coast Waterkeeper

Carol Davis  
Diné CARE

Lan Richart & Pamela Richard  
Eco-Justice Collaborative

Bart Johnsen-Harris  
Environment America

Jacqueline Patterson  
Environmental and Climate Justice,  
NAACP

Jeffrey Hammons  
Environmental Law & Policy Center

R. John Dawes  
Foundation for PA Watersheds

Kristy Meyer  
Freshwater Future

Beth Porter  
Green America

Julian Gonzalez  
GreenLatinos

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

Indra Frank  
Hoosier Environmental Council

Patricia Schuba  
Labadie Environmental Organization  
(LEO)

Yvonne Taylor  
Lake Guardian, a Waterkeeper Alliance  
Affiliate

Madeleine Foote  
League of Conservation Voters

Angie Shugart  
Little River Waterkeeper

Terry Miller  
Lone Tree Council

Ted Evgeniadis  
Lower Susquehanna Riverkeeper  
Association

Cheryl Nenn  
Milwaukee Riverkeeper

Edward Smith  
Missouri Coalition for the Environment

Rachel Bartels  
Missouri Confluence Waterkeeper

Casi Callaway  
Mobile Baykeeper

Anne Hedges  
Montana Environmental Information  
Center

Gray Jernigan  
MountainTrue

Rigoberto Delgado  
National Immigrant Farming Initiative

Rudy Arredondo  
National Latino Farmers & Ranchers  
Trade Association

Naeema Muhammad  
NC Environmental Justice Network

Carrie Clark  
NC League of Conservation Voters

Richard Lawton  
New Jersey Sustainable Business  
Council

Gregory Remaud  
NY/NJ Baykeeper

Damon L Mullis  
Ogeechee Riverkeeper

Vivian Stockman  
Ohio Valley Environmental Coalition  
(OVEC)

Phillip Musegaas  
Potomac Riverkeeper Network

Andrew Rehn  
Prairie Rivers Network

Ward Archer  
Protect Our Aquifer

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

Arthur Norris  
Quad Cities Waterkeeper, Inc.

Georgia Good  
Rural Advancement Fund of the  
National Sharecroppers Inc.

Lorette Picciano  
Rural Coalition

Natalie Wasek  
Seventh Generation, Inc.

Jake Faber  
SouthWings

John S. Quarterman  
Suwannee Riverkeeper

Kathy Hawes  
Tennessee Clean Water Network

David Whiteside  
Tennessee Riverkeeper

Pedro Saade Llorens  
University of Puerto Rico School of Law

Megan Chase  
Upstate Forever

Kelsey Hillner  
Virginia Conservation Network

Cara Schildtknecht  
Waccamaw Riverkeeper

Betsy Nicholas  
Waterkeepers Chesapeake

Bob LaResche  
Western Organization of Resource  
Councils

Larry Baldwin  
White Oak-New Riverkeeper Alliance

Christine Ellis & Cara Schildtknecht  
Winyah Rivers Alliance



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

# Exhibit B

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

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

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

My comments are organized as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **VII. Environmental Justice:**

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

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

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

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

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

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

**IX. Recommendations:**

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

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



**CIVIL COVER SHEET**

JS-44 (Rev. 6/17 DC)

<b>I. (a) PLAINTIFFS</b>  (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____ (EXCEPT IN U.S. PLAINTIFF CASES)	<b>DEFENDANTS</b>  COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	ATTORNEYS (IF KNOWN)

<b>II. BASIS OF JURISDICTION</b> (PLACE AN x IN ONE BOX ONLY)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b>																								
<input type="radio"/> 1 U.S. Government Plaintiff <input type="radio"/> 2 U.S. Government Defendant <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)	<table style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="width:30%;"></th> <th style="width:10%; text-align: center;">PTF</th> <th style="width:10%; text-align: center;">DFT</th> <th style="width:30%;"></th> <th style="width:10%; text-align: center;">PTF</th> <th style="width:10%; text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6																				

**IV. CASE ASSIGNMENT AND NATURE OF SUIT**

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> <b>A. Antitrust</b>  410 Antitrust	<input type="radio"/> <b>B. Personal Injury/Malpractice</b>  310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury 362 Medical Malpractice 365 Product Liability 367 Health Care/Pharmaceutical Personal Injury Product Liability 368 Asbestos Product Liability	<input type="radio"/> <b>C. Administrative Agency Review</b>  151 Medicare Act  <u>Social Security</u> 861 HIA (1395ff) 862 Black Lung (923) 863 DIWC/DIWW (405(g)) 864 SSID Title XVI 865 RSI (405(g))  <u>Other Statutes</u> 891 Agricultural Acts 893 Environmental Matters 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b>  Any nature of suit from any category may be selected for this category of case assignment.  *(If Antitrust, then A governs)*
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<input type="radio"/> <b>E. General Civil (Other)</b>		<b>OR</b>	<input type="radio"/> <b>F. Pro Se General Civil</b>	
<u>Real Property</u> 210 Land Condemnation 220 Foreclosure 230 Rent, Lease & Ejectment 240 Torts to Land 245 Tort Product Liability 290 All Other Real Property  <u>Personal Property</u> 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability	<u>Bankruptcy</u> 422 Appeal 27 USC 158 423 Withdrawal 28 USC 157  <u>Prisoner Petitions</u> 535 Death Penalty 540 Mandamus & Other 550 Civil Rights 555 Prison Conditions 560 Civil Detainee – Conditions of Confinement  <u>Property Rights</u> 820 Copyrights 830 Patent 835 Patent – Abbreviated New Drug Application 840 Trademark	<u>Federal Tax Suits</u> 870 Taxes (US plaintiff or defendant) 871 IRS-Third Party 26 USC 7609  <u>Forfeiture/Penalty</u> 625 Drug Related Seizure of Property 21 USC 881 690 Other  <u>Other Statutes</u> 375 False Claims Act 376 Qui Tam (31 USC 3729(a)) 400 State Reapportionment 430 Banks & Banking 450 Commerce/ICC Rates/etc. 460 Deportation	462 Naturalization Application 465 Other Immigration Actions 470 Racketeer Influenced & Corrupt Organization 480 Consumer Credit 490 Cable/Satellite TV 850 Securities/Commodities/Exchange 896 Arbitration 899 Administrative Procedure Act/Review or Appeal of Agency Decision 950 Constitutionality of State Statutes 890 Other Statutory Actions (if not administrative agency review or Privacy Act)	

<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  530 Habeas Corpus – General 510 Motion/Vacate Sentence 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  *(If pro se, select this deck)*	<input type="radio"/> <b>I. FOIA/Privacy Act</b>  895 Freedom of Information Act 890 Other Statutory Actions (if Privacy Act)  *(If pro se, select this deck)*	<input type="radio"/> <b>J. Student Loan</b>  152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  710 Fair Labor Standards Act 720 Labor/Mgmt. Relations 740 Labor Railway Act 751 Family and Medical Leave Act 790 Other Labor Litigation 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  441 Voting (if not Voting Rights Act) 443 Housing/Accommodations 440 Other Civil Rights 445 Americans w/Disabilities – Employment 446 Americans w/Disabilities – Other 448 Education	<input type="radio"/> <b>M. Contract</b>  110 Insurance 120 Marine 130 Miller Act 140 Negotiable Instrument 150 Recovery of Overpayment & Enforcement of Judgment 153 Recovery of Overpayment of Veteran’s Benefits 160 Stockholder’s Suits 190 Other Contracts 195 Contract Product Liability 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
 1 Original Proceeding  
  2 Removed from State Court  
  3 Remanded from Appellate Court  
  4 Reinstated or Reopened  
  5 Transferred from another district (specify)  
  6 Multi-district Litigation  
  7 Appeal to District Judge from Mag. Judge  
  8 Multi-district Litigation – Direct File

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____	JURY DEMAND: YES <input type="checkbox"/> NO <input type="checkbox"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input type="checkbox"/> NO <input type="checkbox"/>	If yes, please complete related case form

DATE: _____	SIGNATURE OF ATTORNEY OF RECORD _____
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**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk’s Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

LABADIE ENVIRONMENTAL ORGANIZATION, DINÉ
CITIZENS AGAINST RUINING OUR ENVIRONMENT,
HOOSIER ENVIRONMENTAL COUNCIL,
WATERKEEPER ALLIANCE, INC., and SIERRA CLUB

Plaintiff(s)

v.

ANDREW WHEELER, Administrator, U.S.
Environmental Protection Agency, and U.S.
ENVIRONMENTAL PROTECTION AGENCY

Defendant(s)

Civil Action No. 1:20-cv-1819

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jennifer L. Cassel (DC Bar No. IL0025)
Earthjustice
311 S. Wacker Dr., Suite 1400
Chicago, IL 60606
312-500-2198

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

LABADIE ENVIRONMENTAL ORGANIZATION, DINÉ
CITIZENS AGAINST RUINING OUR ENVIRONMENT,
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WATERKEEPER ALLIANCE, INC., and SIERRA CLUB

Plaintiff(s)

v.

ANDREW WHEELER, Administrator, U.S.
Environmental Protection Agency, and U.S.
ENVIRONMENTAL PROTECTION AGENCY

Defendant(s)

Civil Action No. 1:20-cv-1819

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

Jennifer L. Cassel (DC Bar No. IL0025)
Earthjustice
311 S. Wacker Dr., Suite 1400
Chicago, IL 60606
312-500-2198

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: