CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

October 15, 2019

Submitted via regulations.gov

Andrew Wheeler, Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: ***Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles***
Docket ID No. EPA-HQ-OLEM-2018-0524

Dear Administrator Wheeler:

The Chesapeake Bay Foundation, Inc. (CBF) submits the following comments regarding the United States Environmental Protection Agency's (EPA) proposed rule, *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles.*[1] EPA is proposing to change the April 17, 2015 Coal Combustion Residuals (CCR) Final Rule[2] by revising the annual groundwater monitoring and corrective action report requirements, establishing an alternate risk-based groundwater protection standard for boron, and revising the publicly accessible CCR website requirements. In addition, EPA proposes revising the CCR beneficial use definition by replacing the mass-based numerical threshold with specific location-based criteria (as the trigger for an environmental demonstration) and introducing a single approach to address the potential environmental and human health issues associated with piles of CCR.

This is the second set of changes to the 2015 CCR Rule. In 2018, EPA proposed and finalized plans that, among other things, adopted two types of alternative performance standards. The first allows a state director, or EPA, to suspend groundwater monitoring under certain circumstances, and the second allows technical certifications

[1] 84 FR 40353, August 14, 2019.
[2] 80 FR 21301, April 17, 2015.

to be used instead of the expertise of a professional engineer. [3] CBF argued against making those changes and incorporates by reference our prior comments.[4] EPA has also indicated that it intends to make two additional sets of changes to the CCR Rule.[5]

CBF is not in favor of any changes that will result in coal ash leaching to waterways and damage to the environment and human health. Specifically, CBF opposes eliminating the mass-based numerical threshold for requiring an environmental safety demonstration for beneficial uses of CCR and adopting a lax management approach for piles of unencapsulated CCR. The changes in this proposal -combined with the changes already finalized in 2018 - may lead to reduced costs associated with managing coal ash, thereby encouraging an increased use of coal and increased emissions of harmful greenhouse gases. Finally, CBF does not believe that, after the exhaustive process undertaken to establish the 2015 CCR Rule, EPA has demonstrated sufficient cause to make the proposed changes.[6]

I. The Chesapeake Bay Foundation

CBF is a 501(c)(3) non-profit organization, founded in 1967. The organization's mission -- carried out from offices in Maryland, Virginia, Pennsylvania and the District of Columbia -- is to restore and protect the ecological health of the Chesapeake Bay, one of the nation's most vital estuaries. As such, and on behalf of our 300,000 members and e-subscribers across the United States, we are very interested in matters that will impact the health of the Chesapeake Bay, the waters that feed into the watershed and the health of those living and working in the region.

II. Coal Ash Disposal and the Chesapeake Bay Watershed

Many risks are associated with the management of coal ash impoundments including the leaching of contaminants from coal ash into groundwater, blowing of contaminants into the air as dust, and failure of coal ash surface impoundments. Potential contaminants in CCR include mercury, cadmium, arsenic, boron and other heavy metals. A recent report from Duke University discusses findings from the examination of 15 coal facilities in the Southeastern

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[3] EPA, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities: Amendments to the National Minimum Criteria (Phase One, Part One),* Final Rule, 83 FR 36435, July 30, 2018.

[4] *See* Letter from Lisa Feldt, Vice President for Environmental Protection and Restoration, Chesapeake Bay Foundation, to Scott Pruitt, Administrator, Environmental Protection Agency, regarding *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities: Amendments to the National Minimum Criteria (Phase One) Proposed Rule,* Docket ID No. EPA-HQ-OLEM-2017-0285, April 30, 2018.

[5] *See* EPA/OLEM, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities: Federal CCR Permitting Program,* RIN: 2050-AH07; EPA/OLEM, *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,* RIN: 2050-AH10.

[6] While an agency may revisit and revise regulations in recognition of changing circumstances, "the forces of change do not always or necessarily point in the direction of deregulation." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983). There is a presumption "against changes in the current policy that are not justified by the rulemaking record." *Id.* The agency must therefore examine the relevant facts, and articulate a satisfactory explanation for its proposed changes that are supported by the rulemaking record. EPA has not made that demonstration in this proposal.

United States.[7] Analysis of 165 monitoring wells revealed that 49 had high CCR-contaminant levels.[8] The report also notes that EPA has documented reports of 113 potential – and 40 confirmed – cases of damage from the storage and disposal of CCRs with a total of 60 percent of those cases resulting in groundwater or surface water contamination from surface impoundment leakage.[9]

Unfortunately, numerous coal ash impoundments are located within the Chesapeake Bay watershed. Pennsylvania has over 70 coal ash ponds or landfills[10] and Virginia has 132 coal ash impoundments, eleven of which are along the banks of rivers.[11] Data released by power plants – *as required by the 2015 CCR Rule* - shows evidence of CCR contamination in Virginia. Dominion Virginia's report regarding several of its plants in Virginia shows:

- ***High levels of chemicals like boron and chlorides***—which are the "leading indicators" according to the Environmental Protection Agency of whether coal ash pollutants are leaking out of the pits—are present in the groundwater at ***Bremo Power Station***, ***Possum Point Power Station***, and ***Chesterfield Power Station.***
- Groundwater at all three sites show ***higher than normal concentrations of radium***, a radioactive element that can be found in coal ash and is commonly associated with nuclear waste. In many instances, the concentrations exceeded the allowable limit.
- Chesterfield's Upper and Lower Ash Ponds (approximately 15 million tons of coal ash) - located on what used to be the main channel of the James River
  - 10 wells ***exceed the allowable limit for arsenic*** – in some instances, as high at 17 times the limit
  - ***Exceedances*** of the allowable limits or regional screening levels for ***beryllium, chromium, radium, lead, cobalt, thallium, and lithium***.
- ***Bremo's North Pond*** (approximately 6 million tons of coal ash) – located on the banks of the James River
  - Elevated levels of ***lithium, mercury and radium***.

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[7] Jennifer S. Harkness, Barry Sulkin & Avner Vengosh, *Evidence for Coal Ash Ponds Leaking in the Southeastern United States*, 50 Environ. Sci. Technol., 6,583,92 (2016) [hereinafter, "Harkness, *et al*., *Coal Ash Ponds Leaking* (2016)"].
[8] *Id.*, p. 1.
[9] *Id*., *See also*, EPA, *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities*: Final Rule, 80 FR 21302, April 17, 2015.
[10] Earthjustice, *Pennsylvania and Coal Ash Disposal in Ponds and Landfills*, 2014, https://earthjustice.org/sites/default/files/files/Pennsylvania-Fact-Sheet-2014-12.pdf, *citing*, U.S. EPA, *Database of coal combustion waster surface impoundments,*
[11] http://www.southeastcoalash.org/about-coal-ash/find-your-state/virginia/

- ***Possum Point's Pond D*** (approximately 4 million tons of coal ash) – located on a peninsula next to the Potomac
    - Five of Dominion's wells appear to have elevated ***radium*** concentrations, with one well actually exceeding the limit.
    - Elevated levels of *arsenic, beryllium, cobalt, and lithium*, including in "sentinel wells" located between Pond D and the Potomac River, further confirming the fact the pollution is not contained.[12]

Moreover, a recent federal district court found elevated levels of arsenic in the South Branch of the Elizabeth River and Deep Creek, two waterways adjacent to the impoundments of the Chesapeake Energy Center (CEC), where CEC had for decades deposited CCRs.[13] The Court found, based on evidence presented at trial, that there was a "direct hydrological connection" between the ponds, the underlying groundwater and nearby surface waters through which groundwater moved freely and carried dissolved arsenic from the coal ash to surface waters.[14]

III. Climate Change and the Chesapeake Bay

The Chesapeake Bay is the nation's largest estuary, supporting vibrant commercial fishing and tourism industries. The Bay is negatively impacted by the effects of climate change including sea-level rise, warming temperatures, extreme weather, and ocean acidification.[15]

Within 20 years, nearly 170 U.S. communities will be chronically inundated with flooding[16] and more than 70% of these communities will be in Louisiana and Maryland: the "canaries in the coal mine" for sea level rise.[17] Sea level rise threatens to inundate small coastal communities and major cities alike in the Chesapeake Bay region. In Maryland alone, it threatens to flood over 61,000 homes by 2100, valued at $19 billion.[18] Entire previously inhabited islands are now underwater in the Chesapeake Bay, with more likely to follow if greenhouse gas (GHG)

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[12] *Emphasis added, Dominion's Coal Ash Pits Polluting Our Water with Arsenic and Radium,* Southern Environmental Law Center, March 6, 2018, found at: https://www.southernenvironment.org/news-and-press/press-releases/dominions-coal-ash-pits-polluting-our-water-with-arsenic-and-radium; *See also*: https://www.dominionenergy.com/about-us/electric-projects/coal-ash-pond-closure-management/groundwater-reports

[13] *Sierra Club v. Va. Elec. & Power Co*., 247 F. Supp. 3d 753 (E.D. Va. 2017).

[14] *Id*. at 762-764. On appeal, the Fourth Circuit disagreed with the district court's conclusion that the CEC's impoundments were unpermitted point sources that discharged arsenic in violation of the Clean Water Act, but did not disturb the underlying facts on arsenic leaching from the CEC coal ash ponds.

[15] EPA, Chesapeake Bay Program, *Climate Change,* https://www.chesapeakebay.net/issues/climate_change

[16] Erika Spanger-Siegfried, *et. al, When Rising Seas Hit Home: Hard Choices Ahead for Hundreds of US Coastal Communities*, Union of Concerned Scientists 2, 2017.

[17] *Id.*

[18] Catherine Rentz, *Rising sea levels threaten $19 billion in real estate across Maryland*, study says, The Baltimore Sun, Oct. 28, 2017, http://www.baltimoresun.com/news/maryland/investigations/bsmd-suninvestigates-sea-level-20171026-story.html.

emissions do not decrease substantially.[19] In Norfolk, Virginia, sea level rise poses significant risk to the public and military infrastructure and operations.[20]

Wetlands are also threatened by sea level rise. These important filters reduce the level of pollutants entering the Bay[21] and protect coastal communities from storm surge and erosion.[22] They are typically some of the first areas to be exposed to chronic flooding, however, and while they can migrate in response to changes in water levels provided they have the space and time to do so,[23] the pace of sea level rise and changes in land use in coastal communities have weakened the ability of wetlands to migrate.[24] In addition, forested buffers along creeks, tidal rivers, and the Bay are also impacted by seal level rise as saltwater seeps into the soil, killing trees and creating "ghost forests."[25]

Warming waters - that have already been recorded in 92 percent of the Bay - deplete the level of available oxygen in the Bay.[26] This will have major repercussions as the Bay already struggles with dead zones of hypoxic water from nitrogen and phosphorus pollution (these nutrients fuel algal blooms, creating hypoxic and anoxic areas in the Bay).[27] Warming ocean temperatures will

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[19] Erik Ortiz, *How to Save A Sinking Island*, NBC NEWS, November 13, 2017, https://www.nbcnews.com/specials/deal-island; David Fahrenthold, *Last house on sinking Chesapeake Bay island collapses*, Washington Post, October 26, 2010, http://www.washingtonpost.com/wpdyn/content/article/2010/10/24/AR2010102402996.html; Jon Gertner, *Should the United States Save Tangier Island From Oblivion*?, New York Times Magazine, July 6, 2016, https://www.nytimes.com/2016/07/10/magazine/should-the-united-states-save-tangier-island-fromoblivion.html.

[20] "Sea level rise at just one site can have a significant impact on [both military policy and] strategy. Hampton Roads, Virginia, dubbed 'the greatest concentration of military might in the world' for former Secretary of Defense Leon Panetta, is by itself an invaluable operational and strategic hub for both the United States and its allies. It …is the backbone of the U.S. Atlantic Fleet. It is also a low-lying site and very exposed to seal level rise and storm surge. If significant portions of the Hampton Roads infrastructure we regularly inundated, as is projected under a number of scenarios for the years 2023-2100, the impediment to force deployments for critical Atlantic, Mediterranean and Pacific war-fighting and humanitarian operations – many of which are tied to core strategic goals of the United States – would be significant." The Center for Climate and Security, Military Expert Panel Report: *Sea Level Rise and the U.S. Military's Missions, 23-24, 2016*, https://climateandsecurity.files.wordpress.comen/2016/09-center-for-climate-and-security-military-expert-panel-report2.pdf.

[21] Chesapeake Bay Program, *Wetlands*, https://www.chesapeakebay.net/issues/wetlands

[22] *Id.*

[23] Erika Spanger-Siegfried, *et. al, When Rising Seas Hit Home: Hard Choices Ahead for Hundreds of US Coastal Communities*, Union of Concerned Scientists, 10, 2017.

[24] *Id.*

[25] *Id*. *See also* John Upton, '*Ghost Forests' Appear as Rising Seas Kill Trees, Climate Central*, Sept. 15, 2016, http://www.climatecentral.org/news/ghost-forests-appear-as-rising-tides-kill-trees-20701.

[26] *See Army Corps of Engineers and City of Norfolk Draft Integrated City of Norfolk Coastal Storm Risk Management Feasibility Study/Environmental Impact Statement*, October 2017, http://www.nao.usace.army.mil/NCSRM/

[27] EPA, Chesapeake Bay Program, *The Dead Zone*, https://www.chesapeakebay.net/state/dead_zone

only exacerbate the dead zone in the Bay because warmer water molecules hold less oxygen than colder water molecules.[28]

Average U.S. precipitation has increased since the 1990s, and the frequency and intensity of heavy precipitation events is increasing due to climate change.[29] Increased scouring and runoff from more intense rain events carry significantly higher loads of nitrogen, phosphorous, and sediment into the Bay's tributaries.

Finally, GHG emissions cause ocean waters to acidify. Our oceans are a sink for atmospheric carbon, absorbing about a quarter of the CO_2 released into the atmosphere each year.[30] This absorption is not without consequence: excess CO_2 is changing the saltwater chemistry.[31] A chemical reaction occurs between carbon dioxide, water, and carbonate ions that reduces seawater pH depleting the concentration of carbonate ions and calcium carbonate minerals.[32] This negatively affects calcifying species by impairing their shell making ability. Ocean acidification threatens the growth and reproduction of oysters, clams, and other creatures with calcium shells.[33] The Chesapeake Bay blue crab population may be particularly susceptible to acidification because larval crabs spend a portion of their life offshore in the ocean. Blue crabs are a particularly important commercial species in the region's multi-billion-dollar seafood industry.[34]

Taken together, the effects of GHG emissions will impact the complex ecosystem – including water quality and habitat - needed for species survival in the Bay region. Indeed, these impacts are identified and reflected through various sections of the Chesapeake Bay Watershed Agreement, an Interstate Compact,[35] to which the United States is a signatory.[36]

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[28] Chris Mooney, *Global warming could deplete the oceans' oxygen – with severe consequences*, Washington Post, April 28, 2016, https://www.washingtonpost.com/news/energyenvironment/wp/2016/04/28/global-warming-could-deplete-the-oceans-oxygen-levels-with-severeconsequences/?utm_term=.9c3333011616.

[29] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment,* 19, 20, 2017.

[30] NOAA Pacific Marine Environmental Laboratory Carbon Program, *Ocean Acidification: the Other Carbon Dioxide Problem*, https://www.pmel.noaa.gov/co2/story/Ocean+Acidification

[31] NOAA Pacific Marine Environmental Laboratory Carbon Program, *What is Ocean Acidification?*, https://www.pmel.noaa.gov/co2/story/What+is+Ocean+Acidification%3F

[32] *Id.*

[33] Sarah M. Giltz and Caz M. Taylor, *Reduced Growth and Survival in the Larval Blue Crab Callinectes sapidus Under Predicted Ocean Acidification*, 36, J. of Shellfish Research, 481, 2017.

[34] Chesapeake Bay Foundation, *The Economic Importance of the Bay*, http://www.cbf.org/issues/whatwe-have-to-lose/economic-importance-of-the-bay/

[35] One of the purposes of the Chesapeake Bay Restoration Act of 2000 was to "expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay; and to achieve the goals established in the Chesapeake Bay Agreement." 33 U.S.C. § 1267. The Chesapeake Bay Agreement is an interstate compact as Congress developed and authorized the joint state action. *See Cuyler v. Adams*, 449 U.S. 433; 101 S. Ct. 703 (1981); *Seattle Master Builders Assoc. v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986).

[36] *Chesapeake Bay Watershed Agreement*, 2014, https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf

As such, the effects of GHG emissions should be at the forefront of EPA's analyses in promulgating rules. Should some of the provisions suggested in this proposed rulemaking be implemented, combined with the changes to the 2015 CCR Rule that have already been finalized, costs to electric utilities associated with managing coal ash will be reduced thereby incentivizing the future use of coal, and ultimately increasing GHG emissions.

IV. The 2015 CCR Rule

The 2015 CCR Rule established requirements for the safe disposal of coal ash from coal-fired power plants. Two major spills prompted the development of the Rule. The first occurred in 2008 at the Tennessee Valley Authority's Kingston Fossil Plant which resulted in 5.4 million - cubic yards of coal ash to be dumped into the Emory River Channel.[37] The second occurred in North Carolina when 39,000 tons of coal ash from a Duke Energy plant spilled into the Dan River.[38]

The Rule establishes technical requirements for CCR landfills and surface impoundments under subtitle D of the Resource Conservation and Recovery Act (RCRA) and promulgates national minimum criteria for existing and new CCR landfills and existing and new CCR surface impoundments and all lateral expansions of CCR units that are codified in Subpart D of Part 257 of Title 40 of the Code of Federal Regulations. The criteria include "location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post closure care, and record keeping, notification and internet posting requirements."[39] Except in limited circumstances, any existing unlined CCR surface impoundment that is contaminating groundwater above a regulated constituent's groundwater protection standard is also required to stop receiving CCR and either retrofit or close.[40]

As EPA states on its website, the "final rule is the culmination of ***extensive study on the effects of coal ash on the environment and public health***."[41] Now, just a few years later, EPA proposes to make changes to the 2015 CCR rule without valid factual or legal support.

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[37] http://www.southeastcoalash.org/about-coal-ash/coal-ash-disasters/the-dan-river-disaster/
[38] *Id.*
[39] EPA, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One),* 83 FR 11584, March 15, 2018.
[40] *Id; See also:* https://www.federalregister.gov/documents/2016/08/05/2016-18353/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric
[41] *Emphasis added*, EPA, *Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities,* April 22, 2018, https://www.epa.gov/coalash/coal-ash-rule.

V. EPA's Current Proposed Rule Changes to 2015 CCR Rule

A. Beneficial Use – The Agency should not weaken the 2015 CCR Rule by eliminating the mass-based numerical threshold for requiring an environmental safety demonstration for beneficial uses of CCR, and it should amend the rule by using location-based criteria to prohibit uses under certain conditions for proposed placements at lower levels.

The context for this recommendation is the 2015 CCR Rule's definition of "beneficial use," which is intended to distinguish between legitimate (and safe) beneficial CCR uses and the disposal of CCR. One of the definition's criteria addresses unencapsulated placement on the land of 12,400 tons or more of CCR in non-roadway uses. Currently, an owner who claims to be beneficially using CCR at these levels must demonstrate that any environmental releases to groundwater, surface water, soil and air are comparable to or lower than for analogous products made without CCR, or that releases will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use. EPA's proposal would replace this mass-based numerical threshold with specific location-based criteria (e.g., distance from the uppermost aquifer; or placement in a wetland, unstable area, flood plain or seismic area) which would trigger the required environmental demonstration.

CBF strongly opposes EPA's proposal to eliminate the mass-based numerical threshold. As EPA noted in establishing the 2015 CCR Rule, a 12,400-ton threshold criterion is appropriate because the potential risks from CCR placement at these high levels warrant regulation.[42] Virginia and other states have adopted, or are already adopting, the 12,400-ton threshold into their regulations. Moreover, EPA provides no justification for altering the 12,400-ton threshold as it provides no conflicting evidence that higher risks are associated with higher volumes of CCR. Accordingly, **EPA should retain the current mass-based numerical threshold (12,400 tons or higher)** that triggers the requirement of demonstrating environmental safety (that environmental releases are comparable to or lower than for analogous products made without CCR, or that releases will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use).

However, there are environmental and health risks in placing even lower levels of unencapsulated CCR on or near sensitive lands (e.g., in close proximity to the uppermost aquifer; or in a wetland, unstable area, flood plain or seismic area) poses. Ground- and surface water sampling close to coal ash sites in Virginia[43] has repeatedly evidenced significant leaching of toxic chemicals – including ***arsenic, radium, beryllium, chromium, radium, lead, cobalt, thallium, and lithium*** – from coal ash impoundments.

Given this evidence, it is appropriate to prohibit some such placements outright and strictly to regulate the placement of unencapsulated CCR in close proximity to an aquifer, waterbody, wetland, water supply well or in a flood plain or karst terrain. Specifically, CBF recommends

[42] 84 FR 40353, 40356, August 14, 2019, *Citing* 80 FR 21352, April 15, 2015.
[43] *See* examples cited above at pp. 2-4.

the following regarding any proposed placement of unencapsulated CCR for beneficial use in sensitive areas:

- **Placement in a Wetland** – Prohibited.[44]
- **Placement in Karst terrain** – Prohibited, given the potential for subsurface geologic structures to dissolve and allow surface lands to collapse, potentially allowing for the widespread contamination of groundwater.
- **Placement in 100-year floodplain** – Prohibited,[45] given increased, recurrent flooding experienced along coastlines and waterways
- **Distance from Uppermost Aquifer**– Prohibited within 5 feet of maximum seasonal water table (uppermost aquifer).[46]
- **Distance from waterbody (perennial, intermittent streams and rivers)** – Prohibited, within 500 feet, unless environmental safety demonstrated on an annual basis.
- **Distance from water supply well** – Prohibited within 500 feet, unless environmental safety demonstrated on an annual basis.
- **Placement in a fault or seismic area** – Prohibited unless environmental safety demonstrated.

B. Proposal to Revise Requirements Applicable to Piles –EPA should not weaken the 2015 CCR Rule through lax treatment of CCR piles.

EPA proposes to weaken the 2015 CCR Rule through a new and lax management regime for piles of unencapsulated CCR. Under the 2015 CCR Rule, storage of CCR in piles is considered to be a form of disposal, generally subject to regulatory criteria applicable to CCR landfills.[47] Onsite piles are generally required to be containerized to prevent releases to protect human and environmental health; large (12,400 tons) piles stored offsite awaiting treatment as beneficial uses may be subject to the beneficial use rules that require an environmental safety demonstration.

Under the current EPA proposal, a single standard is proposed to apply to "any temporary accumulation of solid, non-flowing CCR placed on the land that is designed and managed to control releases to the environment."[48] To clarify the meaning of "temporary," EPA proposes the owner/user be required to maintain a business record – whether contract, maintenance plan, contract, fugitive dust plan, etc. – documenting that all of the CCR in the pile will be completely removed according to a specific plan *at some point.* [49] According to EPA, maintenance of this record would "effectively limit the amount of unencapsulated CCR that will be placed and

[44] *See, e.g.*, § 62.1-44.15:20 (dumping into wetland prohibited) and 9VAC20-85-70 (placing of fossil fuel combustion products in wetland prohibited).
[45] *See, e.g.*, 9VAC20-85-70 (placing fossil fuel combustion products in areas subject to base flooding general prohibited).
[46] *See, e.g.*, 9VAC20-85-70.
[47] 84 FR 40353, 40361, August 14, 2019; *See also* 40 C.F.R. § 257.53.
[48] 84 FR 40353, 40362, August 14, 2019.
[49] 84 FR 40353, 40371, August 14, 2019, *Citing* proposed rule at 40 C.F.R. § 257.53.

persist in one location."[50] However, the proposal would not impose a time limit on CCR pile storage or regulate the amount of CCR stored in the pile beyond the what the owner/user's document states, or otherwise preclude reuse of the site for additional accumulations of CCR in new "temporary" piles. Accordingly, a massive "temporary" pile could persist over a very long time, be removed and re-accumulated with newly added CCR, and allow for releases that pose significant threats to the environment and human health – absent effective controls.

Yet, while the proposed rule *in terms* requires such piles to be designed and managed to control releases, it would abrogate virtually all EPA responsibility to prescribe or otherwise ensure the effectiveness of control measures. EPA acknowledges that "when significant and persistent volumes of unencapsulated CCR are present, similarities exist in the potential risks posed to human health, groundwater resources, or the air between the place of CCR in piles and placement in landfills, if inappropriately managed." [51] Nonetheless, it declines to impose the same set of technical controls as for landfills, defending this position by arguing that the amount of unencapsulated CCR on any site would be effectively limited by the "temporary" requirement. As discussed above, however, the proposal's "temporary" requirement would not serve this function as it would allow for long term storage of unencapsulated CCR on a specific site with no time limits. Moreover, EPA casts doubt on its commitment to even this minimal and circular requirement; it specifically seeks comment whether requiring a pile to be "temporary" is necessary, in view of the owner/user's "ability to use" control measures such as those in existing federal, state and local rules.[52]

We recognize that the intent of this proposed rule is to enhance business "flexibility," yet our review shows this proposal goes too far in that direction at the expense of both the environment and human health.

We urge EPA to reject the changes to the 2015 CCR Rule related to the treatment of unencapsulated CCR piles.

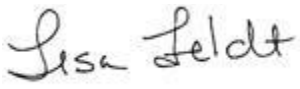
V. EPA Must Not Weaken the 2015 CCR Rule

The balance of the proposed changes in EPA's latest attempt to revise the 2015 CCR rule seek to weaken its requirements, to the potential endangerment of the Chesapeake Bay, its tributary streams and its human and ecosystem health. The 2015 Rule was enacted after major catastrophes, after exhaustive rulemaking proceedings that included Agency research and extensive input from all stakeholders. Backtracking from this Rule – beyond what has already been done and without legitimate factual and legal support - would increase risks to waterways and human health. The overall impact of these changes to the 2015 CCR Rule will incentivize the continued use of coal, and increase harmful GHG emissions. We strongly urge the agency to reject the proposals specifically mentioned in this letter.

[50] 84 FR 40353, 40363, August 14, 2019.
[51] *Id*.
[52] 84 FR 40353, 40365, August 14, 2019.

Thank you for the opportunity to comment on these very important issues. Please let us know if we can answer any questions or provide additional information.

Sincerely,



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