

March 20, 2023

**Memo on House Bill 1623, as passed by the House of Representatives**

From: Tim Maloney, Indra Frank, Hoosier Environmental Council

**1) HEC opposes the “no more stringent than” language concerning coal ash (CCR) rules on page 62.**

a) No more stringent than provisions serve to:

- Reduce state flexibility and limit state options for achieving regulatory goals.
- Reduce regulatory certainty in any instance where “no more stringent than” cannot be easily determined, and lead to litigation to resolve disputes over the term’s meaning and application.
- Create confusion given that the term “no more stringent than” is not defined in law.
- This new language also prohibits any state rules that impose a requirement that is not imposed by the federal CCR rule, even though existing state law and rules now fill these gaps in the federal rule.

Under existing Indiana law (see IC 13-14-9-4(e), IDEM must notify the legislature and the public of any proposed rules that may be more stringent than a federal rule and cannot finalize the proposed rule until the legislature has had an opportunity to review the proposal during a regular session.

b) Indiana already has a coal ash regulatory program in place, as follows:

- Coal ash landfills have been regulated under state rules for many years, as part of Indiana’s solid waste management rules. See 329 IAC 10-24 to 10-28, Restricted waste sites Type I, II, and III. The rules for restricted waste sites are similar in many respects to those for municipal solid waste landfills and include a state-administered permitting process.
- In 2016, Indiana’s Environmental Rules Board incorporated the EPA CCR rule provisions for surface impoundments (pits, ponds, lagoons). These rules have provided the regulatory framework for closure of coal ash surface impoundments, along with existing closure procedures for landfills.
- The language in Section 49, subsection (c), on page 62, amends language adopted in 2017. The language in subsection (d) authorizing the state permit program was adopted in 2021. The 2017 language authorized IDEM to adopt state rules incorporating the federal CCR rule, which IDEM has already done.

New subsections (c)(2) and (c)(3) on page 62 could be construed to apply to rules already adopted by IDEM. In that case, this language if adopted will call into question all of the IDEM reviews, determinations and approvals related to coal ash impoundments, and coal ash landfills, that have occurred to this point. Thus the closure activities undertaken to date by Indiana’s electric utilities would have proceeded without legal authority.

**Why does Indiana need strong coal ash standards?**

Toxic substances in coal ash are contaminating groundwater at many locations in Indiana.

- Indiana’s power plant sites have over 70 coal ash surface impoundments containing over 96 million tons of coal ash.

- Virtually every impoundment is unlined and is contaminating groundwater with metals and other contaminants leaching at toxic levels from the coal ash including arsenic, lead, boron, molybdenum, lithium, cobalt, sulfates and dissolved solids.

*Source of contamination data: Reports filed by the utilities which are posted on their CCR reporting websites – see the utility links at <https://www.in.gov/idem/waste/resources/permits-registrations-approvals-and-closures/coal-combustion-residuals/>*

- At nearly all these sites, the proposed long-term closure approach is to cover the ash and leave it in place in perpetuity. Covering a coal ash impoundment to prevent infiltration of surface water will do nothing to halt the ongoing saturation of the buried ash by shallow groundwater, which along our rivers rises and falls with the rise and fall of the river, and therefore will not prevent continuing contamination.
- In North Carolina and South Carolina, in contrast, Duke Energy is excavating all its leaking impoundments, reusing or recycling the ash that can be safely reused or recycled, and moving the remaining coal ash to lined landfills where it is much less likely to contaminate groundwater or surface water, or threaten public health. See <https://p-cd.duke-energy.com/-/media/pdfs/our-company/ash-management/duke-energy-ash-metrics.pdf>

## **2) The reduction in the sunset period for agency rules will increase workload and delays and should be eliminated.**

The existing 7-year sunset period for agency rules should be maintained, and we oppose reducing this period to 5 years (page 46, Chapter 2.6 of bill). The proposed change will increase the workload for state agencies without any meaningful benefit that would improve the agency regulatory process.

What's more, HB 1623 deletes the existing exceptions (IC 4-22-2.5-1 and IC 4-22-2.5-1.1) under the expiration and readoption requirements for federal environmental rules that Indiana must incorporate into state rules to maintain its authority to implement these programs, including the Clean Air Act and Clean Water Act. This change may lead to more EPA oversight in Indiana. These exceptions should be maintained.

## **3) The “regulatory analysis” requirement (page 8, beginning on line 27) could greatly increase agency workload.**

It's uncertain if state agencies have sufficient staff resources to complete these analyses in a timely fashion and not needlessly delay completion of a rulemaking process. Also, the criteria for determining the benefits of a regulation should encompass the full range of economic and societal benefits, including public health and quality of life, to ensure that any benefit-cost calculation is fair and thorough. See, for example, the U.S. EPA's periodic review of the benefits and costs of the Clean Air Act, at <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study>. The study finds that the benefits of clean air standards exceed the costs by a factor of 30 to 1, for the mid-range forecast of benefits. Even at the low end of the benefits forecast, the benefits exceed costs by 3 to 1.

## **4) We support the added public notice and comment periods provided for in the bill (page 11, beginning on line 33).**