IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPALACHIAN VOICES
191 Howard Street
Boone, NC 28607

CHESAPEAKE CLIMATE ACTION NETWORK
1108 E Main Street, Suite 603
Richmond, VA 23219

ENVIRONMENTAL INTEGRITY PROJECT
1 Thomas Circle, Suite 900
Washington, D.C. 20005

KENTUCKIANS FOR THE COMMONWEALTH
140 Mini Mall Drive
Berea, KY 40403

MONTANA ENVIRONMENTAL
INFORMATION CENTER
107 W Lawrence St. #N-6
Helena, MT 59601

MOAPA BAND OF PAIUTES
Moapa Tribal Office
1 Lincoln Street
Moapa, NV 89025

PRAIRIE RIVERS NETWORK
1902 Fox Drive, Suite G
Champaign, IL 61820

PHYSICIANS FOR SOCIAL RESPONSIBILITY
1875 Connecticut Ave. NW, Suite 1012
Washington, DC 20009

SOUTHERN ALLIANCE FOR CLEAN ENERGY
3804 Middlebrook Pike
Knoxville Tennessee 37921

SIERRA CLUB
85 Second Street, 2nd Floor
San Francisco, CA 94105

No. _____

WESTERN NORTH CAROLINA ALLIANCE
29 North Market Street, Suite 610
Asheville, NC 28801

Plaintiffs,

v.

LISA P. JACKSON, in her official capacity as Administrator, United States Environmental Protection Agency,
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. With this action, Plaintiffs Appalachian Voices, Chesapeake Climate Action Network, Environmental Integrity Project, Kentuckians For The Commonwealth, Moapa Band of Paiutes, Montana Environmental Information Center, Physicians for Social Responsibility, Prairie Rivers Network, Sierra Club, Southern Alliance for Clean Energy, and Western North Carolina Alliance (hereinafter "Plaintiffs") seek to compel the U.S. Environmental Protection Agency ("EPA" or "the Agency") to undertake long overdue action to address the serious and widespread risks that unsafe disposal of coal combustion waste or "coal ash" poses to human health and the environment.

2. Coal-fired power plants in the U.S. generate one of the largest and most toxic solid waste streams in the nation. In this voluminous waste stream are large quantities of heavy metals and metal compounds such as arsenic, boron, cadmium, chromium, lead, mercury,

selenium and thallium. These toxic chemicals can cause cancer and other adverse health impacts including reproductive, neurological, respiratory, and developmental problems.

3. In the absence of national standards requiring safe disposal, coal ash has been dumped in thousands of unlined and unmonitored ponds, landfills, pits and mines. The result has been the widespread release of hazardous pollutants from coal ash to water, air and soil, endangering human health and the environment.

4. A solution to this pressing national problem must begin with effective regulations that require safe disposal of coal ash. Although the EPA has acknowledged repeatedly over the past three decades that revisions to existing federal regulations are needed, the Agency has failed to undertake these revisions. The EPA's longstanding failure to act in the face of well-documented risks associated with irresponsible disposal of coal ash violates the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k. Pursuant to section 2002(b) of RCRA, each regulation promulgated under the Act shall be reviewed by the EPA Administrator and revised, where necessary, no less frequently than every three years. See 42 U.S.C. § 6912(b).

5. The EPA has not reviewed and revised the regulations that are applicable to coal ash since 1981 and has thus lost pace with developments in the industry. The outdated regulations are inadequate to deal with the rising volumes and increasing toxicity of waste and the resulting threats to health and the environment. It defies the most fundamental purpose of RCRA to leave this voluminous and dangerous waste stream without adequate regulation for over thirty years. With this action, Plaintiffs seek to compel the expeditious review and revision of regulations governing coal ash, open dumping, and the Toxicity Characteristic Leaching Procedure, as required under the Resource Conservation and Recovery Act.

JURISDICTION

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

7. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 6972(a), as well as 28 U.S.C. §§ 1331 and 1361, and may issue a declaratory judgment and grant further relief pursuant to 42 U.S.C. § 6972(a) and 28 U.S.C. §§ 2201 and 2202.

8. Plaintiffs have a right to bring this action pursuant to 42 U.S.C. § 6972(a)(2) and the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706.

9. By registered letter posted January 18, 2012, as well as via email, Plaintiffs gave notice to Defendant of the violations alleged herein and have thereby complied with the sixty-day notice requirement of the Resource Conservation and Recovery Act's citizen suit provision. *See* 42 U.S.C. § 6972(c).

PARTIES

10. Plaintiff Appalachian Voices is a nonprofit organization committed to protecting the land, air, and water of the central and southern Appalachian region, focusing on reducing coal's impact on the region and advancing a cleaner energy future. Appalachian Voices has more than 900 members in the Appalachian region, including North Carolina, Virginia and Tennessee. Appalachian Voices was one of the first conservation groups in the country to assess the extensive damage resulting from the Tennessee Valley Authority ("TVA") coal ash disaster in December 2008. Eliminating pollution from coal ash is one of the group's top priorities, and its staff and members are actively engaged in pressuring the EPA to finalize strong rules on coal ash disposal. Appalachian Voices is also working with communities living near coal ash ponds

to ensure that their voices are heard by state and federal agencies, as well as members of Congress.

11. Plaintiff Chesapeake Climate Action Network ("CCAN") was founded to transition the mid-Atlantic region towards clean energy solutions to climate change, specifically in Maryland, Virginia, and Washington, D.C. Its mission is to educate and mobilize citizens in a way that fosters a rapid societal switch to clean energy. This mission includes ensuring that facilities that contribute to global warming, such as coal-fired power plants, do not impact the health of their members or the environment through unsafe management and disposal of waste products such as coal ash. CCAN has over 90,000 members in Maryland, Virginia and Washington, D.C. Many of CCAN's members live or recreate on or near waters that receive effluent discharges and other pollution from coal ash landfills, prompting CCAN to bring Clean Water Act citizen suits on behalf of their members to address these illegal discharges into local water bodies. CCAN is dedicated to preventing and remediating the contamination of these waters from coal ash on behalf of its members.

12. Plaintiff Environmental Integrity Project ("EIP") is a nonpartisan, nonprofit organization founded in 2002 by former EPA enforcement attorneys to advocate for more effective enforcement of environmental laws. The Environmental Integrity Project's three objectives are: to provide analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health; to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and to help local communities in key states obtain the protection of environmental laws. EIP has a longstanding interest in securing effective federal regulation of coal ash and curtailing ongoing pollution that results from existing regulatory failures.

13. Plaintiff Western North Carolina Alliance ("WNCA") was founded in 1982, and for 30 years, WNCA has been a trusted community partner, marshaling grassroots support to keep forests healthy, air and water clean, and communities vibrant. Utilizing a combination of policy advocacy, scientific research, and community collaboration, WNCA and its chapters throughout Western North Carolina unleash the power of citizens' voices to protect the natural heritage of the region so that people and the environment can thrive. WNCA has over 700 members and is home to the French Broad Riverkeeper, which serves as the primary protector and defender of the French Broad River watershed in western North Carolina. The Riverkeeper works for healthy and safe waterways in the French Broad River watershed by partnering with citizens and communities to identify pollution sources, enforce environmental laws, advocate for stronger environmental laws, engage in restoration, and educate and empower the public. The French Broad Riverkeeper has done extensive work to ensure that coal ash is properly regulated and that environmental damage from coal ash around the French Broad River Watershed has been documented and publicized.

14. Plaintiff Kentuckians For The Commonwealth ("KFTC") is a statewide, grassroots, citizens social justice organization working to ensure clean air, water and land for every Kentuckian. The organization works to protect and preserve a clean environment and biodiversity by pushing for stronger regulations and better enforcement of existing regulations. KFTC has over 7,500 members in Kentucky and across the nation. The Jefferson County chapter of KFTC has established a Coal Ash Strategy Team that is organizing around the problems of water and air pollution caused by coal ash ponds and landfills. The county is home to two high hazard coal ash ponds that have been coating neighborhoods with dust, leaching heavy metals into the Ohio River, and causing serious health issues for nearby citizens.

15. Plaintiff Moapa Band of Paiutes is a federally recognized Indian tribe, organized under a Constitution approved by the Secretary of the Interior in 1942. The tribe resides on the 71,954-acre Moapa River Reservation, which is located within the borders of the state of Nevada. Coal ash, which blows onto the Moapa River Reservation from the landfills and waste ponds of the Reid Gardner Generating Station, presents a significant health threat to the Moapa Paiute tribe by degrading air quality. In addition, leaking coal ash ponds at the Reid Gardner Generating Plant have contaminated the underlying aquifer with arsenic, boron, chromium, molybdenum and other toxic substances. Wastewater ponds at the power plant also provide a pathway of contamination for birds and mammals previously hunted by the Moapa Band of Paiutes. Soil contaminated by coal ash prevents the traditional harvesting of plants for medicinal use. The population of the Moapa Band of Paiutes is approximately 700.

16. Plaintiff Montana Environmental Information Center ("MEIC") is a member-supported advocacy and public education organization based in Helena, Montana. MEIC works to protect and restore Montana's natural environment. Since its founding in 1973, MEIC has lobbied and litigated at the local, state and federal levels to prevent degradation of air, water quality and natural resources. MEIC's advocacy work has included the protection of water resources from surface and groundwater contamination, misuse, and over-appropriation by coal-fired power plants. MEIC has worked with local citizens to identify water quantity and quality problems associated with PPL Montana's operation of the Colstrip power complex. MEIC also submitted comments to the Montana Department of Environmental Quality ("DEQ") on the proposed Administrative Order on Consent related to DEQ's enforcement action concerning water contamination from PPL's coal ash ponds.

17. Plaintiff Physicians for Social Responsibility ("PSR") is the largest physician-led nonprofit organization in the U.S. working to slow, stop and reverse global warming and toxic degradation of the environment. PSR has a national network of 50,000 health professionals and concerned citizen members and e-activists, twenty-five PSR chapters in nineteen states, roughly thirty student PSR chapters at medical and public health schools, and national and chapter staff. PSR works to reduce toxic contamination, and to that end has worked for several years to educate health professionals about the toxic constituents found in coal ash, the nature of coal ash disposal, the pathways by which coal ash toxicants may escape from disposal sites, and the health consequences that may result from exposure. PSR has prepared educational materials on coal ash and has engaged its members in states across the nation in educating their communities, speaking to the mass media, and testifying publicly about the health imperatives of secure coal ash disposal.

18. Plaintiff Prairie Rivers Network ("PRN"), a nonprofit organization and a state affiliate of the National Wildlife Federation, is Illinois' statewide leader in river protection, conservation, and restoration. With over 700 members and 1,200 supporters in Illinois, PRN has been a leader in fighting water pollution from coal mining and coal ash in Illinois. PRN, in collaboration with its partners, has researched coal ash disposal practices in the state and revealed the alarming lack of oversight of Illinois' eighty-three power plant coal ash impoundments and numerous other disposal and reuse operations. PRN has shared this information, in concert with affected communities, with state and national regulators and elected officials in order to advocate for solutions.

19. Plaintiff Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization. The Sierra Club is a nonprofit, membership organization

incorporated in California with more than 700,000 members in all fifty states and the District of Columbia. The Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. For over ten years, the Sierra Club has worked at both the local and national levels to address the ongoing problem of water and air quality impairment from coal ash landfills and impoundments. The Club's advocacy has involved efforts to close and clean up existing impoundments as well as litigation involving discharges from coal ash waste sites into ground or surface water.

20. Plaintiff Southern Alliance for Clean Energy ("SACE") has over 100 members in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee, as well as members outside of the Southeast. SACE engages on the state, federal and utility levels to advocate for better coal ash management and to reduce the region's dependence on coal-fired power. SACE responded immediately to the Kingston ash disaster in Roane County, Tennessee in 2008. Since that time SACE brought impacted citizens to Washington, D.C. to tell Congress about their first-hand experience with coal ash. SACE staff developed comprehensive comments on EPA's proposed coal ash rule, organized a citizen's public hearing on the proposed federal rule in Roane County, was instrumental in bringing a formal public hearing to Knoxville, and organized press and public events around both hearings. SACE staff are also engaged in a number of administrative permitting challenges within the service area of TVA and are closely monitoring the TVA's transition from wet to dry coal ash handling. Through the development of a website to catalogue and provide detailed information on all of the coal ash surface impoundments in the Southeast, SACE hopes to stimulate action among local

citizens, Riverkeepers and others in response to the serious risk that improper coal ash waste management poses to public health and the environment.

21. Plaintiffs and their members have been and, unless the relief prayed for herein is granted, will continue to be adversely affected by the failure of the EPA to comply with RCRA, the purpose of which is to promote the protection of human health and the environment by assuring that both solid and hazardous waste management is conducted responsibly. The EPA's failure to review and revise regulations pertaining to coal ash, open dumping and proper characterization of waste according to statutorily mandated timeframes increases the likelihood that Plaintiffs' members and their environment will be injured by unsafe waste management practices that lead to contamination from wastes and hazardous pollutants.

22. Members of Plaintiffs' groups live near coal ash disposal sites that operate without safeguards to prevent the release of hazardous substances and other pollutants, because such safeguards are not required by EPA regulations. Consequently, Plaintiffs' members are exposed to hazardous constituents in coal ash that contaminate soil, air and/or water. The EPA's failure to review and revise existing regulations that fail to address the recognized risks posed by coal ash, increases the exposure of Plaintiffs' members to highly toxic pollutants that endanger their health.

23. Plaintiffs' members have an interest in protecting their own health, the health of their children, and the health of their communities. The Defendant's failure to timely review and revise regulations governing the management of coal ash, as required by section 2002(b) of RCRA, increases the risk to Plaintiffs' members of exposure to contaminants in solid waste and/or increases and prolongs Plaintiffs' members' ongoing exposure to such contaminants and their associated risk of adverse health effects accordingly.

24. The health effects from exposure to the contaminants in coal ash and other solid wastes released by facilities that generate, transport, store, or dispose of solid waste include cancer, birth defects, reproductive disorders, damage to the brain and nervous system, damage to the respiratory system, and other illnesses.

25. Plaintiffs' members use the rivers, landscapes, and watersheds near facilities that generate, transport, store, or dispose of coal ash or other solid waste for recreational, scientific, aesthetic, commercial, life-sustaining, and spiritual purposes. Plaintiffs' members derive—or, but for the presence of coal ash and other solid wastes, would derive—recreational, scientific, aesthetic, commercial, life-sustaining, and spiritual benefits from their use of such places. The past, present, and future enjoyment of these benefits by Plaintiffs and their members has been, is being, and will continue to be irreparably harmed by the Defendant's disregard of her statutory duties.

26. Defendant Lisa P. Jackson is the Administrator of the EPA and in that role is charged with the duty to review regulations and revise such regulations, as necessary, according to the schedules set forth in RCRA.

FACTUAL BACKGROUND

A. The Threat Posed by Unsafe Disposal of Coal Ash

27. Each year, more than 650 power plants in the U.S. burn over one billion tons of coal and, as a result, generate approximately 141 million tons of coal combustion waste or "coal ash." Most of the coal ash, comprised of fly ash, bottom ash, boiler slag and flue gas desulfurization sludge, is disposed of in unlined or inadequately lined surface impoundments (ponds), landfills, structural fills and mines.

28. The EPA has identified forty-one heavy metals and other polluting substances in this waste stream. According to the EPA, the contaminants of most concern in coal ash are

antimony, arsenic, barium, boron, beryllium, cadmium, chromium, lead, mercury, molybdenum, nickel, selenium, silver, and thallium. *See* 75 Fed. Reg. 35,128, 35,153 (June 21, 2010). As EPA's Toxic Release Inventory reveals, electric utilities, through land disposal, release the second largest volume of toxic chemicals of all industry sectors tracked. In 2010 alone, the total releases to land of toxic chemicals from fossil fuel electric generating facilities exceeded 304 million pounds. U.S. EPA, TRI Explorer--Facility Report, http://iaspub.epa.gov/triexplorer/tri_release.facility (2010).

29. Approximately 39 percent of the coal ash disposed annually is placed in surface impoundments, the majority of which (about three-quarters) are unlined or inadequately lined. *See* 75 Fed. Reg. at 35,151. The EPA has determined that there are at least 676 coal ash surface impoundments currently operating in the U.S., and the Agency estimates that there are at least 337 operating landfills, of which a significant portion also are unlined. *See* U.S. EPA, Information Request Response from Electric Utilities, Database of Survey Responses, Database Results, http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm; U.S. EPA, Regulatory Impact Analysis for EPA's Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry, 63 (Apr. 2010). The exact number of structural fills (often unlined gravel quarries) and fills in active and abandoned coal mines (always unlined) is not known, but there are at least many hundreds of fill sites. According to the U.S. Department of Energy in 1993, there are also over 750 "retired" coal ash impoundments and landfills. *See* U.S. Dept. of Energy, Coal Combustion Waste Management Study, ES-1 (Feb. 1993).

30. Toxic metals pollution from coal ash commonly occurs when leaks, seeps, and other failures in surface impoundments, landfills and fill projects allow coal ash-contaminated

water to drain into groundwater and lakes, rivers and streams, either directly or when these surface water bodies are hydrologically connected to surface water. Toxic pollution also occurs when coal ash is placed directly in contact with groundwater. The EPA and environmental groups have identified 156 sites in thirty-four states where coal ash has polluted groundwater and/or surface water. In addition, at twenty-nine more facilities in sixteen states, electric generating utilities have admitted finding coal ash contaminants in groundwater at levels that exceed federal drinking water standards or state groundwater criteria. In fact, levels of toxic metals such as arsenic in groundwater near coal ash disposal sites can exceed the EPA's threshold for hazardous waste. Due to the large volume of coal ash disposed and the frequent absence of liners, it is likely that many more sites are contaminated by coal ash, but since the majority of coal ash disposal sites are not adequately monitored, the release of contaminants is not readily detected.

31. The EPA has listed four contaminated coal ash disposal sites on the Superfund National Priorities List ("NPL"). *See* 75 Fed. Reg. at 35,172. The NPL is the list of the most dangerous hazardous waste sites that the EPA has identified for long-term remedial action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 42 U.S.C. §§ 9601 et seq.

32. The release of toxic contaminants from coal ash disposal sites is common because federal regulations do not require the use of specific controls such as liners, caps, groundwater monitoring systems, and leachate collection systems. A number of states require some controls, but basic safety requirements are often missing. For example, according to the EPA, 36 percent of the states do not have minimum liner requirements for coal ash landfills, and 67 percent do not have liner requirements for coal ash surface impoundments. 75 Fed. Reg. at 35,133. In addition,

a substantial number of coal ash-generating states do not require all landfills and ponds to monitor groundwater to detect toxic releases, install leachate collection systems to control contaminant migration, take timely corrective action to remediate contamination, maintain financial assurance to pay for cleanup and closure, and regularly inspect coal ash ponds for leaks and stability.

33. Many of the toxic chemicals in coal ash pose serious health risks when released into the environment, some in very low concentrations. Arsenic is a known human carcinogen that causes cancer of the skin, bladder, and lungs. Boron exposure can cause stomach, intestinal, kidney, liver, and brain damage, negative effects on male reproduction, and even death. Cadmium exposure can result in diarrhea, stomach pains, severe vomiting, bone fracture, adverse reproductive effects, nerve damage, and immune system damage. Chromium is a known carcinogen and may also cause irritation and ulcers of the stomach and small intestine, sperm damage, and skin ulcers. Lead is a very potent neurotoxicant that can cause developmental delays, hypertension, reduced hearing acuity, impaired hemoglobin synthesis, and male reproductive impairment. Mercury is also a neurotoxicant, and exposure can result in developmental abnormalities, reduced IQ, mental retardation, and behavioral problems. Methylmercury can accumulate to high concentrations in fish and become a major pathway for human exposure to mercury. Molybdenum exposure can result in excess fatigue, headaches and joint pains, and chronic ingestion can cause diarrhea, slowed growth, low birth weight, infertility, and lung, kidney, and liver damage in animals. Exposure to high levels of thallium can result in adverse nervous system effects such as numbness of extremities, and ingestion can lead to vomiting, diarrhea, and temporary hair loss, along with adverse effects on the lungs, heart, liver, kidneys, and reproductive system.

34. Other metals present in coal ash pose additional risks to humans and aquatic organisms. Selenium, for example, is a bioaccumulative pollutant that is harmful to freshwater fish and other aquatic life at very low levels. Selenium at more elevated levels impedes the growth and survival of juvenile fish, and offspring of adult fish that were exposed to excessive selenium suffer skeletal deformities. Selenium can decimate fish populations and make the surviving species unsafe to eat. In humans, exposure to selenium can cause hair and fingernail loss, numbness in extremities, and problems with circulation. The EPA has documented widespread ecosystem damage in water bodies by selenium contamination from coal ash dumps, including the killing of nearly all species of fish from one impacted lake, the deformity or death of fish and amphibians in streams and rivers, and the restriction of fishing due to high selenium levels in fish in several reservoirs. *See* 75 Fed. Reg. at 35,234-9.

35. In 2007, the EPA completed a draft risk assessment on the management of coal ash in landfills and surface impoundments. The EPA found that people living near unlined coal ash surface impoundments have as much as a nine in 1000 chance of getting cancer from drinking water contaminated by arsenic. This risk is 900 times greater than the EPA's regulatory goal of reducing cancer risk to one in 100,000. *See* U.S. EPA, Human Health and Ecological Risk Assessment of Coal Combustion Wastes (draft), ES-1 (Aug. 2007). In 2010, after peer review of the 2007 assessment, the EPA released a second draft of the risk assessment finding an even higher cancer risk from arsenic. U.S. EPA, Human Health and Ecological Risk Assessment of Coal Combustion Wastes (draft) (Apr. 2010). In this risk assessment, the EPA determined that people living near some unlined coal ash impoundments have a one in fifty risk of cancer from drinking water contaminated by arsenic. This risk is 2,000 times the EPA's regulatory goal. *Id.* at ES-5, ES-8. The 2010 risk assessment also identified significant risks to human

health and ecological receptors from disposal of coal ash in unlined and clay-lined landfills and surface impoundments, including substantial risks of injury from antimony, boron, cadmium, lead, molybdenum, selenium and thallium. *Id.* at ES-4 to ES-10.

36. From 2006 to 2009, the EPA's Office of Research and Development ("ORD") published three reports concerning the increased toxicity of coal ash as a result of the use of emission control equipment at coal-fired power plants in a "holistic approach to account for the fate of mercury and other metals in coal throughout the life-cycle stages of [coal ash] management." U.S. EPA, Characterization of Coal Combustion Residues from Electric Utilities Using Wet Scrubbers for Multi-Pollutant Control, EPA-600/R-08/077, xii (July 2008). In its third report in 2009, the ORD's leaching data indicated multiple chemicals of concern where contaminant levels in coal ash leachate greatly exceeded federal drinking water levels and, in the case of arsenic, barium, cadmium, chromium and selenium, the coal ash leachate exceeded the toxicity characteristic levels for hazardous waste. *See* U.S. EPA, Characterization of Coal Combustion Residues from Electric Utilities—Leaching and Characterization Data, EPA/600/R-09/151, viii-xiv (Dec. 2009).

37. In 2009, the EPA completed a screening assessment of the inhalation risks posed by disposal of coal ash in landfills to determine whether the National Ambient Air Quality Standards ("NAAQS") for particulate matter could be violated at such landfills. The EPA concluded that there was a "strong likelihood that dry-handling would lead to the NAAQS being exceeded absent fugitive dust controls." U.S. EPA, Inhalation of Fugitive Dust: A Screening Assessment of the Risks Posed by Coal Combustion Waste Landfills (draft), 11 (Sept. 2009). The report found that daily dust controls, which EPA regulations do not currently require, are necessary to control the "excess levels of particulates" resulting from coal ash landfill operations.

Id. at 12. According to the EPA, particle pollution, especially fine particles, contains microscopic solids or liquid droplets that can lodge deep into the lungs and cause serious health problems. Numerous scientific studies have linked particle pollution exposure to a variety of problems, including decreased lung function, asthma, bronchitis, irregular heartbeat, and premature death in people with heart or lung disease.

38. In short, a wealth of data, much of which the EPA has itself compiled, demonstrates the serious and increasing risks posed by coal ash to air and water quality and consequently to human health and aquatic ecosystems. Such data include extensive documentation of damage that has already occurred to water quality near coal ash dump sites across the country. *See* 75 Fed. Reg. 35,234-9.

B. Threats Posed by Catastrophic Failure of Ash Ponds

39. Failure of the earthen impoundments that hold back millions of tons of coal ash around the country poses another catastrophic risk. Most of the nation's nearly 700 coal ash impoundments are very large (over twenty-five feet high), and over 80 percent of the ponds are over twenty-six years old, with nearly 150 ponds built over forty years ago. *See* U.S. EPA, Information Request Response from Electric Utilities, Database of Survey Responses, Database Results (May 2011) http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/index.htm. Many of the impoundments were not designed, constructed or maintained by professional engineers. *Id.* About fifty coal ash impoundments in the U.S. are rated "high hazard" according to the National Inventory of Dams ("NID") criteria. *Id.* Dams assigned the high hazard classification are those where failure or mis-operation is likely to cause loss of human life. Another 181 coal ash impoundments are rated "significant hazard," which means that a dam

failure or mis-operation is likely to cause economic loss, environmental damage, disruption of lifeline facilities, or other significant adverse impacts. *Id*.

40. Between 2002 and 2008, there were four major spills of coal ash from surface impoundments at three plants, including a two million gallon spill at Plant Bowen in Euharlee, Georgia; a release of over 100 million gallons from the Martin's Creek Power Plant in Martins Creek, Pennsylvania; and two spills of thirty million gallons each at the Eagle Valley Generating Station in Martinsville, Indiana. *Id.*

41. On December 22, 2008, a six-story high earthen dam impounding approximately nine million tons of coal ash collapsed at the TVA's Kingston Fossil Plant, flooding 300 acres of river and adjacent properties with one billion gallons of toxic sludge. The torrent of waste damaged twenty-six houses, carrying one house forty feet downhill with a man inside. The volume of waste released by the disaster was five times larger than the BP oil spill of 2010 and constitutes the largest waste spill in U.S. history. The disaster destroyed the local community, permanently displaced dozens of families, and required a multi-year cleanup, which is still not complete and is currently estimated to cost more than $1.2 billion.

42. A second major coal ash spill occurred on November 1, 2011, when 25,000 tons of coal ash from a decades-old landfill on a bluff above Lake Michigan collapsed at a We Energies power plant in Oak Creek, Wisconsin. The collapse left a debris field 120 yards long and eighty yards wide at the foot of the bluff and resulted in thousands of tons of coal ash fouling Lake Michigan. Inspections by the EPA between 2009-2011 of the nation's coal ash ponds confirmed that many of the ponds might pose a danger to human health and the environment. The EPA gave approximately 25 percent of the 410 ponds inspected (103 impoundments) a "poor" rating, indicating that repairs were needed and/or documentation was not available to

confirm the structural stability of the impoundments. Almost two-thirds of the poor-rated ponds (sixty-five) were high-hazard or significant-hazard impoundments. *See* U.S. EPA, Coal Combustion Residuals Impoundment Reports, Summary Table for Impoundment Reports (Oct. 2011), http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys2/index.htm.

C. The EPA's Failure to Regulate Coal Ash

43. Three weeks after the billion gallon-coal ash spill in Tennessee in 2008, Lisa Jackson, President Obama's choice to head the EPA, stated her intention to review immediately coal ash disposal sites across the country at her Senate confirmation hearing on January 14, 2009.

44. On March 9, 2009, in her new capacity as EPA Administrator, Ms. Jackson issued a statement assuring the public that the Agency was "moving forward quickly to develop regulations to address the management of coal combustion residuals." The statement declared that the EPA anticipated "having a proposed rule ready for public comment by the end of the year." At the end of 2009, however, the EPA had yet to publish a proposed coal ash rule.

45. On June 21, 2010, the EPA published a "bi-proposal" for coal ash, consisting of two sets of proposed rules, one under subtitle C of RCRA, which governs hazardous waste, and a second under subtitle D of the Act, which governs solid waste. *See* Hazardous and Solid Waste Management System; Identification and Listing of Special Waste; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128.

46. Approximately eighteen months later, in lieu of issuing a final rule, the EPA published a Notice of Data Availability that solicited additional public comment on the proposed rule. *See* 76 Fed. Reg. 197 (Oct. 11, 2011). To date, the EPA has issued no final coal ash rule.

STATUTORY BACKGROUND

47. Congress passed the Resource Conservation and Recovery Act in 1976, amending the Solid Waste Disposal Act (P.L. 89-272, 79 Stat. 992) to establish a comprehensive federal program to regulate the handling and disposal of solid waste. *See* 42 U.S.C. § 6901. Congress recognized that, as a result of regulation under the Clean Air Act, the Clean Water Act, and other laws, industry was generating more toxic sludge and other pollution treatment residues that required proper disposal. *See id.* § 6901(b)(3). Further, Congress recognized that inadequate and environmentally unsound practices for the disposal of such solid wastes were responsible for air and water pollution that posed an unacceptable threat to human health and the environment. *See id*. The Act was to ensure that such solid wastes were handled responsibly and did not re-enter the environment.

48. The goal of RCRA is to promote the protection of health and the environment and to conserve valuable material and energy resources by ensuring the safe treatment, storage and disposal of solid waste. *See* 42 U.S.C. § 6902. To achieve this goal, the Act requires that the EPA, among other things: prohibit "open dumping" on the land and close existing open dumps; provide for the management and disposal of hazardous waste in a manner that protects human health and the environment; and promulgate guidelines for responsible solid waste collection and disposal practices. *Id.* §§ 6902(b)(a)(3)- (5), (8).

49. To achieve these objectives, the Act authorizes the EPA Administrator to prescribe regulations as necessary to accomplish the goals of the Act. *See id.* § 6912(a)(1).

50. To ensure that regulations reflect emerging risks to human health and the environment as well as advances in technology and waste management practices, section 2002(b)

of RCRA requires that each regulation promulgated under the Act "shall be reviewed and, where necessary, revised not less frequently than every three years." *Id.* § 2002(b) (emphasis added).

51. Section 2002(b) imposes a mandatory obligation on the EPA to take action in accordance with the three-year statutory deadline. The EPA cannot skirt its statutory responsibilities and must either: (1) complete its review and make a determination that revision is not necessary, or (2) complete its review, make a determination that revision is necessary, and issue revised regulations within the statutory deadline. Under section 2002(b), the EPA must perform this duty every three years. *Id.* § 2002(b).

REGULATORY BACKGROUND

52. In 1980 and 1979, the EPA promulgated regulations addressing coal ash under subtitle C and subtitle D of RCRA, respectively. *See* 40 C.F.R. § 261.4(d) and 40 C.F.R. Part 257, subpart A.

53. The EPA promulgated the regulation governing coal ash under subtitle C of RCRA following Congress' passage of the Solid Waste Disposal Act Amendments of 1980, Public Law 96-482, which amended RCRA. Section 3001(b)(3)(A)(i) of that Act, commonly referred to as the Bevill Amendment, temporarily exempted coal ash from hazardous waste regulation until further study was completed. 42 U.S.C. § 6921(b)(3)(A)(i). At the same time, section 8002(n) of the Act required the EPA to study coal ash and submit a report to Congress evaluating the adverse effects on human health and the environment from the disposal and utilization of these wastes by October 1982. 42 U.S.C. § 6982(n). Lastly, section 3001(b)(3)(C) required the EPA to make a regulatory determination within six months of completing the report

to Congress as to whether coal ash warranted regulation under RCRA subtitle C or some other set of regulations. 42 U.S.C. § 6921(b)(3)(C).

54. The EPA codified the Bevill exemption in 1980 at 40 C.F.R. § 261.4(b)(4). 45 Fed. Reg. 33,084, 33,089 (May 19, 1980). Section 261.4(b)(4) states that "fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste, generated primarily from the combustion of coal or other fossil fuels" are "not hazardous waste." *Id*. This regulation was intended to remain in effect pending the EPA's determination whether subtitle C regulation was warranted.

55. Although the EPA missed by many years the deadlines set out in the statute, the EPA undertook the required consideration of coal ash in response to lawsuits and published its first report to Congress on coal ash in 1988 and a second report to Congress in 1999. *See* U.S. EPA, Report to Congress on Wastes from the Combustion of Coal by Electric Utility Power Plants (EPA530-SW-88-002) (1988); U.S. EPA, Report to Congress: Wastes from the Combustion of Fossil Fuels (EPA530-SW-99-010) (1999).

56. Following its 1999 Report to Congress, the EPA published its final determination regarding the need for coal ash regulation in May 2000. *See* U.S. EPA, Final Regulatory Determination on Wastes from the Combustion of Fossil Fuels, 65 Fed. Reg. 32,214 (May 22, 2000). The EPA's May 2000 Final Determination concluded that while regulation under subtitle C of RCRA was not warranted "at this time," it was nevertheless "appropriate to establish national regulation under non-hazardous waste authorities for coal combustion wastes disposed in landfills and surface impoundments." *Id.* at 32,221. In other words, the EPA's Final Determination in 2000 concluded: (1) subtitle C (hazardous waste) regulation of coal ash was not warranted in 2000, but under certain conditions specified in the determination, it could become

necessary; and (2) revision of subtitle D regulations was in any case immediately required with regard to disposal of coal ash in landfills and surface impoundments.

57. In light of this determination, the EPA officially reported its intent to issue a Notice of Proposed Rulemaking ("NPRM") on "standards for the management of coal combustion wastes generated by electric power producers" in September 2001 and further stated that a "Final Action" would be completed in August 2002. Statement of Regulatory and Deregulatory Priorities, 65 Fed. Reg. 73,453, 73,474 (Nov. 30, 2000). According to the EPA's regulatory agenda, such action would constitute the "development of proposed and final RCRA subtitle D regulations for the management of coal combustion wastes in landfills and surface impoundments." *Id*. The EPA, however, did not publish a NPRM in September 2001, nor did the Agency publish a final rule in August 2002.

58. Instead, the EPA continued to publish semiannual regulatory agendas from 2000-2011 wherein the Agency repeatedly acknowledged that revision of regulations addressing coal ash was needed. However, in each regulatory agenda, the EPA extended the projected dates for promulgation of the NPRM year after year. The following table displays the EPA's regulatory agendas and the projected dates of publication of a NPRM and "Final Action" addressing coal ash in landfills and surface impoundments.

Regulatory Agenda	**Agenda Stage**	**NPRM**	**Final Action**
Fall 2000	Proposed Rule Stage	9/2001	8/2002
Spring 2001	Proposed Rule Stage	12/2001	
Fall 2001	Long-term Actions	3/2003	
Spring 2002	Proposed Rule Stage	3/2003	
Fall 2002	Long-term Actions	1/2004	
Spring 2003	Long-term Actions	8/2004	
Fall 2003	Proposed Rule Stage	8/2004	
Spring 2004	Long-term Actions	3/2007	
Fall 2004	Long-term Actions	4/2006	
Spring 2005	Long-term Actions	7/2006	

Fall 2005	Proposed Rule Stage	8/2006	
Spring 2006	Long-term Actions	5/2007	
Fall 2006	Prerule Stage	12/2006	
Spring 2007	Prerule Stage	5/2007	To be determined
Fall 2007	Long-term Actions	To be determined	
Spring 2008	Long-term Actions	To be determined	
Fall 2008	Long-term Actions	To be determined	
Spring 2009	Proposed Rule Stage	12/2009	
Fall 2010	Long-term Actions	6/21/2010	To be determined
Spring 2011	Proposed Rule Stage	6/21/2010	To be determined
Fall 2011	Long-term Actions	6/21/2010	To be determined

59. After the fall of 2000, the EPA refrained from establishing a target date for "Final Action," and, to date, there has been none. Coal ash continues to be exempted from regulation as a hazardous waste pursuant to 40 C.F.R. § 261.4(d), as promulgated in May 1980, and the subtitle D regulations have not been revised.

A. Subtitle D Regulations and the EPA's Determination of the Need for Revision

60. The subtitle D regulations that are currently applicable to coal ash disposal, and, according to the EPA, in need of revision, are contained in the Criteria for Classification of Solid Waste Disposal Facilities, promulgated in 1979. *See* 40 C.F.R. Part 257, Subpart A. *See* 44 Fed. Reg. 53,438 (Sept. 13, 1979). These criteria broadly define the practices that distinguish "open dumps" from sanitary landfills. *See id*. Coal ash disposal sites not meeting the standards set forth in 40 C.F.R. Part 257 are classified as open dumps and are prohibited under RCRA section 4005(a). 42 U.S.C. § 6945(a).

61. The Part 257 subpart A criteria, however, include only general environmental performance standards. The criteria include regulations broadly addressing surface water (§ 257.3–3), groundwater (§ 257.3–4) and air (§257.3-7). On September 23, 1981, the EPA amended sections 257-3-3, 257.3-4 and 257.3-7. *See* 46 Fed. Reg. 47,048 (Sept. 23, 1981). The

EPA also amended Appendix I of 40 C.F.R. Part 257 in 1991. *See* 56 Fed. Reg. 50,978, 50,998-9 (Oct. 9, 1991). The EPA amended section 257-3-4 with regard to the disposal of sewage sludge on February 19, 1993. *See* 58 Fed. Reg. 9248, 9386. The EPA has not published any further revisions to these subpart A regulations since 1993, and the Agency has never revised these provisions to address the regulatory gaps it has identified with respect to coal ash.

62. Instead, the Agency has acknowledged, in its final determination and each year semiannually since 2000, the need to establish national regulations requiring specific "adequate controls" for coal ash disposal. 66 Fed. Reg. 62,358, 62,361 (Dec. 3, 2001). For example, EPA has acknowledged that the existing subtitle D regulations are inadequate as follows:

a. Section 257.3-4 (Protection of Groundwater). Although the regulation prohibits groundwater contamination beyond the solid waste boundary for particular listed contaminants, section 257.3-4 fails to (1) establish contaminant limits for common coal ash constituents; (2) require liners or specify any design standards to prevent hazardous releases; (3) mandate monitoring to detect groundwater contamination; and (4) require corrective action to address pollution once detected.

b. Section 257.3-3 (Protection of Surface Water). Although Section 257.3-3 prohibits the release of pollutants directly to surface water, it does not address pollution of surface water from hydrologically connected groundwater.

c. Section 257.3-7 (Protection of Air). Section 257.3-7 does not require daily cover at coal ash disposal sites or require any other means to control fugitive dust, nor does it require a final cover to be installed at coal ash disposal sites after disposal ceases.

63. As long ago as 1988, the EPA acknowledged significant deficiencies in section 257.3-4 (protection of groundwater) for all solid wastes. Specifically, the EPA acknowledged that "existing federal and state subtitle D regulations are inadequate" because they lack "essential requirements," including the total absence of groundwater monitoring requirements. *See* U.S.EPA, Report to Congress: Solid Waste Disposal in the United States, Volume 1, ES-2 (1988). In addition to the absence of monitoring requirements, the Agency's 1988 Report to Congress also noted the absence of corrective action requirements in the criteria, as well as any provisions addressing closure, post-closure care and financial responsibility. *Id*. at 43. Despite the deficiencies noted in the 1988 Report to Congress, the EPA has not revised section 257.3-4 to include these requirements.

64. In 1991, the EPA further acknowledged that section 257.3-4 contained a reference to an outdated primary drinking water standard. *See* 56 Fed. Reg. at 50,998-99. Specifically, section 257.3-4 defines contamination as exceedance of the primary drinking water contaminants listed in Appendix I of the regulation. Yet, pursuant to section 257.3-4, the federal maximum contaminant levels ("MCLs") set forth in Appendix I for metals and metal compounds are frozen in time at the levels established by the EPA in 1979. *See* 44 Fed. Reg. at 53,460. Notably, in a 1991 Federal Register notice, the EPA acknowledged that Appendix I did not incorporate changes to the MCL for lead established by the Agency in a drinking water regulation promulgated in 1991. *See* 56 Fed. Reg. 26,460 (June 7, 1991). The EPA explicitly stated that it would "propose necessary changes" to Appendix I after completing an evaluation of how to incorporate the MCL revision. 56 Fed. Reg. at 50,999. The EPA, however, has never revised the regulation, nor has it incorporated additional changes to the MCLs in Appendix I for arsenic and cadmium, which were revised in 2001 and 1991, respectively.

65. Since 1979, the EPA also has acknowledged a substantial deficiency in section 257.3-3, the regulation protecting surface waters from nonhazardous waste disposal. Section 257.3-3(c) prohibits non-point source pollution that violates applicable legal requirements implementing an area-wide or statewide water quality management plan under section 208 of the Clean Water Act. *See* 40 C.F.R. § 257.3-3(c). In 1979, in the preamble to the Part 257 criteria, the EPA noted that some state plans do not address releases from land disposal units, and the EPA promised to revisit the standard if necessary. The Agency wrote, "EPA is also aware that not all 208 plans will have addressed the nonpoint source pollution problems presented by solid waste disposal. EPA intends to explore this problem further to determine whether uniform national guidance is needed…" 44 Fed. Reg. at 53,445. The EPA, however, has never reviewed section 257.3-3(c) to assess the impact of these "leachate seeps" to surface water, which were identified over thirty years ago as a source of surface water contamination from solid waste disposal units.

66. Since 2000, in lieu of revising the exemption for coal ash set forth at 40 C.F.R. §261.4(d) or revising the groundwater, surface water or air regulations applying to coal ash in 40 C.F.R. Part 257, subpart A, the EPA continued to consider several issues identified in its May 2000 Final Determination. In the Determination, the Agency acknowledged that new information might compel a new determination that hazardous waste classification of coal ash is warranted. *See* 65 Fed. Reg. at 32,220-1, 32,221-2. In fact, the EPA's research, undertaken from 2006 to 2009, further demonstrated the need for revisions to current regulations and provided support for hazardous waste regulation of coal ash. Such studies included a report on the gaps remaining in state programs (2006), a documentation of 67 proven and potential "damage cases" from coal ash disposal (2007), health and ecological risk assessments (2007 and

2010), and analyses of the increasing toxicity of coal ash by the EPA's Office of Research and Development (2006, 2008 and 2009).

67. Yet even as EPA acknowledged, year after year, the risks and damage from coal ash, and in spite of two catastrophic failures at coal ash impoundments since 2008, the Agency has never completed its mandatory regulatory review under RCRA § 2002(b), much less taken action, as necessary, to revise its regulations within the timeframe mandated by the statute.

B. The EPA's Failure to Review and Revise the Toxicity Characteristic Leaching Procedure

68. Just as EPA has failed to revisit its regulation exempting coal ash from hazardous waste regulation in the face of mounting evidence that coal ash is hazardous, the Agency also has resisted revising its test for characterizing wastes as hazardous in the face of incontrovertible evidence that its current test is not credible.

69. Pursuant to the directive of Congress to "promulgate regulations identifying the characteristics of hazardous waste," the EPA in 1991 established the Toxicity Characteristic Leaching Procedure ("TCLP") to determine whether a solid waste is "toxic." 40 C.F.R. § 261.24, 42 U.S.C. § 6921(b)(1). A solid waste not specifically listed as "hazardous" by the EPA is nonetheless deemed "hazardous" if it exhibits the characteristic of toxicity. 40 C.F.R. § 261.24.

70. The EPA, other federal agencies, and state regulatory agencies have used the TCLP since 1990 to determine the degree to which toxic metals and other contaminants will leach from solid wastes pursuant to 40 C.F.R. § 261.24. For wastes such as coal ash, the TCLP has provided a basis for the EPA's final regulatory determinations to provide sweeping exemptions from regulation under subtitle C.

71. Because Congress defined hazardous waste to include any solid waste that may "pose a substantial present or potential hazard to human health or the environment *when improperly treated, stored, transported, or disposed of, or otherwise managed*," 42 U.S.C. § 6903(5)(B) (emphasis added), the EPA designed the TCLP to simulate a disposal practice that is dangerous to health and the environment and yet still plausible—the co-disposal of toxic waste in an active municipal solid waste landfill overlying a drinking water aquifer. *See* 55 Fed. Reg. 11,798, 11,807 (Mar. 29, 1990). In order to simplify the process of evaluating solid waste, the EPA chose to establish a test using only this single "plausible" disposal scenario. Many industrial wastes, however, are rarely disposed in municipal landfills.

72. The EPA designed the TCLP to determine the mobility of forty organic and inorganic contaminants present in solid waste, but only under the above-described single disposal scenario. Consequently the TCLP mimics the particular conditions (*e.g.*, a specific pH and liquid-to-solid ratio) present in a municipal solid waste landfill. The resulting leachate, the TCLP extract, is analyzed to determine the concentrations of the forty listed chemicals. *See* Office of Solid Waste, EPA, *Method 1311, in Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,* §§ 2.1, 7.3.15, 7.3.16 (3d ed.1998) (EPA Publication SW-846). According to the regulation, if any of the resulting concentrations of chemicals are equal to or greater than the concentrations listed in Table 1 of 40 C.F.R. § 261.24, then the waste is considered toxic and, consequently, hazardous. *See* 40 C.F.R. § 261.24(a). The concentration levels of the chemicals in Table 1 are equal to 100 times the maximum contaminant level (MCL) for each contaminant as it existed in 1990. Table 1 has not been revised to reflect the EPA's lowering of MCLs for numerous contaminants, including arsenic, cadmium and lead, which occurred after 1990.

73. In 1991, a year after the promulgation of the TCLP, the Environmental Engineering Committee of the EPA's Science Advisory Board ("SAB") identified significant problems with the accuracy of the leach test. The SAB released a report recommending that the EPA conduct a review of the TCLP. *See* U.S. EPA Science Advisory Board, Leachability Phenomena - Recommendations and Rationale for Analysis of Contaminant Release by the Environment Engineering Committee, EPA-SAB-EEC-92-003 (October 1991).

74. In 1999, because the EPA had not yet revised the TCLP, the SAB wrote directly to the EPA Administrator "to call [her] attention to the need to review and improve" the test. *See* U.S. EPA Science Advisory Board. Waste Leachability: The Need for Review of Current Agency Procedures, EPA-SAB-EEC-COM-99-002 (Feb. 26, 1999). The 1999 SAB commentary criticized the EPA's continued reliance on the TCLP, stating emphatically "*[t]he Committee's single most important recommendation is that EPA improve leach test procedures, validate them in the field, and then implement them***."** *Id*. at 2. (Emphasis in original.)

75. The 1999 SAB commentary also warned the EPA of the implications of legal challenges to the TCLP in which courts found that the EPA could not show a "rational relationship" of the TCLP to particular wastes. *See Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (finding the EPA's application of the TCLP to spent potliner was arbitrary and capricious); *Edison Electric Inst. v. EPA*, 2 F.3d 438, 447 (D.C. Cir. 1993) (finding no evidence "that mineral wastes were exposed to conditions similar to those simulated by the TCLP"); and *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (finding the EPA has not justified its application of the TCLP to manufactured gas plant waste).

76. Notwithstanding these recommendations and adverse rulings, the EPA has not substantively revised the regulation establishing the TCLP since 2002, when the Agency

amended the regulation pursuant to the decision in *Association of Battery Recyclers v. EPA. See id.* at 1064. In 2002, the EPA revised Section 261.24 to exempt manufactured gas plant (MGP) waste, codifying the court's decision that the TCLP may not be used for determining whether MGP waste is hazardous under RCRA. 67 Fed. Reg. 11,251 (Mar. 13, 2002). But the EPA has never revised the regulation to address the many other wastes, including coal ash, for which the test is similarly inadequate.

77. For over a decade, the EPA's Science Advisory Board and federal courts have acknowledged the TCLP's failure to predict with accuracy the level of pollutants leaching from broad categories of solid wastes. In 2006, the National Academy of Sciences ("NAS") explicitly acknowledged the inaccuracy of the TCLP for evaluating coal ash. *See* National Academy of Sciences, Managing Coal Combustion Residues in Mines, 123-24, 127 (2006). Also, since at least 2006, the EPA's own Office of Research and Development has acknowledged that the TCLP is not appropriate for testing coal ash and other solid wastes. *See* U.S. EPA, Characterization of Mercury-Enriched Coal Combustion Residues from Electric Utilities Using Enhanced Sorbents for Mercury Control, EPA-600/R-06/008, 12 (Feb. 2008).

78. Finally, while major revisions of the TCLP are warranted in response to the SAB, NAS and ORD concerns, simple revisions are also necessary for those solid wastes for which the TCLP is appropriate. Table 1 of section 261.24 provides maximum concentrations of contaminants for TCLP leachate that were established according to the MCLs in existence in 1990, when the regulation was promulgated. 40 C.F.R. § 261.24, Table 1. For several toxic metals, such as arsenic, cadmium and lead, the MCLs have been substantially lowered since 1990. Since 1990, the EPA, however, has failed to review and revise, as necessary, Table 1 in Section 261.24.

79. The EPA's failure to timely review the TCLP and revise, as necessary, has allowed all of these significant deficiencies to remain unaddressed.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

VIOLATION OF 42 U.S.C. § 6912(b)
(Failure to Review and Revise, as Necessary, 40 C.F.R. § 261.4(b))

80. Plaintiffs reallege and incorporate paragraphs 1 through 59.

81. The EPA violated section 2002(b) of RCRA by failing to review 40 C.F.R. § 261.4(b) and revise, as necessary, not less frequently than every three years. 42 U.S.C. § 6912(b).

82. As a result, the EPA failed to fulfill its rule-making obligation under section 2002(b) of RCRA with respect to coal ash. The EPA's longstanding failure to complete a review of this regulation and revise the regulation accordingly pursuant to section 2002(b) of RCRA constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

SECOND CLAIM FOR RELIEF

VIOLATION OF 42 U.S.C. § 6912(b)
(Failure to Review and Revise, as Necessary, 40 C.F.R. §§ 257.3-3, 257.3-4 and 257.3-7)

83. Plaintiffs reallege and incorporate paragraphs 1 through 67.

84. The EPA violated section 2002(b) of RCRA by failing to review 40 C.F.R. §§ 257.3-3, 257.3-4 and 257.3-7 for adequacy concerning coal ash and revise, as necessary, not less frequently than every three years. 42 U.S.C. § 6912(b).

85. As a result, the EPA failed to fulfill its rule-making obligation under section 2002(b) of RCRA. The EPA's longstanding failure to complete a review of these regulations as they apply to coal ash and revise the regulations accordingly pursuant to section 2002(b) of RCRA constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

THIRD CLAIM FOR RELIEF

VIOLATION OF 42 U.S.C. § 6912(b)
(Failure to Review and Revise, as Necessary, 40 C.F.R. § 261.24)

86. Plaintiffs reallege and incorporate paragraphs 1 through 79.

87. The EPA violated section 2002(b) of RCRA by failing to review 40 C.F.R. § 261.24 and revise, as necessary, not less frequently than every three years. 42 U.S.C. § 6912(b).

88. As a result, EPA failed to fulfill its rule-making obligation under section 2002(b) of RCRA. The EPA's longstanding failure to complete a review of this regulation and revise the regulation accordingly pursuant to section 2002(b) of RCRA constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Declare that Defendant has violated the Resource Conservation and Recovery Act in repeatedly failing to meet the statutory deadlines for completing the requisite review of regulations and revising such regulations where necessary to address risks posed by coal ash;

2. Order Defendant to complete a review of the regulations applying to coal ash and the Toxicity Characteristic Leaching Procedure as soon as possible;

3. Order Defendant to issue necessary revisions of regulations in accordance with section 2002(b) of RCRA as soon as possible.

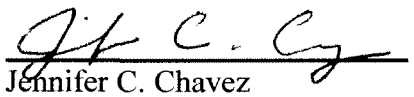
4. Retain jurisdiction of this action to ensure compliance with its decree;

5. Award plaintiffs the costs of this action, including attorney's fees; and

6. Grant such other relief as the Court deems just and proper.

DATED: April 5, 2012

Respectfully submitted,



Jennifer C. Chavez
D.C. Bar No. 493421
EARTHJUSTICE
1625 Massachusetts Avenue NW, Suite 702
Washington, DC 20036
Phone: (202) 667-4500
Fax: (202) 667-2356

Lisa Gollin Evans
Massachusetts Bar No. 200730
Abigail M. Dillen
New York Bar No. 4843744
EARTHJUSTICE
156 William Street, Suite 800
New York, NY 10038
Phone: (781) 631-4119
Fax: (212) 918-1556

Counsel for Plaintiffs