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**Steinzor Comments on EPA's Coal Ash Proposal:
Effort to Regulate Toxic Coal Ash Hijacked by Faulty, OMB-Generated,
Economic Estimates of High Costs**

***Distorted Cost-Benefit Estimates Assume Hundreds of Billions for Supposed 'Stigma Effect';
Ignore Health Effects of Cadmium, Lead, Mercury in Water and of Catastrophic Spills***

(Washington) - The EPA should protect Americans by regulating toxic coal ash as the hazardous waste it is, and not be deterred by faulty cost estimates supported by industry opponents, according to [comments](#) submitted to the agency today by Center for Progressive Reform President Rena Steinzor. Astronomical cost estimates in the EPA's Regulatory Impact Analysis for the rule, inserted by the White House Office of Management and Budget (OMB), are fundamentally flawed, says Steinzor.

"The EPA submitted a strong proposed rule back in October 2009, but the process was hijacked by industry opponents and an OMB that is sympathetic to their self-serving arguments," said Steinzor. "Coal ash pollutes lakes and drinking water with toxic chemicals. One-third of some 629 dump sites that hold ash mixed with water were not designed by a professional engineer and 96 are at least 40 feet tall and 25 years old. In 2008, one of these crumbling old pits broke open, spilling one billion gallons of coal sludge across 300 acres of Kingston, Tennessee, a spill larger than the BP disaster in the Gulf of Mexico. The EPA needs to regain control of the process and issue a strong regulation that genuinely protects the public."

In October 2009, less than a year after the Kingston spill, the EPA submitted its proposed rule on coal ash to the Office of Information and Regulatory Affairs (OIRA), an office within OMB. By Executive Order, OIRA has no more than 120 days to review proposed regulations, but the office went beyond its allowed limit, delaying action while it hosted some 47 meetings on the rule, mostly with industry opponents. In May of this year, the EPA was finally allowed to release a revised proposal reflecting OIRA's changes, ending a phase of the process that the *Wall Street Journal* described as an "internal spat" between the EPA and OIRA.

Documents later posted on the EPA website showed that OIRA had made more than 100 pages of deletions and edits to the EPA's original proposal, and also added dozens of pages to the rule. OIRA even added entirely new proposals, going far beyond the limited scientific expertise of its staff (OIRA's actions were supported by the TVA, operator of the facility where the Tennessee disaster occurred). As a result, the EPA's May announcement included both a modified version of the original "strong" regulation as well as additional, weaker proposals. The accompanying Regulatory Impact Analysis (RIA) -- following OIRA's edits -- indicated that the "strong" proposal could have net benefits as high as \$82 billion over 50 years, but also as low as negative \$251 billion.

That enormous range of projected net benefits flies in the face of the writings of OIRA Administrator Cass Sunstein. In a 2007 book, he wrote that "In order for CBA [cost benefit analysis] to be workable, regulators need to have a relatively restricted range of possibilities." The huge range of possible impacts forecast in the RIA has also served to legitimize arguments by regulatory opponents that a strong regulation could cause great harm.

But the economic estimates are unsubstantiated and arbitrary, Steinzor asserts in her comments. The potentially devastating negative benefits are almost entirely the result of a predicted "stigma effect," which is estimated to cost \$231 billion in economic and environmental losses. Companies that reuse coal ash have argued that consumers and companies would no longer buy products that incorporate recycled coal ash if coal ash disposed at power plants is regulated as a hazardous waste (or euphemistically, as a "special waste"). The EPA's "strong" proposal would treat coal ash dumped into the ground as hazardous – because it is indeed hazardous – but would not regulate coal ash when it is reused. The \$231-billion argument accepts industry's logic and is based on the dual notion that companies (largely construction companies) will use more expensive materials to avoid using recycled coal ash, while utility companies will similarly forego their economic incentives to provide coal ash for reuse—instead paying more to dispose of it, out of an overwhelming fear of liability.

Steinzor notes that a "stigma" argument of this scale is unprecedented in a rulemaking, and defies the history of regulation of toxic chemicals: increasing safety requirements for the disposal of a substance nearly always increases, not decreases, the incentives to recycle more of the product. In response to a stigma argument advanced by the petroleum industry, the D.C. Circuit held in 1988 that "the historical development of [RCRA's] statutory scheme" precluded the EPA from considering the stigma effect when deciding whether to list recycled oil as a hazardous waste under the Resource Conservation and Recovery Act (RCRA). That decision is a controlling legal precedent today and should have precluded the entire stigma estimate from being included in the RIA, Steinzor argues.

The RIA suggests the possibility of a 51-percent reduction in the reuse of coal ash, described as a "reasonable approximation in the absence of information to the contrary." In effect, the RIA applies as a default an arbitrary amount of reduction that is overwhelmingly favorable to industry interests, in that it makes the expected costs of the "strong" proposal appear to dwarf the expected benefits. Instead of placing the burden of proving such an enormous effect on industry commenters, the RIA places the burden on those who would challenge these numbers to supply "information to the contrary."

The comments identify a host of other problems in the RIA for the "strong" option. The RIA:

- Makes the assumption that utility companies will "eventually" discover and address contamination on their own, even without state monitoring requirements. These arbitrary calculations reduce the number of cancers prevented by the rule from 2,509 to 726, and reduce the avoided-cancer benefits by approximately \$380 million.
- Underestimates the cost and frequency of impoundment failures. Zero dollars are allocated for human health and other effects of spills, and "significant" spills (of between 1 million and 1 billion gallons) are defined only by the cleanup costs that plant-owners would have to pay.

- Ignores the effects of all of the toxic substances present in coal ash except arsenic. This unexplained and unjustifiable decision disregards the risks of neurological, reproductive, and organ damage in humans (not to mention harm to wildlife) posed by cadmium, cobalt, lead, mercury, molybdenum, nitrates, and selenium, all of which are also present in elevated levels in the ash.
- Excluded a major coal ash spill in its model because a utility company had failed to disclose the amount of the spill, even though a simple Internet search reveals that the accident actually released two *million* gallons of coal ash.

Steinzor was joined in the comments by Michael Patoka, Law Clerk at the University of Maryland School of Law. Public comment on the proposed coal ash rules ends today.

The comments are available at:

http://www.progressivereform.org/articles/Coal_Ash_Comments_Steinzor_111910.pdf

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