Edison Electric INSTITUTE

Power by Association℠

May 30, 2023

Richard Benware
Office of Science and Technology, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Docket No. EPA-HQ-OW-2009-0819

[SUBMITTED ELECTRONICALLY]

RE: Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category

The Edison Electric Institute appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA or Agency) proposed rule, *Supplemental Effluent Limitations Guidelines (ELG) and Standards for the Steam Electric Power Generating Point Source Category* (Proposed Rule), which proposes stricter limitations on three waste streams, bottom ash transport water (BATW), flue gas desulfurization (FGD) wastewater, and coal combustion residual leachate (CRL); seeks comment on limits for legacy wastewaters; and offers flexibilities for coal-powered electric generating units (EGUs or units) that will soon decommission or repower. 88 *Fed. Reg.* 18,824 (Mar. 29, 2023).

EEI is the association that represents all U.S. investor-owned electric companies. EEI members provide electricity for more than 235 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports more than seven million jobs in communities across the United States. EEI members invest more than $140 billion annually to make the energy grid smarter, cleaner, more dynamic, more flexible, and more secure; to diversify the nation's energy mix; and to integrate new technologies that benefit both customers and the environment. Across the nation, investor-owned electric companies are leading a clean energy transformation, making significant progress to reduce greenhouse gas (GHG) emissions in our sector, while also creating good-paying jobs and an equitable clean energy future. They are united in their commitment to get the energy they provide as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve.

The Proposed Rule is of critical importance to EEI members and the continued clean energy transformation. EPA should move expeditiously to finalize the Proposed Rule with the clarifications and modifications offered herein so EEI's members can adequately plan

for the future of their generating fleets. EEI members are also filing their own comments that address company-specific issues. EPA should consider these comments. Further, EPA should continue its robust engagement with all stakeholders, including EEI and its members, as the Agency works to finalize this rule.

EEI's comments explain that EPA should align the rulemaking and compliance obligations and timelines in the Proposed Rule with other proposed rules affecting EGUs; that subcategories are a well-founded mechanism under environmental regulations that can provide flexibilities for facilities that will soon cease discharging waste streams and that the subcategories in the Proposed Rule should be broadened and finalized; and that EPA should collect additional data for both combustion residual leachate (CRL) and legacy wastewaters.

Questions on these comments may be directed to Patrick McGuire (202-508-5167), Riaz Mohammed (202-508-5036), or Alex Bond (202-508-5523).

Sincerely,



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Cc: Radhika Fox, Assistant Administrator, Office of Water, USEPA
Bruno Pigott, Deputy Assistant Administrator, Office of Water, USEPA
Robert Wood, Director, Engineering and Analysis Division, Office of Science and Technology, Office of Water, USEPA

COMMENTS FROM THE EDISON ELECTRIC INSTITUTE ON THE ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED RULE, SUPPLEMENTAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE STEAM ELECTRIC POWER GENERATING POINT SOURCE CATEGORY

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The Edison Electric Institute appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA or Agency) proposed rule, *Supplemental Effluent Limitations Guidelines (ELG) and Standards for the Steam Electric Power Generating Point Source Category* (Proposed Rule), which proposes stricter limitations for three waste streams, bottom ash transport water (BATW), flue gas desulfurization (FGD) wastewater, and coal combustion residual leachate (CRL); seeks comment on limits for legacy wastewaters; and offers flexibilities for coal-based electric generating units (EGUs or units) that will soon decommission or repower. 88 *Fed. Reg.* 18,824 (Mar. 29, 2023). This Proposed Rule seeks to replace the *Steam Electric Reconsideration Rule* (2020 ELG Rule), which went into effect December 14, 2020. *See* 85 *Fed. Reg.* 64,650 (Oct. 13, 2020).

Along with the Proposed Rule, EPA issued a direct final rule (DFR) extending the Notice of Planned Participation (NOPP) deadline to June 27, 2023 for the permanent cessation of coal combustion subcategory from the 2020 ELG Rule, located at 40 C.F.R. § 423.19(f). *See* 88 *Fed. Reg.* 18,440 (Mar. 29, 2023). EPA issued the DFR as circumstances have changed since the original NOPP deadline of October 13, 2021, and there are now additional EGUs seeking to permanently cease coal combustion by December 31, 2028.[1]

[1] As discussed in these comments, On May 30, 2023, EPA's DFR extending the deadline to submit a NOPP for the 2020 ELG Rule's permanent cessation of coal subcategory to June 27,

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The Proposed Rule and DFR are of critical importance to EEI members and the continued clean energy transformation. EPA should move expeditiously to finalize the Proposed Rule with the clarifications and modifications offered herein so EEI's members can adequately plan for the future of their generating fleets. EEI members also are filing their own comments that address company-specific issues, such as the feasibility of membrane filtration technology. EPA should consider these comments. Further, EPA should continue its robust engagement with all stakeholders, including EEI and its members, as the Agency works to finalize this rule.

2023 became effective. *See* EPA, Steam Electric Power Generating Effluent Guidelines - 2023 Proposed Rule: Rule Summary (May 10, 2023), https://www.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-2023-proposed-rule.

I. Introduction and Executive Summary.

The Clean Water Act (CWA) authorizes EPA to establish national, technology based ELGs for discharges into waters of the United States from categories of point sources. *See* 33 U.S.C. § 1314(b). As explained below, the CWA also authorizes EPA to create compliance subcategories. Subcategories, and the flexibilities they provide, are of critical importance to electric companies as they continue to lead a clean energy transformation, making significant progress to reduce GHG, other emissions, and discharges. These comments focus on how the Proposed Rule can be used to further EEI members' clean energy goals. Specifically:

First, EPA should align the rulemaking and compliance obligations and timelines in this rule with other proposed rules affecting EGUs. EPA has multiple authorities with overlapping statutory timelines that affect EEI members' plans regarding coal-based EGUs and the continued clean energy transformation. To the maximum extent possible and practicable, EPA should align those rulemaking timetables and related compliance obligations to allow for EEI members to make fully informed decisions about retiring older assets and bringing on new, cleaner sources of generation while building the infrastructure to support the clean energy transformation.

Second, subcategories are a well founded mechanism under environmental regulations that can provide flexibilities for facilities that will soon cease discharging waste streams. EPA has broad legal authority to include retirement subcategories in environmental rules, including the proposed ELGs. Retirement subcategories have long been used under various environmental statutes to balance factors such as cost and age of equipment, environmental impacts, and energy requirements. Many EEI members have coal-based EGUs slated to retire (or repower with a

cleaner fuel) in the future, and EPA should avoid requiring the installation of costly controls as this could extend the life of these units, possibly constraining investments in new, cleaner replacement generation and expanded transmission. Accordingly, EPA should maintain the cessation of coal subcategory from the 2020 ELG Rule, broaden the definition of "early adopters" in the new proposed cessation of coal subcategory, modify the deadline in the early adopter subcategory for units that will permanently cease combustion of coal to December 31, 2035, as well as consider a providing a subcategory for units permanently ceasing combustion of coal by December 31, 2032, without imposing early adopter requirements.

Finally, EPA should collect additional data for both combustion residual leachate and legacy wastewaters. Setting best available technology (BAT) limits for CRL and/or legacy wastewaters is technically difficult. Therefore, given the nature of the two waste streams and the many source-specific issues, EPA should gather more information prior to setting BAT limits or should adopt a best professional judgment (BPJ)-style approach.

II. EEI Members Continue to Lead the Clean Energy Transformation.

EEI members are leading a profound, long-term transformation in how electricity is generated, transmitted, and used. This transformation is being driven by a wide range of factors, including relatively lower prices for natural gas, particularly as compared to historic high prices; increased deployment of renewable energy resources, energy efficiency measures, and demand-side management; technological improvements; changing customer, investor, and owner expectations; federal and state regulations and policies; legislation, including the Infrastructure

Investment and Jobs Act[2] (IIJA) and Inflation Reduction Act of 2022[3] (IRA); and the increasing use of distributed energy resources. Across the industry, electric companies are investing in a broad range of affordable, carbon-free technologies and approaches with the goal of finding the most cost-effective ways to deliver resilient clean energy.

The mix of resources used to generate electricity in the United States has changed dramatically over the last decade and is increasingly cleaner.[4] In 2022, for the first time, renewable energy sources[5] surpassed coal as a fuel: 22.6 percent of total generation at utility-scale facilities in the United States came from renewable sources compared to 19 percent from coal-based generation.[6] In total, more than 40 percent of America's electricity came from clean carbon-free resources in 2022, including nuclear energy, hydropower, solar, and wind,[7] putting clean resources at parity

[2] Pub. L. No. 117-58.

[3] Pub. L. No. 117-169.

[4] *See* U.S. Energy Information Administration (EIA), Today in Energy: Renewable generation surpassed coal and nuclear in the U.S. electric power sector in 2022 (Mar. 27, 2023), https://www.eia.gov/todayinenergy/detail.php?id=55960&src=email; *See also* EIA, Electric Power Monthly: Data for February 2023—Table 1.1 Net Generation by Energy Source: Total (All Sectors), 2013-February 2023 (Mar. 24, 2023), https://www.eia.gov/electricity/monthly/xls/table_1_01.xlsx; *and* EIA, Electric Power Monthly: Data for February 2023—Table 1.1.A. Net Generation from Renewable Sources: Total (All Sectors) (Mar. 24, 2023), https://www.eia.gov/electricity/monthly/xls/table_1_01_a.xlsx.

[5] Renewables here include wood, black liquor, other wood waste, biogenic municipal solid waste, landfill gas, sludge waste, agriculture byproducts, other biomass, geothermal, hydroelectric conventional, solar thermal, photovoltaic energy, solar, and wind. *See* EIA, Electric Power Monthly, Table 1.1, *supra* n.4.

[6] *See id*.

[7] *See id.*

with natural gas generation, which provided approximately 40 percent of the country's total electricity generation at utility scale facilities in 2022.

As part of the move toward clean, resilient energy, electric companies are deploying more energy storage, which is a key asset in helping the grid integrate increasing amounts of renewables and offering resilience and reliability. Electric companies are the largest users and operators of the approximately 32 gigawatts (GW) of operational storage in the country—representing 93 percent of active energy storage projects.[8]

Going forward, renewable and clean energy technology deployments will continue. EIA predicts that declining capital costs for solar panels, wind turbines, and battery storage, along with government support such as the IRA, will make these technologies increasingly cost effective compared to the alternatives when building new power generating capacity.[9] EIA projects that in the United States renewable generation will more than triple by 2050, with both wind and solar responsible for most of the growth.[10]

[8] Compiled from the following proprietary sources: Wood Mackenzie Power & Renewables/American Clean Power Association, *U.S. Energy Storage Monitor* (2022); Dep't of Energy, *Energy Storage Database* (2022); Hitachi Energy, *The Velocity Suite Database* (2022).

[9] EIA, Annual Energy Outlook 2023 (AEO 2023) at 9 (Mar. 16, 2023), https://www.eia.gov/outlooks/aeo/pdf/AEO2023_Narrative.pdf.

[10] *See* AEO 2023—Table 16. Renewable Energy Generating Capacity and Generation: Electric Power Sector: Generation: Total (Mar. 16, 2023), https://www.eia.gov/outlooks/aeo/data/browser/#/?id=16-AEO2023&region=0-0&cases=ref2023&start=2021&end=2050&f=A&linechart=ref2023-d020623a.25-16-AEO2023~&ctype=linechart&sid=ref2023-d020623a.25-16-AEO2023~ref2023-d020623a.64-16-AEO2023&sourcekey=0.

The changes in the mix of resources used to generate electricity have profoundly decreased the sector's carbon dioxide (CO_2) emissions, the primary greenhouse gas emissions associated with electricity production. EIA's preliminary full-year estimates for 2022 find that electric power sector CO_2 emissions were 36 percent below 2005 levels, as low as they were almost 40 years ago,[11] and once again led the nation in reducing emissions. These reductions will continue.[12] Further, 50 EEI members have announced voluntary, forward-looking carbon reductions goals, 41 of which include a net-zero by 2050 or earlier equivalent goal, and members routinely increase the ambition or speed of their goals or altogether transform them into net-zero goals to reflect changing expectations about the cost and availability of renewable generation and other clean energy resources.

In addition, the electric industry has significantly reduced emissions of traditional air pollutants, such as mercury, hazardous air pollutants (HAPs), sulfur dioxide (SO_2), and nitrogen oxides (NOx). As of 2022, SO_2 and NOx emissions have declined 95 and 88 percent, respectively, since 1990.[13] In addition, mercury emissions have declined by 95 percent since 2010,[14] and total HAPs—including all acid gas emissions—declined by 96 percent between 2010 to 2017.[15]

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[11] *See* EIA, Monthly Energy Review, Environment, Table 11.6—Electric Power Sector (Mar. 2023), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.

[12] *See* AEO 2023 at 4.

[13] *See* EPA, Power Plant Emissions Trends (Feb. 2023), https://www.epa.gov/power-sector/power-plant-emission-trends.

[14] *See* EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, page 2-7 (Dec. 2011), https://www.epa.gov/sites/default/files/2015-11/documents/matsriafinal.pdf.

[15] *See* 84 *Fed. Reg.* 2,670, 2,689 (Feb. 7, 2019).

EEI's member companies see a clear path to continued emissions reductions over the next decade using current technologies, including nuclear power, natural gas-based generation, energy demand efficiency, energy storage, and deployment of new renewable energy—especially wind and solar[16]—as older coal-based and less-efficient natural gas-based generating units retire.[17] These technologies will continue to enable significant, cost-effective carbon reductions.

In the long term, reaching net-zero carbon emissions also will require the deployment of next-generation, carbon-free, 24/7, dispatchable technologies not currently available commercially. Supported by the clean energy tax incentives included in the IRA and the grant funding available via the IIJA, electric companies are partnering with technology developers, academic institutions, investors, philanthropists, each other, and other stakeholders to develop, demonstrate, and deploy these new clean energy technologies. These include long-duration energy storage, carbon capture and storage, advanced nuclear and renewable generation, and clean fuel (like hydrogen, renewable natural gas, and ammonia). Developing and deploying a broad range of advanced clean energy technologies will further expedite the transition of the electric power sector to one that is low- or non-emitting while keeping electricity affordable and reliable for customers.

[16] Once built and when the resource is available, wind and solar are the least cost resources to operate to meet electricity demand because they have zero fuel costs. Over time, the combined investment and operating cost advantage increases the share of zero-carbon electricity generation. *See* AEO 2023 at 5.

[17] EIA notes that coal-fired generation capacity will decline sharply by 2030 to about 50 percent of current levels (from about 200 GW to 100 GW) with a more gradual decline thereafter. *See* AEO 2023 at 13.

EPA's Proposed Rule is of critical importance to EEI members as they continue to lead this clean energy transformation. An ELG rule that supports the efficient and cost-effective retirement or repowering of coal-based EGUs is essential to the continued success of the clean energy transformation.

III. EPA Should Align Compliance Timelines Across Environmental Rulemakings And Should Utilize Subcategories To Do So.

Aware of the clean energy transition led by EEI's members, EPA Administrator Michael Regan announced the Agency's intent to pursue an integrated and coordinated approach to regulating EGUs under its air, water, and waste programs, so as to provide "greater transparency, regulatory certainty for long-term investments, opportunities to reduce compliance complexity, and the right signals to create market and price stability."[18] To the maximum extent possible, these regulations should support and facilitate the emissions reductions and clean energy progress already being made by electric companies and their fleet transition plans. EPA has multiple authorities—and ongoing rulemakings—with overlapping statutory timelines that affect EEI members' plans regarding the orderly retirement of coal-based EGUs and their ability to continue the industry's clean energy transformation while providing the reliable and affordable electricity their customers demand. These authorities and rulemaking efforts include the Coal Combustion Residuals (CCR) rules,[19] the Mercury and Air Toxics Standards (MATS) proposed rule under Clean Air Act (CAA) section 112,[20] individual state regional haze requirements, the

[18] Administrator Michael Regan, Remarks to CERAWeek About EPA's Approach to Deliver Certainty for Power Sector and Ensure Significant Public Health Benefits (Mar. 10, 2022), https://www.epa.gov/speeches/administrator-michael-regan-remarks-ceraweek-about-epas-approach-deliver-certainty-power.

[19] *See* 40 C.F.R. Part 257, *et seq*.; 88 *Fed. Reg.* 31,982 (May 18, 2023).

[20] *See* 88 *Fed. Reg.* 24,854 (Apr. 24, 2023).

Good Neighbor Rule under CAA section 110,[21] and the Agency's suite of GHG regulations under CAA section 111.[22]

EPA's efforts to align these rulemaking timetables to the maximum extent possible are well founded and essential to providing a consistent framework for the industry to continue its transformation. Regulatory certainty surrounding the timing of compliance obligations will allow EEI members to make fully informed decisions about retiring older assets and bringing on new, cleaner sources of generation and building the infrastructure to support the transformation to clean energy. EPA should seek to:

- Provide consistent timelines that accommodate the expected retirement of coal-based EGUs into the 2030s and align those timetables across Agency rulemakings;
- Provide approaches that allow for the retirement of units in lieu of costly investments in new control technologies, which could prolong the lives of higher-emitting EGUs, to achieve maximum and durable environmental benefits; and,
- Allow electric companies to protect customers and address specific reliability concerns through least-cost compliance pathways that are consistent with resource planning horizons.

Specifically, EPA should align the deadlines of the three retirement-based subcategories for coal-based EGUs in the Agency's *Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units*[23] with the subcategories and deadlines explained in

[21] EPA, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, EPA-HQ-OAR-2021-0668 (Mar. 15, 2023) [unpublished], https://www.epa.gov/system/files/documents/2023-03/FRL%208670-02-OAR_Good%20Neighbor_Final_20230314_Signature_ADMIN%20%281%29.pdf.

[22] *See* 88 *Fed. Reg.* 33,240 (May 23, 2023).

[23] *See id.* at 393-397.

these comments for any permanent cessation of coal subcategories in the final ELG rule and final CAA 111 rules.

A. Subcategories are a well founded mechanism for flexible implementation of environmental regulations.

The Agency has utilized subcategories for types of sources across numerous environmental regulations, and its use of subcategorization in this rulemaking is well founded both legally and as a policy decision to help continue the clean energy transition. EPA should expand and finalize its proposed subcategories in the ELG rule.

1. *Subcategories are a legally sound compliance mechanism under the CWA.*

EPA has ample legal authority to establish retirement subcategories when promulgating ELGs. In developing BAT limits, EPA must consider "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(2)(B). Courts have long recognized that EPA has broad discretion in determining how to evaluate and weigh these factors.[24]

[24] *E.g.*, *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998) ("The EPA nonetheless has considerable discretion in evaluating the relevant factors and determining the weight to be accorded to each in reaching its ultimate BAT determination. Thus, the EPA has significant leeway in determining how the BAT standard will be incorporated into final ELGs."); *NRDC v. EPA*, 863 F.2d 1420, 1426 (9th Cir. 1988) ("EPA has considerable discretion in weighing the costs of BAT."); *Weyerhaeuser Co. v. Costle*, 599 F.2d 1011, 1046 (D.C. Cir. 1978) ("[T]he listing of factors seems aimed at noting all of the matters that Congress considered worthy of study before making limitation decisions, without preventing EPA from identifying other factors that it considers worthy of study. So long as EPA pays some attention to the congressionally specified factors, the section on its face lets EPA relate the various factors as it deems necessary.").

The same statutory factors that EPA must account for when developing BAT limits are relevant to the question of whether to subcategorize within a category of point sources.[25] Accordingly, it is unsurprising that courts have upheld EPA determinations to promulgate different limits for subcategories or classes of sources within a particular point source category based on EPA's consideration of the statutory factors in CWA section 304(b).[26] *Texas Oil & Gas Association* best illustrates the breadth of EPA's "discretion to set different limits for different point sources within the same category or subcategory when circumstances so warrant." *Texas Oil* at 938. Because EPA's "plenary rulemaking authority under the CWA includes the power to set different effluent limits for different point sources in the same category or subcategory," it was acceptable for EPA to set more lenient effluent limits for Cook Inlet facilities after finding that the "cost of complying with a zero discharge standard on produced water or drilling wastes would be substantially higher for Cook Inlet facilities than for the rest of the Coastal Subcategory." *Id.* at 939-40 (emphasizing, *inter alia*, closures, job losses, and loss in net present value of facilities). The Fifth Circuit buttressed its holding by noting that "[t]he Supreme Court

[25] *See* 67 *Fed. Reg.* 42,644, 42,656 (June 24, 2002) ("The CWA requires EPA, in developing effluent limitation guidelines and pretreatment standards, to consider a number of different factors, which are also relevant for subcategorization."); *see also* 64 *Fed. Reg.* 2,280, 2,300-01 (Jan. 13, 1999) ("One way in which the Agency has taken some of these factors into account is by breaking down categories of industries into separate classes of similar characteristics. This recognizes the major differences among companies within an industry that may reflect, for example, different manufacturing processes, economies of scale, or other factors. One result of subdividing an industry by subcategories is to safeguard against overzealous regulatory standards, increase the confidence that the regulations are practicable, and diminish the need to address variations between facilities through a variance process.").

[26] *E.g.*, *Texas Oil & Gas Ass'n*, 161 F.3d at 939 (upholding EPA decision "to set more lenient effluent limits for Cook Inlet facilities than for other members of the Coastal Subcategory"); *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 802 (6th Cir. 1995) (upholding EPA's rejection of zero discharge of drilling wastes in Alaska based on consideration of various factors, such as infeasibility of reinjection technology).

has repeatedly emphasized the importance of balancing the CWA's uniformity interest with the practical reality of differences within a category" and that "EPA is authorized—indeed, is required—to account for substantial variations within an existing category or subcategory of point sources." *Id.* at 939 (citations and quotes omitted).

Of particulate relevance here, the importance of evaluating the statutory age and cost factors, and how they affect economic achievability, is essential to EPA's decision to subcategorize. EPA is required to "consider age as it might pertain to the cost or feasibility of retrofitting plants with new pollution control technology."[27] This may entail accounting for "the fact that all the plants within [a particular] subcategory were built long before plants in another subcategory [which can] present special problems in installing anti-pollution devices." *Id.* at 1048. "Similarly, in a subcategory where there is considerable variation in age, the fact that the processes are similar may mean that the same type of control technology can be installed, but it does not necessarily mean that the ease with which that technology can be installed, or the ability to comply with effluent limitations once it has been installed, is not affected by age." *Id.*

Accordingly, EPA's retirement subcategories stand on firm legal ground. Just as EPA did in the 2020 ELG Rule, the Agency has appropriately balanced the statutory factors, such cost and age of equipment, as well as non-water quality environmental impacts (including energy requirements), and other factors, in establishing and maintaining the retirement subcategories in the proposal.

[27] *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 299 (3d Cir. 1977) (referencing the holding in *Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1048 (3d Cir. 1975)).

EPA's use of subcategories across other environmental rulemakings further supports the Agency's use of subcategories. Other environmental statutory provisions, such as CWA section 316(b) and the CAA, provide additional support for the retirement-based subcategories in the proposal. For instance, EPA promulgated different requirements for facilities that were planning near term retirements in the 2014 final rule titled *National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities*. 79 *Fed. Reg.* 48,300 (Aug. 15, 2014) (Final 316(b) Rule). There, EPA reasoned that it considered that "[u]nit closures provide clear reductions in flow … EPA expects flow reductions due to unit closures could be reasonably included as part of a facility's impingement mortality and entrainment reductions strategy." 79 *Fed. Reg.* at 48,332. The regulations for cooling water intake structures under CWA Section 316(b) contain exemptions for units that are scheduled to retire before the expiration of the current permit, meaning that permittees that planned to retire their facilities before their then-current permit expired did not need to comply with substantive portions of the rule. *See* 40 C.F.R. § 122.21(r)(ii)(F). Units that are scheduled to retire within one permit cycle would not be subject to the substantive portions of the rule so long as they signed a certified statement specifying the facility's last operating date. *Id*. at § 122.21(r)(ii)(G).

EPA has likewise adopted a similar approach in the context of other environmental statutes, notably in implementing the CAA's stationary source, regional haze, and National Ambient Air Quality Standards (NAAQS) programs. Specifically, EPA acknowledged that retiring or repowering units satisfied compliance obligations for those federal environmental requirements

as long as the retirements were federally enforceable by a date certain. EPA's inclusion (in 40 C.F.R. Part 423) of a subcategory for retiring units to avoid unnecessary costs and requirements is not unique.

First, under CAA section 111(d), EPA recently proposed carbon capture and sequestration/storage with 90 percent capture as the best system of emissions reduction (BSER) for existing coal-fired steam generating units that intend to operate on or after January 1, 2040. *See* 88 *Fed. Reg.* 33,240, 33,343 (May 23, 2023). EPA simultaneously proposed to "allow existing sources that are on a path to near term retirement to continue on that path *without having to install additional control equipment*." *Id.* (emphasis added). That proposal acknowledges that many "units have plans to cease operations, are part of utilities with commitments to net zero power by certain dates, or are in States or localities with commitments to net zero power by certain dates." *Id.* Given these facts, EPA exercised its discretion under CAA section 111 to create several subcategories based on operating horizon, allowing units to opt into a subcategory if they elect to commit to permanently cease operations by a certain date and elect to make such commitments federally enforceable and continuing by including them in State plans. *See id.* at 33,344 (establishing different requirements for units retiring by 2032, units retiring by 2035, units retiring by 2040, and units operating in 2040 and beyond). Most notably, for the "imminent-term subcategory," *i.e.*, units retiring by 2032, EPA determined that "no additional CO_2 control measures would be cost reasonable." *Id.*

The 111(d) proposal explains in detail why EPA has broad authority under CAA section 111(d) to identify subcategories for types of stationary sources when such sources "have characteristics

that are relevant to the controls that the EPA may determine to be the BSER for those sources." *Id.* at 33,345. Just as EPA must account for cost when establishing ELGs under CWA section 304(b), EPA must consider the cost of achieving reductions when setting CAA emission standards for existing sources. *See* 42 U.S.C. § 7411(d)(1); *see also* 40 C.F.R. §§ 60.22(b)(5) & 60.22a(b)(5) (recognizing that subcategorization may be appropriate based on costs of control). EPA appropriately determined that "subcategorizing on the basis of operating horizon is consistent with a central characteristic of the coal-fired power industry that is relevant for determining the cost reasonableness of control requirements [under CAA section 111(d)]: A large percentage of the industry has announced, or is expected to announce, dates for ceasing operation, and the fact that many coal-fired steam generating units intend to cease operation affects what controls are 'best' for different subcategories." 88 *Fed. Reg.* at 33,345. Indeed, "[s]ources that have shorter operating horizons will have less time to amortize capital costs and the controls will thereby be less cost-effective and therefore may not qualify as the BSER." *Id.* The very same rationale applies when assessing what is reasonable in the ELG context.

Second, in the regional haze program, EPA has used its discretion to allow retiring units to forgo installation of control technologies that would be otherwise required under an analysis of the Best Available Retrofit Technology (BART). The CAA requires each regional haze plan to "contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress" toward the statutory goal of eliminating manmade visibility impairment in Class I Federal areas. *See* 42 U.S.C. § 7491(b)(2). Similar to the factors required for EPA to review in the CWA for promulgating ELGs, when determining what measures amount to "reasonable progress," a State must consider four criteria: (1) the costs of compliance;

(2) the time necessary for compliance; (3) the energy and nonair quality environmental impacts of compliance; and (4) the remaining useful life of any existing source subject to such requirements. *Id.* at § 7491(g)(1).[28]

While the regional haze program has had a focus on source-specific evaluations of the above BART factors, important for this analysis is that EPA and States have concluded in numerous different contexts that an evaluation of all of the above factors leads to the imposition of no further controls given the pending retirement of the source in question. This has primarily been the result of an analysis of the remaining useful life[29] of the source when weighed against the other four BART factors; specifically, that the installation of pollution control technology can impose significant costs for some environmental gains, but that those costs and environmental benefits do not outweigh the environmental and economic benefits of simply retiring the source.[30]

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[28] To ensure States achieve "reasonable progress," every plan must require certain large-scale, stationary sources of air pollutants to implement controls known as BART or adopt a BART alternative. Id. at § 7491(b)(2)(A); 40 C.F.R. § 51.308. The CAA defines BART as being based on a source-specific evaluation of five factors. *See Oklahoma v. EPA*, 723 F.3d 1201, 1208 (10th Cir. 2013). These "BART factors" are:

(1) The costs of compliance;
(2) The energy and non-air quality environmental impacts of compliance;
(3) Any existing pollution control technology in use at the source;
(4) The remaining useful life of the source; and,
(5) The degree of visibility improvement which may reasonably be anticipated from the use of BART.

42 U.S.C. § 7491(g)(2).

[29] Remaining useful life and other factors is not unique to the regional haze program, as the concept is also included in CAA section 111.

[30] Most recently, EPA has endorsed such an approach in its approval of Arkansas' Regional Haze State Implementation Plan and withdrawal of a Federal Implementation Plan wherein the Agency determined that there was no need to install pollution control technology on BART eligible units

Third, when promulgating air quality designations under CAA section 107(d) for the SO_2 NAAQS, EPA acted pursuant to a consent decree with environmental petitioners to designate areas in several different groups. Crucially, the Agency specifically stated that areas that had electric generating units that had announced an upcoming retirement and cease of operations date did not need to be classified as not attaining the NAAQS, since their pending retirement obviated the need for further regulatory actions an implementation of nonattainment provisions.[31] In essence, the Agency crafted a regulatory category that specifically took account of unit retirements. Accordingly, unit retirements provide long-term environmental benefits, which EPA has recognized. These unit closures should be recognized under the CWA as providing similar benefits.

given that those units had an enforceable order to switch the type of coal used and then to cease use of coal by the end of 2028. *See Approval and Promulgation of Implementation Plans; Arkansas; Approval of Regional Haze State Implementation Plan Revision for Electric Generating Units in Arkansas*, 84 *Fed. Reg.* 51,033 (Sept. 27, 2019). Specifically, EPA concluded that Arkansas satisfied the requirements of the CAA by "fully considering the five statutory factors…Taking into account the remaining useful life of White Bluff Units 1 and 2 (based on Entergy's enforceable Administrative Order to cease coal combustion by December 31, 2028), and the resulting cost-effectiveness of controls, as well as the anticipated visibility improvement of the SO_2 control options and the other BART factors." *Id*. at 51,036.

[31] The Agency's second round of designations specifically focused on areas that "contain any stationary sources that had not been announced as of March 2, 2015, for retirement and that according to the EPA's Air Markets Database emitted in 2012 either (i) more than 16,000 tons of SO_2, or (ii) more than 2,600 tons of SO2 with an annual average emission rate of at least 0.45 pounds of SO2/mmBTU." Response to Significant Comments on the Designation Recommendations for the 2010 Sulfur Dioxide Primary NAAQS, Docket No. EPA-HQ-OAR-2014-0464 (June 30, 2016).

2. *Subcategories are key to EEI members environmental goals due to how electric companies operate.*

Many of EEI members' coal-based EGUs are slated for or are currently being considered for retirement or repowering with a cleaner fuel in the near future. Upon ceasing combustion of coal, whether resulting in retirement or repowering with a cleaner fuel, such as natural gas, these EGUs immediately cease discharging FGD wastewater and BATW. Many EEI members are vertically integrated electric companies that recover prudently incurred costs via electricity rates. This means that expenditures for new control equipment required to comply with the Proposed Rule for coal-based EGUs will be passed to customers via electricity rates. To achieve intergenerational equity, large expenditures, like those for new controls, are depreciated over relatively long time periods. In a time of increasing electricity rates as a result of inflation and increased fuel costs, adding costs that will be borne by customers constrains investments in new, cleaner replacement generation and transmission.

If controls are required for units that are slated to cease combustion of coal in the future, this creates the possibility that these costs actually extend the life of these units in order to fully recover the investments in new control technologies. In the alternative, if electric companies install controls only for a short period of time before ceasing combustion of coal, these costs still will be borne by customers, constraining investments in new, cleaner replacement generation and transmission. In general, if there are still costs to be depreciated, it makes retiring those units significantly more difficult from an economic and regulatory perspective. Accordingly, regulation should take into account the long-term benefits of unit closures in terms of permanently reduced effluent and consider whether controls that prolong the life of a unit are consistent with broader environmental and public health goals.

Subcategories as established in the 2020 ELG Rule and the Proposed Rule—with the modifications described in these comments—provide electric companies with a mechanism to bridge compliance gaps and maximize efficiencies to cease combustion of coal and continue to transform their generation fleets to cleaner sources.

B. The continuation and extension of the 2020 ELG Rule's permanent cessation of coal subcategory is well founded and should be finalized.

Numerous EEI members utilized the permanent cessation of coal subcategory in the 2020 ELG Rule which allows for EGUs to cease combustion of coal by December 31, 2028, in exchange for less stringent total suspended solids limitations and standards for discharges of pollutants found in FGD wastewater and BATW. *See* 88 *Fed. Reg.* at 18,441; 40 C.F.R. § 423.13(g)(2)(i), (k)(2)(ii). Maintaining this subcategory is well founded, as it avoids putting those facilities that have already submitted NOPPs that have been accepted by their state regulators in a position of incurring significant costs to install new treatment technologies. EPA's consideration of the pending retirement of electric generating units in the 2020 ELG Rule, echoed in the Proposed Rule, and the disproportionate costs that would be incurred at those facilities relative to their remaining useful lives—and ultimately born by customers—was and remains appropriate. *See* 88 *Fed. Reg.* at 18,857. Further, replacing coal-based generation with generation that uses natural gas, renewables, and other clean fuels leads to decreased emissions of several air pollutants, in addition to the cessation of FGD wastewater and BATW discharges. *See id.*

As discussed *supra*, this subcategory is consistent with past Agency action as well as judicial precedent and will result in overall reduced pollutant discharges. EPA has strong reasons for creating a subcategory based on the economic impacts from imposing BAT limits on EGUs

likely to retire or repower in the near-to-medium term, given that payback periods for units are often 15 to 20 years or longer, depending on individual circumstances. Additionally, in terms of overall effluent discharges, EGUs that retire by a date certain represent permanently avoided future discharges; in terms of overall discharges, units that retire or repower with fuels other than coal represent environmental benefits through avoided future discharges.[32] These environmental benefits are tangible: EGUs that cease utilization of coal as a fuel source do not have the effluent discharges at issue in the Proposed Rule and retiring or repowering of these units provides an avenue to cease these discharges for all future periods. Moreover, because the Agency has created a time-limited subcategory that would allow units to operate through 2028 does not necessarily mean that all units in this subcategory will operate until the end of 2028—unit retirement decisions are subject to a number of factors including economic viability, grid reliability considerations, regulatory approvals, among many others. In fact, several EGUs that already have opted into this subcategory are closing well in advance of the December 31, 2028, deadline. Accordingly, retirements represent significant environmental gains from avoided effluent discharges, and EPA should realize those benefits by retaining the subcategory.

C. New permanent cessation of coal subcategories are well founded and should be expanded and finalized.

EPA also proposed a new subcategory for facilities that will cease combustion of coal by December 31, 2032. *See* 88 *Fed. Reg.* at 18,859. As proposed, the subcategory is available to "early adopters," defined as those EGUs that, as of March 24, 2023, have installed technologies to comply with the requirements in the 2020 ELG Rule or the 2015 ELG Rule.[33] *See* 88 *Fed.*

[32] Similarly, units that repower to utilize natural gas no longer will have effluent discharges related to the utilization of coal, and therefore do not need to be regulated by the ELGs here.
[33] *See* EPA, *Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 80 *Fed. Reg.* 67,838 (Nov. 3, 2015).

Reg. at 18,896 (to be codified at 40 C.F.R. § 423.11(x)). As proposed, early adopters entering this subcategory would not be required to install new technologies for FGD wastewater and BATW prior to ceasing combustion of coal by December 31, 2032.

EPA's reasoning for this additional subcategory for facilities permanently ceasing combustion of coal is well founded. As explained in Section V above and in the Proposed Rule, the nearing retirement or repowering of coal-based EGUs, costs of installing new technology, and non-water quality environmental impacts of ceasing combustion of coal, like air pollution benefits, are important and appropriate reasons to create a new subcategory. *See* 88 *Fed. Reg.* at 18,859.

However, EPA should modify and expand this subcategory to allow more facilities the flexibility to cease combustion of coal without having first to install costly new FGD wastewater and BATW controls. Providing additional pathways for units to take advantage of a cessation of coal subcategory would allow for more units to permanently cease discharges in both an efficient and environmentally protective manner.

1. *EPA's definition of "early adopter" should be broadened.*

As stated above, the Proposed Rule would only allow "early adopters" of some of the technology requirements in the 2020 ELG Rule and the 2015 ELG Rule to utilize the subcategory if those technologies were installed by March 24, 2023. *See* 88 *Fed. Reg.* at 18,896 (to be codified at 40 C.F.R. § 423.11(x)).[34] This deadline does not comport with how many EEI members have planned to comply with the 2020 ELG Rule and their permits.

[34] The March 24, 2023, deadline corresponds to the publication of the Proposed Rule in the *Federal Register*.

At a minimum, the deadline for determining early adopter status should conform to the deadline for compliance with the 2020 ELG Rule, which is December 31, 2025. *See* 85 *Fed. Reg.* at 64,706. This is the latest permitted deadline against which EEI members could plan compliance with that rule. This also would be consistent with how EPA has approached compliance with the 2020 ELG Rule: On August 3, 2021, EPA published a notice in the *Federal Register* indicating that the Agency planned to initiate a rulemaking process to revise the 2020 ELG Rule, and EPA stated that the Agency expected permitting authorities to continue to implement the current regulations—that is, the 2020 ELG Rule—while the Agency undertook a new rulemaking. *See* 86 *Fed. Reg.* 41,802 (Aug. 3, 2021). Therefore, many EEI members continued to operate, and were permitted, under the assumption that the latest deadline to comply with the technological controls in the 2020 ELG Rule was December 31, 2025. Many of these members are far along in the process of installing the required technologies or have contracts to do so at some point before December 31, 2025, in accordance with their permits.

Moreover, at no point prior to receiving the pre-publication version of the Proposed Rule were facilities informed that the date of publication in the *Federal Register* of the new Proposed Rule would be relevant to whether facilities could utilize a significant regulatory flexibility. These facilities that are nearing completion of controls, have contracted to do so before the deadline of December 31, 2025, or are required by permit to do so by December 31, 2025, are therefore at a disadvantage compared to those that happened to have completed installation of the required control technologies by the date of publication of the Proposed Rule in the *Federal Register*, March 24, 2023.

As an example, one EEI member's facility's permit requires compliance with the 2020 and 2015 ELG Rules' requirements by December 14, 2023. This permit condition required this member to initiate an effort to obtain a Certificate of Authority (CA) from the state public service commission to construct a biological treatment system to enhance the chemical precipitation wastewater treatment equipment currently in operation. Immediately following the publication of the 2020 ELG Rule in October 2020, the company began work developing an application to the state public service commission that was submitted on February 16, 2021. The commission approved the proposed $90 million biological treatment system on December 14, 2021, and this member commenced construction in March 2022. The permit includes the relevant 2015 ELG Rule wet FGD wastewater BAT effluent limitations, and the state environmental department plans to modify the permit to include the relevant 2020 ELG Rule wet FGD wastewater effluent limitations by the fourth quarter 2023. The biological wastewater treatment system was designed to meet the ELG BAT numeric effluent limitations for wet FGD wastewater included in the 2020 ELG Rule. Despite the fact that this facility will very soon comply with both the 2015 and 2020 ELG Rules, the facility would not be considered an "early adopter" under the Proposed Rule.

Since EPA has provided these various subcategories as a way of providing units optionality for compliance with the intent of influencing operator behavior, limiting the subcategory to an already past-date deadline is both arbitrary and counterproductive. Given the lack of advanced notice that this date would be important for facilities to take advantage of a significant regulatory flexibility that would provide affordability benefits to electric company customers while also providing environmental benefits, EPA should reconsider the deadline for early adopters.

Because EPA expected permitting authorities to continue to implement the 2020 ELG Rule while going through the rulemaking process, EPA should change the deadline for early adopters to installation "no later than December 31, 2025." In the alternative, EPA could require that facilities produce records of having completed contracts by a specific date, for the installation of control technologies to comply with the 2020 ELG Rule, but that the deadline for installation still be "no later than December 31, 2025."

2. *EPA should modify the "early adopter" subcategory to accommodate EGUs that will cease combustion of coal by 2035.*

EPA should consider modifying the proposed early adopter subcategory to accommodate units that will run beyond 2032 to provide essential grid services and to ensure availability of generation capacity during peak demand periods throughout the early 2030s. EPA should modify this subcategory to allow units until December 31, 2035 to close or repower. As new, additional clean energy resources are integrated on to the grid and new, dispatchable, carbon-free resources are in the demonstration phase, ensuring that generation capacity is available will be important to ensure grid stability. EPA should therefore provide some level of flexibility for these facilities in the early adopter subcategory and extend the deadline to cease combustion of coal or repower to December 31, 2035.

3. *EPA should consider a subcategory for EGUs to close or repower by 2032 even if they are not "early adopters."*

In the preamble to the Proposed Rule, EPA solicits comment on "whether early adoption should be required at all, or whether the Agency should merely include a new subcategory for retirement by 2032." *See* 88 *Fed. Reg.* at 18,860. EPA should consider this approach, along with those stated in Sections C (1) and (2) above. A deadline of December 31, 2032 without an early adopter requirement would allow multiple EEI member facilities the ability to close or repower,

reallocating resources toward clean energy infrastructure development and deployment. Furthermore, a retirement-based 2032 subcategory would align with the Agency's proposal for imminent-term retiring units in the proposed CAA section 111 rules, discussed *supra*.

This subcategory is appropriate for all the reasons identified by EPA in the 2020 ELG Rule, as well as discussed in Section B above, including that EGUs that retire by a date certain represent permanently avoided future discharges; in terms of overall discharges, units that retire or repower with fuels other than coal represent environmental benefits through avoided future discharges.

4. *EPA should allow EGUs that do not generate FGD wastewater to enter the "early adopter" subcategory.*

In the preamble to the Proposed Rule, EPA states that facilities meeting the 2020 ELG Rule FGD wastewater BAT limitations, because they either do not generate or do not discharge FGD wastewater, are not allowed to use the early adopter subcategory. This restriction is arbitrary and not consistent with the overarching goals of the proposed retirement subcategories. For example, one EEI member spent about $45 million at two units to comply with the BATW limitations in the 2015 and 2020 ELG Rules. These EGUs are slated to cease combustion of coal by 2030. While these only have one waste stream, BATW, it is not clear why fewer waste streams should disqualify these unit from taking advantage of the proposed retirement subcategories. Therefore, EPA should allow facilities that do not generate or discharge FGD wastewater but do generate or discharge BATW to enter the early adopter subcategory.

IV. EPA's Direct Final Rule Reopening the NOPP For The Cessation Of Coal Subcategory Is Well Founded.

On May 30, 2023, EPA's DFR extending the deadline to submit a NOPP for the 2020 ELG Rule's permanent cessation of coal subcategory to June 27, 2023 became effective.[35] For many EEI members, circumstances have changed since the original NOPP deadline of October 13, 2021. 40 C.F.R. § 423.19(f)(1). These EEI members are now seeking to permanently cease coal combustion at facilities. One EEI member has already submitted their NOPP to enter this subcategory now that the deadline is extended. As explained above, allowing units another opportunity to enter the subcategory and permanently cease combustion of coal by December 31, 2028 will allow these members to invest the would-be costs of installing FGD wastewater and BATW controls into cleaner sources and much-need transmission, while providing water quality and non-water quality environmental benefits upon ceasing combustion of coal.

V. EPA Should Reconsider Setting BAT For CRL And Legacy Wastewaters.

EPA proposes chemical precipitation as BAT for CRL and BPJ-based limitations to control legacy wastewaters. *See* 88 *Fed. Reg.* at 18,848-50. Setting BAT limits for CRL and legacy wastewaters are inherently difficult due to many site-specific issues.

A. EPA should take care in attempting to set BAT for CRL.

EPA proposed chemical precipitation as the technological basis for establishing BAT limitations to control pollutants discharged in CRL. However, there are difficulties inherent in the collection and management of CRL as well as site-specific variabilities that make it difficult for many facilities to install this technology. For example, this technology becomes increasingly difficult

[35] *See* EPA, Steam Electric Power Generating Effluent Guidelines - 2023 Proposed Rule: Rule Summary (May 10, 2023), https://www.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-2023-proposed-rule.

to effectively implement when there are complex and diverse geological and hydrogeological variabilities. Treatment by the recommended BAT necessitates optimizing the precipitation based on targeted constituents, which is difficult when the number of constituents increase and the quantity and quality of water to be treated varies. Therefore, EPA should work to gather more information that could inform a BAT determination.

Further, many facilities with CRL already are working to remove the source of the potential discharge in accordance with CCR rule requirements. Therefore, EPA should ensure the CRL requirements are also consistent and harmonized with the requirements of the CCR rules and the ongoing implementation thereof.

1. *"Functionally equivalent" discharges are inherently site-specific determinations.*

In the preamble to the Proposed Rule, EPA explains that it "anticipates that some…[CRL] facilities may need permit coverage in the future" based on the factors in the 2020 U.S. Supreme Court decision, *County of Maui v. Hawaii Wildlife Fund Maui*. *See* 88 *Fed. Reg.* at 18,890. The Court stated in *Maui*, that the CWA "requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge* [emphasis added]." 140 S.Ct. 1462 (2020). EPA's Proposed Rule does not change the requirement outlined in *Maui*.[36] If state and federal permit writers seek to permit discharges to

[36] The Court offered a list of non-exhaustive factors for lower courts and permit writers to consider when determining whether a discharge through groundwater to surface waters is a "functional equivalent of a direct discharge." These include: (i) transit time; (ii) distance traveled; (iii) nature of the material through which the pollutant travels; (iv) extent to which the pollutant it diluted or chemically changed in transit; (v) amount that enters navigable waters versus how much leaves the point source; (vi) manner by or area in which the pollutant enters navigable waters; (vii) degree to which the pollution has maintained its specific identity. The Court noted that time and distance will be the most important factors in most cases, but not

groundwater that reach surface waters from CRL facilities under the *Maui* factors, these permitting entities must take care when making "functionally equivalent" determinations and including them in NPDES permits, as these determinations are inherently data driven and will involve site-specific assessments based on the factors in the *Maui* decision. Given the site-specific nature of these discharges, EPA should not require BAT for these "functionally equivalent" discharges. Rather, BPJ limits are more appropriate.

Due to the complexity of both the test in *Maui* and the site-specific nature of these discharges, EEI and its members are unaware of any permitting authorities that have issued a NPDES permit using the *Maui* factors to regulate functionally equivalent discharges. In addition, the practical challenges of such an approach are complicated by EPA's withdrawal of its *Maui* guidance in 2021,[37] which has not been replaced. Moreover, few, if any, state regulators have provided guidance, either directly through guidance documents to industry or through case-specific permitting decisions, on how to conduct a *Maui* analysis. This lack of guidance and ambiguity further recommends a BPJ analysis over setting a BAT.

Similarly, EPA need not require additional data submissions from permittees at this time as the CCR rules already require submission of this data in an annual groundwater monitoring and corrective action report under 40 C.F.R. § 257.90(e). Requiring duplicative submissions creates

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necessarily every case. *See id.* at 1476-1477. All National Pollutant Discharge Elimination (NPDES) permits for ground water the "functional equivalent of a direct discharge" must be based on these factors.

[37] *See* EPA, EPA Rescinds Previous Administration's Guidance on [CWA] Permit Requirements (Sept. 16, 2021), https://www.epa.gov/newsreleases/epa-rescinds-previous-administrations-guidance-clean-water-act-permit-requirements.

unnecessary and duplicative expense in the regulatory process and unnecessary burdens on permittees and permitting agencies, with no corresponding benefits.

B. BPJ by permitting authorities is an appropriate limitation for legacy wastewaters.

EPA proposed not to establish a nationwide BAT basis for legacy wastewater in the Proposed Rule and instead to continue to reserve these limitations for determination by the permitting authority, using BPJ. *See* 88 *Fed. Reg.* at 18,850. This determination is well founded given the varying characteristics of legacy wastewater ponds. Further, many of these facilities are already in the process of closing under the CCR rules. If in the future EPA seeks to set BAT for legacy wastewaters, the Agency first must gather more data and information.

VI. Conclusion.

As stated above, EPA should move expeditiously to finalize the Proposed Rule with the clarifications and modifications offered in these comments so EEI members can adequately plan for the future of their generating fleets. Also, EEI appreciates the engagement with EPA staff over the last two years regarding this rulemaking. As EPA moves to finalize this rule, EEI hopes to continue engaging with Agency representatives.

Questions on these comments may be directed to Patrick McGuire (202-508-5167), Riaz Mohammed (202-508-5036), or Alex Bond (202-508-5523).