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Docket ID No. EPA-HQ-OW-2009-0819
Environmental Protection Agency
Office of Water, 4101M
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments on Proposed Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 88 Fed. Reg. 18824 (Mar. 29, 2023), Docket ID No. EPA-HQ-OW-2009-0819

To whom it may concern:

The Utility Solid Waste Activities Group ("USWAG")[1] submits these comments on EPA's proposed Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 88 Fed. Reg. 18824 (Mar. 29, 2023) (the "Proposal"). As an industry organization with members who will be affected by this rulemaking, USWAG appreciates the opportunity to comment on this Proposal.

USWAG has engaged extensively with EPA as it has worked to promulgate and implement a series of regulations impacting the management coal combustion residuals ("CCR") in surface impoundments and landfills, including the CCR rule[2] promulgated under Subtitle D of the Resource Conservation Recovery Act ("RCRA") and the Steam Electric Power Generating ELG rule[3] under the Clean Water Act ("CWA"). During that time, USWAG has consistently encouraged EPA to appropriately consider and account for the potential intersection of the CCR rule and ELG rule requirements and to avoid duplicative and/or unnecessary regulatory requirements under those two programs. We echo that request here and note that such consideration is even more critical given the significant investments and operational changes facilities have made to meet the existing requirements of the CCR rule, particularly that rule's groundwater corrective action and closure

[1] USWAG, formed in 1978, is an association of over one hundred and thirty electric utilities, power producers, utility operating companies, utility service companies and utility trade associations. USWAG represents its members on a range of regulatory matters, including the management of coal combustion residuals in surface impoundments and landfills.

[2] 40 C.F.R. Part 257, Subpart D.

[3] 40 C.F.R. Part 243.

requirements. EPA should not take any action that would undermine these activities or impact facilities' ability to meet their obligations under the CCR rule.

This consideration is particularly relevant for EPA's proposed application of ELG requirements to combustion residual leachate (CRL) that is released to groundwater. As discussed in more detail below, the CCR rule already addresses these types of releases through extensive groundwater monitoring and corrective action requirements, which necessarily operate to protect downgradient surface waters. These are the appropriate controls for releases of leachate from CCR landfills and impoundments to groundwaters, not the CWA NPDES permitting program. Yet, EPA's Proposal unnecessarily inserts significant uncertainty into facility operations and, given that CWA point source discharges are not solid waste under RCRA, risks supplanting the CCR rule's carefully crafted groundwater program with controls that are not designed to address diffuse migration of contaminants into or through groundwater.

These issues are discussed in more detail below.

1. Typical releases of CRL from CCR surface impoundments and landfills to groundwater would not qualify as point source discharges subject to the CWA.

In the Proposal, EPA states that "unlined landfills and surface impoundments potentially discharge CRL through groundwater before entering surface water" and proposes "that any discharge through groundwater that is the functional equivalent of a direct discharge under the [*County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020)] decision would be subject to the same BAT limitations as discharges that occur at the end of the pipe."[4] The Agency solicits comments on the appropriateness of the Agency's proposed BAT findings and their application to any releases of CRL via groundwater that permitting authorities ultimately determine are subject to NPDES permitting.[5]

Despite these statements, EPA notably declines to address the definition of key terms in the CWA, such as "point source," because "such issues are outside the scope of this rulemaking."[6] But EPA should not simply ignore this threshold issue, which determines the applicability of the CWA NPDES requirements in the first instance. EPA's failure to address this fundamental issue will unnecessarily result in great uncertainty for permitting authorities and permittees.

Here, unlike *County of Maui*, where all parties agreed that the wells at issue fell within the definition of "point source," EPA has not clearly identified what it considers to be the "point source." The CWA defines a point source as "any discernible, confined and discrete *conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock … *from which pollutants are or may be discharged*."[7] This definition

[4] 88 Fed. Reg. 18824, 18850 (Mar. 29, 2023).

[5] *Id.*

[6] *Id.*

[7] 33 U.S.C. § 1362(14).

expressly requires a "discernible, confined discrete conveyance," something that carries an object to a particular place from another.[8] The point source "conveyance" must be the means by which pollutants are transported to and deposited into navigable waters, and the discharge of pollutants occurs only at the outfall where that conveyance adds pollutants to navigable waters. This "conveyance" is not present when, for example, leachate seeps from a CCR surface impoundment to groundwater.

This understanding of "point source" was confirmed in *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403, 410-411 (4th Cir. 2018) ("*VEPCO"*). There, the Fourth Circuit held that diffuse seepage of pollutants through the bottom of an ash pond and landfill did *not* qualify as the sort of "confined, discrete conveyance" required by the CWA's definition of point source. The court stated:

> Regardless of whether a source is a pond or some other type of container, the source must still be functioning as a conveyance of the pollutant into navigable waters to qualify as a point source. In this case, the diffuse seepage of water through the ponds into the soil and groundwater does not make the pond a conveyance any more than it makes the landfill or soil generally a conveyance.[9]

Because the parties in *County of Maui* agreed that the wells at issue were a "point source," the Supreme Court's decision in that case did not implicate this aspect of *VEPCO*. Nothing in the *County of Maui* decision, therefore, affects the Fourth Circuit's determination that diffuse seepage from an ash pond or landfill is not itself a point source.

To eliminate any uncertainty on this issue caused by EPA's Proposal, USWAG urges the Agency to clarify in the final rule that diffuse seepage of water from CCR units into groundwater does not qualify as a point source discharge, even if that seepage ultimately intersects with surface waters.

2. The CCR rule's groundwater protection measures cannot be applied to any point source discharges of CRL through groundwater to surface water.

As discussed above, typical seepage of leachate from CCR units to groundwater does not qualify as a point source discharge subject to the CWA NPDES permitting requirements. However, USWAG notes that applying the CWA NPDES requirements to this type of seepage would eliminate application of the CCR rule's groundwater protection requirements.

The scope of RCRA's regulatory reach is limited to "solid waste," as that term is defined by the statute.[10] Importantly, RCRA's definition of "solid waste" expressly excludes "*industrial discharges which are point sources subject to permits* under [the CWA Section 402 NPDES

[8] *Id.*

[9] *VEPCO*, 903 F.3d at 412.

[10] *See* 42 U.S.C. § 6901 *et seq*.

permitting program]."[11] Thus, point source discharges subject to NPDES permitting requirements are not subject to regulation under any rule promulgated pursuant to RCRA.

This statutory exclusion from RCRA regulation, commonly referred to as the "industrial wastewater exclusion," is designed to avoid duplicative regulation of point source discharges under RCRA and the CWA.[12] While wastewaters held on-site in treatment and holding facilities—such as surface impoundments—are subject to RCRA and its implementing regulations, point source discharges from those treatment and holding facilities fall solely within the province of the CWA.[13] Courts have consistently applied the RCRA industrial wastewater exclusion to "point source" discharges regulated under CWA Section 402, including point source discharges through groundwater to surface water.[14] And, notably, the industrial wastewater exclusion applies to point sources that *should* have an NPDES permit in place, whether in fact they do or not.[15]

In 1995, EPA's Office of Solid Waste and Emergency Response ("OSWER") issued a memorandum articulating the erroneous position that wastewater releases from treatment and holding facilities to navigable waters through groundwater do not fall within RCRA's industrial wastewater exclusion despite the fact that they are subject to the CWA's NPDES permitting requirements.[16] This position—which to USWAG's knowledge has never been applied in practice or subjected to judicial review—is contrary to RCRA's plain language at 42 U.S.C. § 6903, as well as subsequent judicial precedent.[17] The position also cannot be reconciled with the long-standing position of EPA's Office of Water that, in the case of a point source discharge to surface water through groundwater, the discharge to groundwater itself is the regulated discharge.[18] The fact is, if a discharge is subject to NPDES requirements, it is not subject to RCRA, even if RCRA clearly provides the more appropriate vehicle to address that discharge.

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[11] *Id.* § 6903 (emphasis added).

[12] *See* 45 Fed. Reg. 33084, 33098 (May 19, 1980).

[13] *See id.*; *see also* 40 C.F.R. § 261.4(a)(2) cmt. ("This exclusion [from RCRA's "solid waste" definition] applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge . . . .").

[14] *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997) (dismissing the plaintiff's RCRA claim on the grounds that the groundwater discharges at issue were subject to CWA NPDES permitting requirements); *Coldani v. Hamm*, Civ. No. S-07-660 RRB EFB, 2007 WL 2345016, at *10 (E.D. Cal. Aug. 16, 2007) (same); *State v. PVS Chemicals, Inc.*, 50 F. Supp. 2d at 177-78 (dismissing the plaintiff's RCRA claim on account of the industrial wastewater exclusion because otherwise the discharges at issue would be subject to duplicative regulation under both the CWA and RCRA).

[15] *See, e.g.*, *State v. PVS Chemicals, Inc.*, 50 F. Supp. 2d 171, 177-78 (W.D. N.Y. 1998) (finding that RCRA's industrial wastewater exclusion applies to *unauthorized* discharges of pollutants in violation of the CWA).

[16] *See* Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste, 1995 WL 911821 (Feb. 17, 1995).

[17] *See, e.g.*, *Williams*, 964 F. Supp. at 1328-39; *Coldani*, 2007 WL 2345016, at *10.

[18] *See, e.g.*, 56 Fed. Reg. 64876, 64892 (Dec. 12, 1991).

The result of this statutory scheme is clear: if seepage from a CCR unit to groundwater qualifies as a point source discharge, the stringent groundwater protection standards and corrective action requirements EPA developed to address groundwater contamination from CCR units are statutorily barred from being applied to that CCR unit precisely because it leaks contaminants to groundwater. Specifically, the moment CCR constituents are "discharged" from a "point source" into groundwater, they are "industrial discharges which are point sources subject to permits under [the CWA]" and thus no longer a "solid waste" under RCRA. As such, the facility would no longer be responsible for groundwater monitoring under the CCR rule for the affected CCR surface impoundment, nor would it be obligated to achieve the CCR rule's ultimate remedy: remediating the groundwater to the stringent groundwater protection standards expressly developed to provide for robust environmental and public health safeguards.

3. The CCR rule is the more appropriate regulatory program for addressing releases to groundwater.

The CCR rule, as compared to the CWA, is unquestionably the more appropriate regulatory program for identifying and remediating groundwater contamination from CCR units. The CCR rule establishes stringent requirements for the monitoring and remediation of any releases of CCR constituents into groundwater. Further, these extensive groundwater monitoring and corrective action requirements were designed specifically to address all attendant risks from coal ash disposal, including potential impacts to downgradient surface water.[19]

EPA put this comprehensive groundwater protection scheme in place to "ensure that groundwater contamination at new and existing CCR units will be detected and cleaned up as necessary to protect human health and the environment." [20] For example, the specific constituents for which monitoring is required are those found in coal ash.[21] If groundwater contamination is detected above background levels, the facility must undertake more "targeted" groundwater monitoring to determine whether the relevant contaminants are above the CCR rule's strict groundwater protection standards.[22] If those standards are exceeded, corrective action to remediate

[19] *See, e.g.*, 80 Fed. Reg. 21301, 21322 (noting that EPA's risk assessment developed for the CCR rule included consideration of the "potential impact from the interception of contaminated groundwater plumes by surface water bodies…").

[20] *Id.* at 21396.

[21] *Id*. at 21397; 40 C.F.R. Part 257, Appendices III and IV.

[22] 80 Fed. Reg. at 21404; 40 C.F.R. § 257.95(a). The groundwater protection standards imposed by the CCR Rule are strict. For most contaminants, the groundwater protection standard is set at the "maximum contaminant level" or "MCL," (40 C.F.R. § 257.95(h)(1)), which is the maximum level of a contaminant allowable in groundwater delivered to a user of a public water system (*id*. § 141.2). In other words, MCLs are drinking water standards set by EPA. Standards for monitored contaminants for which no MCL has been established are set either at background levels for the site in question or at an alternative health-based level selected by EPA. *Id*. § 257.95(h)(2)-(3); 83 Fed. Reg. 36435, 36444 (Jul. 30, 2018).

the groundwater is required and must continue until all contaminant levels are at or below the standard.[23]

The rule's comprehensive corrective action requirements are also stringent. Upon detecting an exceedance of a groundwater protection standard, a facility must undertake an assessment of potential corrective measures that will achieve the ultimate remedy required under the rule and hold a public meeting to discuss such measures.[24] The remedy selected must not only attain the groundwater protection standard, but also (1) be protective of human health and the environment, (2) control the source(s) of the releases to reduce or eliminate further releases of CCR constituents from the unit, (3) remove from the environment as much of the contaminated material that was released from the CCR unit as is feasible, and (4) comply with all applicable RCRA requirements for the management of wastes.[25] The CCR rule's corrective action provisions thus require the remediation of groundwater impacted by releases from CCR units and abatement of future groundwater contamination and any resulting downgradient impacts to surface water.

In contrast, the CWA NPDES program is not well-designed to regulate releases of pollutants via groundwater to surface water. Rather, the NPDES program focuses on treating end-of-pipe discharges directly into surface waters.[26] Establishing effluent limitations requires identifiable discharge points where the pollutant being added "into" a navigable water can be measured, but there is typically no identifiable outfall or discharge point that can be used to develop permit conditions where there is an addition via groundwater rather than an addition from a point source.

Finally, USWAG notes that EPA has a statutory obligation to harmonize the ELG and CCR rules, as required by RCRA Section 1006(b), which directs the Agency to "integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of . . . the Federal Water Pollution Control Act."[27] While EPA must perform such integration consistent with the goal and directives expressed in RCRA and the CWA, because both rules will be regulating the same activity—the management of CCR in disposal units—EPA must take steps, consistent with RCRA Section 1006(b), to ensure the integration and coordination in the development and implementation of the rules.

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[23] 40 C.F.R. §§ 257.96(a), 257.98(c).

[24] *Id*. § 257.96.

[25] *Id*. § 257.97(b).

[26] *See* 40 C.F.R. § 122.45(a) (requiring that effluent limitations, standards, and prohibitions be established "for each outfall or discharge point of the permitted facility").

[27] 42 U.S.C § 6905(b).

We appreciate the opportunity to submit these comments on this proposed rule. If we can be of further assistance, please contact me or USWAG counsel Maggie Fawal (mkfawal@venable.com; 202-344-4791).

Sincerely,



Daniel Chartier
USWAG Executive Director