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April 23, 2024

VIA Email

Ms. Michelle Lloyd
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Re: Late Submission of Comments from Geo-Hydro, Inc. in Legacy CCR Rulemaking, Docket No. EPA–HQ–OLEM–2020–0107

Ms. Lloyd:

I write on behalf of the Utility Solid Waste Activities Group ("USWAG")[1] regarding the late submission by Mr. Mark Hutson, P.G. of Geo-Hydro, Inc. critiquing USWAG's comments on EPA's Notice of Data Availability (NODA) regarding the proposed rulemaking for CCR legacy surface impoundments and CCR management units, 88 Fed. Reg. 77491 (Nov. 14, 2023). The comment period for the NODA ended on December 11, 2023. Rather than submit comments on information contained in the NODA itself, Mr. Hutson instead chose to wait until after the comment deadline ended and submit comments in response to USWAG's comments on the NODA.

These late-filed comments have been inappropriately added to the rulemaking record. USWAG thus requests that the Agency remove the posting from the docket. While Mr. Hutson couches his comments as a response to USWAG's comments, most of his comments are made to support EPA's Draft Risk Assessment. Mr. Hutson could (and should) have chosen to submit his own comments on the Draft Risk Assessment during the NODA public comment period. By choosing to ignore that deadline—a deadline that EPA declined to extend after USWAG and many others strongly urged an extension—Mr. Hutson has forfeited his right to have his comments considered by the Agency and reflected in the rulemaking record. EPA made clear in the NODA

[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 requirements related to the management and disposal of coal combustion residuals under the Resource Conservation and Recovery Act.

that it will not respond to late comments and that late comments will not be considered part of the rulemaking record.[2]

Furthermore, EPA did not put USWAG's NODA comments, or any other information the Agency received in response to the NODA, out for public comment. Nor does this rulemaking contain a "reply comment period."[3] By accepting Mr. Hutson's critique of USWAG's comments, the Agency has unfairly excluded other interested stakeholders with differing viewpoints from weighing in on the same issues. This problem is magnified by the Agency's failure to disclose the context in which Mr. Hutson's comments were received.[4] As recognized by the Administrative Conference of the United States, "once the comment period closes, the dangers associated with agency reliance on privately-submitted information become more acute. Interested persons may be particularly keen to discuss with the agency information provided in comments by other persons filed at or near the close of the comment period."[5] To the extent EPA intends to rely on any information submitted by Mr. Hutson, it has a duty to disclose the information (not quietly post the information to the docket) and provide the public with an opportunity to respond.[6]

In fact, Mr. Hutson's comments grossly misconstrue, or simply misunderstand, USWAG's comments on the NODA. These errors are discussed more fully in the attached response prepared by Gradient. To the extent the Agency does not remove Mr. Hutson's late-filed comments from the docket, we ask that this letter and attachment be added to the rulemaking record.

USWAG thanks EPA for its consideration of this letter and for its commitment to a fair and unbiased rulemaking process. If you have any questions, please feel free to contact me or USWAG counsel Maggie Fawal (mkfawal@venable.com; 202-344-4791) at Venable LLP.

Sincerely,

Daniel L Chartier

Daniel Chartier
USWAG Executive Director

cc: Cecilia De Robertis, EPA
Andy Crossland, EPA

Attachment

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[2] *See* 88 Fed. Reg. 77491, 77942 (Nov. 14, 2023).
[3] Compare with 42 U.S.C. § 7607(d)(5)(iv) (requiring EPA to keep the rulemaking record open for an additional 30 days after completion of a proceeding to allow submission of rebuttal comments).
[4] For example, if the submission was transmitted via email, the docket should include that cover email. If the submission was provided during a meeting with EPA, the Agency should include a memorandum to the docket summarizing that meeting. If Mr. Hutson's comments were developed on behalf of another organization, that should also be disclosed.
[5] Administrative Conference of the United States, "Ex Parte" Communications in Informal Rulemaking (June 25, 2014) (available at https://www.acus.gov/document/ex-parte-communications-informal-rulemaking).
[6] *Id.*

Responses to Comments by Mark Hutson Posted by US EPA to Docket for Legacy Surface Impoundments

Docket ID No. EPA-HQ-OLEM-2020-0107-0781

Prepared for

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April 23, 2024

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The document "Responses to USWAG Comments on Legacy Impoundment NODA" was posted by US EPA to the docket for the "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments" (Docket ID No. EPA-HQ-OLEM-2020-0107-0781) on February 1, 2024. The document provides comments prepared by Mr. Mark Hutson ("Hutson comments") (Hutson, 2024) in response to comments submitted by the Utility Solid Waste Activities Group ("USWAG comments") (USWAG, 2023) and the accompanying "Technical Evaluation of US EPA's October 2023 Draft Risk Assessment for Legacy Impoundments and Coal Combustion Residual Management Units (CCRMUs)" (Gradient, 2023). This document provides responses to the Hutson comments.

Hutson Comment #1

Mr. Hutson claims that US EPA does not have the ability to validate its legacy impoundment and CCRMU fill risk assessments, contrasting the assertion in the USWAG comments that data exist that should be used to validate US EPA's risk assessments (Gradient, 2023, p. 1). Mr. Hutson contends that "[c]omplete and accurate characterization of groundwater quality impacts would be necessary for EPA to meaningfully validate model results" (Hutson comments, p. 1). Moreover, Mr. Hutson contends that data on whether CCR units intersect groundwater is one of the "most critical pieces of information" (Hutson comments, p. 2) needed for US EPA to validate its model. Mr. Hutson concludes that (Hutson comments, p. 2)

> EPA has no basis upon which to identify monitoring data from sites that approximate conditions assumed in the model. Validation of EPA's model against a data set that reflects a variety of field conditions including many not reflected in the model assumptions would at best be questionable, and would likely provide misleading results.

Mr. Hutson's conclusion is that US EPA's model does not reflect the variety of conditions that exist in the field, **but that is the explicit purpose of US EPA's model**: "to characterize the risks associated with management practices across the United States" (US EPA, 2023a, p. 7-1). US EPA claims to present risks that represent reality, and reality is composed of the variety of conditions that exist in the field.

US EPA described the purpose and scope of its 2014 risk assessment as "to best reflect the variability of disposal practices, environmental conditions, and receptor behavior across the country" (US EPA, 2023a, p. 1-2). US EPA used the same approach for the 2023 draft risk assessment. While EPA purports to have incorporated "more recent data" (US EPA, 2023a, p. 1-2) into the 2023 draft risk assessment, Gradient (2023) identified a large set of more recent data that EPA failed to use. Given that US EPA's modeling goal is to quantify risks that may actually occur at CCR sites, Mr. Hutson's comment that the model assumptions do not reflect field conditions and the USWAG comments that US EPA should validate its model using the large array of available data point to the same issue as discussed in Gradient (2023):

- **US EPA has not used the best available data to conduct its risk assessment; and**
- **the calculated risks are not realistic.**

Mr. Hutson's assertion is nonsensical—discrepancies between modeled and measured data indicate problems with the model, not the data.

Mr. Hutson's claim that US EPA would need information on whether CCR units are in constant or intermittent contact with groundwater to validate its model disregards US EPA's modeling approach. US EPA has claimed that it was "unable to quantitatively model" the risks associated with "CCR disposal below

the water table" (US EPA, 2023b, p. 32009). In US EPA's CCRMU fill risk assessment, "CCRMU Fills were not allowed to be placed in direct contact with the groundwater table" (US EPA, 2023a, p. 4-3). Information regarding whether CCR data are associated with ash in contact with the water table would thus not change US EPA's modeling approach.

Hutson Comment #2

Mr. Hutson notes that "[f]ill size is just one of an array of factors" that may be predictive of the nature and extent of downgradient contaminants in response to discussions of unit size in the USWAG comments. The USWAG comments discussed unit size because US EPA highlighted unit size as one of three areas with "potential for risks from historical and inactive disposal units to meaningfully diverge from those previously modeled" (US EPA, 2023a, p. 3-1; see also Section 3.3 of US EPA [2023a] titled "Unit Size").

Further, Mr. Hutson agrees that risks associated with CCRMU fills are related to unit size and decrease with decreasing CCRMU fill size ("risk associated with CCRMU fills increases as fill area increases until risk plateaus at around 30 acres" [Hutson comments, p. 2]). This contrasts the rest of his comment and reemphasizes the original point in the USWAG comments—**size is a key factor for CCRMU fills because they are frequently smaller than 30 acres**.

Mr. Hutson further states that (Hutson comments, p. 2)

> Modeling conducted by EPA for this Risk Assessment (2023 Risk Assessment, Figure 3-2) showed that risk associated with CCRMU fills increases as fill area increases until risk plateaus at around 30 acres. These results are not particularly surprising since CCRMU fills are typically not constructed and closed with the same level of protections as are landfills and impoundments.

The results shown in US EPA's Figure 3-2, however, are not new modeling results conducted by US EPA for its 2023 draft risk assessment, but are, in fact, results for landfills from the 2014 risk assessment. As described by US EPA, "EPA reviewed the results of previous model runs to understand the effect of unit size on landfill risks" (US EPA, 2023a, p. 3-6). Mr. Hutson's basis for his comment #2 is thus unfounded.

Hutson Comment #3

Mr. Hutson postulates that, in contrast to trends based on unit size, CCRMU fill risks should be greater than risks from landfills and impoundments because CCRMU fills have fewer closure requirements. Mr. Hutson appears to misunderstand the modeling performed by EPA.

First, the risks calculated by US EPA for impoundments do not account for closure. In the 2014 risk assessment (US EPA, 2014), US EPA "chose to model all surface impoundments during the active stage of their lifecycle under the assumption the constant presence of a hydraulic head would result in the highest releases" (US EPA, 2023a, p. 2-4). Differences in closure procedures would thus not be a factor explaining why calculated risks from CCRMU fills would be greater than risks from impoundments.

Second, the closure assumptions that US EPA used for unlined landfills are consistent with the assumptions used to model CCRMU fills. In the 2014 risk assessment (US EPA, 2014), US EPA modeled unlined landfills with a simple soil cover of two feet (US EPA, 2014, p. 4-8). For CCRMU fills, US EPA assumes

"at least 2 ft of soil cover" (US EPA, 2023a, p. 4-3). Thus, closure using a simple soil cover would not be a factor explaining why calculated risks from CCRMU fills would be greater than risks from unlined landfills, as asserted by Mr. Hutson (Hutson comments, p. 3).

Hutson Comments #4-7, 10

Mr. Hutson makes several comments (Hutson comments numbers 4, 5, 6, 7, and 10) relating to the influence of impounded water on releases from historical and legacy surface impoundments. Mr. Hutson confuses "standing water above the ash surface" with impounded water despite the distinctions detailed in Gradient (2023) Section 2.1:

> US EPA defines free water to include standing water above the ash surface and porewater in the CCR (US EPA 2023b, pp. 31992-31993). These two types of free water are important to distinguish. US EPA has acknowledged on multiple occasions that impounded, drainable water provides the hydraulic head that forces leachate into subsurface soils and is the mechanism that drives risks (US EPA, 2015, p. 21342).
>
> "EPA's risk assessment shows that the highest risks are associated with CCR surface impoundments due to the hydraulic head imposed by impounded water. Dewatered CCR surface impoundments will no longer be subjected to hydraulic head so the risk of releases, including the risk that the unit will leach into the groundwater, would be no greater than those from CCR landfills."

…

> Porewater within ash may or may not cause a hydraulic head. For example, porewater in the ash at or below its residual saturation level will not readily separate from the ash and, thus, does not cause a hydraulic head. In reality, during the post-operational phase of an impoundment's lifecycle, when there is no standing water overlying the ash surface, porewaters in the ash will drain over time until they reach residual saturation, the point at which they no longer cause a hydraulic head and or induce leachate migration into the subsurface in the manner described by US EPA's CSM for active impoundments.

Mr. Hutson interprets Gradient (2023) as implying that only standing water above the ash surface can cause a hydraulic gradient. Mr. Hutson quotes more than 300 words from Gradient (2023) and then proceeds to claim that "[t]his section of the USWAG comments continues their contention that the risk from a CCR surface impoundment is largely driven by whether or not there is visible standing water over the ash surface" (Hutson comments, p. 7). But the quoted USWAG comments do not contain the phrase "visible standing water" and instead repeatedly refer to impounded, drainable water, ponding depth, and hydraulic head.

Mr. Hutson's comments further describe a hydraulically impossible scenario where groundwater flows "radially away from the source" (Hutson comments, p. 5) supplemented by "laterally inflowing groundwater" (Hutson comments, p. 6). Groundwater flows in the direction of decreasing hydraulic gradient (Freeze and Cherry, 1979). Groundwater cannot both flow radially away from a location and flow laterally into that same location.

US EPA has noted across decades of its CCR publications that for surface impoundments, "much of the risk from these units is driven by the hydraulic head imposed by impounded units" (US EPA, 2015, p.

21342). The "[r]elease of leachate is driven by the ponding of water in the impoundment" (US EPA, 2003, p. xxviii), and:

> releases from surface impoundments drop dramatically after closure, even with waste in place. This is because the large hydraulic head present during operation forces leachate into the underlying soils at a faster rate, resulting in higher releases to ground water than can occur postclosure. Based on these findings, EPA concluded that the assumption of clean closure has a negligible effect on modeled risks. (US EPA, 2014, p. 5-28 to 5-29)

As discussed in USWAG's comments, CCRMU, by definition, are no longer in operation and do not function "very much like active impoundments" (Hutson comments, p. 5).

Hutson Comment #8

Mr. Hutson challenges the use of boron as an indicator of CCR-related impacts, stating that data for boron are "much too limited to support the conclusion that groundwater quality necessarily improves after operations cease" (Hutson comments, p. 8). But the use of indicator compounds for analysis is common; for example, US EPA (2023a, p. 3-4) focuses on a single compound for its analysis of unit size. Boron, in-particular, is a leading indicator for coal ash impacts due to its high mobility. As noted by US EPA (2018, p. 11589):

> out of all the coal ash constituents modeled by EPA, boron has one of the shortest travel times, meaning that boron is likely to reach potential receptors before other constituents. As such, including it on Appendix IV would ensure corrective action occurs soon after a potential release, prior to the appearance of slower-moving constituents hydrologically downstream from the source of contamination.

Boron "was used as an indicator parameter in model analyses for all three impoundments" in EPRI (2001, p. 5-2), which is cited several times in Mr. Hutson's comments.

Mr. Hutson also questions the composition of the sluice water, although it is not clear from Mr. Hutson's comments why he expects the composition of the sluice water to impact trends and relative declines in downgradient concentrations. Mr. Hutson appears to agree that "[o]nce leakage of boron-enriched sluice water was reduced, impacts to some wells were reduced" (Hutson comments, p. 8), consistent with concentrations declining in the post-operational stage of surface impoundments (see Section 3.3 in Gradient [2023]).

Hutson Comment #9

Mr. Hutson quotes USWAG's comment that (Gradient, 2023, p. 12):

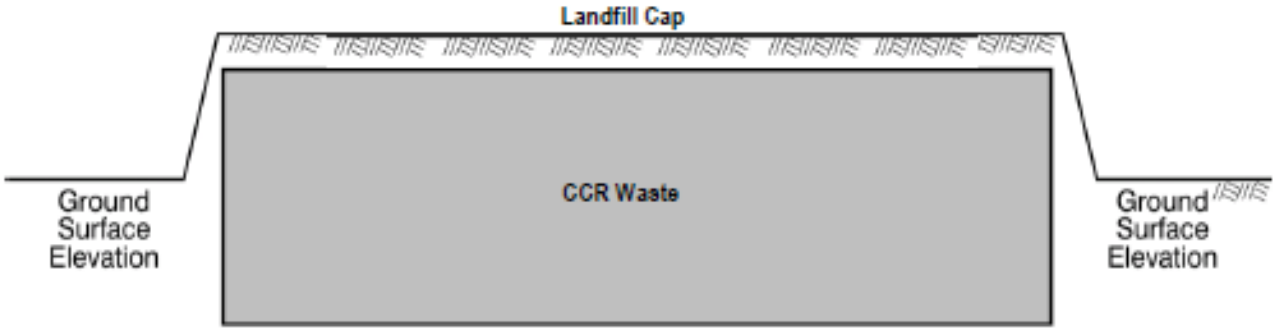
> The risk for previously excluded unlined landfills is not clearly stated in US EPA's risk assessment (US EPA, 2023a), but based on the modeling inputs provided by US EPA (US EPA, 2023a, Attachment C-1), the calculated 90th percentile risk for unlined previously excluded landfills is 1×10^{-5}.

Mr. Hutson cites US EPA (2014) Table 5-4 and states that the 90th percentile risk for unlined landfills is 2 x 10^{-5} (Hutson comments, p. 9). The evaluation in the USWAG comments, as described in the quote above, was for unlined landfills **previously excluded from the 2014 risk assessment** (US EPA, 2023a, see Section 3.1 titled "Previously Excluded Units"). Mr. Hutson's citation to the 2014 risk assessment is therefore irrelevant.

Hutson Comment #11

Mr. Hutson challenges USWAG's comment that "[t]he conceptual model for CCRMU fills used by US EPA closely resembles the conceptual model for landfills modeled by US EPA (Figure 6.1) in its 2014 Risk Assessment (US EPA, 2014)" (Gradient, 2023, p. 15). Mr. Hutson's comment also thus appears to challenge US EPA's own statement that "the conceptual model for fills mirrors that of a landfill" (US EPA, 2023a, p. 2-6). The diagrams shown in Figure 6.1 of Gradient (2023) are illustrative, and are repeated below.

(a)



(b)

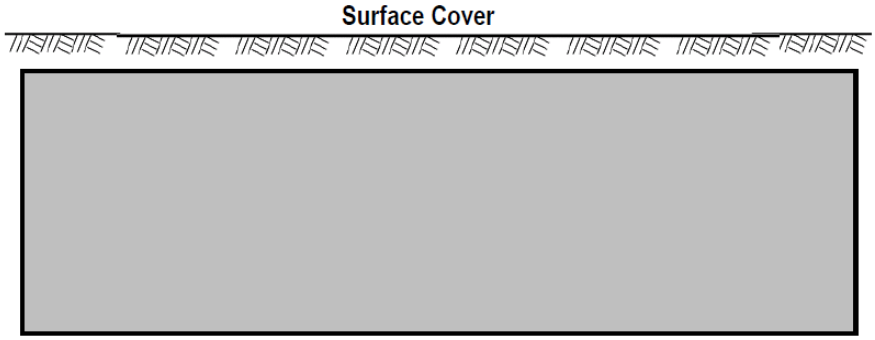


Figure 6.1 (a) Conceptual Model of a Landfill Used by US EPA (b) Conceptual Model of a CCRMU Fill Used by US EPA. CCRMU = Coal Combustion Residual Management Unit; US EPA = United States Environmental Protection Agency. Sources: Figure 2.4 from US EPA (2014a); Figure 2-4 from US EPA (2023a).

Mr. Hutson's comment repeats his earlier argument that the landfill cap and surface cover are significantly different. As discussed in response to Hutson comment #3, above, similar cap designs were used in US EPA's models. In the 2014 risk assessment (US EPA, 2014), US EPA modeled unlined landfills with a simple soil cover of two feet (US EPA, 2014, p. 4-8). For CCRMU fills, US EPA assumes "at least 2 ft of soil cover" (US EPA, 2023a, p. 4-3).

Hutson Comment #12

Mr. Hutson's comment is unclear, but appears to be a continuation of Mr. Hutson's misinterpretation that Figure 3-2 in US EPA (2023a) presents new modeling results for CCRMU. As discussed in response to Hutson comment #2, the results shown in US EPA's Figure 3-2 are not new modeling results; they are results for landfills from the 2014 risk assessment.

Hutson Comment #13

Mr. Hutson quotes the statement that "[i]n the 2014 risk assessment, the 90th percentile cancer risks for the ingestion of groundwater with arsenic III were 2×10^{-4} for SIs, and 5×10^{-6} for landfills (Table 7.1; US EPA, 2014)" (Gradient, 2023, p. 18) and comments that Gradient "appears to be mistaken" (Hutson comments, p. 10), citing to Table 5-4 of US EPA (2014).

As the citation in Table 7.1 in Gradient (2023) indicates, however, US EPA (2014, p. 4-17) reports 90th percentile cancer risks for the ingestion of groundwater with arsenic III were 2×10^{-4} for impoundments, and 5×10^{-6} for landfills. Figure 1 shows an image of the relevant page from US EPA (2014) for additional clarity. The value that Mr. Hutson cites pertains to 90th percentile risk for unlined landfills only.

Section 4 *Probabilistic Analysis*

Table 4-2. 90th Percentile Nationwide Risk Results for Human Health

COPC	Surface Impoundments		Landfills	
	Drinking Water Ingestion	Fish Ingestion	Drinking Water Ingestion	Fish Ingestion
Carcinogenic Effects				
Arsenic III	**2×10^{-4}**	2×10^{-7}	5×10^{-6}	–

Figure 1 Abridged Table 4-2 from US EPA (2014, p. 4-17).

Hutson Comment #14

Mr. Hutson challenges whether "institutional controls should be assumed to be effective" (Hutson comments, p. 10). Mr. Hutson then presents site examples without any discussion of whether institutional controls were used. The purpose of these examples is unclear. As discussed in Gradient (2023) and the referenced US EPA reports, institutional controls "play a key role in ensuring long-term protectiveness and should be evaluated and implemented with the same degree of care as is given to other elements of the remedy" (US EPA, 1995, p. 10).

Hutson Comment #15

Mr. Hutson counters the comment that "US EPA (2023a) unrealistically restricts receptors to being located only on the plume centerline" (Gradient, 2023, p. 22) with the statement that "wells might be placed along the centerline of a plume from a CCRMU fill" (Hutson comments, p. 11). The possibility that wells might be placed along the centerline of a plume, however, is captured by allowing the location of a receptor well to vary within the areal extent of a groundwater plume as was modeled in US EPA (2014). As discussed in Gradient (2023), US EPA's modified assumptions and inputs relative to the 2014 risk assessment may result in changes to risk results that exceed multiple orders of magnitude and have not undergone review comparable to the 2014 risk assessment.

Hutson Comment #16

Mr. Hutson repeats statements from his comment numbers 1-4 in response to the USWAG comment that US EPA's modeled concentrations are unrealistically higher than some active CCR units. The above responses to those earlier comments (Hutson comments #1-4) address the errors in Mr. Hutson's rationale.

Hutson Comment #17

Mr. Hutson argues that undiluted CCR can be used for risk assessment and comparison to background. However, he cites examples of undiluted CCR fill disposal that are not appropriate to the residential scenario (*i.e.*, directly living atop fill) evaluated in US EPA's 2023 draft risk assessment. No detail is provided in Mr. Hutson's examples to explain how such exposures would allegedly occur, including whether constructing residential buildings directly atop CCRMU fill would be structurally feasible. Mr. Hutson essentially introduces a new scenario envisioning direct residential exposure to completely undiluted fill. This scenario escalates the conservatism in US EPA's risk assessment even further from the two scenarios already included: 1) the moderate modeled scenario where a house is built atop buried CCRMU fill (for which EPA models low risks and does not assert a need for regulation); and 2) a simplistic, additional scenario where surface soil is disturbed and mixed with 8 to 17 percent CCRMU fill (Gradient, 2023). It is not appropriate to compare background to 100 percent CCRMU fill for any of the scenarios in the risk assessment, and the differences for the other scenarios do not exceed 5 pCi/g.

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