

June 7, 2019

Via www.regulations.gov

Attn: Scott Wilson
Office of Wastewater Management
Water Permits Division (MC4203M)
United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Comments on Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater
Docket ID No. EPA-HQ-OW-2019-0166

To whom it may concern:

The Utility Solid Waste Activities Group (“USWAG”)¹ submits these comments to the Environmental Protection Agency (“EPA” or the “Agency”) on the Agency’s Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater, published in the Federal Register on April 23, 2019 (84 Fed. Reg. 16811) (the “Interpretive Statement”).

USWAG supports the Agency’s decision to issue the Interpretive Statement clarifying that releases to surface water through hydrologically-connected groundwater are not discharges subject to the Clean Water Act (“CWA”) § 402 National Pollutant Discharge Elimination System (“NPDES”) permitting program. The Interpretive Statement is both appropriate and necessary to help rectify any ongoing confusion surrounding this issue.

As EPA accurately sets forth in the Interpretive Statement, the CWA simply is not applicable to groundwater releases, including releases to groundwater that is hydrologically connected to surface water. While USWAG agrees with the Agency’s rationale supporting the Interpretive Statement, USWAG’s comments below are focused on one narrow issue raised

¹ USWAG is an association of over one hundred and thirty utilities, utility operating companies, energy companies, and associations, including the Edison Electric Institute (“EII”), the American Public Power Association (“APPA”), and the National Rural Electric Cooperative Association (“NRECA”). Together, USWAG members represent more than 73% of the total electric generating capacity and 91% of the nation’s coal-fired generation, and service more than 95% of the nation’s consumers of electricity.

therein: that Congress intended certain releases to groundwater be addressed under the Resource Conservation and Recovery Act (“RCRA”).

Our comments address this point by explaining first in Section I how RCRA and the groundwater monitoring and corrective action regulatory programs promulgated thereunder are specifically designed to protect against groundwater contamination from solid and hazardous waste disposal units, including releases to groundwater that is hydrologically connected to surface water. In addition to the specific groundwater protections in RCRA’s solid and hazardous waste programs, releases to groundwater also can be addressed under RCRA’s imminent and substantial endangerment provisions. Section I thus demonstrates that RCRA was designed to comprehensively address certain releases to groundwater.

We then explain in Section II why RCRA and the CWA cannot *both* apply to such releases. Specifically, Congress statutorily excluded industrial discharges subject to CWA § 402 from the definition of “solid waste” under RCRA. In light of this statutory scheme, we explain that applying CWA § 402 to releases to groundwater that is hydrologically connected to surface water leads to an absurd result: groundwater protection standards and corrective action requirements developed under RCRA designed to address groundwater contamination from solid waste disposal could be statutorily barred from being applied to certain solid waste units precisely because those units release contaminants to groundwater. This makes no sense and underscores that the CWA § 402 NPDES permitting program was never intended to apply to groundwater contamination.

Finally, we discuss in Section III why RCRA’s groundwater monitoring and corrective action provisions are unquestionably the more appropriate regulatory vehicle for identifying and remediating groundwater contamination from disposal units as compared to the CWA’s NPDES permitting program. In contrast to RCRA’s comprehensive groundwater controls, the NPDES “end-of-pipe” discharge requirements are wholly ill-suited for groundwater contamination; indeed, it is far from clear whether NPDES permitting requirements even can be practically applied to diffuse groundwater migration.

USWAG encourages EPA to include these additional policy rationales as support for its Interpretive Statement. And, as further detailed below, the Agency should revise its previous statements to make clear that NPDES permitting requirements do not apply to releases to groundwater from a CCR unit, even if such releases ultimately reach jurisdictional waters.

I. Congress comprehensively addressed certain releases to groundwater under RCRA.

In the Interpretive Statement, EPA rightfully recognizes that multiple federal statutes explicitly address the regulation of groundwater and that these statutes, together with other state programs, “form a mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters.”² In particular, the Agency highlights several provisions of RCRA that address groundwater monitoring and remediation. As detailed further below, these provisions—

² 84 Fed. Reg. at 16811, 16824 (Apr. 23, 2019).

and the regulations promulgated by EPA pursuant to RCRA—provide comprehensive and protective standards for the management and disposal of solid and hazardous waste, including stringent protections for potentially impacted groundwater. In fact, for all solid and hazardous waste regulatory programs, facilities are required to closely monitor groundwater quality and undertake corrective action, as necessary, when releases to groundwater are detected.³

Of particular importance for USWAG, EPA has promulgated comprehensive federal standards governing the disposal of coal combustion residuals (“CCR”) in surface impoundments and landfills.⁴ The CCR Rule, issued pursuant to RCRA’s non-hazardous waste “Subtitle D” provisions, is designed to ensure “no reasonable probability of adverse effects on health or the environment” from the disposal of CCR.⁵ These regulations were the result of three decades of detailed study into the risks associated with CCR disposal practices and represent EPA’s determination of how best to regulate these practices in light of those risks. The CCR Rule therefore touches all aspects of CCR disposal, including monitoring for and remediation of any releases of CCR constituents into groundwater.⁶

The CCR Rule’s extensive groundwater monitoring and corrective action requirements were designed specifically to address the risks from CCR disposal, including potential impacts to groundwater and downgradient surface waters. 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.”⁷ For example, the specific constituents for which monitoring is required are those found in CCR.⁸ 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 Rule’s groundwater protection standards.⁹ If those standards are exceeded, corrective action to remediate the groundwater is required and must continue until all contaminant levels are at or below the standard.¹⁰

The Rule’s comprehensive corrective action requirements are similarly rigorous. Upon detecting an exceedance of a groundwater protection standard, a facility must undertake an

³ See 40 C.F.R. §§ 257.21-.29 (non-municipal solid waste landfill rules); §§ 257.90-.98 (coal combustion residuals rules); §§ 258.50-.58 (municipal solid waste landfill rules); §§ 264.90-.101 (hazardous waste rules). See also 40 C.F.R. §§ 257.3-4 (sanitary landfill rules prohibiting contamination of groundwater).

⁴ See 40 C.F.R. Part 258, Subpart D (the “CCR Rule” or “Rule”).

⁵ See 80 Fed. Reg. 21302, 21311 (Apr. 17, 2015); 42 U.S.C. § 6944(a).

⁶ In light of recent statutory amendments to RCRA Subtitle D specifically altering the implementation and enforcement scheme underlying the CCR Rule, EPA has proposed revisions to the CCR rule allowing for the use of certain risk-based alternative protection standards based on site-specific circumstances. 83 Fed. Reg. 11584 (Mar. 15, 2018). USWAG has submitted comments supporting these proposed changes.

⁷ 80 Fed. Reg. at 21396.

⁸ *Id.* at 21397; 40 C.F.R. Part 257, Appendices III and IV.

⁹ 80 Fed. Reg. at 21404; 40 C.F.R. § 257.95(a).

¹⁰ 40 C.F.R. §§ 257.96(a), 257.98(c).

assessment of potential corrective measures that will achieve the ultimate remedy required under the Rule and hold a public meeting to discuss such measures.¹¹ 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.¹² 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 addition to the specific groundwater protections in RCRA's solid and hazardous waste programs, releases to groundwater can also be addressed under RCRA's imminent and substantial endangerment provisions. For example, citizen suits can be brought against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."¹³ EPA has similar authority.¹⁴ Where releases to groundwater present an imminent and substantial endangerment to health or the environment, such releases can be addressed pursuant to these provisions.

II. Discharges of pollutants subject to CWA § 402 are excluded from RCRA regulation.

RCRA's statutory reach is limited to "solid waste," as that term is defined by the statute.¹⁵ Specifically, RCRA's definition of "solid waste" expressly excludes "*industrial discharges which are point sources subject to permits* under [CWA Section 402]."¹⁶ Thus, point source discharges subject to NPDES permitting requirements are *not* subject to regulation under any rule promulgated pursuant to RCRA or under RCRA's imminent and substantial endangerment provision.

This statutory exclusion, commonly referred to as the "industrial wastewater exclusion," is designed to avoid duplicative regulation of point source discharges under RCRA and the CWA.¹⁷ 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

¹¹ *Id.* § 257.96.

¹² *Id.* § 257.97(b).

¹³ 42 U.S.C. § 6972(a)(1)(B).

¹⁴ *Id.* § 6973.

¹⁵ *See id.* § 6901 *et seq.*

¹⁶ *Id.* § 6903 (emphasis added).

¹⁷ *See* 45 Fed. Reg. 33084, 33098 (May 19, 1980).

from those treatment and holding facilities fall solely within the province of the CWA.¹⁸ Notably, the industrial wastewater exclusion applies to point sources that *should* have an NPDES permit in place, whether in fact they do or not.¹⁹

Courts have consistently applied the RCRA industrial wastewater exclusion to “point source” discharges regulated under CWA Section 402. For example, the district court in *Williams Pipe Line Co. v. Bayer Corp.* explicitly recognized that if releases to groundwater with a hydrologic connection to surface water are considered point source discharges under the CWA, then those discharges—in this case, discharges from above-ground tanks—are *excluded* from the definition of “solid waste” and *not* subject to RCRA regulation.²⁰ The district court in *Coldani v. Hamm* came to the same conclusion.²¹ After holding that releases from an animal feeding operation to groundwater with a hydrologic connection to a jurisdictional surface water were subject to CWA NPDES permitting requirements, the court dismissed the plaintiff’s RCRA claim on the grounds that such releases constituted “point source” discharges excluded from RCRA’s definition of solid waste.²² While the district courts in *Williams* and *Coldani* wrongly decided the issue of NPDES applicability to groundwater releases, the decisions nevertheless appropriately recognized that, where releases are subject to the NPDES program, they are statutorily excluded from RCRA regulation.²³

In light of this statutory scheme, applying NPDES permitting requirements to releases to groundwater that is hydrologically connected to surface water leads to an absurd result: groundwater protection standards and corrective action requirements developed under RCRA and specifically designed to address groundwater contamination from solid waste disposal would be statutorily barred from being applied to any solid waste units that meet the CWA “point source” definition and release contaminants to groundwater with a hydrologic connection to jurisdictional surface waters. Such facilities would therefore not be responsible for groundwater monitoring

¹⁸ 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 . . .”).

¹⁹ 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).

²⁰ 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997); see also *PVS Chemicals, Inc.*, 50 F. Supp. at 177-78 (dismissing the plaintiff’s RCRA claim on the grounds that the discharges at issue were subject to the CWA NPDES permitting requirements).

²¹ No. S-07-660 RRF EFB, 2007 WL 2345016 (E.D. Cal. Aug. 16, 2007).

²² *Id.* at *10.

²³ See also *Ecological Rights Found., v. Pac. Gas & Elec.*, 874 F.3d 1083, 1096 (9th Cir. 2017) (recognizing the exclusion from RCRA’s definition of solid waste for CWA industrial point source discharges); *Ky. Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925, 937 (6th Cir. 2018) (“Reading the CWA to cover groundwater pollution like that at issue in this case would upend the existing regulatory framework. RCRA explicitly exempts from its coverage any pollution that is subject to CWA regulation.”).

under RCRA's array of groundwater monitoring programs (including both hazardous waste and non-hazardous waste disposal units regulated under the statute).²⁴

Nor would these facilities be obligated to achieve applicable RCRA corrective action requirements, which include remediating the groundwater to stringent groundwater protection standards expressly developed to provide for robust environmental and public health safeguards. This ironic and perverse result underscores the fact that Congress never intended to apply the CWA to groundwater releases, and EPA should include this additional policy rationale as support for the Interpretive Statement.

USWAG notes that, in response to questions regarding the relationship between the CCR rule and CWA NPDES permitting requirements, EPA previously made certain statements that are not consistent with the position articulated in the Interpretive Statement.²⁵ USWAG therefore encourages the Agency to revise those statements to make clear that NPDES permitting requirements do not apply to releases to groundwater from a CCR unit, even if such releases ultimately reach jurisdictional waters.

III. RCRA is better suited to address releases to groundwater.

As compared to the CWA's NPDES permitting program, RCRA's groundwater monitoring and corrective action provisions are the more appropriate regulatory vehicle for identifying and remediating groundwater contamination from disposal units. Indeed, because water quality-based NPDES requirements are developed specifically for "end-of-pipe" discharges made directly into surface waters, it is far from clear whether such requirements even can be practically applied to diffuse groundwater migration.

Under the NPDES program, permits are developed to include applicable technology-based effluent limitations, as well as any additional limitations required to ensure that a permitted discharge does not cause or contribute to the violation of a water quality standard applicable to the receiving "navigable water."²⁶ Such standards consist of the designated uses of a "navigable water," as well as the water quality criteria—including, among others, aquatic life, human health, and biological criteria—necessary to achieve those uses.²⁷ Importantly, because water quality-

²⁴ 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 groundwater that is hydrologically connected to a "navigable water" do not fall within RCRA's industrial wastewater exclusion despite the fact that they are subject to the CWA's NPDES permitting requirements. *See* Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste, 1995 WL 911821 (Feb. 17, 1995) ("memorandum"). This position is contrary to RCRA's plain language at 42 U.S.C. § 6903, as well as subsequent judicial precedent (*see, e.g., Williams*, 964 F. Supp. at 1328-39; *Coldani*, 2007 WL 2345016, at *10).

²⁵ *See* Relationship Between the Resource Conservation and Recovery Act's Coal Combustion Residuals Rule and the Clean Water Act's National Pollutant Discharge Elimination System Permit Requirements, available at <https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule>.

²⁶ 40 C.F.R. § 122.44(a), (d).

²⁷ 33 U.S.C. §§ 1313, 1314.

based NPDES permit limits are developed solely for the receiving “navigable water,” they are not—like the CCR Rule and other RCRA groundwater monitoring programs—designed to protect the groundwater itself. Indeed, depending on the “designated uses” of the “navigable water,” the standards applied to groundwater seepage under the CWA may be less protective than those required by RCRA, which applies consistent standards for groundwater protection to all disposal units, regardless of location.

There are likewise significant practical hurdles to applying NPDES permitting requirements to groundwater releases. For example, the NPDES permitting process often entails significant scientific studies and calculations. With respect to diffuse groundwater migration, however, it may be difficult to determine where the groundwater ultimately connects with a “navigable water.” As such, there may not be any readily identifiable points that can be used for purposes of calculating effluent limitations and conducting necessary sampling and monitoring.²⁸ Likewise, it may not be possible to conduct required sampling and monitoring because those locations may be miles away and beyond the owner or operator’s control. Additionally, groundwater will likely contain contaminants from a host of other sources that leach and/or percolate into the same groundwater source, making permit limits and compliance difficult to determine.

Factors such as flow rates and water chemistry could further make applying NPDES regulations impractical. For example, unlike traditional “end of pipe” discharges, at various times of year, flows can change and surface water can flow back into groundwater—a contingency that NPDES regulations do not account for.

RCRA, by contrast, allows regulators to take a more comprehensive approach to environmental protection.²⁹ For example, the CCR Rule was specifically designed and promulgated to address the environmental, health, and safety risks associated with CCR disposal units, including risks to both groundwater and surface water. While the CCR Rule’s groundwater monitoring protections are directly applicable to the groundwater, they necessarily operate to protect downgradient surface waters as well.

In fact, when Congress enacted RCRA, EPA itself emphasized the need to include protections applicable to groundwater releases from land disposal units. Specifically, EPA stated that “[t]he importance of the [CWA’s] distinction between point and nonpoint sources cannot be overemphasized from a hazardous waste management viewpoint, for discharges from point sources *only* are subject to the [CWA’s] regulatory controls. . . . Since the types of pollutant discharges normally associated with improperly managed hazardous waste disposal facilities are runoff into navigable waters and *migration into groundwater supplies*, it seems safe to conclude

²⁸ See 40 C.F.R. Part 122 Subpart C.

²⁹ See, e.g., *Meghrig v. KFC W., Inc.* 516 U.S. 479, 483 (1996) (“RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste.”); see also H.R. Rep. No. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241-42 (Unpermitted disposal of pollutants “on the land in an environmentally unsound manner. . . often result[ed] in air pollution, subsurface leachate and surface run-off, which affect air and water quality. [RCRA aimed to] eliminate this problem and permit the environmental laws to function in a coordinated and effective way.”).

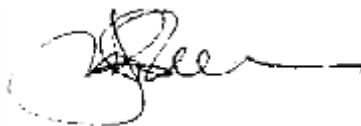
that, unless a disposal facility discharges toxic pollutants into a waterway through a ‘discernible, discrete conveyance,’ such as an outfall pipe, it will be exempt from the [CWA’s] proscriptions.”³⁰

* * *

EPA’s Interpretive Statement will help preserve the appropriate role of RCRA in the protection of groundwater and downgradient surface water. Application of the NPDES program to groundwater releases, on the other hand, would weaken the very groundwater protections EPA developed to promote the more uniform and comprehensive regulation of solid waste disposal. As explained above, such an expansion of the CWA’s NPDES permitting program would necessarily preclude application of EPA’s stringent RCRA groundwater regulations to seepage from *any* solid waste disposal unit that constitutes a “point source” into groundwater that is hydrologically connected to a “navigable water.” EPA’s interpretive statement will help avoid this nonsensical result by clarifying that the NPDES program does not apply to releases to groundwater.

USWAG thanks EPA for the opportunity to provide comment on the Interpretive Statement. Please contact me if you require further information or have questions about these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Roewer', with a long horizontal flourish extending to the right.

James R. Roewer
Executive Director
Utility Solid Waste Activities Group

³⁰ Legislative History of the Resource Conservation and Recovery Act of 1976 P.L. 94-580, Report to Congress by the EPA Pursuant to Section 212 of the Solid Waste Disposal Act, As Amended 19 (June 1974) (second emphasis added).