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May 21, 2018

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 Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water; Request for Comment
Docket ID No. EPA-HQ-OW-2018-0063

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 Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water; Request for Comment, published in the Federal Register on February 20, 2018 (83 Fed. Reg. 7126) (the "Request for Comment").

USWAG strongly encourages the Agency to declare, through notice and comment rulemaking, that releases to surface water through hydrologically-connected groundwater are not discharges subject to the Clean Water Act ("CWA") § 402 NPDES permitting program. As set forth in the comments of EEI and the Utility Water Act Group ("UWAG"), the CWA simply is not applicable to groundwater releases, including releases to groundwater that is hydrologically connected to surface water. Rather than repeat those comments here, however, USWAG's comments below demonstrate that Congress intended these releases to be addressed under other federal programs, specifically 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

[1] USWAG is an association of over one hundred and thirty utilities, utility operating companies, energy companies, and associations, including the Edison Electric Institute ("EEI"), 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.

specifically designed to protect against groundwater contamination from solid and hazardous waste disposal units, including contamination 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 releases to groundwater.

We then explain in Section II why RCRA and the CWA cannot *both* apply to such releases. This is because Congress sought to preclude duplicative regulation by statutorily excluding 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 and specifically designed to address groundwater contamination from solid waste disposal would be statutorily barred from being applied to solid waste units precisely because those units have released contaminants to groundwater. This makes no sense and underscores why the CWA § 402 NPDES permitting program does not and 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 comprehensive groundwater controls, the NPDES "end-of-pipe" discharges 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.

Given this, it is absolutely essential for EPA to state unambiguously through a formal rulemaking proceeding that CWA § 402 does not apply to releases to surface water through hydrologically-connected groundwater. These points are discussed below.

## I. Releases to groundwater are addressed under RCRA and the Agency's implementing regulations.

EPA specifically requests comment on whether releases to groundwater "are addressed adequately . . . through other existing federal regulations and permit programs" (*i.e.*, non-CWA regulations and permit programs).[2] The answer to this question is undoubtedly yes. RCRA, and the regulations promulgated by EPA pursuant to that statute, provide comprehensive and protective standards for the management and disposal of solid and hazardous waste. And these regulations include stringent protections for groundwater. In fact, for all solid and hazardous waste regulatory

[2] 83 Fed. Reg. at 7128.

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 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

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[3] *See* 40 C.F.R. §§ 257.3-4 (sanitary landfill rules), §§ 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).
[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).
[11] *Id.* § 257.96.

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.

Of critical importance to these comments is the fact that the scope of 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 [the CWA Section 402 NPDES permitting program]."[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 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.[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 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. Of particular relevance here, the district court in *Williams Pipe Line Co. v. Bayer Corp.* explicitly recognized that if discharges to surface

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[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).
[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).

water from hydrologically-connected groundwater are considered point source discharges under the CWA, then the discharges—in this case, discharges from above-ground tanks—are *excluded* from the definition of "solid waste" and *not* subject to RCRA regulation, thus leading the court to dismiss the plaintiff's collateral RCRA claim applying to the same discharges.[20] The district court in *Coldani v. Hamm* came to the same conclusion.[21] After holding that point source discharges from animal feeding operations to groundwater that is hydrologically connected to surface water are subject to CWA NPDES permitting requirements, the court dismissed the plaintiff's RCRA claim on grounds that such point source discharges are excluded from RCRA's definition of solid waste.[22] While USWAG believes the district courts in *Williams* and *Coldani* wrongly decided the issue of CWA applicability to groundwater discharges, the decisions nevertheless appropriately recognized that point source discharges regulated under the CWA are statutorily excluded from RCRA regulation.[23]

In light of this statutory scheme, 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 and specifically designed to address groundwater contamination from solid waste disposal would be statutorily barred from being applied to solid waste units precisely because those units have released contaminants to groundwater. Specifically, under this theory, the moment constituents are released from disposal units into hydrologically-connected groundwater—assuming such releases can be deemed "point source" discharges in the first instance, which is contrary to the CWA's definition of that term[24]—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, facilities would no longer be responsible for groundwater monitoring under RCRA's array of groundwater monitoring programs (including both hazardous waste and non-hazardous waste disposal units regulated under the statute).[25]

Nor would these facilities be obligated to achieve applicable RCRA corrective action remedies. For example, CCR surface impoundments subject to the CCR Rule would not have to meet the CCR Rule's ultimate corrective action remedy: remediating the groundwater to the stringent groundwater protection standards expressly developed to provide for robust

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[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).

[24] *See* 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 21 (June 1974) ("EPA Report to Congress") (recognizing that land disposal sites are *nonpoint* sources).

[25] 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).

environmental and public health safeguards. This ironic and perverse result underscores the fact that Congress never intended to apply the CWA to groundwater releases.

## III. RCRA is the regulatory program 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 unquestionably the more appropriate regulatory vehicle for identifying and remediating groundwater contamination from disposal units. Indeed, because NPDES requirements are developed specifically for "end-of-pipe" discharges directly into surface waters, it is far from clear whether NPDES permitting 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 discharges must meet standards under the NPDES permitting scheme that 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 of RCRA, which apply 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—if not impossible—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. And aspects such as flow rates and chemistry could further make applying NPDES regulations impractical. By way of 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. It is even more impractical to account for these

[26] 40 C.F.R. § 122.44(a), (d).
[27] 33 U.S.C. §§ 1313, 1314.
[28] *See* 40 C.F.R. Part 122 Subpart C.

NPDES permit control variabilities at abandoned and/or inactive sites, where the more appropriate regulatory program for groundwater remediation is CERCLA[29] and its state-counterparts.

RCRA, by contrast, allows regulators to take a more comprehensive approach to environmental protection.[30] 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.

And in fact, when Congress enacted RCRA, EPA itself emphasized the need to fill gaps created by the CWA, including protections specifically 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 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."[31]

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EPA should not disregard the role of RCRA in protecting groundwater and downgradient surface water. Doing so would weaken the very groundwater protections EPA developed to promote the more uniform and comprehensive regulation of solid waste disposal. These implications extend beyond CCR disposal units to all other similarly situated disposal units. As explained above, RCRA's Subtitle C hazardous waste program and the Subtitle D regulations for municipal solid waste landfills have groundwater monitoring and corrective action programs similar to the CCR Rule. Therefore, seepage from *any* solid waste disposal unit into groundwater that is hydrologically connected to a "navigable water" would require an NPDES permit and *not* be subject to the groundwater monitoring and corrective action requirements issued pursuant to RCRA. EPA should avoid such a nonsensical result and take immediate steps to declare unambiguously that the CWA does not apply to releases to surface water through hydrologically-connected groundwater.

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[29] 42 U.S.C. §§ 9601, *et. seq.*

[30] *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.").

[31] EPA Report to Congress at 19 (second emphasis added).

USWAG thanks EPA for the opportunity to provide input on this Request for Comment. Please contact me if you require further information or have questions about these comments.

Sincerely,

James R. Roewer
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