

Attorneys General of Maryland, Pennsylvania, Illinois, Michigan, and Vermont

January 21, 2020

Via Electronic Transmission

Administrator Andrew R. Wheeler
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure (EPA-HQ-OLEM-2019-0172; FRL-10002-02-OLEM); Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (EPA-HQ-OW-2009-0819; FRL-10002-04-OW)

Dear Administrator Wheeler:

The undersigned Attorneys General respectfully submit these comments on the proposed rules titled A Holistic Approach to Closure Part A: Deadline to Initiate Closure (EPA-HQ-OLEM-2019-0172; FRL-10002-02-OLEM) (“the Coal Ash Proposal”)¹ and Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (EPA-HQ-OW-2009-0819; FRL-10002-04-OW) (“the ELG Proposal”).² As explained below, we oppose any effort to weaken, roll back, or improperly extend the deadlines for compliance with either the closure requirements applicable to coal ash impoundments or the effluent limitation guidelines applicable to power plants that generate coal ash and related pollutants. We therefore urge the Environmental Protection Agency (“EPA”) to retreat from those aspects of the Coal Ash and ELG Proposals that would ease existing requirements or provide unwarranted extensions of the compliance deadlines.

Although federal law generally allows states to regulate the activities at issue more stringently than federal law, EPA’s proposed rollbacks and deadline extensions will harm our interests in multiple respects. Groundwater and surface waters within our respective borders are interconnected to upstream out-of-state waters, and thus vulnerable to pollution discharged outside our boundaries. Leaking and overflowing coal ash impoundments have contaminated groundwater and surface waters alike. Effluent limitation guidelines, for their part, are meant to protect the quality of surface waters, including those that flow downstream into our states. Our states thus rely on federal regulation to ensure a stable nationwide regulatory floor protecting against pollution crossing our borders. Further, state law may pose impediments to regulating more stringently than EPA, so that the agency’s actions, in practical terms, serve not just as a regulatory floor but also as a regulatory ceiling.

¹ 84 Fed. Reg. 65,941 (Dec. 2, 2019).

² 84 Fed. Reg. 64,620 (Nov. 22, 2019).

Our states are submitting a single comment letter in both dockets because of the interrelated nature of the Coal Ash and ELG Proposals. *See* 84 Fed. Reg. at 64,626. The pollutants deposited in coal ash impoundments (the subject of the Coal Ash Proposal) are, as a general matter, byproducts of the activities subject to the ELG Proposal. To the extent that the ELG Proposal results in more waste routed to these impoundments, the demands for additional impoundment capacity will be correspondingly greater. And to the extent that unlined coal ash impoundments are permitted to continue operating, the power plants subject to the ELG Proposal will have less incentive to find other ways of complying with applicable effluent limitations.

In multiple respects, the Coal Ash Proposal and the ELG Proposal are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In the Coal Ash Proposal, EPA has unlawfully ignored recent data showing the heightened environmental and public health risks posed by unlined coal ash impoundments. The proposal appears to allow consideration of cost and convenience in granting impoundments more time to close, in flagrant violation of RCRA and the D.C. Circuit’s pronouncements. It arbitrarily and irrationally allows impoundments to take advantage of the newly expanded alternative closure provisions even if their closure obligations have been clear since 2015. It fails to delete the regulatory exemption for “legacy ponds” that the D.C. Circuit held was arbitrary and capricious. And in contravention of RCRA’s mandate to encourage public participation, the Coal Ash Proposal has not even been the subject of an in-person hearing.

As for the ELG Proposal, we take particular objection to EPA’s proposed creation of more lenient subcategories for boilers whose owners intend to retire them by December 31, 2028, as well as “low-utilization” boilers. To support these subcategories, EPA offers little more than speculative concerns about the reliability of the electrical grid and conclusory statements about cost. In actuality, the proposed subcategories are just one more subsidy for dirty, non-economical coal plants at the expense of public health and the environment.

I. THE POLLUTANTS AND ACTIVITIES AT ISSUE

When power plants burn coal, the resulting waste—coal combustion residuals, or coal ash—includes a host of toxic chemicals, such as arsenic, lead, and mercury. *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 421 (D.C. Cir. 2018) (“*USWAG*”). These chemicals pose numerous dangers to human health, including cancer, cardiovascular effects, and neurological effects. *Id.* The risks to infants are particularly acute. *Id.* Coal ash and its constituents are also dangerous to fish, birds, amphibians, and plants. *Id.* And the amounts of coal ash generated by coal-fired power plants are staggering: 110 million tons in 2012, by EPA’s calculation. *Id.* at 420.

Historically, power plants have disposed of coal ash in surface impoundments—but surface impoundments are prone to leak or rupture, endangering soil, groundwater, and surface water. By way of one example, in 2008 a release of coal ash sludge from an impoundment in Kingston, Tennessee contaminated the Emory River, made fish unsafe to eat, and polluted hundreds of acres of land. *Id.* at 423. Impoundments without a lining (or with an insufficient lining) separating the coal ash from the soil are especially prone to leaks. *Id.* at 422. Also posing particular dangers are “legacy ponds,” or inactive impoundments at inactive power plants, because they generally are

both unlined (so that they are prone to leak) and unmonitored (so that leaks are less likely to be detected). *Id.* at 422-23.

Coal-fired power plants generate a variety of wastewater streams, too, sometimes as a by-product of efforts to extract pollutants that otherwise would dirty the air. The wastewater that these plants discharge can include arsenic, lead, mercury, and selenium. Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838, 67,840, 67,872 (Nov. 3, 2015). Uncontrolled discharges can harm the quality of receiving waters, accumulate in fish, and contaminate drinking water, with consequences including “cancer, cardiovascular disease, neurological disorders, kidney and liver damage, and lowered IQs in children.” *Id.* at 67,840. Bottom ash transport water, one of the two wastewater streams at issue in this rulemaking, is water that has been used to transport relatively heavy ash particles from the furnace to an impoundment or dewatering bin. *Id.* at 67,846. The other, flue gas desulfurization wastewater, contains pollutants resulting from the removal of sulfur dioxide from flue gas. *Id.*

II. THE COAL ASH PROPOSAL UNLAWFULLY PROVIDES TOO MUCH LATITUDE TO OWNERS AND OPERATORS OF COAL ASH IMPOUNDMENTS.

The Coal Ash Proposal purports to address the D.C. Circuit’s vacatur of certain regulatory provisions and remand of others. 84 Fed. Reg. at 65,943; *see USWAG*, 901 F.3d 414; *Waterkeeper Alliance Inc. v. EPA*, No. 18-1289 (Mar. 13, 2019). In fact, the Coal Ash Proposal is inconsistent with applicable law (including the D.C. Circuit’s decision in *USWAG*), is arbitrary and capricious, and rewards impoundments’ owners and operators for disregarding their legal obligations.

A. Background

Subtitle D of RCRA prohibits the disposal of “nonhazardous” solid waste in open dumps. 42 U.S.C. § 6945(a). To enable implementation of this prohibition, the statute requires EPA to promulgate criteria for determining whether particular solid waste disposal facilities are “sanitary landfills” (which are allowed) or “open dumps” (which are prohibited). *Id.* §§ 6907(a)(3), 6944(a). Categorization as a sanitary landfill, rather than an open dump, requires—at a minimum—that there be “no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.” *Id.* § 6944(a). Thus, for a surface impoundment to be classified as a sanitary landfill, there must be “no reasonable probability” of such effects. Otherwise, it is an impermissible open dump.

EPA proposed to regulate coal ash under RCRA in 2010. *See* 75 Fed. Reg. 35,128 (June 21, 2010). Ultimately, in 2015, EPA issued a final rule governing disposal of coal ash in landfills and surface impoundments, effectively determining which such facilities are open dumps. *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (“the 2015 Coal Ash Rule”). Among other things, the rule established location restrictions for coal ash impoundments; requirements relating to impoundments’ lining and structural integrity; compliance deadlines; and procedures for closing noncompliant impoundments. *See* 40 C.F.R. §§ 257.50 to .107. It also required unlined impoundments to initiate closure (or retrofitting) within six months after detecting leaks into groundwater. *Id.* § 257.101(a)(1).

Emphasizing the “no reasonable probability of adverse effects” standard, the D.C. Circuit concluded that the 2015 Coal Ash Rule was insufficiently protective in multiple respects. *See USWAG*, 901 F.3d at 449-50. The court repeatedly faulted EPA for understating or ignoring overwhelming evidence of the dangers to the environment and public health posed by unlined or leaking coal ash impoundments. *See id.* at 429, 431-32. It held that EPA’s approach to unlined impoundments—requiring closure or retrofitting only after detection of leaks—was “arbitrary and contrary to RCRA.” *Id.* at 429. It also held that EPA had acted unlawfully in treating clay-lined impoundments as if they were lined, rather than unlined. The court further concluded that EPA had acted unlawfully in exempting “legacy ponds,” or inactive impoundments at inactive power plants, from the rule’s closure requirements. *Id.* at 432; *see id.* at 433 (stressing that “[t]he risks posed by legacy ponds are at least as substantial as inactive impoundments at active facilities”). And it rejected a variety of challenges by industry, including (as relevant here) a claim that the rule’s “alternative closure” provisions, which allow owners and operators to delay initiating closure in certain circumstances, were required to take into account the cost and inconvenience associated with closure. *Id.* at 449.

B. The Coal Ash Proposal Is Arbitrary and Capricious in Ignoring Post-2015 Data Showing Heightened Risks to the Environment and Public Health.

Despite the widespread and serious environmental health risks associated with unlined coal ash impoundments, the Coal Ash Proposal rests on an inadequate assessment of risk. The 2015 Coal Ash Rule rested on a risk assessment conducted in 2014. The Coal Ash Proposal itself admits, however, that “more recent data suggest that a greater number of units are leaking than EPA originally estimated during the [2015] rulemaking.” 84 Fed. Reg. at 65,945. It also states that the agency “has learned that some units were constructed such that the base of the unit is located within the underlying aquifer, conditions that were not evaluated in the 2014 risk assessment.” *Id.* Yet the Coal Ash Proposal forswears a new risk assessment because (1) “this new information is not presented in a form that can be readily incorporated into a nationwide risk assessment”; and (2) “given the expedited timeframe needed to complete the reconsideration of the deadline for a unit to cease receiving waste and initiate closure, EPA was unable to develop a nationwide risk assessment of continued operation of these units.” *Id.*

These are not adequate reasons to proceed on the basis of data that EPA knows are outdated. Whatever the steps associated with generating an altogether new risk assessment, EPA now has access to extensive nationwide data regarding groundwater contamination at coal ash impoundments, by virtue of the monitoring and reporting requirements put in place by the 2015 Coal Ash Rule. *See* 40 C.F.R. §§ 257.105(g), 257.107(h). Notably, the Environmental Integrity Project has compiled and analyzed these data, concluding that “groundwater beneath virtually all coal plants is contaminated” by a variety of pollutants, including undisputed carcinogens and neurotoxins. Environmental Integrity Project, *Coal’s Poisonous Legacy* (Mar. 4, 2019), at 4. It is arbitrary and capricious to ignore these data. More specifically, without adequately accounting for the risks associated with coal ash impoundments, EPA cannot rationally conclude that those impoundments should be allowed to continue operating for an extended period, via alternative closure provisions or otherwise, in order to avoid hypothetical disruptions in the supply of electricity. *Compare* 84

Fed. Reg. at 65,945 (asserting that “many utilities currently could not immediately cease the placement of wastestreams into their surface impoundments without causing potentially significant disruptions to plant operations and thus the provision of electricity to their customers”).

C. The Coal Ash Proposal Contravenes RCRA and USWAG by Allowing Consideration of Cost and Convenience.

RCRA requires EPA to ensure that disposal of coal ash yields “no reasonable probability of adverse effects on health or the environment.” 42 U.S.C. § 6944(a). That mandate, *USWAG* made clear, does not allow for consideration of costs or convenience. 901 F.3d at 448-49. In *USWAG*, the court rejected industry petitioners’ argument that exemptions from the 2015 Coal Ash Rule’s closure requirements must take into account cost and convenience. It first observed that, in the context of the Clean Air Act, if Congress instructs EPA to “regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read as implicitly allowing the agency to consider cost anyway.” *USWAG*, 901 F.3d at 448 (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015)). *USWAG* then applied this principle to RCRA: “Under any reasonable reading of RCRA,” the court emphasized, “there is no textual commitment of authority to the EPA to consider costs in the open-dump standards.” *Id.* The court further reasoned that, even though “[e]xcluding consideration of costs and convenience may narrow the alternative closure exemption, . . . including cost and convenience would appear to violate RCRA’s statutory mandate and run afoul of Supreme Court precedent.” *Id.* at 449 (emphasis in original).

Although EPA’s present proposal pays lip service to these pronouncements, it allows cost and convenience to be smuggled back into the alternative closure provisions. EPA first states that “an increase in costs or inconvenience is not sufficient support” for an owner or operator’s certification that “[n]o alternative disposal capacity is available on-site or off-site.” 84 Fed. Reg. at 65,953. But then, after outlining the two demonstrations that a facility may make to qualify for alternative closure, the agency states that “[n]either [of these] demonstrations may rely *solely* on cost considerations as EPA cannot grant additional time on this basis.” *Id.* at 65,954 (emphasis added). EPA thus seems to envision that, notwithstanding the lack of “textual commitment of authority to the EPA to consider costs,” it will consider costs alongside other considerations. Similarly, the proposal states that if an owner operator seeking to take advantage of the alternative closure provisions “provides *no evidence other than* increased cost or inconvenience,” then “EPA will consider the submission incomplete and will return it to the owner/operator without further action.” *Id.* (emphasis added). Again, EPA’s proposal suggests that as long as they are accompanied by other evidence, cost and convenience are fair game. Indeed, EPA’s proposal affirmatively allows an owner or operator to explain “why other [alternate capacity] options that could have been implemented sooner were not selected.” *Id.* at 65,955. If those options “could have been implemented sooner,” then by definition they are technically feasible, and a decision *not* to implement them is likely (if not certainly) a decision based on cost or convenience.

RCRA and the *USWAG* decision bar EPA from allowing cost and convenience to enter the picture in this manner. Rather, as *USWAG* emphasized, RCRA permits classification of a coal ash disposal site as a sanitary landfill, rather than an open dump, only “if there is no reasonable prob-

ability of adverse effects on health or the environment from disposal of solid waste at such facility.” 42 U.S.C. § 6944(a); *see USWAG*, 901 F.3d at 449. That “no reasonable probability” standard has nothing to do with cost. *See id.*

D. The Coal Ash Proposal Arbitrarily and Capriciously Gives More Time to Owners and Operators That Have Known About Their Closure Obligations for Years.

EPA’s proposal irrationally accommodates impoundment owners and operators that have long been aware of their closure obligations. EPA issued the 2015 Coal Ash Rule on April 17, 2015. That rule, by its terms, required closure of a large swath of CCR impoundments. The *USWAG* mandate, which issued on October 15, 2018, swept in “a small group of surface impoundments that were either formerly certified as ‘clay-lined’ or that were unlined, but not leaking and compliant with all location standards.” 84 Fed. Reg. at 65,953. By EPA’s own calculations, only “approximately 45 impoundments” covered by *USWAG* “were not required to close prior to the *USWAG* decision and would not have conducted any preliminary planning for such an activity.” *Id.*

EPA proposes to allow “*all* CCR surface impoundments required to close under § 257.101(a)[] and (b) to be eligible” for extensions under the expanded alternative closure provisions. 84 Fed. Reg. at 65,953 (emphasis added). Yet for the lion’s share of impoundments, the closure obligation has long been clear, as it predated *USWAG*. Indeed, the overwhelming majority of impoundments are leaking. *See* Environmental Integrity Project, *Coal’s Poisonous Legacy*, at 13 (reporting that, of the 265 sites that the 2015 Coal Ash Rule required to post groundwater monitoring data, 91 percent had unsafe groundwater); *cf. USWAG*, 901 F.3d at 427 (“It is inadequate under RCRA for the EPA to conclude that a major category of impoundments that the agency’s own data show are prone to leak pose ‘no reasonable probability of adverse effects on health or the environment’ simply because they do not already leak.” (citation omitted)).

Even if alternative closure provisions were appropriate for some subset of impoundments required to close, that subset should be limited to the impoundments that the rule newly encompasses as a result of *USWAG*. Owners and operators of other impoundments plainly have known of their closure obligations at least since 2015, when EPA finalized the 2015 Coal Ash Rule. Providing these impoundments with more time to close, on the apparent premise that 22.5 months from the *USWAG* mandate might not be enough, would be arbitrary and capricious and would reward owners and operators for nearly 3.5 years of delay. EPA cannot lawfully privilege industry convenience over public health and the environment in this manner.

E. The Coal Ash Proposal Violates RCRA and Contravenes USWAG by Failing to Delete the Vacated Legacy Ponds Exception.

We are troubled by EPA’s failure to revise its regulations to account for the *USWAG* treatment of the 2015 rule’s exemption for “legacy ponds,” or inactive impoundments at inactive power plants. *See* 40 C.F.R. § 257.50(e). *USWAG* vacated that exemption, which applied regardless of the impoundments’ lined or leaking status, as “unreasoned, arbitrary, and capricious.” 901 F.3d at 434. The court recognized that these impoundments “pose the same substantial threats to human

health and the environment as the riskiest Coal Residuals disposal methods, compounded by diminished preventative and remediation oversight due to the absence of an onsite owner and daily monitoring.” *Id.* at 432; *see id.* at 433 (“Simply hoping that somehow there will be last-minute warnings about imminent dangers at sites that are not monitored, or relying on cleaning up the spills after great damage is done and the harm inflicted[,] does not sensibly address those dangers.”); *see also id.* at 422 (noting EPA’s acknowledgment that “it will not always be possible to restore groundwater or surface water to background conditions after a contamination event”). Especially in light of these threats, the court held that “EPA’s decision to shrug off preventative regulation makes no sense.” *Id.*

Having been vacated, the legacy ponds exemption retains no legal force. In spite of that vacatur, however, the exemption remains on the books, and EPA states that it “will be addressed in a subsequent rulemaking.” 84 Fed. Reg. at 65,943. Any attempt to revive the exemption in that rulemaking would fly in the face of *USWAG*. In the meantime, to forestall any claim of confusion on the part of responsible parties, we urge EPA to remove the legacy ponds exemption from the codified regulations immediately, just as it has proposed to remove the other provisions vacated by the *USWAG* decision.

F. By Not Holding an In-Person Hearing on the Coal Ash Proposal, EPA Has Failed to Adhere to RCRA’s Public Participation Requirements.

Finally, EPA’s failure to hold an in-person hearing on the Coal Ash Proposal violates RCRA. The statute requires EPA to promulgate solid waste management guidelines, including minimum criteria “to define those solid waste management practice which constitute the open dumping of solid waste or hazardous waste,” only “after public hearings.” 42 U.S.C. § 6907(a), (a)(3). In an apparent effort to satisfy this hearing requirement, EPA held a “virtual” hearing on the proposed rule. That hearing consisted merely of an opportunity to offer comments online, in a setting that would keep EPA’s proposal out of the public spotlight. While a virtual hearing undoubtedly has the benefit of enabling remote participation, it cannot substitute for an in-person hearing. That is particularly true in view of RCRA’s mandate that “[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” 42 U.S.C. § 6974(b). Before taking any further action, EPA must conduct an in-person hearing on its proposed rule, consistent with RCRA’s mandate to encourage public participation in the regulatory process.

III. THE ELG PROPOSAL SUFFERS FROM MULTIPLE FLAWS.

Vigorous implementation of the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) permitting program ensures that discharges to navigable waters comply with permits that take into account the capabilities of treatment technologies, impacts on water quality, and the Act’s overall goal of protecting the nation’s waters. More specifically, federal effluent limitation guidelines provide a stable regulatory floor that guides nationwide permitting and enforcement and protects our surface waters.

This regulatory floor is important to our states. The minimum nationwide standards required by the Clean Water Act protect our waters against upstream, out-of-state pollution that we cannot regulate directly. Although pollutants discharged in one state can travel downstream to the waters of another, states typically cannot apply their own water pollution laws to polluters outside their boundaries. *See generally International Paper Co. v. Ouelette*, 479 U.S. 481, 491-97 (1987). Robust effluent limitation guidelines protect our states by ensuring that upstream, out-of-state point source discharges are subject at least to minimum standards applicable nationwide. A strong federal regulatory floor empowers us to protect our surface waters without fear that other states will undermine these efforts. And although federal law may permit states to regulate more stringently than EPA, there may be state-law or other impediments to doing so, causing EPA's actions to serve not just as a regulatory floor but also as a regulatory ceiling.

Against that backdrop, we are broadly concerned that EPA is unduly weakening, or delaying implementation of, effluent limitation guidelines applicable to the steam electric generating sector. Here, we write to emphasize two particular aspects of the ELG Proposal that constitute unjustifiable subsidies to dirty and uneconomical coal-fired power plants, by means of carve-outs from generally applicable effluent limitation guidelines. Neither of these carve-outs rests on any distinction in the harms caused by the pollutants at issue, and both should be withdrawn.

A. Background

The Clean Water Act's primary objective is to restore and maintain the integrity of the nation's waters. 33 U.S.C. § 1251(a). To that end, it generally prohibits point source discharges of pollutants into navigable waters unless those discharges are authorized by permits under the National Pollutant Discharge Elimination System (NPDES) program. *Id.* §§ 1311(a), 1342. Such permits must incorporate, among other things, effluent limitations based on the pollution reduction achievable through the use of particular controls or technologies. *Id.* §§ 1311(b), 1342(a)(1). To guide the issuance of NPDES permits, EPA issues effluent limitation guidelines applicable to particular categories of point sources.

In 2015, EPA revised the effluent limitation guidelines for steam electric power generating sources, a category that includes coal-fired power plants. 80 Fed. Reg. at 67,838. The 2015 regulations "set the first federal limitations on the levels of toxic metals in wastewater that can be discharged from steam electric facilities, based on technology improvements in the steam electric power industry over the preceding three decades." 84 Fed. Reg. at 64,624. As of 2015, the wastewater from such facilities "account[ed] for about 30 percent of all toxic pollutants discharged into surface waters by all industrial categories regulated under the [Clean Water Act]." 80 Fed. Reg. at 67,839-40.

Among other waste streams, the 2015 effluent limitation guidelines addressed the discharge of bottom ash transport water and flue gas desulfurization wastewater, both of which result from the operation of coal-fired power plants. *See, e.g., id.* at 67,850, 67,852-53. Those regulations provided that the subcategory of plants with a nameplate generating capacity of 50 MW or less would be subject to more lenient effluent limitations. *Id.* at 67,857. EPA subsequently postponed the earliest compliance date for the new effluent limitation guidelines from November 1, 2018 to November 1, 2020. 84 Fed. Reg. at 64,625.

The ELG Proposal would revise the effluent limitation guidelines applicable to the discharge of bottom ash transport water and flue gas desulfurization water from existing coal-fired power plants. Among other things, it would create new subcategories of plants subject to less stringent effluent limitations. Two of these subcategories are arbitrary and capricious for the reasons set forth below.

B. EPA’s Proposed Subcategorization of End-of-Life Boilers Is Arbitrary and Capricious.

EPA’s proposal to create a more lenient subcategory for boilers whose owners claim they will retire by December 31, 2028, *see* 84 Fed. Reg. at 64,640-41, is arbitrary and capricious. EPA’s primary rationale seems to be that these owners should not have to invest in equipment or technology necessary to meet more stringent effluent limitations if the costs of investments cannot be spread over a long enough period. *See id.* at 64,640. To the extent that EPA’s position is that an overly short amortization period could cause power plants to accelerate their timeline for closing, the ELG Proposal offers nothing to elevate this possibility (much less the possibility of meaningful impacts on grid reliability) beyond the realm of mere speculation. *See id.* (citing study “identifying the reliability risks *if* large baseload coal and nuclear facilities were to bring their projected retirement dates forward,” and noting that “this stress test is not a predictive forecast” (emphasis added)); *id.* (stating generally that “additional flexibility may help to avoid premature closures for some facilities and/or boilers”).

Further, to the extent that these investments merely make a power plant less profitable to operate in the years before it closes, EPA does not explain why it is fair to require the public to bear the costs of the pollution that results from subjecting the boiler to less stringent effluent limitations. Notably, the ELG Proposal itself admits that surface impoundments—the proposed BAT basis for boilers retiring by 2028—“are not as effective at controlling pollutants like dissolved metals and nutrients as available and achievable technologies like [chemical precipitation] and [low hydraulic residence time biological reduction].” 84 Fed. Reg. at 64,634.

Those boilers whose owners currently intend to retire them by 2028, moreover, may be among those for which robust water pollution controls are particularly urgent. If closure is on the horizon for these boilers, they may have forgone the sorts of improvements that are more likely when a plant is relatively early in its life. Not only that, but their expected imminent closure suggests that they are already economically marginal, potentially giving their owners a further incentive to cut corners when it comes to pollution controls. One cause of a plant’s economically marginal status, moreover, may be its relative inefficiency—*i.e.*, its reliance on more coal to generate a particular amount of energy.

No more persuasive is EPA’s statement that subcategorization of boilers expected to retire by 2028 “would ensure that facilities could make better use of the CCR rule’s alternative closure provision, by which an unlined surface impoundment could continue to receive waste and complete closure by 2028.” 84 Fed. Reg. at 64,641. That rationale amounts to a kind of polluter-friendly bootstrapping: the alternative closure provision is broadly available only because EPA has chosen to make it so, out of a concern about the need to develop alternative capacity. It verges on

the absurd for EPA to now use the provision to justify measures that increase the amount of waste routed to surface impoundments in the first place. That rationale strongly suggests that creating this less-regulated subcategory is just a subsidy for non-economical, dirty plants that may have been benefiting from other regulatory rollbacks already. *See, e.g., id.* at 64,625 (discussing replacement of Clean Power Plan with Affordable Clean Energy rule).

Further, even if a facility declares its intent to close by 2028, that stated intent remains unenforceable: the ELG Proposal does not prevent a facility owner from announcing that it will close by 2028, but then changing its mind as that date approaches. *See* 84 Fed. Reg. at 64,666. EPA does seem to envision that, in such circumstances, the facility owner may become subject to more stringent effluent limitations. *See id.* (stating that a facility that voluntarily withdraws or delays its retirement “should carefully plan its implementation of the ELGs”). But in the meantime, the facility will have operated under inappropriately lax effluent limitations for years. And the ELG Proposal seems to offer facilities yet another way out: in the case of retirement delays or withdrawals resulting from “involuntary orders and agreements,” a savings clause in permits “would protect a facility which involuntarily fails to qualify for the subcategory . . . , and would allow that facility to prove that, but for the order or agreement, it would have qualified for the subcategory.” *Id.* The existence of such a savings clause improperly creates an incentive and opportunity for facility owners to characterize delayed or withdrawn retirements as “involuntary” when they are anything but that.

C. EPA’s Proposed Subcategorization of Low-Utilization Boilers Is Arbitrary and Capricious.

EPA should not create a more lenient subcategory for boilers with “low utilization,” either. *See* 84 Fed. Reg. at 64,638-39. Once again, EPA’s principal reason for proposing this subcategory is cost: according to EPA, the more stringent standards will impose “disparate costs” on low-utilization boilers and, if the costs are passed on, “would make these boilers increasingly uncompetitive.” *Id.* Once again, that reason is inadequate. Even if EPA is correct that the more stringent standards would be more costly (per MWh) for these boilers than for others, the proposal does not explain why those costs are so excessive as to warrant an exception resulting in increased water pollution. And although EPA asserts that low-utilization boilers’ “continued operation is useful, if not necessary, for ensuring electricity reliability in the near term,” *id.* at 64,639, it provides no reason to conclude that adhering to more stringent standards will actually *hinder* those boilers’ continued operation.

As with the proposed subcategory for boilers retiring by 2028, moreover, the subcategory for low-utilization boilers appears ripe for improper exploitation. For one thing, eligibility for this subcategory is to be calculated on a two-year average basis—enabling a boiler to significantly exceed the eligibility threshold in one year as long as it correspondingly reduces utilization in the prior and subsequent years. *Id.* at 64,665. For another thing, once a boiler qualifies for (and benefits from) subcategorization as low-utilization, it still can ramp back up—in which case it will have another two years to come into compliance with the limitations applicable to the rest of the point source category. *Id.* And if the owner can cast the boiler’s newly increased utilization as the result of “involuntary orders and agreements,” the boiler apparently can continue to benefit

from the less stringent limitations applicable to the low-utilization subcategory. *Id.* at 64,666. These loopholes are significant and render the proposed subcategory arbitrary and capricious.

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In at least the respects described above, the Coal Ash Proposal and the ELG Proposal are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Coal Ash Proposal ignores recent risk data, flouts the requirements of RCRA and the D.C. Circuit's *USWAG* decision, and arbitrarily prolongs the life of unlined coal ash impoundments. The ELG Proposal, for its part, arbitrarily subsidizes particular subcategories of coal-fired power plants by allowing them to exempt themselves from more stringent effluent limitations in a manner ripe for abuse.

We appreciate the opportunity to submit these comments and urge the Administrator to remedy the legal defects described above.

Respectfully submitted,

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