USWAG UTILITY SOLID WASTE ACTIVITIES GROUP

October 13, 2025

Via Electronic Mail

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Re: RCRA Exemption for On-Site CCR Beneficial Uses

Mr. Cook,

Thank you again for meeting with the Utility Solid Waste Activities Group (USWAG)[1] on July 29th to discuss various challenges USWAG members face to implement the requirements of the federal coal combustion residuals (CCR) regulations at 40 C.F.R. Part 257, Subpart D, including the recently promulgated requirements in the Legacy Rule (89 Fed. Reg. 38,950 (May 8, 2024)). The purpose of this letter is to follow-up on one specific item discussed during that meeting—the Legacy Rule's regulation for the first time of CCR beneficial uses that occurred on-site at power plants.

As discussed in the attached White Paper, the Agency has consistently found that beneficial uses of CCR do not warrant regulation under the Resource Conservation and Recovery Act (RCRA). That determination has never been dependent on the location of beneficial use. Nor has EPA ever determined that the legitimacy of beneficial use is dependent on location. Yet, the Legacy Rule inappropriately swept on-site beneficial uses into the scope of regulation. The Agency managed to do this without ever proposing to regulate such uses or providing a basis for doing so.

To address this flawed regulatory process and realign the scope of regulation with the Agency's statutory authority under RCRA Subtitle D, EPA should act quickly to confirm the exemption for all CCR beneficial uses, including beneficial uses conducted on-site at power plants. Among other things, the Agency should issue guidance clarifying that, under the plain text of the rule, any practice—including on-site use—that meets the definition of "beneficial use of CCR" is exempt from all of 40 C.F.R. Part 257, including requirements applicable to CCR management units.

[1] USWAG, formed in 1978, is an association that represents its members on a range of regulatory matters, including the regulation of coal combustion residuals under RCRA. USWAG's 85 members comprise over one hundred and thirty electric utilities, power producers, utility operating companies, and utility service companies, and include several utility trade associations.

USWAG thanks EPA for considering this information as it evaluates appropriate measures to address the legal deficiencies of the Legacy Rule. USWAG looks forward to working with the Agency in these ongoing efforts. Please don't hesitate to contact me (dan.chartier@uswag.org) or USWAG counsel Maggie Fawal (mkfawal@venable.com) with any questions.

Sincerely,

Daniel L Chartier

Dan Chartier
USWAG Executive Director

cc: David Fotouhi (EPA)
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The Case for Confirming the Exemption for On-Site CCR Beneficial Uses

A white paper from the Utility Solid Waste Activities Group

I. EXECUTIVE SUMMARY

Until May 2024, all beneficial uses of CCR were exempt from regulation under the Resource Conservation and Recovery Act (RCRA). Over the past several decades, EPA has recognized the "measurable environmental and economic benefits derived from the use of this valuable material" and routinely and consistently found that beneficial uses—including unencapsulated uses—do not warrant RCRA regulation.

The Agency has never changed its determination that beneficial uses do not warrant regulation or questioned the legitimacy of any particular beneficial use based on location. Moreover, EPA has explicitly recognized it does not have the authority to regulate uses of CCR under RCRA Subtitle D because Subtitle D is limited to regulation of "disposal" of solid waste and does not cover "use."

And yet, in May 2024, EPA promulgated a rule that subjected beneficial uses of CCR that had occurred on-site at power plants to regulation for the first time. It did so by claiming that such on-site uses are not beneficial uses at all and, more remarkably, that this was not even a change in the regulations. But despite these claims, the record is void of any discussion or determination by EPA that the legitimacy of beneficial uses is determined by location. Nor has EPA ever provided an explanation as to why uses on-site at power plants should be treated differently than off-site uses.

Instead, using a flawed and legally deficient regulatory process, the Agency has attempted to retroactively reclassify previously exempt beneficial uses as regulated units subject to 40 C.F.R. Part 257, Subpart D (the "CCR rule"). Because EPA never proposed to change its determination that beneficial use does not warrant regulation and never proposed to regulate on-site beneficial use, the Agency should act quickly to confirm that all beneficial uses remain exempt from the CCR rule, regardless of location. Among other things, the Agency should issue guidance clarifying that, under the plain text of the rule, any practice—including on-site use—that meets the definition of "beneficial use of CCR" is exempt from all of 40 C.F.R. Part 257, including requirements applicable to CCRMU.

II. BACKGROUND ON THE BENEFICIAL USE EXEMPTION

In its May 2000 report to Congress regarding potential adverse effects on human health and the environment from the disposal and utilization of CCR ("the 2000 Regulatory Determination"), EPA concluded that "no additional regulations are warranted for coal combustion wastes that are used beneficially."[2] The Agency identified the wide array of beneficial uses covered by the May 2000 Determination, including, but not limited to, "waste stabilization, beneficial construction applications (*e.g.*, cement, concrete, brick and concrete products, road bed, structural fill, blasting grit, wall board, insulation, roofing materials), agricultural applications (*e.g.*, as a substitute for lime) and other

[2] Notice of Regulatory Determination on Wastes From the Combustion of Fossil Fuels, 65 Fed. Reg. 32214, 32214 (May 22, 2000).

applications (absorbents, filter media, paints, plastics and metals manufacture, snow and ice control, waste stabilization)."[3] EPA's findings on beneficial use were not limited by the location where the use occurred.

In 2010, when EPA proposed to issue disposal regulations specific to CCR for the first time, the Agency declined to modify the 2000 Regulatory Determination on beneficial use, stating that "today's proposed action would leave in place EPA's May 2000 Regulatory Determination that beneficially used CCRs do not warrant federal regulation under subtitle C or D of RCRA."[4] The Agency, however, sought comment on whether certain unencapsulated uses—specifically placement in sand and gravel pits and quarries and use in large-scale fill operations—should be regulated as *disposal*.[5] And, recognizing that it would need to more specifically define these activities, it specifically sought comment on how to distinguish legitimate beneficial uses from disposal.[6]

In the final 2015 CCR rule, "after considering all of the available information, EPA [] concluded that the most appropriate approach toward beneficial use is to retain the May 2000 Regulatory Determination that regulation [] of the beneficial use of CCR is not warranted."[7] Again, as in the 2010 proposal, the Agency explained the importance of differentiating legitimate beneficial uses and practices that constitute disposal.[8] **It noted that Subtitle D provides EPA authority to regulate *only* "solid waste management" and "disposal" activities, not "use."**[9] The Agency therefore adopted a definition of "beneficial use of CCR" in 2015 that it determined would be sufficient to "distinguish between the activities that will be regulated as disposal . . . and those that will be considered beneficial use."[10] None of these criteria contain a limitation on the location of use.

Notably, the Agency specifically declined to regulate "large-scale fill operations" as disposal, responding to comments expressing concern that the Agency was inappropriately ignoring numerous legitimate structural fill applications for CCR.[11] While acknowledging that there can be "some risks" associated with unencapsulated uses—specifically uses involving placement of large quantities of CCR directly on the land—the Agency agreed that, for these uses, "the amounts and, in some cases, the

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[3] *Id.* at 32229.

[4] Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35128, 35161 (June 21, 2010).

[5] *Id.* at 35148, 35163, 35222.

[6] *Id.* at 35163.

[7] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302, 21329 (April 17, 2015).

[8] *Id.* at 21347-48.

[9] *Id.* Note that this is simply a recitation of EPA's explanation in the preamble to the 2015 CCR rule, and USWAG does not concede that Subtitle D provides EPA authority over "solid waste management." As USWAG has previously explained, Subtitle D allows EPA to regulate only "disposal" of solid waste, not the broader category of activities considered "solid waste management." This reading is consistent with the plain language of RCRA Subtitle D and EPA's historical interpretation of its Subtitle D prior to 2015. *See* 75 Fed. Reg. at 35136 ("In contrast to subtitle C, RCRA subtitle D requirements relate only to the disposal of solid waste, and EPA does not have the authority to establish requirements governing the generation, transportation, storage, or treatment of such wastes prior to disposal.").

[10] 80 Fed. Reg. at 21348.

[11] *See id.* at 21351.

manner in which [CCR] are used are very different than land disposal."[12] To address the Agency's concern with some large-scale fills of CCR (which were unrelated to location), EPA included a new beneficial use criterion that applied only to unencapsulated uses of CCR above 12,400 tons.[13] The Agency's approach to large-scale fills was different than its approach to sand and gravel pits and quarries, which it determined always constitutes "disposal," not beneficial use, and explicitly defined the term "CCR landfill" to include placement of CCR in "sand and gravel pits and quarries."[14]

Thus, for uses occurring after the CCR rule's effective date (October 19, 2015), the new definition of "beneficial use of CCR" set forth four criteria—none of which were based on location of use—for distinguishing legitimate beneficial uses from sham disposal practices.[15] The final rule explicitly stated that the rule "does not apply to practices that meet the definition of a beneficial use of CCR."[16] This effectively exempted all prospective beneficial uses of CCR from regulation. Without this explicit exemption, post-effective date beneficial uses involving placement of CCR on the ground (*e.g.*, structural fill) could have been inadvertently regulated as a new or existing CCR landfill.[17] To make this exemption crystal clear, EPA also defined the term "CCR landfill" to explicitly exclude any practices meeting the definition of "beneficial use of CCR."[18]

For uses that occurred prior to the effective date, on the other hand, EPA did not include an explicit exemption in the regulatory text. Rather, these uses were not regulated because they fell outside the rule's scope of regulation. This is because, at that time, the CCR rule applied only to new and existing landfills that *continued to receive* CCR after the effective date of the rule.[19] Thus, an explicit exemption was not needed for past beneficial uses. Beneficial uses that occurred prior to the effective date—where placement of CCR had concluded—were not at risk of being inadvertently swept into regulation.

EPA explained this structure in the preamble to the 2015 rule as follows: "This rule does not regulate practices that meet the definition of a beneficial use of CCR. Beneficial uses that occur after the effective date of the rule need to determine if they comply with the criteria contained in the

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[12] *Id.* at 21330.

[13] *Id.* at 21349.

[14] *Id.* at 21351, 21354.

[15] *See id.* at 21349 (40 C.F.R. § 257.53). These four criteria are: (1) The CCR must provide a functional benefit; (2) The CCR must substitute for the use of a virgin material, conserving natural resources that would otherwise need to be obtained through practices, such as extraction; (3) The use of the CCR must meet relevant product specifications, regulatory standards or design standards when available, and when such standards are not available, the CCR is not used in excess quantities; and (4) When unencapsulated use of CCR involving placement on the land of 12,400 tons or more in non-roadway applications, the user must demonstrate and keep records, and provide such documentation upon request, that environmental releases to groundwater, surface water, soil and air are comparable to or lower than those from analogous products made without CCR, or that environmental releases to groundwater, surface water, soil and air will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use.

[16] 80 Fed. Reg. at 21468 (40 C.F.R. § 257.50(g)).

[17] *See* 40 C.F.R. § 257.53 (defining "CCR landfill" and "existing CCR landfill" based on the "receipt" of CCR, rather than "disposal").

[18] 40 C.F.R. § 257.53 (definition of "CCR landfill").

[19] *See* 40 C.F.R. § 257.50 (setting forth the scope of regulation).

definition of 'beneficial use of CCRs.' This rule does not affect past beneficial uses (*i.e.*, uses completed before the effective date of the rule)."[20]

Critically, EPA has never distinguished between the locations at which CCR is beneficially used. Nor has it ever questioned the legitimacy of a beneficial use based on location. In fact, placement in sand and gravel pits and quarries is the only "use" that the Agency has determined is not legitimate and should therefore be regulated as disposal. All other beneficial uses—regardless of location—remain outside the scope of EPA's Subtitle D authority.

III. THE LEGACY CCR RULE

A. Without proposing to change the exemption for CCR beneficial use or revisiting the prior beneficial use Regulatory Determination, the Legacy CCR Rule subjects on-site uses of CCR to regulation for the first time.

In 2023, EPA proposed to expand the scope of the CCR rule to cover historical areas of past CCR placement, including inactive and closed landfills.[21] To do this, EPA proposed to create the new term "CCR management unit." This term was defined to mean "any area of land on which any non-containerized accumulation of CCR is received, placed, or otherwise managed at any time, that is not a CCR unit."[22] Unlike the existing term "CCR landfill," the proposed term "CCR management unit" did not specifically exclude beneficial uses.[23] Nowhere in the 2023 proposal, however, did EPA discuss beneficial use, propose to change its determination that regulation of beneficial uses is not warranted, or propose to regulate previously exempt beneficial uses. To seek clarity, commenters, including USWAG, asked EPA to explicitly carve out beneficial use from the definition of CCRMU, explaining that Subtitle D does not give the Agency authority to regulate "use" and that, even if it did, the Agency has never reversed (or even proposed to reverse) its finding that beneficial uses do not warrant regulation.[24]

EPA's response in the final 2024 rule directly contradicts the regulatory history and prior Agency determinations. The Agency "disagree[d] that the proposal to regulate CCRMU effectively revoked or amended the current exemption for beneficial use" and that, rather, "the proposal merely accurately reflect[ed] the existing regulations, which the[] commenters have misunderstood."[25] EPA claimed that, under the existing regulations, "direct placement of CCR on the land on site of a utility, with nothing to control releases, is, by definition, a CCR pile and therefore not beneficial use."[26] The Agency's rationale for this claim—despite never having determined that regulation of beneficial use

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[20] 80 Fed. Reg. at 21302.

[21] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31982, 31984, 32018 (May 18, 2023).

[22] *Id.* at 32034.

[23] *See id.* at 32018, 32034 (proposed definition of "CCR management unit" at § 257.53).

[24] *See* USWAG comments at 37-39.

[25] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38950, 39050 (May 8, 2024).

[26] *Id.*

on-site at a utility is warranted—was that the definition of "CCR pile" "expressly limits the beneficial use of CCR to 'off-site.'"[27]

EPA's interpretation of the term "CCR pile" is in direct opposition to the regulatory history and prior Agency statements. Contrary to the Agency's explanation in the 2024 rule, these facts remain:

1. For over 25 years (since May 2000), EPA has repeatedly determined that CCR beneficial uses do not warrant regulation, irrespective of location. The Agency has never revisited that determination.

2. All beneficial uses, irrespective of location, were not subject to the 2015 CCR rule.

3. EPA has never determined that the legitimacy of beneficial use is determined based on the location of use (*i.e.*, on- vs. off-site).

4. EPA has not eliminated or revised 40 C.F.R. § 257.50(g), which explicitly excludes CCR beneficial use from all parts of the CCR rule regardless of location.

Yet, despite these facts and despite never proposing to regulate beneficial uses, the 2024 final rule now subjects previously exempt on-site beneficial uses to regulation for the first time.

B. EPA's position in the Legacy CCR Rule hinges on an inaccurate re-interpretation of the term "CCR Pile."

The entire premise of EPA's position hinges on its (new) view that the term "CCR pile" limits beneficial use of CCR to "off-site." The Agency explained that the second sentence of that definition (which states "CCR that is beneficially used off-site is not a pile") expressly limits beneficial use of CCR to "off-site" and that therefore any placement of CCR on the land on-site at a power plant is not beneficial use.[28]

But the Agency's reading of the term "CCR pile" is incorrect and inconsistent with its past explanation of that term. The phrase "CCR that is beneficially used offsite is not a pile" was intended to clarify the Agency's view that once CCR is sent off-site for beneficial use, it is in the process of being beneficially used and therefore, *even if stored in a temporary storage pile prior to use*, not a "CCR pile" subject to regulation.[29] In other words, the phrase was meant to distinguish the Agency's different approach to on- and off-site storage *piles* of CCR. The phrase was not intended to prohibit on-site beneficial uses of CCR. For the reasons discussed below, EPA's new interpretation of the term "CCR piles" is, quite simply, wrong.

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[27] *Id.*

[28] *Id.*

[29] *See* 80 Fed. Reg. at 21356.

1. EPA's reading conflicts with the beneficial use exclusion and the term "CCR landfill."

EPA's interpretation of "CCR pile" conflicts with the explicit exemption in § 257.50(g) for all practices meeting the definition of "beneficial use of CCR." This exclusion contains no limitation on location of beneficial use practices. Similarly, § 257.50(b) states that the rule "applies to any practice that does not meet the definition of a beneficial use of CCR." "Beneficial use of CCR" also does not incorporate any limitation on location. It simply does not make sense that EPA would hide a limitation on the location of beneficial use in the definition of "CCR pile."

EPA's interpretation also conflicts with the term "CCR landfill." The rule defines "CCR landfill" as:

> an area of land or an excavation that contains CCR and which is not a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine, or a cave. For purposes of this subpart, a CCR landfill also includes sand and gravel pits and quarries that receive CCR, CCR piles, *and any practice that does not meet the definition of a beneficial use of CCR.*[30]

Notably, the definition of "beneficial use of CCR" contains no limitation on the location of CCR use. Thus, EPA's reading results in an unworkable definitional conflict—an on-site use of CCR that meets the definition of "beneficial use of CCR" cannot somehow be a CCR pile but not a landfill. At the very least, EPA's reading of the term "CCR pile" renders the last phrase in the definition of "CCR landfill" meaningless. If the term "CCR pile" already excludes the appropriate scope of beneficial uses, why would EPA see the need to carve out "any practice that does not meet the definition of a beneficial use of CCR" from the definition of landfill a second time?

The answer to this question, of course, is that EPA is not reading the term "CCR pile" in line with its original intent.

2. EPA's reading conflicts with prior statements by the Agency regarding the scope of the term "CCR pile."

In the preamble to the 2015 rule, EPA provided a lengthy discussion of the term "CCR Pile" that directly contradicts its explanation in the Legacy CCR Rule. Specifically, the Agency stated:

> This definition mirrors the existing definition of "waste pile or pile" from the part 257 regulations, (i.e., the regulations that currently apply to CCR facilities), as well as the definition in part 260... To further clarify how this relates to EPA's overall approach to beneficial use *it is important to distinguish between CCR that is actually being used beneficially and CCR that may someday be used beneficially.* CCR that is currently being used beneficially—for example, fly ash that has been transferred to a cement manufacturer and that is stored off-site in a "temporary pile," and that complies with all of the criteria in the definition to be considered a beneficial use including the fourth criterion relating to the placement of large quantities of unconsolidated CCR on the land— would not be subject to the regulations applicable to CCR disposal.

[30] 40 C.F.R. § 257.53 (definition of "CCR landfill").

> Accordingly, the final regulation specifies that practices that meet the definition of beneficial use of CCR are not subject to the "disposal" requirements of the rule.
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> By contrast, CCR located on-site *that may someday be used beneficially but is not yet beneficially used* remains subject to the disposal rule. Given that landfills and surface impoundments can be periodically dredged to provide material for beneficial use, any other approach would be impracticable, and would exclude from regulation many of the greatest sources of risk. *An example of a "pile" that is not yet beneficially used* is unconsolidated CCR placed on the land, that have been designated by the CCR facility to be transferred to another location for subsequent beneficial use (e.g., use as road bed) in the near future.[31]

It is clear from this discussion—which was provided at the time of promulgation and therefore provides the best evidence of the Agency's intent—that EPA viewed CCR that had been transported off-site for beneficial use as already in the process of being beneficially used, even if stored in a temporary storage pile prior to the actual use. The same storage piles of CCR on-site at a power plant, however, were not viewed the same way. But EPA never intended to encompass CCR that had *already been beneficially used* on-site within the definition of CCR pile. Those practices were to remain outside the scope of regulation.

The Agency has made numerous statements following issuance of the 2015 rule that confirm this reading. For example, in its response brief filed in litigation over the 2015 CCR rule, the Agency defended its disparate treatment of on- and off-site *storage* piles of CCR by stating:

> EPA also determined that only CCR actually in the process of being beneficially reused is excluded, while CCR managed in a way that is indistinguishable from disposal, with the hope or intention that it might someday be beneficially reused, is considered disposal. *Id.* at 21,356. Thus, EPA expanded the concept of beneficial use to include "temporary" piles awaiting direct and timely qualified use, without letting the exception swallow the rule by extending it to encompass all piles of CCR placed on the ground that might someday be reused…
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> To bridge the gap between the regulation of all CCR placed on land, and the non-regulation of beneficial uses of CCR, the Rule clarifies that CCR "that is beneficially used off-site" is not considered to be a CCR pile. *Id.* In other words, CCR in the process of being beneficially used, even if temporarily stored on the land as part of that use, is not considered a CCR pile, and therefore is not subject to the regulatory requirements. 80 Fed. Reg. at 21,356. But a permanent CCR pile, whether off-site or on-site, is still considered a CCR landfill….
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> In attempting to find the correct balance between regulating CCR deposited on land, as required under the statute, and allowing for beneficially used CCR to remain exempt from regulation, EPA determined that CCR located at the user's facility, e.g., at the cement manufacturer who is continually incorporating CCR into its cement production, was likely to be in the process of being beneficially used and therefore any

[31] 80 Fed. Reg. at 21356 (emphasis added).

> "piles" were likely to be "temporary." It is reasonable to presume that CCR that already has been transported to a user's facility is likely to be there only temporarily as part of the on-going process of being put to a legitimate beneficial use. *Id.* at 21,354-56. Consequently, off-site temporary piles are exempt from the regulatory requirements, provided they satisfy the four beneficial use criteria outlined above. 40 C.F.R. §257.53; 80 Fed. Reg. at 21,356/2.
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> In contrast, if the pile is located onsite at the coal-combustion facility, *with no obvious indicia that it is in the relatively immediate process of being beneficially used*, it is subject to regulation as a CCR pile. *Id.* As EPA explained, CCR piles located at a generator's facility that are purportedly destined for beneficial use are indistinguishable from CCR piles that will *not* be put to beneficial use. *Id.* at 21,356. For instance, an on-site CCR pile that the operator claims is destined for off-site use may, in fact, be destined for use as fill in sand or gravel pits or rock quarries, which are not qualifying beneficial uses.[32]

Similarly, in the Agency's motion for voluntarily remand in the same litigation, EPA stated:

> The Rule clarifies that CCR in a pile on the ground at the site of a manufacturer incorporating the CCR into its encapsulated product is a temporary pile, not a "CCR Pile" subject to the Rule's criteria, because its location is objective evidence that it will be put to a beneficial use within a reasonable time. 40 C.F.R. §257.53; 80 Fed. Reg. at 21,354-56. EPA found, however, that it could not apply such an approach to the identical pile of CCR located onsite at the coal combustion facility prior to transfer to the manufacturer, and thus such a pile is a CCR Pile subject to all of the regulatory requirements of the Rule.
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> EPA made this distinction in part because it lacked the oversight and enforcement authority to ensure that the pile of CCR at the coal-combustion facility would, in fact, be transferred to a manufacturer within a reasonable period of time. *See, e.g.*, *id.* at 21,355 (explaining that promulgating a time limit on CCR held at the coal-combustion facility is not a solution, given the lack of EPA oversight authority to ensure that such time limit is met).[33]

And, following remand by the court, EPA issued a proposed rulemaking to address the definition of "CCR Pile" and it, again, explained the scope of that term as follows:

> The current regulation distinguishes piles of CCR *on-site* (at an electric utility or independent power producer site) from temporary piles of CCR *off-site* (at a beneficial use site), based on whether CCR from the pile could fairly be considered to be in the process of being beneficially used. See § 257.53 (definition of CCR pile); 80 FR 21356 (April 17, 2015). While the CCR from the pile on-site *may* someday be beneficially used, it is not currently in the process of being beneficially used, and even when some amount is transported away, a new amount from the utility may replace it. See *Id.* The extended placement of CCR directly on the land in such a manner is a potential source of uncontrolled releases. To address these potential releases, the regulation requires that the pile be containerized (*i.e.,* that the facility adopt measures to control these

[32] Response Brief at 45-48, *USWAG v. EPA*, No. 15-1219 (D.C. Cir. Sept. 6, 2016).

[33] Motion for Voluntary Remand at 13-14, *USWAG v. EPA*, No. 15-1219 (D.C. Cir. Nov. 7, 2017).

releases, and any resulting exposures to human health and the environment). Such measures include placement of CCR on an impervious base such as asphalt, concrete or geomembrane; leachate and run off collection; and walls or wind barriers. See *Id.* If CCR is not containerized, the pile is a CCR pile and subject to the same requirements as a CCR landfill. See *Id.*

In contrast, the regulations treat CCR stored off-site at a beneficial use site in a temporary pile to be in the process of being beneficially used (even though a pile is not itself a beneficial use). If the CCR is temporarily placed at a beneficial use site and meets the regulatory definition of a beneficial use, the pile is not a CCR pile and is not subject to disposal requirements. See *Id.*[34]

In all of these documents, EPA explanation of the term "CCR piles" is limited to the treatment of CCR stored on the ground in piles *prior to being beneficially used* (*e.g.*, *prior* to use in wallboard, roadbed, or structural fill). Piles located off-site are treated differently than the same piles located on-site at a power plant. But EPA never indicated that it was treating actual beneficial uses (*e.g.*, use in wallboard, roadbed or structural fill) differently based on the location of that use; nor did it ever provide a basis for treating such uses differently. Rather, EPA correctly and consistently explained that the rule was not intended to capture CCR that *is actually in the process of being beneficial used*, regardless of location.

3. EPA has repeatedly explicitly and implicitly acknowledged the potential for on-site beneficial use of CCR.

EPA's new reading of the term CCR pile is also inconsistent with prior statements conceding that there can in fact be legitimate exempt on-site beneficial uses of CCR. These statements include:

- **The Agency's FAQ webpage**: When asked whether the final CCR rule applies to CCRs that are land applied outside a landfill or impoundment, EPA stated that *"[i]f the land application does not meet the criteria for beneficial use defined in title 40 of the Code of Federal Regulations (CFR) section 257.53*, the land application constitutes disposal and would be considered a landfill, subject to all of the requirements for CCR landfills. (Refer to the definition of CCR landfill in 40 CFR section 257.53)."[35]

- **EPA's Phase One Proposed Rule**: When explaining that the rule prohibits further placement of CCR into units subject to forced closure pursuant to § 257.101, EPA stated that the prohibition on "placement" in § 257.101 "does not distinguish between placement that might be considered beneficial use and placement that might be considered disposal."[36] If there was

[34] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles, 84 Fed. Reg. 40353, 40362 (Aug. 14, 2019).

[35] EPA, *Frequent Questions About Definitions and Implementing the Final Rule Regulating the Disposal of Coal Combustion Residuals (CCR)* (last updated April 15, 2025), https://www.epa.gov/coalash/frequent-questions-about-definitions-and-implementing-final-rule-regulating-disposal-coal#q1.

[36] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One); Proposed Rule, 83 Fed. Reg. 11584, 11605 (Mar. 15, 2018) ("Phase 1 Proposal").

no such thing as on-site beneficial use of CCR—as EPA now contends—this clarification would have been unnecessary.

- **EPA's Part B Proposal**: The Agency again explained that the rule does not allow CCR to be placed into units subject to forced closure. Yet instead of saying there is no such thing as on-site beneficial use—as it now contends—the Agency again stated that the prohibition on "placement" in § 257.101 does not distinguish between placement that might be considered beneficial use and placement that might be considered disposal."[37] Thus, EPA argued, all further CCR placement into CCR units subject to forced closure, regardless of whether for beneficial use or disposal, "is prohibited once the provisions of § 257.101 are triggered."[38] Again, if there is no such thing as on-site beneficial use (as EPA now contends), there would have been no need for this clarification in the first instance.

- **December 2016 EPA Letter**: In a letter from EPA to Minnesota Power regarding Taconite Harbor Landfill, dated December 22, 2016, the Agency explained that the exemption for inactive landfills at 40 C.F.R. § 257.50(d) applies only to CCR landfills that ceased "receiving" CCR prior to October 19, 2015, "without regard to whether that receipt is characterized as disposal or beneficial use." Notably, EPA did not rely on the definition of "CCR piles" for this contention but instead its use of the term "receiving," which it claimed encompasses both CCR disposal and beneficial use (implicitly acknowledging the possibility of onsite beneficial use).[39]

- **June 2021 EPA Email**: In a June 2021 email sent from Dale Carpenter (EPA), the Agency responded to an inquiry from a power plant asking if relocation of CCR on the site for purposes of beneficial use would be exempt from the rule. In response, EPA stated "The placement of CCR back on the land in a different location may be considered disposal. The use or reuse of the CCR material would need to meet the federal beneficial use (BU) definition in the CCR Rule as well as the New Jersey state beneficial use program requirements. Based on the limited information [] provided about the two proposed uses of the embankment material, it is unclear whether the BU definition in 40 CFR 257. 53 would be met." Critically, EPA did not eliminate the possibility that this onsite use of CCR could in fact qualify as an exempt beneficial use.[40]

In short, in all of these cases involving potential on-site beneficial use of CCR, EPA never indicated that these uses of CCR are in fact "CCR piles" and not beneficial use.

4. EPA's reading conflicts with its determination that no beneficial uses warrant regulation and the unambiguous language of 40 C.F.R. § 257(g) that exempts all CCR beneficial use without limitation.

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[37] Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternative Demonstration for Unlined Surface Impoundments; Implementation of Closure, 85 Fed. Reg. 12456, 12462 (Mar. 3, 2020) ("Part B Proposal").

[38] *Id.*

[39] For convenience, USWAG has attached a copy of this letter hereto.

[40] For convenience, USWAG has attached a copy of this email hereto.

As noted above, EPA has repeatedly determined that beneficial use does not warrant regulation. This determination was never dependent on the location of the beneficial use, as there is no rational basis for such distinction. Accordingly, the Agency has never explained why such uses would be treated differently and, in fact, explicitly excluded all CCR beneficial uses from the scope of regulation without any limitation on location.[41]

Further, as noted above, EPA took great pains to explain why temporary storage piles on-site should be regulated, while the same piles off-site should remain exempt.[42] But the same discussion or finding was never provided for on- vs. off-site beneficial uses. The record is therefore devoid of any basis for EPA's interpretation or its regulation of on-site beneficial uses.

IV. ACTION REQUIRED

The Agency has never changed its 2000 and 2015 Regulatory Determinations that beneficial uses do not warrant regulation, proposed to regulate beneficial use, revised the explicit exemption at § 257.50(g), or even discussed why beneficial use of CCR on-site at utilities should be viewed differently than CCR beneficially used off-site. Due to this lack of valid regulatory process, **the Agency should act as soon as possible to clearly confirm the existing exemption applies to all beneficial uses**. It should do this by: (1) affirming that § 257.50(g) means what it says: *all* beneficial uses of CCR are exempt from the CCR rule; (2) clarifying the term "CCR Pile"; and (3) explicitly carving out "beneficial use of CCR" from the scope of "CCR management units" and "inactive landfill."

CCR Pile

EPA should immediately act to clarify that its interpretation of the term "CCR pile" in the legacy CCR rule is incorrect and revert back to the interpretation EPA provided in the preamble to the 2015 CCR rule. To memorialize this interpretation, USWAG also recommends EPA amend the definition to eliminate any potential confusion. It could do this by revising the definition to state: "*CCR pile* or *pile* means any non-containerized accumulation of solid, non-flowing CCR that is placed on the land. CCR stored off-site prior to beneficial use is not a CCR pile."[43]

CCR Management Unit

The Agency should also immediately issue guidance clarifying that, under the plain text of the rule, any practice—including on-site use—that meets the definition of "beneficial use of CCR" is exempt from all of 40 C.F.R. Part 257, including requirements applicable to CCRMU. This exemption at § 257.50(g) applies regardless of location.

EPA should also amend the terms "CCR management unit"[44] and "Inactive CCR landfill" to explicitly exclude practices meeting the definition of beneficial use of CCR. To address pre-October

[41] *See* 40 C.F.R. § 257.50(g).

[42] *See, e.g.,* 80 Fed. Reg. at 21356.

[43] USWAG also encourages EPA to reconsider whether there is a reasonable basis for regulating all on-site storage piles of CCR as regulated landfills, given that many such temporary piles do in fact have "obvious indicia" that the pile is in the process of being beneficially used.

[44] Note that, as USWAG has previously discussed with EPA, the scope of CCRMU in the Legacy CCR Rule is overbroad and legally deficient for a number of reasons. The discussion herein is solely limited to addressing

2015 beneficial uses, EPA should also explicitly carve out the following uses from the definition of CCRMU:

1. CCR used in construction of a road, embankment, or rail bed;

2. CCR use meeting the definition of beneficial use of CCR in 40 C.F.R. § 257.53;

3. CCR use that was done in accordance with state regulations, approval, and/or oversight;

4. CCR use that was done in accordance with standard industry and good engineering practices existing at the time of placement; or

5. CCR used in an encapsulated manner or to make a cement-like product.

This revision is necessary to recognize that the definition of beneficial use—including the fourth criterion in particular—was promulgated by EPA in 2015 and did not apply to beneficial uses that occurred prior to October 19, 2015. USWAG acknowledges that EPA promulgated the definition to distinguish between legitimate beneficial uses and disposal practices. However, USWAG believes the above conditions for pre-2015 uses are sufficient to address this distinction as well.

CONCLUSION

EPA has consistently found that beneficial use of CCR does not warrant regulation under RCRA. The Agency has never articulated a basis for distinguishing beneficial uses that occur on-site at a power plant versus off-site. The regulatory carve out for temporary piles of CCR stored off-site at a beneficial user's site *prior* to beneficial use does not have any bearing on the legitimacy of beneficial uses on-site at power plants.

And yet, the 2024 amendments to the CCR rule resulted in the regulation of previously exempt on-site beneficial uses for the first time. Because EPA never determined that beneficial use of CCR warrants regulation, proposed to regulate on-site beneficial uses, or even articulated a rational basis for treating such uses differently, it must act quickly to confirm the regulatory exclusion for all CCR beneficial uses.

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one issue—confirming that on-site beneficial uses of CCR are exempt from regulation—and does not impact the need for EPA to narrow the scope the CCR rule to align with its statutory authority under Subtitle D and a valid risk assessment.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 22 2016

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

NOW THE
OFFICE OF LAND AND
EMERGENCY MANAGEMENT

Mr. Kurt Anderson
Director, Environmental and Land Management
ALLETE Minnesota Power
30 West Superior Street
Duluth, Minnesota 55802

Dear Mr. Anderson:

Thank you for your letter dated November 16, 2016, presenting a more detailed explanation for your interpretation that the Taconite Harbor Landfill is exempt from the requirements in 40 C.F.R. part 257, subpart D. In summary, you claim that your Coal Combustion Residual (CCR) landfill is exempt from these requirements as an "inactive landfill" pursuant to 40 C.F.R. 257.50(d), even though you placed CCR into that unit after the effective date of the rule. You further claim that the activity involving placement of CCR into the unit constituted beneficial use, which is exempt under 40 C.F.R. 257.50(g). However, nothing in your letter alters our conclusion that your landfill does not qualify for the exemption at 257.50(d). Therefore it is an active CCR landfill, subject to all of the requirements applicable to an "existing CCR landfill" under section 257, subpart D.

As we explained during our November 10th phone call, by placing CCR into your CCR landfill after the effective date of the rule, based on the plain language of the regulation, this unit no longer qualifies for the exemption at 257.50(d). This provision applies only to CCR landfills "that have ceased receiving CCR prior to October 19, 2015," without regard to whether that receipt is characterized as disposal or beneficial use. Note as well that, contrary to your claim, the Taconite Harbor landfill meets the definition of an "existing CCR landfill" ("a CCR landfill that receives CCR both before and after October 19, 2015") 40 C.F.R. 257.53. See also the definitions of "active life" and "active portion," which use the terms "placement of CCR in the CCR unit" and "has received or is receiving." None of these definitions use the term "disposal." Accordingly, by the express terms of these provisions, whether your activity constitutes beneficial use is irrelevant.

Your letter raised concern about the interplay between the general exemption for beneficial use activities under 40 C.F.R. 257.50(g) and the exemption at 40 C.F.R. 257.50(d); in essence, you argue that the EPA must interpret the term "receipt" to exclude all alleged beneficial use activities because such activities are exempt under 257.50(g).

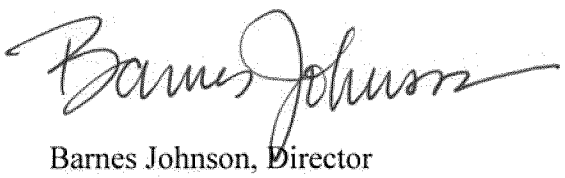
Had the EPA intended the interpretation you propose the regulatory text would not have focused exclusively on receipt of CCR, but would have used the word "disposal," which actually is defined to exclude beneficial use. See 40 C.F.R. 257.53. Alternatively, the EPA would have included an express

exception within 257.50(d) or at least a cross-reference to 257.50(g). See, e.g., 257.50(b)("Unless otherwise provided in this subpart…") and 257.104(a)("Except as provided by either paragraph (a)(2) or (3) of this section"). Because your interpretation would effectively revise the regulation (and greatly expand the exemption), the EPA cannot accept it.

Finally, with respect to your concern that this is inconsistent with EPA's statements that beneficial use operations would be exempt from the CCR rule provisions, we note that you acknowledge that the Taconite Harbor landfill is a CCR landfill, and not a beneficial use operation. Thus the net effect of the regulatory provisions referenced above is merely the regulation of your CCR landfill, which was precisely the kind of operation that the rules were designed to cover. See, e.g., 80 Federal Register 21,348 (purpose of the beneficial use criteria is to distinguish between "legitimate beneficial use" and "activities that have consistently been considered to be disposal;" the fourth criterion "directly correlates to the practices and the risks that the disposal regulations are designed to address: the risks associated with the placement of large quantities of CCR in a single concentrated location, such as a CCR landfill,…"). We further note that this result is consistent with the regulatory determination made by your state regulatory authority. We understand that Minnesota considers the use of CCR to facilitate closure as "…ongoing utilization of the Taconite Harbor Energy Center landfill for disposal of a permitted industrial solid waste," and also considers the unit to be active.

As we explained during our phone conversation, the Taconite Landfill remains on the open dump list. The EPA intends to publish the final list on January 13, 2016. If prior to that date you provide evidence to the EPA that your unit has come into compliance with the requirements of 40 C.F.R. 257, subpart D, the EPA will remove your facility from the list.

Sincerely,



Barnes Johnson, Director
Office of Resource Conservation and Recovery

cc: Margaret Guerriero

U.S. EPA Region 5

From:	Lamster, Stephanie (she/her/hers)
To:	Miller, Jesse M.; Holt, Taylor; Lloyd, Michelle
Cc:	Kijanka, Kevin; Conetta, Benny
Subject:	FW: Gilbert
Date:	Wednesday, August 14, 2024 9:57:35 AM
Attachments:	image003.png

Hi Michelle, Taylor, and Jesse,

I hope all is well. Please see the correspondence below regarding BU from Dale to the owners/operators of Gilbert Station in NJ. NJ DEP was CCed. This is the only correspondence we have found that may meet the FOIA request.

Best,
Stephanie

From: Carpenter, Dale <Carpenter.Dale@epa.gov>
Sent: Tuesday, June 1, 2021 8:12 AM
To: Frank, Stephen <Stephen.Frank@genon.com>
Cc: Jackson, Mary <Jackson.Mary@epa.gov>; Behan, Frank <Behan.Frank@epa.gov>; Long, Michelle <Long.Michelle@epa.gov>; Yonce, Stacey <yonce.stacey@epa.gov>; Celeste, Laurel <celeste.laurel@epa.gov>; Malki, Joseph <Malki.Joseph@epa.gov>; Kijanka, Kevin <Kijanka.Kevin@epa.gov>; Conetta, Benny <Conetta.Benny@epa.gov>; Schmidt, Keith A <Keith.Schmidt@genon.com>; MacIntosh, Neil C <Neil.MacIntosh@genon.com>; McDevitt, Daniel <Daniel.McDevitt@Genon.com>; Grossman, Lenny <Grossman.Lenny@epa.gov>; McCleary, Emmie <McCleary.Emily@epa.gov>; Hido, Daniel P. <DHido@babstcalland.com>; Steinbauer, Gary <GSteinbauer@babstcalland.com>; Gerchman, Michael <Michael.Gerchman@dep.nj.gov>; Anthony.Fontana <Anthony.Fontana@dep.nj.gov>
Subject: RE: Gilbert

Dear Mr. Frank,

We'd like to thank you and your representatives for taking the time to speak with us on February 1, 2021 and providing answers to our follow-up questions.

After careful review and consideration of our conversations and your written responses below, the EPA has identified two areas of intersection with the CCR Rule:

1. The status of the former ash ponds and whether they are CCR surface impoundments subject to the rule, and;
2. The use of the embankment material containing CCR.

Regarding item #1 above, assuming that the former ash ponds did not contain liquids after October 19, 2015, they would not be considered either inactive or existing CCR surface impoundments subject to the requirements of 40 CFR subpart D (40 CFR 257. 53).

Regarding item #2 above, use of the embankment material containing CCR described in your email appears to be subject to the CCR Rule. The placement of the CCR back on the land in a different location may be considered disposal. The use or reuse of the CCR material would need to meet the federal beneficial use (BU) definition in the CCR Rule as well as the New Jersey state beneficial use program requirements. Based on the limited information GenOn provided about the two proposed uses of the embankment material, it is unclear whether the BU definition in 40 CFR 257. 53 would be met. In particular, for some uses, such as fill or landscaping, which resemble disposal, it is especially challenging to meet the BU definition. Should a use proceed and result in environmental harm, there could be liability under RCRA.

Finally, we apologize for the delays in responding to these issues and appreciate the potential impacts to your deadlines under the NJ ISRA program.

Please feel free to contact me if you have further questions.

Sincerely,

Dale J. Carpenter, Chief
Sustainable Materials Management Section
USEPA, Region 2

From: Frank, Stephen <Stephen.Frank@genon.com>
Sent: Friday, April 16, 2021 3:52 PM
To: Carpenter, Dale <Carpenter.Dale@epa.gov>
Cc: Jackson, Mary <Jackson.Mary@epa.gov>; Behan, Frank <Behan.Frank@epa.gov>; Long, Michelle <Long.Michelle@epa.gov>; Yonce, Stacey <yonce.stacey@epa.gov>; Celeste, Laurel <celeste.laurel@epa.gov>; Malki, Joseph <Malki.Joseph@epa.gov>; Kijanka, Kevin <Kijanka.Kevin@epa.gov>; Conetta, Benny <Conetta.Benny@epa.gov>; Schmidt, Keith A <Keith.Schmidt@genon.com>; MacIntosh, Neil C <Neil.MacIntosh@genon.com>; McDevitt, Daniel <Daniel.McDevitt@Genon.com>; Grossman, Lenny <Grossman.Lenny@epa.gov>; McCleary, Emmie <McCleary.Emily@epa.gov>; Hido, Daniel P. <DHido@babstcalland.com>; Steinbauer, Gary <GSteinbauer@babstcalland.com>
Subject: RE: Gilbert

Dale,

I am writing to follow up on our meeting on February 1 and in response to EPA's February 22 follow-up requests. Responses to EPA's requests are below. At the outset, GenOn would like to reiterate that, as discussed on February 1, it is the company's position that neither of the two former ponds at the Gilbert Station nor the relocation of the embankment material as part of the site's ongoing New Jersey Industrial Site Recovery Act (ISRA) remediation are subject to the CCR Rule.

As I described during the February 1 meeting, the Gilbert Station transitioned from firing on coal to fuel oil and natural gas in the early 1970s. Neither the former East Pond nor the former West Pond

have been used to manage, store or dispose of CCR since that time, and are not currently designed to hold an accumulation of CCR. Following our February 1 meeting, GenOn initiated an engineering evaluation that confirmed the following:

- The West Pond is currently dry; i.e., it does not hold any liquids. As such, the West Pond is not subject to the CCR Rule.

- The East Pond is used as a stormwater retention basin for the adjacent tank farm. GenOn's evaluation of prior boring logs in the area of the east pond indicates that any CCR in the area of the pond is historically placed structural fill/embankment material around the pond perimeter, and that the pond itself does not contain previously disposed CCR beyond potential de minimis amounts that do not subject the pond to the CCR rule. EPA has confirmed that stormwater ponds that contain only de minimis amounts of CCR are not subject to the CCR Rule. *See* 80 Fed. Reg. 21301, 21357 (Apr. 17, 2015); *Frequent Questions on the Implementation of the Disposal of Coal Combustion Residuals (CCR) from Electric Utilities Final Rule,* at 8-9.

Finally, regarding the relocation of the embankment material, GenOn's position is that this material should not be subject to the CCR Rule because the material was previously beneficially reused as structural fill to support the embankment and is merely being relocated elsewhere onsite; however, to the extent EPA believes this practice implicates the CCR Rule, the relocation of the embankment material constitutes a beneficial reuse and therefore is not subject to the CCR Rule. A portion of the embankment material will be used to stabilize the north side of the access road. The remaining material will be placed in the former West Pond depression to promote positive drainage and erosion and sedimentation control and otherwise meets the beneficial use criteria of 40 C.F.R. 257.53 as further described below.

As you know, GenOn is in the process of completing remediation at the site under ISRA. The relocation of the embankment material, in particular, is a key component of this ISRA remediation. If EPA's position is that the relocation of embankment material from the south to the north side of the embankment creates a regulated CCR landfill, GenOn will need to revisit the current approach delaying implementation of the site remediation. We therefore respectfully request EPA's concurrence on the positions set forth in this email so that GenOn can continue to implement the NJ ISRA remediation at the site and meet upcoming NJDEP ISRA deadlines.

1. How many metric tons of CCR ash do you anticipate moving/removing from the embankment as part of the slope stabilization project?

   The quantity of ash to be excavated for the proposed ISRA-related slope stabilization is 9,177 cubic yards or 9,440.8 metric tons based on the weight of the ash material averaged at approximately 84 lb/ft^3.

   Because the access road/embankment will be shifted inland, approximately 1,000 metric tons will be used to support the north side of the road. We propose using the

remaining excavated material as a virgin soil substitute/supplement to fill and promote positive drainage in the former West Pond depression and, to a limited extent, the eastern and northern perimeter of the East Pond.

2. What alternative methods or designs are you considering as part of slope stabilization plans in lieu of moving/removing CCR ash from the embankment?

   Based on our 2017 Limited Geotechnical Evaluation, four design options were evaluated. All included increasing the slope, adding approximately 18" of cover material, establishing vegetation, and moving ash from the embankment farther from the river. Because surface elevations cannot be increased within the floodway, most if not all options are expected to require the removal of some embankment material.

   The selected option involves using riprap up to the midpoint of the slope and completing the stabilization with 18" of cover soil and establishing vegetative cover to the top of the slope. This proposed approach is acceptable to the NJ Land Use permitting agency because it balances the need for safety with the aesthetic considerations of the scenic waterway designation.

3. Please specify what waste(s) are present in both the former East and West ash ponds, along with the dates and results of any soil or groundwater sampling performed in the past.

   Based on our review and evaluation of historic records, no significant quantities of CCR or other wastes are present in either the former East or West ponds. The East Pond only receives stormwater runoff from the adjacent tank farm concrete containment and the West Pond is dry. The following results of our technical review support these findings.

   Former East Pond Observations:

   - The footprint of the pond is covered with mature wooded vegetation and there is a somewhat centrally located wetland area with standing water that can fluctuate depending upon precipitation events and runoff.

   Footprint of former East Pond, with delineated Wetland Area in foreground.

Northern Interior Slope of former East Pond.

- The pond was used (and has been since the early-1970's) as a stormwater settling basin to manage runoff from the adjacent tank farm containment area. Prior to entering the pond, containment area runoff is routed through an oil-water separator. Accumulated stormwater eventually percolates from the pond to groundwater.

- The pond does not receive any other inputs (liquid, solid, or otherwise) beyond the noted stormwater runoff or precipitation that falls within its physical limits.

- Coal and/or coal ash were historically used as structural fill in the areas near the pond and extending southward to form the existing adjacent embankment along the Delaware River.

- Of five borings installed during a 1998 Phase II Investigation, only one location (SB-25A-1) along the northern slope/boundary suggests the potential presence of coal ash over a continuous depth horizon (from 0.0 to 7.5 feet bgs). Location (SB-25A-4)

along the southern embankment suggests the potential presence of coal ash over an intermittent depth horizon (between 1.0-2.5 feet bgs). Locations (SB-25A-3, 4 and 5) farther from the southern embankment identified no coal ash present.

- Of 10 borings installed during the 2012/2016 Remedial Investigation (RI), three locations on the northern side of the pond did not identify coal ash (LE-SP44, LE-SP45, and LE-SP49), with four locations near the southern embankment (LE-SP36, LE-SP46, LE-SP47, and LE-SP48) suggesting the potential presence of coal ash over various intermittent depth horizons (between 4.0-12.0 feet bgs). The remaining three locations along the embankment (LE-SP114, LE-SP115, and LE-SP116) suggest the potential presence of coal ash over continuous depth horizons (ranging from 0.0 down to a maximum of 28.0 feet bgs).

- The borings in which the presence of coal ash is noted are located in areas that indicate the ash is from past structural filling operations as part of the construction of the embankments and structural support for the access road rather than ash management within the pond. Specifically, ash was only identified around the perimeter of the former pond footprint and at higher elevations than the bottom of the pond, indicating that the ash is structural fill/embankment material. This evidence suggests that ash was removed from the pond when the coal units were retired in the 1970s.

- The review of soil data (generated during both the Phase II Investigation and RI) focused primarily on arsenic to serve as a representative indicator of possible impacts from past activities. Exceedances of the New Jersey NRDC remediation standards were identified in and around the former pond footprint; however, there is no discernible pattern or trend that differentiates elevated arsenic concentrations due specifically to the potential presence of coal ash. As portions of this area were subject to prior filling operations, the results are likely influenced by multiple factors including the nature of the fill. Samples collected at depths near or below the groundwater table do not appear impacted. Note that these elevated arsenic concentrations are not pertinent to the applicability of the CCR Rule and are being fully addressed under the oversight of NJDEP through the ISRA remediation as described below.

- The review of groundwater data (generated during the RI) again focused primarily on arsenic as a representative indicator of possible impacts. Discounting the Phase II Investigation data, which appears to be biased based on highly turbid sample conditions, the remaining RI data indicates elevated arsenic concentrations in reaches considered downgradient of the pond (wells MW28 and MW29). Both locations are in excess of the New Jersey Groundwater Quality Standard (3 ug/L),

however, only one location is elevated (13.7 ug/L) above the arsenic MCL (10 ug/L). Again, note that these elevated arsenic concentrations are not pertinent to the applicability of the CCR Rule and are being fully addressed under the oversight of NJDEP through the ISRA remediation as described below.

- Under the New Jersey Site Remediation Program, exceedances of State Groundwater Quality Standards (including arsenic and other constituents) have been addressed with the concurrence of NJDEP via the February 2018 establishment of groundwater classification exception area/well restriction area (CEA/WRA) covenants for the Gilbert Station property, including the former East Pond.

Former West Pond Observations:

- The footprint of the former pond is covered with mature wooded vegetation, a likely reflection of complete inactivity since being taken out of service when the Station transitioned from coal-fired operations.

Footprint of former West Pond.

- No liquids are present in the pond and the pond does not receive any other inputs (liquid, solid, or otherwise) aside from precipitation that falls within its physical limits. Any such precipitation percolates into the ground and is not retained in the pond. As further support that the pond is dry, note that the groundwater table is located approximately 10 to 15 feet below the design bottom of the pond, and thus

groundwater does not infiltrate the pond.

- Previously, coal and/or coal ash were used as structural fill in the areas around the pond and extending southward to form the existing adjacent embankment along the Delaware River.

- Of five borings installed during the Phase II Investigation, none identified the presence of coal ash.

- Of 13 borings installed during the RI, four did not identify the presence of coal ash. (LE-SP39, LE-SP40, LE-SP42, and LE-SP43). Five locations (LE-SP37, LE-SP38, LE-SP39, LE-SP41, and LE-SP120) suggest the potential presence of coal ash over shallower continuous depth horizons (ranging from 0.0 down to approx. 6.0 feet bgs), with the remaining four locations (LE-SP117, LE-SP118, LE-SP119, and LE-SP121) suggesting the potential presence of coal ash over deeper continuous depth horizons (ranging from 0.0 down to a maximum of 21.0 feet bgs).

- As with the East Pond, the borings in which the suggested continuous presence of coal ash is noted are in areas that indicate the ash is from past structural filling operations as part of the embankments and structural support for the access road rather than ash management within the former pond. Specifically, ash was only identified around the perimeter of the former pond footprint and at higher elevations than the bottom of the pond, indicating that the ash is structural fill/embankment material. This evidence suggests that ash was removed from the pond when the coal units were retired in the 1970s.

- The review of soil data (generated during both the Phase II Investigation and RI) for arsenic showed exceedances of the New Jersey NRDC remediation standards. However, there is again no discernible pattern or trend that differentiates elevated arsenic concentrations due specifically to the potential presence of coal ash. As portions of this area were subject to prior filling operations, the results are likely influenced by multiple factors including the nature of the fill materials. Samples collected at depths near or below the groundwater table do not appear impacted. As noted above, these elevated arsenic concentrations are not pertinent to the applicability of the CCR Rule and are being fully addressed under the oversight of NJDEP through the ISRA remediation as described below.

- The review of groundwater data (generated during the RI) for arsenic show elevated concentrations at locations side-gradient (well MW26) and downgradient (well MW27) of the pond. Both locations are in excess of the New Jersey Groundwater Quality Standard (3 ug/L), however, only the downgradient location is elevated (12.4

ug/l) above the arsenic MCL (10 ug/L). Well MW31 (hydraulically upgradient) does not appear impacted when compared to the state and federal groundwater standards. As noted above, these elevated arsenic concentrations are not pertinent to the applicability of the CCR Rule and are being fully addressed under the oversight of NJDEP through the ISRA remediation as described below.

- Under the New Jersey Site Remediation Program, exceedances of State Groundwater Quality Standards (including arsenic and other constituents) have been addressed with the concurrence of NJDEP via the February 2018 establishment of groundwater CEA/WRA covenants for the Gilbert Station property, including the former West Pond.

4. Please specify, beyond stormwater runoff, whether either the East or West ponds currently receive any type of solid or hazardous waste streams.

   Neither pond receives any type of solid or hazardous waste beyond stormwater runoff. Neither of the ponds has been used for ash management in roughly 50 years since the Station transitioned completely to firing on fuel oil and natural gas in the early-1970's. These ponds are now wooded/vegetated depressions with the West Pond being a dry upland feature and the East Pond maintaining periodic accumulations of stormwater associated with runoff from the adjacent tank farm containment area. Therefore, the most appropriate designation for the East Pond is a stormwater retention pond that is not subject to the CCR Rule. Neither of the ponds is in any way designed to store, treat or otherwise manage accumulations of CCR materials, and there are presently no other inputs to the ponds besides the noted containment area stormwater runoff to the East Pond.

5. Please explain why West Pond needs to be filled with embankment material to promote drainage (this was something that came up on the Feb. 1 call with facility). Is the West Pond dry, or are there liquids/water in it? Does it collect water after rain events (or as overflow from the east pond)? If so, have these been sampled and what are the results?

   As described above, the West Pond is dry and does not hold any liquids. The West Pond does not collect overflow from the East Pond, and rainwater percolates into the ground and does not collect in the West Pond. Filling the West Pond with the embankment material will bring the area to grade and promote positive drainage and more effective erosion and sedimentation control at the site because in a 100-year storm event the river water surface elevation is higher than the West Pond's embankment crest. Filling the pond will therefore prevent the pond embankment from being overtopped by river water during a 100-year storm event and provide additional crest stabilization to reduce the potential for erosion during a flood event.

Thus, to the extent the relocation of the embankment material implicates the CCR Rule, the placement of approximately 1,000 metric tons of embankment material under the access road and 7,440.8 metric tons of embankment material in the West Pond and/or a portion of the East Pond outside the wetland therefore meets the beneficial use criteria of 40 C.F.R. 257.53 because the embankment material provides a functional benefit, substitutes for the use of virgin fill material, will be subject to engineering-based design specifications and does not involve unencapsulated placement of more than 12,400 tons in non-roadway applications. In any event, and as further support of the company's position, the placement of the embankment material will meet the beneficial use criteria for unencapsulated placement of greater than 12,400 tons in non-roadway applications, even though those standards do not apply here, because the work will be performed in accordance with NJDEP's Technical Requirements for Site Remediation, which will limit the potential exposure to human and ecological receptors through the use of a soil cover, deed restriction, routine inspections and monitoring and post-remediation groundwater monitoring.

6. Can GenOn confirm that all residual CCR materials were removed from the East pond?

Due to the passage of time since the ponds were taken out of service in the early 1970s, there is no definitive documentation on cleaning of the ponds that was performed at that time, nor would it likely have been a specific requirement at that time to maintain such records. However, , the information as recorded on the historical boring logs as described above shows that the potential presence of ash is associated with locations in closer proximity to the structural embankments around the perimeter of the ponds and access road and the river embankment, and less with the actual pond footprints, which indicates that the ash around the ponds is structural fill, that the pond no longer contains CCR, and suggests that ash was removed from the pond when the coal units were retired in the 1970s.

As previously indicated, we respectfully request EPA's concurrence on the positions set forth in this email so that GenOn can continue to implement the ISRA remediation at the site and meet upcoming NJDEP ISRA deadlines.

Please do not hesitate to contact us if you have any questions or comments or would like to schedule a call to discuss in more detail.

Respectfully submitted, Steve

GenOn

Stephen M. Frank, PE (Pa)
Senior Manager, Environmental
Stephen.Frank@GenOn.com

724-249-3610

From: Carpenter, Dale <Carpenter.Dale@epa.gov>
Sent: Monday, February 22, 2021 11:12 AM
To: Frank, Stephen <Stephen.Frank@genon.com>
Cc: Jackson, Mary <Jackson.Mary@epa.gov>; Behan, Frank <Behan.Frank@epa.gov>; Long, Michelle <Long.Michelle@epa.gov>; Yonce, Stacey <yonce.stacey@epa.gov>; Celeste, Laurel <celeste.laurel@epa.gov>; Malki, Joseph <Malki.Joseph@epa.gov>; Kijanka, Kevin <Kijanka.Kevin@epa.gov>; Conetta, Benny <Conetta.Benny@epa.gov>; Schmidt, Keith A <Keith.Schmidt@genon.com>; MacIntosh, Neil C <Neil.MacIntosh@genon.com>; McDevitt, Daniel <Daniel.McDevitt@Genon.com>; Grossman, Lenny <Grossman.Lenny@epa.gov>; McCleary, Emmie <McCleary.Emily@epa.gov>
Subject: RE: Gilbert

Stephen,

As a follow-up to our last call on the Gilbert Generating Station, I have included some questions for GenOn below:

1. How many metric tons of CCR ash do you anticipate moving/removing from the embankment as part of the slope stabilization project?
2. What alternative methods or designs are you considering as part of slope stabilization plans in lieu of moving/removing CCR ash from the embankment?
3. Please specify what waste(s) are present in both the former East and West ash ponds, along with the dates and results of any soil or groundwater sampling performed in the past.
4. Please specify, beyond stormwater runoff, whether either the East or West ponds currently receive any type of solid or hazardous waste streams.
5. Please explain why West Pond needs to be filled with embankment material to promote drainage (this was something that came up on the Feb. 1 call with facility). Is the West Pond dry, or are there liquids/water in it? Does it collect water after rain events (or as overflow from the east pond)? If so, have these been sampled and what are the results?
6. Can GenOn confirm that all residual CCR materials were removed from the East pond?

Responses to these questions would be helpful for EPA to get a better understanding of the status of the former ash ponds at this facility.

Thank you for your assistance.

Dale

From: Frank, Stephen <Stephen.Frank@genon.com>
Sent: Tuesday, January 26, 2021 8:23 AM
To: Carpenter, Dale <Carpenter.Dale@epa.gov>
Cc: Jackson, Mary <Jackson.Mary@epa.gov>; Behan, Frank <Behan.Frank@epa.gov>; Long, Michelle <Long.Michelle@epa.gov>; Yonce, Stacey <yonce.stacey@epa.gov>; Celeste, Laurel <celeste.laurel@epa.gov>; Malki, Joseph <Malki.Joseph@epa.gov>; Kijanka, Kevin <Kijanka.Kevin@epa.gov>; Conetta, Benny <Conetta.Benny@epa.gov>; Schmidt, Keith A <Keith.Schmidt@genon.com>; MacIntosh, Neil C <Neil.MacIntosh@genon.com>; McDevitt, Daniel <Daniel.McDevitt@Genon.com>; Grossman, Lenny <Grossman.Lenny@epa.gov>; McCleary, Emmie <McCleary.Emily@epa.gov>
Subject: RE: Gilbert

Dale,

Yes, outlook should be fine. We are also set up on Skype and Microsoft Teams if you would like to be able to share screens.

Thanks, Steve

GenOn

Stephen M. Frank, PE (Pa)
Senior Manager, Environmental
Stephen.Frank@GenOn.com
724-249-3610

From: Carpenter, Dale <Carpenter.Dale@epa.gov>
Sent: Tuesday, January 26, 2021 8:17 AM
To: Frank, Stephen <Stephen.Frank@genon.com>
Cc: Jackson, Mary <Jackson.Mary@epa.gov>; Behan, Frank <Behan.Frank@epa.gov>; Long, Michelle <Long.Michelle@epa.gov>; Yonce, Stacey <yonce.stacey@epa.gov>; Celeste, Laurel <celeste.laurel@epa.gov>; Malki, Joseph <Malki.Joseph@epa.gov>; Kijanka, Kevin <Kijanka.Kevin@epa.gov>; Conetta, Benny <Conetta.Benny@epa.gov>; Schmidt, Keith A <Keith.Schmidt@genon.com>; MacIntosh, Neil C <Neil.MacIntosh@genon.com>; McDevitt, Daniel <Daniel.McDevitt@Genon.com>; Grossman, Lenny <Grossman.Lenny@epa.gov>; McCleary, Emmie