The Utility Solid Waste Activities Group (USWAG) submits this Position Paper to assist the Office of Information and Regulatory Affairs (OIRA) in connection with its review of the Environmental Protection Agency's Draft Final Rule on Disposal of Coal Combustion Residuals (CCRs). USWAG believes that the application of the Resource Conservation and Recovery Act (RCRA) Subtitle D regulatory program to inactive or closed surface impoundments no longer accepting CCRs on the effective date of the rule, as we believe EPA may attempt to do in its Draft Final Rule, exceeds the agency's statutory authority under the RCRA and would be declared unlawful by a reviewing court.

EPA has acknowledged that it has never previously attempted to apply its RCRA rules retroactively to any other wastes. 75 Fed. Reg. 35128, 35177 (June 21, 2010). For nearly four decades, from the promulgation of the first RCRA implementing rules forward, EPA has consistently taken the position that RCRA rules are designed to be applied prospectively only. 43 Fed. Reg. 58946, 58984 (Dec. 18, 1978). EPA has long been of the view that "RCRA is written in the present tense, and its regulatory scheme is organized in a way which seems to contemplate coverage only of those facilities which continue to operate after the effective date of the regulations." *Id*. The agency has recognized that "[e]normous technical, legal and economic problems would arise if these standards were to be directly applied to inactive facilities [*i.e.*, those facilities that have stopped disposing of regulated wastes prior to the effective date of the Subtitle D regulations] and all such facilities were required to upgrade." *Id*. EPA also has recognized that applying new rules retroactively to inactive or closed facilities would be inequitable "because of the enormous difficulty of bringing a closed facility into compliance, and because the present owner or operator on which an inactive site is located might have no connection (other than present ownership of the land) with the prior disposal activities." *Id*. Any regulation of inactive sites in the final CCR rule would be completely inconsistent with past agency precedent and policies.

In submitting this analysis, USWAG assumes that any legal rationale in the Draft Final Rule for regulation of inactive surface impoundments under Subtitle D is similar to the legal theory that EPA set forth in its discussion of the regulation of inactive surface impoundments under Subtitle C in the Preamble to the Notice of Proposed Rulemaking (NPRM). In the Subtitle C discussion, EPA relied upon the "passive migration" theory—that the passive migration or leaching of wastes that may subsequently occur from an inactive CCR surface impoundment would constitute a "disposal" of those wastes within the meaning of that term set forth in RCRA. RCRA § 1004(3), 42 U.S.C. § 6903(3).

While the NPRM did not set forth a separate legal rationale for the regulation of inactive or closed CCR surface impoundments under Subtitle D, the same legal theory must underlie EPA's position because the definition of the two key terms under Subtitle D—whether a facility constitutes a lawful "sanitary landfill" or an illegal "open dump"—both depend upon the statutory definition of "disposal." Any alternative rationale relied upon by EPA for attempting to regulate inactive units under Subtitle D would be at significant risk of being declared invalid on procedural grounds under the Administrative Procedure Act (APA) because EPA provided no information in the NPRM about an alternative legal theory that it was considering for attempting

to regulate inactive sites under a final Subtitle D rule, nor did it propose any Subtitle D regulatory text that would specifically regulate inactive sites (as it did in the Subtitle C proposal).

Discussion

EPA is directed under Section 1008(a) of RCRA, 42 U.S.C. § 6907(a), to establish minimum criteria to be used by the States to define solid waste management practices that constitute the "open dumping" of solid wastes. Open dumping is prohibited under the statute. *See* RCRA § 4005(a), 42 U.S.C. § 6945(a). Under Section 4004(a), 42 U.S.C. § 6944(a), EPA is directed to promulgate regulations setting forth criteria for distinguishing between "sanitary landfills" and "open dumps." In particular, "a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from *disposal* of solid waste at such facility." (Emphasis added.) Section 4004(b) of RCRA provides further that in order to comply with the requirements for EPA approval of State solid waste management plans:

> each State plan shall prohibit the establishment of open dumps and contain a requirement that *disposal* of all solid waste within the State shall be in compliance with section 6943(2) of this title.

42 U.S.C. § 6944(b) (emphasis added.) Consistent with the statutory directive that the *disposal* of solid waste in a sanitary landfill may not pose a reasonable probability of adverse effects on health or the environment, the statutory definitions of "sanitary landfill" and "open dump" also are keyed to the act of "disposal." The term "sanitary landfill" is defined, in pertinent part, to mean "a facility for the *disposal* of solid waste which meets the criteria" promulgated under Section 4004(a), and the term "open dump" is defined, in pertinent part, to mean "any facility or site where solid waste is *disposed of* which is not a sanitary landfill . . . ." RCRA §§ 1004(14), (26), 42 U.S.C. §§ 6903(14), (26).

Thus, the legal parameters of EPA's statutory authority under Subtitle D for defining when CCR management activities constitute a "sanitary landfill" versus an "open dump" extend only to those actions that fall within the statutory definition of "disposal." As explained below, the statutory term "disposal" does not extend to units no longer receiving CCR on the effective date of the rule, including the "passive migration" from previously disposed of waste.

Therefore, an inactive or closed CCR surface impoundment cannot lawfully be included in the category of "open dumps" under Subtitle D because such units are not engaged in the "disposal" of solid waste. As discussed below, Congress enacted other statutory authorities under which EPA may address the risk from these inactive sites no longer engaging in disposal of CCR, including groundwater contamination from such units, and the agency is obliged to address any such risks under those other provisions.

1. The Definition of "Disposal" Does Not Encompass Inactive Units

Under Section 1004(3) of RCRA, 42 U.S.C. § 6903(3), the term "disposal" means:

> [t]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Five U.S. Court of Appeals have construed this term as being written in the present tense, rather than in the past tense as would be necessary to justify the application of the new Subtitle D rules to the past management of CCRs in inactive or closed facilities.[1]

In *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), the Ninth Circuit held that in light of the plain meaning of the terms used to define "disposal" in Section 6903(3), the passive migration of contaminants through soil that occurred in that case did not constitute a "disposal" under the statutory definition. The court stated that "[i]f we try to characterize this passive soil migration in plain English, a number of words come to mind, including gradual 'spreading,' 'migration,' 'seeping,' 'oozing,' and possibly 'leaching.' But certainly none of those words fits within the plain and common meaning of 'discharge, … injection, dumping, … or placing.'" *Id*. at 879.

In *United States v. CDMG Realty Co.*, 96 F.3d 706 (3rd Cir. 1996), the Third Circuit held that "the passive migration of contamination dumped in the land prior to ownership does not constitute disposal." *Id*. at 711. The court expressly held that its conclusion was supported by the fact that Congress did not include the term "leaching" in the statutory definition of "disposal."

In *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997), the Second Circuit held that none of the terms Congress included in the statutory definition of "disposal"—*i.e.*, discharge, deposit, injection, dumping, spilling, leaking, or placing—"is commonly used to refer to the gradual spreading of hazardous chemicals already in the ground." *Id*. at 358.

In *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000), the Sixth Circuit also held that "because 'disposal' is defined primarily in terms of active words such as injection, deposit, and placing, the potentially passive words 'spilling' and 'leaking' should be interpreted actively[.]" *Id*. at 706. It therefore held that no "disposal" within the meaning of the statute occurred "[i]n the absence of any evidence that there was human activity involved in whatever movement of hazardous substances occurred."

In *Joslyn Manufacturing Co. v. Koppers Co., Inc.*, 40 F.3d 750 (5th Cir. 1994), the Fifth Circuit held that where the plaintiff "failed to show that any hazardous waste 'leaked' or 'spilled' during the [defendant's] ownership of the property[,] a disposal did not occur during [the defendant's] ownership." *Id*. at 762.

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[1] These decisions were issued in lawsuits filed under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). These decisions are fully applicable in interpreting the scope of RCRA, however, because CERCLA explicitly incorporates the RCRA definition of "disposal." 42 U.S.C. § 9601(29).

Based on these decisions, EPA's unprecedented effort to expand RCRA to apply retroactively to inactive or closed surface CCR impoundments no longer engaging in the disposal of solid waste would be highly vulnerable to being rejected by the courts as illegal.

2. The Structure of RCRA Demonstrates that Congress Did Not Grant EPA Regulatory Jurisdiction under Subtitle D over Inactive or Closed Facilities

Congress did not include in RCRA's definition of "disposal" a term that encompasses inactive facilities no longer receiving waste. Congress was aware of the concept of passive migration and other issues associated with the past management of solid wastes at the time it enacted the statute, and other provisions of RCRA demonstrate that Congress knew how to provide EPA with authority to regulate any concerns with these past management practices when it chose to do so (these RCRA provisions are in addition to EPA's authority under CERCLA to address contamination from past management practices).

a. EPA's Authority To Act in Response to an Imminent and Substantial Endangerment Presented by a Past Disposal of Solid Waste. Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), expressly grants EPA authority to take remedial action in response to a *past* disposal of solid waste that is currently presenting an imminent and substantial endangerment. It provides, in pertinent part, that "upon receipt of evidence that the *past* or present disposal of any solid waste . . . may present an imminent and substantial endangerment to health or the environment," EPA may bring a lawsuit in federal court against any "*past* or present owner or operator of . . . a disposal facility" to remedy the problem. (Emphasis added.) This provision applies to past disposal activities under both RCRA Subtitle C and Subtitle D, including inactive CCR surface impoundments

b. Citizens' Suits. Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), provides that a person adversely affected by a *past* disposal of a solid waste that may present an imminent and substantial endangerment may bring an enforcement action in federal court. This provision creates a private right of action against *past* disposals that are currently creating current problems. It thus is the private sector counterpart of Section 6973(a), which provides EPA with enforcement authority against *past* disposals. This provision also applies to past disposal activities under both RCRA Subtitle C and Subtitle D, including any risk from inactive CCR surface impoundments.

c. Facilities Seeking a Hazardous Waste Operating Permit. Section 3004(u) of RCRA, 42 U.S.C. § 6924(u), provides that any facility seeking a hazardous waste operating permit under Subtitle C must conduct "corrective action for all *releases* of hazardous waste or constituents from any solid waste management unit . . . *regardless of the time at which waste was placed in such unit*." (Emphasis added.) By utilizing the term "release"—which is broader than "disposal," *see e.g., United States v. CDMG Realty Co.*, 96 F.3d 706 (3rd Cir. 1996)—Congress demonstrated that it knew how to address concerns with past management practices involving solid wastes when it wished to. Congress, however, did not include this authority to regulate past disposal practices in Subtitle D, but rather limited EPA's authority to establishing criteria

distinguishing between solid waste "disposal" that constitutes a "sanitary landfill" versus an "open dump."

The explicit language of these three statutory provisions, which grants EPA authority to address *past* disposal activities only in limited circumstances, confirms the conclusion drawn from the literal language of RCRA—that Congress did not authorize EPA to apply its authority under Subtitle D retroactively to past disposal practices at inactive or closed surface impoundments that previously accepted CCRs.

3. EPA's Failure to Provide Adequate Public Notice of the Possible Contents of its Subtitle D Rule

In addition to the above, USWAG submits that any attempt by EPA to regulate inactive sites under the forthcoming rule has a procedural defect that renders it further vulnerable to being held invalid by a reviewing court. In particular, the NPRM failed to provide the public with appropriate notice of the possible contents of the rule that might be issued under the Subtitle D option.

To satisfy the notice requirement of the APA, the final rule must constitute a "logical outgrowth" of the NPRM, which means that the NPRM must have provided the public with sufficient information about the possible provisions of the final rule that they could comment meaningfully on those issues. *See e.g., CSX Transp. Inc., v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009) (striking down an STB rule for failure to provide the public notice that four years of private data, rather than one year, might be required).

Here, the NPRM provided the public with no specifics or theories about the possible content of the final rule as applied to inactive or closed facilities if EPA chose the Subtitle D option. While EPA set forth with specificity its passive migration legal theory underlying the possible regulation of inactive sites under the Subtitle C option and included specific regulatory text under the Subtitle C option by which inactive sites would be regulated, the agency provided no comparable legal theory for its statutory basis for regulating inactive sites under Subtitle D, let alone any proposed regulatory text for doing so. Regulated entities, therefore, did not have sufficient notice that the Subtitle D rule might be applied retroactively to inactive CCR surface impoundments; indeed, the Subtitle D option was criticized by many environmental organizations precisely because it did *not* extend to inactive sites. As a result, the public was unable to comment meaningfully on the various theories EPA may be developing to regulate inactive sites under Subtitle D, let alone on the scope of such potential regulation or the means by which it might attempt to do so.

Conclusion: USWAG respectfully submits that in its review of the Draft Final Rule, OIRA should take into consideration that, to the extent the rule now attempts to regulate inactive or closed CCR surface impoundments, there is a significant risk that a reviewing court would find that this unprecedented action violates the explicit language and structure of RCRA and is procedurally flawed under the APA.