

January 5, 2024

*Via email*

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EPA Docket Center  
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Re: Docket ID No. EPA-HQ-OW-2009-0819  
Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric  
Power Generating Point Source Category

Dear Mr. Benware,

Thank you for the opportunity to meet with you and other EPA staff on December 13, 2023. We write to follow up on one of the topics we discussed with you in that meeting: the importance of ensuring that any revised limitations and standards established in the supplemental Steam Electric ELG rulemaking are implemented promptly in NPDES permits and do not languish for years or even decades due to pervasive state agency delays in issuing new or modified permits. We ask that you include this letter as a late-filed comment on the proposed rule.<sup>1</sup>

Any revised ELG limits for arsenic, mercury, and selenium can and should be incorporated into existing NPDES permits as soon as possible and without any permitting delays. Arsenic, mercury, and selenium are all toxic pollutants listed at 40 C.F.R. § 401.15 pursuant to Section 307(a)(1) of the Clean Water Act, 33 U.S.C. § 1317(a)(1). EPA's definition of toxic pollutants in the proposed rule references this regulatory list under Section 307(a). 88 Fed. Reg. 18,824, 18,896 (Mar. 29, 2023). The proposed Steam Electric ELGs are "effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources." 33 U.S.C. § 1317(a)(2).

As EPA acknowledges in the proposed rule, in setting these ELGs, EPA is acting pursuant to Section 307(a):

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<sup>1</sup> See, e.g., Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5120, 5121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking stating that "[c]omments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable").

EPA promulgates national ELGs for major industrial categories for three classes of pollutants: (1) conventional pollutants (i.e., total suspended solids (TSS), oil and grease, biochemical oxygen demand (BOD5), fecal coliform, and pH), as outlined in CWA section 304(a)(4) and 40 CFR 401.16; (2) *toxic pollutants (e.g., toxic metals such as arsenic, mercury, selenium, and chromium; toxic organic pollutants such as benzene, benzo-a-pyrene, phenol, and naphthalene)*, as outlined in section 307(a) of the Act, 40 CFR 401.15 and 40 CFR part 423 appendix A; and (3) nonconventional pollutants, which are those pollutants that are not categorized as conventional or toxic (e.g., ammonia- N, phosphorus, and total dissolved solids (TDS)).

88 Fed. Reg. at 18,828.

Existing permit limits for toxic pollutants must be modified when more stringent standards are put in place under Section 307 of the Clean Water Act. 40 C.F.R. § 122.44(b)(1). This requirement applies to state-issued NPDES permits. *Id.* § 123.25(a)(15). Because the revised ELG limits that EPA has proposed for arsenic, mercury, and selenium are more stringent toxic pollutant limits under Section 307(a), existing power plant NPDES permits must be modified to incorporate these effluent limits after they are finalized.

To avoid any potential confusion on this point, EPA should include express findings under Section 307(a)(2) in the final supplemental rule. The proposed rule (and accompanying Environmental Assessment) contain ample support, so we believe it is entirely appropriate for EPA to make clear that it has already “take[n] into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority,” as specified under Section 307(a)(2). 33 U.S.C. § 1317(a)(2). For example, EPA explains that it thoroughly analyzed these toxic pollutants in the Environmental Assessment, including the joint toxic action of multiple pollutants together: “As described in the EA Report, EPA focused its quantitative analyses on the changes in environmental and human health impacts associated with exposure to toxic bioaccumulative pollutants via the surface water pathway.” 88 Fed. Reg. at 18,871. Accordingly, making findings expressly under Section 307(a)(2) should not be controversial and would—at most—be a logical outgrowth of the proposed rule.

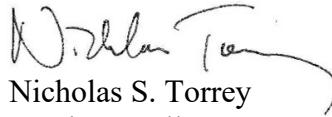
Having eliminated any possible confusion on this point, EPA should at the same time make clear that these toxic pollutant limits must be incorporated into existing NPDES permits pursuant to 33 U.S.C. § 1342(k) and 40 C.F.R. § 122.44(b)(1).

By doing so, EPA will help ensure that underfunded or recalcitrant state permitting agencies do not prevent the implementation of these important effluent limitations for years or decades, thereby undermining the Clean Water Act’s technology-forcing approach to eliminating the discharge of pollutants to the navigable waters of the United States. Unfortunately, we have seen these delays all too often; for example, in December 2023 the Southern Environmental Law Center filed comments on a draft NPDES permit for a coal-fired power plant in South Carolina

whose current permit expired in 2010, meaning it was last issued in 2005, over 18 years ago—despite the Clean Water Act’s mandate that new permits be issued every five years. While this is a serious and intractable problem, EPA can at least make clear that existing NPDES permits must be modified or renewed promptly to incorporate new ELG limits for toxic pollutants.

Thank you for your consideration of these comments.

Sincerely,



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