

**Comments on the
Utility Solid Waste Activities Group's
*Utility Industry Action Plan
for the Management of
Coal Combustion Products***

**Prepared in response to:
US EPA, Notice of Data Availability
72 Fed. Reg, 49714
August 29, 2007
RCRA Docket No. EPA-HQ-RCRA-2006-0796**

**Submitted by Earthjustice, Clean Air Task Force *et al*
January 28, 2008**

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Introduction

The “Utility Industry Action Plan for the Management of Coal Combustion Products” is a hollow proposal from the Utility Solid Waste Activities Group (USWAG)¹ that offers far too little, too late, and is designed to allow the electric utility industry to continue avoiding the cost of safe disposal of its voluminous toxic waste. The plan intentionally fails to require monitoring that would detect pollution escaping coal combustion waste (CCW) units or to require any specific response should any pollution be detected. In view of all the documented damage from disposal of coal ash in leaking landfills, surface impoundments, and mines and all the drinking water ruined and lives threatened by carelessly managed coal ash, it is an affront to the public and to regulators to be offered such a vastly empty and ineffective “plan.”

Furthermore, in view of the overwhelming evidence of current and continuing damage from coal ash, it is untenable for EPA to even entertain an *unenforceable and voluntary* proposal from USWAG. For six decades, the utilities’ careless, irresponsible and cost-cutting disposal practices have poisoned drinking water and ecosystems, harmed wildlife and endangered public health across the U.S. Decade after decade, the industry has failed to police itself—resulting in hundreds of unlined and inadequately-lined surface impoundments and landfills that continue to operate today without safeguards. According to a 1993 report by the U.S. Department of Energy (DOE), there are over 600 operating landfills and surface impoundments, as well as over 750 retired CCW disposal units.² According to EPA, most of these active and inactive landfills and surface impoundments lack adequate liners and monitoring.³ Moreover, the recent study by EPA and DOE on landfills and surface impoundments *built between 1994 and 2004* reveals that the majority of even these units *still* lack adequate safeguards such as composite liners.⁴ With this dismal track record, it is necessary to object out of hand to any proposal from the electric utility industry for *voluntary* standards.

¹ USWAG is an informal consortium of approximately 80 utility operating companies. USWAG member companies and trade associations represent more than 85% of the total electric generating capacity of the U.S. and service more than 95% of the nation's consumers of electricity. According to USWAG, the association is responsible for addressing solid and hazardous waste issues on behalf of the utility industry.

² U.S. Department of Energy, Office of Fossil Energy, Coal Combustion Waste Management Study, February 1993 at 7.

³ For units constructed before 1985, only 26% of surface impoundments and 57% of landfills have liners according to U.S. EPA, Regulatory Determination on Wastes from the Combustion of Fossil Fuels, Final Rule, May 22, 2000, 65 Fed .Reg. 32214 at 32216.

⁴ The DOE/EPA Report, *Coal Combustion Waste Management at Landfills and Surface Impoundments, 1994-2004*, provides detailed information on 56 permitted waste disposal units constructed or expanded between 1994 and 2004. The report reveals that, at best, only 39% of these new units have been constructed with composite liners. Clay liners, deemed to present unacceptable level of risk for CCW landfills and surface impoundments were used at 25% of the units permitted between 1994 and 2004. Single liners, also deemed inadequate, were used at 18% of the units. Thus it is clear that the majority of new units built between 1994 and 2004 do not have adequate liners.

EPA committed nearly eight years ago to promulgate federal standards for the disposal of coal combustion waste in its “Determination on Waste from the Combustion of Fossil Fuels.”⁵ In March 2006, the National Academies of Science explicitly reiterated the need for national enforceable regulations in its report on CCW minefilling, “Managing Coal Combustion Residue in Mines.” Yet today, as evidenced by EPA’s August 29, 2007 Notice of Data Availability (NODA), the Agency has abandoned its commitment to issue enforceable federal regulations and is considering instead the USWAG’s voluntary “Action Plan.”⁶ EPA has taken this casual approach despite a more than doubling of sites since 2000 where the Agency concedes offsite contamination of drinking water supplies by CCW has been proven. A steady growth has also occurred in this time of the total number of CCW sites on EPA’s list of damage cases to 135 sites, many of which qualify as open dumps prohibited under RCRA.

By the weight of the evidence presented in EPA’s own NODA, however, the Agency’s consideration of voluntary industry standards is dead wrong. Nevertheless, it is useful to examine the plan offered by industry to determine whether it has been offered in good faith and whether there are elements in the plan that Earthjustice, Clean Air Task Force, *et al* could support as *interim measures* as EPA moves toward promulgation of enforceable federal regulations. Without hesitation, we conclude that this plan, as a substitute for comprehensive regulations, was not offered in good faith, because it will do little to cure the extensively documented and extremely serious threats to health and the environment posed by CCW. While the solutions to the risks posed by CCW are clear-cut and have been well tested over time, this plan does not offer those basic solutions. Beneficial reuse and secure disposal in engineered landfills will cure the problems posed by CCW, but the USWAG plan promotes inadequate and untimely measures that fall far short of protecting the public and environment from the threats posed by CCW.

Below we describe the most serious shortcomings of the USWAG plan. While acceptance of the plan as a substitute for regulations is wholly untenable, we do find merit in a voluntary industry agreement to institute a strengthened version of the proposed measures *immediately*, as a good faith effort and *as an interim measure*, to prevent the rampant contamination by CCW that is occurring at many sites throughout the U.S. We suggest such measures in the last section of this document. We reiterate, however, that the implementation of interim measures to curb the current damage occurring at CCW sites should not in any way slow EPA’s promulgation of federal minimum enforceable disposal standards.

A. The USWAG Voluntary Plan for the Management of Coal Combustion Waste

1. Overview

The USWAG plan addresses only four areas of concern regarding CCW disposal. Utilities who choose to participate in the plan agree to do the following: (1) accept some

⁵ 65 Fed. Reg. 32214.

⁶ U.S. Environmental Protection Agency. Notice of Data Availability, 72 Fed. Reg. 49714, August 29, 2007.

very limited groundwater performance standards for landfills and surface impoundments; (2) conduct very limited groundwater monitoring twice a year, which may be waived upon a demonstration by the utility; (3) consider safeguards when disposing CCW in sand and gravel pits, although no specific safeguards are specifically required (not even the prohibition of dumping ash in groundwater), and (4) agree to consider dry handling of CCW in lieu of construction of surface impoundments, but the construction of surface impoundments is not prohibited.

The plan is missing many critical elements. The plan does not ask utilities to implement the most basic safeguards that are required at every municipal solid waste landfill in the U.S. Namely, it does not ask the industry to construct liners, to install leachate collection systems, to provide financial assurance, or to guarantee safe closure and post-closure care. These are essential safeguards that are federally required at all municipal landfills. While the plan addresses two of the most dangerous methods of CCW disposal, the dumping of ash in sand and gravel pits and the disposal of ash in waste ponds, the plan stops well short of prohibiting such disposal or requiring meaningful safeguards to prevent harm from such disposal.

The primary deficiencies of the four elements of the USWAG plan; groundwater performance standards, groundwater monitoring, sand and gravel pits, and surface impoundments, are discussed in greater detail below.

2. USWAG's Proposed "Groundwater Performance Standards" Will Not Protect Groundwater

- (a) The USWAG plan only requires monitoring for constituents regulated by the Safe Drinking Water Act.

The plan will apply "groundwater performance standards" for CCW disposal units only to primary pollutants for which there are maximum contaminant limits (MCLs) under the Safe Drinking Water Act.⁷ Yet many of the most commonly detected CCW pollutants that have threatened public health and destroyed drinking water sources do not have MCLs. These pollutants include aluminum, chloride, boron, molybdenum, manganese, sulfate, silver, zinc, cobalt, and nickel. Under the USWAG plan, there are neither testing requirements nor standards for these dangerous and common contaminants of CCW.

- (b) The groundwater performance standards only apply in a "designated drinking water source aquifer."

The entire groundwater monitoring program under the USWAG plan only applies to CCW-derived MCL contaminants that have the potential to enter "an aquifer designated as a drinking water source."⁸ Thus, under this plan, there would be no

⁷ Utility Solid Waste Activities Group. "Utility Industry Action Plan for the Management of Coal Combustion Products," October 2006 at 6.

⁸ Id.

protection for wetlands, streams, lakes, rivers or even *potential* sources of drinking water. By limiting protection of groundwater to “an aquifer designated as a drinking water source,” the plan does not comply with existing federal regulations governing disposal of coal combustion waste. Federal groundwater protection standards set forth at 40 C.F.R. § 257.3-4 prohibit CCW disposal units from contaminating of “an underground drinking water source beyond the solid waste boundary.”⁹ “Underground drinking water source” is defined very broadly in the federal regulations and includes any aquifer in which the groundwater contains less than 10,000 mg/l total dissolved solids.¹⁰ While the USWAG plan would allow any quantity of arsenic, selenium, lead, mercury, cadmium, chromium, etc. to enter an underground drinking water source not yet “designated as a drinking water source,” such pollution would constitute illegal open dumping and would violate federal law.¹¹

(c) Generous loopholes in the USWAG plan reduce its effectiveness.

The plan contains a major loophole allowing “alternative performance standards” for groundwater monitoring. Such “alternative groundwater performance standards” are allowed if the facility makes a vaguely described demonstration to “an appropriate government agency.” There is, however, no government agency that will be a party to this agreement. It is unclear whether the “appropriate government agency” would be a local, state or federal agency. This mechanism for altering the performance standard is far too loosely described and there is no clear regulatory oversight in place to ensure that waivers would be consistently and knowledgeably evaluated by an agency with appropriate authority and expertise.

(d) The schedule for implementation of the groundwater monitoring program allows for considerable, if not indefinite delay.

The USWAG plan allows companies to wait three to five years before monitoring is initiated. After a utility signs the agreement to participate in the plan, the following schedule applies: for waste units which are located less than a mile upgradient from an active source of drinking water, defined as “active drinking water well,” the requirements to monitor groundwater don’t apply until three years after signing. If the waste disposal unit is located over a mile but less than two miles from an active drinking water source, monitoring need not be implemented for four years. If the waste disposal unit is located over two miles upgradient from an active drinking water well, monitoring is not required for five years from the date of the agreement.¹² Furthermore, if there is no downgradient “active drinking water source,” there may never be a requirement to monitor, regardless

⁹ 40 C.F.R. § 257.3-4(a).

¹⁰ 40 C.F.R. § 257.3-4(c)(4).

¹¹ Section 4005(a) of RCRA states that “upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited...” 42 U.S.C. § 6945(a). EPA promulgated criteria under section 6907(a)(3) defining solid waste management practices which constitute the prohibited open dumping of solid waste, and those criteria are contained in 40 C.F.R. Parts 257 and 258.

¹² USWAG plan at 5.

of the presence of a potential drinking water source or other sensitive receptors such as wetlands, streams, lakes, etc.

This snail's pace proposed by USWAG for establishing monitoring in aquifers being used as drinking water supplies is an outrageous insult to communities around coal fired power plants. This timetable will allow contamination from CCW of underground drinking water supplies to continue for years despite pervasive, documented contamination of underlying groundwater at CCW sites across the country and EPA's acknowledgement of cancer risks as much as 1,000 times over acceptable levels around unlined surface impoundments. EPA should be ashamed for making the USWAG proposal part of this NODA, given the proposal's inclusion of such a negligent timetable to establish monitoring.

3. The USWAG Plan's Groundwater Monitoring Program is Grossly Deficient

- (a) The plan will monitor only for primary MCLs, leaving out many critical contaminants of coal ash.

This deficiency is explained in section 2(a), above.

- (b) The program will conduct only semi-annual monitoring.

Participating owners or operators agree to conduct only "semi-annual monitoring for [CCW]-related primary drinking water constituents (i.e., constituents with MCLs) that are reasonably expected to migrate to the groundwater based on site-specific factors."¹³ Quarterly monitoring is standard practice for groundwater monitoring programs at solid waste facilities. Semi-annual monitoring is not frequent enough. Semi-annual monitoring does not account for seasonal influences and does not permit the effective and timely response to contamination migration.

- (c) The number of downgradient and upgradient monitoring wells are not specified.

There are no provisions indicating that complete monitoring systems will be established. There is no indication that upgradient monitoring and pore water monitoring (of leachate or water in the waste) will even occur, a common deficiency at monitored CCW sites.

- (d) The plan does not require the characterization of surface and groundwater hydrology as a precursor to establishing effective monitoring systems.

This characterization should be undertaken in a transparent, accountable process that involves the local community. The failure to undertake characterization along with the deficiencies in (c) leaves no means for assuring the public that monitoring systems

¹³ USWAG plan at 8.

capable of reliably detecting the migration of contaminants will be established at sites under this plan.

(e) Utilities can easily opt out of the “requirements.”

Utilities can easily opt out of the program by demonstrating that there is no reasonable potential for migration of *primary* drinking water constituents from the unit to an aquifer *designated as a drinking water source*.¹⁴ Even municipal waste landfills must monitor in areas where there is any potential for migration of hazardous constituents to the uppermost aquifer, whether it is used for drinking water or not. Furthermore this demonstration is not made to any regulatory agency, it is simply made by the utility and retained in their files. There is no independent authority evaluating the “demonstration.” Far too much discretion is thus afforded to the participating utility to avoid groundwater monitoring entirely, with absolutely no regulatory or public oversight.

(f) When monitoring detects contamination in the groundwater, there is *no* specific time given for determining whether there has been a “statistically significant increase” in contaminants.

According to the plan, utilities agree to determine “within a reasonable period of time after completing semi-annual sampling and analysis whether there has been a statistically significant increase over background levels” for CCW-related contaminants that exceed the MCLs.¹⁵ The requirement to determine the extent of contamination is unacceptably vague. The failure to specify a time period in which the determination must be made increases the likelihood that a timely finding will not be made. The failure to require a time-certain to complete an analysis of elevated pollutant levels, combined with the infrequent semi-annual monitoring, almost ensure that contamination will not be detected and responded to in a timely manner. Furthermore the method for ensuring that “background levels” of CCW-related contaminants are credibly established is unspecified, leaving room for the often used assertion that elevated levels of CCW-related contaminants are from other sources or nature.

(g) If a statistically significant increase in contaminants is found, there is no time period by which a utility must consult with “the appropriate governmental agency” to determine assessment monitoring.

Again, the plan fails to require that critical steps be accomplished within a time certain after contamination of the underlying drinking water aquifer is detected. After a determination that there is contamination and that the contamination is coming from the CCW unit, the utility under this plan is still under no obligation to commence assessment monitoring within a specified period of time.¹⁶ The plan only requires that the utility consult with the appropriate government agency. This requirement, again, raises the problem that no agency is a party to the agreement and no agency, local, state or federal,

¹⁴ USWAG plan at 7.

¹⁵ USWAG plan at 8.

¹⁶ USWAG Plan at 8.

is specified as “appropriate.”¹⁷ The vagueness of this provision results in no action being required within a time certain and thereby creates the likelihood that the pollution of the aquifer will not be addressed in a timely matter.

- (h) There is no provision for corrective action even after contamination of groundwater is detected.

The requirement to correct a problem within a reasonable time is the foundation of the regulatory system applying to solid waste units. Yet specific corrective action requirements are wholly absent in this plan. The plan simply states that “[i]f assessment monitoring and analysis confirms a statistically significant [CCW]-derived increase over background that exceeds Groundwater Performance Standards for one or more constituents, then a participating owner or operator shall, within 90 days of such confirmation, consult with the appropriate governmental agency and begin to develop a risk-based management plan to address contamination.”¹⁸ Not only are there absolutely no time frames specified in which to take action, but a “risk-based management plan” is never defined. It is completely unacceptable that the plan fails to mandate an effective response to abate the pollution as soon as possible, even when contamination of a drinking water source with primary pollutants above the MCLs is confirmed and reported.

- (i) The groundwater monitoring program does not ask participants to submit data to state or federal regulatory agencies

Under the USWAG voluntary program, participants do not submit their groundwater monitoring data to any state or federal regulatory agencies. Thus, any data generated by a facility would be unavailable to the public and to regulators. Public availability of monitoring data is the cornerstone of EPA’s RCRA monitoring programs. Allowing participating facilities to maintain private compilations of monitoring data keeps the public, state and federal government in the dark regarding health and environmental impacts. Such secrecy is likely to delay critical enforcement and corrective action, impede the analysis of monitoring systems, and, in the end, result in greater environmental degradation and threats to public health. Under USWAG’s program a community whose drinking water is potentially impacted by CCW disposal units would have no access to monitoring data that might indicate damage or threats to their water. This is untenable.

4. Restrictions on CCW disposal in sand and gravel pits are far too weak.

Since 2000, EPA has specifically identified CCW disposal in sand and gravel pits as an activity that must be prohibited because of the many damage cases resulting from this practice.¹⁹ This plan, however, contains no provision to stop disposal of CCW in

¹⁷ Id.

¹⁸ Id.

¹⁹ Consider the following proven damage cases listed on EPA’s Coal Combustion Waste Damage Case Assessments (August 2007) where CCW was disposed in sand and gravel pits: City of Beverly/Vitale

sand and gravel pits. The plan only prohibits disposal without “appropriate site-specific engineering and management controls to protect groundwater.”²⁰ There are no required safeguards, however, specified in the plan. The plan only lists several options for “management controls.”²¹ The plan does not even ask signatories to stop disposing of CCW directly into groundwater in sand and gravel pits. Clearly, at a minimum, the plan should have asked companies to stop this dangerous practice.

5. The plan does not stop the construction of new surface impoundments.

The USWAG plan does not ask participants to refrain from construction of new surface impoundments, it only asks owners to “consider” dry handling of CCW when building new disposal units.²² Yet the disposal of coal combustion waste in waste ponds is a dangerous practice, and there are dozens of cases of contamination from the leaching of pollutants from surface impoundments across the U.S. In fact, EPA’s recently published “Human and Ecological Risk Assessment of Coal Combustion Wastes” identifies exceedingly high risks of groundwater contamination from CCW surface impoundments and finds that the risk from surface impoundments is considerably higher than the risk from CCW landfills.²³ Isolation of CCW from water is unquestionably the safest way to dispose of coal ash. Consequently, there should be a prohibition on construction of all new surface impoundments at both new and existing power plants.

B. The Deficiencies of the USWAG Plan are Clear when Measured Against Real World Damage from Coal Combustion Waste

The ineffectiveness of the USWAG voluntary plan is immediately evident when one examines an example of a real world CCW damage case. Consider the recent poisoning of drinking water wells in Town of Pines, Indiana by ash generated by a coal-fired power plant owned and operated by Northern Indiana Public Service Company (NIPSCO), a USWAG member. Levels of boron and molybdenum well above health-based standards migrated from ash placed in an inadequately lined landfill and poisoned the drinking water of the entire town. Only after a lawsuit was filed against the utility, did the company provide safe drinking water to most of the town. The Town of Pines is now a Superfund site and a “proven damage case.”²⁴ The very serious and health-threatening contamination of drinking water, caused by the disposal of CCW, would not have been discovered by the voluntary monitoring proposed by USWAG. Neither boron nor molybdenum has a maximum contaminant level. Thus there would have been no

Brothers Fly Ash Pit, Massachusetts; Virginia Power Yorktown Power Station Chisman Creek Disposal Site, Virginia; WEPCO Highway 59 Landfill, Wisconsin; WEPCO Cedar-Sauk Landfill, Wisconsin; and WEPCO Port Washington Facility, Wisconsin. In addition, EPA lists the following CCW disposal site/sand and gravel pit as a potential damage case: K.R. Resendez, South Main Street Ash Landfill, Freetown, Massachusetts.

²⁰ USWAG plan at 9.

²¹ Id.

²² Id.

²³ US EPA, Human and Ecological Risk Assessment of Coal Combustion Wastes, August 6, 2007.

²⁴ See Northern Indiana Public Service Corp (NIPSCO) Yard 520 Landfill Site, Township of Pines, Porter County, IN in US EPA, Coal Combustion Waste Damage Case Assessments, August 2007 at page 32.

“groundwater protection standard” set for these contaminants, and no monitoring would have included them. Furthermore, the utility sent its waste to an offsite landfill, not a landfill owned by a utility, so even if NIPSCO was a party to the agreement, the monitoring program would not have been implemented by the leaking landfill. Thus nothing in the USWAG plan would prevent a tragedy like the Town of Pines Superfund Site from happening again.

It is easy to find countless additional examples where this voluntary plan will fail to protect communities living near CCW landfills and surface impoundments. Two additional examples of *ongoing contamination* of drinking water are illustrative. The first is the boron contamination that is believed to be migrating from waste disposal units at Duke Energy’s Gibson Generating Station in Owensville, Indiana. Homes near the plant are currently being supplied with bottled water after elevated levels of boron was found in the groundwater. Again, since boron does not have a maximum contaminant level, the USWAG voluntary agreement would not have uncovered the pollution of drinking water wells. Lastly, the contamination of drinking water wells by CCW contaminants flowing from the Gambrills coal ash dump, which started operation in 1999 in an unlined gravel quarry in Anne Arundel County, Maryland, might have been avoided if company officials had heeded warnings of elevated levels of sulfates in groundwater migrating in the direction of residential wells. Sulfate, a common CCW contaminant, is also not covered by USWAG’s voluntary agreement. Thus voluntary monitoring under this agreement would *not* have alerted authorities in a timely manner to the contamination of a drinking water supply by Constellation Energy.

C. The Need for a Voluntary Agreement to Take Interim Measures

Earthjustice, Clean Air Task Force, *et al* recommends that USWAG consider the voluntary agreement a vehicle for immediately improving CCW management prior to the promulgation of national EPA standards under RCRA. Such an agreement could encompass the areas addressed by the USWAG plan, but with important changes. First such an agreement would ask for immediate implementation of quarterly groundwater monitoring at all CCW units, operating and retired, for all CCW-related pollutants. This monitoring would be highly useful for two reasons. Foremost, it would identify CCW disposal units that are currently threatening health and the environment. Secondly, it would provide critical data to EPA that would inform the Agency’s rulemaking to establish minimum standards. In addition, the agreement would ask utilities to immediately cease CCW disposal in sand and gravel pits and to close existing sand and gravel dumps, including the implementation of post-closure monitoring and the establishment of corrective action standards. Lastly, in lieu of the proposed USWAG voluntary plan, an interim agreement would agree to stop the construction of new surface impoundments. There are many more provisions that should be included in an interim agreement to protect health and the environment from CCW, but our comments in this document deal only with the present scope of the USWAG plan.

Conclusion

The USWAG voluntary plan must be exposed for what it is—an shameful attempt on the part of the coal-fired electric utility industry to avoid regulation even when public health is genuinely endangered by its activities. Furthermore, EPA’s serious consideration of the USWAG plan, in lieu of promulgating federal regulations under subtitle D of RCRA, constitutes a remarkable failure of EPA to protect the public from toxic waste, in direct contravention of its responsibility under RCRA. USWAG met several times with EPA to discuss the voluntary plan, including with high level staff of EPA’s Office of Solid Waste in May 2006 and with Susan Bodine, Assistant Administrator for the Office of Solid Waste and Emergency Response in the summer of 2006. Following the meeting with the Assistant Administrator, in August 2006, EPA supplied USWAG with several suggestions for minor changes in the language of the voluntary agreement.²⁵ Markedly missing from EPA’s response to USWAG was any substantive criticism of the plan. By failing to object to the gross deficiencies of the USWAG plan and by agreeing in 2006 to place the agreement in the NODA, EPA has shown its complicity in the continuing failure of the utility industry to manage its waste in the manner that RCRA demands. EPA’s decision to consider and implicitly promote the USWAG voluntary plan is indefensible. By doing so, the Agency directly contradicts its earlier promises to regulate CCW -- in full view of ample data revealing damage caused by CCW, unacceptable risks to communities surrounding CCW sites, and evidence of inadequate and inconsistent state law governing CCW.

²⁵ Email from Matt Straus, US EPA, Office of Solid Waste, to Alexander Livnat, US EPA, Office of Solid Waste, “RE: USWAG’s Action Plan for the CCW NODA,” dated August 21, 2006.