

**Construction Permit  
for  
Sunnyside Cogeneration Associates Ash Landfill #2  
Issued in Association with Ground Water Discharge Permit No. 070002**

**Comment Response Summary**

**Utah Division of Water Quality**

**September, 2014**

## I. General Response to HEAL's Comments

### A. Background

1. The Division of Water Quality (DWQ) requested comments on its intent to issue a construction permit<sup>1</sup> for Ash Landfill #2 (SCA #2) to Sunnyside Cogeneration Associates (SCA), through the 30 day period ending May 15, 2014.
2. On May 15, 2014 the law office of John M. Barth on behalf of several entities, collectively known as "HEAL" Utah submitted comments on the noticed construction permit.
3. DWQ issued the ground water discharge permit associated with this construction permit on December 6, 2013.<sup>2</sup> DWQ provided responses to comments on the proposed issuance of the ground water discharge permits in a Ground Water Discharge Permit Comment Response Summary on December 6, 2013. HEAL challenged the ground water discharge permit in a Request for Agency Action filed on January 6, 2014.

### B. Applicable Rules

The rules applicable to the issuance of a construction permit include UAC Rule 317-6 as well as the following.

UAC R317-1-2(2.2) states:

*"Construction Permit. No person shall make or construct any device for treatment or discharge of wastewater without first receiving a permit to do so from the Director or its authorized representative, except as provided herein."*

UAC R317-1-1 states in part:

*"Wasterwater" means . . . industrial waste or other liquid substances which might cause pollution of waters of the state."*

UAC R317-1-2(2.2)(C) states:

*"Review of Plans. The Division shall review said plans and specifications as to the adequacy of their intended purpose and shall require such changes as are found necessary to assure compliance with the pertinent parts of these rules."*

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<sup>1</sup> There is no regulatory requirement for public comment prior to issuance of a construction permit. DWQ opted to receive comments regarding the issuance of the SCA #2 construction permit because it is of heightened scrutiny.

<sup>2</sup> Ground Water Discharge Permit No. UGW070002.

UAC R317-6-1 states in part:

*“Best Available Technology” [or ‘BAT’] means the application of design, equipment, work practice, operation standard or combination thereof at a facility to effect the maximum reduction of a pollutant achievable by available processes and methods taking into account energy, public health, environmental and economic impacts and other costs.”*

### C. Engineering Basis for Construction Permit Issuance

1. The basis for construction permit issuance is an engineering review of the plans and specifications for consistency with the ground water discharge permit and standard engineering design practices related to the ground water discharge permit.<sup>3</sup>

2. Engineers at DWQ reviewed the final design documents to ensure that construction of SCA #2 would be consistent with the ground water discharge permit and standard engineering design practices and principles related to the ground water discharge permit. One example is on page 9 of the Construction Permit Submittal where there is a discussion that:

- All of the configurations modeled indicated short term and long term safety factors greater than the minimums recommended per ASTM E 2277-03 “Standard Guide for Design and Construction of Coal Ash Structural Fills” and also in accordance with the guidelines presented in USACE Manual EM 1110-2-1902 “Slope Stability.”

3. Based on the review of the construction design documents, DWQ is satisfied that engineering plans and specifications for construction of SCA #2 are consistent with the ground water discharge permit and standard engineering design practices related to the ground water discharge permit. The Construction Permit may be issued as proposed by SCA.

### D. Statement of Scope

1. DWQ sought comments on the plans and specifications for the construction of SCA #2. A significant number of the comments are on wholly unrelated or irrelevant topics; for example, the entire discussion and analysis concerning air emissions and the operating plan. Also, the determination of Best Available Technology as it is defined in UAC R317-6-1 was previously addressed in the public comment period for the ground water discharge permit and is not subject to comment here except as specifically related to the plans and specifications for the construction, modification, and operation of discharge systems. DWQ will limit its response to those comments submitted by HEAL which are within the scope of DWQ’s review of the Construction Permit.

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<sup>3</sup> DWQ uses site-specific data on a case by case basis to issue ground water discharge and construction permits for a wide variety of activities and industries (and their associated wastewater types) across the State which also varies greatly in its climatic factors, geology and hydrogeology. For a general description, please see DWQ’s December 2006 permitting information and guidance document “Ground Water Quality Protection Permitting Information Document” on the DWQ website at:  
[http://www.waterquality.utah.gov/GroundWater/documents/GWQP\\_PermitInfo.pdf](http://www.waterquality.utah.gov/GroundWater/documents/GWQP_PermitInfo.pdf).

2. Also, some comments are merely discovery requests related to the request for agency action filed to challenge the ground water discharge permit as opposed to comments supported with sufficient information or documentation to enable DWQ to fully consider the substance and significance of the issue as provided in Section 19-1-301.5(4). There is nothing in Section 19-1-301.5 requiring DWQ to respond to interrogatories or requests for the production of documents. Also, many of the comments request DWQ to identify and include documents in the administrative record. Section 19-1-301.5(8) and Rule 305-7-209 govern the content and process for identification of documents in the administrative record. DWQ is not required to identify documents that will be included in the administrative record in its response to comments; nor does Section 19-1-301.5 or Rule 305-7 require DWQ to marshal the evidence.

3. HEAL's May 15, 2014 comment submittal indicated that it incorporates by reference the following as comments to the draft construction permit: HEAL's January 6, 2014 Request for Agency Action (RAA) and all exhibits on Ground Water Discharge Permit No. UGW070002 (GW Permit); HEAL's petition to intervene and Statement of Standing; and all documents on the DWQ website related to the SCA ground water discharge and Construction Permits. This attempted incorporation by reference is impermissible. Incorporation by reference is not allowed unless the documents are already part of the administrative record in the same proceeding. Rule R305-7-202(2). This is not the same proceeding as the ground water discharge permit at this point in time. If this were the same proceeding, the attachments to the Request for Agency Action would still not be part of the administrative record because comments or supplemental documentation received after the end of the comment period are not considered. Therefore the statutory procedures to supplement the record must be followed. See Utah Code Ann. § 19-1-301.5(8).

4. By HEAL's own account, the purpose of Dr. Nelson's Supplemental Report and HEAL's December 20, 2013, Supplemental Comments (Exhibit 1 of HEAL's RAA) is to extend the ground water discharge permit comment period. As a practical matter, to the extent that HEAL's submittals are outside of the scope of the Construction Permit, but instead related directly to comments that have already been submitted by HEAL relative to the ground water discharge permit; such submittals would constitute supplementing the administrative record on HEAL's pending Request for Agency Action. For those submittals to become part of the administrative record, the Administrative Law Judge in the pending challenge of the ground water discharge permit would have to grant a motion to supplement the record with technical or factual information, which could be granted if the moving party proves good cause. See Utah Code Ann. § 19-1-301.5(8)(c). HEAL's December 20, 2013, Supplemental Comments and Dr. Nelson's Supplemental Report falls within such a category of a supplementation of the administrative record of the pending challenge to the ground water discharge permit that can only come into that proceeding by motion and a showing of good cause or by stipulation.

## **II. DWQ Response to Specific HEAL Comments**

**The text of the comments is restated verbatim in italics. Some of the comments are broken into subparts for purposes of the DWQ response. All responses are subject to the Statement of Scope described in Part I.**

### **Comment 1 (1.1)**

*On behalf of HEAL Utah, 824 S 400 W #B-111, Salt Lake City, UT 84101, I submit the following comments on the above-referenced construction permit. HEAL Utah incorporates herein by reference the following: its January 6, 2014 Request for Agency Action ("RAA") for review of Groundwater Discharge Permit 570002 to Sunnyside Cogeneration Associates ("SCA") and all exhibits thereto; its Petition to Intervene, Statement of Standing and the declarations of Gerald D. Huff, Madeline Huff, Robert Warren, and Janice Hunt in support thereof; and all documents made available on the Utah Division of Water Quality's ("UDWQ") website related to the SCA groundwater discharge permit and construction permit.*

#### **1.1 DWQ Response**

DWQ rejects the incorporation of the request of agency action and associated documents. See Part I. D. above.

### **Comment 1 cont. (1.2)**

*The public notice for the draft Sunnyside construction permit states that UDWQ's draft construction permit is being issued pursuant to Utah Code 19-5-108(1). This provision states: "The board may make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, for and require the submission of plans, specifications, and other information to the director in connection with the issuance of discharge permits." This provision related solely to the issuance of discharge permits, not construction permits. Nowhere in this provision has the Utah legislature granted UDWQ the authority to issue construction permits. Please identify all statutory legal authority upon which the UDWQ relies in issuing a draft or final construction permit. In the event there is no specific statutory authority from the Utah legislature authorizing UDWQ to issue construction permits, UDWQ's issuance of the draft construction permit is an unconstitutional act, an ultra vires act, or is otherwise unauthorized by law.*

#### **1.2 DWQ Response**

Please see Part I. above. In addition, several rules applicable to the issuance of a construction permit are identified in Part I. Also, as described in Part I., the construction permit is issued *in connection with* the ground water permit on a case by case basis evaluating a variety of factors. Authority independent of the authority to issue the ground water permit is not required. Pursuant to R317-6-6, DWQ may require and consider the plans and specifications relating to

construction, modification and operation of discharge systems and other information required by DWQ.<sup>4</sup>

## **Comment 2**

*The public notice for the draft Sunnyside construction permit states that this draft construction permit is being issued pursuant to Utah Administrative Code R317-1. This provision states,*

*2.2 Construction Permit. No person shall make or construct any device for treatment or discharge of wastewater (including storm sewers) without first receiving a permit to do so from the Director or its authorized representative, except as provided herein.*

*B. Submission of Plans. Any person desiring a permit shall submit complete plans, specifications, and other pertinent documents covering the proposed construction to the Director for review. Liquid waste storage facilities at animal feeding operations must be designed and constructed in accordance with Table 2a - Criteria for Siting, Investigation, and Design of Liquid Waste Storage Facilities with a water depth greater than 2 feet; Table 2b - Criteria for Siting, Investigation, and Design of Liquid Waste Storage Facilities with a water depth of 2 feet or less; and Table 2c - Criteria for runoff ponds with a water depth of 2 feet or less and a storage period less than 90 days annually, contained in the U.S.D.A. Natural Resource Conservation Service (NRCS) Conservation Practice Standard, Waste Storage Facility, Code 313, dated August 2006. This rule incorporates by reference Tables 2a, 2b, and 2c in the August 2006 U.S.D.A. NRCS Conservation Practice Standard, Waste Storage Facility, Code 313.*

*C. Review of Plans. The Division shall review said plans and specifications as to their adequacy of design for the intended purpose and shall require such changes as are found necessary to assure compliance with pertinent parts of these rules.*

*Although these rules contain specific criteria for issuance of "liquid waste storage facilities at animal feeding operations" the regulations fail to contain any specific criteria for issuance of a construction permit for a coal ash landfill. Please identify all regulatory legal authority relied upon by UDWQ in issuing this draft construction permit. Please identify the regulations relied upon by UDWQ setting forth the legal and technical criteria used by UDWQ in issuing this draft construction permit. Please identify all regulations defining the term "adequacy" above.*

*The scarcity of details in the regulations for construction permits outlined in the R317-1-2 regulations makes it difficult to determine the standards that the Director of the Division of Water Quality ("Director") applied in his review of SCA's construction permit application. Further, the complete lack of written analysis of SCA's application on the part of the Director offers no insight into how he applied what standards do exist (if any). Because the details associated with UDWQ's review of the application are either absent or are being withheld and because the Director offers no insight into how he applied the regulatory requirements with this permit, the Director has failed to provide sufficient justification for his approval of SCA's Construction Permit.*

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<sup>4</sup> Details related to the construction permit for which the comment period was advertised, please see the April 3, 2014 SCA #2 Ash Landfill DEQ Construction Permit Submittal.

*In the event there is no specific regulatory authority setting forth the criteria to be employed by UDWQ in issuing construction permits, the regulations are unconstitutionally vague and UDWQ's action in issuing the construction permit is likewise an unconstitutional act, an ultra vires act, or is otherwise unauthorized. In the absence of any regulatory criteria for approving a construction permit, please describe the criteria used by UDWQ in issuing a construction permit, including but not limited to, the above-referenced "adequacy" requirement.*

*Moreover, please identify all statutory and regulatory requirements for determining the proper location for a coal ash landfill, such as Sunnyside's SCA #2. If there are no such requirements, please describe the criteria used by UDWQ to determine whether the proposed location for SCA #2 is an acceptable location.*

## **2. DWQ Response**

Designs are reviewed on a case by case basis by an engineer as described in Part I. C. above. SCA submitted construction design drawings and specifications for SCA #2 and after review, DWQ's engineers found that the design was consistent with the ground water discharge permit and complied with standard engineering design practices related to the ground water discharge permit.

## **Comment 3**

*Please identify any written policy or guidance document relied upon by UDWQ in issuing this draft construction permit. Please include a copy of any such written policy or guidance document in the administrative record for this proceeding.*

*In the event there is no specific policy or guidance setting forth the criteria to be employed by UDWQ in issuing construction permits, UDWQ's action in issuing the construction permit is likewise an unconstitutional act, an ultra vires act, or is otherwise unauthorized by law. In the event UDWQ identifies written policy or guidance it relied upon in issuing the draft construction permit, any such document amounts to a formal regulation and may not be relied upon by UDWQ unless and until the policy/guidance is promulgated as required under the Utah Administrative Rulemaking Act.*

## **3. DWQ Response**

DWQ does not have any written policy or guidance specific to construction permit issuance. General engineering principles, best practices and standards are reviewed in addition to the adequacy of the plans and specifications for their intended purpose as related to the ground water permit. See also Part I. C. above.

## **Comment 4**

*Please identify all UDEQ employees that worked on, or were in any way involved in the issuance of the draft construction permit. Describe in detail the role of each UDEQ employee in issuing the construction permit. Please include in the administrative record a copy of a current CV*

*and/or resume for each UDEQ employee who was involved in the issuance of the draft construction permit.*

#### **4. DWQ Response**

This is not a comment. It is an interrogatory. The purpose of the request for comments is to obtain comments for consideration in making the final decision. The purpose of the comment period is not to serve as a forum for discovery. The content of the administrative record is dictated by law. See Part I. D. above.

#### **Comment 5**

*Please identify all ground water discharge permits and construction permits issued by UDWQ from 2005 to the present for coal ash dumps/landfills. Please include a copy of any such ground water discharge permits and construction permits in the administrative record for this proceeding. In the event any such permit contains more stringent design, construction, monitoring or other requirements than does the Sunnyside permit, HEAL Utah objects that the Sunnyside construction permit fails to incorporate the more stringent requirements of previously issued construction permits for coal ash dumps. Please describe the statutory, regulatory, and/or policy and guidance used by DWQ in issuing these other construction permits for coal ash dumps.*

#### **5. DWQ Response**

This is not a comment. It is an interrogatory and a request for production of documents. See Part I. D. above.

#### **Comment 6**

*The plans submitted by Sunnyside are incomplete and vague because they fail to identify the location of the existing and new coal ash landfill #2. These structures are not clearly identified on any of the existing plans (SH3) or access plans (SH4). The location of the new coal ash landfill cannot be determined in relation to the power plant and other coal ash landfills on any of the plans.*

#### **6. DWQ Response**

The construction drawing submittal provided by SCA contains 12 sheets of drawings and an index for them on the cover sheet. These are all contained in the April 3, 2014 Construction Permit Submittal submitted by SCA. Sheet 3 of the drawings shows the existing conditions at the site, i.e. without the location of SCA #2 since it does not yet exist. Sheet 4 clearly shows the site location with the outlines SCA #2 and is labeled as SCA #2 Ash Landfill and also labels the area identified as "proposed ash landfill footprint". Both sheets 3 and 4 show the Power Plant facilities in the upper left hand corner of the drawing. The power plant facilities are labeled "SCA Power Plant Facilities". DWQ is satisfied that the landfill and its location are properly

identified relative to other structures or activities at the current site for construction permitting needs.

Also, on page one of the construction permit submittal, bottom of the page, paragraph one under "2.0 Executive Summary" the application provides the location of the landfill in both Section, Township and Range format as well as latitude and longitude in degrees, minutes and seconds.

Discussion provided in Mr. Nelson's report attached to the comments demonstrates that the location of the proposed SCA #2 is understood by HEAL.

### **Comment 7**

*Please describe any coordination between UDWQ and either the Utah Division of Air Quality (UDAQ) or the Utah Division of Solid and Hazardous Waste (UDSHW) regarding the issuance of the draft construction permit and/or the groundwater discharge permit. If any such coordination occurred, please place a copy of all written correspondence/documentation (including emails) in the administrative record for this permit action. Please describe in detail how each employee with UDAQ and/or UDSHW was involved in any way regarding the issuance of the groundwater discharge permit and/or construction permit. Please include in the administrative record a copy of a current CV and/or resume for each UDWQ employee that was involved in the issuance of the groundwater discharge permit and/or draft construction permit.*

### **7. DWQ Response**

DWQ did not coordinate with either the Division of Air Quality or the Division of Solid and Hazardous Waste on any part of the construction permit.

DWQ is aware that SCA has a permit from the Division of Air Quality. DWQ is also aware that the Utah Division of Solid and Hazardous Waste does not regulate coal ash as a hazardous waste because it is Bevill exempt, as discussed in DWQ Response 12 below.

### **Comment 8**

*As discussed in more detail in the attached expert report of Steve Nelson (Exhibit 1 hereto), the proposed SCA #2 coal ash dump is proposed to be located in an inappropriate location. The proposed location is a slot canyon. As discussed in Dr. Nelson's report there is, and will continue to be, ephemeral drainage running through the slot canyon. Placing a coal ash dump in a slot canyon with an existing ephemeral drainage will expose the dump and its contents to erosion, surface and groundwater contamination, and potential structural failure. The location of the coal ash dump also inappropriately excludes the construction and operation of an upstream groundwater monitoring well, thus prohibiting the collection of groundwater data that could be used to document groundwater contamination. DWQ should deny the construction permit application due to the unsuitability of the proposed coal ash dump. Dr. Nelson's report is incorporated herein by reference. Dr. Nelson's previous reports submitted to UDWQ on the SCA groundwater discharge permit are also incorporated herein by reference.*

## **8. DWQ Response**

To the extent Dr. Nelson's reports do not address design but rather location, they are outside the scope of construction permit request for comment. Location is not a criterion for issuance of either the construction permit or the ground water permit except as specified in R317-6-6.4.

Since no definition is provided in the comment or in Dr. Nelson's report, it is unclear what is meant by use of the term "slot" canyon or why the term is used. The generally accepted use of the term "slot" canyon refers to a canyon significantly deeper than it is wide. This site is significantly wider than it is deep and not a "slot canyon".

The last paragraph of section 2.0 of the construction permit application describes how erosion and drainage will be controlled. Surface water flows at this location are related to immediate precipitation or snowmelt in the near vicinity. Ephemeral drainage from other areas is not flowing through this site.

Erosion and slope stability will be controlled by the design parameters explained clearly on page 7 of the Construction Permit Submittal. These parameters are:

- 3H:1V slope on the face of the landfill,
- Benches/Terraces 15 feet wide at a minimum with a vertical spacing of 60 feet at a maximum, and
- Drainage collection ditches on each bench/terrace with the ditch profile slope generally in the range of 1-2%. Drainage will be directed to perimeter collection ditches, through erosion control BMPs and sediment traps then into a clay lined sediment pond.

On page 9 of the Construction Permit Submittal there is also a discussion that:

- All of the configurations modeled indicated short term and long term safety factors greater than the minimums recommended per ASTM E 2277-03 "Standard Guide for Design and Construction of Coal Ash Structural Fills" and also in accordance with the guidelines presented in USACE Manual EM 1110-2-1902 "Slope Stability".

An upstream ground water monitoring well is not required. See DWQ Response 10.2 below.

DWQ is satisfied that sufficient design specifications and details regarding site suitability, stability and erosion control, relative to ground water protection, have been provided to support construction permit issuance.

## **Comment 9**

*It appears that the regulations require that UDWQ certify that the construction of the coal ash dump meets the primary purpose of the groundwater discharge permit, namely to ensure that contaminants placed in the coal ash dump do not illegally contaminate subsurface waters of the*

*State. However, the draft construction permit fails to address this fundamental issue. Please describe all evidence relied upon by UDWQ to certify that the proposed unlined coal ash dump SCA #2 will prevent illegal contamination of subsurface waters of the State. Please describe why UDWQ did not require a synthetic liner system with leak detection to be required as part of the construction permit to ensure protection of groundwater. Please identify all evidence relied upon by UDWQ for its determination that a synthetic liner system with leak detection was not necessary. Please include all documentation of UDWQ's finding in the administrative record for this proceeding. Because the draft construction permit is not adequate to support a purported goal of the groundwater discharge permit to ensure that contaminants from the SCA coal ash dump will not contaminate subsurface waters of the State, the Director's decision to approve the construction permit is arbitrary, capricious and a violation of the law.*

## **9. DWQ Response**

An opportunity to comment on Best Available Technology was made during the ground water discharge permit comment period. The point of this comment period was to solicit input on the plans and specifications of the construction permit not to revisit the chosen Best Available Technology. See Part I. above for a discussion of scope. In addition, the construction permit application sections 3.5 through 3.9, section 4.0 and 5.0 provides a satisfactory discussion of the relevant ground water issues as they relate to the construction permit.

### **Comment 10 (10.1)**

*It appears that the regulations require SCA to gather the information needed to determine whether the coal ash dump will be protective of ground water in a variety of geological formations, and that the Construction Permit must ensure that the dump is designed and constructed in a manner that allows the Director to obtain the information he needs to make that determination. However, the Construction Permit fails to accomplish this.*

### **10.1 DWQ Response**

DWQ is satisfied that the construction permit documents contain sufficient specifications, design details and adequate information to ensure that SCA #2 will be constructed in a manner that is protective of ground water and in keeping with applicable engineering practices and standards and the ground water discharge permit. See also Part I. C.

### **Comment 10 (10.2)**

*The proposed construction permit does not require installation of an upgradient groundwater well. See, Report of Steve Nelson attached hereto. Please identify all evidence relied upon by UDWQ for its determination that an upgradient groundwater well is not necessary to monitor future groundwater. Please include all documentation of UDWQ's finding in the administrative record for this proceeding. Please describe how UDWQ intends to monitor future impacts to groundwater without a groundwater monitoring well upgradient of SCA #2. Because the draft construction permit is not adequate to support a purported goal of the groundwater discharge permit of gathering information to ensuring that contaminants from the SCA coal ash dump will*

*not contaminate subsurface waters of the State, the Director's decision to approve the construction permit is arbitrary, capricious and a violation of the law.*

## **10.2 DWQ Response**

For the most part this is an interrogatory, not a comment supported by sufficient information for DWQ to consider to issuing the final construction permit.

A requirement for an up-gradient monitoring well does not exist. In fact, there is no requirement for down-gradient wells either, necessarily. As described above a determination of the type of monitoring is made on a case by case basis. At SCA, it has been determined that down-gradient monitoring is appropriate and adequate for determination of permit compliance.

Although installation of an up-gradient well is an option for the benefit of a permittee, SCA has determined that it is not feasible or necessary at this location. DWQ concurs. Under section 3.5 paragraph 2 of the construction permit submittal SCA provides a description of the monitoring that has occurred at SCA #2 using MW-8 to establish background conditions prior to operation of the landfill.

## **Comment 11**

*UDWQ may not approve a construction permit for SCA #2 because of frequent existing fugitive coal ash dust releases at the existing Sunnyside coal ash dumps that pose a threat to public health. As discussed more fully in the attached Report of Steve Nelson, there are frequent and extensive fugitive coal ash dust releases from the existing coal ash dump and related facilities at Sunnyside. These releases have resulted in dangerous compounds (glass and other particles) being emitted as fugitive coal ash dust from Sunnyside and being deposited in the town of Sunnyside and elsewhere in the vicinity of the coal plant. These compounds pose a threat to public health due to their adverse effects in respiration. In addition to the photographs in Mr. Nelson's report documenting these fugitive coal ash dust releases, we are attaching additional photographs taken in 2014 documenting such releases. Exhibits 2, 3 and 4 hereto. These fugitive dust emissions from the SCA facility and existing coal ash dumps have been further documented in the Declarations of Gerald D. Huff, Madeline Huff, Robert Warren, and Janice Hunt previously submitted to UDWQ with the Petition to Intervene and are incorporated herein by reference. SCA's fugitive dust plan is attached hereto as Exhibit 5. For the reasons stated in the declarations, reports of Steve Nelson, and related photographs, HEAL Utah alleges that SCA is failing to comply with the Fugitive Dust Plan which is resulting the creation of a public nuisance and/or public health hazard for communities living near the SCA facility.*

*Please state whether UDWQ's approval of the SCA construction permit application included an evaluation of whether SCA was in compliance with all fugitive dust emission requirements. If so, please identify all evidence relied upon by UDWQ in reaching a determination that SCA was in compliance with all fugitive dust emission requirements. If UDWQ did not consider fugitive dust emissions as part of its review of SCA's construction permit application, please state this fact in response to comments and identify any law or regulation exempting UDWQ from evaluating fugitive dust emission requirements in issuing a construction permit for a coal ash dump.*

*Please state whether UDWQ requested an evaluation by UDAQ of SCA's compliance with fugitive dust requirements. If so, please include a copy of any such evaluation, and all related documentation (including emails), in the administrative record for this proceeding. If UDWQ did not request such an evaluation from UDAQ, please state why such an evaluation was not requested and why such an evaluation is not required under Utah law in conjunction with the issuance of a construction permit for a coal ash landfill.*

## **11. DWQ Response**

DWQ does not regulate fugitive dust emissions. DAQ regulates fugitive dust emissions.

### **Comment 12**

*UDWQ may not issue the construction permit because the proposed coal ash dump SCA #2 would constitute an illegal open dump in the Resource Conservation and Recovery Act ("RCRA"). One of the primary concerns of RCRA is that "open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and land." 42 U.S.C. § 6901(b)(4). The EPA published final regulations, Criteria for Classification of Solid Waste Disposal Facilities and Practices, on September 13, 1979 to define*

*the practices that distinguish "open dumps" from sanitary landfills. See 44 Fed. Reg. 53,438. Disposal sites not meeting the standards set forth in 40 C.F.R. Part 257 are classified as "open dumps" and are prohibited under RCRA section 4005(a). 42 U.S.C. § 6945(a). "Open dump" is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste." 42 U.S.C § 6903(14). The term "solid waste" includes any...other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations..." 42 U.S.C. §6903(27). The term "disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing 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." 42 U.S.C. §6903(3). From these provisions of RCRA, it is clear that Sunnyside's practices of discharging its coal ash onto land constitutes illegal open dumping under RCRA.*

*The Part 257 subpart A regulations require that all dumping practices comply with general environmental performance standards addressing: floodplains, endangered species, surface water, ground water, land application, disease, air and safety. 40 C.F.R. Part 257, subpar A. For the reasons stated herein and in our comments on the related groundwater permit application, Sunnyside's existing and proposed coal ash dumps fail to comply with these criteria and thus are illegal open dumps under RCRA. In issuing the construction permit, please explain whether DWQ considered the open dump prohibition under RCRA and the performance standards in 40 C.F.R. Part 257. If UDWQ did consider these requirements, please explain whether construction of SCA #2 would comply with all such requirements. If SCA #2 will not comply with these requirements, please explain how UDWQ can approve the construction permit for SCA #2 despite such non-compliance with RCRA and its regulations.*

*Sunnyside's existing coal ash dumps pose a threat to public health and the environment. As is evidenced from the water quality data in its groundwater permit application and referenced in the construction permit application, Sunnyside's coal ash dumping practices has contaminated groundwater with pollutants such as TDS, metals, nutrients and organic and inorganic compounds. See, expert reports of Steve Nelson submitted as comments to the SCA groundwater discharge permit UGW 570002 and attached to HEAL Utah's RAA. Pollutants found in Sunnyside's groundwater pollution contain metals, selenium, and other compounds that pose a threat to aquatic life, birds, mammals, and plant-life.*

*In addition, the proposed coal ash dump SCA #2 would fail to comply with EPA's proposed regulation of coal ash. On June 21, 2010, EPA proposed regulations for disposal of coal ash. See, 75 Fed. Reg. 35128. EPA is under a consent decree to finalize these regulations prior to the end of 2014. These proposed regulations would require all surface impoundments built after finalization of the regulations to install a liner and conduct comprehensive groundwater monitoring. Id. For surface impoundments built before finalization of the regulations, all coal ash must be removed and the impoundment must be retrofitted with a liner. Id. SCA #2 would qualify as a "surface impoundment" under the proposed rule because Sunnyside intends to rely on a natural topographic depression that will hold an accumulation of coal ash containing free liquids. Id.*

*Please explain whether SCA #2 will comply with EPA's proposed coal ash regulations. Please identify all requirements outlined in EPA's proposed rule and whether SCA #2 will comply with each requirement. Please explain whether UDWQ considered SCA #2 as a "surface impoundment" or a "landfill" under EPA's proposed regulation and why. If UDWQ considers SCA #2 to be a "landfill," please provide all legal authority under Utah state law for this legal conclusion and all technical support for such a determination. Finally, please explain why UDWQ is proposing to approve SCA #2 despite the fact that new EPA coal ash regulations will be finalized within 6 months.*

*Further, please state whether SCA #2 is subject to the State's laws and regulations governing the siting, design, and operation of solid or hazardous waste landfills. If so, please identify all laws and regulations relied upon by UDWQ in issuing the construction permit for SCA #2. If SCA #2 is not subject to the State's laws and regulations governing the siting, design and operation of solid or hazardous waste landfills, please identify the statutory or regulatory provision(s) exempting SCA #2 from compliance with these siting, design, and operational laws and regulations governing landfills. In the event UDWQ determines that SCA #2 is exempt from these landfill laws and regulations, please admit that SCA #2 is not a "landfill" under Utah state law. Please also admit that if SCA #2 is not a "landfill" under Utah state law, SCA #2 constitutes an "open dump" under RCRA. If UDWQ denies that SCA #2 is an "open dump" under RCRA, please identify all facts, evidence, and legal support for your position that SCA #2 is not an "open dump" under RCRA. In the event UDWQ states that SCA #2 is neither a landfill under state law, nor an "open dump" under RCRA, please state what type of structure SCA #2 is under state law and identify all state laws and regulations that apply to such a structure.*

## **12. DWQ Response**

See Part 1. above. Also, see the Water Quality Act and regulations for the authority and scope of matters regulated by DWQ. DWQ does not administer or enforce RCRA. The Division of Solid and Hazardous Waste is delegated authority by EPA to regulate hazardous waste in Utah. The Division of Solid and Hazardous Waste regulates solid and hazardous waste pursuant to applicable provisions in Chapter 6, Title 19 of the Utah Code. Questions concerning the regulation of coal ash by the Division of Solid and Hazardous Waste should be directed to that division. Notwithstanding this, DWQ answers these concerns as follows:

RCRA does not apply to the construction permit for SCA #2 because SCA #2 does not constitute an illegal open dump. RCRA prohibits the open dumping of solid waste. See 42 U.S.C.A. §§ 6941–6949a. RCRA defines an “open dump” as “any facility or site where solid waste is disposed of which is not a sanitary landfill.” 42 U.S.C.A. § 6903(14). However, certain solid wastes are exempt under RCRA, including “fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.” 42 U.S.C.A. § 6921(b)(3)(A)(i). These forms of waste are subject “only to regulations under other applicable provisions of Federal or State law.” 42 U.S.C.A. §§ 6921(b)(3)(A). SCA #2 would dispose of fly ash and bottom ash waste, which types of waste are explicitly exempt under RCRA. Therefore, RCRA does not apply to SCA #2.

Similar to its federal counterpart, Utah’s Solid and Hazardous Waste Act prohibits the open dumping of solid or hazardous waste. See Utah Code Ann. § 19-6-101 et seq. The Act states that “fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels” do not constitute solid waste and are exempt from the Act, unless the waste causes a public nuisance, public health hazard, or is otherwise determined to be a hazardous waste. Utah Code Ann. § 19-6-101(19)(a) and (b)(iii). As stated above, SCA is seeking a construction permit for SCA # 2 in order to dispose of fly ash and bottom ash waste, which types of waste are exempt under Utah’s Solid and Hazardous Waste Act.

HEAL contends that SCA’s existing coal ash dumps pose a threat to public health and the environment based on water quality data. [See John Barth’s May 15, 2014 letter to Keith Eagan regarding comments on SCA Construction Permit, p. 6]. DWQ disagrees with HEAL’s interpretation of the water quality data that was submitted in the groundwater permit application, or that SCA’s disposal practices pose a threat to public health or the environment. These concerns were addressed in DWQ’s Response to Comments dated December 6, 2013.

In sum, under both federal and state law, SCA # 2 does not constitute an illegal open dump because fly ash and bottom ash waste are explicitly exempt as a solid waste under RCRA and Utah’s Solid and Hazardous Waste Act. Further, as addressed in DWQ’s Response to Comments dated December 6, 2013, the disposal practices do not pose a threat to public health or the environment.

SCA #2 does not need to comply with EPA’s proposed regulations that are not yet in effect. The EPA proposed regulations for disposal Coal Combustion Residuals (“CCR”), or coal ash waste,

on June 21, 2010 (“proposed regulations”). See 75 Fed. Reg. 35128 (proposed June 21, 2010) (to be codified at 40 CFR Parts 257, 261, 264, 265, 268, 271 and 302). These proposed regulations, however, have not been finalized. Even if the proposed regulations were to be finalized today, the rule would not become effective for another six months:

If EPA were to finalize the subtitle C regulatory alternative proposed today, the rule, as is the case with all RCRA subtitle C rules, would become effective six months after promulgation by the appropriate regulatory authority—that is, six months after promulgation of the federal rule in States and other jurisdictions where EPA implements the hazardous waste program (Iowa, Alaska, Indian Country, and the territories, except Guam) and in authorized States, six months after the State promulgates its regulations that EPA has approved via the authorization process (unless State laws specify an alternative time).

75 Fed Reg. 35128, 35188.

In addition, the proposed regulations are not concrete, as they discuss two separate proposals: 1) to consider CCR as a special waste subject to regulation under subtitle C of RCRA, or 2) leave the Beville determination in place and regulate disposal of such materials under subtitle D of RCRA by issuing minimum criteria. 75 Fed. Reg. 35128, 35128. This indicates that the EPA has not decided which proposal it will finalize. SCA does not need to comply with proposed regulations that are not finalized, concrete, or in effect. Therefore, the proposed regulations should not impede the granting of the construction permit.

Furthermore, under the proposed regulations, HEAL improperly contends that SCA #2 is a surface impoundment. HEAL further contends that EPA proposed regulations would require all surface impoundments built after finalization of the proposed regulations to install a liner and conduct comprehensive groundwater monitoring, and for surface impoundments built before finalization of the proposed regulations to remove all coal ash and have the impoundment retrofitted with a liner. [See John Barth’s May 15, 2014 letter to Keith Eagan re comments on SCA Construction Permit, p. 6–7]. However, SCA #2 is not a surface impoundment. Under the proposed regulations, a surface impoundment is defined as:

a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of CCRs containing *free liquids* . . . . CCR surface impoundments are used to receive CCRs that have been sluiced (flushed or mixed with water to facilitate movement), or wastes from wet air pollution control devices, often in addition to other solid wastes.

75 Fed. Reg. 35128, 35130 (emphasis added).

The fly ash and bottom ash that would be disposed of in SCA #2 contain no free liquids; they are both solid substances. Therefore, the proposed regulations that would require impoundments to install a liner or conduct comprehensive groundwater monitoring do not apply to SCA #2.

In sum, as the proposed regulations are not yet in effect, finalized or concrete, SCA does not need to comply with them. Furthermore, SCA # 2 is not an impoundment, so SCA would not need to install a liner or conduct comprehensive groundwater monitoring.

**Comment 13 (13.1)**

*Please state whether UDWQ reviewed SCA's plan of operation (or operations plan) for SCA #2 and/or SCA #1 and associated compliance reports as part of its approval of the construction permit. If so, please describe any conclusion reached by UDWQ regarding whether SCA is/will be in compliance with this plan of operation. Please include all such documents (plan of operation, associated compliance reports, UDWQ evaluation) in the administrative record for this proceeding. If UDWQ did not review the plan of operation and associated compliance reports, please so state and explain why UDWQ did not review the plan of operation and associated compliance reports.*

**13.1 DWQ Response**

DWQ did not review the plan of operation for the draft construction permit; it has no bearing or relevance to the construction permit for which the comment period was advertised. To be clear, the comment does not state why such a review is necessary or how the two are related. No relevant issue is raised or preserved by merely asking if DWQ reviewed the operation plan.

**Comment 13 (13.2)**

*In response to a GRAMA request for the SCA plan of operations, UDSHW stated, "the Utah Department of Environmental Quality, Division of Solid and Hazardous Waste does not regulate coal ash, therefore our Division has no files for this request." Exhibit 6 hereto. Please state whether UDWQ regulates coal ash? If so, please identify the legal authority authorizing UDWQ to regulate coal ash and coal ash dumps/landfills.*

**13.2 DWQ Response**

DWQ does not regulate coal ash. DWQ regulates any potential discharge from the coal ash landfill under R317-6 and the construction of the associated structures under R317-1.

**Comment 13 (13.3)**

*Please state whether any other Division within UDEQ regulates coal ash, how each such Division regulates coal ash, and the legal authority authorizing each Division to regulate coal ash. In the event any Division of UDEQ regulates coal ash at SCA, please include all documents evaluated by each and any Division of UDEQ (plan of operation, associated compliance reports, UDWQ evaluation) in the administrative record for this proceeding. If no Division of UDEQ reviewed the plan of operation and associated compliance reports, please so state and explain why UDEQ did not review the plan of operation and associated compliance reports.*

### **13.3 DWQ Response**

See Part I. above.

### **Comment 14**

*Please state whether UDWQ considers the fugitive dust emissions from SCA to be a public nuisance or public health hazard. If not, please state why the fugitive dust emissions are not a public nuisance or public health hazard. Please include all documentation supporting your determination in the administrative record for this proceeding.*

### **14. DWQ Response**

See Part I. above. DWQ does not regulate fugitive dust emissions. DAQ regulates fugitive dust emissions.

### **Comment 15**

*Please state whether UDWQ considers the groundwater contamination emanating from SCA #1 (and described in Steve Nelson's reports) to be a public nuisance or public health hazard. If not, please state why this groundwater contamination is not a public nuisance or public health hazard. Please include all documentation supporting your determination in the administrative record for this proceeding.*

### **15. DWQ Response**

Comments were solicited for the issuance of the construction permit for SCA #2 pursuant to Section 19-1-301.5 and Rule 305-7. In attempting to raise an issue about SCA #1, this comment is outside of the scope of the construction permit for SCA #2 because it appears to address neither SCA #2, nor the construction plans for SCA # 2. Moreover, the comment appears to request DWQ to identify material in Steve Nelson's report and make a public nuisance or public health analysis instead of itself providing an analysis and describing how Steve Nelson's report supports the analysis for DWQ's consideration, as contemplated by Rule 305-7-202 and 209.

### **Comment 16**

*Please state whether UDWQ has conducted any testing of the waste disposed of in SCA #1 or SCA #2 to determine whether the waste could be determined to be a hazardous waste under Utah law. If not, please state why UDWQ has not conducted such testing. If testing has been performed, please describe all such testing, any conclusions reached as a result of the testing, and include a copy of any such documentation in the administrative record for this proceeding.*

### **16. DWQ Response**

This comment is outside the scope of the construction permit. However, the definition of 'hazardous waste' is found in the Utah Solid and Hazardous Waste Act administered by the Utah

Division of Solid and Hazardous Waste, not in the Utah Water Quality Act administered by DWQ. DWQ does not regulate solid or hazardous waste. DWQ does consider the type, source, and chemical, physical, radiological, and toxic characteristics of the effluent or leachate to be discharged. SCA has tested the coal ash for TCLP as a condition of compliance since the ground water permit was issued. The testing data is available through a GRAMA request. The content of the administrative record will be consistent with Section 19-1-301.5 of the Utah Code.

**End of DWQ Responses to HEAL Comments**