

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

CENTER FOR BIOLOGICAL DIVERSITY,	:	CIVIL ACTION NO. 1:25-CV-590
	:	
Plaintiff	:	(Judge Neary)
	:	
v.	:	
	:	
TALEN ENERGY CORPORATION and BRUNNER ISLAND, LLC,	:	
	:	
Defendant	:	

MEMORANDUM AND ORDER

The Center for Biological Diversity (“CBD”) brings suit against Talen Energy Corporation and Brunner Island, LLC (together, “Brunner”) under the citizen suit provision of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901, *et seq.* CBD contends Brunner’s Ash Basin 5 is not in compliance with RCRA regulations and is impermissibly polluting the Susquehanna River and surrounding area. Brunner moved to dismiss this suit, arguing CBD lacks standing, the issues with Ash Basin 5 are being adequately supervised by state authorities, and that the RCRA regulations cited by CBD do not apply to Ash Basin 5. After careful review of the briefs in this case, the court concludes CBD has standing for its case, and it states legitimate claims against Brunner; therefore, the motion to dismiss will be denied.

I. Factual Background & Procedural History

A. Regulatory Background

RCRA is a comprehensive environmental statute that empowers the Environmental Protection Agency (“EPA”) to regulate both hazardous and

nonhazardous wastes. City of Chicago v. Env't Def. Fund, 511 U.S. 328, 331 (1994). Nonhazardous wastes are regulated under Subtitle D of RCRA, Env't Def. Fund v. U.S.E.P.A., 852 F.2d 1309, 1310 (D.C. Cir. 1988), which delegates to the EPA the power to promulgate regulations to ensure “there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at [a] facility.” 42 U.S.C. § 6944(a).

Pursuant to that authority, the EPA in 2015 promulgated a rule regulating the disposal of coal combustion residuals (“CCR”) in landfills and surface impoundments. Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities (“2015 CCR Rule”), 80 FED. REG. 21302, 21303 (April 17, 2015). This rule regulates “Existing CCR surface impoundment[s],” which are “CCR surface impoundment[s] that receive[] CCR both before and after October 14, 2015” as well as “[i]nactive CCR surface impoundment[s],” which are “CCR surface impoundment[s] that no longer receive[] CCR on or after October 14, 2015 and still contains both CCR and liquids on or after October 14, 2015.” Id. at 21470. While not explicit in the regulatory text, the 2015 CCR Rule was not meant to cover closed CCR impoundments, which were impoundments “that no longer contain water and can no longer impound liquid.” Id. at 21343. The 2015 CCR Rule never defined the term “liquids” and confusion arose about the scope of inactive impoundments, which were subject to the CCR Rule, and closed impoundments, which were not meant to be covered.

Responding to this ambiguity, among other reasons, the EPA promulgated an updated version of its CCR rule in 2024. Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments (“2024 CCR Rule”), 89 FED. REG. 38950, 38987 (May 8, 2024).

The 2024 Rule added an explicit definition of “liquids,” stating they are:

[A]ny fluid (such as water) that has no independent shape but has a definite volume and does not expand indefinitely and that is only slightly compressible. This encompasses all of the various types of liquids that may be present in a CCR unit, including water that was sluiced into an impoundment along with CCR, precipitation, surface water, groundwater, and any other form of water that has migrated into the impoundment, which may be found as free water or standing water ponded above CCR or porewater intermingled with CCR.

Id. at 39100. Though the EPA added this definition to the 2024 Rule, it did so only for clarity; it did not believe this represented a substantive change from the 2015 Rule. Id. at 38991-92; see also id. at 38987.

The 2024 Rule also added a clear substantive change—the regulation of CCR management units (“CCRMU”). CCRMU are cover surface impoundments containing CCR that were previously unregulated by the EPA. Id. at 39034. In a document on the regulatory docket, EPA listed Ash Basin 5 as a potential CCRMU, U.S. Env’tl. Prot. Agency, Universe of CCR Management Units, Docket No. EPA-HQ-OLEM-2020-0107-1032 (May 8, 2024), meaning that it would have only been regulated under this new provision of the 2024 CCR Rule.

B. Ash Basin 5 and its Contaminants

Turning to the specifics of this case, Brunner operates the Brunner Island Steam Electric station which is an electric power plant located on the western shore

of the Susquehanna River. (Doc. 1 ¶¶ 1-2). The facility generates power using coal and natural gas. (Id. ¶ 2). In burning coal to produce energy, the facility also produces CCR as a byproduct. (Id.). CCR, or coal ash, is a toxic substance that can harm humans and wildlife alike. (Id. ¶¶ 2-3). For example, one of the components of CCR is arsenic, a known carcinogen. (Id. ¶¶ 3-4).

Ash Basin 5 is an unlined depression designed to hold an accumulation of CCR and liquids known as a surface impoundment. (Id. ¶ 11). See also 2015 CCR Rule, 80 FED. REG. at 21469 (defining CCR surface impoundment). Brunner ended disposing of CCR in Ash Basin 5 in 1987, but the basin remains filled with CCR. (Doc. 1 ¶¶ 31, 34). Additionally, Ash Basin 5 is “saturated” with ground water and Brunner’s monitoring wells around the basin have detected elevated levels of contaminants in the surrounding area. (Id. ¶¶ 35-37).

Because of this saturation, CCR components are leaking into the surrounding area. For example, monitoring wells have detected amounts of lithium, aluminum, arsenic, molybdenum, and manganese in excess of limits set by state law in the groundwater in areas around the basin. (Id. ¶ 37). Specifically, two wells have detected arsenic levels of 122 ug/l and 239 ug/l respectively. (Id. ¶ 38). CBD now brings a citizen suit pursuant to RCRA over these excessive pollutant levels.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a claim for lack of subject matter jurisdiction. See FED. R. CIV. P. 12(b)(1). Such jurisdictional challenges take one of two forms: (1) parties may levy a “factual” attack,

arguing that one or more of the pleading's factual allegations are untrue, removing the action from the court's jurisdictional ken; or (2) they may assert a "facial" challenge, which assumes the veracity of the complaint's allegations but nonetheless argues that a claim is not within the court's jurisdiction. Lincoln Benefit Life Co. v. AEI Life, LLC, 800 F.3d 99, 105 (3d Cir. 2015) (quoting CNA v. United States, 535 F.3d 132, 139 (3d Cir. 2008)). In either instance, it is the plaintiff's burden to establish jurisdiction. See Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief may be granted. See FED. R. CIV. P. 12(b)(6). When ruling on a motion to dismiss under Rule 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

Federal notice and pleading rules require the complaint to provide "the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Phillips, 515 F.3d at 232 (alteration in original) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). To test the sufficiency of the complaint, the court conducts a three-step inquiry. See Santiago v. Warminster Township, 629 F.3d 121, 130-31 (3d Cir. 2010). In the first step, "the court must 'tak[e] note of the elements a plaintiff

must plead to state a claim.” Id. at 130 (alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)). Next, the factual and legal elements of a claim must be separated; well-pleaded facts are accepted as true, while mere legal conclusions may be disregarded. Id. at 131-32; see Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009). Once the court isolates the well-pleaded factual allegations, it must determine whether they are sufficient to show a “plausible claim for relief.” Iqbal, 556 U.S. at 679 (citing Twombly, 550 U.S. at 556). A claim is facially plausible when the plaintiff pleads facts “that allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 678.

III. Discussion

Brunner contends this case should be dismissed for lack of standing. It also argues the court should abstain from wading into this dispute given there is a prior consent decree between citizen groups and Brunner that concerns state environmental regulations, and which covers Ash Basin 5. Finally, Brunner asserts the EPA’s CCR rule does not apply to Ash Basin 5. None of these arguments support dismissal at this stage.

A. Standing

The court begins with standing. “At an irreducible minimum, Article III requires plaintiffs to establish three elements: injury in fact, causation, and redressability.” Fields v. Speaker of the Pennsylvania House of Representatives, 251 F. Supp. 3d 772, 780 (M.D. Pa. 2017), aff’d, 936 F.3d 142 (3d Cir. 2019) (citation modified). In environmental law cases, plaintiffs demonstrate an injury in fact “when

they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

Here, the complaint alleges at least one member of CBD lives less than six miles from Brunner Island and enjoys boating and fishing in the area. (Doc. 1 ¶ 21). These activities are threatened by the proliferation of arsenic and other pollutants flowing from Ash Basin 5. (Id.). At the pleading stage, this is sufficient to demonstrate an injury in fact. See Laidlaw, 528 U.S. at 184 (“[The court] see[s] nothing ‘improbable’ about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms.”).

Traceability is easily satisfied in this case. Brunner owns Ash Basin 5, the subject of this litigation, which contains CCR and is alleged to be leaking contaminants to the surrounding area. (Doc. 1 ¶¶ 32, 36-38).

This leaves the last requirement of redressability. “[A] plaintiff establishes redressability by showing ‘that it is “likely, as opposed to merely speculative,” that the alleged injury will be redressed by a favorable decision.’” Knudsen v. MetLife Grp., Inc., 117 F.4th 570, 577 (3d Cir. 2024) quoting (Finkelman v. Nat’l Football League (“Finkelman I”), 810 F.3d 187, 194 (3d Cir. 2016)).

Brunner argues CBD cannot meet the redressability requirement because it is already doing what CBD's lawsuit seeks to accomplish. (Doc. 26 at 17-18). We cannot agree. The EPA's CCR rule requires Brunner to undertake corrective action if a contaminant is detected at a statistically significant level exceeding a certain standard. 40 C.F.R. § 257.96(a). The complaint alleges arsenic levels around Ash Basin 5 are above the relevant regulatory standard. (Doc. 1 ¶ 38). While the CCR rule does not have an express time limit for compliance, an owner or operator must select a remedial plan "as soon as feasible." 40 C.F.R. § 257.97(a). Once a plan is selected, an owner or operator must implement the plan within 90 days. *Id.* § 257.98(a). Taking CBD's allegations in the complaint as true, Brunner would have to submit a remedial plan within the scope of the CCR. This potential action is likely enough to redress the harm of elevated arsenic levels.

Nothing in the 2019 consent decree disproves redressability, at least at this stage of the litigation. The consent decree does require Brunner to undertake an abatement plan to stop contaminants from spreading from the northern portion of Ash Basin 5. (Doc. 37-2 ¶¶ 29-31). However, the details of the abatement plan required by the decree are relatively scant; the decree only provides that the plan "limit infiltration and contaminant migration from the northern portion of Ash Basin 5, including from the Pyrite Tomb and bottom ash processing area." (*Id.* ¶ 30). Conversely, the CCR rule requires corrective plans to:

- (1) Be protective of human health and the environment;
- (2) Attain the groundwater protection standard as specified pursuant to [40 C.F.R.] § 257.95(h);

- (3) Control the source(s) of releases so as to reduce or eliminate, to the maximum extent feasible, further releases of constituents in appendix IV to this part into the environment;
- (4) Remove from the environment as much of the contaminated material that was released from the CCR unit as is feasible, taking into account factors such as avoiding inappropriate disturbance of sensitive ecosystems;
- (5) Comply with standards for management of wastes as specified in [40 C.F.R.] § 257.98(d).

40 C.F.R. § 257.97(b). Notably, the CCR rule requires *removal* of contaminants while the consent decree only requires *limitation* of further contamination. Compare Doc. 37-2 ¶ 30 with 40 C.F.R. § 257.97(b)(4). Additionally, the CCR rule sets specific thresholds an owner or operator must meet when designing a remedial plan. In short, based on the pleadings, the CCR rule is far more specific and strict in its compliance requirements. Therefore, CBD succeeds in showing that, if the court orders Brunner to comply with the CCR rule, it is likely Brunner will have to take action to reduce the harms of the spread of containments from Ash Basin 5. With all three conditions met, CBD has established standing at the pleading stage.¹

B. Diligent Prosecution and Abstention

Next, Brunner argues this court should not hear this case because of a statutory bar and because of the primary jurisdiction doctrine of abstention. Starting with the former, RCRA prohibits citizen suits where the EPA or state “has commenced and is diligently prosecuting a civil or criminal action in a court of the

¹ Brunner does not challenge CBD’s ability to raise associational standing in this case. Taking an independent review, the court also finds the complaint adequately alleges CBD may stand in place of individual members who would otherwise have standing and so may proceed in this case. See Interfaith Cmty. Org. v. Honeywell Int’l, Inc., 399 F.3d 248, 257-58 (3d Cir. 2005).

United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.” 42 U.S.C. § 6972(b)(1)(B). This section is plainly inapplicable to the consent decree in this case. That decree was based on state environmental laws and the Federal Clean Water Act. (Doc. 37-2 ¶ B). That means Pennsylvania’s Department of Environmental Protection (“DEP”) was not seeking compliance with the CCR rule of RCRA.

Brunner argues that because the consent decree involved “the same conduct,” it applies here. (Doc. 26 at 19). That argument is inconsistent with the statutory text, which only applies when the state is seeking to enforce a regulation issued pursuant to RCRA. Congress is aware of and capable of creating broader diligent prosecution bars. For example, the bar in the Clean Water Act blocks citizen suits where the state “is diligently prosecuting an action under a State law comparable to [the Clean Water Act].” 33 U.S.C. § 1319(g)(6)(A)(ii). RCRA contains no such language. Because the consent decree was not brought under the applicable federal law, it does not bar CBD’s current lawsuit.

Nor is this a case where the court should invoke primary jurisdiction abstention. This doctrine “comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” Baykeeper v. NL Indus., Inc., 660 F.3d 686, 691 (3d Cir. 2011) (quoting United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)). At the same time, federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” Colo. River Water Conservation Dist. v.

United States, 424 U.S. 800, 817 (1976). “Abstention, therefore, is the exception rather than the rule.” Baykeeper, 660 F.3d at 691 (quoting Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 1995)). This is particularly the case in instances involving citizen suit provisions where abstention should be “exceedingly rare, because declining to hear a case for a reason not enumerated in the RCRA would substitute [a court’s judgment] for that of Congress about the correct balance between respect for state administrative processes and the need for consistent and timely enforcement of RCRA.” Id. at 694 (citation and internal quotation marks omitted).

Courts use four factors to determine whether to apply the primary jurisdiction doctrine. They are:

(1) Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s particular field of expertise; (2) Whether the question at issue is particularly within the agency’s discretion; (3) Whether there exists a substantial danger of inconsistent rulings; and (4) Whether a prior application to the agency has been made.

Id. at 691 (quoting Global Naps, Inc. v. Bell Atl.–N.J., 287 F.Supp.2d 532, 549 (D.N.J. 2003)). Here, the parties are asking the court to interpret a regulation, something squarely within the purview of courts. Next, while state laws authorize the DEP to regulate sites like Brunner Island, the EPA acted pursuant to RCRA in enacting the CCR rule. Thus, this issue is not particularly within DEP’s discretion. See id. at 691-92. Nor is there a real risk of inconsistent rulings. If anything, a favorable ruling to CBD will just require Brunner Island to do more than it is currently doing, which is not a reason to invoke primary jurisdiction. Id. at 692 (quoting Interfaith Cmty. Org. Inc. v. PPG Indus., 702 F.Supp.2d 295, 312 (D.N.J. 2010)). The final factor does favor

Brunner as DEP entered into a consent decree, but this one factor is not dispositive. Id. Taking all the factors together, the court concludes the primary jurisdiction doctrine is inapplicable here and so will not abstain from deciding this case.

C. CCR Rule Application

Brunner's last argument² for dismissing the case is that it says the EPA's CCR Rules are inapplicable to Ash Basin 5. CBD makes clear in its brief, that it is only seeking to enforce the 2015 CCR Rule against Brunner; it is *not* seeking relief based on Ash Basin 5's potential status as a CCRMU as defined by the 2024 CCR Rule. (Doc. 37 at ECF 7-8).

Because all parties agree Ash Basin 5 was not receiving CCR at the time the 2015 CCR Rule took effect, Ash Basin 5 would only be subject to regulation if it could be classified as an inactive surface impoundment. An inactive surface impound is one "that no longer receives CCR on or after October 14, 2015 and still contains both CCR and liquids on or after October 14, 2015." 40 C.F.R. § 257.53 (2015). The complaint alleges, and there appears to be no dispute, that Ash Basin 5 still contains CCR. (Doc. 1 ¶¶ 32, 34). The complaint further alleges Ash Basin 5 is "saturated" with groundwater. (Id. ¶ 35). Thus, per the complaint, Ash Basin 5 contains both CCR and a liquid. Consequently, the court finds that, per the allegations in the complaint, Ash Basin 5 is an inactive surface impoundment and subject to the 2015 CCR Rule.

² The court is aware the Utility Solid Waste Activities Group submitted an amicus brief in this case supporting Brunner. (Doc. 35). Having reviewed the brief, the court determines the issues raised therein are largely identical to Brunner's own arguments and so focuses on Brunner's briefing in this section.

Brunner advances several arguments to avoid this straightforward conclusion, but none are convincing. First, Brunner contends that subjecting Ash Basin 5 to the 2015 CCR Rule based on the 2024 CCR Rule’s definition of “liquids” would be an unlawful retroactive finding. (Doc. 26 at 13-16). But the EPA did not give “liquids” a special meaning in 2024; rather, it emphasized it was trying to pick an ordinary dictionary definition. 2024 CCR Rule, 89 FED. REG. at 38988. This is precisely what courts do when confronted with a regulatory text using a word without an express definition. See United States v. Riddy, 179 F.4th 211, 215 (3d Cir. 2026) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)). So, while the 2024 CCR Rule offered clarification as to what was precisely meant by “liquids,” that clarification was not substantive; it only reinforced that the ordinary meaning of “liquids” should be used.³

Nowhere does Brunner identify which definition of “liquids” the court should use when interpreting the 2015 CCR Rule. It only contends that, whatever the definition may be, it should exclude groundwater. (Doc. 38 at 14-15). Brunner also contends the court should not read “liquids” as including “groundwater” because the 2015 CCR Rule uses “the terms ‘liquids’ and ‘groundwater,’ sometimes in close proximity, to mean different things.” (Id. at 15). But it is obvious the rule does so

³ While not completely clear if Brunner advances this argument, for completeness’s sake, the court also does not find the 2015 CCR Rule would be an impermissible retroactive regulation of Ash Basin 5. The 2015 CCR Rule applies to surface impoundments that *currently* contain CCR and *currently* contain liquids, which, per the complaint, would apply to Ash Basin 5. Though Brunner may have relied on state law and guidance in “closing” Ash Basin 5, such factors would be considerations for the policy behind the 2015 CCR Rule. As a matter of law, however, Brunner is only being regulated for Ash Basin 5’s *current* state, not based on any action it took or did not take in the past.

because “liquids” is far broader than “groundwater.” The 2015 CCR Rule uses “groundwater” and “liquids” to refer to different things, but all applications of “liquids” apply to “groundwater.” Notably, Brunner never gives an example, nor could the court find one, where interpreting “liquids” to include “groundwater” would lead to a logical inconsistency in the 2015 CCR Rule. In sum, Brunner fails to point to any support in the regulatory text to justify adopting a definition of “liquids” that would exclude “groundwater” in the 2015 CCR Rule.

Having failed to secure support in the regulatory text, Brunner instead hones in on one paragraph of the preamble of the 2015 CCR Rule. In it, the EPA states the 2015 CCR Rule would not “require ‘closed’ surface impoundments to ‘reclose.’” 2015 CCR Rule, 80 FED. REG. at 21343. Brunner argues Ash Basin 5 closed under state guidance and so this means it falls outside of the 2015 CCR Rule’s ambit. (Doc. 26 at 12-13). But the excerpt from the preamble Brunner cites begs the question, “closed according to whom?”

Brunner asserts surface impoundments that closed pursuant to state law should not have to reclose. (Id.). True, the EPA does explain the 2015 CCR Rule was never meant to apply to surface impoundments “which were properly closed decades ago under state solid waste programs.” 2015 CCR Rule, 80 FED. REG. at 21343. But these two sentences do not outweigh the rest of the preamble taken as a whole (not to mention the clear regulatory text as addressed above). Just before this paragraph, the EPA makes clear that “[i]nactive’ surface impoundments are those that contain both CCR and water, but no longer receive additional wastes. By contrast, a ‘closed’

surface impoundment would no longer contain water, although it may continue to contain CCR (or other wastes), and would be capped or otherwise maintained.” Id. Thus, when the EPA stated its rule would not apply to surface impoundments that were closed under state law, it meant only those that had closed pursuant to its definition of closed—i.e., fully dewatered impoundments. Ash Basin 5 has not been fully dewatered; instead, it is saturated with groundwater. Though it may have “closed” under Pennsylvania law, it has not been closed under the EPA’s definition. There is nothing inherently unlawful about the EPA setting a stricter standard than the one set by a state.

Brunner’s final argument is that the EPA itself has said Ash Basin 5 was never meant to be regulated under the 2015 CCR Rule. This is because in a document on the regulatory docket, the EPA listed Ash Basin 5 as a CCRMU, a new regulatory category that would be subject to prospective regulation. See U.S. Env’tl. Prot. Agency, Universe of CCR Management Units, Docket No. EPA-HQ-OLEM-2020-0107-1032 (May 8, 2024). CBD contends that inactive surface impoundments and CCRMU are not mutually exclusive. (Doc. 37 at 7). This is incorrect. First, the EPA made clear that CCRMU were previously unregulated. 2024 CCR Rule, 89 FED. REG. at 39034-35. Second, the definition of CCRMU also states it applies to nonregulated units, including those that had previously closed. Id. at 39100. If an impoundment is a CCRMU, that means it would not otherwise be subject to regulation, which necessarily excludes inactive surface impoundments. Therefore, if Ash Basin 5 is a

CCRMU, that means it would have been closed and not an inactive surface impoundment subject to regulation under the 2015 CCR Rule.

That said, the court disagrees with the EPA's classification of Ash Basin 5. As an initial matter, the EPA's classification is one line in a spreadsheet. See Universe of CCR Management Units, Docket No. EPA-HQ-OLEM-2020-0107-1032. It is not accompanied by any analysis or explanation, meaning there is no way of knowing how the EPA arrived at the conclusion that Ash Basin 5 is a CCRMU. Because of this, the court finds the EPA's determination on this point to be unpersuasive. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Moreover, it is quite telling that in the preamble to the 2024 CCR Rule, the EPA thoroughly rejects many of the arguments Brunner tries to make in this case. As mentioned above, the EPA explained it always meant to treat groundwater as a liquid under the original, 2015 CCR Rule. 2024 CCR Rule, 89 FED. REG. at 38987-88. The EPA also explained the 2015 CCR Rule applied to impoundments even if they "closed" under state law and even if they no longer impounded liquid. Id. at 38987. This is the opposite position Brunner takes in this litigation. (Doc. 26 at 12-13; Doc. 38 at 13-15). Overall, it is clear the EPA rejects Brunner's interpretation of the 2015 CCR Rule. And, for the reasons explained above, the court agrees with the EPA's assessment on this point. In the end, it is clear from the plain text of the regulatory language and the preambles explaining both the 2015 and 2024 CCR Rules, that Ash Basin 5 is an inactive surface impoundment and so subject to regulation.

IV. Conclusion

According to the complaint, Ash Basin 5 is leaching arsenic to the local area's groundwater. Under current EPA regulations, Brunner should be taking certain remedial measures it currently is not taking. Such allegations are sufficient for standing. Moreover, Pennsylvania's Department of Environmental Protection has not brought an action against Brunner for RCRA. Finally, based on the plain text of the 2015 CCR Rule, assuming the allegations in the complaint are true, Ash Basin 5 is subject to EPA CCR regulation.

For all these reasons, Brunner's motion to dismiss (Doc. 25) is DENIED.

/S/ KELI M. NEARY
Keli M. Neary
United States District Judge
Middle District of Pennsylvania

Dated: September 22, 2026.