IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WATERKEEPER ALLIANCE, INC.
180 Maiden Lane, Suite 603
New York, NY 10038,

LEAD Agency, Inc.
19289 S. 4403 Drive
Vinita, OK 74301,

and

SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612

Plaintiffs,

v.

ANDREW WHEELER,
ACTING ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION
AGENCY, in his official capacity
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460,

and

U.S. ENVIRONMENTAL
PROTECTION AGENCY
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Defendants.

Civil Action No. 1:18-cv-2230

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Plaintiffs Waterkeeper Alliance, Inc., Local Environmental Action Demanded Agency, Inc. ("LEAD Agency"), and Sierra Club (collectively "Plaintiffs") hereby bring a citizen suit pursuant to 42 U.S.C. § 6972(a)(2) against Defendants Andrew Wheeler, Acting Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively "EPA" or "Defendants"), for failing to perform a nondiscretionary duty required by the Resource Conservation and Recovery Act ("RCRA") to develop and publish minimum guidelines for public participation in state coal combustion residuals ("coal ash" or "CCR") programs. Plaintiffs also allege violations of RCRA and the Administrative Procedure Act ("APA") by Defendants for unlawfully approving Oklahoma's coal ash permit program. *See* Oklahoma: Approval of State Coal Combustion Residuals Permit Program, 83 Fed. Reg. 30,356 (June 28, 2018) ("Final Program Approval"), attached hereto as Exhibit A.

INTRODUCTION

1. Coal-fired power plants in the U.S. generate one of the largest and most toxic solid waste streams in the nation, including large quantities of heavy metals and metal compounds such as arsenic, boron, cadmium, chromium, lead, mercury, selenium, and thallium. These toxic chemicals can cause cancer and other adverse health impacts including reproductive, neurological, respiratory, and developmental problems.

2. For decades, in the absence of national standards requiring safe disposal, coal ash was dumped in thousands of unlined and unmonitored lagoons, landfills, pits, and mines. The result was the widespread release of dangerous pollutants from coal ash to water, air, and soil, endangering human health and the environment.

3. In 2015, EPA promulgated regulations to begin to address the longstanding threats posed by coal ash. *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) ("2015 Rule") (codified at 40 C.F.R. § 257.50 *et seq*).

4. In 2016, Congress passed the Water Infrastructure Improvements for the Nation Act ("WIIN Act"), which directs EPA to approve state coal ash permit programs to operate "in lieu of" federal regulations provided that the state program meets several conditions. *See* 42 U.S.C. § 6945(d). For a state coal ash program to be approved, the state standards for coal ash units must be "at least as protective as" the federal standards, and the state must require that covered coal ash dumps in the state "achieve[] compliance" with those standards. *See id*. § 6945(d)(1)(B)(ii), (D)(ii)(I).

5. In addition to the WIIN Act, there are other RCRA requirements that apply to EPA action on state coal ash programs under 42 U.S.C. § 6945(d). One such requirement is set out in RCRA section 7004(b)(1), which states that "[p]ublic participation in the development, revision, implementation, and enforcement of any . . . program under [RCRA] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator . . . shall develop and publish minimum guidelines for public participation in such processes." 42 U.S.C. § 6974(b)(1). Another such requirement is RCRA section 4004(a), which directs EPA to allow the continued operation of only those solid waste disposal facilities – including coal ash dumps – that do not present a "reasonable probability of adverse effects on health or the environment." *Id.* § 6944(a).

6. Notwithstanding its receipt – and subsequent approval – of at least one application for approval of a state coal ash program, EPA has not fulfilled its non-discretionary duty to

develop and publish minimum guidelines for public participation in state coal ash programs pursuant to 42 U.S.C. § 6974(b)(1).

7. On August 21, 2018, the D.C. Circuit partially vacated the 2015 Rule for failure to ensure "no reasonable probability of adverse effects on health or the environment" as required by RCRA section 4004(a). *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, No. 15-1219, 2018 WL 4000476, at *1-2 (D.C. Cir. Aug. 21, 2018) (hereinafter "*USWAG v. EPA*") (quoting 42 U.S.C. § 6944(a)). The court ordered that "the Final Rule be vacated and remanded with respect to the provisions that permit unlined impoundments to continue receiving coal ash unless they leak, *see* [40 C.F.R.] § 257.101(a), classify 'clay-lined' impoundments as lined, *see* 40 C.F.R. § 257.71(a)(1)(i), and exempt from regulation inactive impoundments at inactive facilities, *see* 40 C.F.R. § 257.50(e)." Judgment, *Util. Solid Waste Activities Grp. v. EPA*, No. 15-1219, 2018 WL 4158384, at *1 (D.C. Cir. Aug. 21, 2018) (hereinafter "*USWAG* Judgment").

8. Oklahoma's coal ash regulations, approved by EPA less than a month prior to the D.C. Circuit's decision in *USWAG v. EPA*, contain provisions nearly identical to the provisions vacated by the D.C. Circuit. The corresponding provisions in Oklahoma's coal ash regulations are Okla. Admin. Code 252:517-15-6(a), 252:517-11-2(a)(1)(A), and 252:517-1-1(d).

9. Notwithstanding the clear mandate of the WIIN Act and other applicable RCRA requirements, EPA has unlawfully approved a state coal ash program that allows unsafe impoundments full of toxic coal ash to continue operating, deprives the public of their right to review and comment on critical compliance documents, and grants coal ash dumps permits that never expire. EPA's approval of Oklahoma's coal ash program is also unlawful due to EPA's failure to publish minimum public participation guidelines for state programs prior to approving

that program, and due to EPA's failure to respond to two significant comments expressing concerns about the program. *See* 5 U.S.C. § 706(2)(A), (D); 42 U.S.C. § 6974(b)(1).

10. With this action, Plaintiffs seek to compel the promulgation of public participation regulations for state coal ash programs and to vacate EPA's approval of Oklahoma's flawed coal ash program.

JURISDICTION & VENUE

11. This action arises under RCRA, 42 U.S.C. § 6901 *et seq*.

12. This Court has jurisdiction over Count 1 pursuant to 42 U.S.C. § 6972(a), and over all Counts pursuant to 28 U.S.C. §§ 1331 and 1361. This Court may issue a declaratory judgment and grant further relief pursuant to 42 U.S.C. § 6972(a) and 28 U.S.C. §§ 2201 and 2202.

13. Plaintiffs are authorized to bring Count 1 of this action pursuant to 42 U.S.C. § 6972(a)(2), the citizen suit provision of RCRA.

14. Plaintiffs are authorized to bring Counts 2 through 7 of this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, which provides for judicial review of final agency actions for which there is no other adequate remedy in a court.

15. By registered letter posted July 26, 2018, as well as via email, Plaintiffs gave notice to Defendants of the failure to perform a mandatory duty alleged in Count 1 and have thereby complied with the sixty-day notice requirement of the RCRA citizen suit provision. *See* 42 U.S.C. § 6972(c). A copy of the notice letter is attached hereto as Exhibit B.

16. Venue is proper in this Court because Defendants reside in this district, the failure to act alleged in Count 1 occurred in this district, and the Final Program Approval giving rise to Counts 2 through 7 of this lawsuit was issued in this district. *See* 28 U.S.C. § 1391(e). Venue is also proper in this Court on Count 1 because the RCRA citizen suit provision expressly provides

that any action under 42 U.S.C. § 6972(a)(2) may be brought in the District Court for the District of Columbia. *See* 42 U.S.C. § 6972.

PARTIES

17. Waterkeeper Alliance, Inc. is a non-profit headquartered in New York, New York, uniting more than 300 Waterkeeper Member Organizations and Affiliates that are on the frontlines of the global water crisis, patrolling and protecting more than 2.5 million square miles of waterways on six continents. From the Great Lakes to the Himalayas, Alaska to Australia, the Waterkeeper movement defends the fundamental human right to drinkable, fishable, and swimmable waters, and combines firsthand knowledge of local waterways with an unwavering commitment to the rights of communities. Within the United States, Waterkeeper Alliance, Inc. works with more than 170 Waterkeeper Member Organizations and Affiliates.

18. LEAD Agency is a non-profit headquartered in Vinita, Oklahoma, with a satellite office in Miami, Oklahoma, and with members in the Grand River Watershed focusing on issues that affect it and its water quality. LEAD Agency has advocated for the cleanup of Tar Creek and the Tar Creek Superfund Site, and for the downstream restoration and eventual cleanup of the Tri-State Mining District affecting three states with legacy mining of lead and zinc. It is a Waterkeeper Member Organization and stands with the Waterkeeper movement for drinkable, fishable, and swimmable waters.

19. Sierra Club is America's largest grassroots environmental organization, with more than 3 million members and supporters nationwide, including more than 4,200 members in Oklahoma. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to

use all lawful means to carry out those objectives. Its activities include public education, advocacy, and litigation to enforce environmental laws**.**

20. Plaintiffs have individual and/or organizational members who have been and, unless the relief prayed for herein is granted, will continue to be adversely affected by EPA's failure to comply with RCRA, the purpose of which is to promote the protection of human health and the environment by assuring that both solid and hazardous waste management is conducted responsibly. EPA's approval of Oklahoma's flawed coal ash program, as well as its failure to publish minimum public participation guidelines for state coal ash programs, increase the likelihood that Plaintiffs' members and their environment will be injured by unsafe waste management practices that lead to contamination from dangerous pollutants in coal ash.

21. Plaintiffs' members live, work, and recreate near coal ash units affected by EPA's approval of Oklahoma's coal ash program and by EPA's failure to promulgate minimum public participation requirements for state coal ash programs. These members' use and enjoyment of local waterways –and for some, their use and enjoyment of their own property– has been, and/or threatens to be, diminished due to coal ash pollution.

22. Plaintiffs' members are concerned that coal ash dumps in Oklahoma will continue to pollute, further diminishing their use and enjoyment of these waterways and property and possibly harming their health. They would like to, and if given the opportunity would, exercise their right to review industry and agency proposals for compliance with safeguards at coal ash dumps in Oklahoma, as well as to testify or submit comments to agency officials to express their concerns about those proposals and how they affect their environment, health, and well-being.

23. Defendants' failure to promulgate required minimum guidelines for public participation in state coal ash programs, as well as their unlawful approval of Oklahoma's coal

ash program, (a) deprives Plaintiffs' members of opportunities to exercise their right to be notified of, review, and provide input to government agencies about those coal ash dumps; (b) increases the risk to Plaintiffs' members of exposure to contaminants in coal ash waste; and (c) in some cases, increases and prolongs Plaintiffs' members' ongoing exposure to such contaminants and their associated risk of adverse health effects accordingly.

24. Defendant Andrew Wheeler is the Acting Administrator of the United States Environmental Protection Agency. He is sued in his official capacity only.

25. Defendant United States Environmental Protection Agency is an agency of the federal government.

LEGAL FRAMEWORK

I. The Resource Conservation and Recovery Act, as Amended by the Water Infrastructure Improvements for the Nation Act, and the 2015 Rule

26. Congress enacted RCRA in 1976, amending the Solid Waste Disposal Act, *see* Pub. L. No. 89-272, 79 Stat. 997-1001 (1965), to establish a comprehensive federal program to regulate the handling and disposal of solid waste. *See* Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. § 6901 *et seq*). In so doing, Congress recognized that, as a result of regulation under the Clean Air Act, the Clean Water Act, and other laws, American industries were generating more toxic sludge and other pollution treatment residues that required proper disposal. *See* 42 U.S.C. § 6901(b)(3). Further, Congress recognized that "inadequate and environmentally unsound practices" for the disposal of such solid wastes were responsible for air and water pollution that posed an unacceptable threat to human health and the environment. *See id*. RCRA was meant to ensure that such solid wastes were handled responsibly and did not re-enter the environment.

27. The goal of RCRA is to promote the protection of health and the environment and to conserve valuable material and energy resources by ensuring the safe treatment, storage, and disposal of solid waste. *See id.* § 6902. To achieve this goal, RCRA requires that EPA, among other things: prohibit "open dumping" on the land and close existing open dumps; provide for the management and disposal of hazardous waste in a manner that protects human health and the environment; and promulgate guidelines for responsible solid waste collection and disposal practices. *Id.* § 6902(a)(3)-(5), (8).

28. RCRA authorizes the EPA Administrator to prescribe regulations as necessary to accomplish the goals of RCRA. *See id.* § 6912(a)(1). RCRA specifically directs EPA to publish minimum criteria that differentiate "open dumps," which are prohibited, from "sanitary landfills," which are permitted. *See id.* §§ 6907(a), 6944(a). The criteria for sanitary landfills must guarantee "no reasonable probability of adverse effects on health or the environment from disposal of solid waste" at sanitary landfills. *Id.* § 6944(a).

29. RCRA also calls for extensive public participation to ensure the public has many opportunities to provide input into, and enhance the protectiveness of, standards for the treatment, storage, and disposal of solid waste. This mandate is codified in RCRA section 7004(b)(1), which states that "[p]ublic participation in the development, revision, implementation, and enforcement of any . . . program under [RCRA] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator . . . shall develop and publish minimum guidelines for public participation in such processes." 42 U.S.C. § 6974(b)(1).

30. In order to fulfill the mandatory duty set out in RCRA section 7004(b)(1), EPA has promulgated several sets of public participation regulations that apply to different areas of

RCRA enforcement. *See* 40 C.F.R. pt. 25 (various programs, including state hazardous waste programs); *id.* pt. 239 (state municipal solid waste landfill programs); *id.* pt. 256 (state solid waste management plans).

31. In 2015, following a district court ruling directing EPA to devise a schedule to comply with its obligation to regulate coal ash under RCRA,[1] EPA promulgated the 2015 Rule pursuant to its authority to regulate "open dumps" under RCRA Subtitle D. *See* 42 U.S.C. §§ 6907(a), 6944(a); 80 Fed. Reg. 21,302. The 2015 Rule established national minimum criteria for coal ash impoundments including location restrictions; design and operating criteria; groundwater monitoring, corrective action, and post-closure requirements; and recordkeeping, notification, and disclosure obligations. *See* 80 Fed. Reg. 21,302.

32. A coalition of environmental groups, including Waterkeeper Alliance, Inc. and Sierra Club, petitioned for review of the 2015 Rule pursuant to section 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(l). After consolidation with various industry petitions, the environmental petitioners argued, among other points, that the 2015 Rule was unlawful inasmuch as it allowed unlined surface impoundments to continue to operate, classified "clay-lined" impoundments as lined, and failed to regulate legacy (inactive) surface impoundments at coal plants that were no longer in operation as of the effective date of the rule. *See USWAG v. EPA*, 2018 WL 4000476, at *5.

33. During the pendency of that lawsuit, Congress passed the WIIN Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016), an amendment to RCRA that directs EPA to approve State "permit program[s] . . . for regulation by the State of coal combustion residuals units" to operate

[1] *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 56 (D.D.C. 2013).

"in lieu of" federal coal ash regulations provided that the state program meets several conditions. *See* 42 U.S.C. § 6945(d). For a state coal ash program to be approved, the state standards for coal ash units must be "at least as protective as" the federal standards, and the state must require that covered coal ash dumps in the state "achieve[] compliance" with those standards. *See id.* § 6945(d)(1)(B), (C), (D)(ii)(I). The WIIN Act also provides that a coal ash disposal site only qualifies as a "sanitary landfill" if it is in full compliance with either a permit issued by a State, a permit issued by EPA in a nonparticipating state, or the federal standards for coal ash units set forth at 40 C.F.R. Part 257. *Id.* § 6945(d)(6).

34. EPA subsequently issued non-binding guidance to serve as "a technical resource to States that may be useful in developing and submitting a State CCRs Permit Program to EPA for approval." *See* Release of Interim Final Guidance for State Coal Combustion Residuals Permit Programs; Comment Request, 82 Fed. Reg. 38,685, 38,685 (Aug. 15, 2017). EPA did not promulgate any binding regulations setting out minimum public participation requirements – or any other requirements – for approval of state coal ash programs.

35. On August 21, 2018, the D.C. Circuit issued its decision in *USWAG v. EPA* granting relief on three claims upon which environmental petitioners had sought review. *See USWAG v. EPA*, 2018 WL 4000476. The decision partially vacated the 2015 Rule because it had failed to guarantee "no reasonable probability of adverse effects on health or the environment" as required by RCRA section 4004(a). *See id.*; *USWAG* Judgment, 2018 WL 4158384, at *1. The court held, in relevant part, that the 2015 Rule's "approach of relying on leak detection followed by closure" for unlined and clay-lined coal ash impoundments violated RCRA because it "does not address the identified health and environmental harms" the record evidenced at those impoundments. *USWAG v. EPA*, 2018 WL 4000476, at *9-11.

36. The court ordered that "the Final Rule be vacated and remanded with respect to the provisions that permit unlined impoundments to continue receiving coal ash unless they leak, *see* [40 C.F.R.] § 257.101(a), classify 'clay-lined' impoundments as lined, *see* 40 C.F.R. § 257.71(a)(1)(i), and exempt from regulation inactive impoundments at inactive facilities, *see* 40 C.F.R. § 257.50(e)." *USWAG* Judgment, 2018 WL 4158384, at *1.

II. The Administrative Procedure Act

37. The Administrative Procedure Act ("APA") provides that "[t]he reviewing court shall . . . hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2).

38. The APA requires agencies to engage in a notice-and-comment process prior to formulating, amending, or repealing a rule. *Id.* §§ 551(5), 553. This process is designed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c).

39. Under the APA, "final agency action for which there is no other adequate remedy in a court" is "subject to judicial review." *Id.* § 704.

III. Oklahoma Environmental Permitting and Coal Ash Regulations

40. Under Oklahoma law, permits for coal ash units are governed by the Oklahoma Uniform Environmental Permitting Act ("UEPA"), 27A Okla. Stat. § 2-14-101 *et seq.*, implementing regulations codified at Okla. Admin. Code 252:4-7-1 *et seq*. and 252:517. *See* Okla. Admin. Code 252:517-3-3(a) ("All permit applications are subject to the Oklahoma Uniform Environmental Permitting Act as well as the requirements of this Subchapter.")

41. The UEPA establishes three "tiers" of permits, set out, in relevant part, at Okla. Admin. Code 252:4-7-58 through 60. "Tier I" permits include "technical plans," "modification of plans for closure and/or post-closure," modifications of pre-existing permits to allow "lateral expansion within permitted boundaries," to grant "a request for less than twenty-five percent (25%) increase in permitted capacity for storage," to make other "minor changes," and "[a]ll other administrative approvals required by solid waste rules." *See* Okla. Admin. Code 252:4-7-58(2), (3).

42. With the exception of notice of a landowner, there are no opportunities for public participation for Tier I permits under Oklahoma's permitting scheme. *See* 27A Okla. Stat. § 2-14-103(9); Okla. Admin. Code 252:4-7-2.

43. Oklahoma's coal ash rules grant permits to coal ash disposal units "for the life" of the unit. *See* Okla. Admin. Code 252:517-3-1(a).

FACTUAL BACKGROUND

I. The Toxic Hazards Posed by Coal Ash

44. Each year, power plants in the U.S. burn over 800 million tons of coal and, as a result, generate approximately 110 million tons of coal combustion residuals or "coal ash." Most of the coal ash, comprised of fly ash, bottom ash, boiler slag, and flue gas desulfurization sludge, is disposed of in unlined or inadequately lined surface impoundments (ponds), landfills, structural fills, and mines. *See USWAG v. EPA*, 2018 WL 4000476, at *2.

45. Coal ash contains "myriad carcinogens and neurotoxins," including arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium, and thallium. *Id.* at *1-2. Exposure to these carcinogens and neurotoxins creates elevated risks of skin, liver, bladder, and lung cancer, as well as "non-cancer risks such as neurological and

psychiatric effects, cardiovascular effects, damage to blood vessels, and anemia." *See id.* at *2 (quotation marks omitted).

46. Arsenic is a known human carcinogen that causes cancer of the skin, liver, bladder, and lungs. 80 Fed. Reg. at 21,451. Boron "can pose developmental risk to humans when released to groundwater and can result in stunted growth, phytotoxicity, or death to aquatic biota and plants when released to surfacewater bodies." Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One); Proposed Rule, 83 Fed. Reg. 11,584, 11,589 (Mar. 15, 2018). Lead is a very potent neurotoxin that can cause "kidney disease, lung disease, fragile bone[s], decreased nervous system function, high blood pressure, and anemia." Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule, 75 Fed. Reg. 35,128, 35,169 (June 21, 2010). Mercury is also a neurotoxin, and exposure can result in "permanently damage the brain, kidneys, and developing fetus." *Id.* Molybdenum exposure can result in "higher levels of uric acid in the blood, gout-like symptoms, and anemia." 80 Fed. Reg. at 21,451.

47. Coal ash disposal sites are "massive." *USWAG v. EPA*, 2018 WL 4000476, at *2. There are over 310 coal ash landfills scattered across the United States, averaging 120 acres in area and 40 feet deep. *Id.* There are at least 735 surface impoundments around the country that are currently receiving coal ash, as well as many "inactive" surface impoundments that contain, but are no longer actively receiving, coal ash. *Id.* Those surface impoundments average 50 acres in size and 20 feet deep. *Id.* Both landfills and surface impoundments carry "risk of structural

failure, particularly where they are located in unstable areas such as wetlands or seismic impact zones." *Id.* at *3.

48. There are five facilities in Oklahoma with coal ash sites now covered by Oklahoma's coal ash regulations. *See* Ex. A, Final Program Approval, 83 Fed. Reg. at 30,357 & n.4. Those facilities include unlined surface impoundments containing coal ash. *See* Plaintiffs' comments on the proposed approval of Oklahoma's coal ash plan ("Environmental Comments"), attached hereto as Exhibit C, at 3-5.

49. Increasing evidence shows that coal ash is polluting groundwater at Oklahoma's coal ash disposal sites. Publicly available documents reveal evidence of extensive contamination at the sites. *See id.* at 3-6. That contamination includes dangerous concentrations of pollutants such as arsenic, cadmium, chromium, thallium, and molybdenum in groundwater at American Electric Power's Northeastern coal plant near Oologah, Oklahoma; at the Grand River Dam Authority's coal ash landfill adjacent to the Grand River near Choteau, Oklahoma; at the coal ash impoundments and landfill at the Hugo coal plant near Ft. Towson, Oklahoma; and at the "Big Fork Ranch" coal ash landfill that abuts the Arkansas River in Marland, Oklahoma. *Id.*

II. Oklahoma's Coal Ash Program

50. EPA received Oklahoma's application for approval of its coal ash program ("the Application") – the first application of its kind – on August 3, 2017. *See* Ex. A, Final Program Approval, 83 Fed. Reg. at 30,357.

51. The Application revealed that Oklahoma's regulations do not require that many compliance proposals and plans – documents detailing site-specific practices that coal ash units propose to use to comply with the federal standards and equivalent Oklahoma standards – be included in applications for a new permit. Specifically, Oklahoma's regulations do not require applicants for new coal ash permits to submit, as part of their permit application: (a) their

certifications that their groundwater monitoring system and groundwater sampling and analysis program meet applicable requirements, (b) their post-closure care plan, (c) any retrofit plan, (d) any certification that an alternative groundwater monitoring frequency is appropriate, or (e) any plans or specifications demonstrating that the coal ash disposal site meets certain critical design requirements for coal ash impoundments, including hazard potential assessments, structural stability assessments, safety factor assessments, and emergency action plans. *See* Oklahoma Admin. Code 252:517-3-6(a). Each of those documents is required, where applicable,[2] by the federal coal ash standards to demonstrate compliance with those standards. *See* 40 C.F.R. §§ 257.73-74, 257.91, 257.93, 257.94(d), 257.102(k)(2), 257.104(d).

52. The Application also left largely unclear which permit modifications for already-permitted coal ash disposal sites would be classified as Tier II versus Tier I.

53. EPA proposed approval of Oklahoma's program by notice in the *Federal Register* dated January 16, 2018. *See* Oklahoma: Approval of State Coal Combustion Residuals State Permit Program, 83 Fed. Reg. 2100 (Jan. 16, 2018).

[2] All coal ash units must obtain certifications that their groundwater monitoring programs and groundwater sampling programs meet the standards for those programs. 40 C.F.R. §§ 257.91(f), 257.93(f)(6). All coal ash units must also have written post-closure plans. *Id.* § 257.104(d). If owners or operators of coal ash units wish to monitor groundwater on a different schedule than required by the federal standards, they must demonstrate the need for that alternate frequency and obtain a certification stating that the demonstration meets applicable requirements. *Id.* § 257.94(d)(3). If they wish to retrofit a unit instead of closing it, they must prepare a retrofit plan. *Id.* § 257.102(k)(2). All coal ash impoundments must prepare hazard potential assessments, structural stability assessments, and safety factor assessments; emergency action plans are required for certain impoundments with high or significant hazard potential. *Id.* §§ 257.73, 257.74.

54. On March 19, 2018, Plaintiffs submitted comments opposing the approval ("Environmental Comments"), which are attached hereto as Exhibit C. Plaintiffs argued that EPA should deny Oklahoma's application for approval, arguing among other points that:

a. EPA must promulgate enforceable regulations setting out minimum public participation requirements for state coal ash programs before approving any such program, *see* Ex. C, Environmental Comments at 41-43;

b. Oklahoma's program fails to ensure that the public has the opportunity to comment on permitting and post-permitting documents addressing compliance with regulatory requirements, as required by RCRA section 7004(b), 42 U.S.C. § 6974(b), and 40 C.F.R. Part 239, *see* Ex. C, Environmental Comments at 28-32, 35-36; and

c. Oklahoma's practice of granting permits "for life" contravenes the WIIN Act because it allows permits to remain in force even when they do not require compliance with standards "at least as protective as" revised federal standards. *See* Ex. C, Environmental Comments at 20-22.

55. On June 28, 2018, EPA approved Oklahoma's coal ash program, with an effective date of July 30, 2018. *See* Ex. A., Final Program Approval, 83 Fed. Reg. 30,356.

56. EPA's approval encompasses both Oklahoma's coal ash regulatory scheme as it will be applied to coal ash dumps in the state in the future, as well as permits issued to CCR units prior to EPA's approval of the program. *See id.* at 30,357, 30,363-64.

57. EPA acknowledged in the Final Program Approval that certain plans required by the Oklahoma and federal coal ash standards to demonstrate compliance with those standards, including coal ash units' "fugitive dust control plans," "run-on/runoff control system plans," and

modifications to closure or post-closure plans or other "technical plans," are classified by Oklahoma DEQ as "Tier I" permits. *See id*. at 30,358.

58. EPA further acknowledged in the Final Program Approval that "all existing CCR landfills in [Oklahoma] submitted Tier I modification requests to change the applicable standards in their permit from the previous state solid waste standards at OAC 252:215 to the new CCR standards at OAC 252:217. As a Tier I modification, the public would not have had opportunity for input into these 252:517 CCR landfill permits. Further, the public will not have opportunity for comment on these 'permits for life' in the future unless the permit is modified under a Tier II or Tier III modification." *Id*. at 30,363.

59. Many documents in the record confirm that DEQ has classified, and continues to classify, as "Tier I" various critical plans required by the Oklahoma and federal coal ash standards to demonstrate compliance with those standards. Those plans include groundwater sampling and analysis programs, groundwater monitoring plans, closure plans, post-closure plans, fugitive dust control plans, and run-on/runoff control system plans for multiple coal ash disposal sites in Oklahoma.

60. Contemporaneous with the notice in the *Federal Register*, EPA released, as one of the documents in the administrative record for this action, a Comment Summary and Response Document. Docket ID No. EPA-HQ-OLEM-2017-0613-0073 (June 2018) ("Response to Comments").

61. EPA acknowledged that no existing regulations setting out public participation requirements apply to the approval of state coal ash programs. *See* Ex. A, Final Program Approval, 83 Fed. Reg. at 30,358; Response to Comments at 8-9.

62. Among the provisions EPA approved in Oklahoma's coal ash program is the provision granting permits to coal ash disposal units "for the life" of the unit. *See* Okla. Admin. Code 252:517-3-1(a); Ex. A, Final Program Approval, 83 Fed. Reg. at 30,363.

63. Also among the provisions EPA approved in Oklahoma's coal ash program are regulations identical[3] to those vacated by the D.C. Circuit in *USWAG v. EPA*. Those provisions are codified at Okla. Admin. Code 252:517-15-6(a), 252:517-11-2(a)(1)(A), and 252:517-1-1(d). *See* Ex. A, Final Program Approval.

CLAIMS FOR RELIEF

Count 1 – Violation of 42 U.S.C. § 6974(b)(1).

(EPA was Required, but Failed, to Publish Minimum Guidelines for Public Participation in State Coal Ash Programs)

64. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

65. Under section 7004(b) of RCRA, the Administrator, in cooperation with the states, "shall develop and publish minimum guidelines for public participation" in the "development, revision, implementation, and enforcement of any regulation, guideline, information, or program" under RCRA. *See* 42 U.S.C. § 6974(b)(1).

66. The Administrator's duty to publish minimum guidelines for public participation under section 7004(b) is nondiscretionary.

67. State coal ash programs that EPA is authorized to approve under the WIIN Act are RCRA programs with respect to which EPA must comply with RCRA section 7004(b).

[3] In the Oklahoma regulations, references to the Code of Federal Regulations have been replaced with references to the relevant provisions of Oklahoma's rules.

68. EPA has not published minimum guidelines for public participation in the "development, revision, implementation, and enforcement" of state coal ash programs.

69. No existing regulations setting out minimum public participation requirements apply to state coal ash programs.

70. EPA's failure to issue public participation guidelines constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

71. Unless EPA performs its non-discretionary duty to issue public participation guidelines for state coal ash programs, Plaintiffs and their members will suffer irreparable harm.

72. Plaintiffs have no adequate remedy at law, and therefore equitable relief is warranted.

Count 2 – Violations of 42 U.S.C. § 6945(d) and 5 U.S.C. § 706(2)(C).

(The D.C. Circuit's Decision Partially Vacating the 2015 Rule Renders the Final Program Approval Invalid)

73. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

74. The D.C. Circuit's decision in *USWAG v. EPA* vacated portions of the 2015 Rule because they failed to guarantee "no reasonable probability of adverse effects on health or the environment," as required by RCRA section 4004(a). *USWAG v. EPA*, 2018 WL 4000476, at *1-2; 42 U.S.C. § 6944(a).

75. Due to that vacatur, EPA lacked the authority to approve Oklahoma's state coal ash program as "at least as protective as" federal coal ash standards pursuant to the WIIN Act, 42 U.S.C. § 6945(d)(1)(B)(ii).

76. Because Oklahoma's coal ash program contains provisions that are substantively identical to those vacated by the D.C. Circuit, approval of the program unlawfully allows operation of coal ash units that fail to meet the standard of RCRA section 4004(a).

77. EPA's approval of Oklahoma's state coal ash program based on regulations that violate RCRA section 4004(a), *id.* § 6944(a), exceeded EPA's authority under the WIIN Act, *id.* § 6945(d).

78. EPA's approval of Oklahoma's state coal ash program constituted "agency action . . . in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), as well as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id*. § 706(2)(A).

Count 3 – Violation of 42 U.S.C. § 6974(b) and 5 U.S.C. § 706(2)(A).

(EPA's Approval of Oklahoma's Coal Ash Program Without First Publishing Minimum Guidelines for Public Participation in State Coal Ash Programs Violates 42 U.S.C. § 6974(b) and the APA)

79. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

80. Under section 7004(b) of RCRA, the Administrator, in cooperation with the states, "shall develop and publish minimum guidelines for public participation" in the "development, revision, implementation, and enforcement of any regulation, guideline, information, or program" under RCRA. 42 U.S.C. § 6974(b)(1).

81. The Administrator's duty to publish minimum guidelines for public participation under Section 7004(b) is nondiscretionary.

82. Oklahoma's coal ash program is a RCRA program, to which RCRA section 7004(b) applies.

83. EPA's approval of Oklahoma's coal ash program without first promulgating the public participation guidelines required by 42 U.S.C. § 6974(b) and ensuring that Oklahoma's coal ash program met those minimum requirements constitutes "agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Count 4 – Violation of 42 U.S.C. § 6974(b) and 5 U.S.C. § 706(2)(A)

(EPA's Approval of Oklahoma's Coal Ash Program Notwithstanding Its Inadequate Public Participation Opportunities Violates 42 U.S.C. § 6974(b) and the APA)

84. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

85. In addition to a mandate that EPA issue public participation guidelines, section 7004(b) of RCRA provides that "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." 42 U.S.C. § 6974(b)(1).

86. Oklahoma's coal ash program does not afford public participation opportunities in the development and implementation of numerous compliance proposals and compliance demonstration documents essential for the implementation of its regulations for coal ash units.

87. By approving Oklahoma's coal ash program notwithstanding that program's failure to afford public participation opportunities on many critical documents, EPA violated its duty to "provide[] for, encourage[], and assist[]" public participation in "any . . . program" under RCRA. *Id.*

88. EPA's approval of Oklahoma's state coal ash program in contravention of the requirements of 42 U.S.C. § 6974(b)(1) constituted "agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Count 5 – Violation of 42 U.S.C. § 6945(d)(1)(B), (d)(1)(D)(ii)(I), and 5 U.S.C. § 706(2)(A).

(EPA's Approval of the Oklahoma Coal Ash Program's Grant of "Permits for Life" Contravenes the WIIN Act)

89. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

90. The WIIN Act allows approval of state coal ash programs only if they ensure that coal ash units located in the state meet standards "at least as protective as" federal coal ash standards. *See* 42 U.S.C. § 6945(d)(1)(B), (C); *see also id*. § 6945(d)(1)(D)(ii)(I).

91. RCRA requires EPA to "review[] and, where necessary, revise[]" all regulations implementing the statute, including those for coal ash, every three years. *See* 42 U.S.C. § 6912(b).

92. At the time it approved Oklahoma's coal ash program, EPA had already proposed to revise the federal coal ash standards. *See* Ex. C, Environmental Comments at 21.

93. Whenever EPA revises the federal coal ash standards codified at 40 C.F.R. pt. 257, EPA must review approved state programs within three years to evaluate whether the program "continues to ensure that each [CCR] unit located in the state" is complying with requirements at least as protective as the revised federal standards. 42 U.S.C. § 6945(d)(1)(D)(ii)(I); *see also id.* § 6945(d)(1)(D)(i)(II).

94. Oklahoma's coal ash regulations direct DEQ to grant permits "for the life of the CCR unit." Okla. Admin. Code 252:517-3-1(a).

95. Oklahoma's coal ash program does not require that permits for coal ash units be revoked or revised to ensure that each CCR unit in the state achieves compliance with standards at least as protective as any revised federal coal ash standards.

96. Thus, permits for coal ash units in Oklahoma may remain in force even when they do not require compliance with standards "at least as protective as" revised federal standards.

97. Accordingly, Oklahoma's coal ash state permit program does not meet the standard for state program approval set forth in 42 U.S.C. § 6945(d)(1).

98. EPA's approval of Oklahoma's state coal ash program in contravention of the standard set forth in 42 U.S.C. § 6945(d)(1) constituted "agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Count 6 – Violation of 5 U.S.C. § 706(2)(A), (D).

(EPA's Failure to Respond to Plaintiffs' Comment that EPA Violated 42 U.S.C. § 6974(b) by Failing to Promulgate Minimum Public Participation Guidelines Violates the APA)

99. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

100. Section 553(c) of the APA obliges an agency to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and then "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

101. As part of that obligation, agencies must "must respond to those comments which, if true, would require a change in the proposed rule." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018) (quoting another source).

102. The WIIN Act similarly provides for state program approvals only "after public notice and an opportunity for public comment." 42 U.S.C. § 6945(d)(1)(B).

103. Plaintiffs commented that EPA violated RCRA section 7004(b) by approving the Oklahoma coal ash program without first issuing regulations setting out minimum public participation opportunities for state CCR programs. *See* Ex. C, Environmental Comments at 41-43.

104. If true, that comment would require a change to the proposed rule because EPA may not act arbitrarily, capriciously, or contrary to law. *See* 5 U.S.C. § 706(2)(A), (D).

105. EPA did not respond to the comment in either the Final Program Approval or the Response Document. EPA acknowledged, in its Response to Comments, that it had received that comment. *See* Ex. C, Response to Comments at 13. However, EPA offered no response, noting only that "RCRA section 4005(d) does not require EPA to promulgate regulations for determining the adequacy of state programs." *Id.* at 14.

106. EPA's failure to respond to the comment regarding public participation guidelines violated the APA, 5 U.S.C. § 553(c) and the WIIN Act.

107. EPA's approval of Oklahoma's coal ash program after failing to respond to a significant comment constituted "agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law." *Id.* § 706(2)(A), (D).

Count 7 – Violation of 5 U.S.C. § 706(2)(A), (D).

(EPA's Failure to Respond to Plaintiffs' Comment that Permits for Life Contravene the WIIN Act Violates the APA)

108. Plaintiffs re-allege and incorporate the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

109. Plaintiffs commented that Oklahoma's granting of permits for life contravenes the WIIN Act because it fails to guarantee that CCR sites will be under requirements at least as protective as federal standards. *See* Ex. C, Environmental Comments at 20-22.

110. If true, that comment would require a change to the proposed rule because EPA may not act arbitrarily, capriciously, or contrary to law. *See* 5 U.S.C. § 706(2)(A), (D).

111. EPA did not respond to the comment in either the Final Program Approval or the Response Document. EPA responded in both the Final Program Approval and the Response to Comments that "nothing in the Federal rule prohibits" granting permits for life. Ex. A, EPA Final Approval, 83 Fed. Reg. at 30,363; Response to Comments at 12. However, EPA did not address the argument that permits for life are inconsistent with the WIIN Act itself.

112. EPA's failure to respond to the comment regarding permits for life under the WIIN Act violated the APA, 5 U.S.C. § 553(c), and the WIIN Act.

113. EPA's approval of Oklahoma's state coal ash program after failing to respond to a significant comment constituted "agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law." *Id.* § 706(2)(A), (D).

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiffs request that the Court:

a. declare that Defendants have violated the Resource Conservation and Recovery Act in failing to promulgate minimum public participation guidelines governing the approval of state coal ash programs;

b. order Defendants to issue necessary public participation guidelines as soon as possible in accordance with RCRA section 7004(b);

c. declare that EPA's approval of the Oklahoma coal ash permit program was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," and/or "without observance of procedure required by law," in violation of the APA, 5 U.S.C. § 706(2);

d. vacate EPA's approval of Oklahoma's coal ash permit program;

e. award Plaintiffs their litigation costs and reasonable attorneys' fees in this action; and,

f. provide any other necessary and appropriate relief.

DATED: September 26, 2018

Respectfully submitted,

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Counsel for Plaintiffs Waterkeeper Alliance, Inc., LEAD Agency, and Sierra Club

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WATERKEEPER ALLIANCE, INC., *et al.*,

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*,

Defendants.

Civil Action No. 1:18-cv-2230

Exhibit A

Oklahoma: Approval of State Coal Combustion Residuals Permit Program, 83 Fed. Reg. 30,356 (June 28, 2018) ("Final Program Approval")

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 257

[EPA–HQ–OLEM–2017–0613; FRL–9979–88–OLEM]

Oklahoma: Approval of State Coal Combustion Residuals Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of final authorization.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is approving the Oklahoma Department of Environmental Quality's Coal Combustion Residuals (CCR) State permit program, which will operate in lieu of the Federal CCR program. EPA has determined that Oklahoma's program meets the standard for approval under RCRA. Facilities operating under the state program requirements and resulting permit provisions will also be subject to EPA's inspection and enforcement authorities under RCRA.

DATES: The final authorization is effective on July 30, 2018.

FOR FURTHER INFORMATION CONTACT: Mary Jackson, Office of Resource Conservation and Recovery, Environmental Protection Agency; *telephone number:* (703) 308–8453; *email address: jackson.mary@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' means the EPA.

I. General Information

A. Overview of Final Authorization

EPA is granting approval to Oklahoma's CCR state permit program application, pursuant to RCRA 4005(d)(1)(B). Oklahoma's program allows the Oklahoma Department of Environmental Quality (ODEQ) to enforce state rules related to CCR disposal activities in non-Indian country, as well as to review for approval permit applications and to enforce permit violations. Oklahoma's CCR permit program will operate in lieu of the Federal CCR program, codified at 40 CFR part 257, subpart D.

EPA will retain sole authority to regulate and permit CCR units in Indian country as defined in 18 U.S.C. 1151, which includes reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. EPA treats as reservations trust lands validly set aside for the use of a tribe even if the trust lands have not been formally designated as a reservation.[1] EPA has engaged federally-recognized Tribes within the state of Oklahoma in consultation and coordination regarding the program authorizations for ODEQ and established opportunities for formal as well as informal discussion throughout the consultation period, beginning with an initial conference call on October 19, 2017. On that call, the authorization procedures and the impact of granting authorization were discussed, and further consultation was offered. Tribal consultation is conducted in accordance with the EPA policy on Consultation and Coordination with Indian Tribes. (see *https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf*).[2]

B. Background

CCR are generated from the combustion of coal, including solid fuels classified as anthracite, bituminous, subbituminous, and lignite, for the purpose of generating steam for powering a generator to produce electricity or electricity and other thermal energy by electric utilities and independent power producers. CCR include fly ash, bottom ash, boiler slag, and flue gas desulfurization materials. CCR can be sent off-site for disposal or beneficial use or may be disposed in on-site landfills or surface impoundments.

On April 17, 2015, EPA published a final rule, creating 40 CFR part 257, subpart D, which established nationally applicable minimum criteria for the safe disposal of CCR in landfills and surface impoundments (80 FR 21302). The rule created a self-implementing program which regulates the location, design, operating criteria, groundwater monitoring and corrective action for CCR disposal, as well as regulating the closure and post-closure care of CCR units and recordkeeping and notifications for CCR units. The regulations do not cover the ''beneficial use'' of CCR as that term is defined in § 257.53.

C. Statutory Authority

EPA is issuing this action under the authority of RCRA sections 4005(d) and 7004(b)(1). See 42 U.S.C. 6945(d), 6974(b)(1).

In December 2016, Congress passed and the President signed the Water Infrastructure Improvements for the Nation (WIIN) Act. Section 2301 of the WIIN Act amended Section 4005 of RCRA, creating a new subsection (d) that establishes a Federal permitting program similar to those under RCRA section 4005(c) and subtitle C, as well as other environmental statutes. See 42 U.S.C. 6945(d). Under section 4005(d), states may develop and submit a CCR permit program to EPA for approval; once approved the state permit program operates in lieu of the Federal requirements. See 42 U.S.C. 6945(d)(1)(A).

To become approved, the statute requires that a state provide ''evidence of a permit program or other system of prior approval and conditions under state law for regulation by the state of coal combustion residuals units that are located in the state.'' See 42 U.S.C. 6945(d)(1)(A). In addition, the statute directs that the state submit evidence that the program meets the standard in section 4005(d)(1)(B), *i.e.,* that it will require each CCR unit located in the state to achieve compliance with either: (1) The Federal CCR requirements at 40 CFR part 257, subpart D; or (2) other state criteria that the Administrator, after consultation with the state, determines to be at least as protective as the Federal requirements. See 42 U.S.C. 6945(d)(1)(B). EPA has 180 days after submittal of such evidence to make a final determination, and must provide public notice and an opportunity for public comment. See 42 U.S.C. 6945(d)(1)(B).

To receive EPA approval, EPA must determine that the state program requires each CCR unit located in the state to achieve compliance either with the requirements of 40 CFR part 257, subpart D, or with state criteria that EPA determines (after consultation with the state) to be at least as protective as the requirements of 40 CFR part 257, subpart D. See 42 U.S.C. 6945(d)(1)(B). EPA may approve a proposed state permit program in whole or in part. *Id.*

Once a program is approved, EPA must review the program at least every 12 years, as well as no later than three years after a revision to an applicable section of 40 CFR part 257, subpart D, or one year after any unauthorized significant release from a CCR unit located in the state. See 42 U.S.C. 6945(d)(1)(D)(i)(I)–(III). EPA also must review a program at the request of another state alleging that the soil, groundwater, or surface water of the requesting state is or is likely to be

[1] *See, e.g.,* Oklahoma Tax Commission vs. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511 (1991).

[2] See October 12, 2017 letter from Wren Stenger to Chet Brooks, Chief, Delaware Tribe of Oklahoma. EPA–HQ–OLEM–2017–0613.

adversely affected by a release from a CCR unit in the approved state. See 42 U.S.C. 6945(d)(1)(D)(i)(IV).

In a state with an approved CCR program, EPA may commence administrative or judicial enforcement actions under RCRA section 3008 if the state requests assistance or if EPA determines that an EPA enforcement action is likely to be necessary to ensure that a CCR unit is operating in accordance with the criteria of the approved permit program. See 42 U.S.C. 6945(d)(4).

II. Oklahoma's Application

ODEQ issued a notice of rulemaking intent related to its proposed CCR program and accepted public comments from December 1, 2015, through January 13, 2016. ODEQ then published an Executive Summary rulemaking document that included the public comments received and the ODEQ responses.

In September 2016, ODEQ promulgated Oklahoma Administrative Code (OAC) Title 252 Chapter 517 *Disposal of Coal Combustion Residuals from Electric Utilities,* establishing its CCR program. OAC 252:517 incorporates the Federal technical regulations at 40 CFR part 257, subpart D, with some minor modifications discussed below.

On August 3, 2017, EPA received an application from the state of Oklahoma requesting a review of their CCR state permit program. EPA determined that the application was complete and notified Oklahoma of its determination by letter dated December 21, 2017.[3] On January 16, 2018, EPA published a notification and requested comment on its proposed determination to approve the Oklahoma CCR program (83 FR 2100). The comment period closed on March 19, 2018.

On February 13, 2018, EPA conducted a public hearing on the application at the ODEQ building located at 707 N Robinson Avenue, Oklahoma City, Oklahoma. The public hearing provided interested persons the opportunity to present information, views or arguments concerning ODEQ's program application. Comments from the hearing as well as additional comments received during the comment period are included in the docket for this document.

The state indicates there are currently five CCR facilities in Oklahoma.[4] A facility previously thought to be regulated under the CCR part 257 regulations was not correctly identified initially. One of the current five facilities is not yet permitted as it was previously under the jurisdiction of the Oklahoma Department of Mines. The other four facilities have permitted landfills and/or surface impoundments that are now subject to the CCR part 257 regulations. Approval of ODEQ's CCR application allows the ODEQ regulations to apply to existing CCR units, as well as any future CCR units not located in Indian country, in lieu of the Federal requirements.

EPA is not aware of any existing CCR units in Indian country within Oklahoma, but EPA will maintain sole authority to regulate and permit CCR units in Indian country, meaning formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.

III. EPA Analysis of Oklahoma's Application

As discussed in Section I.C. of this document, the statute requires EPA to evaluate two components of a state program to determine whether it meets the standard for approval. First, EPA is to evaluate the adequacy of the permit program itself (or other system of prior approval and conditions). See 42 U.S.C. 6945(d)(1)(A). Second, EPA is to evaluate the adequacy of the technical criteria that will be included in each permit to determine whether they are the same as the Federal criteria, or to the extent they differ, whether the modified criteria are ''at least as protective as'' the Federal requirements. See 42 U.S.C. 6945(d)(1)(B). Only if both components meet the statutory requirements may EPA approve the program. See 42 U.S.C. 6945(d)(1).

On that basis, EPA conducted a review of ODEQ's application, including a thorough analysis of OAC 252:517 and its adoption of 40 CFR part 257, subpart D (see section A. Adequacy of Oklahoma's Permit Program and section B. Adequacy of Technical Criteria below.). Based on this review, EPA has determined that ODEQ's CCR permit program as submitted meets the standard for approval in section 4005(d)(1)(A) and (B). Oklahoma's program contains all but two of the technical elements of the Federal rule, including requirements for location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, recordkeeping, notification and internet posting requirements. As discussed in greater detail below, the two exceptions relate to the requirements at 40 CFR 257.3–1 (which address siting of units in floodplains), and 257.3–2 (which addresses the protection of endangered and threatened species). Oklahoma has not adopted the specific language of either of these Federal regulations but is relying on its existing state regulations at OAC 252:517–5–8 and 5–9 which EPA has determined to be at least as protective as the Federal criteria. The program also contains state-specific language, references and state-specific requirements that differ from the Federal rule, which EPA has determined to be at least as protective as the Federal criteria. EPA's analysis and findings are discussed in greater detail below and in the Technical Support Document for the Approval of Oklahoma's Coal Combustion Residuals State Permit Program, which is included in the docket to this action.

The OAC rules promulgated in 2016 included language inserts and deletions to enable ODEQ to permit CCR units and enforce the Oklahoma rule. The revisions include: The removal of statements regarding national applicability; the inclusion of language to require submittal and approval of plans to ODEQ; the inclusion of permitting provisions to allow ODEQ to administer the CCR rules in the context of a permitting program; the inclusion of state-specific location restrictions; the inclusion of procedures for subsurface investigation; and the inclusion of provisions addressing cost estimates and financial assurance.

Throughout Oklahoma's Chapter 517 rules, references for tribal notifications and/or approval that appear in the Federal rule have been deleted along with the terms ''Indian Country,'' ''Indian Lands,'' and ''Indian Tribe.'' Per the WIIN Act, EPA will retain sole authority to operate the Federal CCR program in Indian country, including the regulation and permitting of CCR units. As defined in 18 U.S.C. 1151, Indian country includes reservations. Dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. EPA treats as reservations trust lands validly set aside for the use of a tribe even if the trust lands have not been formally designated as a reservation. *See, e.g., Oklahoma Tax Commission vs. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 511 (1991).

[3] ODEQ's initial CCR permit program application, subsequent supplementation, and EPA's determination of completeness letter are available in the docket supporting this authorization.

[4] The notification for proposed authorization indicated six facilities in Oklahoma. Currently there are 5 facilities at which CCR units are located. The sixth facility identified in the proposal stores fly and bottom ash in metal bins or enclosed structures neither of which meets the definition of a CCR unit.

A. Adequacy of Oklahoma's Permit Program

RCRA section 4005(d)(1)(A) requires a state seeking program approval to submit to EPA an application with ''evidence of a permit program or other system of prior approval and conditions under state law for regulation by the state of coal combustion residuals units that are located in the State.'' RCRA section 4005(d) does not require EPA to promulgate regulations for determining the adequacy of state programs. EPA therefore evaluated the adequacy of ODEQ's permit program against the standard in RCRA section 4005(d)(1)(A) by reference to the existing regulations in 40 CFR part 239, Requirements for State Permit Program Determination of Adequacy and the statutory requirements for public participation in RCRA Section 7004(b). The Agency's general experience in reviewing and approving state programs also informed EPA's evaluation.

In order to aid states in developing their programs and to provide a clear statement of how, in EPA's judgment, the existing regulations and statutory requirements in sections 4005(d) and 7004(b) apply to state CCR programs, EPA announced on August 15, 2017, the availability of an interim final Guidance for Coal Combustion Residuals State Permit Programs (82 FR 38685). This guidance outlines the process and procedures EPA generally intends to use to review and make determinations on state CCR permit programs, and that were used in evaluating Oklahoma's application.

RCRA section 7004(b) applies to all RCRA programs, directing that ''public participation in the development, revision, implementation, and enforcement of any . . . program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.'' 42 U.S.C.S. 6974(b)(1). Although 40 CFR part 239 applies to approval of state Municipal Solid Waste Landfill (MSWLF) programs under RCRA 4005(c)(1), rather than EPA's evaluation of CCR permit programs under RCRA 4005(d), the specific criteria outlined in part 239 provide a helpful framework to more broadly examine the various aspects of ODEQ's proposed program. States are familiar with these criteria through the MSWLF program (all states have MSWLF programs that have been approved pursuant to these regulations) and the regulations are generally regarded as protective and appropriate. In general, EPA considers that a state program that is consistent with the part 239 provisions would meet the section 7004(b)(1) directive regarding public participation. As part of analyzing the application, EPA reviewed the four categories of criteria outlined in 40 CFR part 239 as guidelines for permitting requirements, requirements for compliance monitoring authority, requirements for enforcement authority, and requirements for intervention in civil enforcement proceedings.

To complete its evaluation, EPA relied on the information contained in the original application, as well as all materials submitted during the comment period and at the public hearing. The findings are also based on additional information submitted by Oklahoma on April 27, 2018 and May 9, 14, 16, and 31, 2018, in response to follow-up questions from EPA on the authorization application. All of this information is included in the docket for this document. A summary of EPA's findings is provided below, organized by the program elements identified in the part 239 regulations and EPA's interim final guidance document; detailed analysis of the submitted state program can be found in the Technical Support Document, which is included in the docket for this action.

1. Permitting Guidelines

Based on RCRA section 7004 and on the part 239 regulations, an adequate permitting program will provide for public participation by ensuring that: Documents for permit determinations are made available for public review and comment; final determinations on permit applications are made known to the public; and public comments on permit determinations are considered.

All environmental permit and modification applications in Oklahoma are subject to the Oklahoma Uniform Environmental Permitting Act (UEPA) and the permitting rules promulgated to carry out UEPA. UEPA classifies all permit applications and modifications into three tiers that determine the level of public participation and administrative review the permit application will receive. (Section 27A–2–14–201(B)(1)). In making determinations for Tier I, II or III, the following criteria are considered:

- The significance of the potential impact of the type of activity on the environment,
- the amount, volume and types of waste proposed to be accepted, stored, treated, disposed, discharged, emitted or land applied,
- the degree of public concern traditionally connected with the type of activity,
- the Federal classification, if any, for such proposed activity, operation or type of site or facility, and
- any other factors relevant to such determinations.

Such designations must be consistent with any analogous classifications set forth in applicable Federal programs. Section 27A OS–2–14–201(B)(2). Oklahoma classifies solid waste management applications, including CCR applications, into their respective tiers at OAC 252:4–7–58 through 60. All permit documents, regardless of tier, are available for public review and copying. OAC 252:4–1–5.

Oklahoma describes the Tier I permit application process as ''the category for those things that are basically administrative decisions which can be made by a technical supervisor with no public participation except for the landowner.'' OAC 252:4–7–2. The Tier I permit application requires an application, notice to the landowner, and Department review. 27A O.S. section 2–14–103(9). Applications for minor modifications, and approval of technical plans fall within the Tier I category. OAC 252:4–7–58. Such plans would include, for example, fugitive dust control plans, run-on/runoff control system plans. EPA notes that these plans would be available for public comment and review if they are part of a new permit or other action designated as Tier II or III as discussed below.

Under OAC 252:4–7–58 (2)(A)(iii), modifications to closure or post-closure plans and modifications to technical plans are considered Tier 1 modifications. ODEQ has stated that, when applying the regulations and designating the appropriate Tier for these plan modifications, the underlying UEPA statute requires consideration of potential environmental impact.[5] For example, if a facility had an approved closure plan to close the unit with waste in place and they sought approval instead to ''clean close'' the unit, that would be considered minor (Tier I) because clean closure is generally a more aggressive and difficult to achieve option. However, if a facility applied to amend a closure plan that specifies clean closure, and it is modified to authorize closure of the unit with waste in place, such a change would be designated as Tier II (discussed below). The basis for requiring this would be the statutory provisions at 27A–2–14–201 listed above. Thus, the seemingly broad categories of Tier 1 modifications must

[5] Telephone Conference Call May 11, 2018 EPA Region VI, EPA Office of Resource Conservation and Recovery, ODEQ.

be interpreted to be consistent with the statutory directive.

The Tier II permit application process expands upon the Tier I requirements to include published notice of the application filing, published notice of the draft permit or denial, opportunity for a public meeting, and submittal of public comment. 27A O.S. section 2–14–103(10). The Tier II process applies to new permits for on-site CCR disposal units and all modifications to existing facilities unless specifically listed under Tier I. OAC 252:4–7–59. ODEQ requires any application for expansion of a CCR unit or additional capacity, whether existing or new surface impoundment or landfill, to follow at a minimum the Tier II process. Non-generator owned facilities that receive material from off-site follow the Tier III process.

The Tier III permit application process includes the requirements of Tiers I and II and adds notice of an opportunity for a process meeting (*i.e.* how the permit process works). The Tier III process applies to new permits for off-site disposal units and permits for some significant modifications to off-site disposal units. OAC 252:4–7–60.

UEPA provides for public notice and review of permit applications and significant permit modifications through its Tier II and III programs. In the case of Tier II and III applications that do not receive timely comments or public meeting request and for which no public meeting was held, the final permit would be issued or denied by ODEQ. For Tier II and III applications for which comments or a public meeting request was received or which a public meeting was held, ODEQ considers the comments and then prepares a response to comments prior to issuance of the final permit. These programs provide opportunities for public participation and the application of UEPA to the CCR permitting program is consistent with Oklahoma's practice across environmental programs. Permit and permit modification applications for CCR facilities fall under the existing solid waste management application requirements at OAC 252:4–7–58 through 60. Thus, EPA has determined that the Oklahoma program provides for adequate public participation, thereby satisfying the requirements of RCRA section 7004.

2. Guidelines for Compliance Monitoring Authority

EPA considers that the ''evidence of a permit program or other system of prior approval and conditions under state law for regulation by the state of coal combustion residuals units'' required under RCRA 4005(d)(1)(A) should normally include information to demonstrate that the state has the authority to gather information about compliance, perform inspections, and ensure that information it gathers is suitable for enforcement. Note that this is consistent with the part 239 regulations and with the interpretation expressed in EPA's interim final guidance.

ODEQ has compliance monitoring authority under 27A O.S. section 2–3–501, allowing for inspections, sampling, information gathering, and other investigations. This authority extends to ODEQ's proposed CCR permit program and would provide the authority to adequately gather information for enforcement.

3. Guidelines for Enforcement Authority

EPA considers that the ''evidence of a permit program or other system of prior approval and conditions under state law for regulation by the state of coal combustion residual units'' required under RCRA 4005(d)(1)(A) should normally include information to demonstrate that the state has adequate authority to administer and enforce RCRA CCR permit programs, including: the authority to restrain any person from engaging in activity which may damage human health or the environment, the authority to sue to enjoin prohibited activity, and the authority to sue to recover civil penalties for prohibited activity.

EPA has determined that ODEQ has adequate authority to administer and enforce its existing programs under 27A O.S. section 2–3–501–507 and that authority extends to the ODEQ CCR permit program.

4. Intervention in Civil Enforcement Proceedings

Based on RCRA section 7004, EPA considers that the ''evidence of a permit program or other system of prior approval and conditions under state law for regulation by the state of coal combustion residuals units'' required under RCRA 4005(d)(1)(A) includes a demonstration that the state provides adequate opportunity for citizen intervention in civil enforcement proceedings. As EPA has explained (for example, in the interim final guidance) the standards found in 40 CFR 239.9 provide a useful model. Using those standards, the state must have authority to allow citizen intervention or provide assurance of (1) a notice and public involvement process, (2) investigating and providing responses about violations, and (3) not opposing intervention when permitted by statute, rule, or regulation.

Using 40 CFR 239.9(a) as a model, ODEQ's CCR program satisfies the civil intervention requirement by allowing intervention by right (12 OK Stat section 12–2024).[6] In addition, ODEQ's CCR program would satisfy the requirements of 40 CFR 239.9(b) by providing a process to respond to citizen complaints (see 27A O.S. section 2–3–101,503) and by not opposing citizen intervention when allowed by statute (see 27A O.S. section 2–7–133).

ODEQ has a robust process for responding to citizen complaints. Under 27A O.S. section 2–3–101–F–1, the complaints program is responsible for intake processing, mediation and conciliation of inquiries and complaints received by the Department and provides for the expedient resolution of complaints within the jurisdiction of the Department. Under 27A O.S. section 2–3–503, if the Department undertakes an enforcement action as a result of a complaint, the Department notifies the complainant of the enforcement action by mail. The state program in 27A O.S. section 2–3–503 offers the complainant an opportunity to provide written information pertinent to the complaint within fourteen (14) calendar days after the date of the mailing. The state program also goes further in 27A O.S. section 2–3–104 stating that the complaints program shall, in addition to the responsibilities specified by section 2–3–101, refer, upon written request, all complaints in which one of the complainants remains unsatisfied with the Department's resolution of said complaint to an outside source trained in mediation. These additional elements of the state's complaint process indicate that ODEQ takes public intervention seriously in enforcement actions.

EPA has determined that these requirements meet the level of public participation in the enforcement process required under RCRA 7004(b).

B. Adequacy of Technical Criteria

EPA has determined that ODEQ's CCR permit program meets the standard for approval in RCRA section 4005(d)(1)(B)(i), as it will require each CCR unit located in Oklahoma to achieve compliance with the applicable criteria for CCR units under 40 CFR part 257 or with other state criteria that the Administrator, after consultation with

[6] Under 12 OK Stat section 12–2024, intervention by right is allowed when a statute confers an unconditional right to intervene; or when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest.

the state, has determined to be at least as protective as the criteria in part 257. To make this determination, EPA compared ODEQ's proposed CCR permit program to 40 CFR part 257 to determine whether it differed from the Federal requirements, and if so, whether those differences met the standard for approval in RCRA section 4005(d)(1)(B)(ii) and (C).

Oklahoma has adopted all but two of the technical criteria at 40 CFR part 257, subpart D, into its regulations at OAC Title 252 Chapter 517. The two exceptions are discussed in sections 1 and 2 below.

While ODEQ's CCR permit program also includes some modification of 40 CFR part 257, subpart D, the majority of ODEQ's modifications were needed to allow the state to implement the part 257 criteria through a permit process. As mentioned above, the 40 CFR part 257, subpart D, rules were meant to be implemented directly by the regulated facility, without the oversight of any regulatory authority, such as a state permitting program. ODEQ thus needed to make some changes to the part 257 regulations to allow it to implement the permit program. Examples of these changes include the addition of language to require submittal and approval of plans to ODEQ, and of permitting provisions to allow the ODEQ to administer the CCR rules in the context of a permitting program. ODEQ also made some minor modifications to address state-specific issues: For example, the state did not incorporate 40 CFR 257.61(a)(2)(iv), which references the Marine Protection, Research, and Sanctuaries Act (MPRSA) requirements because Oklahoma does not have any coastal or ocean environments which apply under the MPRSA regulations. Oklahoma also included provisions to integrate purely state-law requirements into the Federal criteria—such as state-specific locations restrictions; procedures for subsurface investigation; and provisions addressing cost estimates and financial assurance. EPA considers these revisions to be administrative ones, that they do not substantively modify the Federal technical criteria.[7]

Other minor changes made by ODEQ to the 40 CFR part 257, subpart D, criteria reflect the integration of the CCR rules with the responsibilities of other state agencies or state specific conditions. Additional changes include removal of the web link to EPA publication SW–846 under the definition ''*Representative Sample*'' in 40 CFR 257.53; and the replacement of 40 CFR 257.91(e) with a reference to the Oklahoma Water Resources Board (OWRB) section 785:35–7–2. A few changes were made inadvertently including a typographic error in Chapter 517–9–4(g)(5) and the inadvertent removal of the words ''*and the leachate collection and removal*'' from section 252:517–11–1(e)(1). The state has updated their rule language to correct the errors.

EPA finds these references to OWRB standards to be minor because the key aspects of the CCR program, including requirements for location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, recordkeeping, notification and internet posting requirements, are not substantially changed or reduced and in one example, are more stringent. These changes do not keep the overall program from being at least as protective as 40 CFR part 257, subpart D. EPA's full analysis of Oklahoma's CCR permit program can be found in the Technical Support Document, located in the docket for this document.

1. Adequacy of State Analog to 40 CFR 257.3–1 Regarding Floodplains

The current Federal criteria at § 257.3–1 addresses location of CCR units in floodplains as follows:

Facilities or practices in floodplains cannot restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.

(1) Base flood means a flood that has a one percent or greater chance of recurring in any year or a flood of a magnitude equaled or exceeded once in 100 years on the average over a significantly long period.

(2) Floodplain means the lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, which are inundated by the base flood.

(3) Washout means the carrying away of solid waste by waters of the base flood.

Oklahoma's floodplain requirement at section 252:517–5–9 states that no waste management or disposal area of a CCR unit can be located within the 100-year floodplain except: (1) CCR units that were permitted before April 9, 1994 and that meet the same criteria under the Federal floodplain standards at 40 CFR 257.3–1 and summarized above; and (2) units that have received an authorized variance for waste management or disposal areas of new CCR units, or expansions of waste management or disposal areas of existing units, provided the variance is conditioned upon the subsequent redefinition of the floodplain to not include the land area proposed by the variance.

Discussions with ODEQ provided additional information regarding how the variance is implemented.[8] Specifically, to qualify for the variance, facilities may employ engineering solutions such as building a dike, changing the flow of water or changing the elevation of the area, and seek to have the floodplain redefined not to include the land area of the new or expanded unit. To authorize the redefinition of the floodplain based on these engineering solutions, an application is submitted by the facility to the Federal Emergency Management Administration (FEMA) for receipt of a Letter of Map Revision (LOMR). If approved, the facility first receives a Conditional Letter of Map Revision (CLOMR) allowing construction of the unit and the engineering solutions per the conditions outlined in the CLOMR. If the conditions of the CLOMR are met, a LOMR is issued by FEMA authorizing that agency to revise the flood hazard map information so as not to include the land area of the new or expanded unit (see *https://www.fema.gov/flood-map-revision-processes#4* for additional information on the FEMA process).

ODEQ has stated that no CCR unit can begin receiving CCR until approval of the redefined floodplain by FEMA and receipt of the LOMR by the facility. Based on all of these facts, EPA has determined that the Oklahoma floodplain standard would be at least as protective as the Federal part 257 standard.

2. Adequacy of State Analog to 40 CFR 257.3–2

As noted previously, Oklahoma has not adopted the Federal regulation, but is relying on its existing state regulation at OAC 252:517–5–8. EPA has determined that this regulation meets the standard for approval in RCRA section 4005(d)(1)(B)(ii) and (C) as it is at least as protective as the Federal criteria in 40 CFR 257.3–2.

OAC 252:517–5–8. Endangered or Threatened Species requires that for a new CCR unit, or expansion of the permit boundary of an existing CCR unit, a statement from the Oklahoma Department of Wildlife Conservation (ODWC) and from the Oklahoma Biological Survey (OBS), must be submitted regarding current information

[7] List of revisions included in the docket for this document.

[8] See summary of call with ODEQ May 31, 2018 included in the docket for this authorization.

about endangered or threatened wildlife or plant species listed in state and Federal laws, that exist within one mile of the permit boundary or expansion area. If threatened or endangered species exist within, or periodically utilize any area within, or within one mile of, the permit boundary or expansion area, the projected impacts on the identified species must be addressed, and measures specified to avoid or mitigate the impacts.

When impacts are unavoidable, a mitigation plan that has been approved by ODWC for wildlife or OBS for plants, must be submitted to ODEQ. ODEQ confirmed the language in OAC 252:517–5–8 includes fish. See OAC 800:25–19–6.

EPA has compared the existing Federal CCR regulations at 40 CFR 257.52 with ODEQ's act and regulation and has determined that ODEQ's provision is at least as protective as the Federal CCR provision. Specifically, the term ''impact'' in the state rule is consistent with ''taking'' in the Federal rule. Pursuant to 40 CFR 257.3–2(a), facilities or practices cannot cause or contribute to the taking of an endangered or threatened species. All the actions included in the definition of ''taking'' in 40 CFR 257.3–2(b)(3) can have an impact on a particular species and therefore fall within the scope of OAC 252:517–5–8(a).

Pursuant to OAC 252:517–5–8(1), the facility must address any projected impact on any threatened or endangered species that exists within or periodically utilizes any area within one mile of the permit boundary or proposed area of expansion. Furthermore, the facility must specify measures to avoid or mitigate the projected impacts. The state interprets this provision to include any destruction or adverse modification of critical habitat of the endangered/threatened species, as that would have an impact on the species.

The Federal provision has no time-specific trigger of when any review, etc. is to occur. The state provision requires that the facility, upon the proposed permitting of a new CCR unit or the expansion of a facility's permit boundaries, shall provide confirmation from the OBS of any state and Federal listed threatened or endangered species that can be found within a mile of the facility or expansion area. Due to the inclusion of state-listed species, EPA has read this provision to be more protective than the Federal requirements.

Pursuant to OAC 252:517–5–8(2), if a projected impact is determined to be unavoidable, the facility must develop and submit a mitigation plan to ODWC or OBS for approval. An approved plan must be submitted to ODEQ with the permit application for the new CCR unit or expansion of the permitted boundary. In the event a Federal listed species is involved, ODWC refers the matter to USFWS. For purposes of wetlands, OAC 252:517–5–2(a)(2)(C) contains the same restrictions as 40 CFR 257.61(a)(2)(iii). Any additional ESA requirements beyond what is set out in the Federal and state provisions being compared must still be complied with by all facilities under ODEQ's rules. OAC 252:517–1–2 expressly provides that compliance with Chapter 517 does not affect the need for a CCR facility to comply with any other applicable Federal, state, tribal, or local laws or requirements. Therefore, compliance with Chapter 517 does not preclude any additional ESA requirements.

Overall, based on our analysis, EPA concludes that Oklahoma's Endangered Species Act provisions are as protective as the Federal standards.

C. EPA Responses to Major Comments on the Proposed Determination

Below is a summary of the major comments received on the February 20, 2018, proposed notification: Approval of Coal Combustion Residuals State Permit Programs: Oklahoma. (EPA–HQ–OLEM–2017–0613–0013). The major comments received focused on three primary topics: Facility compliance with (and state oversite of) state and Federal groundwater protection standards for CCR units, public participation under the Oklahoma CCR permitting program and facility compliance with the Endangered Species Act. Responses to all other comments received are summarized in the Response to Comments document included in the docket for this document.

Commenters raised a number of questions or concerns about compliance issues at individual facilities, with varying specificity and supporting data. EPA is not making any determinations regarding the compliance status of individual facilities based on the public comment process for this action. However, some commenters raised these concerns about compliance issues in the broader context of program approval, and questioned whether Oklahoma has the ability and inclination to fully implement an approved program. EPA has reviewed all significant comments on this issue, and has identified evidence of actions taken by ODEQ to address instances of non-compliance through notices and consent orders.

EPA reviews of state program applications focus primarily on the legal and regulatory framework that the state puts forward. The Agency has determined that the underlying statutes and regulations, provide Oklahoma the authority to implement the program, and that there is evidence that Oklahoma has utilized its authority to implement these provisions since it adopted the Federal standards in 2016, and also prior to that time. Given that Oklahoma is in the early stages of implementing its new CCR rules, it is not unexpected that compliance with those rules across the state may be evolving. EPA does not view instances of non-compliance as a reason to deny approval of a State program. Implementation and enforcement of Oklahoma's CCR requirements in Oklahoma are expected to continue, and enforcement of those provisions may be initiated not only by ODEQ, but also by EPA or citizens, as appropriate. In accordance with the WIIN Act, the Agency must also conduct continuing periodic reviews of state permit programs (see Section IV below for additional details).

1. Compliance With Groundwater Standards

Comments: When CCR is dumped without proper safeguards, hazardous chemicals are released to groundwater, surface water, soil and air, and nearby communities and ecosystems are harmed. There is evidence that CCR regulatory oversight by state agencies has failed to prevent contamination of Oklahoma's fresh groundwater or CCR from blowing into and harming Oklahoma communities.

For example, recent groundwater monitoring conducted at Oklahoma CCR units pursuant to the Federal CCR rule shows that groundwater can contain contaminants at levels significantly higher than the corresponding Maximum Concentration Levels (MCLs) established under the Safe Drinking Water Act.[9] Other harmful metals were found in concentrations multiple times greater than the Regional Screening Levels for tap water. Chloride, fluoride, sulfate and total dissolved solids (''TDS'')—all indicators of coal ash pollution—were also found in elevated concentrations in the groundwater. Other recent groundwater testing showed high concentrations of arsenic, lead, mercury, nickel, selenium, and vanadium.

Response: Under both the Federal CCR regulations and the state program,

[9] Maximum Contaminant Levels (MCLs) are standards that are set by the EPA for drinking water quality. An MCL is the legal threshold limit on the amount of a substance that is allowed in public water systems under the Safe Drinking Water Act.

the determination that a release has occurred that may result in contamination of groundwater is not determined solely by contaminant concentrations that exceed an MCL or Regional Screening Levels cited above.[10] Rather, it is first determined if those exceedances represent statistically significant increases (SSIs) of Appendix III and IV contaminants over background levels. Corrective action is required when there is an SSI of any Appendix IV contaminants that exceeds the groundwater protection standard, typically set at the applicable MCL. (See 40 CFR 257.96(a), OAC 252–917–9–5,6).

Public comments and EPA's analysis both indicate that some Oklahoma CCR units may not currently be in compliance with OAC standards requiring the establishment of a groundwater monitoring program and the posting of the first annual groundwater monitoring report.[11] As discussed above, the state is addressing such instances of noncompliance through inspection or investigation. In general, ODEQ may give the owner or operator of the unit a written notice of the specific violation and the duty to correct it (a notice of deficiency). The failure to do so can result in the issuance of a compliance order (CO). If the owner or operator fails to come into compliance or fails to agree to a schedule to come into compliance, the Department may issue a CO, which becomes final within fifteen days unless an administrative enforcement hearing is requested. The CO may assess administrative penalties for each day the owner or operator fails to comply. If a facility does not comply with a CO or an administrative compliance order (ACO) within the specified time frames, an Assessment Order to impose an additional penalty may be issued. ODEQ may also pursue action in District Court for an injunction to require a facility to comply and, in rare and extreme instances, may seek to revoke or suspend the permit of a facility. Criminal enforcement proceedings may also be pursued in some instances.[12]

Oklahoma has provided evidence that it has taken actions to ensure that all CCR facilities covered by the OAC standards are either complying with or will be put on a schedule to comply with the applicable groundwater monitoring requirements.[13]

The Agency notes that Oklahoma facilities have submitted most of the compliance documents that are required to be placed on the facilities' internet site (see OAC 252:517–19–1). Oklahoma has provided information to EPA about its current enforcement strategy for this requirement. Specifically, when documents that are required to be posted to the internet are received, permit engineers will check to ensure those documents have been posted to a facility's website. Compliance inspections will include website reviews as part of records checks during annual, in-depth inspections. Failure to maintain required documents on a facility's public website will be handled similarly to a deficient record, and as an issue of noncompliance.[14]

2. Public Participation

i. Permitting and Enforcement

Comments: Oklahoma's CCR program fails to provide adequate opportunities for public participation in the development, revision, implementation, and enforcement of its CCR regulations. For permitting, the program fails to require new CCR units to submit key compliance proposals and compliance demonstrations in permit applications, such as groundwater monitoring plans, sampling and analysis plan, plans and specifications relating to design requirements (*i.e.* structural stability assessments), retrofit plans and post-closure care plans. The public is not provided an opportunity to review and comment on those documents during the permitting process. For existing CCR units, Oklahoma is entirely depriving the public of any opportunity to review and comment on permit applications, associated supporting documents, and even the CCR unit's permit itself prior to issuance of that permit.

Oklahoma's program grants CCR units a ''permit for life'' without providing the public any opportunity to review and comment on those critical site-specific compliance documents before the permitting decision is made.

Finally, Oklahoma failed to show that its CCR program affords the public participation opportunities in enforcement required by RCRA section 7004(b)(1) and set forth in 40 CFR 239.75. Specifically, the state has not shown that it provides for citizen intervention in civil enforcement proceedings.

Response: The Agency does not agree that the Oklahoma program fails to provide public participation opportunities for enforcement and for permitting. State regulations require new CCR units to submit plans containing compliance proposals and compliance demonstrations in permit applications. As discussed in section III. A. (1), Oklahoma statutes and regulations (section 27A–2–14–201(B)(1) and OAC 252:4–7–58 through 60) set out the appropriate tier for processing permit applications and modifications. These classifications are consistent with the requirements for all other Oklahoma solid waste disposal facilities (OAC 252:4–7–58 through 60 apply to all solid waste disposal facilities).

All plans and subsequent modifications fall within the permitting tier classifications and are approved either through review and action on an original permit application or as a subsequent modification to that permit. The permit general conditions provide that any permit noncompliance, including noncompliance with the original permit or any subsequent permit modification, is grounds for an enforcement action. ODEQ has the authority to evaluate permit applications for administrative and technical completeness and request changes,[15] revisions, corrections, or supplemental submissions to ensure consistency with the Chapter 517 code and all rules. ODEQ may also evaluate plans or other supplemental attachments to applications for sufficiency of content and compliance and require that omissions or inaccuracies be remedied.

Regarding lack of public participation for existing permits for CCR landfills, each application and permit would have been required to provide the appropriate public participation opportunities when those permits were issued. When the permits are modified, the OAC will require public participation according to the established tiering classifications in UEPA (see section 27A–2–14–201(B)(1) and OAC 252:4–7–58 through 60). Examples of Tier II modifications for previously permitted CCR landfills are provided in the docket for this action. Each Tier II or Tier III modification allows for the opportunity for public participation.

Unlike CCR landfill units, surface impoundments were not previously permitted by ODEQ. In accordance with state and Federal CCR standards, permit applications for surface impoundments for regulation under OAC 252:517 must be submitted to ODEQ by October 2018.

[10] RSLs are screening levels generally used for Superfund sites to determine the need for further remedial action. *www.epa/risk/regional-screening-levels.*

[11] October 17, 2017 was the compliance deadline for instillation of groundwater monitoring, sampling and analysis and initial detection monitoring (see 40 CFR 257.90).

[12] Email from Patrick Riley, ODEQ to Mary Jackson, EPA. April 27, 2018. Included in the docket for this authorization.

[13] Ibid.

[14] Ibid.

[15] Oklahoma CCR Program Application in docket for this document.

These new surface impoundment permits authorizing disposal of CCR generated onsite, will follow ODEQs Tier II process and provide opportunity for public participation.

Nothing in the Federal rule prohibits granting such permits for life. The life of a CCR unit begins when it is initially permitted for waste disposal and continues through active operations, closure of the unit, and conclusion of the post-closure monitoring period. The post-closure period begins at closure and continues for a minimum of 30 years. With the exception of an ODEQ enforcement action to revoke a facility's permit, a facility's permit will not terminate until the facility successfully completes closure, post-closure and any corrective action requirements. The facility's closure, post-closure, and corrective action plans are all available through ODEQ and on the facility's publicly accessible internet site. The ability for the public to comment on the initial plans and any subsequent modifications will depend on the associated permitting tier classification when applications for modifications are submitted to ODEQ.

Regarding public participation opportunities in enforcement required by RCRA section 7004(b)(1), ODEQ has reaffirmed that its CCR program allows intervention by right (see 12 OK Stat section 12–2024).[16] In addition, ODEQ's CCR program provides a process to respond to citizen complaints (see 27A O.S. section 2–3–101,503) and by not opposing citizen intervention when allowed by statute (see 27A O.S. section 2–7–133). In the event any member of the public believes a facility is not in compliance with any permitting requirement, the ODEQ complaints program requires investigation and the expedient resolution of complaints involving noncompliance with statutory, regulatory, and permitting requirements. *See ODEQ* Application on page 8. In the event a complainant remains unsatisfied with the resolution of a complaint, mediation is available by statute. *See ODEQ* Application on page 9.

This satisfies the civil intervention requirement at 40 CFR 239.9(a), and on that basis, EPA considers the requirements of RCRA section 7004(b) satisfied.

ii. Permit Modifications

Comment: Most permit modifications are Tier I, which does not require public participation.

Response: The Agency agrees that under OAC rules, most permit modifications are Tier I since they address minor or administrative changes to the permit, which can occur frequently. All existing CCR landfills in the state submitted Tier I modification requests to change the applicable standards in their permit from the previous state solid waste standards at OAC 252:215 to the new CCR standards at OAC 252:217. As a Tier I modification, the public would not have had opportunity for input into these 252:517 CCR landfill permits. Further, the public will not have opportunity for comment on these ''permits for life'' in the future unless the permit is modified under a Tier II or Tier III modification (see preceding discussion on comment/response above).

Based on information submitted by the state comparing standards under OAC 252:215 and OAC 252:217 (included in the docket for this authorization), the Agency has concluded that for existing landfill units, the standards under the two sets of regulations were substantially the same and the public participation opportunities were appropriate. Specifically, as indicated previously, each application and permit issuance under OAC 252:515, including permit modifications, would have included the public participation opportunities that were required when those permits were issued. Public participation requirements under the previous program in OAC 252:515 and the current program in OAC 252:517 are authorized by the same standard under Oklahoma UEPA (27A O.S. section 2–14–104).

As discussed above, permit applications for new units classified as Tier II (for on-site facilities) and Tier III (for off-site facilities) require public notice and comment and the opportunity for a public hearing. In the case of Tier II and III applications that do not receive timely comments or public meeting requests and for which no public meeting was held, ODEQ considers the comments and then prepares a response to comments prior to final permit issuance determinations. The Department makes available Tier II applications and draft permits and Tier III applications, draft permits, and proposed permits on the Department's website.[17]

As discussed, Tier II and III permit modifications focus on substantive changes and require public participation for any permit modifications not specifically covered under Tier I. The Tier II and III permit application processes include: Published notice of the application filing, published notice of the draft permit or denial, and opportunity for a public meeting. In determining the appropriate Tier for an application, the significance of the potential impact on the environment and other criteria outlined in III. A. 1 are considered.

iii. Endangered Species Act

Comment: Under the ESA, Federal agencies must, in consultation with FWS and/or NMFS, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). An agency proposing an action must first determine whether the action ''may affect'' species listed as threatened or endangered under the ESA. 50 CFR 402.14. EPA's proposal to approve Oklahoma's Application creates a significant risk that CCR units in the state would pollute water more than if EPA did not approve that Application, and thus the proposed action may affect listed species within the meaning of 50 CFR 402.14. As a result, EPA must initiate consultation with FWS and NMFS under ESA Section 7 prior to making a final determination as to whether to approve or deny Oklahoma's Application. See generally Nat'l Parks Conservation Ass'n v. Jewell, 62 F. Supp. 3d at 17 (finding that a 2008 rule revising standards for coal mining near streams may affect listed species where there was ''clear evidence that habitats within stream buffer zones are home to threatened and endangered species and that mining operations affect the environment, water quality, and all living biota'').

Response: As discussed in section III.B.2, EPA has concluded that Oklahoma's regulation applicable to endangered and threatened species (OAC 252:517–5–8) is at least as protective as the Federal criteria in 40 CFR 257.3–2. Having made this determination, RCRA section 4005(d)(1)(C) expressly mandates that EPA approve the state's program. Therefore, consistent with 50 CFR 402.03, the requirement for EPA to consult under section 7(a)(2) of the ESA does not apply to this action.

IV. Approval of the ODEQ CCR Permitting Program

On July 30, 2018, for those CCR units that are currently permitted and regulated by ODEQ under OAC 252:517,

[16] Email from Patrick Riley, ODEQ to Mary Jackson, EPA April 27, 2018. Included in the docket for this authorization.

[17] Oklahoma CCR Program Application in docket for this document.

such permits will be in effect in lieu of the Federal 40 CFR part 257, subpart D, CCR regulations. For those CCR units that are not yet permitted, the Federal regulations at part 257 will remain in effect until such time that ODEQ issues permits under this CCR program for those units.

The WIIN Act specifies that EPA will review a state CCR permit program:

- From time to time, as the Administrator determines necessary, but not less frequently than once every 12 years;
- Not later than 3 years after the date on which the Administrator revises the applicable criteria for CCR units under part 257 of title 40, CFR (or successor regulations promulgated pursuant to sections 1008(a)(3) and 4004(a));
- Not later than 1 year after the date of a significant release (as defined by the Administrator), that was not authorized at the time the release occurred, from a CCR unit located in the state; and
- In request of any other state that asserts that the soil, groundwater, or surface water of the state is or is likely to be adversely affected by a release or potential release from a CCR unit located in the state for which the program was approved.

The WIIN Act also provides that in a state with an approved CCR permitting program, the Administrator may commence an administrative or judicial enforcement action under section 3008 if:

- The state requests that the Administrator provide assistance in the performance of an enforcement action; or
- After consideration of any other administrative or judicial enforcement action involving the CCR unit, the Administrator determines that an enforcement action is likely to be necessary to ensure that the CCR unit is operating in accordance with the criteria established under the state's permit program.

Further, in the case of an enforcement action by the Administrator, before issuing an order or commencing a civil action, the Administrator shall notify the state in which the coal combustion residuals unit is located.

V. Action

In accordance with 42 U.S.C. 6945(d), EPA is approving ODEQ's CCR permit program application.

Dated: June 18, 2018.

E. Scott Pruitt,

Administrator.

[FR Doc. 2018–13461 Filed 6–27–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 90

[PS Docket Nos. 13–87, 06–229; WT Docket No. 96–86, RM–11433, RM–11577; FCC 16–111]

Service Rules Governing Narrowband Operations in the 769–775/799–805 MHz Bands

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) amends the Commission's rules to promote spectrum efficiency, interoperability, and flexibility in 700 MHz public safety narrowband (769–775/799–805 MHz).

DATES: Effective July 30, 2018.

FOR FURTHER INFORMATION CONTACT: John A. Evanoff, Policy and Licensing Division, Public Safety and Homeland Security Bureau, (202) 418–0848 or *john.evanoff@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Report and Order on Reconsideration* in PS Docket No. 13–87, FCC 18–11, released on February 12, 2018, and corrected by *Erratum* released on May 10, 2018. The complete text of this document is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Synopsis

In this *Second Report and Order,* the Commission amends and clarifies the Commission's 700 MHz narrowband (769–775/799–805 MHz) interoperability and technical rules. Specifically, this *Second Report and Order* (1) amends and clarifies the rules to exempt 700 MHz low-power Vehicular Repeater Systems (VRS) from the 700 MHz trunking requirements; (2) amends the rules to ensure that 700 MHz public safety licensees receive information on the basis of vendor assertions that equipment is interoperable across vendors and complies with Project 25 (P25) standards; and (3) amends the rules to require that all narrowband mobile and portable 700 MHz public safety radios, as supplied to the ultimate user, must be capable of operating on all of the narrowband nationwide interoperability channels without addition of hardware, firmware, or software, and must be interoperable across vendors and operate in conformance with P25 standards.

In the companion *Order on Reconsideration,* the Commission addresses the Petition for Partial Reconsideration filed by Motorola Solutions, Inc. (Motorola), which requested that the Commission postpone the effective date of certain previously adopted rules (*i.e.* 47 CFR Sections 2.1033(c) and 90.548(c)) until complementary proposals that were the subject of the *Further Notice of Proposed Rulemaking* in this proceeding are resolved. As requested by Motorola, we adopt a uniform effective date for the rules that were the subject of the Motorola Petition for Partial Reconsideration and the rules newly adopted in this *Second Report and Order.*

Procedural Matters

The Final Regulatory Flexibility Analysis required by section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, is included in Appendix A of the *Second Report and Order and Order on Reconsideration.*

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice of Proposed Rule Making (FNPRM)* in PS Docket No. 13–87 released on August 22, 2016. *See* 81 FR 65984 (2016). The Commission sought written public comment on proposals in the *FNPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Final Rules

In the *Second Report and Order* in this proceeding, we amend the interoperability and technical rules governing 700 MHz public safety narrowband spectrum (769–775 MHz and 799–805 MHz). The rule changes promote interoperable and efficient use of 700 MHz public safety narrowband spectrum while reducing the regulatory burdens on public safety entities, manufacturers and other stakeholders wherever possible. In order to achieve these objectives, we revise the rules to exempt low power vehicular repeater

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WATERKEEPER ALLIANCE, INC., *et al.*,

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*,

Defendants.

Civil Action No. 1:18-cv-2230

Exhibit B

Notice of Citizen Suit for Failure to Perform Nondiscretionary Duty under the Resource Conservation and Recovery Act (July 26, 2018)

EARTHJUSTICE

July 26, 2018

By Registered Mail, Return Receipt Requested

Andrew Wheeler, Acting Administrator
United States Environmental Protection Agency
Office of the Administrator (1101A)
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Notice of Citizen Suit for Failure to Perform Nondiscretionary Duty under the Resource Conservation and Recovery Act

Dear Acting Administrator Wheeler:

This letter provides notice that Waterkeeper Alliance, Inc. ("Waterkeeper Alliance"), Local Environmental Action Demanded, Inc. ("LEAD Agency"), and Sierra Club intend to file a citizen suit against the United States Environmental Protection Agency ("EPA") and the Administrator of the EPA based on the Administrator's failure to perform a nondiscretionary duty pursuant to the Resource Conservation and Recovery Act ("RCRA") to develop and publish minimum guidelines for public participation in state programs regarding coal combustion residuals.

Coal combustion residuals are one of the largest toxic waste streams in the United States. Our nation's coal-fired power plants burn more than 800 million tons of coal every year, producing more than 110 million tons of industrial waste in the form of fly ash, bottom ash, scrubber sludge, and boiler slag (collectively known as CCR or coal ash). Coal ash is a deadly brew of carcinogens, neurotoxins, and poisons—including arsenic, boron, hexavalent chromium, lead, radium, selenium, and thallium. When this toxic waste is dumped without proper safeguards, hazardous chemicals are released to air and water, harming nearby communities. At least 414 coal plants in 43 states maintain at least 1,033 coal ash landfills and surface impoundments containing hundreds of millions of tons of toxic waste.

This notice is provided by Waterkeeper Alliance, the LEAD Agency, and Sierra Club pursuant to 42 U.S.C. § 6972(a)(2). Waterkeeper Alliance unites more than 300 Waterkeeper Organizations and Affiliates that are on the frontlines of the global water crisis, patrolling and

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protecting more than 2.5 million square miles of rivers, lakes, and coastal waterways on 6 continents. From the Great Lakes to the Himalayas, Alaska to Australia, the Waterkeeper movement defends the fundamental human right to drinkable, fishable, and swimmable waters, and combines firsthand knowledge of local waterways with an unwavering commitment to the rights of communities. Within the United States, Waterkeeper Alliance works with more than 170 Waterkeeper Organizations and Affiliates.

LEAD Agency is a non-profit headquartered in Vinita, Oklahoma, with a satellite office in Miami, Oklahoma, and with members in the Grand River Watershed focusing on issues that affect it and its water quality. LEAD Agency has advocated for the cleanup of Tar Creek and the Tar Creek Superfund Site, and for the downstream restoration and eventual cleanup of the Tri-State Mining District affecting three states with legacy mining of lead and zinc. It stands with the Waterkeeper movement for drinkable, fishable, and swimmable waters.

Sierra Club is America's largest grassroots environmental organization, with more than 3 million members and supporters nationwide, including more than 4,200 members in Oklahoma. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out those objectives. Its activities include public education, advocacy, and litigation to enforce environmental laws**.**

I. Under RCRA, EPA must provide for public participation in the approval of state coal ash programs.

Since the enactment of the Water Infrastructure Improvements for the Nation Act in 2016, RCRA has allowed states to apply to administer permit programs that would operate "in lieu of" federal regulation under Subtitle D of RCRA of coal combustion residuals units in the state. 42 U.S.C. § 6945(d). Under a previously existing provision of RCRA, EPA has a duty to promulgate minimum guidelines for public participation in the approval, development, revision, implementation, and enforcement of state coal ash permit programs:

> Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, **shall develop and publish minimum guidelines for public participation** in such processes.

Id. § 6974(b)(1) (emphasis added). State permit programs for coal combustion residuals are "programs" for which RCRA imposes a nondiscretionary duty on EPA to develop and publish minimum guidelines. The opportunity for public participation is essential to allow citizens to help shape coal ash programs that have a direct impact on their health, to ensure that state

governments hear these concerns while considering permit program alternatives, and ultimately to ensure proper safeguards at landfills and ponds, many of which are already known to be leaking dangerous chemicals.

II. EPA has failed to promulgate regulations for public participation.

As of the date of this letter, EPA has taken no action to issue guidelines that would discharge its nondiscretionary duty to provide for public participation in its action on state permit programs regarding coal combustion residuals. EPA's rules under other RCRA programs do not address the public participation requirements of 42 U.S.C. § 6974(b)(1) as to state permit programs regarding coal combustion residuals. *See* 40 C.F.R. Part 25 (applies to specific activities per 40 C.F.R. § 25.2(a), including approval of state hazardous waste programs); Part 239 (state municipal solid waste landfill programs); and Part 256 (state solid waste management plans). Guidelines setting forth minimum public participation requirements for certain RCRA programs do not satisfy the mandate under 42 U.S.C. § 6974(b)(1) with regard to separate RCRA programs. *See Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722-23 (7th Cir. 1979) (holding that EPA's prior adoption of public participation regulations for National Pollutant Discharge Elimination System ("NPDES") permits, but not for state NPDES program enforcement, did not satisfy 33 U.S.C. § 1251(e)).

As EPA correctly recognizes, the rules set out at 40 C.F.R. Parts 25, 239, and 256 do not apply to state programs concerning coal combustion residuals.[1] And even if those rules could apply to state coal combustion residuals permit programs, it would be arbitrary and unlawful to apply those rules to such state programs without a full notice-and-comment rulemaking process. Those rules were promulgated many years ago[2] for different waste streams and may not ensure public participation in state coal combustion residuals programs in 2018 and beyond. Moreover, without a rulemaking procedure that sets forth precisely which – if any – of those preexisting rules apply to state coal combustion residuals programs, citizens are left without a clear picture of which may apply, rendering EPA action nontransparent and hindering public participation – precisely the opposite of what Congress mandated in RCRA. Accordingly, EPA

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[1] *See* EPA, Coal Combustion Residuals State Permit Program Guidance Document; Interim Final, at 2-1 (Aug. 2017) [hereinafter "Guidance Document"], *available at* https://www.epa.gov/coalash/guidance-coal-combustion-residuals-state-permit-programs (noting that EPA "reviewed the requirements in 40 CFR parts 239, 256 and 258 as *potential models* for determining whether the statutory criteria have been met and has used these as a basis for this guidance" (emphasis added)) (last visited July 26, 2018); *see also* EPA, Relationship Between State CCR Permit Programs and State Solid Waste Management Plans (updated May 29, 2018), *available at* https://www.epa.gov/coalash/permit-programs-coal-combustion-residual-disposal-units ("Approval of a [solid waste management plan] and a state CCR permit program are fundamentally different.") (last visited July 26, 2018).

[2] The regulations set out at 40 C.F.R. Part 25 were promulgated in 1979, the Solid Waste Management Plan regulations at 40 C.F.R Part 256 were promulgated in 1979 and amended in 1981, and the Municipal Solid Waste Landfill regulations set out in 40 C.F.R. Part 258 were promulgated in 1991.

cannot rely on those rules to discharge its duty to develop public participation guidelines for state coal combustion residuals programs.

EPA's Guidance Document, *supra* note 1, also does not discharge EPA's nondiscretionary duty regarding public participation in its action on state permit programs regarding coal combustion residuals. The Guidance Document includes only a brief description of the elements of public participation in which EPA "believes" (at 2-3); at any rate, EPA states that the Guidance Document is not a rulemaking or regulation that presents substantive or procedural rights (at ii).

EPA's failure to perform its nondiscretionary duty to promulgate public participation guidelines as required by RCRA directly prejudices the public in states requesting EPA's approval of their coal combustion residuals programs, including, most urgently, Oklahoma. EPA's recent approval of Oklahoma's coal combustion residuals state permit program, 83 Fed. Reg. 30,356 (June 28, 2018) – without first finalizing public participation guidelines pursuant to RCRA– leaves Oklahomans without clear, detailed, enforceable rules to redress that state's failure to provide for meaningful public participation in its coal combustion residuals program.[3] The public in other states such as Georgia, Missouri, and Alabama faces similar prejudice as those states' coal combustion residuals programs make their way toward EPA approval.[4]

Courts have recognized public participation rights in decisions interpreting nearly identical public participation requirements under the Clean Water Act. *Waterkeeper Alliance, Inc., v. EPA*, 399 F.3d 486, 503 (2d Cir. 2005) ("Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act."); *Citizens for a Better Env't*, 596 F.2d at 724 ("the EPA Administrator's approval of the Illinois program, without his prior promulgation of guidelines regarding citizen participation in the state enforcement process, violates the terms of the Clean Water Act and must be overturned").

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[3] *See* Earthjustice et al., Comments on Oklahoma: Approval of State Coal Combustion Residuals State Permit Program, 83 Fed. Reg. 2100 (January 16, 2018), Docket ID No. EPA-HQ-OLEM-2017-0613, at 25-40 (Mar. 19, 2018) (attached as Exhibit A) (describing public participation deficiencies in Oklahoma's coal combustion residuals program, including, *inter alia*, the program's granting of permits for life, its failure to make available permits for public review and comment, and its failure to subject critical compliance plans to public review and comment).

[4] *See, e.g.*, Jason Taylor, Missourinet, "MO Senate Passes Measure on Industrial Waste From Coal Power Plants," Apr. 3, 2018, *available at* http://www.ozarksfirst.com/news/mo-senate-passes-measure-on-industrial-waste-from-coal-power-plants/1098354538 (last visited July 26, 2018); Dennis Pillion, Alabama Local News, "Alabama passed state coal ash rules: What's in them?" Apr. 25, 2018, *available at* https://www.al.com/news/index.ssf/2018/04/alabama_passed_state_coal_ash.html (last visited July 26, 2018); Deborah Bayliss, The Brunswick News, "State coal ash rules approved," Oct. 27, 2016, *available at* https://thebrunswicknews.com/news/local_news/state-coal-ash-rules-approved/article_30c8d9aa-a6be-5486-be7a-8a110e5db9d4.html (last visited July 26, 2018).

Similarly, EPA's failure to discharge its nondiscretionary duty under RCRA is in derogation of public participation rights afforded by government to citizens under the statute, including 42 U.S.C. §§ 6972 and 6974(b). Without the guidelines required by statute, there is no guarantee that citizens will enjoy basic opportunities to be heard by their government, such as the right to obtain information, review proposals, and submit comments, and the right to a public hearing.

III. Waterkeeper Alliance, LEAD Agency, and Sierra Club intend to file a citizen suit against EPA under RCRA.

RCRA provides for citizen suits "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 6972(a)(2); *see also* 40 C.F.R. §§ 254.2, 254.3. RCRA requires citizens to provide the Administrator with 60 days' notice prior to bringing such a suit. 42 U.S.C. § 6972(c).

Accordingly, Waterkeeper Alliance, LEAD Agency, and Sierra Club hereby notify EPA and the Administrator of their intent to file suit against EPA and the Administrator of the EPA for failing to perform the nondiscretionary duty under 42 U.S.C. § 6974(b)(1) of developing and publishing minimum guidelines for public participation in the approval of state permit programs for coal combustion residuals. If these violations remain unresolved at the end of the 60-day notice period, Waterkeeper Alliance, LEAD Agency, and Sierra Club intend to seek an order (a) finding that EPA has failed to perform the nondiscretionary duty described herein; (b) ensuring future compliance with this duty; (c) providing for Waterkeeper Alliance, LEAD Agency, and Sierra Club to recover attorneys' fees and other costs of litigation; and (d) granting other appropriate relief.

IV. Persons Giving Notice

In accordance with 40 C.F.R. § 254.3, the person(s) giving notice is/are:

Larissa U. Liebmann, Esq., Staff Attorney
Waterkeeper Alliance, Inc.
180 Maiden Lane, Suite 603
New York, NY 10038
(212) 747-0622, ext. 122
LLiebmann@waterkeeper.org

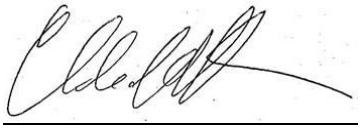
Earl Hatley
LEAD Agency, Inc.
19289 S. 4403 Drive
Vinita, OK 74301

(918) 256-5269
ehatley@neok.com

Matthew E. Miller, Staff Attorney
Sierra Club
50 F Street NW, 8th Floor
Washington, DC 20001
(202) 650-6069
matthew.miller@sierraclub.org

Waterkeeper Alliance, LEAD Agency, and Sierra Club are represented by the undersigned legal counsel in this matter. If you would like to discuss the matters identified in this letter or offer a proposal for resolving these issues, please contact Charles McPhedran at (215) 717-4521 or cmcphedran@earthjustice.org.

Sincerely,



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Enclosure (Ex. A)

copy: Jeff Sessions
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WATERKEEPER ALLIANCE, INC., *et al.*,

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*,

Defendants.

Civil Action No. 1:18-cv-2230

Exhibit C

Comments on Oklahoma: Approval of State Coal Combustion Residuals State Permit Program, 83 Fed. Reg. 2100 (January 16, 2018), Docket ID No. EPA-HQ-OLEM-2017-0613 (Mar. 19, 2018) ("Environmental Comments")

March 19, 2018

Mary Jackson
Materials Recovery and Waste Management Division
Office of Resource Conservation and Recovery (5304P)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
jackson.mary@epa.gov
https://www.regulations.gov

Re: Comments on Oklahoma: Approval of State Coal Combustion Residuals State Permit Program, 83 Fed. Reg. 2100 (January 16, 2018), Docket ID No. EPA-HQ-OLEM-2017-0613.

Dear Ms. Jackson:

On behalf of Earthjustice, Grand Riverkeeper, Local Environmental Action Demanded, Inc. ("LEAD Agency, Inc."), the Sierra Club, Tar Creekkeeper, and Waterkeeper Alliance, Inc., please accept the following comments on the Environmental Protection Agency's ("EPA") notice of availability and request for comment concerning Oklahoma: Approval of State Coal Combustion Residuals State Permit Program, 83 Fed. Reg. 2100 (January 16, 2018), Docket ID No. EPA-HQ-OLEM-2017-0613. We urge EPA to deny Oklahoma's request for approval of its coal combustion residuals program ("Oklahoma's Application") for failure to meet requirements of the 2016 Water Infrastructure Improvements for the Nation Act (the "WIIN Act"), the Resource Conservation Recovery Act ("RCRA"), and implementing regulations. We further note that EPA must not approve Oklahoma's Application, or any other state CCR program application, unless and until it promulgates guidelines for public participation in such programs pursuant to RCRA § 7004(b)(1), 42 U.S.C. § 6974(b)(1).

I. Coal Combustion Residuals are Causing Ongoing, Serious Harm to the People and Environment of Oklahoma.

Each year, coal-fired power plants in Oklahoma generate many thousands of tons of coal combustion residuals ("CCR" or "coal ash"), a toxic waste made up of fly ash, bottom ash, scrubber sludge and boiler slag. CCR contains some of the most toxic and deadliest chemicals known, including carcinogens, neurotoxins, and poisons such as arsenic, cadmium, hexavalent chromium, lead, mercury, and thallium. When CCR is dumped without proper safeguards, hazardous chemicals are released to groundwater, surface water, soil, and air, and nearby communities and ecosystems are harmed. There is ample evidence that CCR regulatory oversight by state agencies has failed to prevent contamination of Oklahoma's fresh groundwater and stop CCR from blowing into and harming Oklahoma communities.

a. Toxic Effects of Coal Ash Pollutants

Coal ash contains a toxic stew of metals and other chemicals that are harmful, and sometimes deadly, to people, wildlife, and aquatic life. While exposure to individual coal ash pollutants can cause devastating damage, concurrent exposure to multiple contaminants may intensify the effects of individual contaminants, or may give rise to interactions and synergies that create new effects. Where several coal ash contaminants share a common mechanism of toxicity or affect the same bodily organ or organ system, exposure to several contaminants concurrently produces a greater chance of increased risk to health. Effects of some of the pollutants frequently found in coal ash include:

- *Arsenic* is a known carcinogen that causes multiple forms of cancer in humans. It is also a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423 App. A. Arsenic is associated with non-cancer health effects of the skin and the nervous system.

- *Lead* is a very potent neurotoxicant that is highly damaging to the nervous system. Health effects associated with exposure to lead include, but are not limited to, neurotoxicity, developmental delays, hypertension, impaired hearing acuity, impaired hemoglobin synthesis, and male reproductive impairment. Importantly, many of lead's health effects may occur without overt signs of toxicity. Lead is also classified by the EPA as a "probable human carcinogen." Lead is a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423, App. A.

- *Cadmium* is a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423, App. A. Chronic exposure to cadmium can result in kidney disease and obstructive lung diseases such as emphysema. Cadmium may also be related to increased blood pressure (hypertension) and is a possible lung carcinogen. Cadmium affects calcium metabolism and can result in bone mineral loss and associated bone loss, osteoporosis, and bone fractures.

- *Chromium*, in its hexavalent form – the form that nearly all chromium in coal ash takes – is a potent carcinogen.[1] Chromium is a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423, App. A.

- *Selenium* is a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423, App. A, and excess exposure can cause a chemical-specific condition known as selenosis, with symptoms that include hair and nail loss.

- *Antimony* may damage the liver and kidneys and may affect the heart. Chronic exposure to antimony can cause an ulcer or a hole in the septum dividing the inner nose, sometimes with bleeding or discharge. Repeated exposure can affect the lungs, cause an abnormal

[1] *See, e.g.*, Earthjustice, "EPA's Blind Spot: Hexavalent Chromium in Coal Ash, Coal ash may be the secret source of cancer-causing chromium in your drinking water," Feb. 1, 2011, *available at* https://earthjustice.org/sites/default/files/CoalAshChromeReport.pdf.

chest x-ray to develop, and lead to permanent lung damage. Antimony is a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423, App. A.

- *Nickel* is a probable carcinogen. Nickel can cause headache, dizziness, nausea and vomiting, and may also cause scarring of the lungs and affect the kidneys. Nickel is a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423, App. A.

- *Vanadium*, according to the U.S. Agency for Toxic Substances and Disease Registry ("ATSDR"), can cause nausea, diarrhea, and stomach cramps. And the International Agency for Research on Cancer ("IARC") has determined that vanadium is possibly carcinogenic to humans.

- *Barium* can cause gastrointestinal disturbances and muscular weakness. Ingesting large amounts, dissolved in water, can change heart rhythm and cause paralysis and possibly death. Barium can also cause increased blood pressure.

- *Molybdenum* has been linked to gout (joint pain, fatigue), high blood pressure, liver disease, and potential adverse impacts on the reproductive system.[2]

- *Manganese* is known to be toxic to the nervous system. Manganese concentrations greater than .05 mg/L render water unusable by discoloring the water, giving it a metallic taste, and causing black staining. Exposure to high levels can affect the nervous system; very high levels may impair brain development in children.

- *Total Dissolved Solids* ("TDS"), in high concentrations, can make drinking water unpalatable and can cause scale buildup in pipes, valves and filters, reducing performance and adding to system maintenance costs.

- *Sulfate*, at high concentrations (greater than 500 mg/L – found in sampling results at several Oklahoma CCR units) can result in a mild laxative response.

b. Toxic Coal Ash Pollution in Oklahoma

In the words of the Oklahoma Supreme Court, "[n]o commodity affects and concerns the citizens of Oklahoma more than fresh groundwater." *DuLaney v. Okla. State Dep't of Health*, 1993 OK 113, 868 P.2d 676, 684 (Ok. 1993). Increasing evidence shows that coal ash is significantly damaging groundwater, surface water and air quality at coal ash disposal sites in Oklahoma. Coal ash dumps at American Electric Power's ("AEP") Northeastern plant in Oologah, for example, have been shown to be releasing poisons into groundwater since

[2] Agency for Toxic Substances and Disease Registry, "Toxicological Profile for Molybdenum: Draft for Public Comment, April 2017," at pp. 9-10, *available at* https://www.atsdr.cdc.gov/toxprofiles/tp212.pdf.

monitoring began there in 2008.[3] The plant has a bottom ash impoundment and a landfill, both unlined,[4] located near the banks of the Verdegris River and Oologah Lake.

Protection of the fresh groundwater in and around Oologah Lake and the Verdegris River is important for protecting public health and the environment. Oologah Lake and its tailwaters are stocked with millions of fish, including sand bass, catfish, hybrid striped bass, crappie, and walleye. The lake is also a camping destination, with eleven U.S. Army Corps of Engineers parks that include showers, overnight camping pads, electric hookups, and grills. People are invited to participate in fishing, water skiing, sailing, canoeing, and swimming on or around Oologah Lake. Fourteen boat launching ramps are located around the lake and two designated swimming beaches have been developed in Hawthorn Bluff and Spencer Creek.[5] The portion of the Verdegris River adjacent to the Northeastern plant's CCR units has been designated as "critical habitat" for two mussel species listed under the Endangered Species Act ("ESA").

A 2010 report notes that groundwater tested near the coal ash landfill at the Northeastern coal plant contained selenium up to 37 times EPA's standard for safe drinking water (the "MCL"), arsenic up to six times the MCL, lead up to 13 times the EPA's "action level," and barium up to four times the MCL.[6] Chromium and thallium (once used as rat poison) also exceeded MCLs, while vanadium was nine times state standards.[7]

Recent testing conducted by AEP pursuant to the federal CCR rule shows that groundwater at the site continues to be highly polluted by coal ash contaminants. Testing revealed:[8]

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[3] *See* Earthjustice and Environmental Integrity Project, "In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and Their Environment," Aug. 26, 2010, at 149-54 [hereinafter "In Harm's Way"], *available at* https://earthjustice.org/sites/default/files/files/report-in-harms-way.pdf.

[4] *See* American Electric Power Service Corporation, "Northeastern Plant Bottom Ash Pond Professional Engineer's Liner Certification," Aug. 5, 2016, *available at* https://www.aep.com/about/codeofconduct/CCRRule/docs/2016/NE-BAP-LinerCert-081516.pdf and American Electric Power Service Corporation, "Report 1 – Groundwater Monitoring Network for CCR Compliance, Northeastern Station 3 & 4, Landfill," October 2017, *available at* http://www.aep.com/about/codeofconduct/CCRRule/docs/2017/GroundWater/NE-LF-GWMN-101717.pdf at 2 ("[A] geosynthetic intermediate liner and a leachate collection system have been installed above existing waste in the landfill.").

[5] Oologah Lake Recreation, U.S. Army Corps of Engineers, http://www.swt.usace.army.mil/Locations/Tulsa-District-Lakes/Oklahoma/Oologah-Lake/Oologah-Lake-Recreation/ (last visited Mar. 19, 2018).

[6] *See* In Harm's Way at 149-54.

[7] *Id*. A map of the site, is available at https://ashtracker.org/facility/49/northeastern-power-station (last visited Mar. 19, 2018).

[8] *See* American Electric Power Service Corporation, "Annual Groundwater Monitoring Report, Public Service Co. of Oklahoma, Northeastern 3 & 4 Power Station, Landfill CCR Management Unit," January 2018 [hereinafter "AEP GW Report, Landfill"], *available at* http://www.aep.com/about/codeofconduct/CCRRule/docs/2018/CCR-Mar2/NE-LF-AnnGWMonRept-013118.pdf; American Electric Power Service Corporation, "Annual Groundwater Monitoring Report, Public Service Co. of Oklahoma, Northeastern 3 & 4 Power Station, Bottom Ash Pond CCR Management Unit," January 2018 (hereafter "AEP GW Report, Bottom Ash Pond"), *available at* http://www.aep.com/about/codeofconduct/CCRRule/docs/2018/CCR-Mar2/NE-BAP-AnnGWMonRept-013118.pdf.

- Arsenic at concentrations 33% greater than the MCL;
- Antimony at concentrations nearly double the MCL;
- Barium at concentrations nearly four times the MCL;
- Beryllium at concentrations 37.5% greater than the MCL;
- Cadmium at concentrations 65% greater than the MCL;
- Chromium at concentrations 10% greater than the MCL; and
- Radium – the indicator for radioactivity – in concentrations over five times the MCL;

Other harmful metals – specifically, cobalt, lithium and molybdenum – were found in concentrations multiple times greater than the Regional Screening Levels for tap water that EPA uses to determine when a Superfund site likely requires cleanup.[9] Chloride, fluoride, sulfate and total dissolved solids ("TDS") – all indicators of coal ash pollution – were also found in elevated concentrations in the groundwater.[10] Other recent groundwater testing that AEP submitted to Oklahoma's Department of Environmental Quality ("DEQ") confirm the problem, showing high concentrations of arsenic, lead, mercury, nickel, selenium, and vanadium.

Coal ash at the Grand River Dam Authority's ("GRDA") "Grand River Energy Center" coal plant – near Choteau, Oklahoma, just northwest of the Neosho River – is spread across 47 acres in an unlined landfill. Groundwater testing at the site has repeatedly revealed arsenic concentrations above the MCL since arsenic testing began in 2007, including at concentrations more than six times the MCL.[11] Recent groundwater testing performed by GRDA consultants at the site shows that other harmful pollutants, including boron, chloride, and sulfate, are also leaching into groundwater at the site at concentrations far in excess of applicable EPA standards.[12]

Recent groundwater testing near a coal ash landfill and two adjacent coal ash impoundments at the Western Farmers' Electric Cooperative's Hugo coal plant in Choctaw County, Oklahoma, has revealed coal ash contamination at unsafe levels at that site as well. The testing, conducted by Western Farmers' consultant, found boron, sulfate, thallium, TDS, and molybdenum at levels exceeding applicable federal health advisories and MCLs.[13] The coal ash landfill and

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[9] *See* AEP GW Report, Landfill; AEP GW Report, Bottom Ash Pond; USEPA, Summary Table, RSLs, Nov. 2017, *available at* https://semspub.epa.gov/work/HQ/197025.pdf; EPA, "Regional Screening Levels, Frequent Questions," Qs 1-2, *available at* https://www.epa.gov/risk/regional-screening-levels-frequent-questions-november-2017#FQ1 (last visited Mar. 19, 2018).

[10] *See* AEP GW Report, Landfill and AEP GW Report, Bottom Ash Pond.

[11] *See* "Annual Groundwater Monitoring and Corrective Action Report for Calendar 2017, Grand River Dam Authority, Grand River Energy Center," results for monitoring well MW 93-2 (tbls. 1, 1a, 2, 2a), *available at* http://www.grda.com/wp-content/uploads/2015/09/Annual-GW-Monitoring-and-Corrective-Action-Report-2017.pdf.

[12] *Id.*

[13] *See* "Initial Annual Groundwater and Corrective Action Report, Western Farmers Electric Cooperative, Hugo Power Station," data for monitoring well MW-19S, *available at* http://2015website2.wixsite.com/wfec-ccr/groundwater-monitoring---corrective-act--y70x6; U.S. E.P.A., "2012 Edition of the Drinking Water Standards and Health Advisories," at 8, *available at* https://www.epa.gov/sites/production/files/2015-09/documents/dwstandards2012.pdf; U.S. EPA,

impoundments are located approximately 1 mile from the Hugo Lake and the Hugo Lake State Park, as well as the Raymond Gary State Park. These are popular sites for fishing, swimming, and other types of recreation.[14] The Kiamichi River flows south of the Hugo plant property before flowing into the Red River a short distance to the southeast.

Groundwater testing performed in 2016 and 2017 at the "Big Fork Ranch" coal ash landfill in Noble County, Oklahoma, also revealed elevated concentrations of pollutants associated with coal ash, including boron, manganese, and sulfate in concentrations exceeding EPA's health advisories for drinking water, and chloride and TDS in excess of EPA's secondary drinking water standards.[15] The Arkansas River flows just north of the Big Fork Ranch site.

Finally, a vast coal ash dump in Bokoshe, Oklahoma – the "Thumb's Up Ranch" dump, operated by a company formerly known as "Making Money Having Fun LLC"[16] – is known to be causing severe air pollution in the town, where rates of respiratory ailments and other maladies are reportedly very high. In a 2016 report on the ash dump, NPR noted that "[f]or years, people in Bokoshe saw the gray dust from the [coal ash dump] coat almost every surface in town. Gardens withered and crops died, residents say. Cows grew sick; calves were stillborn. Residents say ailments among their neighbors — from migraines to nosebleeds, heart conditions and respiratory problems — seemed to become commonplace."[17]

Although this dump is not regulated under the federal coal ash rule, it could, and should – along with all other coal ash minefill – be regulated under Oklahoma's CCR program. Oklahoma's failure to propose that such coal ash minefills be covered by that program underscores the state's negligent inattention to the critical pollution problems the dump in Bokoshe has created. Bokoshe provides a powerful example of how inadequate protections from coal ash contamination – and inadequate attention from DEQ to that pollution – can, and have, put Oklahomans in harm's way.[18] If EPA were to approve Oklahoma's highly flawed Application, allowing DEQ to take over administration and enforcement of CCR regulations in the state, that harm would surely continue.

"Secondary Drinking Water Standards: Guidance for Nuisance Chemicals," *available at* https://www.epa.gov/dwstandardsregulations/secondary-drinking-water-standards-guidance-nuisance-chemicals#table.

[14] *See*, for example, Hugo Lake State Park – Hugo Lake Fishing, http://www.hugolakestatepark.com/Fishing.html (last visited Mar. 19, 2018).

[15] *See* Evans and Associates, "Groundwater Monitoring 2016," *available at* http://evansandassociatesconstructioncompany.com/Docs/Ground%20Water%20Monitoring%20Report%202016.pdf, and Evans and Associates, "Groundwater Monitoring 2017," *available at* http://evansandassociatesconstructioncompany.com/Docs/Ground%20Water%20Monitoring%20Report%202017.pdf.

[16] *See, e.g.*, https://earthjustice.org/blog/2011-march/tr-ash-talk-making-money-having-fun.

[17] *See* NPR, "Coal Ash Bedevils Oklahoma Town, Revealing Weakness of EPA Rule," June 30, 2016, *available at* https://stateimpact.npr.org/oklahoma/2016/06/30/coal-ash-bedevils-oklahoma-town-revealing-weakness-of-epa-rule/.

[18] *See* Think Progress, "Pruitt's EPA wants to let states handle coal ash. Oklahoma shows why that's so dangerous," Jan. 18, 2018, *available at* https://thinkprogress.org/oklahoma-state-coal-ash-epa-333e6061fc7d/.

II. EPA May Not Approve Oklahoma's Application Unless and Until It Complies with Its ESA Obligation to Consult with the FWS On Potential Impacts to Listed Species.

Prior to issuing a final decision on Oklahoma's Application, EPA must consult with the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") under Section 7 of the Endangered Species Act ("ESA") regarding the effects of approving Oklahoma Application on threatened and endangered species.

Under the ESA, federal agencies must, in consultation with FWS and/or NMFS, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). An agency proposing an action must first determine whether the action "may affect" species listed as threatened or endangered under the ESA. 50 C.F.R. § 402.14. "The 'may affect' threshold for triggering the consultation duty under section 7(a)(2) is low." *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 12-13 (D.D.C. 2014); *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) ("[A]ctions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA.").

If the action "may affect" listed species or designated critical habitat, the action agency must pursue either formal or informal consultation. Informal consultation is "an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the [action agency] in determining whether formal consultation . . . is required." 50 C.F.R. § 402.13(a). "If during informal consultation it is determined by the [action agency], with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary." *Id. Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1034 (D.C. Cir. 2008) ("If an agency determines that an action "may affect" endangered or threatened species or critical habitats, the agency must initiate formal consultation with the [FWS], at least unless preparation of a biological assessment or participation in informal consultation indicates that a proposed action is 'not likely' to have an adverse affect.").

If an action agency chooses to forego informal consultation, or the informal consultation concludes that the proposed action is likely to adversely affect listed species or critical habitat, the agency must participate in "formal consultation." 50 C.F.R. § 402.14. Formal consultation entails the formulation of a Biological Opinion ("BiOp") by either FWS or NMFS. In a BiOp, the FWS or NMFS determines whether the proposed action, taken together with all other relevant impacts on the species – including both those included in the environmental baseline as well as cumulative impacts – is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. *Id.* § 402.14(h)(3).

If the BiOp determines that the proposed actions are likely to jeopardize the continued existence of listed species or critical habitats, the FWS or NMFS may not approve them. 16 U.S.C. §§ 1536(a)(2), (b)(4); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 41

(D.C. Cir. 2015). Alternatively, if the BiOp concludes that an action will likely result in at most a limited take that is incidental to the project, FWS or NMFS prepares an Incidental Take Statement ("ITS") identifying reasonable and prudent measures that are necessary or appropriate to minimize the impact on species likely to be incidentally affected. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i), (iv).[19] Notably, if the action agency were then to authorize take of protected species by way of incorporating the ITS's terms and conditions into that authorization, such authorization constitutes "federal action" triggering NEPA review. *Sierra Club*, 803 F.3d at 45; *see* 40 C.F.R. § 1508.18(b)(4).

Here, EPA's approval of Oklahoma's CCR program may affect three mussel species listed under the ESA, the Neosho mucket, rabbitsfoot, and scaleshell. Critical habitat for Neosho mucket and rabbitsfoot mussels includes the portion of the Verdegris River adjacent to the CCR units at AEP's Northeastern Plant in Oologah, Oklahoma.[20] One of the few places the scaleshell mussel is still known to exist is the Kiamichi River in southeast Oklahoma,[21] in which watershed the Hugo coal plant's CCR impoundments are located.[22] EPA has acknowledged that many pollutants present in coal ash wastewaters can harm, and even kill, fish and other wildlife. *See, e.g.*, EPA, Benefit and Cost Analysis for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Doc. No. EPA-821-R-15-005, Docket ID No. EPA-HQ-OW-2009-0819-5856, at 5-1 ("Final Benefit & Cost Analysis"). In light of DEQ's longstanding failure to adequately enforce Oklahoma's environmental standards, including, in particular, standards governing CCR units – discussed in detail below – approval of Oklahoma's Application may result in increased water pollution from those units than if the federal CCR rule continued to govern CCR units in the state.

In sum, EPA's proposal to approve Oklahoma's Application creates a significant risk that CCR units in the state would pollute water more than if EPA did not approve that Application, and thus the proposed action may affect listed species within the meaning of 50 C.F.R. § 402.14. As a result, EPA must initiate consultation with FWS and NMFS under ESA Section 7 prior to making a final determination as to whether to approve or deny Oklahoma's Application. *See generally Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d at 17 (finding that a 2008 rule revising standards for coal mining near streams may affect listed species where there was "clear evidence that habitats within stream buffer zones are home to threatened and endangered species and that mining operations affect the environment, water quality, and all living biota").

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[19] If FWS or NMFS issues an ITS, the choice falls to the action agency that consulted with FWS/NMFS under Section 7 to determine whether and how to proceed with the proposed action (including permitting private activity) in light of the ITS issued by the Service--but the action agency and private party (if any) must comply with the terms of the ITS if they wish to be insulated from ESA liability for any (otherwise unlawful) take of protected species incidental to the carrying out of the proposed action. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.15(a).

[20] *See* US Fish & Wildlife Service, "Neosho Mucket and Rabbitsfoot, Frequently Asked Questions, Proposed Critical Habitat Rule for the Neosho Mucket and Rabbitsfoot," *available at* https://www.fws.gov/midwest/endangered/clams/neoshomucket/QAsNEMU_RABBproposedCHMay2014.html (last visited Mar. 19, 2018).

[21] *See* FWS, "Scaleshell Mussel Recovery Plan," at 94, Feb. 2010, *available at* https://ecos.fws.gov/docs/recovery_plan/100407_v2.pdf.

[22] *See* Western Farmers Electric Cooperative, "Hugo Coal Plant History of Construction," at 1-4, Oct. 14, 2016, *available at* http://docs.wixstatic.com/ugd/7d5e0d_d03cbb01d99045739f2d53817ea38840.pdf.

III. EPA Must Reject Oklahoma's CCR Program Because It Does Not Meet the Requirements of the WIIN Act.

a. Oklahoma's CCR Program Does Not Provide for "Prior Approval" of Key Site-Specific Conditions, in Contravention of the WIIN Act.

Oklahoma's Application may not be approved because its CCR program does not provide for "prior approval" of key documents required to ensure compliance with provisions at least as protective as the federal CCR rule, as required by the WIIN Act. The WIIN Act directs EPA to approve "a permit program or *other system of prior approval* and conditions … if … the program or other system requires each [CCR] unit located in the State to achieve compliance with" the federal CCR rule[23] or State provisions that are "at least as protective as" the federal CCR rule, 42 U.S.C. § 6945(d)(1)(B) (emphasis added), making clear that regardless of whether a State proposes a permit program or other system, the State must provide for "prior approval" of CCR units' proposals to comply with the substantive requirements for CCR units. Oklahoma's CCR program fails to ensure such prior approval.

First, Oklahoma's CCR program fails to ensure prior approval of key compliance proposals and compliance demonstrations for new CCR units, lateral extensions of existing CCR units, and existing CCR impoundments without a state permit. Oklahoma's CCR program is a permitting program. *See, e.g.*, OAC 252:517-l-7(a) ("All CCR units must be permitted in accordance with the rules of this Chapter."). The primary, and in many cases first, opportunity for DEQ to review and, if appropriate, approve a CCR unit's proposals for compliance with the federal CCR rule and corresponding Oklahoma requirements is when reviewing the CCR unit's permit application.[24]

Oklahoma's CCR program, however, does not require CCR permit applicants to submit many essential documents proposing how the CCR unit will comply with the requirements of the federal CCR rule and corresponding Oklahoma rules as part of their permit applications. Thus, DEQ neither reviews nor approves those documents in the permitting process. The contents of permit applications for new CCR units and existing impoundments without a state permit are set forth at OAC 252:517-3-6(a). Permit applications are to include information about the location of the unit; a description of the unit; maps and drawings of the unit; documents demonstrating compliance with location restrictions for CCR units; plans for complying with operational requirements, storm water management requirements and aesthetic enhancement requirements; the unit's closure plan; and establishment of financial assurance for the unit. OAC 252:517-3-6(a)(1) – (12). Neither OAC 252:517-3-6(a) nor any other Oklahoma provision, however,

[23] EPA, "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities," 80 Fed. Reg. 21,302 (April 17, 2015), codified at 40 C.F.R. Part 257, Subpart D.
[24] *See* OAC 252:517-3-3(a) (providing that all permit applications are subject to the Oklahoma Uniform Environmental Permitting); Ok. Stat. 27A, § 2-14-103(9) (defining as "Tier I" the "basic process of permitting which includes application … and [DEQ] review"); Ok. Stat. 27A, § 2-14-302(A) (providing that DEQ "shall prepare a draft denial or draft permit" for Tier II or III permits "[u]pon conclusion of its technical review of a Tier II or III application."); OAC 252:4-7-15(a).

clearly requires a CCR permit applicant to submit, as part of its permit application, any of the following essential information:

(a) The applicant's groundwater monitoring plan, setting forth how the CCR unit will comply with groundwater monitoring system design requirements set out in the federal CCR rule and Oklahoma CCR program;
(b) its groundwater monitoring program, setting out how it will comply with the sampling and analysis requirements of the federal CCR rule and its Oklahoma counterpart;
(c) any proposal for an alternative groundwater monitoring frequency, pursuant to OAC 252:517-9-5(d);
(d) any plans or specifications demonstrating that the CCR unit will meet many of the critical design requirements for CCR units, including hazard potential assessments, structural stability assessments, safety factor assessments, and emergency action plans;
(e) the CCR unit's retrofit plan, setting forth its proposal for complying with retrofit requirements in the federal CCR rule and its Oklahoma counterpart; or
(f) the CCR unit's post-closure care plan, setting out how it intends to comply with the federal CCR rule and corresponding Oklahoma mandates for safeguarding against pollution once the CCR unit is closed.

See OAC 252:517-3-6(a) (setting forth permit application contents for new CCR units).

Nor does Oklahoma's CCR program ever require that DEQ pre-approve these key compliance demonstration documents subsequent to the permitting process. The State's regulations provide that CCR units are to submit their groundwater monitoring plan; their groundwater sampling and analysis plan; the unit's retrofit plan; the post-closure plan, and documents demonstrating compliance with design requirements to DEQ.[25] But those regulations require only *submission* of those plans to DEQ; they do not require DEQ to approve, disapprove, or even review those plans,[26] nor do they prohibit CCR units from moving forward with those plans unless and until they receive DEQ's approval. In short, contrary to the WIIN Act, Oklahoma's CCR program fails to require prior approval of CCR units' plans for compliance with those critical requirements.

Oklahoma also does not require prior approval of other key compliance demonstrations that may not be available at the time of a CCR unit's permit application. For example, if groundwater monitoring conducted pursuant to the federal CCR rule and corresponding Oklahoma regulations reveals concentrations of certain coal ash pollutants that are "statistically significant" increases over background concentrations of those pollutants, the owner/ operator of the CCR unit is required to begin monitoring for an additional set of contaminants associated

[25] *See* OAC 252:517-9-2(g), OAC 252:517-9-4(a), 252:517-15-7(k)(2)(E), 252:517-15-9(d)(5) (requiring CCR unit owners/operators to submit to DEQ their groundwater monitoring plan, groundwater sampling and analysis plan, retrofit plan and post-closure care plan); OAC 252:517-11-4(a)(2)(C), (3)(E), (d)(4), (e)(3) (requiring CCR units to submit to DEQ their initial and periodic hazard potential assessments; Emergency Action Plans, if applicable; structural stability assessments; and safety factor assessments).
[26] Several of these provisions contain, in their title, the words "DEQ approval required," and several state that owners/operators of CCR units are to submit those plans or assessments to "DEQ for approval." However, nowhere in the language of the provisions is review or approval by DEQ required.

with coal ash (Appendix IV or, under Oklahoma's program, Appendix B contaminants) unless the owner/operator provides an adequate "alternative cause demonstration" showing that the contamination comes from elsewhere. *See* OAC 252:517-9-5(e). If sampling reveals elevated levels of those Appendix IV/Appendix B pollutants and the owner/operator does not demonstrate that the pollutants are coming from a different source, the owner/operator must assess corrective measures and select a remedy to bring the pollution down to safe levels, or, if the CCR unit at issue is an unlined impoundment, retrofit or close the unit. *See* 40 CFR 257.97(a); OAC 252:517-9-6(g)(3)(B)); OAC 252:517-9-7(a); OAC 252:517-9-7(d); OAC 252:517-9-8(a); OAC 252:517-9-6(g)(5). Yet Oklahoma's CCR program does not require that DEQ review or approve *any* alternative cause demonstration or selected remedy for contamination. Instead, the State's regulations direct the owner/operator of the CCR unit to implement the corrective action remedy within 90 days of selecting that remedy, with no mention of any need for the owner/operator to receive approval from DEQ before doing so. OAC 252:517-9-9(a)(2).

The same is true of the critical periodic structural stability analyses that are performed after the permitting process is complete. Owners/operators of CCR impoundments are required to conduct safety factor analyses, hazard potential analyses, and structural stability assessments every five years to ensure that changing conditions and pressures on CCR impoundments have not rendered the impoundments unsafe. Notwithstanding the important analysis that these documents contain – and the serious threat to health and safety that CCR units may pose if these analyses are done incorrectly – Oklahoma's CCR program does not require that DEQ review or approve them. *See* OAC 252:517-11-4(a)(2)(C), (d)(4) and (e)(3).

Oklahoma's CCR program also fails to ensure prior approval of key compliance demonstration documents at existing CCR units that already have a state permit. Pursuant to OAC 252:517-1-7(b)(2), existing CCR landfills need only apply for a modification to their permit, rather than apply for a new permit. The same appears to be true for existing CCR impoundments with a state permit. *See* OAC 252:517-1-7(c) ("[e]xisting CCR impoundments permitted under OAC 252:616 must be permitted in accordance with the rules of this Chapter upon expiration of the existing permit or no later than Oct. 19, 2018, whichever occurs first"); OAC 252:517-3-6(a) (including "existing surface impoundment[s] *without* a solid waste permit" in the description of CCR units requiring a new CCR permit application) (emphasis added).

But Oklahoma's mandates for what must be included in applications to modify a permit for existing CCR units are extremely vague. The State's CCR provisions state only that "[a]n applicant requesting a modification to an existing permit shall submit information identified in this Part related to the proposed modification." OAC 252:517-3-6(c). Maps and detailed drawings of the unit, including design drawing showing liner design, groundwater levels, and flood plains, are required only for permit modifications for which "the data originally submitted would be made ambiguous, inaccurate, or out of date by the proposed modification." OAC 252:517-3-31(a)(4). In sum, Oklahoma's CCR program largely delegates to the owner/operator of the CCR unit the determination of which documents are "related" to the permit modification it seeks, thereby failing to make sure that all plans and assessments necessary to ensure compliance with the federal CCR rule and its Oklahoma counterpart are submitted to, reviewed, or pre-approved by DEQ.

These are not minor omissions. The structural stability documents that Oklahoma's program fails to require be pre-approved are essential to demonstrating compliance with stability requirements, while providing critical information about the threats posed by CCR impoundments. If a safety factor analysis is flawed, for instance, an impoundment that should have been closed may be left in dangerous conditions, teetering on the edge of collapse. Groundwater monitoring plans are likewise critical: monitoring is the prerequisite for cleaning up – and, for existing unlined CCR impoundments – closing CCR units that are polluting Oklahoma's waters. As EPA stated in the preamble to the proposed federal CCR rule, "groundwater monitoring is the single most critical set of protective measures on which EPA is relying to protect human health and the environment."[27] If the owner/operator of a CCR unit has selected inappropriate or insufficient monitoring wells, or claimed, without sufficient basis, that an alternative source is causing contamination found in those wells, those deficiencies can lead to severe pollution continuing to threaten the health and safety of Oklahoma's residents and wildlife for decades, and possibly centuries, to come. The same is true for post-closure care plans: if post-closure groundwater monitoring is done incorrectly or with insufficient wells, contamination may continue to escape, undetected, from closed CCR units for decades.

Oklahoma's failure to ensure pre-approval of key documents by DEQ not only contravenes the WIIN Act's clear terms, but also is contrary to a significant body of jurisprudence holding that the failure of agencies to review and, if appropriate, approve site-specific proposals for compliance with applicable law constitutes impermissible "self-regulation" and an improper abdication of agencies' duties. *See, e.g., Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 498-502 (2d Cir 2005) (EPA's Concentrated Animal Feeding Operation ("CAFO") rule violated the Clean Water Act's mandate to ensure compliance with applicable requirements when it failed to require permitting authorities to review CAFOs' nutrient management plans); *Envtl. Def. Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 855-56 (9th Cir. 2003) (holding that EPA's rule for storm water management violated the Clean Water Act when it failed to require permitting authorities to review operators' site-specific "minimum measures" to reduce storm water discharges, and concluding that "programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable").

Unlike the federal CCR rule, state CCR programs may not, under the plain terms of the WIIN Act, be self-implementing. Rather, the state permitting agency must review and pre-approve – or if appropriate, deny – regulated entities' proposals to comply with applicable requirements to ensure that they achieve compliance with the mandatory safeguards. 42 U.S.C. § 6945(d)(1)(B). Oklahoma's CCR program could provide for prior approval by requiring that all compliance proposals and demonstrations available at the time of permit application be submitted as part of that application, and by mandating that all compliance proposals and demonstrations completed after the initial permitting process be included as part of an application for permit renewal, permit modification, or re-opener, subject to DEQ review and pre-approval. But Oklahoma's program does not so provide. Because Oklahoma's CCR program does not ensure prior approval of these critical compliance documents, EPA must deny Oklahoma's Application.

[27] EPA, "Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities," Proposed Rule, 75 Fed. Reg. 35,128, 35,205 (June 21, 2010).

b. Oklahoma's CCR Program Does Not Ensure that Each CCR Unit Complies with Standards "At Least As Protective As" the Federal CCR Rule.

i. The Oklahoma Department of Environmental Quality Is Unwilling and/or Unable to Enforce Its CCR Program.

Oklahoma's application may not be approved because Oklahoma has failed to show that it is able and willing to enforce its environmental regulations. The state's inability and unwillingness to enforce its environmental regulations – including CCR regulations – renders approval of Oklahoma's CCR program unacceptable under the WIIN Act. Under that Act, EPA may only approve a state CCR program if it "requires each [CCR] unit located in the State to achieve compliance with" the federal CCR rule or State provisions that are "at least as protective as" the federal CCR rule. 42 U.S.C. § 6945(d)(1)(B). This is a continuing obligation: EPA must withdraw approval of a state CCR program if, upon review, EPA finds that the state program does not "continue[] to ensure that each [CCR] unit located in the state achieves compliance" with requirements at least as protective as those in the federal CCR rule. *Id*. §§ 6945(D)(i)(II), (D)(ii)(I), and (E).

Oklahoma's failure to demonstrate that it can ensure that CCR units comply with the state's CCR regulations likewise warrants denial of its application under the 40 C.F.R. Part 239 regulations that EPA looked to in evaluating the adequacy of the program.[28] *See, e.g.*, 83 Fed. Reg. at 2102 (stating that "EPA is therefore relying in large measure on the existing regulations in 40 CFR part 239," among other provisions, in evaluating the adequacy of Oklahoma's CCR program); 40 C.F.R. § 239.4 ("The description of a state's program must include: … (e) A discussion of staff resources available to carry out and enforce the relevant state permit program."); EPA, "Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule (STIR)," 61 Fed. Reg. 2584, 2594 (Jan. 26, 1996) [hereinafter, "STIR"] (interpreting 40 C.F.R. Part 239 and concluding that "in certain cases (e.g., where EPA determines that State… resources clearly are insufficient), this information may be used to make a determination of inadequacy.").

There is *no information whatsoever* in Oklahoma's application, EPA's proposal to grant Oklahoma's application, or supporting documents, about "the staff resources available to carry out and enforce" Oklahoma's CCR program. Neither DEQ nor EPA bothered to address the critical question of available resources, contrary to the WIIN Act's mandates and the explicit instruction of 40 C.F.R. § 239.4(e). Oklahoma's failure to provide the information specified in 40 C.F.R. § 239.4(e) is, alone, sufficient grounds for EPA to deny the state's application. *See* STIR, 61 Fed. Reg. 2584.

Oklahoma may have avoided providing the information mandated by 40 C.F.R. § 239.4 because it simply cannot demonstrate adequate resources to ensure CCR units comply with the applicable protections. The state is in the throes of a severe financial crisis. On February 8, 2018, National Public Radio reported that Oklahoma's budget crisis is so dire that around a fifth

[28] As discussed in *infra* note 65, the regulations set out at 40 C.F.R. Part 239 do not apply to EPA's approval of state CCR programs. If they did apply, Oklahoma's CCR program would fail to meet their mandates, as explained herein.

of Oklahoma's schools "now hold classes just four days a week," and in 2017, "Highway Patrol officers were given a mileage limit because the state couldn't afford to put gas in their tanks."[29] Oklahoma news channel KFOR reported on February 20, 2018, that a bill to raise revenue failed to pass, and the state is now cutting costs left and right.[30]

State agencies are being hit hard by Oklahoma's financial crisis,[31] and DEQ is no exception. DEQ "ha[s] seen sharp budget cuts in recent years, which have forced the agenc[y] to cut back on staff."[32] One of the areas hit hardest by those cuts is protection of Oklahoma's waters. Think Progress explained in January 2018:[33]

> [O]versight of [Oklahoma] waterways and water pollution is funded by state dollars, not federal funds, meaning budget cuts will likely have a direct impact on the state's ability to monitor potential water contamination from coal ash disposal. Years of budget cuts have already caused the state Department of Environmental Quality to close 17 of its field offices, leaving it with just 22 around the state. It has also seen its force of inspectors shrink from 89 to 58.

The impact of funding cuts was reiterated by DEQ Deputy Director Jimmy Givens, who told NPR in 2016 that cuts in state funding "disproportionately affect DEQ programs that make sure local water supplies are safe to drink, and that wastewater discharged from municipal and industrial sources isn't polluting the environment."[34] Indeed, funding cuts to DEQ have already forced the agency to abandon plans to clean up open dumps and work to protect drinking water.[35] DEQ's most recent annual report notes that several positions have gone unfilled due to the

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[29] Rachel Hubbard, "Tax Cuts Put Oklahoma In A Bind. Now Gov. Fallin Wants To Raise Taxes," NPR, Feb. 8, 2018, *available at* https://www.npr.org/2018/02/08/584064306/tax-cuts-put-oklahoma-in-a-bind-now-gov-fallin-wants-to-raise-taxes.

[30] Bill Miston, "House passes funding bill for last year's budget, cutting $44M in agency appropriations," KFOR, Feb. 20, 2018, *available at* http://kfor.com/2018/02/20/house-passes-funding-bill-for-last-years-budget-cutting-44m-in-agency-appropriations/.

[31] *See id*. (reporting that Oklahoma legislators are slashing funding for state agencies "by roughly $44.6 million for the final three months of the FY 2018 budget") and Sean Murphy, "Oklahoma plans across-the-board cuts to close budget hole," Feb. 15, 2018, *available at* https://www.seattletimes.com/nation-world/oklahoma-plans-across-the-board-cuts-to-close-budget-hole/ (reporting that the $44.6 million chopped from state agency budgets results from across-the-board cuts of approximately two percent per state agency).

[32] Think Progress, "Pruitt's EPA wants to let states handle coal ash. Oklahoma shows why that's so dangerous," Jan. 18, 2018, *available at* https://thinkprogress.org/oklahoma-state-coal-ash-epa-333e6061fc7d/.

[33] NPR, "State Budget Agreement Brings Sharp Funding Cuts to Agencies Overseeing Oklahoma's Environment," May 16, 2016, *available at* https://stateimpact.npr.org/oklahoma/2016/05/26/state-budget-agreement-brings-sharp-funding-cuts-to-agencies-overseeing-oklahomas-environment/.

[34] *Id*.

[35] *See, e.g.*, OK Energy Today, "DEQ Wonders How Budget Cuts Will Affect Its Abilities," June 1, 2017, *available at* http://www.okenergytoday.com/2017/06/deq-wonders-budget-cuts-will-affect-abilities/; Koco News 5, "State budget crisis forces DEQ to delay cleanup projects," July 7, 2016, *available at* http://www.koco.com/article/state-budget-crisis-forces-deq-to-delay-cleanup-projects/4310550; The Journal Record, "Cut in DEQ budget means fewer cleanup projects," June 20, 2014, *available at* http://journalrecord.com/2014/06/20/cut-in-deq-budget-means-fewer-cleanup-projects-capitol/.

funding shortages and states that, "Should state or federal funding substantially decrease, DEQ would have to further reduce activities and/or secure additional fee funding."[36] A law further cutting DEQ's budget – and that of other state agencies – was enacted on February 27, 2018.[37]

Even if DEQ had adequate funding, it is far from clear that the agency would fully enforce Oklahoma's CCR program. DEQ has long been derelict in protecting Oklahomans against coal ash pollution, as shown by its inaction at the Bokoshe "Thumb's Up" coal ash landfill and by its failure to take effective action to stop the contamination at AEP's Northeastern plant in Oologah. As discussed above, testing of groundwater at that site starting ten years ago revealed dangerous concentrations of arsenic, lead, barium, chromium, selenium, thallium, and other coal ash pollutants.[38] And, though AEP built a "slurry wall" and "grout curtain" along one side of the CCR landfill in 2012-2013,[39] those barriers clearly have not stopped the escape of pollution. The 2017 testing of groundwater monitoring wells located just beyond the grout curtain show unsafe levels of arsenic, boron, molybdenum, and radium, and high concentrations of coal ash constituents cobalt, fluoride, sulfate, and TDS.[40] Yet DEQ has not required AEP to do anything more to halt the flow of these dangerous pollutants out of its coal ash dumps.

In fact, DEQ is already failing to enforce its CCR regulations. GRDA, owner of a CCR landfill at the Grand River Energy Center, was required by both the federal CCR rule and Oklahoma regulations to collect and analyze eight independent samples from each background and down-gradient monitoring well of all contaminants listed in Appendices III and IV of the federal CCR rule (Appendices A and B of the Oklahoma regulations) by October 17, 2017. 40 C.F.R. § 257.94(b); OAC 252:517-9-5(b). GRDA's annual groundwater monitoring report[41] makes clear that it failed to do so.[42] GRDA did not hide this failure; rather, GRDA made it clear to DEQ that it had not collected and analyzed the required eight independent samples for

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[36] DEQ Annual Report 2017, at 18, *available at* http://www.deq.state.ok.us/mainlinks/reports/2017AnnualReport/2017%20DEQ%20Annual%20Report.pdf.

[37] Sean Murphy, "Governor signs bill imposing cuts to Oklahoma agencies," Feb. 27, 2018, *available at* https://www.seattletimes.com/nation-world/governor-signs-bill-imposing-cuts-to-oklahoma-agencies/.

[38] *See* In Harm's Way at 149-54.

[39] *See* Terrecon Consultants, "Report 1 - Groundwater Monitoring Network for CCR Compliance, Public Service Co. of Oklahoma, Northeastern 3 & 4 Power Station," October 2017, at 2, *available at* http://www.aep.com/about/codeofconduct/CCRRule/docs/2017/GroundWater/NE-LF-GWMN-101717.pdf.

[40] *See* AEP GW Report, Landfill and AEP GW Report, Bottom Ash Pond.

[41] A&M Engineering, "Annual Groundwater Monitoring and Corrective Action Report (Calendar Year 2017), for Grand River Dam Authority Landfill, Grand River Energy Center, Mayes County, Oklahoma," Jan. 31, 2018 [hereinafter, "GRDA Annual GW Monitoring Report"], *available at* http://www.grda.com/wp-content/uploads/2015/09/Annual-GW-Monitoring-and-Corrective-Action-Report-2017.pdf.

[42] For example, none of the sampling included in GRDA's Annual GW Monitoring Report – which notes semi-annual results from 2004 through 2017 –includes testing for calcium or TDS, both of which are Appendix III constituents, from downgradient monitoring wells 03-1 or MW 03-2. And while two samples were collected and analyzed for calcium and TDS from the remaining two downgradient monitoring wells in 2017, nothing in the report shows compliance with the requirement that eight independent samples be taken by Oct. 2017.

Appendix IV (Appendix B) constituents. *See, e.g.*, GRDA Annual GW Monitoring Report at 6. Yet DEQ did not sanction GRDA for this clear violation of groundwater monitoring requirements that could lead to delayed cleanup of polluted groundwater at the site. Instead, DEQ gave GRDA a pass, granting the company an extension of *more than a year* to complete that crucial initial sampling.[43]

GRDA's plan to evaluate whether any statistically significant increases of coal ash contamination are found over background levels at the GREC landfill site is likewise entirely deficient under both the federal CCR rule and corresponding Oklahoma rules. Instead of evaluating whether concentrations of coal ash pollution in down-gradient wells are statistically significantly higher than concentrations of those same pollutants in background wells, as those rules require,[44] GRDA intends to base its determination of whether a "statistically significant increase" has occurred by evaluating whether concentrations of a pollutant in *same* well are increasing over time.[45] That is plainly not what the federal CCR rule or corresponding Oklahoma rules require. *See* 40 C.F.R. §§ 257.93(d), (h)(1); OAC 252:517-9-4(d), (h)(1). Again, GRDA did not hide this violation of the state and federal rule in its severely flawed plan for statistical analysis; it sent the plan to DEQ, which failed to identify *any* deficiency whatsoever with that plan. *See* Letter from DEQ to GRDA regarding Oct. 18, 2017 GRDA Groundwater Sampling and Analysis Plan, dated Nov. 29, 2017, attached hereto as Exhibit 1. The letter shows that DEQ cannot be relied upon to recognize and correct a significant violation of its own rules.

Moreover, it appears that GRDA may not meet the requirement that its background groundwater monitoring well "[a]ccurately represent[s] the quality of background groundwater that has not been affected by leakage from a CCR unit." 40 C.F.R. § 257.91(a)(1); OAC 252:517-9-2(a)(1). The well, MW 93-1, which GRDA is using as its background well, is located right on the perimeter of the CCR landfill, and historic groundwater sampling from that well has consistently resulted in sulfate concentrations greater than EPA's secondary MCL and boron concentrations above .341 mg/L.[46] GRDA identified MW 93-1 as its background well in filings

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[43] *See* GRDA Annual GW Monitoring Report at 6 ("In addition, *and at the request of DEQ*, a schedule had been prepared and submitted for the collection and analysis of groundwater samples for OAC 252:517 Appendix B constituents. The additional sampling and analysis would be conducted to gather eight background samples necessary for statistical evaluation of the Appendix B constituents should evaluation become necessary. The schedule prepared and submitted requested an accelerated period (over 6 months rather than quarterly) for the sampling and analysis. Approval for the accelerated schedule is pending. It is anticipated that this activity will be initiated and completed during the upcoming 2018 calendar year.") (emphasis added).

[44] *See* 40 C.F.R. §§ 257.93(d), (h)(1); OAC 252:517-9-4(d), (h)(1).

[45] *See* A&M Engineering, "Groundwater Sampling and Analysis Program for Grand River Dam Authority Landfill, Grand River Energy Center, Mayes County, Oklahoma," Oct. 16, 2017, at 12 [hereinafter, "GRDA GW Sampling & Analysis Program"], *available at* http://www.grda.com/wp-content/uploads/2015/09/2017_10_16-GRDA-GW-Sampling-and-Analysis-Program.pdf ("In the event that inter-well statistical evaluation indicates the presence of an elevated parameter in the downgradient wells compared to historical data of the upgradient or background wells, an Intra-well Prediction Limit Interval test will also be conducted on the specific well or wells of interest. These intra-well comparisons will then be utilized to determine whether a significant increase had occurred within a specific well in question….").

[46] GRDA GW Sampling & Analysis Program.

with DEQ. Yet again, DEQ identified no concerns with this likely violation of state and federal rules. *See* Ex. 1.

Documents obtained from DEQ indicate that the agency also would have let AEP off easily for failing to collect and analyze eight independent samples of the Appendix III and IV constituents (Appendix A and B constituents) at CCR units at its Northeastern coal plant by the October 17, 2017 deadline.[47] *See* Letter from DEQ to AEP, dated January 16, 2018, attached hereto as Exhibit 2, at 2 ("In accordance with OAC 252:517-9-5(b), a minimum of eight independent samples from each background and downgradient well must be collected and analyzed for the constituents listed in Appendix A and B of OAC 252:517 no later than October 17, 2017. Please submit a schedule for collecting the samples and establishing background for those constituents for which background has not already been established under the current monitoring program.").

Finally, DEQ has apparently not required Evans & Associates, the owners of the Big Fork Ranch landfill, to perform groundwater monitoring that comes anywhere close to meeting the requirements of the federal CCR rule and corresponding Oklahoma rules. In the "clarification" to its Application, Oklahoma told EPA that Big Fork Ranch has been under DEQ jurisdiction since November 1, 2016, meaning it has been subject to DEQ's rules for CCR units, in addition to the requirements of the federal CCR rule, since that time. Both the federal CCR rule and Oklahoma's CCR regulations require that eight samples of both Appendix A and B (federal CCR rule Appendix III and IV) constituents be taken from each upgradient and downgradient monitoring well at CCR units by October 17, 2017. *See* OAC 252:517-9-5(b); 40 C.F.R. § 257.94(b). Annual groundwater monitoring reports containing the results of that sampling were required to be posted on each CCR unit's coal ash compliance website by March 2, 2018. *See* OAC 252:517-9-1(e); 252:517-19-1(h); 252:517-19-3(d), (h)(1); 40 C.F.R. §§ 257.90(e), 257.105(h)(1), 257.107(d), (h)(1).

But Evans and Associates have posted no such Annual Report, and the groundwater monitoring results that are provided on the company's website reveal that the monitoring the company has done is highly deficient. First, the company has provided no groundwater monitoring plan, so it is not clear that it has selected both background and downgradient wells, as required by the federal and Oklahoma rules, nor whether it is – as required – sampling from all such wells. *See* OAC 252:517-9-2(a); 252:517-9-5(b); 40 C.F.R. §§ 257.91(a) and 257.94(b). Second, it has not tested for all required constituents, and even where it has tested for those constituents, it has not taken the mandated eight samples. The only testing done at the site in 2017 was for Appendix A/Appendix III ("detection monitoring") constituents, and samples were only taken twice.[48] No testing of Appendix B/Appendix IV constituents was conducted. In 2016, the company tested the groundwater for Appendix A/Appendix III constituents twice, in

[47] With the exception of Appendix IV constituent Combined Radium, which was only sampled twice in one monitoring well (MW 9D) down-gradient from the coal ash landfill at the Northeastern plant, AEP appears to have taken 8 independent samples of each of the Appendix III and Appendix IV constituents. *See* AEP GW Report, Landfill.

[48] *See* Evans and Associates, "Groundwater Monitoring 2017," *available at* http://evansandassociatesconstructioncompany.com/Docs/Ground%20Water%20Monitoring%20Report%202017.pdf.

February and September, but only tested for some of the Appendix B/Appendix IV constituents (arsenic, barium, cadmium, chromium, lead, and selenium) once, in February 2016.[49] When Evans and Associates did sample for those pollutants, the lab to which the company sent them used detection limits far higher than safe drinking water standards for those pollutants (for example, the detection limit for arsenic was .05 mg/L, while the MCL for arsenic is .01 mg/L), making it impossible to determine if unsafe concentrations were found in the water.[50] At no time in the 2016 or 2017 did Evans and Associates test for the remaining Appendix B/Appendix IV constituents, namely antimony, beryllium, cobalt, lithium, mercury, molybdenum, or thallium.[51] Evans and Associates have also failed to post on their CCR website a number of other key compliance plans and analyses required by the federal CCR rule and corresponding Oklahoma regulations, including its run-on/run-off control system plan, its closure plan, and its post-closure care plan. *See* 40 C.F.R. §§ 257.81, 257.102(b), and 257.104(c).

DEQ's manifest failure to enforce Oklahoma's CCR regulations is consistent with its stated purpose in proposing those regulations. DEQ explicitly told the state's Environmental Quality Board that protecting industry from citizen enforcement was a primary aim in proposing to adopt the state's CCR regulations.[52] When the agency charged with administering and enforcing Oklahoma's environmental standards is actively attempting to protect industry from citizen suits, it is hardly surprising that the agency itself is failing to hold industry to those standards.

DEQ's failure to enforce Oklahoma's CCR regulations is not out of character. Failure to enforce environmental protections has been routine for DEQ in recent years. Examples abound. For instance, the Sooner Generating Station in Red Rock, Oklahoma, has been releasing unlawful amounts of harmful particulate matter into the air, and DEQ has imposed no fines whatsoever on the coal-fired power plant despite years of noncompliance.[53] Similarly, during every quarter over the last three years, the Jupiter Sulphur, LLC, fertilizer manufacturer in Ponca City, Oklahoma, has been a "high priority violator" of the CAA for releasing unlawful amounts of sulfur dioxide and hydrogen sulfide.[54] No enforcement actions, formal or informal, have been taken by DEQ against the facility. *Id.* Finally, the Wynnewood Refinery in Wynnewood, Oklahoma, has been a "significant noncomplier" with RCRA during every single quarter for

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[49] *See* Evans and Associates, "Groundwater Monitoring 2016," *available at* http://evansandassociatesconstructioncompany.com/Docs/Ground%20Water%20Monitoring%20Report%202016.pdf.
[50] *See id*.
[51] *Id*.
[52] *See* Minutes, Environmental Quality Board, Feb. 19, 2016, DEQ, at 23, *available at* http://www.deq.state.ok.us/mainlinks/eqbinfo/Approved%20EQB%20minutes%202%2019%2016%20on%209%2013%2016.pdf (DEQ official Jeffrey Shepherd reporting that DEQ decided to promulgate the state coal ash regulations "after internal discussions and stakeholder meetings revealed clear reasons for doing so. The reasons include: … [t]he DEQ has been told by industry that complying with the state rules may offer some protection from citizen suits….").
[53] *See* EPA, Detailed Facility Report: Sooner Generating Station, *available at* https://echo.epa.gov/detailed-facility-report?fid=110000598611 (last visited Mar. 19, 2018).
[54] *See* EPA, Detailed Facility Report: Jupiter Sulfur LLC, *available at* https://echo.epa.gov/detailed-facility-report?fid=110000455757 (last visited Mar. 19, 2018).

three years, yet, since 2015, DEQ has let them get away with nothing more than informal requests to comply with critical protections against pollution from waste.[55]

In sum, Oklahoma has neither the means nor, it appears, the will to enforce its CCR program. Its Application fails to ensure compliance with requirements "at least as protective as" the federal CCR rule and fails to demonstrate that the state has the resources or the intent to adequately protect Oklahoma communities against polluting, unsafe CCR sites. Accordingly, because it fails to comply with the WIIN Act and is inconsistent with 40 C.F.R. Part 239, Oklahoma's Application must be denied.

ii. Oklahoma's Failure to Require Pre-Approval of Key Compliance Plans Means Oklahoma Will Not Ensure that Each CCR Unit Complies with Applicable Standards.

One major consequence of Oklahoma's failure to require prior review and approval by DEQ of many key compliance demonstration documents for CCR units is that, contrary to the WIIN Act and 40 C.F.R. Part 239,[56] the State's CCR program does not ensure compliance with the safeguards of the federal CCR rule or its state counterpart. 42 U.S.C. §§ 6945(D)(i), (D)(ii)(I), (E); 40 C.F.R. § 239.4(b) (directing states to explain how they "will ensure that existing and new facilities are permitted or otherwise approved and in compliance with the relevant Subtitle D federal revised criteria").

Failure to require DEQ to review and pre-approve key compliance proposals means that owners/operators of CCR units are, in effect, self-regulating. Allowing regulated entities to decide for themselves whether they are complying with the safeguards mandated by the federal CCR rule and its Oklahoma counterpart leaves the fox guarding the henhouse.[57] The protections of the CCR rule are highly site-specific, requiring complex analyses of hydrogeology and engineering, among other specialties, to show whether and how a CCR unit will comply with them. Technical expertise is needed not only to perform those analyses but also to evaluate whether they've been done correctly. Although the federal CCR rule and Oklahoma counterpart appropriately require that professional engineers certify a number of the rule's assessments and compliance proposals, the State still must review and pre-approve those proposals to make sure the health and safety of local residents are properly safeguarded. As EPA itself has recognized, "relying upon third party certifications is not the same as relying upon the state regulatory authority, and will likely not provide the same level of 'independence.' For example, although not an employee, the [certifying] engineer will still have been hired by the utility." 75 Fed. Reg. at 35,194; *see also* preamble to final federal CCR rule, 80 Fed. Reg. at 21,405 (explaining that EPA did not allow alternative groundwater protection standards in the final federal CCR rule

[55] *See* EPA, Detailed Facility Report: Wynnewood Refining Co., *available at* https://echo.epa.gov/detailed-facility-report?fid=110000453697 (last visited Mar. 19, 2018).
[56] As discussed in *infra* note 65, the regulations set out at 40 C.F.R. Part 239 do not apply to EPA's approval of state CCR programs. If they did apply, Oklahoma's CCR program would fail to meet their mandates, as explained herein.
[57] As noted above, protecting industry against enforcement was one of the express aims of DEQ in proposing to adopt Oklahoma's CCR regulations. *See supra* note 52.

because, despite being certified by an "independent registered professional engineer," such alternative standards were "too susceptible to potential abuse").

Oklahoma's failure to require DEQ review and prior-approval of critical compliance proposals – together with its far-too-limited public participation opportunities, discussed below – means that incorrectly or inadequately conducted analyses will go unchecked, exposing Oklahoma residents to the unnecessary risk of harm. In sum, Oklahoma is abdicating its responsibility to its residents, as well as its duty under the WIIN Act, by failing to ensure that DEQ review and pre-approve or, if appropriate, deny – key compliance analyses and proposals that show how a facility will comply with its federal CCR rule and corresponding Oklahoma requirements. Accordingly, Oklahoma's application must be rejected. *See, e.g.*, *Waterkeeper Alliance, Inc.*, 399 F.3d at 498-502; *Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality*, 277 Mich. App. 531, 551-52, 747 N.W.2d 321 (2008) (holding that the failure of the Michigan Department of Environmental Quality to "conduct a meaningful review" of nutrient management plans violated the Clean Water Act even though a "Certified CNMP Provider" is required to approve the plan, when those plans were part of the facility's CWA permit).

iii. Oklahoma's Failure to Clearly Incorporate Key Compliance Plans into the Permit as Permit Conditions Means Oklahoma Will Not Ensure that Each CCR Unit Complies with Applicable Standards.

Oklahoma's CCR program does not clearly provide that key site-specific compliance proposals and demonstrations – including but not limited to closure plans, post-closure plans, groundwater monitoring plans, and corrective action plans – are to be incorporated into a CCR unit's permit. Those documents set out critical site-specific measures necessary for each CCR unit to comply with the CCR regulations; as such, they must – once reviewed and approved by DEQ – be incorporated into the permit as site-specific conditions. *See Waterkeeper Alliance, Inc.*, 399 F.3d at 503; *Envtl. Def. Center*, 344 F.3d at 855; *Sierra Club Mackinac Chapter*, 277 Mich.App. at 533-34. If Oklahoma does not ensure that these critical, site-specific compliance proposals are incorporated as enforceable permit conditions, CCR unit owners/ operators may argue that they need not follow those plans, which are the basis for compliance with both federal and Oklahoma CCR requirements. As such, under the WIIN Act, EPA may not approve Oklahoma's Application until it modifies its regulations to clearly, explicitly provide that CCR units' compliance plans and demonstrations – once pre-approved by DEQ after opportunity for public participation – become conditions of the CCR units' permits.

iv. Granting CCR Units a "Permit for Life" Contravenes the WIIN Act's Mandate that Each CCR Unit Achieve Compliance with Standards "at Least as Protective as" EPA's CCR Rule.

The crux of the WIIN Act is that State CCR programs must be "at least as protective as" federal CCR standards. This holds true even after a State CCR program has been approved. If EPA revises the federal CCR standards, as it is now proposing to do, the WIIN Act directs the agency to review approved State programs within three years of those revisions to evaluate whether the state program "continues to ensure that each [CCR] unit located in the state" is complying with requirements at least as protective as those set forth in the revised federal CCR

standards. 42 U.S.C. §§ 6945(D)(i)(II), 6945(D)(ii)(I). If EPA finds that the state program does not do so, EPA is to withdraw approval of the State program, which is not to be restored unless and until the State has "corrected the deficiencies" in its program. *Id*. § 6945(E).

Oklahoma's CCR program grants "permits for life." OAC 252:517-3-1(a) ("Permits shall be issued for the life of the CCR unit, subject to the limitations of (b) of this Section [providing that "DEQ may specify timelines within permits for commencement of construction and operation of new CCR units."]."). This grant of a permit for life is not permissible under the WIIN Act. Permits must include provisions allowing them to be re-opened, or expire and be renewed, to incorporate any changes to the state program necessary to ensure that the CCR unit "continues to achieve compliance" with standards "at least as protective as" those in any revised federal CCR standards. *See* 42 U.S.C. § 6945(D)(i)(II), (D)(ii)(I), (E).

This is not a hypothetical concern. In a status report filed with the U.S. Court of Appeals for the District of Columbia in November 2017, EPA informed the court that it plans to propose revisions to the federal CCR standards in March and September 2018. On March 1, 2018, EPA posted on its coal ash website a pre-publication version of proposed changes to the federal CCR rule, which include, *inter alia*, the addition of boron to the federal CCR rule's Appendix IV. That proposal, which EPA calls "Phase One," was published in the Federal Register on March 15. 83 Fed. Reg. 11,584 (Mar. 15, 2018). Therein, EPA reiterates that it plans to finalize the Phase One changes to the federal CCR rule by June 2019 and plans to propose further, "Phase Two" changes to the rule by September 2018, to be finalized by December 2019. *Id*. at 11,587.

Looking forward, additional revisions to the federal CCR standards should be expected. RCRA directs EPA to "review[] and, where necessary, revise[]" all regulations implementing the statute every three years. 42 U.S.C. § 6912(b); *see also id*. § 6907(a) (directing EPA to publish suggested guidelines for solid waste management "from time to time," including guidelines setting forth what constitutes open dumping). Congress intended regulations implementing RCRA to reflect updates to technology and science that improve environmental protection.[58] As such, the federal CCR standards will need further revision going forward to incorporate advances in science and technology that lessen CCR's impact on the environment. *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 45 (D.D.C. 2013) (concluding that RCRA § 2002(b) imposes "a continuing obligation on the EPA to review and revise its regulations").

In sum, because a "permit for life" is inconsistent with the WIIN Act's mandate that state CCR programs ensure that CCR units located therein meet standards "at least as protective as" changing federal CCR standards, and Oklahoma's program grants CCR units permits for life,

[58] *See, e.g.*, 42 U.S.C. § 6902(a)(9)-(10) (declaring that the objectives of RCRA "are to promote the protection of health and the environment and to conserve valuable material and energy resources by …promoting a national research and development program for … new and improved methods of …environmentally safe disposal of nonrecoverable residues" and by "promoting the demonstration, construction, and application of solid waste management … systems which preserve and enhance the quality of air, water, and land resources"); *Id*. § 6907(a)(1) (mandating that guidelines for solid waste management are to "provide a technical and economic description of the level of performance that can be attained by various *available* solid waste management practices … which provide for the protection of public health and the environment.") (emphasis added).

EPA must deny Oklahoma's Application. Oklahoma must modify its CCR program to provide that permits for CCR units be re-opened, or expire and be renewed, to incorporate any changes to the state program necessary to ensure that the CCR unit continues to achieve compliance with standards at least as protective as those in any revised federal CCR standards.

IV. EPA Should Deny Oklahoma's Application Because Granting CCR Units a Permit for Life Is Inconsistent with Federal and State Environmental Policies.

EPA must reject Oklahoma's CCR program because its proposal to grant a "permit for life" to CCR units runs contrary to fundamental principles enshrined in many federal and state environmental laws, not to mention common sense. Granting a permit for life is nearly unheard of for environmental permits: air permits, water discharge permits, and hazardous waste permits all expire and must be renewed.[59] There is good reason for that: our nation's environmental laws – and in particular, RCRA – require that standards be periodically updated to reflect our changing understanding of pollution's health impacts and changing technologies that reduce damage to the environment,[60] and those updates would have little effect if the permits governing polluting facilities were not adjusted accordingly. Indeed, EPA regulations consistently require that environmental permits be updated to incorporate revised standards.[61] This is true of waste permits just as it is for air and water permits. For example, permits for hazardous waste facilities must be reviewed every five years and are to be modified[62] if, among other reasons, "the standards or regulations on which the permit was based have been changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued." 40 C.F.R. § 270.41(a)(3).

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[59] *See, e.g.*, 40 C.F.R. § 70.6(a)(2) (limiting the term of Clean Air Act ("CAA") operating permits to five years, except for solid waste incineration units, for which the term may not exceed 12 years); *id.* § 72.69(b)(1) (limiting the term of CAA Acid Rain permits to five years); *id.* § 122.46(a) (limiting the terms of Clean Water Act ("CWA") National Pollutant Discharge Elimination System permits to five years); *id.* § 270.50(a) (limiting the term of RCRA hazardous waste permits to ten years).

[60] *See, e.g.*, 42 U.S.C. § 7409 (requiring EPA to review and, if necessary to protect public health or welfare, revise National Ambient Air Quality Standards ("NAAQS") every five years, in consultation with a committee of scientific experts); *id.* § 7411(g)(4) (requiring EPA to revise New Source Performance Standards ("NSPS") setting the technological floor for pollution controls if a governor identifies a demonstrated technology and shows that the existing NSPS does not reflect the pollution control that technology can achieve); 33 U.S.C. § 1313(c) (requiring states to review and, if appropriate, revise water quality standards at least every three years to ensure those standards protect the public health and enhance water quality).

[61] *See, e.g.*, 40 C.F.R. § 70.1(b) (requiring all sources subject to CAA Title V operating permits to "have a permit to operate that assures compliance by the source with all applicable requirements"); *id.* § 70.2 (defining "applicable requirement" to mean, *inter alia*, any periodically updated NSPS that sets a technological floor for air pollution controls for particular pollutants and facilities; any periodically updated standard setting emission limits for facilities releasing hazardous air pollution under Section 112 of the CAA; and any periodically updated NAAQS limiting the concentration of particular air pollutants that may be in the air in a given area); *id.* § 122.44(l)(2)(ii) (providing that reissued NPDES permits under the CWA may not "be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified").

[62] *Id.* § 270.50(d) (providing that a RCRA permit for a hazardous waste facility is to be reviewed five years after issuance and modified "as necessary" consistent with 40 C.F.R. § 270.41); *Id.* § 270.41(a)(3).

RCRA's directives that standards be updated to reflect advances in science and technology, and that documents governing waste management be revised to incorporate those updated standards, also apply to solid waste. *See* 42 U.S.C. § 6944(a) (allowing solid waste disposal sites to be classified as sanitary landfills and not open dumps "only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility;"); RCRA § 2002(b), 42 U.S.C. § 6912(b) (directing EPA to "review[] and, where necessary, revise[]" *all* RCRA implementing regulations every three years); RCRA § 1008, 42 U.S.C. § 6907 (stating that, "from time to time," EPA is to publish guidelines for solid waste management that "provide a technical and economic description of the level of performance that can be attained by various *available* solid waste management practices … which provide for the protection of public health and the environment" and "provide minimum criteria to be used by the States to define those solid waste management practices which constitute the open dumping of solid waste…."); (emphasis added); *Appalachian Voices*, 989 F. Supp. 2d at 55 (holding that RCRA §§ 1008 and 2002(b) both apply to RCRA standards for solid waste, including CCR); 40 C.F.R. § 256.03(d)-(e) (providing that state Solid Waste Management Plans ("SWMPs") are to be reviewed and, if necessary, revised by the state at least every three years, and that an SWMP must be revised when it "is not in compliance with the requirements of these guidelines;"); *id.* § 256.01(b)(2) (requiring state SWMPs to require "that all solid waste … shall be … disposed of in sanitary landfills … or otherwise disposed of in an environmentally sound manner.").

Consistent with that principle, EPA regulations governing solid waste management indicate that EPA neither contemplated nor intended that permits for solid waste facilities would not expire. *See* 40 C.F.R. § 256.63(a) (directing states to hold a public hearing "[b]efore approving a permit application (or *renewal* of a permit)" for solid waste facilities) (emphasis added); 40 C.F.R. § 256.06 (defining permit as "an entitlement to commence and continue operation of a facility as long as both procedural and performance standards are met."); 40 C.F.R. § 239.04(b) (requiring state permit programs for MSWLFs to include "[a]n explanation of how the state will ensure that existing and new facilities are permitted or otherwise approved and in compliance with the relevant Subtitle D federal revised criteria;"); 40 C.F.R. § 258.74(a)(2) (requiring that, if operators of MSWLFs rely on a trust fund for financial assurance, payments into the trust fund be made each year "over the term of the *initial* permit …."). (emphasis added). Oklahoma's proposal to grant permits for life to CCR units contravenes the fundamental principle underlying our nation's environmental laws, including RCRA, that permits for polluting facilities must be revised to incorporate updated standards reflecting scientific and technological advances that reduce harm to public health and the environment.

A requirement that permits be periodically renewed is also critical to ensure compliance with applicable requirements, in that it directs the state regulatory agency, as well as the public, to review the facility's compliance record and other management issues. Periodic evaluation of the facility is required to ensure that facilities are in compliance with their permits, and have adequately conducted monitoring, maintenance, remediation, reporting, closure activities, as well as posted adequate bonds. The permit reissuance process presents a critical opportunity for state regulators and the public to examine issues essential to the safe operation of the facility. During this process, the facility must be required to provide current information on its operations and compliance. Since a permit is the critical instrument ensuring the facility's compliance with environmental laws, all permits must have fixed terms in order to reflect updated conditions and

remain tailored to a facility's individual operations. During regular permit reissuance, regulators and the public have the necessary opportunity to evaluate past performance and raise issues that may lead to permit modification or revocation. Permit review and reissuance is recognized by EPA as an essential function of the RCRA permit system.[63]

Requiring permits to be periodically renewed is also just plain common sense. Facilities for the disposal of coal ash commonly operate for more than half a century. Decades of active coal ash disposal is followed by a 30-year minimum post-closure maintenance period. *See* 40 C.F.R. § 257.104(c). In light of the long-term nature of the disposal and maintenance activities at these sites, it is essential that state regulators periodically ascertain that the facility is in compliance with the permit, that the permit conditions adequately reflect the nature and scope of the disposal activities, and that the permit requires compliance with all updated safeguards.[64] For example, coal ash disposal at GRDA's Grand River Energy Center landfill added nearly five and a half thousand tons to the landfill in 2017 alone. Conditions after a decade of such disposal, following the dumping of approximately 55,000 additional tons of toxic waste, may be very different than the conditions that existed when the permit was issued. Therefore, to ensure the protection of public health and the environment, review and reissuance of permits are essential functions of the state permit program.

In addition to its inconsistency with fundamental principles of RCRA, the CAA, and the CWA, as well as basic common sense, the "permit for life" Oklahoma proposes also appears not to conform to Oklahoma's own laws, at least with regard to CCR surface impoundments. *See* 27A Okla.St.Ann. § 2-6-501(C) ("A permit for activities specified in paragraph A of this section shall be issued by the Executive Director for no more than five (5) years and may be renewed pursuant to rules of the Board"); 27A Okla.St.Ann. § 2-6-501(A)(1) ("The construction, installation, operation and closure of any industrial surface impoundment, industrial septic tank or treatment system, or the use of any existing unpermitted surface impoundment, septic tank or treatment system that is within the jurisdiction of the Department and which is proposed to be used for the containment or treatment of industrial wastewater or sludge."); OAC 252:616-1-2 (defining "surface impoundment" as "a native soil or lined basin either below or above ground level which is designed, maintained and/or operated to store, recycle, treat and/or dispose of industrial wastewater or stormwater, and shall include but is not limited to lagoons, excavations, basins, diked areas, and pits.").

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[63] *See, e.g.*, EPA Memo, "EPA Controls Over RCRA Permit Renewals Report No. E1DSF9-11-0002-9100115," Mar. 30, 1999, *available at* https://www.epa.gov/sites/production/files/2015-09/documents/9100115.pdf; EPA, "Permit Modifications Report: Safeguarding the Environment in the Face of Changing Business Needs," Jan. 2016 [hereinafter "EPA Permit Modifications Report"], *available at* https://www.epa.gov/sites/production/files/2016-01/documents/permit_mod_report_final_508.pdf.

[64] *See, e.g.*, EPA Permit Modifications Report at 41 ("It is important to have current safety and emergency response information available and related equipment ready in the event there is a fire, spill, or other emergency at a permitted facility. There are permit modifications that owners and operators of permitted facilities must propose when certain changes are made at the facility. These changes include things such as updated emergency/contingency plans, emergency contacts, and emergency equipment.")

In short, Oklahoma's proposal to grant CCR units permits for life contravenes fundamental principles of our nation's bedrock environmental laws, including RCRA, as well as Oklahoma law and common sense. EPA should deny Oklahoma's Application.

V. EPA Must Reject Oklahoma's CCR Program Because It Fails to Provide Adequate Opportunities for Public Participation.

EPA must reject Oklahoma's application because its CCR program fails to provide adequate opportunities for public participation in the development, revision, implementation, and enforcement of its CCR regulations. Specifically, Oklahoma's provisions for public participation in permitting, key post-permitting compliance determinations, and enforcement all fall short of the mandates set out in RCRA § 7004(b)(1) and implementing regulations codified at 40 C.F.R. Parts 25, 239, and 256.[65] Moreover, contrary to the WIIN Act, Oklahoma's CCR

[65]The regulations set out at 40 C.F.R. Parts 25, 239, and 256 do not apply to EPA's approval of state CCR programs. Part 25 applies to certain enumerated activities set out in *id*. § 25.2(a), including the process for EPA approval of state administration of the State Hazardous Waste Program under RCRA, and state implementation of that program once approved. *See* 40 C.F.R § 25.2(a)(6)-(7), (e), and (f). EPA approval of, and state implementation of, state CCR programs are not included among those activities.

Part 239 likewise does not apply to state CCR programs or EPA approval thereof. Rather, it sets out the standards for state municipal solid waste landfill programs and for EPA approval of those programs. *See id*. § 239.1(a) ("This part specifies the requirements that state permit programs must meet to determined adequate by the EPA under [RCRA § 4005(c)(1)(C)] and the procedures EPA will follow in determining the adequacy of state Subtitle D permit programs or other systems of prior approval and conditions required to be adopted and implemented by states under RCRA [§] 4005(c)(1)(B)."); RCRA § 4005(c)(1)(B), 42 U.S.C. § 6945(c)(1)(B) (directing states to adopt permit programs…to assure that each solid waste management facility which may receive hazardous household waste or hazardous waste due to the provision of section 6921(d) of this title for small quantity generators… will comply with the criteria revised under section 6944(a) and 6907(a)(3) of this title."); RCRA § 4005(c)(1)(C), 42 U.S.C. § 6945(c)(1)(C) (directing EPA to determine the adequacy of state programs "under this paragraph"). CCR units are not units that "may receive hazardous household waste or hazardous waste due to the provision of [42 U.S.C. § 6921(d)] for small quantity generators…." As such, they are not governed by 40 C.F.R. Part 239.

Finally, 40 C.F.R. Part 256, which sets forth minimum requirements for state Solid Waste Management Plans, also does not apply to state CCR programs or EPA approval thereof. *See* 40 C.F.R § 256.01(a) ("The purpose of these guidelines is to assist in the development and implementation of State solid waste management plans, in accordance with section 4002(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6942(b))…."). Indeed, EPA takes pains to differentiate between state CCR programs and state Solid Waste Management Plans governed by 40 C.F.R. Part 256: in its guidance document for approval of state CCR programs, EPA include a chart laying out the differences between CCR programs and Solid Waste Management Plans. *See* EPA, "Coal Combustion Residuals State Permit Program Guidance Document, Interim Final," August 2017, at 1-12 [hereinafter "State CCR Guidance"], *available at* https://www.epa.gov/coalash/guidance-coal-combustion-residuals-state-permit-programs.

Notably, EPA has not claimed that 40 C.F.R. Parts 25, 239 or 256 apply to state CCR programs or EPA's approval thereof. EPA states that it looked to the regulations codified at 40 C.F.R. Part 239 in evaluating the adequacy of Oklahoma's program. *See* 83 Fed. Reg. at 2102. Although EPA states in the State CCR Guidance at page 2-1 that it "reviewed the requirements in 40 CFR parts 239, 256 and 258 as potential models for determining whether the statutory criteria have been met and has used these as a

program fails to provide public participation opportunities "at least as protective as" the few that are set out in the federal CCR rule. Accordingly, Oklahoma's application must be rejected.

a. Oklahoma's CCR Program Fails to Provide Adequate Opportunities for Public Participation in Permitting.

Oklahoma's CCR program fails to provide even the minimum public participation opportunities in solid waste facility permitting mandated by 42 U.S.C. § 6974(b)(1) and RCRA's implementing regulations, codified at 40 C.F.R. Parts 239, 256, and 25. First, as discussed above, Oklahoma's CCR program fails to require new CCR units to submit numerous key compliance proposals and compliance demonstrations in their CCR permit applications. Because these key compliance proposals and demonstrations are excluded from the permit application, the public is not provided an opportunity to review and comment on those documents during the permitting process. Second, for existing CCR units, Oklahoma is entirely depriving the public of any opportunity to review and comment on permit applications, associated supporting documents, and even the CCR unit's permit itself prior to issuance of that permit. Third, even when Oklahoma provides for public review and comment on certain key compliance demonstration documents in the permitting process, it fails to ensure that that public participation is meaningful. These deficiencies require EPA to reject Oklahoma's application.

i. Background: Oklahoma's Permitting Scheme

In Oklahoma, environmental permits are governed by the Oklahoma Uniform Environmental Permitting Act ("UEPA"), 27A Okla. Stat. § 2-14-101 et seq., and implementing regulations codified in Subchapter 7 of OAC 252:4. Applications for permits for CCR units are governed by the UEPA. OAC 252:517-3-3(a) ("All permit applications are subject to the Oklahoma Uniform Environmental Permitting Act as well as the requirements of this Subchapter."). The UEPA establishes three "tiers" of environmental permits, "each with varying opportunities for public participation, and every permit application submitted to the Department falls within one of these 3 categories." ODEQ Application at 5. The tiers are codified at OAC 252:4-7-58 through 60.

Tier 1 permits include "[m]odification to any solid waste permit to make minor changes;" "[m]odification of plans for closure and/or post-closure;" "[a]dministrative modification of all permits and other authorizations," "[m]odification of an existing land disposal permit for a lateral expansion within permitted boundaries [for both on-site and off-site land disposal facilities];" "[t]he modification of a solid waste permit. . . involving a request for less than twenty-five percent (25%) increase in permitted capacity for storage… or disposal when the request is for equivalent methods, units or appurtenances as those permitted and which does not involve expansions of permitted boundaries;" and "[t]he approval of new and when applicable, modified or renewed…; [p]ermit transfers; [n]on-hazardous industrial solid waste disposal plans;

basis for this guidance," EPA does not purport to rely on regulations codified at 40 C.F.R. Parts 25 or 256 in evaluating Oklahoma's program. *See* 83 Fed. Reg. 2100.

If any of the regulations codified at 40 C.F.R. Parts 25, 239 or 256 do apply to state CCR programs or EPA approval thereof, however, neither Oklahoma's CCR program nor EPA's procedures in proposing to approve that program meet their mandates, as explained further herein.

[t]echnical plans; … [and] [a]ll other administrative approvals required by solid waste rules." OAC 252:4-7-58(2) – (3).

There are *no opportunities* for public participation for Tier I permits, with the exception of requiring notice to the landowner. *See* 27A Okla. Stat. § 2-14-103(9) (defining "Tier I" as "a basic process of permitting which includes application, notice to the landowner and Department review…."); OAC 252:4-7-2 ("Tier I is the category for those things that are basically administrative decisions which can be made by a technical supervisor with no public participation except for the landowner.").

Tier II permits include new permits for "on-site" solid waste disposal sites, meaning sites where waste is disposed at the facility at which it is generated; "[a]ny modification of an on-site solid waste permit, except as listed under Tier I;" and modifications of off-site solid waste permits requesting a "more than 25% but less than 50% increase in permitted capacity for disposal…except those listed under Tier I." OAC 252:4-7-59(2)(B)-(C). Tier II will apply, per Oklahoma's Application, to new permits for onsite CCR disposal units and to permit modifications as described in OAC 252:4-7-59.

In contrast to the provisions for Tier I permits, Oklahoma does provide some opportunities for public participation for Tier II permits. Those include:

- notice published in a local newspaper of permit applications and draft permits or draft denials, 27A Okla. Stat. § 2-14-302(A); OAC 252:4-7-13(c) – (d), as well as, for landfills, "notice by certified mail, return receipt requested, to owners of mineral interests and to adjacent landowners whose property may be substantially affected by installation of a landfill site." OAC 252:4-7-13(f)(3);
- the opportunity to review and submit comments on permit applications, draft permits or draft permit denials, with a minimum of 30 days to comment; 27A Okla. Stat. § 2-14-302; 27A Okla. Stat. § 2-14-303(4); OAC 252:4-7-4(b);
- the opportunity to request a public meeting, which DEQ "shall" hold if it "receives written timely request…and determines there is a significant degree of public interest in the draft denial or draft permit," which "shall be held at a location convenient to and near the proposed new site or existing facility…;" 27A Okla. Stat. § 2-14-303;
- notice at least 30 days in advance of that meeting, if held; 27A Okla. Stat. § 2-14-303(1); and
- a mandate that DEQ provide a response to comments. 27A Okla. Stat. § 2-14-304.[66]

Notably, there is no opportunity for administrative (quasi-judicial) hearing on Tier II permits, which appears to preclude judicial review of the permit under Oklahoma's Administrative Procedure Act. *See* 75 Okla. Stat. 250.3 (defining "Individual proceeding" as "the formal process employed by an agency having jurisdiction by law to resolve issues of law or fact

[66] In addition, if a Tier II permit applicant requests "significant corrections" – *i.e.*, a "correction" that "significantly alters a facility's permitted size, capacity or limits," OAC 252:4-7-18(c) – prior to issuance of a final permit, the applicant must publish notice of that correction and DEQ "may" open a public comment period and/or reconvene a public meeting … on the proposed correction(s)." OAC 252:4-7-18(c)(1).

between parties and which results in the exercise of discretion of a judicial nature"); 75 Okla. Stat. 318 ("Any party aggrieved by a final agency order in an individual proceeding is entitled to certain, speedy, adequate and complete judicial review thereof pursuant to the provisions of this section and Sections 319, 320, 321, 322 and 323 of this title.").[67]

Finally, Tier III permits include new permits for off-site solid waste land disposal site; modifications of permits seeking a greater than 50% increase in permitted capacity for disposal; "Modification of an off-site solid waste land disposal permit for an expansion of permitted boundaries;" "Modification of an off-site solid waste permit in which the request involves different methods, units or appurtenances than those permitted, except those listed under Tier I;" and all variances. *See* OAC 252:4-7-60. Tier III will apply, per Oklahoma's Application, to new permits for offsite CCR disposal units and "certain significant modifications" to offsite disposal units. OAC 252:4-7-60.

Oklahoma's process for Tier III permits includes public notice of applications, draft permits, and proposed permits; two comment periods; opportunity for a public meeting; response to comments; and opportunity for a quasi-judicial administrative hearing ("individual proceeding"). As described by DEQ in Oklahoma's Application, Tier III permits include the Tier II process plus (1) opportunity for a public meeting concerning the notice of application; (2) publication of a "notice of availability of proposed permit" and a response to comments, along with a proposed permit; (3) the opportunity to request an administrative permit hearing; (4) the permit is issued/denied by the Executive Director of DEQ; and (5) DEQ publishes notice of final permit decision and "availability" of Response to Comments.

ii. Oklahoma's CCR Program Fails to Provide the Opportunities for Public Participation in Permitting Required by RCRA § 7004(b)(1)

In RCRA § 7004(b)(1), Congress made an unambiguous declaration that the public must be afforded opportunities to participate in all aspects of RCRA programs:

> Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish minimum guidelines for public participation in such processes.

[67] The failure to provide for quasi-judicial hearings ("individual proceedings") for Tier II permits may violate due process requirements of the Oklahoma Constitution for certain permits, including for landfills. *See DuLaney*, 868 P.2d at 681 n.16 (holding that, even where statute then in effect did not guarantee formal adjudicatory hearing, a formal hearing was still required: "Because the necessity of notice and an opportunity for a hearing is based on constitutionally protected property rights, an individual proceeding would remain necessary under the 1992 amendment."); *see also Daffin v. State ex rel. Okla. Dep't of Mines*, 2011 OK 22, ¶ 6, 251 P.3d 741 (holding that federal and Oklahoma Constitutional due process provisions required landowner who lived just over a mile from a proposed mine, but within the floodplain of a "high hazard" dam threatened by the mine, to be given formal notice of proposed mine, right to participate in a "conference," and opportunity to comment on the mine proposal in that conference).

42 U.S.C. § 6974(b)(1). Courts have interpreted the nearly identical provision of the Clean Water Act, 33 U.S.C. § 1251(e), as a clear, broad mandate for public participation, and have held that 33 U.S.C. § 1251(e) requires meaningful public participation in the context of permitting. *See Waterkeeper Alliance, Inc.*, 399 F.3d at 503 (reasoning that, as manifested by 33 U.S.C. § 1251(e), "Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act.").

In *Waterkeeper Alliance, Inc.*, the U.S. Court of Appeals for the Second Circuit held that EPA violated 33 U.S.C.A. § 1251(e) in adopting a rule that "effectively shield[ed]" site-specific permit conditions set out in nutrient management plans "from public scrutiny and comment…." 399 F.3d at 503. The court explained that the rule "prevents the public from calling for a hearing about—and then meaningfully commenting on—NPDES permits before they issue." *Id*. The rule also violated 33 U.S.C. § 1251(e), the court explained, by failing to provide for public participation in the development and enforcement of those nutrient management plans because those plans "embody all the relevant 'site specific nutrient management practices,' [and thus] are a *sine qua non* of the 'regulation, standard, plan, or program' …established to regulate land application discharges." *Id*. at 504; *see also Sierra Club Mackinac Chapter*, 277 Mich.App. at 533-34 (same). In short, the public participation mandate of the Clean Water Act – and therefore the nearly-identical mandate of RCRA § 7004(b)(1) – demands that documents detailing site-specific practices required to comply with the statute or implementing regulations be made available for public review and comment before the associated permit issues.

Oklahoma's CCR program fails to meet that demand. The state's CCR program provides little and, in some cases, no opportunity for the public to review and comment on key documents setting out site-specific practices that the CCR unit must undertake to comply with the federal CCR rule and corresponding Oklahoma requirements. As discussed above, under Oklahoma's CCR program, applicants for permits for new CCR units and existing impoundments that do not already have a permit need not include in their permit applications many key compliance proposals and demonstrations, including the groundwater monitoring and sampling plans, the post-closure plan, structural stability assessments and the retrofit plan. *See* OAC 252:517-3-6(a). Oklahoma's program grants these CCR units a "permit for life" without providing the public any opportunity to review and comment on those critical site-specific compliance documents before the permitting decision is made.

Moreover, Oklahoma's CCR program does not appear to mandate that those site-specific compliance proposals and demonstrations – including but not limited to closure plans, post-closure plans, groundwater monitoring plans, and corrective action plans – be incorporated into a CCR unit's permit. Those documents set out critical site-specific measures necessary for each CCR unit to comply with the CCR regulations; as such, they must – once reviewed and approved by DEQ – be incorporated into the permit as site-specific conditions. *See Waterkeeper Alliance, Inc.*, 399 F.3d at 503; *Envtl. Def. Center*, 344 F.3d at 855; *Sierra Club Mackinac Chapter*, 277 Mich.App. at 533-34. And because those site-specific compliance proposals and demonstrations must be part of the permit, those that are available at the time of the permit application must be made available for public review and comment prior to issuance of that permit. *Waterkeeper Alliance, Inc.*, 399 F.3d at 503; *Envtl. Def. Center*, 344 F.3d at 855; *Sierra Club Mackinac Chapter*, 277 Mich.App. at 533-34. Those compliance plans and demonstrations that are only

available after the initial permit is issued – including but not limited to alternative cause demonstrations, selection of corrective action remedies, and periodic structural stability assessments – should be included as part of applications required for permit re-openings or renewals which also must be made available for public review and comment.

The situation is even more problematic for existing CCR units, which under Oklahoma's CCR program are only required to modify their existing permits. *See* OAC 252:517-1-7(b)-(c). Oklahoma represented to EPA in its state program application that "only CCR unit applications for *minor* modifications, lateral expansions within the permit boundary below a certain capacity, and approval of technical plans fall within the Tier I category." Application at 6 (emphasis added). DEQ's regulations setting forth which solid waste permits fall into Tier I likewise make clear that the lengthy and comprehensive permit modifications necessary to ensure permittees comply with federal CCR rules and their Oklahoma counterpart should not be classified as Tier I.[68] Nonetheless, it appears that DEQ is improperly classifying permit modification applications for existing CCR units – the permit modifications to obtain permits mandating compliance with the Oklahoma counterparts to the federal CCR rule – as "Tier 1" applications, meaning that there is *no opportunity whatsoever* for public review or comment of those permit applications or the associated "permits for life" that DEQ issues to these facilities prior to the permit's issuance. *See* 27A Okla. Stat. § 2-14-103(9); OAC 252:4-7-2.

For example, GRDA submitted a permit modification application for the CCR landfill at the Grand River Energy Center, classifying it as "Tier I," and DEQ made no indication that the application was improperly classified. *See* GRDA Tier I Permit Modification Application, March 14, 2017, attached hereto as Exhibit 3; Letter from DEQ to GRDA, June 23, 2017, attached hereto as Exhibit 4. There is nothing "minor" about that modification application: it includes numerous critical assessments necessary to determine compliance with the CCR program, including GRDA's closure plan, post-closure plan, initial run-on/run-off control plan, and initial fugitive dust control plan, among other documents. *See* Ex. 3. DEQ went ahead and approved all of those plans with no public participation whatsoever. *See* Ex. 4. Entirely depriving the public of any opportunity to review and comment on the many critical compliance proposals submitted in permit applications, as well as on the permits themselves, prior to permit issuance may be in violation of the Oklahoma Constitution,[69] and is contrary to the broad directive of RCRA § 7004(b)(1). *See Waterkeeper Alliance, Inc.*, 399 F.3d at 503.

Finally, even when Oklahoma's CCR program does provide for public review and comment in the permitting process, it fails to ensure that that public participation is meaningful. This problem is particularly acute for CCR unit closure plans. Oklahoma requires the owner/operator

[68] None of the categories DEQ sets out for Tier I permit applications come close to covering the complicated and lengthy modifications required to establish compliance with CCR requirements. *See* OAC 252:4-7-58(2) – (3).

[69] The opinion of the Oklahoma Supreme Court in *DuLaney*, 868 P.2d 676 indicates that due process protections of the Oklahoma and US Constitutions apply to property owners that may be impacted by any solid waste management disposal facility. *See DuLaney*, 868 P.2d at 685 (concluding that "[b]oth mineral interest owners and property owners whose residences may be affected by a solid waste management disposal facility have legally protected rights sufficient to require the application of due process privileges guaranteed by the United States and Oklahoma Constitutions.").

of a new CCR unit to submit a closure plan for the unit as part of its permit application, OAC 252:517-3-6(a)(11)(D), thus making the closure plan subject to public review and comment prior to permit issuance if Oklahoma stays true to its word in its Application that new CCR units will be permitted as Tier II or III. *See* Application at 7; 27A Okla. Stat. § 2-14-302; OAC 252:4-7-59; OAC 252:4-7-60. But owners/operators may modify their closure plans at any time, OAC 252-517-15-7(b)(3)(a), and Oklahoma's regulations treat modifications to closure plans as Tier I permits, which provide no public participation opportunities. *See* OAC 252:4-7-2 ("Tier I is the category … with no public participation except for the landowner"); OAC 252:4-7-58(2)(A)(iii) (Tier I includes "[m]odifications of plans for closure"). The public, then, could provide extensive input on a CCR unit's closure plan during the Tier II or III permitting process, only to have the CCR unit modify that closure plan – potentially only days after receiving its permit – wholly behind closed doors. This creates the possibility for bait-and-switch that deprives the public of meaningful opportunity to comment on closure plans – plans which, if inadequately protective, could subject Oklahoma communities to dangerous pollution for generations.

In sum, Oklahoma's CCR program fails to afford the public participation opportunities in permitting required by 42 U.S.C. § 6974(b)(1). Oklahoma must revise its permitting program to ensure that the public is afforded a meaningful opportunity to review and comment on all critical compliance proposals, potentially by specifying that all CCR permit applications (whether new applications or permit modifications) fall into Tiers II or III of its permit classification system, and that all compliance proposals must be submitted as part of permit applications. Unless and until it makes the necessary changes to ensure its program conforms to RCRA § 7004(b)(1), EPA may not approve Oklahoma's Application.

iii. Oklahoma's CCR Program Fails to Provide the Opportunities for Public Participation in Permitting Called For in 40 C.F.R. Part 239

Oklahoma's CCR program also fails to meet the mandates for public participation in permitting set out in 40 C.F.R. Part 239.[70] Under 40 C.F.R. § 239.6(a)(1), state programs must ensure that "[d]ocuments for permit determinations are made available for public review and comment." In turn, 40 C.F.R. § 239.2 defines "permit or prior approval and conditions" as "any authorization, license, or equivalent control document issued under the authority of the state regulating the location, design, operation, ground-water monitoring, closure, post-closure care, corrective action, and financial assurance of Subtitle D regulated facilities" and "permit documents" as "permit applications, draft and final permits, or other documents that include applicable design and management conditions in accordance with the Subtitle D federal revised criteria … and the technical and administrative information used to explain the basis of permit conditions."

In short, Part 239 mandates that all documents necessary to meaningfully evaluate and ensure compliance with applicable standards be made available for public review and comment. *See, e.g.*, STIR, 61 Fed Reg. 2595 (interpreting 40 C.F.R. Part 239.6 and stating: "The Agency recognizes public involvement in permit decisions as an essential component of an effective

[70] As discussed in *supra* note 65, the regulations set out at 40 C.F.R. Part 239 do not apply to EPA's approval of state CCR programs. If they did apply, Oklahoma's CCR program would fail to meet their mandates, as explained herein.

permit program. In light of the recognized importance of public participation, EPA is requiring that *the permit application process must provide for public review of and input to permit documents containing the applicable site-specific design and operating conditions* and must provide for consideration of comments received and notification to the public of the final permit decision.").

Oklahoma's CCR program stands in stark contrast. As explained herein, the state's CCR program provides little and, in some cases, no opportunity for the public to review and comment on key documents setting out site-specific practices that the CCR unit must undertake to comply with the federal CCR rule and corresponding Oklahoma requirements. Under Oklahoma's CCR program, applicants for permits for new CCR units need not include in their permit applications many key compliance proposals and demonstrations, including the groundwater monitoring and sampling plans, the post-closure plan, structural stability assessments and the retrofit plan. *See* OAC 252:517-3-6(a). Oklahoma's program grants these CCR units a "permit for life" without providing the public <u>any</u> opportunity to review and comment on those critical site-specific compliance documents before the permitting decision is made.

Moreover, as described above, the public is deprived of its rightful public participation opportunities to an even greater extent in the context of permit modifications for existing CCR units in Oklahoma. DEQ has already classified permit modification applications for existing CCR units as "Tier 1" applications, leaving the public with no opportunity whatsoever to review or comment on any documents setting out conditions for, or purporting to show compliance with, requirements of the federal CCR rule and corresponding Oklahoma regulations at those existing CCR units. This wholesale shutting-out of the public in permitting decisions for existing CCR units is plainly contrary to the mandates of 40 C.F.R. Part 239.6. *See, e.g.*, 40 C.F.R. § 239.6(a)(1); STIR, 61 Fed Reg. 2595. Oklahoma's Application, as such, must be denied.

iv. <u>Oklahoma's CCR Program Fails to Provide the Opportunities for Public Participation in Permitting Called for in 40 C.F.R. Part 256</u>

Oklahoma's CCR program also does not provide the opportunities for public participation in permitting called for by 40 C.F.R. Part 256.[71] For one, 40 C.F.R. § 256.03(c) provides that state plans shall be "developed in accord in public participation procedures required by Subpart G of this part." Subpart G includes 40 C.F.R. § 256.63, which states that "(a) Before approving a permit application (or renewal of a permit) for a … solid waste disposal facility the State shall hold a public hearing to solicit public reaction and recommendations on the proposed permit application if the State determines there is a significant degree of public interest in the proposed permit. (b) This hearing shall be held in accord with 40 CFR 25.5."

In turn, 40 C.F.R. § 25.5 sets out a number of important provisions to ensure meaningful access to, and participation in, public hearings. That section provides that public hearings are to be "held at times and places which, to the maximum extent feasible, facilitate attendance by the public. Accessibility of public transportation, and use of evening and weekend hearings, should

[71] As discussed in *supra* note 65, the regulations set out at 40 C.F.R. Part 256 do not apply to EPA's approval of state CCR programs. If they did apply, Oklahoma's CCR program would fail to meet their mandates, as explained herein.

be considered." 40 C.F.R. § 25.5(c). It further calls for 45-day advanced notice to the public of the hearing except in emergency situations or "where EPA determines that there are no substantial documents which must be reviewed for effective hearing participation and that there are no complex or controversial matters to be addressed by the hearing," in which case "the notice requirement may be reduced to no less than 30 days." 40 C.F.R. § 25.5(b). In addition, it calls for the advanced notice to be mailed to "appropriate portions" of a list that the notifying agency is required to develop of "persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in any covered activity." *Id*.; 40 C.F.R. § 25.4(b)(5).

Oklahoma's CCR program falls far short of providing the public participation opportunities set forth in 40 C.F.R. § 256.63. As discussed above, for "Tier I" permits – which DEQ is apparently considering an appropriate classification for modifications of permits for existing CCR units – there is no opportunity for public hearing whatsoever. *See* 27A Okla. Stat. § 2-14-103(9); OAC 252:4-7-2. And, although there are some provisions for a "public meeting" for Tier II and Tier III permits, those provisions do not include certain critical components for public participation contained in 40 C.F.R. § 256.63.

Oklahoma's process for Tier II and III permits includes some provisions for public participation, but those fall short of the safeguards for meaningful public participation included in 40 C.F.R. § 256.63. To begin with, it appears that the "public meeting" Oklahoma provides for Tier II and III permits may not qualify as a "public hearing," as referenced in 40 C.F.R. §§ 256.63 and 25.5, incorporated therein. Under 40 C.F.R. § 25.5(e), the agency holding the public hearing "shall inform the audience of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from the public." Nothing in Oklahoma's Application or in Oklahoma's statutory and regulatory mandates for public meetings on Tier II and III permits requires DEQ to provide such information at the public meeting. *See* 27A Okla. Stat. § 2-14-303.

Oklahoma also does not require that a list of interested and affected persons and organizations be kept, and appropriate portions of that list notified of a public hearing. Nowhere in its Application does Oklahoma indicate that, as called for in 40 C.F.R. Part 256, the state will develop, maintain, and mail notification of public meeting to a list of "persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in" permitting of CCR units. No statutory or regulatory provisions that DEQ cited or provided in its Application mandate that DEQ develop, maintain, and mail notification of the public meeting to such a list.

Oklahoma's provisions for public meetings on Tier II and III permits also fail to include the time and location mandates included by incorporation in 40 C.F.R. § 256.63. DEQ regulations state that a public meeting on a Tier II or III permit "shall be held at a location convenient to and near the proposed new site or existing facility." 27A Okla. Stat. § 2-14-303(2). Nowhere, however, in Oklahoma's Application, or in the statutory and regulatory provisions on which it relies, is there a mandate that the public meeting be "held at times and places which, to the maximum extent feasible, facilitate attendance by the public," or that "[a]ccessibility of public

transportation, and use of evening and weekend hearings, should be considered," as set forth in 40 C.F.R. § 25.5(c). Moreover, nothing in Oklahoma's Application or the statutes or regulations it cites to provide for 45-day advanced notice of public meetings on Tier II and III permit applications, as provided by 40 C.F.R. § 25.5(b). The exception in that provision allowing for 30-day advanced notice where the permitting agency "determines that there are no substantial documents which must be reviewed for effective hearing participation and that there are no complex or controversial matters to be addressed by the hearing" is clearly not applicable for CCR unit permits, where the nature of the regulations, and the documentation submitted with permit applications purporting to show how a CCR unit will comply with those regulations, is highly technical, voluminous, and complex.[72]

The omission of these mandates to facilitate public participation has a real-world impact. Many people cannot attend a public hearing during daytime hours on a weekday, for example, and others may not have the time or money to get to locations far from their homes or that are not easily accessible by public transportation. An additional two weeks of notice prior to the hearing provides the public more time to prepare for that hearing, and thus provide more meaningful and studied input; for some, the additional time will make it possible for them to attend the hearing. Finally, the failure to develop, maintain and notify a list of interested or affected persons or organizations means that – as occurred when Oklahoma first adopted its CCR regulations in 2016 – many interested and affected Oklahomans will never know that a CCR unit near their homes, water wells, or waterways they love is seeking a permit that could allow it to continue poisoning their waters for decades or longer. Oklahoma's Application should be denied.

v. Oklahoma's CCR Program Fails to Provide the Opportunities for Public Participation in Permitting Called for in 40 C.F.R. Part 25

Oklahoma's CCR program also fails to provide the opportunities for public participation in permitting called for in 40 C.F.R. Part 25.[73] As discussed immediately above, Oklahoma's CCR program provides no public hearing at all for Tier I permits, and, for Tier II and III permits, does not include a mandate that (1) notice of the public hearing be provided 45 days in advance of the hearing; (2) that DEQ inform attendees "of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from the public;" (3) that DEQ develop, maintain and notify, via mail, a list of persons and organizations potentially interested in or affected by the permitting of CCR units; and (4) that public hearings be held at times and locations which facilitate public participation. *See* 40 C.F.R. § 25.5(b), (c) and (e).

Even if the "public meetings" Oklahoma offers for Tier II and III permits need not be public hearings, Oklahoma's CCR program is still inconsistent with the public participation provisions of 40 C.F.R. Part 25. Section 25.6 of that Part states that "[t]he requirements of §25.5 (b) and (c)

[72] The permitting documentation that must be reviewed for effective hearing participation is highly technical, voluminous and complex notwithstanding the significant omissions in Oklahoma's content requirements for CCR unit permit applications discussed herein.

[73] As discussed in *supra* note 65, the regulations set out at 40 C.F.R. Part 25 do not apply to EPA's approval of state CCR programs. If they did apply, Oklahoma's CCR program would fail to meet their mandates, as explained herein.

are applicable to public meetings, except that the agency holding the meeting may reduce the notice to not less than 30 days if there is good reason that longer notice cannot be provided." Oklahoma has provided no "good reason" why the 45-day notice cannot be provided. Thus, because Oklahoma's CCR program does not include the public participation provisions set out in 40 C.F.R. § 25.5 (b)-(c) for public hearings, it likewise falls short of provisions for public meetings set forth in 40 C.F.R. § 25.6.

Finally, Oklahoma's CCR program falls short of 40 C.F.R. Part 25's provisions with regard to provision of information to the public. 40 C.F.R. § 25.4 states that "[p]roviding information to the public is a necessary prerequisite to meaningful, active public involvement. Agencies shall design informational activities to encourage and facilitate the public's participation in all significant decisions covered by §25.2(a) …." 40 C.F.R. § 25.4(b)(1). It further states: "Each agency shall provide the public with continuing policy, program, and technical information and assistance beginning at the earliest practicable time …. Fact sheets, news releases, newsletters, and other similar publications may be used to provide notice that materials are available and to facilitate public understanding of more complex documents, but *shall not be a substitute for public access to the full documents*." 40 C.F.R. § 25.4(b)(2) (emphasis added).

As discussed at length above, Oklahoma fails to require numerous key compliance proposals and demonstrations to be made part of the permitting record available for public review because it does not require CCR permit applicants to submit them as part of their permit applications, even though the requirements they purport to demonstrate compliance with are part of the permits. *See* OAC 252:517-l-7(a). By depriving the public of access to those critical compliance documents, Oklahoma is failing to provide "public access to the full documents" necessary to allow meaningful public participation in permitting decisions. As such, it falls short of the provisions contained in 40 C.F.R. Part 25, and its Application should be denied.

b. Oklahoma's CCR Program Fails to Provide Adequate Opportunities for Public Participation in Key Post-Permitting Decisions.

Contrary to RCRA § 7004(b)(1) and the regulations EPA looked to in evaluating Oklahoma's Application, *see* 40 C.F.R. Part 239, Oklahoma's CCR program deprives the public of the opportunity to review and comment on key documents informing critical post-permitting decisions. EPA has made clear that:

> [O]pportunities for public review of and input to key post-permit decisions (e.g., significant permit modifications) is essential to an effective public participation program. …While some States/Tribes may distinguish between minor permit actions… and major permit actions (e.g., selecting a corrective action a remedy), *the public should be involved in key decisions which affect their health and their community*. For example, public notice of remedial actions and opportunity to comment on the selection of remedies is recommended.

STIR, 61 Fed. Reg. at 2595 (Interpreting 40 C.F.R. Part 239) (emphasis added); *see also* EPA, "Alaska: Tentative Determination and Final Determination of Full Program Adequacy of the State of Alaska's Municipal Solid Waste Landfill Permit Program," 65 Fed. Reg. 453, 457 (Jan. 5, 2000) (evaluating Alaska's state MSWLP program under 40 C.F.R. Part 239 and basing

approval of that program, in part, on Alaska's representation in its state program application that it will "provide additional public participation opportunities after a permit is issued, including at the time of permit renewals and major modifications or variances …").

As discussed above, many key site-specific compliance proposals are developed subsequent to the permitting process, including "alternative cause demonstrations," selection of corrective measures to halt and clean up groundwater pollution, and periodic structural stability assessments that determine, in some cases, whether an impoundment must be immediately closed. *See* OAC 252:517-9-6; OAC 252:517-9-7; OAC 252:517-9-8; OAC 252:517-11-4(a), (d), (e) and (f). Other key decisions may be made post-permitting; for example, owners/ operators may modify their closure plans at any time. OAC 252-517-15-7(b)(3)(a).

Oklahoma's CCR program provides no opportunity for public review and comment on these critical post-permitting compliance proposals. Because CCR unit permittees are required by their permit to submit these documents to DEQ, *see* OAC 252:517-1-7(a), there is no indication that these post-permit submissions will be treated as separate permit applications. And even if they were, the only "tier" of Oklahoma's tiered permitting system that appears to encompass these compliance documents is Tier I, which provides no public participation whatsoever in the permitting process.[74] Because Oklahoma's CCR program fails to provide the post-permitting opportunities for public participation contained in 40 C.F.R. Part 239, Oklahoma's Application must be denied.

c. Oklahoma Fails to Show That It Provides the Required Minimum Public Participation Opportunities for Enforcement.

Oklahoma failed to show that its CCR program affords the public participation opportunities in enforcement required by RCRA § 7004(b)(1) and set forth in 40 C.F.R. Part 239.[75] Specifically, the state has not shown that it provides for citizen intervention in civil enforcement proceedings.

In order to satisfy the public participation directive of 33 U.S.C. § 1251(e) – the CWA provision that is nearly identical to RCRA § 7004(b)(1)) – a state permitting program must provide an opportunity for citizen intervention in civil enforcement proceedings. *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 859 F.2d 156, 177-78 (D.C. Cir. 1988). That opportunity may be via intervention by right or permissive intervention, as long as state law provided for permissive intervention and the state agrees not to oppose citizens' requests to intervene. *Id.*; *see also Citizens for a Better Env't v. EPA*, 596 F.2d 720, 726 & 726 n.2 (7th Cir.1979) (holding that a provision directing the state agency to "develop internal procedures for receiving and ensuring

[74] *See* OAC 252:4-7-2 ("Tier I is the category for those things that are basically administrative decisions which can be made by a technical supervisor with no public participation except for the landowner."); OAC 252:4-7-58(2)(A)(iii) (Tier I includes "[m]odifications of plans for closure and/or post-closure"); OAC 252:4-7-58(3)(D) (Tier I includes "The approval of new or when applicable, modified or renewed…Technical plans").

[75] As discussed in *supra* note 65, the regulations set out at 40 C.F.R. Part 239 do not apply to EPA's approval of state CCR programs. If they did apply, Oklahoma's CCR program would fail to meet their mandates, as explained herein.

proper consideration of information and evidence submitted by citizens" and "promptly investigate[alleged violations]" failed to satisfy the mandate of 33 U.S.C.A. § 1251(e) because it "is no more than a legalistic articulation of a common courtesy and hardly can be cited as satisfaction of the EPA's statutory duty to issue regulations promoting public participation in state enforcement.")

40 C.F.R. § 239.9 includes precisely that provision. It states that, to be approved, state programs must:

> (a) allow[] intervention, as a right, in any civil action to obtain remedies specified in §239.8 by any citizen having an interest that is or may be adversely affected; or (b) [provide] [a]ssurance by the appropriate state agency that: (1) It will provide notice and opportunity for public involvement in all proposed settlements of civil enforcement actions (except where immediate action is necessary to adequately protect human health and the environment); and (2) It will investigate and provide responses to citizen complaints about violations; and (3) It will not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation.

These requirements are mirrored in EPA's State CCR Guidance.[76]

Oklahoma's Application fails to establish that it meets either prong of 40 C.F.R. § 239.9. The state makes clear that it cannot meet the second option – providing for permissive intervention under 40 C.F.R. § 239.9(b) – because it does not provide public notice of proposed settlements of civil enforcement actions. Specifically, Oklahoma admits that it cannot meet 40 C.F.R. § 239.9(b)(1) because it "has no statutory or regulatory process for public notice in the event that a civil enforcement action is settled in District Court." Application at 9. Tellingly, Oklahoma never even argued that it meets 40 C.F.R. § 239.9(a)'s requirement that a state provide intervention as of right in civil enforcement actions. Although EPA cites to a provision of the Oklahoma code providing intervention as of right in certain situations, Oklahoma never brought that up in its application, much less provided examples of that provision being relied on to allow intervention as of right in civil enforcement proceedings. Oklahoma has, in contrast, clearly demonstrated its intent to provide a right to intervene in similar contexts, such as in 27A Okla. Stat., § 2-6-206(B), regarding discharge permits. That provision states:

> Any person having any interest connected with the geographic area or waters or water system affected, including but not limited to any aesthetic, recreational,

[76] In the State CCR Guidance, EPA states: "Using the existing regulations and the criteria used to approve Municipal Solid Waste Programs as a model, EPA believes that a State seeking approval should demonstrate that intervention in the State civil enforcement process is possible by providing either: (a) Authority that allows intervention, as a right, in any civil action to obtain remedies specified in Q & A (6) by any citizen having an interest that is or may be adversely affected; or, (b) Assurance by the appropriate State agency that: (1) It will provide notice and opportunity for public involvement in all proposed settlements of civil enforcement actions (except where immediate action is necessary to adequately protect human health and the environment); and, (2) It will investigate and provide responses to citizen complaints about violations; and, (3) It will not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation." State CCR Guidance at 2-5.

> health, environmental, pecuniary or property interest, which interest is or may be adversely affected, shall have the right to intervene as a party in any administrative proceeding before the Department, or in any civil proceeding, relating to violations of the Oklahoma Pollutant Discharge Elimination System Act or rules, permits or orders issued hereunder.

Unless and until Oklahoma is willing to provide similar, explicit statutory language ensuring intervention as of right in civil enforcement actions pertaining to its CCR program, EPA should find that it fails to meet its burden to ensure citizen participation in enforcement, and deny Oklahoma's Application. *See Nat. Res. Def. Council, Inc.*, 859 F.2d at 178; *Citizens for a Better Env't*, 596 F.2d at 726; *Cf. Paper, Allied-Industrial, Chem. and Energy Workers Int'l Union ("PACE") v. Continental Carbon Co*., No. CIV 02-1677 R, 2003 WL 24206367, *5 (W.D. Okla. June 23, 2003) (holding that Oklahoma's public participation provisions were comparable to those of the CWA due to intervention as of right provided in 27A Okla. Stat. § 2-6-206(B), and concluding that "if a state law permits intervention as of right by a citizen having an interest which is or may be adversely affected, the minimum standard for public participation in the enforcement of any program established by a state under the CWA is met").

d. Oklahoma's CCR Program Does Not Ensure Public Participation in Modifications to State Programs.

Contrary to RCRA § 7004(b)(1) and inconsistent with 40 C.F.R. Parts 239 and 256, Oklahoma's CCR program does not ensure public participation in the modification of the state's CCR program. 40 C.F.R. § 239.12(d) directs states to notify EPA "of all permit program modifications," while 40 C.F.R. § 239.12(g) provides that, for most "revised [state] applications,"[77] and "all amended applications in the case of partially approved programs," public participation is required. 40 C.F.R. Part 256, in turn, provides that a state plan "shall contain procedures for revision," and "shall be revised by the State, after *notice and public hearings*, when" EPA or the State determines that the existing state place is inadequate, inconsistent with 40 C.F.R. Part 256, or otherwise requires modification. 40 C.F.R. § 256.03(d) (emphasis added).

Neither Oklahoma's CCR regulations nor its Application contain any "procedures for revision," as called for by 40 C.F.R. § 256.03(d), nor provide any information whatsoever about what procedures DEQ will employ if and when the state modifies its CCR program. This gaping hole leaves many key questions unanswered. Will Oklahoma notify EPA of all permit program modifications, as called for by 40 C.F.R. Part 239? Are there any types of modifications to the state program that Oklahoma proposes not to submit to EPA for approval? If so, what are they? How soon does Oklahoma propose to notify EPA in the instance of a change to its state CCR program? In general, what procedures will be used for modification of the state program, and what public participation opportunities will be offered? Without clarity as to the procedures for when and whether modifications to the state program would be submitted to EPA for approval, or other clear provisions affording public participation in such modifications, Oklahomans are

[77] Only modified state programs that "incorporate permit programs for additional classifications of Subtitle D regulated facilities" may not require public participation. *See* 40 C.F.R. § 239.12(g).

left wondering if and when they will be provided the required opportunity to weigh in on the operations of CCR units that have longstanding, harmful impacts to health and environment.

This concern is underscored by the fact that EPA is already in the process of proposing revisions to the federal CCR rule. As noted above, the WIIN Act requires state CCR programs to be "as protective as" any revised CCR Rule and directs EPA to withdraw approval of a state's CCR program if it fails to meet that standard. 42 U.S.C. §§ 6945(D)(i)(II), (D)(ii)(I), and (E). Because EPA is now proposing to revise the federal CCR rule, it is foreseeable that Oklahoma may decide to modify its CCR program in response to those revisions. Without procedures in place for public participation if and when that likely modification to Oklahoma's CCR program takes place, Oklahomans may be left without adequate opportunity for input into changes into that plan, with serious implications for their health, safety and environment.

Oklahoma's failure to clearly set out the procedures for modification of its CCR program and the public participation opportunities to be afforded with any such modification renders the state program inconsistent with 40 C.F.R. Parts 239 and 256 and RCRA § 7004(b)(1). Accordingly, EPA must reject Oklahoma's Application.

e. Oklahoma's CCR Program Fails to Provide Public Participation Opportunities "At Least As Protective As" Those in the Federal CCR Rule.

i. <u>Oklahoma's CCR Program does not ensure that "interested and affected parties" are notified of a public meeting on the assessment of corrective measures at polluting CCR units.</u>

Oklahoma's CCR program does not ensure that all "interested and affected parties" will be notified of a public meeting on the assessment of corrective measures at polluting CCR units, and therefore is not "at least as protective as" the federal CCR rule. When groundwater pollution has been found at a CCR unit, the federal CCR rule requires the owner/operator of such unit to assess corrective measures and to "discuss the results of the corrective measures assessment at least 30 days prior to the selection of remedy, in a public meeting with interested and affected parties." 40 C.F.R. § 257.96(e). Oklahoma added notice requirements to its state provisions concerning this public meeting, directing the owner or operator to notify, via certified mail, "all persons who own the land or minerals or who reside on the land that directly overlies any part of the plume of contamination and within one year time of travel if contaminants have migrated off-site," and "boards of County Commissioners, incorporated municipalities, rural water districts and conservation districts within a three-mile radius of the facility." OAC 252:517-9-7(e). Oklahoma also mandates that "[l]egal notice of the public meeting shall be published at least 10 calendar days prior to the date of the meeting in accordance with forms and instructions provided by the DEQ," *id*., but provides no further clarity as to what "instructions" or "forms" DEQ may provide for publication of such notice.

Oklahoma's requirements fail to ensure that all "interested and affected" parties receive notice of the meeting and thus have the opportunity to participate in it. Numerous community members and residents who do not live on land "directly overl[ying]" the plume, or where the plume is predicted to travel within one year, may be interested or affected by pollution from the

CCR unit. For example, drinking water wells or surface water intakes may be located just further than where the plume is predicted to travel within one year; private or community water wells may draw from an aquifer that intersects with the plume. Residents who drink such water would potentially be "interested or affected" by the pollution from the CCR unit but, under Oklahoma's program, would not receive direct notice of the meeting. Nor is it clear that notice would be published in news outlets local to such residents and communities, since Oklahoma's CCR program does not specify where publication of such notice would be required. Failing to notify these "interested and affected" parties could result in a corrective measures assessment that does not take into account important water or geological features, local uses, or other important considerations that could affect the success of measures taken to abate pollution. This failure renders Oklahoma's CCR program not "at least as protective as" the federal CCR rule; the state's application must, therefore, be denied.

ii. Oklahoma's CCR Program Provides Insufficient Notification to Tribes.

Oklahoma's CCR program is not "at least as protective as" the federal CCR rule because it fails to incorporate 40 C.F.R. § 257.106(b). That provision requires notification to tribes concerning the availability of a variety of compliance demonstration documents – including analyses showing compliance with location restrictions and design restrictions, among others – when a CCR unit is located in part on Tribal land. *See* 40 C.F.R. § 257.106(b), OAC 252:517-19-2. EPA pointed out this deficiency and asked Oklahoma to clarify. Oklahoma responded that if a CCR unit were located in part on Tribal land, it would aim to "work cooperatively with" EPA to issue a joint permit for that CCR unit. *See* DEQ, CCR Permit Program Application, Response to EPA request for Clarification, dated Oct. 18, 2017, Docket No. EPA-HQ-OLEM-2017-0613-0004, at 6. Oklahoma did not offer to modify, nor did it modify, its CCR program to require that notification to tribes be provided in that circumstance.

Although Oklahoma represents that there are currently no CCR units located partially in Oklahoma and partially in Tribal territory, its program covers new CCR units as well as existing ones and a CCR unit might in the future be built in such a location. Failing to require CCR units located partially in Tribal territory to notify Tribal governments of compliance demonstration documents may result in less notice to Native Americans of these critical documents, which, in turn, decreases the likelihood of citizen enforcement if those compliance assessments are deficient. By omitting this requirement, Oklahoma is giving polluters an opportunity to slip by unnoticed when and if they soil Oklahoma's and Tribal waters – which, as discussed above, is exactly what industry sought in asking DEQ to adopt the state's CCR program. This must not be tolerated. A program that limits opportunities for Tribal residents residing within the state's borders to ensure that CCR requirements are fully complied with is not "at least as protective as" the federal CCR rule and may not be approved under the WIIN Act.

VI. EPA Must Not Approve Oklahoma's CCR Program Unless and Until It Adopts Guidelines for Adequate Public Participation in State CCR Programs and Provides the Public with Adequate Opportunity for Meaningful Review and Comment.

a. EPA Must Not Approve Oklahoma's CCR Program Unless and Until It Adopts Guidelines for Public Participation in State CCR Programs Pursuant to RCRA Section 7004(b).

EPA may not proceed with final approval of Oklahoma's CCR program – and should not have tentatively approved the state's CCR program – unless and until it promulgates formal guidelines specifying the public participation opportunities that states must afford in order for EPA to approve a state CCR program. As discussed above, RCRA § 7004(b)(1) provides that:

> Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, *shall develop and publish minimum guidelines for public participation* in such processes.

RCRA § 7004(b)(1), 42 U.S.C. § 6974(b)(1) (emphasis added). This provision sets forth a clear Congressional directive to EPA to promulgate regulations containing minimum guidelines for public participation in any RCRA program, which includes state CCR programs. *See, e.g., City of Dover v. U.S. E.P.A.*, 956 F.Supp.2d 272 (D.D.C. 2013) (holding that 33 U.S.C. § 1251(e)[78] establishes a non-discretionary duty for EPA to promulgate regulations setting forth public participation guidelines); *Citizens for a Better Env't,* 596 F.2d at 722 (holding that 33 U.S.C. § 1251(e) establishes a non-discretionary duty for EPA to promulgate regulations setting forth public participation guidelines in state NPDES programs); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 116 (1977) (holding that a statute requiring an agency to "develop and publish" guidelines directs the agency to promulgate those guidelines).

The fact that EPA has promulgated guidelines setting forth public minimum public participation requirements for other RCRA programs does not satisfy RCRA § 7004(b)(1). *See Citizens for a Better Env't,* 596 F.2d at 722-23 (holding that EPA's prior adoption of public participation regulations for NPDES permits, but not for state NPDES program enforcement, did not satisfy 33 U.S.C.A. § 1251(e)). Aspects of state CCR programs for which EPA must promulgate public participation guidelines include, but are not limited to, permitting; post-permitting, including modification of the state program; and enforcement. *See id.*; *Nat. Res. Def. Council,* 859 F.2d at 178; *Waterkeeper Alliance, Inc.*, 399 F.3d at 503; *Envtl. Def. Center, Inc.*, 344 F.3d at 855; *Sierra Club Mackinac Chapter,* 277 Mich.App. at 533-34; *see also* EPA, "Final

[78] 33 U.S.C. § 1251(e) is nearly identical to 42 U.S.C. § 6974(b)(1). It states:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

Rule: Subtitle D Regulated Facilities; State Permit Program Determination of Adequacy; State Implementation Rule," 63 Fed. Reg. 57,026, 57,034 (Oct. 23, 1998) (asserting that, by requiring approved states to have public participation procedures for permit issuance and post-permit action [including modification of state programs] and to provide for public intervention in civil enforcement proceedings," EPA "encourage[d] public participation as prescribed under RCRA section 7004(b).").

Moreover, it is not enough to promulgate minimum public participation guidelines after approving a state program. That puts the cart before the horse, rendering judicial review of EPA's approval of state programs infeasible. As the Seventh Circuit explains in *Citizens for a Better Environment*:

> Congress did not intend reviewing courts to make ad hoc determinations about the adequacy of the citizen participation components of state programs without the benefit of regulations duly promulgated by the EPA. The only way to prevent such unguided judicial judgments is to require the EPA to… issu[e] public participation regulations prior to the ratification of a state NPDES program.

Id. at 724.

Here, EPA has not promulgated any public participation guidelines that clearly apply to its approval of state CCR programs. EPA did publish its "Interim-Final" State CCR Guidance in August 2017; however, that document purports to be mere interpretive guidance, as opposed to enforceable regulation. State CCR Guidance at ii ("The information and procedures set forth here are intended as a technical resource to States…. This Guidance does not constitute rulemaking by the Agency, and cannot be relied on to create a substantive or procedural right enforceable by any party in litigation with the United States.").

Even if EPA were to change its mind and claim that the State CCR Guidance does set out enforceable requirements for approval of state CCR programs, the State CCR Guidance does not meet the requirements for rulemaking under the APA. Specifically, the process EPA followed in publishing the State CCR Guidance does not meet APA notice-and-comment requirements for agency rulemaking. EPA initially offered a 30-day comment period on the State CCR Guidance, subsequently agreed to a 30-day extension, and then reneged on that promise just a few hours before the comment deadline.[79] In doing so, EPA failed to provide the meaningful opportunity for comments the APA mandates and therefore does not meet its requirements. *See Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) (explaining that the APA requires agencies to provide "a reasonable opportunity to participate in the rulemaking process" and therefore notice of rulemaking that must "give adequate time for comments"); *NRDC v. Thomas*, 838 F.2d 1224, 1243 (D.C.Cir.1988) (finding rulemaking barely acceptable under the APA when EPA provided notice that it had changed its position just two weeks before the final rule, "severely press[ing]" commenters, who had "a limited opportunity" to submit comments on that changed position). Moreover, EPA never responded to significant comments on the State

[79] *See* Letter to EPA Administrator Scott Pruitt from Lisa Evans, Earthjustice, Sept. 14, 2017, attached hereto as Exhibit 5.

CCR Guidance, as required by the APA. *See, e.g., Action on Smoking & Health v. CAB,* 699 F.2d 1209, 1216 (D.C.Cir.1983).

Because EPA has not, as required by RCRA § 7004(b)(1), "develop[ed] and publish[ed] minimum guidelines for public participation" in state CCR programs prior to its evaluation and tentative approval of Oklahoma's Application, it must halt the process, deny Oklahoma's Application, and immediately propose regulations setting forth public participation requirements for state CCR programs before approving Oklahoma's – or any other state's – CCR program.

b. EPA Should Not Approve Oklahoma's CCR Program Because It Provided the Public Inadequate Opportunity for Meaningful Review and Comment on Its Proposal to Approve Oklahoma's Application.

The opportunities that EPA has provided for public participation in its proposed approval of Oklahoma's Application fall short of those called for in EPA's own regulations codified at 40 C.F.R. Parts 239 and 25.[80]

First, public notice and scheduling of the public hearing on EPA's proposal to approve Oklahoma's Application do not pass muster. Pursuant to 40 C.F.R. § 25.5, public hearings "must be held at times and places which, to the maximum extent feasible, facilitate attendance by the public," and "use of evening and weekend hearings[], should be considered." *Id*. Here, in contrast, EPA provided only a single public hearing – held on a weekday (Tuesday, Feb. 13) beginning at 9am.

Moreover, EPA provided far less than the 45-day advanced notice of public hearings called for in 40 C.F.R. Part 239 and 40 C.F.R. § 25.5(b). Part 239 regulations provide that:

> After receipt and review of a complete application, the [EPA] will make a tentative determination on the adequacy of the state program. [EPA] shall publish the tentative determination on the adequacy of the state program in the FEDERAL REGISTER. Notice of the tentative determination must … [i]ndicate that a public hearing will be held by EPA if sufficient public interest is expressed during the comment period …. If held, the public hearing will be scheduled *at least 45 days from public notice of such hearing*.

40 C.F.R. § 239.10 (emphasis added). 40 C.F.R. § 25.5(b) likewise provides that notice of a public hearing is to be published 45 days prior to the hearing.

EPA did not provide that important advanced notice here. The Federal Register notice containing EPA's proposal to approve Oklahoma's Application, which stated that a public hearing, if any were held, would be on February 13, 2018, was published on January 16, 2018 – just 28 days before the hearing. Even the pre-publication version of the Federal Register notice was not provided adequately in advance; that pre-publication version was posted on EPA's coal

[80] As discussed in *supra* note 65, the regulations set out at 40 C.F.R. Parts 25 and 239 do not apply to EPA's approval of state CCR programs. If they did apply, Oklahoma's CCR program would fail to meet their mandates, as explained herein.

ash website on approximately January 9, 2018 – just 35 days prior to the public hearing. And EPA confirmed that the hearing would take place just one week before the hearing date, leaving the public scrambling to finalize plans to attend or, due to the short notice, unable to do so.

Finally, even with a limited extension of the comment deadline, EPA provided a comment period of just 62 days, an inadequate timeframe for regulations with this level of technical complexity, import, and impact on public health and the environment.

EPA cannot justify failing to act according to public participation regulatory provisions in proposing to approve the very first state CCR program, in a state with demonstrated damage from coal ash and a lot to lose if – as is the case – Oklahoma's program fails to meet statutory and regulatory standards for protection of health and the environment. Before EPA makes a final decision on whether to approve or deny Oklahoma's Application, EPA must promulgate regulations specifying the public participation opportunities required both for approval of, and that must in included in, state CCR programs, or at absolute minimum comply with the regulations it has already adopted at 40 C.F.R Parts 239 and 25.

VII. Conclusion

Wherefore, for all the reasons discussed herein, EPA should deny Oklahoma's Application.

Respectfully submitted,

Jennifer Cassel
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Larissa Liebmann
Waterkeeper Alliance, Inc.
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cc: David Cates, Oklahoma Department of Environmental Quality

CIVIL COVER SHEET

JS-44 (Rev. 6/17 DC)

I. (a) PLAINTIFFS

Waterkeeper Alliance, Inc., LEAD Agency, Inc., and Sierra Club

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 88888
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, in his official capacity, and U.S. ENVIRONMENTAL PROTECTION AGENCY

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Jennifer L. Cassel (D.C. Bar No. IL0025)
Earthjustice
1101 Lake Street, Suite 308
Oak Park, IL 60301
215-717-4525

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ○ 3 Federal Question (U.S. Government Not a Party)
- ◉ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	● 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ A. *Antitrust*

- ☐ 410 Antitrust

○ B. *Personal Injury/ Malpractice*

- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

◉ C. *Administrative Agency Review*

- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☒ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ D. *Temporary Restraining Order/Preliminary Injunction*

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ E. *General Civil (Other)* OR **○ F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 27 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

G. *Habeas Corpus/ 2255*	H. *Employment Discrimination*	I. *FOIA/Privacy Act*	J. *Student Loan*
☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	☐ 152 Recovery of Defaulted Student Loan (excluding veterans)

K. *Labor/ERISA (non-employment)*	L. *Other Civil Rights (non-employment)*	M. *Contract*	N. *Three-Judge Court*
☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

◉ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
42 U.S.C. § 6972(a)(2), Failure of agency to fulfill a nondiscretionary duty; and 5 U.S.C. §§ 701-706, Review of unlawful agency action.

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form

DATE: 09-26-2018 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Jennifer L. Cassel

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Waterkeeper Alliance, Inc., LEAD Agency, Inc., and Sierra Club

Plaintiff(s)

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY

Defendant(s)

Civil Action No. 1:18-cv-2230

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Andrew Wheeler, Acting Administrator of the U.S. Environmental Protection Agency
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jennifer L. Cassel (DC Bar No. IL0025)
Earthjustice
1101 Lake Street, Suite 308
Oak Park, IL 60301
215-717-4525

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Waterkeeper Alliance, Inc., LEAD Agency, Inc., and Sierra Club

Plaintiff(s)

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY

Defendant(s)

Civil Action No. 1:18-cv-2230

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Correspondence Control Unit
Office of General Counsel (2310A)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Jennifer L. Cassel (DC Bar No. IL0025)
Earthjustice
1101 Lake Street, Suite 308
Oak Park, IL 60301
215-717-4525

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Waterkeeper Alliance, Inc., LEAD Agency, Inc., and Sierra Club

Plaintiff(s)

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY

Defendant(s)

Civil Action No. 1:18-cv-2230

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Jeff Sessions
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Jennifer L. Cassel (DC Bar No. IL0025)
Earthjustice
1101 Lake Street, Suite 308
Oak Park, IL 60301
215-717-4525

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

Waterkeeper Alliance, Inc., LEAD Agency, Inc., and Sierra Club

Plaintiff(s)

v.

ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY

Defendant(s)

Civil Action No. 1:18-cv-2230

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Jessie K. Liu
United States Attorney for the District of Columbia
c/o Civil Process Clerk
United States Attorney's Office
555 4th Street, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Jennifer L. Cassel (DC Bar No. IL0025)
Earthjustice
1101 Lake Street, Suite 308
Oak Park, IL 60301
215-717-4525

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk