

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Louisiana: Approval of State Coal Combustion
Residuals Permit Program

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)

COMMENTS OF EARTHJUSTICE, SIERRA CLUB, AND ALLIANCE FOR AFFORDABLE
ENERGY

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I. INTRODUCTION

The United States Environmental Protection Agency’s (“EPA” or “the Agency”) proposed approval of Louisiana’s coal ash permitting program (“Louisiana program” or “program”) would have direct and long-term effects on the health of Louisiana residents and the water resources they depend on for drinking, agriculture, recreation, and more. Coal combustion residuals (“CCR” or “coal ash”) are the toxic waste left after burning coal. Coal ash contains arsenic, chromium, lead, lithium, radium, and other heavy metals, which have been linked to numerous types of cancer, heart and thyroid disease, respiratory illness, reproductive failure, and neurological harm.

Despite existing oversight by Louisiana’s Department of Environmental Quality (“LDEQ”), all of Louisiana’s coal-fired power plants are contaminating the state’s groundwater with hazardous chemicals, and have been doing so for years, according to the industry’s own data. This pollution impacts the many Louisiana residents who rely on groundwater wells for drinking water, and those who fish, farm, and recreate near the state’s coal ash dumps. Unless this contamination is stopped and cleaned up correctly, human health and the environment will continue to be harmed over the long term. Comprehensive and effective regulation of coal ash in Louisiana is therefore paramount. EPA should not—and cannot, under federal law—delegate its authority over coal ash regulation to Louisiana unless the record demonstrates that Louisiana is implementing, and will in the future implement, a coal ash program at least as protective as federal rules require.

LDEQ does not run such a program. CCR landfills and CCR surface impoundments in the state have been historically regulated under solid waste regulations that LDEQ asserts are modeled after the Resource Conservation and Recovery Act’s (“RCRA”) Subtitle D Regulations. Louisiana now seeks approval of the CCR permitting program that was promulgated in 2024 to reflect the federal CCR requirements. However, as detailed in these comments from Earthjustice, Sierra Club, and Alliance for Affordable Energy (“Commenters”), LDEQ has allowed and is continuing to allow every coal-fired power plant in the state to flagrantly violate the analogous federal and state coal ash standards that are critical to public safety and resource protection.

In its proposed partial approval of Louisiana’s program (“Proposed Approval”),¹ EPA ignores the robust, clear evidence of rampant noncompliance at Louisiana’s coal ash dumps that has persisted for many years under the state’s watch. That evidence includes *EPA’s own findings* that multiple sites have failed to comply with critical safeguards in the federal requirements. Additional evidence from the owners and operators of Louisiana’s coal ash dumps makes clear this problem is widespread. EPA’s sudden attempt under the Trump administration to ignore this glaring noncompliance is unlawful; EPA must consider this evidence in its final decision.

It would also be unlawful for EPA to approve Louisiana’s program because it is based on regulations that are plainly weaker than the federal coal ash rules. Congress made clear that EPA cannot approve a state permitting program unless it is “at least as protective” as the federal rules, and Louisiana’s program fails to satisfy that critical requirement. In addition, the state program’s

¹ Louisiana: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 34189 (June 5, 2026) (“Louisiana Proposed Approval”).

significant barriers to public participation and enforcement violate fundamental mandates of RCRA.

EPA’s decision to approve Louisiana’s program is likely to cause irreparable harm. EPA rarely revisits state program delegations. In fact, RCRA requires EPA to review state CCR programs only once every twelve years.² In addition, Commenters are aware of no instances in which EPA has withdrawn approval of a state permitting program under RCRA. Approval of the Louisiana program will also shield LDEQ from federal enforcement and oversight while it continues to act in dereliction of its duty to clean up and prevent coal ash pollution and protect public health and the state’s water resources.

Therefore, EPA must carefully and closely evaluate Louisiana’s program *now* and get this decision right the first time—by denying Louisiana’s application. The health, wellbeing, and environment of Louisiana residents, including Commenters’ members, depends on it.

II. FACTUAL BACKGROUND

Coal ash—the toxic waste left after burning coal for electricity—is one of the largest industrial waste streams in the United States. It is a mix of hazardous pollutants, metals, carcinogens, and neurotoxins—including arsenic, boron, cobalt, chromium, lead, mercury, radium, selenium, and thallium—that cause a wide range of harms to human health and the environment. The coal industry has contaminated aquifers, streams, and lakes at hundreds of sites across the country with these hazardous pollutants.

According to industry’s own data, approximately twenty-five million cubic yards of coal ash are stored at the nine coal ash dumps in Louisiana that have been regulated since 2015 under EPA’s first CCR regulations (“2015 CCR Rule”).³ These nine dumps are located at four coal plants—Big Cajun II, Brame Energy Center, Dolet Hills, and R S Nelson—and include three coal ash landfills and six coal ash surface impoundments.⁴ None of the six coal ash impoundments have a protective liner to prevent leaks of toxic chemicals to groundwater.

In addition, at least ten older coal ash dumps are located at these same four coal plants. These older dumps are regulated for the first time under EPA’s 2024 CCR regulations (“2024 Legacy Rule”).⁵ The amount of coal ash sitting in these older dump sites is currently unknown because their owners and operators have yet to report this information.

² 42 U.S.C. § 6945(d)(1)(D)(i)(I).

³ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21302 (Apr. 17, 2015) (“2015 CCR Rule”).

⁴ Earthjustice, *Toxic Coal Ash in Louisiana: Addressing Coal Plants’ Hazardous Legacy* (last updated Sept. 4, 2025), <https://earthjustice.org/feature/coal-ash-states/louisiana>.

⁵ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38950 (May 8, 2024) (“2024 Legacy Rule”).

Approximately 11,000 people live within three miles of these four plants with coal ash units.⁶ Dolet Hills has the smallest three-mile population with only eighty people, while R S Nelson has the largest with nearly 9,000 people. All four plants are within three miles of private groundwater wells that are used domestically, for public water systems, or for irrigation. R S Nelson has the most private groundwater wells, with more than 100 wells within three miles. Dolet Hills has six domestic wells within three miles; Big Cajun II has four domestic wells, three public drinking water wells, and three wells used for irrigation within three miles; and Brame Energy Center has seventeen domestic and one public drinking water well within three miles.⁷ Overall, more than sixty-one percent of the state's population rely on drinking water from a groundwater source.⁸ Because no government entity regularly tests private wells for pollution, the people who rely on private wells near coal ash dumps likely would not know if they were being poisoned by coal ash contaminants unless they tested the water themselves.

Louisiana's coal ash dumps have been contaminating groundwater for decades. All facilities show evidence of groundwater contamination from the ash.⁹ Despite this, not one of the four power plants covered by the 2015 CCR Rule has begun the cleanup process, as further discussed in Section V.B. As a result, groundwater monitoring continues to reveal contaminant levels exceeding groundwater protection standards at all four facilities for numerous pollutants, including arsenic, boron, cobalt, lead, lithium, radium, sulfate, and thallium.¹⁰ Units at these facilities also violate the 2015 CCR Rule because they are planning to close in place with ash in contact with groundwater and have insufficient groundwater monitoring networks.¹¹

Coal ash poses a threat to Louisiana's groundwater and the populations that rely on those water resources, now and in the future. These communities deserve a coal ash regulatory program that protects their health and the environment and prevents future harm through safe operation, cleanup, and closure of leaking toxic coal ash dump sites.

⁶ 2018–2022 American Community Survey data as evaluated via a preserved version of EJScreen, available at <https://pedp-ejscreen.azurewebsites.net/>, where Community Reports were generated with a three-mile radius for all four facilities.

⁷ Groundwater well data derived from Chung-Yi Lin et al., *A Database of Groundwater Wells in the United States*, HydroShare (Mar. 25, 2024), <https://www.hydroshare.org/resource/8b02895f02c14dd1a749bcc5584a5c55/>.

⁸ C.G. Stuart, Darwin Knochenmus & Benton D. McGee, *Guide to Louisiana's Ground-Water Resources: U.S. Geological Survey Water-Resources Investigations Report 94-4085*, U.S. Dep't of the Interior (1994), <https://doi.org/10.3133/wri944085>.

⁹ Earthjustice & EIP, *Poisonous Coverup: The Widespread Failure of the Power Industry to Clean Up Coal Ash Dumps* (Nov. 3, 2022) at tbl. A4, https://earthjustice.org/wp-content/uploads/coal-ash-report-poisonous-coverup_earthjustice.pdf ("Poisonous Coverup").

¹⁰ *Id.*

¹¹ See Section V.B.

III. OVERVIEW OF FEDERAL COAL ASH REGULATIONS

A. Federal CCR Rulemakings

RCRA obligates and authorizes EPA to regulate CCR units. Pursuant to that authority, EPA promulgated the first national CCR regulations in 2015 and additional regulations in 2018, 2020, and 2024, collectively codified at 40 C.F.R. Part 257 (“Federal CCR Rules”).¹²

EPA promulgated its 2015 CCR Rule in response to overwhelming evidence that unsafe coal ash disposal poses serious risks to human health and the environment.¹³ In support of its rule, EPA pointed to the toxic and hazardous contaminants contained in coal ash that are associated with serious health and environmental effects, including arsenic, cadmium, chromium, lead, mercury, selenium, and thallium.¹⁴ EPA documented “cancer in the skin, liver, bladder and lungs,” “neurological and psychiatric effects,” “cardiovascular effects,” “damage to blood vessels,” and “anemia” among the risks to humans associated with exposure to coal ash contaminants.¹⁵ EPA further found that the improper management of coal ash across the country led to groundwater contamination, air pollution, and catastrophic spills of ash into rivers, lakes, streams, and neighboring communities when dams or other structural components of landfills and impoundments failed.¹⁶

For certain coal ash landfills and surface impoundments, the 2015 CCR Rule established minimum criteria, including location restrictions, design requirements, operating requirements, and closure and post-closure care requirements.¹⁷ Key protections include semi-annual groundwater monitoring requirements that trigger corrective action obligations at lined impoundments and closure obligations at unlined ones if groundwater protection standards are exceeded; location restrictions to keep coal ash units out of unstable areas, wetlands, fault areas, seismic zones, and the groundwater table; structural stability criteria for impoundments; and

¹² See generally 2015 CCR Rule, 80 Fed. Reg. 21302; Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36435 (Jul. 30, 2018) (“Phase One, Part One Rule”); Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure, 85 Fed. Reg. 53516, (Aug. 28, 2020) (“Part A Rule”); Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments, 85 Fed. Reg. 72506 (Nov. 12, 2020) (“Part B Rule”); 2024 Legacy Rule, 89 Fed. Reg. 38950.

¹³ See, e.g., 2015 CCR Rule, 80 Fed. Reg. at 21302 (“The available information demonstrates that the risks posed to human health and the environment by certain CCR management units warrant regulatory controls.”), 21320 (“[T]he record is clear that current management of these wastes can present, and in many cases has presented, significant risks to human health and the environment.”), 21451 (“EPA concludes that current management practice of placing CCR waste in surface impoundments and landfills poses risks to human health and the environment . . .”).

¹⁴ *Id.* at 21311, 21449–51.

¹⁵ *Id.* at 21451.

¹⁶ *Id.* at 21449, 21456–57.

¹⁷ See generally 40 C.F.R. Part 257.

comprehensive closure and post-closure requirements.¹⁸ Any unit that fails to comply with these requirements is deemed an “open dump” and subject to closure.¹⁹

Multiple parties challenged the 2015 CCR Rule in court, including industry actors, who asserted that the rule went too far; and environmental and public health organizations, who asserted that the rule was deficient in certain ways. These challenges were consolidated, and in its 2018 decision *Utility Solid Waste Activities Group v. EPA* (“USWAG”), the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit”) sided with environmental challengers in holding that under RCRA’s Section 4004(a) protectiveness standard:

- Delaying closure of unlined coal ash ponds until groundwater contamination was detected was unacceptable given the high probability of such contamination;
- Excluding inactive coal ash ponds at inactive power plants—termed “legacy” ponds—from regulation was unlawful given the risks they present; and
- Allowing inadequately lined ash ponds was unacceptable.²⁰

The D.C. Circuit instructed EPA to strengthen the 2015 CCR Rule by requiring closure of all unlined impoundments, regulating legacy ponds, and requiring inadequately lined CCR surface impoundments to close.²¹

After an extended delay, EPA took action to regulate legacy coal ash ponds in 2024.²² In the 2024 Legacy Rule, EPA eliminated the regulatory exemption for legacy ponds and imposed regulatory safeguards on inactive landfills.²³ In so doing, EPA noted that the risks from legacy ponds and inactive landfills are “at least as significant” as the substantial public health and environmental risks posed by unlined surface impoundments and landfills already regulated by the 2015 CCR Rule.²⁴

In 2024, in response to several industry challenges claiming that EPA had engaged in improper rulemaking, the D.C. Circuit affirmed several fundamental aspects of the 2015 CCR Rule. First, it held that the rule, “standing on its own, makes clear that operators [of coal ash units] cannot close their surface impoundments with groundwater leaching in and out of the unit and mixing with the coal residuals.”²⁵ Second, the court explained that requiring operators of coal ash units “to discuss ‘the engineering measures taken’ before installation of the cover system ‘to ensure that the groundwater had been removed from the unit,’ and to describe the steps taken to control water and waste flow in and out of the surface impoundment” is “a straightforward application . . . of the 2015 [CCR] Rule.”²⁶ Third, the court confirmed that the

¹⁸ *Id.*

¹⁹ 40 C.F.R. § 257.1(a); 2015 CCR Rule, 80 Fed. Reg. at 21468.

²⁰ *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 430, 432 (D.C. Cir. 2018) (“USWAG”).

²¹ *Id.* at 429–30, 432.

²² *See generally* 2024 Legacy Rule, 89 Fed. Reg. 38950.

²³ *Id.* at 38950.

²⁴ *Id.* at 38951, 39046.

²⁵ *Elec. Energy, Inc. v. EPA*, 106 F.4th 31, 41 (D.C. Cir. 2024).

²⁶ *Id.*

2015 CCR Rule plainly covers coal ash “settling tanks” as well as coal ash units that stopped receiving ash before October 2015 but continued to contain liquids and ash after that date.²⁷ Finally, the court affirmed EPA’s position that the addition of coal ash to a closing unit is not a “beneficial use” of that ash as defined under the 2015 CCR Rule.²⁸

B. The Water Infrastructure Improvements for the Nation Act

EPA established the 2015 CCR Rule to be “self-implementing” and largely enforced through citizen suits.²⁹ At the time of the rule’s promulgation, RCRA Subtitle D neither authorized EPA to directly implement or enforce minimum national criteria for solid waste disposal facilities, nor required states to adopt, implement, or enforce EPA’s minimum criteria.

In 2016, Congress passed the Water Infrastructure Improvements for the Nation Act (“WIIN Act”).³⁰ The WIIN Act “amended RCRA Subtitle D to allow the EPA to approve State permitting programs ‘to operate in lieu of [EPA] regulation of coal combustion residuals units in the State,’ provided those programs are at least as environmentally protective as the existing (or successor) EPA regulations.”³¹ Specifically, the WIIN Act provides:

(A) [] Each State may submit to the Administrator, in such form as the Administrator may establish, 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 that, after approval by the Administrator, will operate in lieu of regulation of coal combustion residuals units in the State by—

(i) application of part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title); or

(ii) implementation by the Administrator of a permit program under paragraph (2)(B).

(B) [] Not later than 180 days after the date on which a State submits the evidence described in subparagraph (A), the Administrator, after public notice and an opportunity for public comment, shall approve, in whole or in part, a permit program or other system of prior approval and conditions submitted under subparagraph (A) if the Administrator determines that the program or other system requires each coal combustion residuals unit located in the State to achieve compliance with—

²⁷ *Id.* at 42.

²⁸ *Id.* at 43.

²⁹ 2015 CCR Rule, 80 Fed. Reg. at 21309, 21311; *see also* 42 U.S.C. § 6972.

³⁰ Pub. L. No. 114-322, 130 Stat. 1628 (2016) (codified at 42 U.S.C. § 6945(d)).

³¹ *USWAG*, 901 F.3d at 426 (quoting 42 U.S.C. § 6945(d)(1)(A)).

(i) the applicable criteria for coal combustion residuals units under part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title); or

(ii) such other State criteria that the Administrator, after consultation with the State, determines to be at least as protective as the criteria described in clause (i).³²

Since the WIIN Act's passage, EPA has approved primacy applications from five states: Oklahoma,³³ Georgia,³⁴ Texas,³⁵ North Dakota,³⁶ and Wyoming;³⁷ and issued proposed approvals to Louisiana, Virginia³⁸ and Alabama.³⁹

IV. APPROVING LOUISIANA'S PROGRAM WOULD VIOLATE THE WIIN ACT AND BE ARBITRARY AND CAPRICIOUS BECAUSE LOUISIANA'S REGULATIONS LACK IMPORTANT ASPECTS OF, AND INCLUDE WEAKER STANDARDS THAN, THE FEDERAL CCR RULES.

EPA cannot grant primacy to Louisiana unless it determines that the state's program is "at least as protective as" the requirements in the Federal CCR Rules.⁴⁰ As part of its determination, EPA proposes to evaluate the Louisiana program concerning "permitting requirements, requirements for compliance monitoring authority, requirements for enforcement authority, and requirements for intervention in civil enforcement proceedings," among other

³² 42 U.S.C. § 6945(d)(1).

³³ *See generally* Oklahoma: Approval of State Coal Combustion Residuals Permit Program, 83 Fed. Reg. 30356 (Jun. 28, 2018).

³⁴ *See generally* Georgia: Approval of State Coal Combustion Residuals Permit Program, 85 Fed. Reg. 1269 (Jan. 10, 2020). In February 2024, EPA sent a letter to Georgia's Environmental Protection Division raising concerns that the state's incorrect interpretation of closure performance standards in the 2015 CCR Rule may mean the state's CCR permitting program is less protective than the Federal CCR Rules. *See generally* Letter from Jeananne M. Gettle, EPA, to Jeffrey Cown, GAEPD, Re: Plant Hammond Ash Pond 3 (Feb. 13, 2024), <https://www.selc.org/wp-content/uploads/2024/07/Letter-to-GAEPD-Plant-Hammond.pdf>.

³⁵ *See generally* Texas: Approval of State Coal Combustion Residuals Permit Program, 86 Fed. Reg. 33892 (June 28, 2021).

³⁶ *See, generally*, North Dakota: Approval of State Coal Combustion Residuals Permit Program, 90 Fed. Reg. 20985 (May 16, 2025).

³⁷ *See generally*, Wyoming: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 9459 (Feb. 26, 2026).

³⁸ *See generally*, Virginia: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 23924 (May 4, 2026).

³⁹ *See, generally*, Alabama: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 43054 (July 14, 2026). EPA initially denied Alabama's primacy application. *See generally* Alabama: Denial of State Coal Combustion Residuals Permit Program, 89 Fed. Reg. 48774 (June 7, 2024) ("Alabama Primacy Denial").

⁴⁰ 42 U.S.C. § 6945(d)(1)(B)(ii); *see also* *USWAG*, 901 F.3d at 426 (explaining that EPA can approve state permitting programs under the WIIN Act "provided those programs are at least as environmentally protective as the existing (or successor) EPA regulations").

program aspects.⁴¹ A review of Louisiana’s program makes clear that it lacks key definitions from, and includes weaker standards than, the Federal CCR Rules and as such EPA should deny it.

A. Louisiana’s Program Lacks And Alters Definitions Found in the Federal CCR Rules That Are Critical to Protecting Human Health and the Environment.

Among the federal regulations that will not be incorporated into Louisiana’s program, according to EPA’s Proposed Approval, are all the amendments made in the 2024 Legacy Rule.⁴² As a result, newly-regulated surface impoundments, landfills, and other CCR Management Units⁴³ in Louisiana will remain subject to EPA oversight. However, the 2024 Legacy Rule includes several amendments that apply to *all* CCR units, including those units for which EPA proposes to grant Louisiana primacy.⁴⁴ Among these is the addition of definitions that clarify the meaning of terms critical to the effectiveness of activities taken pursuant to Federal CCR Rules. EPA’s proposal to approve Louisiana’s program without these new clarifying definitions fails to meet the statutory requirement that state programs be “at least as protective” as the Federal CCR Rules. In addition, EPA is proposing definitions of “aquifer” and “uppermost aquifer” that are different, and potentially less protective, than the federal definitions.⁴⁵

Among the definitions added by the 2024 Legacy Rule, which apply to regulatory safeguards for *all* CCR units, are those for “[i]nfiltration,” “[l]iquids,” and “[c]ontains both CCR and liquids.”⁴⁶ These clarifying definitions are directly responsive to persistent noncompliance issues that EPA has noted at coal ash dumps throughout the country, including in Louisiana.

EPA proposed and ultimately adopted these definitions due to the repeated assertion by industry actors that the terms were significantly more limited than their plain meanings—an assertion that industry has relied on to justify unsafe CCR management practices.⁴⁷ For example, USWAG, an industry trade group, has repeatedly argued that the term “free liquids,” as used in the 2015 CCR Rule, does not include groundwater. Misconstrued in this manner, the requirement that “[f]ree liquids must be eliminated” when closing a surface impoundment with waste in place

⁴¹ See, e.g., Louisiana Proposed Approval, 91 Fed. Reg. at 34193.

⁴² *Id.* at 34199 (referencing 2024 Legacy Rule, 89 Fed. Reg. at 38985).

⁴³ CCR Management Units are defined as “any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit. This includes inactive CCR landfills and CCR units that closed prior to October 19, 2015, but does not include roadbed and associated embankments in which CCR is used unless the facility or a permitting authority determines that the roadbed is causing or contributing to a statistically significant level above the groundwater protection standard established under § 257.95(h).” 40 C.F.R. § 257.53.

⁴⁴ See Louisiana Proposed Approval, 91 Fed. Reg. at 34199 (“In the 2024 Legacy Rule, EPA amended certain terms and provisions that apply to all CCR units.”).

⁴⁵ See LDEQ Narrative Statement for the Louisiana CCR Permit Program Application, Docket ID No. EPA-HQ-OLEM-2025-3324-0002, at 10-12 (Mar. 19, 2026) (“Narrative Statement”).

⁴⁶ 2024 Legacy Rule, 89 Fed. Reg. at 39100; 40 C.F.R. § 257.53.

⁴⁷ See Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31982, 32026 (May 18, 2023).

(40 C.F.R. § 257.102(d)(2)(i)) allows industry to illegally leave waste saturated in and contaminating groundwater in perpetuity.⁴⁸ Similarly, industry actors have asserted that “infiltration,” as used in the Federal CCR Rules, only refers to the downward infiltration of precipitation into a CCR unit, not to the infiltration of groundwater from the sides and below. Relying on this false claim, USWAG has argued that the Rules’ mandate that a CCR unit close in a manner that will “[c]ontrol, minimize, or eliminate . . . post-closure infiltration of liquids” only applies to rainwater and requires no measures to address liquids infiltrating coal ash from any other source.⁴⁹

In addition to making these assertions in various comments to EPA, several utilities and a coal industry trade association went so far as to claim before the D.C. Circuit that EPA had engaged in improper rulemaking by not adhering to industry’s unreasonably narrow and nonsensical construction of these key terms.⁵⁰ And even though the D.C. Circuit agreed with EPA that the 2015 CCR Rule, and not any subsequent EPA action, requires the elimination and preclusion of groundwater from closing surface impoundments,⁵¹ industry actors have continued to push these claims through other avenues. More recently, industry actors involved in the D.C. Circuit case made similar arguments in the Southern District of Ohio. There, the court granted EPA’s motion to dismiss and noted that industry was “flouting common sense” and asserting a reading of the 2015 CCR Rule that “is hopeless as a matter of text and purpose.”⁵² Similarly, USWAG recently requested that EPA Administrator Zeldin take “immediate action” to resolve litigation over the 2024 Legacy Rule and voluntarily rescind its clarifying definitions of “liquids,” “infiltration,” and “contains both CCR and liquids.”⁵³ A letter to Administrator Zeldin from several coal companies makes an identical request.⁵⁴

⁴⁸ See, e.g., USWAG, Comments on Proposed Decision: Proposed Denial of Alternative Closure Deadline for General James M. Gavin Plant, at 2–3, 7, 9–28 (Mar. 25, 2022), <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0590-0054> (“USWAG Comments on Gavin Decision”). USWAG filed identical comments regarding proposed Part A decisions for the Clifty Creek, Spurlock, and Ottumwa plants. See generally USWAG, Comments on Proposed Decision: Proposed Denial of Alternative Closure Deadline for Clifty Creek Power Station (Mar. 25, 2022), <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0587-0044>; USWAG, Comments on Proposed Decision: Conditional Approval of an Alternative Closure Deadline for H.L. Spurlock Power Station (Mar. 25, 2022), <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0595-0026>; and USWAG, Comments on Proposed Decision: Proposed Denial of Alternative Closure Deadline for Ottumwa Generating Station (Mar. 25, 2022), <https://www.regulations.gov/comment/EPA-HQ-OLEM-2021-0593-0031>.

⁴⁹ USWAG Comments on Gavin Decision at 2.

⁵⁰ See *Elec. Energy*, 106 F. 4th at 31.

⁵¹ *Id.* at 40–41.

⁵² *Gavin Power, LLC v. EPA*, No. 2:24-CV-41, 2025 WL 2908716, at *16 (S.D. Ohio Aug. 26, 2025).

⁵³ Letter from Daniel L. Chartier, USWAG Executive Director to Hon. Lee Zeldin, then-Nominee to be U.S. EPA Administrator (Jan. 16, 2025), <https://earthjustice.org/wp-content/uploads/2026/04/uswag-letter-re-ccr-priorities.pdf>.

⁵⁴ See Letter from Jessica Bednarik, Duke Energy et al. to Hon. Lee Zeldin, then-Nominee to be U.S. EPA Administrator (Jan. 15, 2025) (requesting that EPA “[p]rioritize the expeditious approval of State CCR permit programs to operate in place of the federal rule”), <https://cdn.wmnf.org/wp-content/uploads/2025/01/Jan-15-letter-from-power-plant-operators-to-EPA-on-coal-ash.pdf>.

Louisiana’s program incorporates the exact language of the Federal CCR Rules regarding closure and thus incorporates these same terms. The Agency also notes in the Proposed Approval that “[i]t is EPA’s understanding that LDEQ interprets the provisions in LAC 33:VII.Chapter 10 the same as EPA interprets these in 40 CFR part 257, subpart D.”⁵⁵ However, LDEQ’s administration of its coal ash regulations contradicts EPA’s statement. As further discussed below, LDEQ has issued closure permits for several CCR surface impoundments even though their closure and post-closure plans only address infiltration related to precipitation and fail to address the elimination of free liquids prior to closure in place. This is in violation of the 2015 CCR Rule, as the courts have made clear, and demonstrates that Louisiana is not running a permit program that is “at least as protective as” the federal system. Moreover, Louisiana’s failure to include the clarifying definitions for these terms provided in the 2024 Legacy Rule – which are now codified in the Federal CCR Rules – increases the likelihood that this improper interpretation of federal protections will continue.

EPA is also proposing to approve several definitions of new terms in the Louisiana Program as well as definitions that would differ from the Federal CCR Rules’ definitions of the same terms. Two of the altered definitions – aquifer and uppermost aquifer – create ambiguity that leaves the terms vulnerable to intentional misconstruction and renders Louisiana’s program less protective than the federal program. EPA notes the difference between the Louisiana and Federal definitions of both terms in the Agency’s Technical Support Document:

State: Aquifer—a continuous geologic formation, group of formations, or part of a formation that contains enough saturated permeable materials to yield useable quantities of water to wells or springs. For the purposes of these regulations, a useable quantity of water is enough water to yield a groundwater sample within 24 hours after purging a monitoring well.

Federal: Aquifer means a geologic formation, group of formations, or portion of a formation capable of yielding usable quantities of groundwater to wells or springs.⁵⁶

State: Uppermost Aquifer—The geologic formation (excluding the vadose zone) nearest the natural ground surface that is an aquifer, as well as lower (deeper) geologic formations that are aquifers and are hydraulically connected within the facility’s property boundary. An aquifer can yield usable quantities of groundwater and for the purposes of this regulation, an aquifer is defined as being capable of yielding a groundwater sample from a monitoring well within 24 hours without purging a monitoring well dry. The upper limit of the uppermost aquifer is measured at a point nearest to the natural ground surface to which the aquifer rises during the wet season.

Federal: Uppermost Aquifer means the geologic formation nearest the natural ground surface that is an aquifer, as well as, lower aquifers that are hydraulically

⁵⁵ Louisiana Proposed Approval, 91 Fed. Reg. at 34199.

⁵⁶ EPA, Technical Support Document for the Approval of Louisiana’s Coal Combustion Residuals Permit Program, Docket ID No. EPA-HQ-OLEM-2025-3324-0042, at 45 (May 2026) (“TSD”).

interconnected with this aquifer within the facility's property boundary. Upper limit is measured at a point nearest to the natural ground surface to which the aquifer rises during the wet season.⁵⁷

In evaluating the differences, EPA claims that the Louisiana definition of aquifer "is more precise in that it requires an aquifer to have the ability to supply sufficient volumes of water to enable sample collection (for chemical analysis) over a 24-hour period 'without pumping the well dry.'"⁵⁸ As result, EPA finds that the Louisiana definition "is consistent with the federal definition and as protective as the federal CCR regulations in that a more specific description of groundwater yield is provided."⁵⁹ For the term "uppermost aquifer," EPA similarly finds that the Louisiana definition provides "additional clarification" because it accounts for the geographical variations of conditions, including a higher water table, within the state.⁶⁰

However, Louisiana's definitions of these two terms also create ambiguity that could lead to accidental or intentional misconstruction and make the groundwater monitoring provisions of the state regulations less protective than the federal regulations. First, it appears that the definition of "uppermost aquifer" incorporates either a partial definition of "aquifer" or includes a typographical error.⁶¹ Second, it is unclear whether these definitions account for seasonality or whether the additional specificity in the Louisiana definitions may result in aquifers that meet the federal definition but fail to meet the state definition. For example, there may be a situation where a sampling event occurs during a dry season or during a drought and after a well is purged, groundwater samples are unable to be gathered within 24 hours. This could be due to the time of year or a drought rather than whether the aquifer is actually capable of yielding a groundwater sample from a monitoring well. It is for these reasons that the federal definition of aquifer is broader and accounts for seasonality or droughts.

Thus, EPA should either require LDEQ to provide additional information in the Narrative or revise the proposed definitions to ensure they are at least as protective as the federal definitions of "aquifer" and "uppermost aquifer," or require the Louisiana program to adopt the federal definitions.

B. The Louisiana Program's Post-Closure Care Requirements Are Less Protective than the Federal CCR Rules.

The Louisiana program fails to meet the standard prescribed in the WIIN Act because its post-closure care requirements are less protective than those of the Federal CCR Rules. La. Admin. Code tit. 33, § VII-1004.J.1 requires an applicant to "submit documentation in the permit application demonstrating compliance with 40 CFR 257.100-104." 40 CFR 257.104(c)(1) states

⁵⁷ *Id.* at 48.

⁵⁸ *Id.* at 45.

⁵⁹ *Id.*

⁶⁰ *Id.* at 49.

⁶¹ *See* La. Admin. Code tit. 33, § VII-1002 (the definition of aquifer states "[f]or the purposes of these regulations, a usable quantity of water is enough water to yield a groundwater sample within 24 hours *after purging a monitoring well*" while the definition of uppermost aquifer states "for the purposes of this regulation, an aquifer is defined as being capable of yielding a groundwater sample from a monitoring well within 24 hours *without purging a monitoring well dry*.").

that “the owner or operator of the CCR unit must conduct post-closure care for 30 years.” However, La. Admin. Code tit. 33, § VII-1004.A.4 also states:

Each facility processing and/or disposing of CCR subject material to the permitting requirements of this Chapter shall operate under a permit for the active life of the facility and duration of post-closure care, *until such time the department deems closure and post-closure complete and terminates permit coverage*.⁶²

As such, section 1004.A.4 of the state regulations authorizes the Administrator to terminate the permit upon determination that all closure and post-closure activities have been completed. Not only do the Federal CCR Rules prohibit shortening the 30-year post-closure period, but they also provide for a *mandatory indefinite extension of the period* if the owner or operator of the CCR unit is operating under assessment monitoring.⁶³ While Louisiana has incorporated this section by reference, section 1004.A.4 could be interpreted to override this requirement.

Furthermore, the length of the Federal CCR Rules’ mandatory post-closure period is not arbitrary. The 30-year post-closure period is essential for protecting human health and the environment. EPA explained:

By not allowing the post-closure care period to be shortened, EPA better ensures that the final cover system will be properly maintained. In addition, a mandatory 30 year period ensures that if problems do arise with respect to a final cover system, the groundwater monitoring and corrective action provisions of the rule will detect and address any releases from the CCR unit, at least during the post-closure care period.⁶⁴

EPA also noted that a 30-year post-closure care period is necessary particularly for CCR units because the Federal CCR Rules afford owners and operators the flexibility to select alternative final cover systems.⁶⁵ Pursuant to the WIIN Act, if the Louisiana program is different than the Federal CCR Rules, EPA may only approve the State requirements if “the Administrator, after consultation with the State, determines [the State criteria] to be at least as protective as the criteria described in clause (i).”⁶⁶ EPA has made no such determination, nor has it provided any basis for such a determination.

Thus, section 1004.A.4 must be revised to clarify that owner/operators of CCR units must conduct post-closure care until such time the department deems closure and post-closure complete and terminates permit coverage, *but not until the 30-year post-closure period has been completed*.

⁶² La. Admin. Code tit. 33, § VII-1004.A.4 (emphasis added).

⁶³ 42 U.S.C. § 257.104(c)(2).

⁶⁴ 80 Fed. Reg. at 21426.

⁶⁵ *Id.*

⁶⁶ 42 U.S.C. § 6945(d)(1)(B)(ii).

V. APPROVING LOUISIANA’S PROGRAM WOULD VIOLATE THE WIIN ACT AND BE ARBITRARY AND CAPRICIOUS BECAUSE LDEQ HAS AN ONGOING PRACTICE OF COMMITTING AND ALLOWING VIOLATIONS OF THE REGULATIONS THAT ARE THE FOUNDATION OF ITS PRIMACY APPLICATION.

EPA cannot ignore the amply documented pattern of behavior indicating that LDEQ’s program does not require each CCR unit in the state to comply with standards as protective as the Federal CCR Rules. EPA and industry data reveal that LDEQ has a track record of failing to enforce the analogous federal and state standards concerning monitoring, closure, and corrective action at every coal plant in the state. Thus, EPA must deny the program. Approval of the Louisiana program will create a shield to federal enforcement and oversight while LDEQ continues to act in dereliction of its duty to clean up and prevent coal ash pollution and protect public health and the state’s water resources.

A. The WIIN Act Requires EPA to Consider How Louisiana Is Administering Its CCR Regulations.

The WIIN Act enables EPA to approve Louisiana’s program only upon determining that the program “requires each coal combustion residuals unit located in the State *to achieve compliance with*” the Federal CCR Rules or state rules that are “at least as protective.”⁶⁷ This language compels EPA to evaluate Louisiana’s program at the time of its application—including by considering the active permits LDEQ issued pursuant to its coal ash regulations—rather than base its decision upon speculation about how Louisiana might operate its program in the future.⁶⁸ By examining how the state has been implementing the permit program for which it is seeking approval, EPA can determine whether Louisiana is interpreting and applying its state regulations in a manner consistent with and at least as protective as the plain language of the Federal requirements, and thus, administering a program that is consistent with the Federal CCR Rules, as mandated for program approval.

A state’s CCR permits are essential to determining whether a state’s program requires “each” CCR unit to “achieve compliance with” federal requirements or equally protective state requirements.⁶⁹ EPA acknowledged this in its Alabama Primacy Denial. There, EPA explained that it could not make this mandatory determination under the WIIN Act without considering “both a State’s statute and regulations and what the State actually requires individual CCR units to do, such as in permits or orders”⁷⁰ EPA elaborated:

⁶⁷ *Id.* § 6945(d)(1)(B) (emphasis added).

⁶⁸ Alabama Primacy Denial, 89 Fed. Reg. at 48778 (“This direction necessarily includes Agency consideration of the existing record of what the State actually requires individual CCR units to do pursuant to the program that the state has submitted to EPA for approval.”).

⁶⁹ 42 U.S.C. § 6945(d)(1)(B).

⁷⁰ Alabama: Denial of State Coal Combustion Residuals Permit Program, 88 Fed. Reg. 55220, 55226 (Aug. 14, 2023) (“Alabama Proposed Primacy Denial”) (emphasis added); *see also* Alabama Primacy Denial, 89 Fed. Reg. at 48781 (“Section 4005(d)(1) of RCRA directs EPA to determine whether a State program ‘requires each’ CCR unit in the State ‘to achieve compliance’ with either the Federal standards

[I]t would be both unreasonable and arbitrary and capricious to ignore issued permits since they are the best evidence of whether a State program does in fact require each CCR unit in the State to achieve compliance with the Federal CCR regulations or State standards that are at least as protective as the Federal regulations.⁷¹

The WIIN Act's requirement to consider *what the state actually requires individual CCR units to do*—including by evaluating those units' permits—is necessary given the WIIN Act's permit shield provision. As EPA explains in its Proposed Approval:

Once a final CCR permit is issued by an approved State or pursuant to a Federal CCR permit program, [] the terms of the permit apply in lieu of the terms of the Federal CCR regulations and/or requirements in an approved State program, and RCRA section 4005(d)(3) provides a permit shield against direct enforcement of the applicable Federal or State CCR regulations⁷²

In other words, once a permit is issued, a unit owner is bound to the permit's terms, and these determine whether the unit is required “to achieve compliance with” criteria that are “at least as protective as” federal requirements. Permits are therefore essential components of a state program, and EPA must consider them to determine whether the program satisfies the conditions for primacy under the WIIN Act.⁷³

Another critical factor EPA must consider when evaluating a state program is how the governing agency interprets the state's CCR regulations.⁷⁴ For example, understanding how LDEQ interprets the program's closure, groundwater monitoring, and corrective action regulations is critical to evaluating the sufficiency of LDEQ's application and, ultimately, the state program. Here, the Louisiana program incorporates the Federal CCR Rules' closure, groundwater monitoring, and corrective action requirements by reference. Thus, EPA must determine whether LDEQ interprets the Louisiana program's standards to impose the same requirements as the Federal CCR Rules in order to evaluate the sufficiency of LDEQ's application and program.⁷⁵

The Federal CCR regulations authorize two methods for closure of surface impoundments: closure by removal⁷⁶ and closure in place,⁷⁷ the latter of which may be used *only*

or an alternative State program at least as protective as the Federal CCR regulations Given that statutory directive, EPA concludes that it cannot ignore permits that are available prior to approval of a State CCR program, as in this case.” (citation omitted)).

⁷¹ Alabama Primacy Denial, 89 Fed. Reg. at 48781.

⁷² Louisiana Proposed Approval, 91 Fed. Reg. at 34192.

⁷³ 42 U.S.C. § 6945(d)(1)(B).

⁷⁴ Alabama Proposed Primacy Denial, 88 Fed. Reg. at 55226-28.

⁷⁵ *Id.*

⁷⁶ See 40 C.F.R. § 257.102(c).

⁷⁷ See *id.* § 257.102(d).

if the performance standards for closure in place are satisfied at that ash pond.⁷⁸ The performance standards for closure in place require that:

- “Free liquids” be “eliminated” prior to the installation of a cover system;⁷⁹
- The impoundment be closed in a manner that will: “control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere;”⁸⁰ and
- The impoundment be closed in a manner that will “preclude the probability of future impoundment of water, sediment, or slurry.”⁸¹

These standards, taken together, establish that coal ash may **not** remain in contact with groundwater or other liquids after closure. As detailed by the D.C. Circuit in a June 2024 decision, “[t]he 2015 Rule, standing on its own, makes clear that operators cannot close their surface impoundments with groundwater leaching in and out of the unit and mixing with the coal residuals.”⁸² The Court went on to explain, “[a] unit operator closing a surface impoundment with waste saturated feet-deep in groundwater has neither eliminated ‘free liquids’ from the impoundment nor controlled the ‘infiltration of liquids’ into that unit.”⁸³

EPA’s denial of Gavin Power’s request to delay the cease-receipt deadline for a coal ash pond at that Ohio plant echoes the D.C. Circuit’s holdings in *EEI v. EPA* and is instructive here. In that denial, EPA explained that, based on its review of the site, “at least a portion of the closed [CCR surface impoundment] could be sitting in groundwater as much as 64 feet deep, which would mean that as much as 40% of the CCR in the unit would still be saturated—and would remain so indefinitely.”⁸⁴ However,

[T]he narrative description in the closure plan entirely fails to discuss the groundwater infiltrating into the impoundment, and to describe how, despite those continuous flows into the unit, the facility eliminated free liquids as required by 40 C.F.R. § 257.102(d)(2)(i). The closure plan also fails to describe any engineering measures taken to “control, minimize, or eliminate to maximum extent feasible”

⁷⁸ See *Alabama Primacy Denial*, 89 Fed. Reg. at 48813 (“But if a facility cannot meet the performance standards in § 257.102(d), the facility must close by the only other method allowed under the regulations: closure by removal under § 257.102(c).”); EPA, Denial of Alternative Closure Deadline for General James M. Gavin Plant, Cheshire, Ohio, at 26–27 (Nov. 18, 2022), <https://www.regulations.gov/document/EPA-HQ-OLEM-2021-0590-0100> (“Final Gavin Denial”) (“If the performance standards for each option can both be met, the regulations allow a facility to select either of the options. However, a facility must meet all of the performance standards for the closure option it has selected, and if it cannot meet all of the performance standards for one option, then it must select the other option and meet all of the performance standards for that option. 40 C.F.R. § 257.102(a).”).

⁷⁹ 40 C.F.R. § 257.102(d)(2)(i).

⁸⁰ *Id.* § 257.102(d)(1)(i).

⁸¹ *Id.* § 257.102(d)(1)(ii).

⁸² *Elec. Energy*, 106 F. 4th at 31.

⁸³ *Id.*

⁸⁴ Final Gavin Denial at 15.

either the post-closure infiltration of liquids from either the side or base of the units into the waste, or the post-closure releases of CCR or leachate to the groundwater. 40 C.F.R. § 257.102(d)(1)(i). Finally, the closure plan narrative includes no discussion of how Gavin has “preclude[d] the probability of future impoundment of water, sediment, or slurry.” 40 C.F.R. § 257.102(d)(1)(ii).⁸⁵

The only related discussion in Gavin Power’s written closure plan, EPA noted, was the unsupported statement that “[a]s part of closure of the CCR unit, all free water will be removed.”⁸⁶ EPA concluded that, without any detailed description of exactly which measures Gavin Power would take or had taken to satisfy the directive to eliminate free liquids and meet other performance standards, neither the closure of the CCR surface impoundment at issue, nor the written closure plan for it, satisfied the 2015 CCR Rule.⁸⁷

EPA’s discussion of non-compliant closures in place, inadequate permits, and insufficient permit applications in its denial of Alabama’s application for primacy reiterate the same point: the owner of an impoundment cannot satisfy the performance standards for closure in place without a detailed demonstration that, after closure, the coal ash will not be in contact with groundwater.⁸⁸ Moreover, if a permit does not clearly spell out site-specific compliance with those performance standards—specifically how they will be satisfied for *that* coal ash pond—it fails to ensure compliance with the rules.⁸⁹

As such, the D.C. Circuit’s and EPA’s interpretations of the federal performance standards for closure in place make clear that a state program that allows closure in place with ash remaining in contact with groundwater or other liquids *after* closure does not require each

⁸⁵ *Id.*

⁸⁶ *Id.* at 25.

⁸⁷ *Id.* at, e.g., 14, 30–45.

⁸⁸ See Alabama Primacy Denial, 89 Fed. Reg. at 48813 (“[I]f a facility that has waste in contact with groundwater has installed only a cover system and taken no measures to address the continued infiltration of groundwater or the continued releases of leachate to the groundwater, or the CCR that EPA estimates could still be saturated—and would remain so indefinitely—has not met the performance standards for closure with waste in place.”).

⁸⁹ *Id.* at 48777 (“EPA reviewed four permits for CCR surface impoundments in Alabama and the Agency found that those permits allow CCR in closed units to remain saturated by groundwater, without requiring adequate (or any) engineering measures to control the groundwater flowing into and out of the closed unit Because of the technical insufficiency of the permit terms as issued and the absence of any supporting rationale for why those permit terms were protective of human health and the environment notwithstanding their deficiencies, EPA could not conclude that the Alabama CCR permits are as protective as the Federal CCR regulations; therefore, EPA could not conclude that Alabama’s program satisfied the requirement for approval of a State CCR permit program.”); *id.* at 48801 (“The Permit could either have specified what the facility needs to do to meet the requirements, or ADEM could have required the facility to submit a revised Closure Plan. ADEM did neither, and as a consequence, there is no binding and enforceable provision for the facility to comply with these performance standards. In essence, ADEM has issued a permit that allows the facility to decide whether to comply with § 257.102(b) and (d)(2), rather than ‘requiring each CCR unit to achieve compliance with’ those provisions. 42 U.S.C. 6945(d)(1).”).

CCR unit located in the state to achieve compliance with the Federal CCR Rules or state standards that are at least as protective as the federal standards.

EPA unconvincingly attempts to justify its failure to consider Louisiana's permits and LDEQ's interpretation of state CCR regulations. The Agency first tries to supplant the WIIN Act's plain language standard with one of its own creation. In its Proposed Approval, EPA claims that the Act "directs EPA to determine that the State *has sufficient authority* to require compliance at all CCR units located within the State."⁹⁰ The WIIN Act requires, however, that EPA determine whether a state *requires* each CCR unit to achieve compliance, not just whether the state has the authority to require compliance should it choose to do so: "the Administrator . . . shall approve . . . a permit program . . . if the Administrator determines that the program . . . requires each coal combustion residuals unit located in the State to achieve compliance with" federal requirements or at-least-as-protective state requirements.⁹¹ A state agency that has the authority to implement standards that are at least as protective as those of the Federal CCR Rules, but fails to do so, is clearly not requiring each unit within the state to achieve compliance with federal requirements or their state equivalents. EPA's interpretation—which would insert "has sufficient authority to" into this plain language—is far from the "single, best meaning" of the statute.⁹² EPA's interpretation is also a stark departure from its prior interpretation of this same language in its Alabama Primacy Denial, where it concluded that the statute compels consideration of "both a State's statute and regulations and what the State actually requires individual CCR units to do."⁹³

Thus, to determine whether the Louisiana program meets the statutory standard, EPA must consider how LDEQ is administering its program and how LDEQ interprets the state CCR regulations, as required by the WIIN Act. As discussed below, such a review compels denial of Louisiana's application.

⁹⁰ Louisiana Proposed Approval, 91 Fed. Reg. at 34192 (emphasis added); *see also id.* (stating that "EPA evaluates the State's *authority* to issue permit and impose condition in those permits, as well as the State's *authority* to conduct compliance monitoring and enforcement") (emphasis added); *see also id.* at 34193 (stating that an adequate program must ensure the state "has the authority to impose requirements for CCR units adequate to ensure compliance with either 40 CFR part 257, subpart D, or such other State criteria that have been determined and approved by the Administrator to be at least as protective as 40 CFR part 257, subpart D").

⁹¹ 42 U.S.C. § 6945(d)(1)(B).

⁹² *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).

⁹³ Alabama Proposed Primacy Denial, 88 Fed. Reg. at 55226 (emphasis added); *see also* Alabama Primacy Denial, 89 Fed. Reg. at 48778. EPA also has not provided the requisite "reasoned analysis" for this about-face. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

B. LDEQ Has Failed to Ensure Compliance with the Federal CCR Rules at All Four of the Coal-Fired Power Plants in the State.

1. Pointe Coupee RT's Big Cajun II Power Plant

Pointe Coupee RT is planning to close the Bottom Ash Basin and the Fly Ash Unit at Big Cajun II leaving ash in place, where ash is likely in contact with groundwater.⁹⁴ As part of the LDEQ solid waste permit at the facility, LDEQ has approved the engineering design for the closure of the site.⁹⁵ EPA is aware of this 2015 CCR Rule violation as it has included the Bottom Ash Basin and the Fly Ash Unit on a list of surface impoundments that “intend to close or are closing with waste in place, and that the CCR in those units may currently be in contact with groundwater.”⁹⁶

EPA identified groundwater contamination problems at Big Cajun II Power Plant decades ago. Before EPA finalized the 2015 CCR Rule, the Agency investigated groundwater contamination from coal ash at over 150 different facilities. At Big Cajun II, EPA noted, “Onsite groundwater data exceeded the primary maximum contaminant level (“MCL”) for selenium. Onsite groundwater data exceeded the secondary MCL for [Total Dissolved Solids].”⁹⁷ Despite this long history of groundwater contamination, Pointe Coupee RT has never initiated corrective action planning. This is likely due to an inappropriate groundwater monitoring network that includes “background wells” that are downgradient of coal ash impacted groundwater.⁹⁸ This means that even while contaminant levels exceed thresholds, when compared to “background” levels that are skewed by contamination, no cleanup action is triggered. The establishment of this deficient groundwater monitoring system has been overseen by LDEQ: as is explained in a recent groundwater monitoring report, “The monitoring system has been historically used to conduct groundwater monitoring required by BC2’s LDEQ approved solid waste permit.”⁹⁹

⁹⁴ Providence Engineering, *Final Waste Grading Revisions Final Closure of Fly Ash Basin Pointe Coupee RT, LLC – Big Cajun II Power Plant* (June 6, 2026), https://pointecoupeertccr.com/wp-content/uploads/2026/04/BCII-Fly-Ash-Basin-Closure-Plan_Amendment-to-Revision-1.pdf; CB&I Environmental & Infrastructure, *CCR Compliance: Bottom Ash Basin Closure Plan* (Oct. 2016), <https://pointecoupeertccr.com/wp-content/uploads/2025/03/BCII-Bottom-Ash-Basin-Closure-Plan-revision-0.pdf>.

⁹⁵ CB&I Environmental & Infrastructure, *CCR Compliance: Bottom Ash Basin Closure Plan*, at § 3-1 (Oct. 2016), <https://pointecoupeertccr.com/wp-content/uploads/2025/03/BCII-Bottom-Ash-Basin-Closure-Plan-revision-0.pdf>.

⁹⁶ EPA, *CCR Surface Impoundments Potentially with Waste Below the Water Table*, at PDF 4 (Nov. 7, 2023), <https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0107-0894> (“EPA CCR Waste Below Water Table List”).

⁹⁷ Alexander Livnat, *Damage Case Compendium: Technical Support Document, Volume IIb Part One: Potential Damage Cases*, at 104 (Dec. 18, 2014), <https://www.regulations.gov/document/EPA-HQ-RCRA-2009-0640-12120>.

⁹⁸ Pointe Coupee RT, LLC, *Big Cajun II Surface Impoundments 2025 Annual Groundwater Monitoring Report*, at Figures 2 & 3, PDF 9–10 (Jan. 2026), <https://pointecoupeertccr.com/wp-content/uploads/2026/01/2025-BCII-Annual-GW-Monitoring-Report.pdf>.

⁹⁹ *Id.* at PDF 4.

By approving these illegal closures and failing to enforce critical groundwater monitoring and corrective action requirements, LDEQ has demonstrated that it is not requiring each CCR unit in the State “to achieve compliance with” the 2015 CCR Rule or at-least-as-protective requirements.¹⁰⁰

2. *Cleco Power’s Brame Energy Center*

Cleco’s Brame Energy Center also plans to close its Bottom Ash Pond in place,¹⁰¹ likely leaving ash in contact with groundwater in violation of the 2015 CCR Rule’s closure performance standards.¹⁰² Cleco’s Closure Plan alludes to LDEQ oversight, explaining “The Bottom Ash Pond will be closed through leaving CCR material in place as noted in the most recent version of the permit documentation.”¹⁰³ Other 2015 CCR Rule compliance documents confirm that ash may be in contact with groundwater at the Bottom Ash Pond: the Aquifer Location Restriction Demonstration for the Bottom Ash Pond shows cross sections of the impoundment with base depths as low as an elevation of 82 feet.¹⁰⁴ While groundwater elevations generally remain below 80 feet to the east of the Bottom Ash Pond, groundwater monitors to the southwest consistently measure groundwater elevations above 90 feet, indicating that waste in the Bottom Ash Pond is likely saturated with groundwater.¹⁰⁵ EPA is aware of this as the Agency included the Bottom Ash Pond on a list of surface impoundments that “intend to close or are closing with waste in place, and that the CCR in those units may currently be in contact with groundwater.”¹⁰⁶

EPA identified groundwater contamination problems at Brame Energy Center decades ago. As previously mentioned, EPA investigated coal ash contamination from coal ash at over 150 different facilities. At Brame Energy Center (referred to as Rodemacher Power Station at the time), EPA noted, “Onsite groundwater exceeded primary EPA MCLs for arsenic and lead.

¹⁰⁰ 42 U.S.C. § 6945(d)(1)(B).

¹⁰¹ In its 2020 Demonstration, Cleco stated, “pursuant to the Closure Plan, Cleco will close the BEC Bottom Ash Pond by leaving CCR material in place (closure-in-place).” Cleco Power LLC & Brame Energy Center, *Demonstration for a Site-Specific Alternative to Initiation of Closure Deadline for the Coal Combustion Residuals Rule Pursuant to 40 C.F.R. § 257.103(f)(2)*, at PDF 38 (Nov. 25, 2020), https://www.cleco.com/docs/default-source/ccr/rodemacher/bec-demonstrations.pdf?sfvrsn=376ed80e_4.

¹⁰² 40 C.F.R. § 257.102(d).

¹⁰³ Burns & McDonnell Engineering Company, Inc, *Closure Plan: Brame Bottom Ash Pond*, at § 4-1 (Oct. 14, 2016), https://www.cleco.com/docs/default-source/ccr/rodemacher/ccr-rod-bottom-ash-pond-closure.pdf?sfvrsn=fb641850_2.

¹⁰⁴ Cleco Power LLC & Brame Energy Center, *Placement Above Uppermost Aquifer Location Restriction Demonstration for the Coal Combustion Residuals Rule*, at PDF 8 (Oct. 2018), https://www.cleco.com/docs/default-source/ccr/rodemacher/ccr-rod-bottom-ash-pond-uppermost-aquifer.pdf?sfvrsn=2cd2632a_2 (see Cross Sec. A-A).

¹⁰⁵ Cleco Power LLC & Brame Energy Center, *2024 Annual Groundwater Monitoring Report for the Coal Combustion Residuals Rule*, at Fig. 3 (Jan. 2025), https://www.cleco.com/docs/default-source/ccr/rodemacher/bec-ccr-ar-2024.pdf?sfvrsn=a134d17f_1; Cleco Power LLC & Brame Energy Center, *2021 Annual Groundwater Monitoring Report for the Coal Combustion Residuals Rule*, at fig. 3 (Jan. 2022), https://www.cleco.com/docs/default-source/ccr/rodemacher/bec-ccr-ar-2021.pdf?sfvrsn=9d6533bb_2.

¹⁰⁶ EPA CCR Waste Below Water Table List at PDF 3.

Onsite groundwater exceeded EPA [secondary MCLs] for chloride, pH, and TDS.”¹⁰⁷ Despite this long history of groundwater contamination, Cleco has never initiated corrective action planning. Similar to Big Cajun II, this is likely due to an inappropriate groundwater monitoring network that includes “background wells” that are downgradient of coal ash impacted groundwater.¹⁰⁸ The establishment of this deficient groundwater monitoring system has been overseen by LDEQ, as is explained in a recent groundwater monitoring report, “The monitoring system consists of monitoring wells installed previously to conduct groundwater monitoring required by BEC’s LDEQ approved solid waste permits.”¹⁰⁹

By approving this illegal closure and failing to enforce critical groundwater monitoring and corrective action requirements, LDEQ has demonstrated that it is not requiring each CCR unit in the State “to achieve compliance with” the 2015 CCR Rule or at-least-as-protective requirements.¹¹⁰

3. *Cleco Power’s Dolet Hills Power Station*

EPA identified groundwater contamination problems at Dolet Hills Power Station decades ago. As previously mentioned, EPA investigated coal ash contamination at over 150 different facilities, including Dolet Hills Power Station. EPA noted, “Onsite groundwater data exceeded primary EPA MCLs for arsenic, lead, and selenium. Onsite groundwater data exceeded EPA [secondary MCLs] for sulfate and TDS. Onsite groundwater data exceeded the EPA Health Advisory Level for sulfate.”¹¹¹ Despite this long history of groundwater contamination, Cleco has never initiated corrective action planning. Similar to Big Cajun II and Brame Energy Center, this is likely due to an inappropriate groundwater monitoring network that includes “background wells” that are located at the waste boundary of the ash basins and landfill and are contaminated with lithium, among other CCR contaminants.¹¹² The establishment of this deficient groundwater monitoring system has been overseen by LDEQ, as is explained in a recent groundwater monitoring report, which notes, “[t]he monitoring system consists of monitoring wells installed

¹⁰⁷ Alexander Livnat, *Damage Case Compendium: Technical Support Document, Volume IIb Part One: Potential Damage Cases*, at 112 (Dec. 18, 2014), <https://www.regulations.gov/document/EPA-HQ-RCRA-2009-0640-12120>.

¹⁰⁸ Cleco Power LLC & Brame Energy Center, *2025 Annual Groundwater Monitoring Report for the Coal Combustion Residuals Rule*, at Figures 2 & 3, PDF 10-11 (Jan. 2026), https://www.cleco.com/docs/default-source/ccr/rodemacher/bec-ccr-ar-2025.pdf?sfvrsn=b2ca8697_1.

¹⁰⁹ *Id.* at PDF 4.

¹¹⁰ 42 U.S.C. § 6945(d)(1)(B).

¹¹¹ Alexander Livnat, *Damage Case Compendium: Technical Support Document, Volume IIb Part One: Potential Damage Cases*, at 108 (Dec. 18, 2014), <https://www.regulations.gov/document/EPA-HQ-RCRA-2009-0640-12120>.

¹¹² Cleco Power LLC & Dolet Hills Power Station, *Ash Basins No. 1 and No. 2, 2025 Annual Groundwater Monitoring Report for the Coal Combustion Residuals Rule*, at Figures 2 & 3, PDF 9-10 (Jan. 2026), https://www.cleco.com/docs/default-source/ccr/dolet-hills/dhps-plant-ccr-ar-2025.pdf?sfvrsn=29e7b8b0_1; Cleco Power LLC & Dolet Hills Power Station, *Fly Ash/Scrubber Sludge Landfill, 2025 Annual Groundwater Monitoring Report for the Coal Combustion Residuals Rule*, at Figure 4, PDF 12 (Jan. 2026), https://www.cleco.com/docs/default-source/ccr/dolet-hills/dhps-landfill-ccr-ar-2025.pdf?sfvrsn=e9e11adb_1; Ashtracker, *Dolet Hills Power Station, Lithium*, <https://ashtracker.org/site/127> (last accessed Aug. 3, 2026).

previously to conduct groundwater monitoring required by BEC's LDEQ approved solid waste permits.”¹¹³

By failing to enforce critical groundwater monitoring and corrective action requirements, LDEQ has demonstrated that it is not requiring each CCR unit in the State “to achieve compliance with” the 2015 CCR Rule or at-least-as-protective requirements.¹¹⁴

4. *Entergy's R S Nelson Plant*

Entergy has detected statistically significant increases (“SSIs”) in calcium at the R S Nelson Plant almost every year since its first monitoring event in 2017.¹¹⁵ However, Entergy has not conducted assessment monitoring even though Alternate Source Demonstrations (“ASDs”) it prepared do not demonstrate that these SSIs are from a source other than the CCR unit. One of the lines of evidence Entergy draws on in their ASDs is that “Prior to the CCR Rule, LDEQ monitoring wells in the area of CCR-7 were sampled on a semiannual basis, and indicated calcium concentrations in the groundwater ranging from 19 mg/L to 119 mg/L.”¹¹⁶ This LDEQ monitoring was only conducted because of the solid waste permit at the site, i.e., after the landfill had begun receiving waste. Thus, this is not a satisfactory line of evidence to establish that elevated calcium levels are due to “natural variation” of groundwater conditions. LDEQ has taken no action to keep Entergy from misusing their data in this way. As a result, the R S Nelson Plant inappropriately remains in detection monitoring.

By failing to enforce critical groundwater monitoring requirements, LDEQ has demonstrated that it is not requiring each CCR unit in the State “to achieve compliance with” the 2015 CCR Rule or at-least-as-protective requirements.¹¹⁷

The evidence clearly shows that LDEQ has failed to enforce critical closure, groundwater monitoring, and corrective action requirements at every coal plant in the state. Thus, EPA should

¹¹³ Cleco Power LLC & Dolet Hills Power Station, *Ash Basins No. 1 and No. 2, 2025 Annual Groundwater Monitoring Report for the Coal Combustion Residuals Rule*, at PDF 4 (Jan. 2026), https://www.cleco.com/docs/default-source/ccr/dolet-hills/dhps-plant-ccr-ar-2025.pdf?sfvrsn=29e7b8b0_1; Cleco Power LLC & Dolet Hills Power Station, *Fly Ash/Scrubber Sludge Landfill 2025 Annual Groundwater Monitoring Report for the Coal Combustion Residual Rule*, at PDF 4 (Jan. 2026), https://www.cleco.com/docs/default-source/ccr/dolet-hills/dhps-landfill-ccr-ar-2025.pdf?sfvrsn=e9e11adb_1.

¹¹⁴ 42 U.S.C. § 6945(d)(1)(B).

¹¹⁵ Entergy, *Roy S. Nelson Plant 2018 Annual Groundwater Monitoring and Corrective Action Report*, at 2 (Jan. 2019), <https://www.energylouisiana.com/wp-content/uploads/2018-Groundwater-Monitoring-Corrective-Action-Report-Nelson-r4.pdf>; Entergy, *Roy S. Nelson Plant 2024 Annual Groundwater Monitoring and Corrective Action Report*, at 2-3 (Jan. 2025), <https://www.energylouisiana.com/wp-content/uploads/2024-Groundwater-Monitoring-Corrective-Action-Report-Nelson-text-and-figures.pdf>.

¹¹⁶ Entergy, *Roy S. Nelson Plant 2018 Annual Groundwater Monitoring and Corrective Action Report*, at PDF 17 (Jan. 2019), <https://www.energylouisiana.com/wp-content/uploads/2018-Groundwater-Monitoring-Corrective-Action-Report-Nelson-r4.pdf>.

¹¹⁷ 42 U.S.C. § 6945(d)(1)(B).

not approve the Louisiana program because doing so would be arbitrary and capricious and violate the WIIN Act.

VI. APPROVING LOUISIANA’S PROGRAM WOULD CREATE A REGULATORY SYSTEM WITH INADEQUATE PUBLIC PARTICIPATION IMPAIRING THE PUBLIC’S ENFORCEMENT RIGHTS.

Public participation and the public’s right to enforce the law are central to RCRA regulatory programs, as well as to state and (prospective) federal CCR permit programs. RCRA makes clear that public participation shall be provided for in the “development, revision, implementation and enforcement” of all RCRA programs.¹¹⁸ Moreover, EPA has determined that “[t]he core components of public participation in the permitting decision-making process are public notice, opportunity for public comment, opportunity for a public meeting or hearing, and making final decisions known to the public, including providing written responses to public comments.”¹¹⁹ The Louisiana program fails to meet these criteria and is less protective than the federal requirements. It does not require that all relevant materials in the permit decision-making process be made publicly available, does not require adequate public notice, and does not provide adequate opportunity for public hearings.

A. Louisiana’s Program Does Not Provide Public Access to Key Permitting Documents That Are Essential to Understanding a Site’s Compliance Requirements and Whether They Are Being Met.

While paying lip service to the concept that the public’s right to enforce the law is central to RCRA regulatory programs, EPA has overlooked key deficiencies in the Louisiana program that will curb citizen enforcement and meaningful participation. EPA stated in its Proposed Approval, “RCRA section 7004(b), which applies to all RCRA programs, directs 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.’”¹²⁰ Nevertheless, EPA’s analysis of the deficiencies of the Louisiana program are nowhere in sight in its Proposed Approval.

Under RCRA Section 7002, “any person may commence a civil action . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order” issued pursuant to RCRA.¹²¹ The Federal CCR Rules contain reporting provisions that require owners and operators of CCR units to publish extensive information about their units.¹²² EPA was clear when it promulgated the 2015 CCR Rule that these reporting requirements are meant to effectuate the public’s enforcement rights under RCRA:

¹¹⁸ *Id.* § 6974(b)(1).

¹¹⁹ EPA, *State Coal Combustion Residuals Permit Programs: Considerations for Developing Public Participation Opportunities Memorandum*, at 3 (Mar. 20, 2023) (“EPA State Public Participation Memo”) (attached).

¹²⁰ Louisiana Proposed Approval, 91 Fed. Reg. at 34192 (quoting 42 U.S.C. § 6974(b)(1)).

¹²¹ 42 U.S.C. § 6972(a).

¹²² *See generally* 40 C.F.R. § 257.107.

EPA has developed a number of provisions designed to facilitate citizens to enforce the rule pursuant to RCRA section 7002. Chief among these is the requirement to publicly post monitoring data, along with critical documentation of facility operations, so that the public will have access to the information to monitor activities at CCR disposal facilities.¹²³

EPA underscored that enforcement by the public is fundamental to ensure compliance with the Federal CCR Rules and concluded that, without such enforcement, the rule would not satisfy RCRA's protectiveness standard:

The Agency cannot conclude that the regulations promulgated in this rule will ensure there is no reasonable probability of adverse effects on health or the environment unless there is a mechanism for states and citizens, as the entities responsible for enforcing the rule, to effectively monitor or oversee its implementation.¹²⁴

Since promulgating the 2015 CCR Rule, EPA has emphasized that citizen enforcement remains a key mechanism for ensuring compliance, including in approved state programs.¹²⁵ Primacy does not change the essential role of citizen enforcement and does not change the critical importance of reporting requirements to enable it.

For the same reasons, transparency and public participation in CCR permitting are essential for implementing RCRA's citizen enforcement requirements. Unless the public has access to documents demonstrating or explaining how CCR units will achieve compliance with CCR regulations, the public cannot exercise its enforcement rights under RCRA Section 7002.

EPA states in its Proposed Approval:

[I]t is EPA's judgment that an adequate State CCR permit program will ensure that: (1) Documents for permit determinations are made available for public review and comment; (2) Final determinations on permit applications are made known to the

¹²³ 2024 Legacy Rule, 89 Fed. Reg. at 48788 (quoting the preamble to the 2015 CCR Rule, 80 Fed. Reg. at 21335).

¹²⁴ 2015 CCR Rule, 80 Fed. Reg. at 21338; *see also id.* at 21426–27 (“EPA believes that it cannot conclude that the RCRA subtitle D regulations will ensure that there is no reasonable probability of adverse effects on health or the environment, unless there are mechanisms for states and citizens to monitor the situation . . . so they can determine when intervention is appropriate.”); *id.* at 21339 (“[A] key component of EPA's support for determining that the rule achieves the statutory standard is the existence of a mechanism for states and citizens to monitor the situation, such as when groundwater monitoring shows evidence of potential contamination, so that they can determine when intervention is appropriate. The existence of effective oversight measures provides critical support for the statutory finding . . .”).

¹²⁵ *See Texas: Approval of State Coal Combustion Residuals Permit Program*, 86 Fed. Reg. at 33900 (“[T]he right to file a RCRA citizen suit pertaining to CCR facilities in Texas is unaffected by EPA's approval Citizen suits are authorized by RCRA section 7002(a). Citizens' ability to file RCRA citizen suits are not affected by RCRA section 4005(d), establishing a process for approving state CCR programs. *See* 42 U.S.C. § 6945(d)(7). Likewise, EPA's approval of the Texas CCR permit program does not affect citizens' ability to file RCRA citizen suits.”).

public; and (3) Public comments on permit determinations are considered and significant comments are responded to in the permit record.¹²⁶

EPA “preliminarily determined that the Louisiana approach to public participation requirements provides adequate opportunities for public participation in the permitting process sufficient to meet the standard for program approval.”¹²⁷ EPA further concluded that Louisiana’s program provides for “an adequate level of citizen involvement in the enforcement process” because the “Louisiana statutes and Code of Civil Procedure provide the opportunity for the public to intervene and participate in the State’s civil enforcement process.”¹²⁸

However, EPA’s determination is wrong. The Louisiana program does not require that all permit applications, draft permit decisions, and final permit decisions be posted on an owner or operator’s publicly accessible CCR website, a failure that fundamentally undermines both public participation and enforcement. The Louisiana program requires all permit applications¹²⁹ and draft permit decisions¹³⁰ to be made available for public review via the department’s electronic document management system. Although LDEQ is required to provide public notice of final permit decisions, there is no requirement that the final permit decisions be made available for public review.¹³¹ As such, there is no requirement that the applications or permit decisions be posted on the facility’s publicly accessible CCR website, similar to the requirements for public notices of permit applications, draft permit decisions and final permit decisions, without any explanation.

In March 2023, EPA augmented its Coal Combustion Residuals State Permit Program Interim Final Guidance from August 2017 with a memorandum entitled, “State Coal Combustion Residuals Permit Programs: Considerations for Developing Public Participation Opportunities.”¹³² In the memorandum, EPA emphasizes precise requirements, such as web-posting to a publicly available website, that are lacking in the Louisiana program, that would ensure that “documents for permit determinations are made available for public review and comment.”¹³³

The Louisiana program must be improved to ensure adequate public notice and access to all permit application and materials. As such, Louisiana’s regulations must be amended to require that (1) all owners and operators of CCR units post all permit applications, materials relied upon or referenced in the applications, permitting decisions, and draft/final permits on

¹²⁶ Louisiana Proposed Approval, 91 Fed. Reg. at 34194; *see also* EPA State Public Participation Memo at 2 (attached) (noting that although 40 C.F.R. § 239.6 applies to the approval of state MSWLF programs rather than state CCR permit programs, the specific criteria, including the requirement that “documents for permit determinations are made available for public review and comment,” provide a helpful framework to evaluating state permit programs).

¹²⁷ Louisiana Proposed Approval, 91 Fed. Reg. at 34196.

¹²⁸ *Id.* at 34197-98.

¹²⁹ La. Admin. Code tit. 33, § VII-513.C.2.f.

¹³⁰ La. Admin. Code tit. 33, § VII-1006.A.4.c.

¹³¹ La. Admin. Code tit. 33, § VII-1006.A.5.

¹³² EPA State Public Participation Memo (attached).

¹³³ EPA State Public Participation Memo at 3 (attached).

their publicly accessible CCR website; and (2) LDEQ post all public notices, permitting decisions, and draft/final permits on its publicly accessible website.

The effect of Louisiana's limited access to public documents is exacerbated by the program's short 30-day comment period.¹³⁴ The EPA State Public Participation Memo also speaks to this issue, recommending a "minimum 45-day public comment period, which is what is included in the Federal CCR permit program proposed rule."¹³⁵ EPA also noted that 40 C.F.R. § 124.10(b) states that a 60-day comment period may be appropriate for complicated proceedings.¹³⁶ In fact, once EPA finalizes the federal permitting rule,¹³⁷ which it is expected to do in 2026, Louisiana will need to amend its program to be consistent with the longer public comment period, as required by the WIIN Act.¹³⁸ Therefore it makes sense to make this change now.

The Louisiana program's public participation process does not meet the public participation and enforcement requirements of RCRA and—given the importance of citizen enforcement to ensuring compliance with the Federal CCR Rules and RCRA's underlying protectiveness standard—also renders Louisiana's program not "at least as protective as" the Federal CCR Rules.¹³⁹ Louisiana's program must be changed to require public access via the facility's publicly accessible CCR website for all essential permitting documents, including draft permits, final permits, and permit applications and other permitting materials, so that the public can meaningfully comment on permit applications, understand a permitted site's compliance requirements, and identify when a site is violating those requirements. In addition, the public comment period must be extended to at least 45 days to allow the public an adequate opportunity to participate and provide meaningful written comments.

B. Other Aspects of Louisiana's Program Render Its Public Participation and Enforcement Requirements Inadequate.

Other aspects of Louisiana's public participation requirements similarly fall short of what is necessary for the public to enforce state coal ash permits consistent with both RCRA's citizen enforcement provisions and protectiveness standard and EPA's prior statements about the importance of citizen enforcement in coal ash permitting.

The Louisiana program does not provide an adequate opportunity for a public hearing regarding a proposed permit decision. La. Admin. Code tit. 33, § VII-1006.B.1 requires a public hearing to be held "for any CCR facility permit if the administrative authority determines, on the basis of comments received and/or other information, that a hearing is necessary or appropriate." According to La. Admin. Code tit. 33, § VII-509.E.5, which is referenced in section 1006.B.1, the administrative authority's determination of whether a hearing is necessary or appropriate is to

¹³⁴ La. Admin. Code tit. 33, § VII-1006.A.4.d.

¹³⁵ EPA State Public Participation Memo at 3 (attached).

¹³⁶ *Id.*

¹³⁷ EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program, 85 Fed. Reg. 9940 (Feb. 20, 2020) ("Proposed Federal CCR Permit Program").

¹³⁸ 42 U.S.C. § 6945(d)(1)(D)(i)(II).

¹³⁹ *Id.* § 6944(a); see 2015 CCR Rule, 80 Fed. Reg. at 21338, 21426–27, 21339.

be based on whether the request raises “genuine and pertinent issues.” However, LDEQ does not explain what constitutes “genuine and pertinent issues,” and the ability of the public to submit substantial written objections is undermined by the very limited information they will have access to and the very limited amount of time they will have to evaluate a proposal and articulate their objections to it. EPA has noted that some states provide for a public hearing based on “a significant degree of public interest” rather than objections.¹⁴⁰ Therefore, Louisiana’s program should be amended to, at a minimum, provide for a public hearing when there is expressed public interest in holding a public hearing.

La. Admin. Code tit. 33, § VII-509.E.4 also states that, if a public hearing is held, it “shall be conducted in accordance with the Environmental Quality Act for fact-finding hearings or other hearing procedures developed by the administrative authority and the Administrative Procedure Act (R.S. 49:950 et seq.).” Further, under La. R.S. 49:978.1, a person who is aggrieved by a final permit decision or order in an adjudication proceeding is entitled to judicial review. However, it is unclear whether a final permit decision will be subject to judicial review if a public hearing is not held. Louisiana’s program and/or Narrative Statement should be amended to specify that a public hearing is not required for a final permit decision to be appealable and attendance at a public hearing is not required to appeal a final permit decision.

Finally, the Louisiana program allows significant permit modifications without any public participation because of its overly narrow and vague definition of “major modification,” the standard that triggers public review. Under the Louisiana program, a “major modification” is “any change in a site, facility, process or disposal method, or operation that substantially deviates from the permit or tends to substantially increase the impact of the site, facility, process or disposal method, or operation on the environment.”¹⁴¹ The Louisiana program merely defines a “minor modification” as “any modification that does not meet the criteria for a major modification.”¹⁴²

The language in the Louisiana program’s definition of “major modification” is not sufficiently clear and gives LDEQ unacceptable discretion to determine whether and which changes to detailed compliance approaches in site-specific plans required by the Federal CCR Rules, such as changes to groundwater monitoring plans or corrective action plans, require public engagement. Determining whether these plans will achieve compliance with the Federal CCR Rules or Louisiana’s program requires judgment and consideration of facility-specific conditions. Moreover, it is unclear what would constitute a change that “substantially deviates from the permit or tends to substantially increase” a facility’s impact on the environment. These are the most critical decisions LDEQ makes at the time of permit issuance, decisions that are essential to protecting public health, and are the ones that benefit the most from public input. Requiring public input on decisions LDEQ makes at the time of initial permit issuance but then allowing LDEQ to supersede those decisions without public input through a permit modification undermines any meaningful opportunity for public participation.

¹⁴⁰ EPA State Public Participation Memo at 4 (attached).

¹⁴¹ La. Admin. Code tit. 33, § VII-1002.

¹⁴² *Id.*

While the existing solid waste permit regulations provide some examples of a major modification, they are insufficient to ensure adequate public participation. La. Admin. Code tit. 33, § VII-517.B.1 states that major modifications include, but are not limited to:

- a. a change in the types of waste to be received at a facility (e.g., where a facility is modified to accept industrial waste);
- b. an increase in the volume or rate of waste to be received at a facility;
- c. a physical expansion of the service area;
- d. an increase in the capacity of a facility;
- e. an extension of the operating hours or days of operation;
- f. a change to the facility that may have an impact on traffic patterns;
- g. a reduction in the number of groundwater sampling parameters or the number of groundwater monitoring wells;
- h. a lateral or vertical expansion of the permitted area(s) for waste disposal, except for vertical expansion that would result in no net increase of in-place volume; or
- i. other changes in the permit that tend to make the permit requirements less stringent.

Without clear language in Louisiana's program stating that changes to detailed compliance approaches in site-specific plans are "major modifications" or specifying what types of changes constitute "minor modifications," LDEQ could make such changes—allowing sites to meet less protective criteria than state or federal coal ash requirements—without ever providing the public with notice or an opportunity to comment on this change. As EPA has noted, the proposed Federal CCR permit program¹⁴³ defines "major modifications" as:

[A]ll changes to a permit that are not considered a minor modification listed at § 257.151(a). These include changes that materially alter the CCR unit or its operations, changes that impact the applicability of subpart D requirements, changes that could impact the protection of human health and the environment, and changes necessary to comply with new regulations, where these changes can only be implemented by substantially changing design, operational requirements, or compliance approaches in the permit, or where the revised regulation requires the application of significant technical judgement or discretion.¹⁴⁴

¹⁴³ Proposed Federal CCR Permit Program, 85 Fed. Reg. at 9986–87.

¹⁴⁴ EPA State Public Participation Memo at 6 (attached) (quoting Proposed Federal CCR Permit Program, 85 Fed. Reg. at 9986).

Examples of potentially major modifications under the proposed federal CCR permit program¹⁴⁵ include:

- (1) Changes that reduce the frequency or stringency of requirements for inspection, groundwater monitoring, sampling, analysis, recordkeeping, reporting, web posting, or maintenance activities by the permittee.
- (2) Changes to remove or relax a permit condition that is based on an underlying requirement that is no longer applicable, but where this change in applicability is not due to a regulatory change that was subject to public notice and a public comment period, a statutory change, or an order from a court.
- (3) Reduction in the number, or substantial changes in location, depth, or design of groundwater monitoring wells required by the permit.
- (4) Addition of a new CCR unit including a new landfill unit, a lateral expansion, or a new surface impoundment unit not already authorized by a RCRA CCR permit and not covered by a permit by rule in accordance with § 257.128.
- (5) Modification of a CCR unit, including physical changes or changes in management practices which are not minor modifications under § 257.151(a).
- (6) Addition of a corrective action program or changes to the corrective action requirements in the permit.
- (7) Changes to a plan approved in a permit, including reduction in the postclosure care period for any reason. This does not include administrative changes, a change that is a direct incorporation of a change to subpart D, or changes to a closure plan specified in § 257.151(a)(9),
- (8) Extension of the final compliance date in a schedule of compliance established in accordance with § 257.142.
- (9) A change to a permit condition that is based on a change in an underlying regulatory or statutory requirement, which requires substantial changes to the design, operation, or compliance strategies established in the permit or which requires the application of significant technical judgement or discretion.¹⁴⁶

¹⁴⁵ Although EPA's proposed federal CCR permit program may provide better opportunities for public participation in the modification process, Commenters have noted several ways the proposed federal program's modification process must be improved, as detailed in Commenters' recent comments on the reopening of the proposed federal program's comment period. *See* Comments of Earthjustice *et al.*, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program (July 29, 2026), <https://www.regulations.gov/comment/EPA-HQ-OLEM-2019-0361-0487>.

¹⁴⁶ EPA State Public Participation Memo at 6–7 (attached) (quoting Proposed Federal CCR Permit Program, 85 Fed. Reg. at 9986–87).

It is also important that the Louisiana program revise the definition for the term “minor modification,” especially since minor modifications will not be subject to the program’s public participation requirements.¹⁴⁷ The proposed federal CCR permit program defines “minor modifications” as:

[T]hose that involve only minor or administrative changes that keep the permit current with respect to common changes to the facility or its operations. Minor modifications are changes that do not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment. These include changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit or where the revised regulation does not require the application of significant technical judgement or discretion.¹⁴⁸

Examples of potential minor modifications under the proposed federal CCR permit program include:

- (1) Administrative and informational changes, including changes to the name or contact information of permittees or other persons or agencies identified as points of contact in the permit or compliance plans.
- (2) Correction of typographical errors.
- (3) Transfer of ownership or operational control of a facility. The new owner and operator must submit a revised permit application 30 days prior to the transfer of ownership or operational control or as soon as practicable. If prior notice is impracticable, the revised permit application must be submitted no later than 30 days after the transfer of ownership or operational control.
- (4) Changes to a permit condition to incorporate a change to a maximum contaminant level (MCL) under §§ 141.62 and 141.66, which serve as the underlying basis for the permit condition.
- (5) Changes that increase the frequency, duration, or stringency of the requirements or procedures for inspection, monitoring, recordkeeping, reporting, web posting, sampling, analytical methods, or maintenance activities by the permittee.
- (7) Changes to monitoring, sampling or analysis methods or procedures to conform with EPA guidance or regulations.

¹⁴⁷ See La. Admin. Code tit. 33, § VII-1006.

¹⁴⁸ EPA State Public Participation Memo at 7 (attached) (quoting Proposed Federal CCR Permit Program, 85 Fed. Reg. at 9986).

(8) Replacement of an existing groundwater monitoring well that has been damaged or rendered inoperable, as close as possible to the original location, and of similar design and depth.

(9) In the closure plan, increases to estimates of the maximum extent of operations or the maximum inventory of waste.¹⁴⁹

The Louisiana program should be amended to clarify that major modifications, such as those included in the proposed federal CCR permit program, are subject to the same public participation requirements as permit applications. In addition, the Louisiana program should revise the definition of the term “minor modification” and include illustrative examples, as suggested above. Once the EPA’s final permitting rule is finalized, Louisiana will be required to make these changes in order to bring the Louisiana program in line with the new federal regulations. Making these changes now will obviate the need for future revisions and ensure that these important provisions apply to permit modifications in the meantime.

VII. CONCLUSION

For the reasons discussed above, we urge EPA to deny Louisiana’s application for primacy over coal ash permitting.

Sincerely,

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¹⁴⁹ *Id.*

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**Document Accompanying Comments of Earthjustice, Sierra Club, and Alliance for
Affordable Energy on August 4, 2026**

Submitted via Regulations.gov

- EPA, *State Coal Combustion Residuals Permit Programs: Considerations for Developing Public Participation Opportunities Memorandum*, at 3 (Mar. 20, 2023) (“EPA State Public Participation Memo”)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

March 20, 2023

OFFICE OF
LAND AND EMERGENCY
MANAGEMENT

MEMORANDUM

SUBJECT: State Coal Combustion Residuals Permit Programs: Considerations for Developing Public Participation Opportunities

FROM: Carolyn Hoskinson, Director
Office of Resource Conservation and Recovery

A handwritten signature in black ink, appearing to read "CHoskinson", is placed next to the "FROM:" line.

Digitally signed by
CAROLYN HOSKINSON
Date: 2023.03.20
09:58:47 -04'00'

TO: Regional Land, Chemical, and Redevelopment Division Directors

This memo consolidates existing resources to aid states in developing state CCR permit programs that provide for adequate public participation. In considering public participation opportunities in the CCR context, EPA suggests that states begin by referring to 40 CFR 239.6, EPA's Coal Combustion Residuals State Permit Program Interim Final Guidance (August 2017) ("Interim Final Guidance"), and 40 CFR part 124 subpart A. It may also be useful for states to review public participation elements from select states that have included some heightened public participation elements, such as web-posting and translation services. For example, states can review the EPA-approved state CCR permit programs.¹ Collectively, these resources provide a comprehensive picture of the types of public participation opportunities in the permitting decision-making process that may aid EPA in evaluating a state CCR permit program.² EPA has summarized these elements in the sections below titled "Public Participation Components" and "Public Participation Considerations by Permit Action." EPA is also providing some considerations for defining the scope of major and minor modifications for permits, as EPA generally expects that major modifications would be subject to public participation.

This memo is not intended to be fully comprehensive of any and all resources and options available for public participation. Rather, this memo is designed to help consolidate information that pertains to aspects of public participation that have repeatedly arisen during EPA's discussions with states that have or are preparing to submit a state CCR permit program application for EPA's review. It is intended to be wholly consistent with existing guidance pertaining to public participation for state CCR permit programs. This memo is also designed to identify potential options for public participation in CCR permitting decisions; however, states may choose to have more robust public participation or different public participation requirements for CCR permits beyond those identified in this memo.

EPA makes individual state permit program adequacy determinations on a case-by-case basis once a state permit program application has been submitted and EPA has subsequently determined the

¹ EPA has approved state programs for Oklahoma, Georgia, and Texas. For more information on those programs please visit [this EPA website](#).

² In evaluating the adequacy of a state's CCR permit program, EPA considers whether the program addresses the four categories of criteria outlined in 40 CFR Part 239 in addition to evaluating public participation opportunities in the state's permitting process. The four categories of criteria outlined in 40 CFR part 239 include: permitting requirements, requirements for compliance monitoring authority, requirements for enforcement authority, and requirements for intervention in civil enforcement proceedings. Please refer to EPA's Interim Final Guidance for more information on all four categories.

application to be complete. Adoption of select public participation options identified in this memo does not necessarily guarantee that EPA will approve a state's regulations for public participation.

This memo 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. As indicated by the use of non-mandatory language such as "may" and "should," it only provides recommendations and does not impose any legally binding requirements.

EPA GUIDELINES FOR PUBLIC PARTICIPATION IN FEDERAL AND STATE CCR PERMIT PROGRAMS

40 CFR section 239.6

Although 40 CFR part 239 applies to the approval of state Municipal Solid Waste Landfill (MSWLF) programs under RCRA section 4005(c)(1), rather than EPA's evaluation of state CCR permit programs under RCRA section 4005(d), the specific criteria outlined in 40 CFR part 239 provide a helpful framework to examine the relevant aspects of a state's permit program.

With respect to public participation, section 239.6 provides the following:

(a) State law must require that:

- (1) Documents for permit determinations are made available for public review and comment; and*
- (2) Final determinations on permit applications are made known to the public.*

(b) The state shall have procedures that ensure that public comments on permit determinations are considered.

Coal Combustion Residuals State Permit Program Interim Final Guidance Document (August 2017)

The Interim Final Guidance at page 2-3 explains that an "adequate permit program" must meet the statutory requirements (that is, it must ensure that each CCR unit in the State achieves compliance with either the 40 CFR part 257 regulations or another system that EPA has determined is "at least as protective as" those regulations). The Interim Final Guidance also provides that:

EPA also believes that an adequate permit program provides for public participation by ensuring that:

- (1) Documents for permit determinations are made available for public review and comment; and*
- (2) Final determinations on permit applications are made known to the public.*
- (3) Public comments on permit determinations are considered.*

The Interim Final Guidance further provides at page 1-7 that:

Public participation plays an integral role in a State permitting program. A good public participation program will create an inclusive dialogue, allowing interested parties to talk openly and frankly with one another about issues and search for mutually agreeable solutions to differences. The State should keep these overarching themes in mind when planning and conducting public participation activities and outreach:

- communicating risk effectively;*
- assessing and addressing environmental justice, cultural, and tribal concerns;*
- supporting community-based environmental protection;*
- assessing and responding to technical assistance needs;*

- *using traditional and new media effectively;*
- *planning for public participation when resources are limited; and*
- *evaluating public participation activities.*

40 CFR PART 124 SUBPART A

EPA recommends that states reference 40 CFR part 124 subpart A in developing their state public participation opportunities for CCR permitting, as EPA has proposed to adopt those provisions for the future federal CCR permit program. *See Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program (Proposed Rule)*, 85 Fed. Reg. 9940, 9945 (Feb. 20, 2020) (describing EPA’s proposal to apply the procedural requirements of Part 124 subpart A). However, specifics of EPA’s federal CCR permit program remains under consideration and are subject to change.

Part 124 subpart A contains permitting procedures for issuing, modifying, revoking, and reissuing or terminating certain permits. These regulations may be a helpful starting point for states in identifying public participation opportunities in the CCR context. States that choose to more closely mirror public participation requirements in part 124 subpart A, including such changes as those proposed for the federal CCR permit program, may be better positioned to avoid future state regulatory changes as the federal CCR permit program evolves.

PUBLIC PARTICIPATION COMPONENTS

The core components of public participation in the permitting decision-making process are public notice, opportunity for public comment, opportunity for a public meeting or hearing, and making final decisions known to the public, including providing written responses to public comments. Those public participation core components, and other supporting activities, are identified below, along with some considerations for how a permit program can utilize each element to effectively support and encourage public participation.

- Public Notice – States should consider how to most effectively provide public notice of the state’s pending and final permitting decisions based on the local community. For some communities, it might be prudent for the State to identify any critical community organizations that may more effectively distribute information to community members. Potential outlets for posting notice include newspaper, radio, web-posting to a publicly available internet website, social media, listservs, mailing lists, etc.ⁱ
- Documents Available for Review – Providing notice and availability of permit applications is important before a state makes decisions. States could require the regulated entity to keep a list of interested parties so the regulated entity could notify them of a renewal application or any modification request. Documents supporting the action at issue are generally expected to be made available to the public. Potential options for making supporting documents available for public inspection could include web-posting electronic documents or including paper copies of documents in a public place that is most convenient and accessible to the public (such as a library or town hall).ⁱⁱ
- Public Comment Period – The public should have an opportunity to comment on certain permitting actions, such as draft permits or major modifications to permits. Generally, EPA considers whether the state provides a minimum of 30 days for public comment, with an option

to extend the public comment period as needed. Given the potential complexity of permits for CCR units, states may also consider a comment period of more than 30 days.ⁱⁱⁱ Even though EPA has approved state permit programs that provide a minimum of 30 days for public comment, EPA's preference is for a minimum 45-day public comment period, which is what is included in the federal CCR permit program proposed rule.

- Public Meeting or Public Hearing – EPA evaluates whether the state provides an option for a public meeting or a more formal public hearing for certain permitting actions, such as draft permits or major modifications to permits.^{iv} EPA also evaluates what circumstances may warrant a public meeting or public hearing. For example, some states provide for a public hearing based on a significant degree of public interest.^v In addition, a public hearing may also be warranted when a state director, for example, determines in his or her discretion that a hearing would be appropriate.^{vi}
- Translation services – It may be appropriate in certain circumstances to provide translation services to increase accessibility and meaningful engagement for all communities with a potential interest in permitting decisions. Consideration should be given as to whether it may be appropriate to translate notice or certain supporting documents into alternative languages. Likewise, providing a translator, as may be necessary, at public meetings or hearings should be considered.^{vii}

PUBLIC PARTICIPATION CONSIDERATIONS BY PERMIT ACTION

EPA recommends that states consider public participation opportunities for the following stages of the state permitting process or by types of permitting actions, which include: (1) a permit application; (2) a draft permit; (3) a final permit; and (4) a major modification to a permit. By evaluating public participation at each one of these permitting decision points, states may be better able to craft public participation requirements consistent with EPA guidance. A robust public participation program may include the public participation components identified above, as well as additional methods for increasing public awareness and participation. States are not limited by the public participation opportunities identified in this memo.

States may consider providing the following public participation opportunities for specific stages of the permitting decision process or specific permitting actions, which are largely consistent with public participation as described in 40 CFR part 124.³ For example:

Permit Applications

- Consider providing public notice of a permit application and the state's proposed decision on the application;
- Consider making permit application documents available for review via methods that are most accessible to the community, including any supporting documents provided by the applicant; and,
- Consider translation services if/when necessary.

³ This section, "Public Participation Considerations by Permit Action," and the previous section, "Public Participation Core Components," are intended to be read in tandem. For example, the possible parameters and contours of public notice or public comment are described in the previous section and not repeated in this section for the sake of brevity.

Draft Permits⁴

- Provide public notice of the draft permit, which includes revoking and reissuing a permit, and suspension of a permit;
- Make documents available for review, including the draft permit and any supporting documents;
- Provide a public comment period of at least 30 days, with an option to extend it. It may be appropriate to consider a longer public comment period of 45 or 60 days, for example;⁵
- Provide an option for a public meeting or public hearing; and,
- Consider translation services for public notice, supporting documents, public meetings or public hearings.

Final Permit Determinations

- Provide public notice of the state's final determination on the draft permit, including a decision to deny the permit;
 - Note: Public notice of the final decision on the draft permit is generally expected to include a written response to comments received during the public comment period.
- Compile and make publicly available a written response to comments received during the public comment period;
- Make documents available for review, including the final permit and any supporting documents; and,
- Consider translation services for public notice, supporting documents, and the written response to comments.

Major Modifications to Permits⁶

- Provide public notice of the revised draft permit that includes the major modification, the final determination on the modified draft permit, including a decision to deny the modified draft permit;
 - Note: Public notice of the final decision on the requested modification is generally expected to include a written response to comments received during the public comment period.
- Make documents available for review, including the amended permit that includes the major modification and any supporting documents;
- Provide a public comment period of at least 30 days, with an option to extend it. It may be appropriate to consider a longer public comment period of 45 or 60 days, for example;⁷
- Provide an option for a public meeting or public hearing; and,
- Consider translation services for public notice, supporting documents, response to comments, public meetings or public hearings.

⁴ EPA generally expects that when a state is revoking and reissuing a permit, the state will draft a new permit and that the new, draft permit will be subject to the same public participation procedures as an initial draft permit. *See, e.g.*, 40 CFR § 124.5; Federal CCR Permit Program (Proposed Rule), 85 Fed. Reg. at 9945.

⁵ As part of the Federal CCR Permit Program Rule, EPA has proposed to adopt 40 CFR § 124.10(b), which requires a public comment period of a minimum of 45 days. Section 124(a)(4) also suggests that a 60-day comment period may be appropriate for "complicated proceedings."

⁶ As described *infra* "Permit Modifications," EPA recommends that states provide the same public participation opportunities for major modifications as is provided for draft permits.

⁷ As part of the federal CCR permit program rule, EPA has proposed to adopt 40 CFR § 124.10(b), which requires a public comment period of a minimum of 45 days. Section 124(a)(4) also suggests that a 60-day comment period may be appropriate for "complicated proceedings."

PERMIT MODIFICATIONS

EPA evaluates whether a state CCR permit program provides for public participation in modifications to existing permits, particularly, for major modifications. EPA recommends that states provide the same public participation opportunities for major modifications as is provided for draft permits. See “Public Participation Considerations by Permit Action” above for more information on potential public participation for major modifications. Ideally, a state permit program would provide for public participation, either through regulation or as standard policy, for any modification that is not purely administrative and that could impact the protection of human health and the environment. Additionally, EPA evaluates whether a state considers a major modification to include changes to an existing permit that may be necessary to comply with new regulations.

State regulations may include a general definition of which actions would be considered a major or minor modification and/or a specific list of actions or changes that are considered a major or minor modification. The proposed federal CCR permit program, which remains under consideration and subject to change, provides a helpful example.

Major modifications are all changes to a permit that are not considered a minor modification listed at § 257.151(a). These include changes that materially alter the CCR unit or its operations, changes that impact the applicability of subpart D requirements, changes that could impact the protection of human health and the environment, and changes necessary to comply with new regulations, where these changes can only be implemented by substantially changing design, operational requirements, or compliance approaches in the permit, or where the revised regulation requires the application of significant technical judgement or discretion. The following are examples of major modifications:

- (1) Changes that reduce the frequency or stringency of requirements for inspection, groundwater monitoring, sampling, analysis, recordkeeping, reporting, web posting, or maintenance activities by the permittee.*
- (2) Changes to remove or relax a permit condition that is based on an underlying requirement that is no longer applicable, but where this change in applicability is not due to a regulatory change that was subject to public notice and a public comment period, a statutory change, or an order from a court.*
- (3) Reduction in the number, or substantial changes in location, depth, or design of groundwater monitoring wells required by the permit.*
- (4) Addition of a new CCR unit including a new landfill unit, a lateral expansion, or a new surface impoundment unit not already authorized by a RCRA CCR permit and not covered by a permit by rule in accordance with § 257.128.*
- (5) Modification of a CCR unit, including physical changes or changes in management practices which are not minor modifications under § 257.151(a).*
- (6) Addition of a corrective action program or changes to the corrective action requirements in the permit.*
- (7) Changes to a plan approved in a permit, including reduction in the postclosure care period for any reason. This does not include administrative changes, a change that is a direct incorporation of a change to subpart D, or changes to a closure plan specified in § 257.151(a)(9),*
- (8) Extension of the final compliance date in a schedule of compliance established in accordance with § 257.142.*

- (9) *A change to a permit condition that is based on a change in an underlying regulatory or statutory requirement, which requires substantial changes to the design, operation, or compliance strategies established in the permit or which requires the application of significant technical judgement or discretion.*

Minor modifications are those that involve only minor or administrative changes that keep the permit current with respect to common changes to the facility or its operations. Minor modifications are changes that do not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment. These include changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit or where the revised regulation does not require the application of significant technical judgement or discretion. The following are examples of minor modifications:

- (1) *Administrative and informational changes, including changes to the name or contact information of permittees or other persons or agencies identified as points of contact in the permit or compliance plans.*
- (2) *Correction of typographical errors.*
- (3) *Transfer of ownership or operational control of a facility. The new owner and operator must submit a revised permit application 30 days prior to the transfer of ownership or operational control or as soon as practicable. If prior notice is impracticable, the revised permit application must be submitted no later than 30 days after the transfer of ownership or operational control.*
- (4) *Changes to a permit condition to incorporate a change to a maximum contaminant level (MCL) under §§ 141.62 and 141.66, which serve as the underlying basis for the permit condition.*
- (5) *Changes that increase the frequency, duration, or stringency of the requirements or procedures for inspection, monitoring, recordkeeping, reporting, web posting, sampling, analytical methods, or maintenance activities by the permittee.*
- (7) *Changes to monitoring, sampling or analysis methods or procedures to conform with EPA guidance or regulations.*
- (8) *Replacement of an existing groundwater monitoring well that has been damaged or rendered inoperable, as close as possible to the original location, and of similar design and depth.*
- (9) *In the closure plan, increases to estimates of the maximum extent of operations or the maximum inventory of waste.*

See Federal CCR Permit Program (Proposed Rule), 85 Fed. Reg. at 9986-87. Please refer to the Federal Register notice for the federal CCR permit program (Proposed Rule) at pages 9965-72 for additional considerations relevant to permit changes and modifications.

EXISTING EPA PROGRAM GUIDANCE FOR ALL RECIPIENTS OF EPA FINANCIAL ASSISTANCE

EPA has promulgated relevant guidance for public participation programs entitled, “Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs” and “Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI

Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons” (2004) (PDF).⁸

ⁱ See, e.g., 40 CFR § 239.6(a); 40 CFR §§ 124.10, 124.15(a). See also Federal CCR Permit Program (Proposed Rule), 85 Fed. Reg. at 9977 (proposing to amend the notice procedures in 40 CFR § 124.10(c) to include notice on a “publicly accessible internet website.”).

ⁱⁱ See, e.g., 40 CFR § 239.6(a)(1); 40 CFR §§ 124.12(d), 124.17(c). See also *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (Recipient Guidance), 71 Fed. Reg. 14207, 14215-16 (Mar. 21, 2006).

ⁱⁱⁱ See, e.g., 40 CFR § 239.6(a)(1); 40 CFR §§ 124.10(b), 124.14(a)(4).

^{iv} See, e.g., 40 CFR § 239.6(b); 40 CFR §§ 124.10(b)(2), 124.11, 124.12(a), (c)-(d). See also *Recipient Guidance*, 71 Fed. Reg. at 14215.

^v See, e.g., 40 CFR § 124.12 (requiring a public hearing for draft permits when a state director determines there is a “significant degree of public interest”). See also 30 Tex. Admin. Code § 39.503(e)(3) (defining specific circumstances that demonstrate a “substantial public interest” that require a public meeting).

^{vi} See, e.g., 40 CFR § 124.12 (providing that a public hearing may be held “at the Director’s discretion”).

^{vii} See *Recipient Guidance*, 71 Fed. Reg. at 14214. For an example of alternative language requirements in state permitting programs, see 30 Tex. Admin. Code § 39.426 (requiring that notice and hearings are translated into languages other than English if certain criteria are met).

⁸ See 71 FR 14207 (March 21, 2006) and 69 FR 35602 (June 25, 2004) Available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf and https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf