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Provisions	)	<i>Submitted via regulations.gov</i>
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COMMENTS OF EARTHJUSTICE, ENVIRONMENTAL INTEGRITY PROJECT,
SOUTHERN ENVIRONMENTAL LAW CENTER, ALTAMAHA RIVERKEEPER,
CHATTAHOOCHEE RIVERKEEPER, CLEAN POWER LAKE COUNTY, COOSA RIVER
BASIN INITIATIVE, HOOSIER ENVIRONMENTAL COUNCIL, NATURAL RESOURCES
DEFENSE COUNCIL, SIERRA CLUB, AND WATERKEEPER ALLIANCE ON EPA'S
ADVANCE NOTICE OF PROPOSED RULEMAKING REGARDING A GENERAL PERMIT
OPTION FOR COAL ASH

October 13, 2026

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I. INTRODUCTION

After belatedly beginning to regulate coal ash, one of the largest industrial waste streams in the United States (also known as coal combustion residuals or “CCR”), the United States Environmental Protection Agency (“EPA” or the “Agency”) has issued a flurry of proposals in 2026. If finalized, these proposals would undo progress on addressing toxic coal ash pollution and hand significant responsibility for its management to the polluters themselves. The first proposal (the “Proposed 2026 CCR Rule”) would weaken baseline coal ash regulations and, in part, invite owners and operators of coal ash sites to request from permit authorities variances from the “minimum criteria” that the Resource Conservation and Recovery Act (“RCRA”) requires EPA to establish by regulation.¹ The second proposal (the “Proposed Permitting Rule”) would finalize an EPA permitting scheme that, among other failings, would allow for general permits that: were automatically effective after a 45-day period, regardless of whether the Agency reviewed the request for coverage; had no public notice or comment period; had no end date; and operated as a permit shield.² Now, in this third proposal, the Advance Notice of Proposed Rulemaking Regarding a General Permit Option for Coal Ash (“ANPRM”), EPA announces that it is considering one or more general permits that would allow owners and operators of coal ash sites to obtain permit coverage for their own requested variances *before* (and potentially years before, if ever) any permitting agency—whether that is EPA or an approved state—has an opportunity to review.³

Taken together, EPA’s recent coal ash proposals portend a regulatory and permitting system that would fail to prevent a reasonable probability of adverse effects on human health and the environment, as required by RCRA. The ANPRM floats a general permit scheme that would create a system of industry self-regulation, where an industry with a long history of pollution and skirting the rules could speedily obtain permits that insulate coal ash sites from having to meet true minimum criteria that would be protective of health and the environment. Commenters have submitted detailed comments on their concerns with the first two proposals, which are incorporated herein,⁴ and now urge EPA to abandon its consideration of whether a general

¹ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy/CCRMU Amendments, 91 Fed. Reg. 18968 (Apr. 13, 2026) (“Proposed 2026 CCR Rule”) (attached).

² 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 Permitting Rule”) (attached); Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program; Reopening of Comment Period, 91 Fed. Reg. 31684 (May 28, 2026) (“Reopening of Proposed Permitting Rule”) (attached).

³ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program; General Permit Provisions, 91 Fed. Reg. 43051 (July 14, 2026) (“ANPRM”) (attached).

⁴ See Earthjustice & Env’t Integrity Project et al., Comments on Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy/CCRMU Amendments, Docket ID No. EPA-HQ-OLEM-2020-0107 (June 29, 2026) (“2026 Rollback Comments”) (attached); Earthjustice et al., Comments on Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program; Proposed Rule, Docket ID

permit could be developed to allow facilities to obtain permit coverage until an individual permit issued by EPA or an approved state CCR permit program is in effect.

II. EPA HAS TAKEN A SLOW AND INCONSISTENT APPROACH TO REGULATING HARMFUL COAL ASH POLLUTION.

A. Coal Ash Poses a Significant Threat to Human Health and the Environment.

Coal ash remains one of the largest industrial waste streams in the United States, and the mismanagement of it poses a significant threat to human health and the environment, as several of Commenters' organizations explained in detail in comments submitted in the dockets for the Proposed Permitting Rule and the docket for the Proposed 2026 CCR Rule.⁵

In summary, over the course of more than a century, the coal-fired power industry has generated approximately five billion tons of coal ash and dumped most of this ash in unlined surface impoundments (ponds) and landfills with minimal protection against leaks of coal ash, coal ash leachate, and wastewater. Widespread coal ash mismanagement has caused and continues to cause substantial leaching of toxic coal ash constituents into groundwater and surface water, releases to air via fugitive dust, and soil contamination, as well as numerous and at times massive spills of coal ash itself from poorly constructed and maintained impoundments.

As EPA has documented, coal ash contains many toxic metals and other pollutants, including arsenic, boron, cadmium, cobalt, chromium, fluoride, lead, lithium, mercury, molybdenum, radium, selenium, and thallium, that cause a wide range of adverse impacts on human health and the environment.⁶

Groundwater is a scarce resource that must be protected for future use, including as a source of drinking water.⁷ But at coal plants, it is typically contaminated with unsafe levels of several coal ash pollutants, which create a cumulative risk to people and aquatic life. Groundwater monitoring by owners and operators of coal plants shows that at ninety-one percent

No. EPA-HQ-OLEM-2019-0361-0487 (July 29, 2026) ("Proposed Permitting Rule 2026 Comments") (attached); Earthjustice et al., Comments on Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program; Proposed Rule, Docket ID No. EPA-HQ-OLEM-2019-0361-0321 (July 17, 2020) ("Proposed Permitting Rule 2020 Comments") (attached).

⁵ *Id.*

⁶ See generally EPA, Human and Ecological Risk Assessment of Coal Combustion Residuals, Docket ID No. EPA-HQ-OLEM-2020-0107-0885 (Dec. 2014), <https://downloads.regulations.gov/EPA-HQ-OLEM-2019-0173-0008/content.pdf> ("2014 EPA Risk Assessment"); EPA et al., Risk Assessment of Coal Combustion Residuals: Legacy Impoundments and CCR Management Units, Docket ID No. EPA-HQ-OLEM-2020-0107-1075 (Apr. 2024), <https://www.regulations.gov/document/EPA-HQ-OLEM-2020-0107-1075> ("2024 EPA Risk Assessment").

⁷ EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302, 21455 (Apr. 17, 2015) (codified at 40 C.F.R. §§ 257, 261) ("2015 CCR Rule").

of coal plants, coal ash is contaminating groundwater in excess of federal safe standards for drinking water.⁸

Coal-fired power plants and their coal ash units are also located near surface water and the plants and animals that live in and near it. A 2010 questionnaire involving 360 coal-fired power plants found that seventy-nine percent reported at least one unit within a quarter mile of surface water, and sixty-one percent reported at least one unit within 500 feet of surface water.⁹

The risks from coal ash are disproportionately borne by overburdened communities. Over half of the 417 coal-fired power plants with coal ash dumps that were analyzed using the Council on Environmental Quality's Climate and Economic Justice Screening Tool¹⁰ are located within a mile of a disadvantaged community, i.e. a community facing multiple environmental threats. Moreover, over seventy percent of the 393 coal-fired power plants that have coal ash units subject to 2015 regulations are located near a community that has higher-than-state average levels of low-income populations or populations of color.¹¹

Without corrective action and cleanup, the risks from coal ash exposure will increase for decades. According to EPA models, unaddressed leaking coal ash dumps will cause increasing contamination in nearby residential wells for more than seventy years for some pollutants, and for thousands of years for others.¹² This means that much of the potential harm from improper coal ash disposal has not yet manifested—and it is not too late to address coal ash mismanagement and avoid the worst outcomes.

⁸ Env't Integrity Project & Earthjustice, *Poisonous Coverup: The Widespread Failure of the Power Industry to Clean Up Coal Ash Dumps*, at 4 (Nov. 3, 2022), <https://environmentalintegrity.org/wp-content/uploads/2022/10/Poisonous-Coverup-11.03.22.pdf> (“Poisonous Coverup”) (attached). This analysis looked at data through 2019 for more than 548 coal ash disposal units at 292 coal-fired power plants and offsite disposal areas and found that seventy-four percent of landfills and ninety-one percent of surface impoundments at coal plants are contaminating groundwater with unsafe levels of one or more dangerous coal ash pollutants. *Id.* at 17, 51–53.

⁹ Calculated by Earthjustice. See EPA, *Steam Electric Power Generating Effluent Guidelines Questionnaire – Response Database*, <https://www.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-questionnaire>.

¹⁰ Council on Env't Quality (preserved), *Climate and Economic Justice Screening Tool* (“CEJST”), <https://public-environmental-data-partners.github.io/j40-cejst-2/en/#3/33.47/-97.5> (last accessed Oct. 5, 2026). CEJST uses over thirty indicators to identify census tracts that are overburdened and underserved, i.e., disadvantaged, with respect to climate and environmental threats. CEJST offers data at the census tract-level on PM_{2.5} exposure, diesel particulate matter, traffic proximity, abandoned mine land, formerly used defense sites, hazardous waste site proximity, Superfund site proximity, underground storage tanks and releases, wastewater discharge, and Risk Management Plan site proximity.

¹¹ See Earthjustice, *Where are Coal Ash Dump Sites?* (Apr. 17, 2025), <https://earthjustice.org/feature/coal-ash-map-sites-legacy-inactive-regulated>. It is possible that there are sites that are not captured in this analysis. Industry generally did not report on offsite CCR disposal areas and on power plants that stopped producing electricity before the 1990s, so these sites are likely not captured in this universe. This evaluation was conducted by analyzing the demographics of communities within one, two, three, and four miles of each facility based on 2018-2022 ACS data as summarized by EJScreen.

¹² See 2014 EPA Risk Assessment at 5-36–5-37.

B. EPA Regulates Coal Ash Under RCRA and the WIIN Act.

The goal of RCRA is to promote the protection of health and the environment and to conserve valuable material and energy resources by ensuring the safe treatment, storage, and disposal of solid waste.¹³ To achieve this goal, RCRA requires that EPA, among other things, prohibit “open dumps” on the land, close existing open dumps, and regulate waste disposal.¹⁴

EPA regulates the disposal of solid wastes that are not classified as hazardous under Subtitle D of RCRA. In Subtitle D, Congress directed EPA to promulgate regulations defining when a solid waste disposal facility is deemed to be a “sanitary landfill” as opposed to a prohibited “open dump.”¹⁵ These regulations take the form of “minimum criteria”¹⁶ – that is, EPA’s criteria establish the minimum standards necessary to classify units as sanitary landfills and ensure “there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste . . .”¹⁷ If a waste unit fails to comply with the minimum criteria established by EPA for sanitary landfills, the unit is deemed to be an “open dump,” must be “[c]los[ed] or upgrad[ed],” and is subject to citizen suits for “open dumping.”¹⁸

RCRA Subtitle D did not initially authorize EPA to directly implement or enforce its minimum national criteria for solid waste disposal facilities and did not provide a mechanism for states to adopt or implement EPA’s minimum criteria.¹⁹ That changed in 2016, with the passage of the Water Infrastructure Improvements for the Nation Act (“WIIN Act”).²⁰ The WIIN Act amended RCRA by providing for state and federal permitting programs to administer the minimum federal criteria, as well as by authorizing federal enforcement of the criteria. States can seek approval of CCR permitting programs that are “at least as protective as” the federal criteria for CCR units under 40 C.F.R. § 257.²¹ Approved states are referred to as “participating states.” States without approved state CCR permitting programs are “nonparticipating states.” In nonparticipating states, and on tribal lands, the WIIN Act requires EPA to implement and administer a CCR permitting program requiring compliance with the federal CCR criteria (subject to Congressional appropriations).²² The WIIN Act authorizes EPA to enforce the federal CCR criteria in states without approved programs.²³

¹³ 42 U.S.C. § 6902.

¹⁴ *Id.* § 6944(a).

¹⁵ *Id.*

¹⁶ *Id.* § 6907(a)(3).

¹⁷ *Id.* § 6944(a).

¹⁸ *Id.* §§ 6945(a), 6972.

¹⁹ 2015 CCR Rule, 80 Fed. Reg. at 21399, 21311; *see also* 42 U.S.C. § 6972.

²⁰ WIIN Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016) (codified at 42 U.S.C. § 6945(d)).

²¹ 42 U.S.C. § 6945(d)(1)(B)(ii).

²² *Id.* § 6945(d)(2)(B) and (d)(5).

²³ *Id.* § 6945(d)(4)(A)(i). In states with approved CCR programs, the WIIN Act authorizes EPA to enforce only approved program requirements, and only if the state so requests or if EPA determines that enforcement is necessary to ensure compliance with the program. *Id.* § 6945(d)(4)(A)(ii)–(B)(i).

To date, Oklahoma,²⁴ Georgia,²⁵ Texas,²⁶ North Dakota,²⁷ and Wyoming²⁸ are participating states with EPA-approved programs. EPA has also issued proposed approvals of permit programs for Virginia,²⁹ Louisiana,³⁰ Alabama,³¹ Wisconsin,³² and Indiana.³³ All other states are nonparticipating states.

C. EPA’s Federal CCR Rules.

1. The 2015 CCR Rule.

Nearly forty years after Congress enacted RCRA,³⁴ EPA finally exercised its statutory authority to adopt regulations governing coal ash disposal—the 2015 CCR Rule.³⁵ The 2015 CCR Rule established nationally applicable minimum criteria, including location restrictions, design requirements, operating requirements, and closure and post-closure requirements for a limited universe of CCR landfills and surface impoundments.³⁶ Some of its key protections include semi-annual groundwater monitoring requirements that can trigger corrective action obligations at lined impoundments and closure obligations at unlined ones; location restrictions to keep CCR units out of unstable areas, wetlands, fault areas, seismic zones, and the groundwater table; structural stability standards for impoundments; and comprehensive closure and post-closure requirements.³⁷ Failure to comply with these criteria results in the unit being deemed an “open dump” and, therefore, potentially subject to closure.

²⁴ Oklahoma: Approval of State Coal Combustion Residuals Permit Program, 83 Fed. Reg. 30356 (June 28, 2018).

²⁵ Georgia: Approval of State Coal Combustion Residuals Permit Program, 85 Fed. Reg. 1269 (Jan. 10, 2020).

²⁶ Texas: Approval of State Coal Combustion Residuals Permit Program, 86 Fed. Reg. 33892 (June 28, 2021).

²⁷ North Dakota: Approval of State Coal Combustion Residuals Permit Program, 90 Fed. Reg. 51168 (Nov. 17, 2025).

²⁸ Wyoming: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 9459 (Feb. 26, 2026).

²⁹ Virginia: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 23924 (May 4, 2026).

³⁰ Louisiana: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 34189 (June 5, 2026).

³¹ Alabama: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 43054 (July 14, 2026).

³² Wisconsin: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 57842 (Sept. 11, 2026).

³³ Indiana: Approval of State Coal Combustion Residuals Permit Program, 91 Fed. Reg. 58616 (Sept. 16, 2026).

³⁴ 42 U.S.C. §§ 6901–6992k.

³⁵ 2015 CCR Rule, 80 Fed. Reg. at 21302.

³⁶ 40 C.F.R. § 257.

³⁷ *Id.*

While the 2015 CCR Rule applied to many CCR surface impoundments and landfills, it exempted several types of CCR disposal units, including inactive surface impoundments at inactive power plant sites (“legacy ponds”), and inactive landfills.

2. *The 2024 Legacy CCR Rule.*

The Legacy CCR Rule, adopted nearly six years after the U.S. Court of Appeals for the D.C. Circuit resolved challenges to the 2015 CCR Rule, addressed several, but not all, shortcomings identified by the court.³⁸ In particular, the Legacy CCR Rule extended most existing requirements for unlined surface impoundments to legacy ponds and established safeguards for inactive CCR landfills and other areas where coal ash has been placed directly on the land (i.e. CCR Management Units or “CCRMU”). In addition to greatly expanding the universe of regulated units, the Legacy CCR Rule added compliance time frames for legacy ponds and CCRMU that differ from those for already-regulated units.³⁹ Compliance requirements for CCRMU, such as those for groundwater monitoring, will only be determined after site owners and operators complete newly-required Facility Evaluation Reports (“FERs”) to identify the presence of CCRMU.⁴⁰

Through an analysis of data submitted to EPA by industry actors over the past three decades, Earthjustice was able to determine that the Legacy CCR Rule subjected more than 900 additional units, including nearly 200 legacy surface impoundments, to regulation (the exact number will not be known until all FERs are completed).⁴¹

3. *The Proposed 2026 CCR Rule.*

On April 13, 2026, EPA issued a draft proposal that would significantly amend its CCR regulations.⁴² Notably for permitting, the Proposed 2026 CCR Rule would establish “alternative compliance pathways,” i.e. variances allowing owners and operators to seek approval of site-specific standards and practices during permitting for groundwater monitoring points of compliance, corrective action cleanup levels, closure requirements and time frames (including to

³⁸ 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) (codified at 40 C.F.R. §§ 9, 257) (“Legacy CCR Rule”).

³⁹ *Id.* at 39005 (legacy surface impoundment compliance time frames); *id.* at 39061 (CCRMU compliance time frames).

⁴⁰ *See*, 40 C.F.R. § 257.75.

⁴¹ EPA, Protecting Communities from Coal Ash Contamination FY 2024-27 National Enforcement and Compliance Initiative Strategy, at 1 (Sept. 22, 2023) (attached); *Supra* n.11, *see* Earthjustice, Where are Coal Ash Dump Sites? (Apr. 17, 2025). Industry generally did not report on offsite CCR disposal areas and on power plants that stopped producing electricity before the 1990s.; Earthjustice, Coal Ash in the United States: Addressing Coal Plants’ Hazardous Legacy (Sept. 4, 2025), <https://earthjustice.org/feature/coal-ash-states>. Units were identified using data gathered by EPA and self-reported by the coal industry, including EPA datasets used in 2007 and 2014 coal ash risk assessments (Human and Ecological Risk Assessment of Coal Combustion Residuals); Energy Information Administration data; and industry self-reporting since November of 2024. The number of units is likely an underestimate as many plants stopped burning coal long before EPA began to collect data.

⁴² *See* Proposed 2026 CCR Rule, 91 Fed. Reg. at 18968.

provide for increased extraction for beneficial use), setting of groundwater protection standards, and post-closure care time frames.⁴³

D. EPA’s Proposed Federal Permitting Programs.

1. The Proposed Permitting Rule.

In 2020, EPA proposed a federal permitting program for CCR units.⁴⁴ Without ever finalizing that rule, the Agency reopened comment on the Proposed Permitting Rule, in the same docket in 2026.⁴⁵ Although that comment period has closed, EPA has not finalized any permitting rule.

In the Proposed Permitting Rule, EPA proposes three types of permits it would issue in nonparticipating states: individual permits, permits by rule, and general permits. As Commenters have previously detailed, each type of permit is flawed, particularly in their inadequate (or entirely nonexistent) public participation requirements and lack of expiration.

According to EPA, the Proposed Permitting Rule was designed to implement the relatively uniform set of standards in place when it was first proposed in 2020. The site-specific variances provided in the Proposed 2026 CCR Rule would render the Proposed Permitting Rule unworkable in some respects and unclear in others.

2. The ANPRM for General Permit Provisions.

On July 14, 2026, EPA issued an ANPRM that seeks to placate CCR unit owners and operators that want to use the variances of the Proposed 2026 CCR Rule without waiting for a permit authority to tell them whether the variance they seek satisfies RCRA. More specifically, “EPA is considering whether a general permit could be developed to allow . . . facilities [seeking a variance] to temporarily obtain permit coverage until an individual permit issued by EPA or an approved state CCR program is in effect.”⁴⁶ According to EPA,

In some states, [incorporating the variances into the state permitting program] can take years. Consequently, concerns have been raised that the new compliance pathways would not be available to any facility that must comply with the self-implementing regulations while waiting for [a] state to obtain EPA approval for the new provisions.⁴⁷

In the ANPRM, EPA acknowledges that its Proposed Permitting Rule envisioned issuance of general permits to “categor[ies] of CCR units involving the same, or substantially similar, operations, which are all subject to the same applicable requirements of subpart D and would require the same permit terms and conditions to achieve compliance with subpart D.”⁴⁸

⁴³ *Id.* at 18998 (proposed at 40 C.F.R. § 257).

⁴⁴ Proposed Permitting Rule, 85 Fed. Reg. 9940.

⁴⁵ Reopening of Proposed Permitting Rule, 91 Fed. Reg. 31684.

⁴⁶ ANPRM, 91 Fed. Reg. 43051.

⁴⁷ *Id.* at 43053.

⁴⁸ *Id.*

Illogically, EPA nonetheless seeks “comment on whether the use of general permits would be effective and appropriate in this circumstance,” i.e. where a unit owner or operator believes that its unit is so distinct that it warrants regulation by bespoke requirements and does not want to wait for EPA or another permit authority to approve.⁴⁹

EPA issued this ANPRM despite lacking a federal permitting scheme for coal ash (it only exists in a proposed form at present) and not having finalized the “new compliance pathways” (they, too, exist only in a proposed form at present).

III. THE GENERAL PERMITS CONTEMPLATED BY THE ANPRM ARE INCONSISTENT WITH EPA’S PAST STATEMENTS ABOUT GENERAL PERMITS AND INDIVIDUAL PERMITS FOR COAL ASH AND CONTINUE A PATTERN OF INCOHERENT AGENCY REASONING.

Over the course of a few months, EPA has taken actions regarding the regulation of coal ash that have contradictory substance and rationales. On April 13, 2026, EPA published the Proposed 2026 CCR Rule, which would weaken coal ash protections, in significant part by allowing permit authorities to deviate on a site-by-site basis from standards the Agency previously determined were essential to meeting its statutory duties under RCRA.⁵⁰ EPA claims that these so-called “alternative compliance pathways,” which are the subject of this ANPRM, would account for the *heterogeneity* of coal ash sites and be developed under the watchful eye of a permit authority.

On May 28, 2026, during the comment period for the 2026 Proposed CCR Rule, EPA reopened comment on its Proposed Permitting Rule, which was originally published on February 20, 2020.⁵¹ The Proposed Permitting Rule is unchanged and EPA’s justification for many of its provisions, including the general permits that are also the subject of this ANPRM, is that the *homogeneity* of coal ash sites allows for the imposition of uniform standards on CCR units that share common characteristics.

Missing from either proposal is any indication of how EPA might reconcile these contradictory characterizations of coal ash units and the incompatible proposals they support. Through this ANPRM, issued on July 14, 2026, during the comment period for the Proposed Permitting Rule, EPA makes clear that it has no intention to do so. Indifferent to its responsibilities under RCRA, EPA’s stated aim with the ANPRM is to minimize any possible delay for owners and operators who want to avail themselves of these flexible protections.⁵² To do so, EPA considers allowing owners and operators to set their own site-specific standards without agency oversight and via a mechanism the EPA simultaneously asserts should only be

⁴⁹ *Id.*

⁵⁰ Proposed 2026 CCR Rule, 91 Fed. Reg. 18968.

⁵¹ Reopening of Proposed Permitting Rule, 91 Fed. Reg. 31684.

⁵² *See* ANPRM, 91 Fed. Reg. at 43053 (explaining that EPA’s ANPRM responds to “concerns . . . that the new compliance pathways would not be available to any facility that must comply with the self-implementing regulations while waiting for the state to obtain EPA approval for new provisions”).

used to set uniform requirements for sites of sufficient similarity.⁵³ EPA’s approach across these three proposals is clearly arbitrary and devoid of coherent rationale.

Proposed 2026 CCR Rule. Claiming that the WIIN Act provided relevant authority the Agency lacked when promulgating the 2015 CCR Rule, EPA proposes “to create an additional regulatory pathway that incorporates new regulatory provisions providing permit authorities the ability to approve certain flexibilities . . . [and] establish permit conditions that are better tailored to site conditions.”⁵⁴ These flexibilities would apply to several compliance activities critical to effective and safe coal ash disposal.

First, EPA proposes to establish a “closure method under a CCR permit authority,” an alternative approach allowing unit owners and operators to avoid current closure standards. In their place, the owner or operator would have broad latitude over the closure measures proposed in its permit application and these would be approved if the permit authority determined that the proposed approach would “result in no reasonable probability of adverse effects to human health and the environment during the active life of the CCR unit and the post-closure care period.”⁵⁵ EPA also proposes to allow permit authorities to reduce a unit’s post-closure care period from the current thirty-year minimum, again based upon a permit authority’s site-specific determination that the RCRA protectiveness standard will nonetheless be met.⁵⁶

EPA also proposes allowing permit authorities to deviate from existing groundwater monitoring requirements, which require well placement at the boundary of a waste unit to ensure the timely and accurate detection of leaks. Instead, a permit authority could permit the placement of groundwater monitoring wells up to 150 meters from the waste boundary if it determined that such placement will not “materially delay detection” of groundwater contamination and will “[m]inimize the migration” of such contamination into the uppermost aquifer.⁵⁷ Finally, EPA proposes allowing permit authorities to set “[a]lternative groundwater protection standards for” cobalt, lithium, and molybdenum – Appendix IV constituents that do not have MCLs.⁵⁸ Ignoring the fact that the health impacts of these coal ash constituents do not vary by site, EPA would allow a permit authority to set ad hoc protection standards provided that they are “appropriate health-based levels.”⁵⁹

EPA justifies these variances on the ground that they will “allow a *permit authority* to establish permit conditions that are better tailored to site conditions.”⁶⁰ Permit authority oversight, per EPA, would lead to “a refined risk record developed through the permitting process” and “a set of technical requirements different than those set forth in the national, self-implementing scheme that . . . better account for the site-specific data and risks of individual units and sites.”⁶¹ In the 2026 Proposed CCR Rule, EPA notes that allowing such flexibility

⁵³ *Id.* at 43052.

⁵⁴ Proposed 2026 CCR Rule, 91 Fed. Reg. at 18973.

⁵⁵ *Id.* at 19022-23 (proposed at 40 C.F.R § 257.112(b)).

⁵⁶ *Id.* at 19009.

⁵⁷ *Id.* at 18999.

⁵⁸ *Id.* at 19022.

⁵⁹ *Id.* (proposed at 40 C.F.R § 257.112(b)).

⁶⁰ *Id.* at 18973 (emphasis added).

⁶¹ *Id.*

without permit authority oversight would not be appropriate because it “would create too much potential for misinterpretation.”⁶² EPA emphasizes, “[t]o be clear, [that] the site-specific considerations in the new compliance pathway will apply to any facility *only after* . . . the permit authority determines the appropriate permit provisions.”⁶³

Reopened Proposed Permitting Rule. The Proposed Permitting Rule also under consideration by EPA is rooted in a fundamentally different understanding of CCR units. In the Proposed Permitting Rule, EPA asserts that CCR units are of a “more homogenous nature” than other types of waste units, “handl[ing] fewer types of waste with a limited range of constituents, and typically involv[ing] a more limited range of waste management activities.”⁶⁴ As such, EPA claims that general permits are appropriate “to accommodate a narrow set of circumstances”⁶⁵ (i.e. a clearly defined category of CCR units) and “would be issued without site-specific considerations and could not be modified for an individual permittee.”⁶⁶ In issuing such a permit, the Proposed Permitting Rule would require EPA to “clearly identify what types of CCR units [or solid waste management practices] are eligible for coverage under the general permit and clearly identify the applicable conditions for each category or subcategory of CCR units or solid waste management practices covered by the permit.”⁶⁷ Because of their uniform nature, those seeking general permit coverage would only submit a “request for coverage” that “must include all information necessary to demonstrate qualification for coverage.”⁶⁸ Procedures applicable to individual permit applications, such as public hearings and opportunity for comment, would not apply to general permit applications.

Advance Notice of Proposed Rulemaking. With the ANPRM, EPA solicits feedback on whether to make general permits available in circumstances EPA says are forbidden in the Proposed Permitting Rule and for proposed regulatory provisions that the Agency says in the 2026 Proposed CCR Rule should only be available where a permit authority performs a careful, site-specific analysis. Specifically, EPA seeks comment on whether to issue a general permit that would enable unit owners and operators to “take site-specific conditions into account when establishing permit requirements,”⁶⁹ while also asserting in the Proposed Permitting Rule that such use of general permits would be inappropriate.

At the same time, EPA considers allowing owners and operators to set such requirements without permit authority oversight, which the Agency says in the 2026 Proposed CCR Rule is inappropriate. Under the Proposed Permitting Rule, an owner or operator’s request for coverage is granted if EPA fails to object to it within forty-five days.⁷⁰ As detailed more thoroughly in our attached comments on the Proposed Permitting Rule, EPA has a track record of *very* sluggish decision-making, as evidenced by its woeful administration of the Part A and Part B variance

⁶² *Id.*

⁶³ *Id.* at 18997 (emphasis added).

⁶⁴ Proposed Permitting Rule, 85 Fed. Reg. at 9943.

⁶⁵ *Id.* at 9961.

⁶⁶ *Id.* at 9954.

⁶⁷ *Id.* at 9980 (proposed at 40 C.F.R. § 257.127(a)(2)).

⁶⁸ *Id.* (proposed at 40 C.F.R. § 257.127(b)(2)).

⁶⁹ ANPRM, 91 Fed. Reg. at 43053.

⁷⁰ Proposed Permitting Rule, 85 Fed. Reg. at 9980 (proposed at 40 C.F.R. § 257.127(b)(3)).

programs,⁷¹ and this will only be exacerbated by recent budget and staff cuts. There is no chance that EPA can evaluate and decide upon what is likely to be hundreds of requests for coverage under a general permit within forty-five days. This would be true if general permits only applied to requests for coverage under a prescribed set of conditions, as the Proposed Permitting Rule envisions, and is undeniably true if general permits become a vehicle for proposing site-specific compliance activities, as the ANPRM considers.

EPA claims that its ANPRM approach would ensure that owners and operators in participating states would have timely access to any alternative compliance pathways the Agency ultimately adopts. Absent such a general permit, these pathways “would not be available for facilities located in participating states . . . until the state adopts these provisions into its regulations and the EPA approves the revision, [which] . . . can take years.”⁷² At the same time, EPA attempts to minimize the significance of this lag by suggesting that owners and operators “could be eligible for a temporary general permit” lasting only “until the state CCR permit authority can evaluate” the sufficiency of its terms.⁷³ A multi-year period is significant when it comes to the potential risks of improper coal ash management.⁷⁴ And EPA fails to acknowledge in the ANPRM that after a permit program is approved, it will take additional years before any given permit application is decided upon.⁷⁵ EPA acknowledges this in the Proposed Permitting Rule and proposes tiered permit application deadlines to avoid the “poor quality permits” and “permit appeals that could have been avoided” if the permit review process is rushed.⁷⁶ Moreover, it is entirely possible that some states will never adopt the alternative compliance pathways, choosing instead to adhere to already approved, clear standards, viewing them as more easily administered and more protective.

Further adding to the confusion generated by these simultaneous actions, in the ANPRM EPA seeks comment on matters that are best addressed in a different docket and potentially premature. For example, here EPA seeks comment on numerous potential features of a general permit scheme rather than in the docket for the Proposed Permitting Rule. These include comment on questions such as “whether public comment on individual applications for a general permit is appropriate, and whether the EPA should be required to issue a determination that

⁷¹ Proposed Permitting Rule 2026 Comments at section III.C.1 (describing how, in five years, EPA issued a final decision on only one of thirty-five Part A extension applications despite the Agency’s deadline of “four months” to approve or deny such an application; EPA similarly failed to meet its deadlines for Part B applications).

⁷² *Id.*

⁷³ ANPRM, 91 Fed. Reg. at 43053. This proposal is internally inconsistent, as EPA is suggesting that a permit could allow a facility to have a “temporary” permit to “complete” closure of a CCR surface impoundment before a permit authority review—where, really, completing closure should be a one-time occurrence done with the permit authority’s review and evaluation.

⁷⁴ *See, e.g., USWAG v. EPA*, 901 F.3d 414, 429-30 (D.C. Cir. 2018) (noting that risks that can arise if proper coal ash management is delayed for a period of years are “an important aspect of the problem” and EPA’s failure to consider them is emblematic “of arbitrary and capricious reasoning.”).

⁷⁵ *See* 2026 Rollback Comments at section VI.B.11.iii (describing state agencies’ lack of capacity to oversee variance-intensive coal ash programs and how this will result in unreasonable delays); *see, e.g., id.* at section VI.B.11.iv (detailing Illinois’ experience with variances in its coal ash program and the delays it has faced as one state example).

⁷⁶ Proposed Permitting Rule, 85 Fed. Reg. at 9950.

coverage under a general permit is appropriate for a particular CCR unit,” while also “request[ing] input on scope or details of the terms of the general permit.”⁷⁷ It is unclear why EPA did not ask these questions when proposing the general permit scheme and responses provided here will not live in the record for the Proposed Permitting Rule where they properly belong. Similarly, EPA’s issuance of this ANPRM, which contemplates allowing general permits for proposed variance provisions, is premature and impedes meaningful comment when the basic elements of a general permit scheme have yet to be determined.

In the ANPRM, EPA also entirely fails to consider the risks to human health and the environment that could result from this general permit approach, which RCRA compels it to do. Should EPA proceed with this approach, it would essentially allow self-interested industry actors to set their own permit conditions for a potentially very lengthy period of years and in so doing to obtain a permit shield that would insulate them from accountability. Such a “fox guarding the hen house” approach would be preposterous under any circumstances. It is particularly preposterous to propose for an industry whose compliance with clear regulatory standards has been so deficient as to land it on EPA’s priority list for its National Enforcement and Compliance Initiative.⁷⁸

IV. EPA LACKS LEGAL AUTHORITY TO CREATE THE TYPE OF GENERAL PERMIT CONTEMPLATED BY THE ANPRM.

The type of general permit contemplated by the ANPRM runs afoul of both RCRA and the WIIN Act. Accordingly, EPA lacks legal authority to create such general permits.

A. The Proposed Variances Are Unlawful and Cannot Be Authorized by a General Permit.

In the ANPRM, EPA floats the idea of a general permit option for coal ash units seeking permit coverage under a “new compliance pathway” (i.e., site specific variance) that was proposed in the Proposed 2026 CCR Rule.⁷⁹ If the variances are finalized as proposed, they will be unlawful, as set out in Commenters’ 2026 Rollback Comments.⁸⁰ EPA cannot issue blanket permits for facilities proclaiming to follow site-specific variances. Such permits would both violate RCRA’s protectiveness standard to ensure “no reasonable probability of adverse effects on health or the environment,”⁸¹ and fail to satisfy the WIIN Act’s requirement that permits require coal ash units to achieve compliance with minimum criteria established by the EPA.⁸²

RCRA requires EPA to establish enforceable regulations that classify units as sanitary landfills—rather than prohibited open dumps—“only if there is no reasonable probability of

⁷⁷ ANPRM, 91 Fed. Reg. at 43053.

⁷⁸ EPA, Protecting Communities from Coal Ash Contamination FY 2024-2027 National Enforcement and Compliance Initiative Strategy (Sept. 22, 2023); *see also* Earthjustice, Env’t Integrity Project et al., Comments on EPA’s National Enforcement and Compliance Initiatives for Fiscal Years 2024-2027, Docket ID No. EPA-HQ-OECA-2022-0981 (March 13, 2023) (attached).

⁷⁹ ANPRM, 91 Fed. Reg. at 43051.

⁸⁰ *See generally* 2026 Rollback Comments.

⁸¹ 42 U.S.C. § 6944(a).

⁸² *Id.* § 6945(d)(2)(B).

adverse effects on health or the environment.”⁸³ The regulations must be “minimum criteria.”⁸⁴ In turn, minimum criteria “established by the Administrator” are the benchmark each permit EPA issues under the WIIN Act’s mandated permit program in nonparticipating states must require the permittee to achieve.⁸⁵

With the proposed variances, EPA proposes to allow permit authorities to set ad hoc standards for groundwater monitoring, corrective action, and closure on a site-by-site basis. EPA’s proposal ignores the need for minimum criteria by allowing for the minimum to vary on a site-by-site basis.⁸⁶

The ANPRM goes a step further. EPA suggests that instead of permit authorities setting the ad hoc standards on a site-by-site basis, owners and operators of coal ash sites would be able to be covered by a general permit authorizing the ad hoc standards, which means that those owners and operators will set their own ad hoc standards for their own sites. This cannot be squared with RCRA’s call for minimum criteria to satisfy the protectiveness standard. Nor does it fulfill the WIIN Act’s mandate for the EPA to implement a permit program to require each coal ash unit in a nonparticipating state “to achieve compliance with applicable *criteria established by the Administrator*,” where any “criteria” in the general permit are functionally established by owners and operators.⁸⁷

One variance EPA has proposed would allow permit-writers to supplant clear and standardized closure requirements with ad hoc “alternative closure standards.”⁸⁸ This variance fails to meet RCRA’s protectiveness standard, and it is unsupported by evidence and cannot be finalized without running afoul of rulemaking principles to avoid arbitrary and capricious decision making.⁸⁹ Yet the ANPRM singles this variance out as one ripe for a general permit.⁹⁰

Permittees pursuing this compliance pathway would be able to propose any set of closure measures and, per the Proposed 2026 CCR Rule, the permit authority would be tasked with determining whether those measures “will result in no reasonable probability of adverse effects to human health and the environment,”⁹¹ i.e. EPA’s minimum national criteria for satisfying RCRA could be supplanted for individual CCR units by a permit authority after consideration of

⁸³ 42 U.S.C. § 6944(a).

⁸⁴ *Id.* at §§ 6907(a)(3), 6944(a); *see also* 2026 Rollback Comments at 29-38.

⁸⁵ *Id.* at § 6945(d)(2)(B). Yet this is exactly what EPA suggests in the ANPRM.

⁸⁶ *See* Proposed 2026 CCR Rule, 91 Fed. Reg. at 18973–74 (describing “*various standards* for what triggers closure, what constitutes adequate protection of the environment, and the sequencing and timelines of closure procedures” (emphasis added)).

⁸⁷ 42 U.S.C. § 6945(d)(2)(B) (emphasis added).

⁸⁸ Proposed 2026 CCR Rule, 91 Fed. Reg. at 19022–23 (proposed at 40 C.F.R. § 257.112).

⁸⁹ *See* 2026 Rollback Comments at 101–182.

⁹⁰ *See* ANPRM, 91 Fed. Reg. at 43053 (identifying as an example of a facility that could be subject to a general permit, “a facility with a closing CCR surface impoundment located in an approved state that has not received a state CCR permit could be eligible for a temporary general permit that would allow the facility to complete the closure under the new compliance pathway until the state CCR permit authority can evaluate if the closure method was appropriate and accurate”).

⁹¹ Proposed 2026 CCR Rule, 91 Fed. Reg. at 19022 (proposed at 40 C.F.R. § 257.112(b)).

certain criteria, such as “[a]quifer characteristics,” “[w]aste characteristics,” and “[c]limatic conditions.”⁹² This variance violates RCRA on its own.

The ANPRM suggests baking this variance into a “general permit that would allow the facility to complete the closure under the new compliance pathway until the state CCR permit authority can evaluate if the closure method was appropriate and accurate.”⁹³ That would run afoul of the proposed variance itself. In the Proposed 2026 CCR Rule, the text requires an assessment of the ad hoc closure standards by the permit authority, but the ANPRM suggests a general permit that would treat a facility as complying with Subpart D while it “completes the closure” pursuant to the method of its choosing *before* the “permit authority can evaluate *if* the closure method was appropriate and accurate.”⁹⁴ Essentially, the owner or operator of a facility could opt into a general permit, obtaining the protection of a permit shield, and close its coal ash units under its own oversight before any permit authority has an opportunity to look at the specifics.

Another variance EPA has proposed would allow permit-writers to establish alternative points of compliance farther away from a waste unit.⁹⁵ This variance would violate RCRA’s protectiveness standard by delaying detection of contamination.⁹⁶ Not only would this variance allow permit-writers, who, per the ANPRM, might be the owners and operators themselves, to establish the points of compliance, but it would allow them to exercise discretion in interpreting whether this would “materially delay detection” and “minimize the migration” of pollution.⁹⁷ Because this variance is unlawful, any general permit program permitting owners and operators to implement it is necessarily unlawful.⁹⁸

Yet another variance EPA has proposed would allow permit-writers to set “alternative groundwater protection standards” for Appendix IV constituents without maximum contaminant levels (e.g., cobalt, lithium, and molybdenum),⁹⁹ as well as for lead.¹⁰⁰ However, just as the toxicity of a groundwater pollutant is the same, independent of location, so should the standard for that pollutant be the same, independent of location.¹⁰¹ But a single general permit contemplated by the ANPRM could hypothetically cover multiple different coal ash sites endeavoring to meet *different* standards for a pollutant such as lithium (or lead, a pollutant for which there is no “safe level” of exposure¹⁰²), while also allowing owners and operators to

⁹² *Id.* at 19022–23 (proposed at 40 C.F.R. § 257.112(b)(1)(i)-(iii)).

⁹³ ANPRM, 91 Fed. Reg. at 43053.

⁹⁴ Proposed 2026 CCR Rule, 91 Fed. Reg. at 19022 (emphasis added).

⁹⁵ *Id.* at 18999.

⁹⁶ *See* 2026 Rollback Comments at 241–260.

⁹⁷ *Id.*

⁹⁸ Yet this is exactly what EPA suggests in the ANPRM. *See* ANPRM, 91 Fed. Reg. at 43053 (identifying an example of a general permit that “could apply broadly to any facility [waiting for a permit] provided it had met the regulatory criteria for the new compliance pathway”).

⁹⁹ Proposed 2026 CCR Rule, 91 Fed. Reg. at 19022.

¹⁰⁰ *Id.* (proposed at 40 C.F.R. § 257.111(b)).

¹⁰¹ *See* 2026 Rollback Comments at 261–70.

¹⁰² *See* National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198, 4240 (Jan. 15, 2021) (emphasis added); *see also id.* at 4199 (“no safe blood lead level

functionally set those different standards. EPA has previously considered and rejected a proposal to allow owners and operators to establish their own standards, at least in part because it is unlikely that they “would have the scientific expertise necessary to conduct a risk assessment, and it was too susceptible to potential abuse,” and EPA should reject this repackaging of that idea again.¹⁰³

In sum, the variances are unlawful even when a regulatory agency, as permit authority, is tasked with setting the ad hoc standards. Any permit that provides for them will fail to satisfy RCRA and the WIIN Act. And a general permit scheme would functionally render the owners and operators of coal ash facilities the permitting authorities for their own sites—making Subpart D an unlawful self-permitting scheme.

B. EPA Is Not the Permit Authority in Participating States.

EPA specifies in the ANPRM that the contemplated general permits would apply to coal ash sites otherwise waiting on a site-specific permit from either a federal or participating-state permit authority.¹⁰⁴ The legal authority for EPA to provide general permit coverage for a site that is part of a participating state’s approved program is unclear. Even if EPA were to have this authority, it would raise federalism concerns and create confusion.

EPA lacks the legal authority to issue general permits to coal ash sites in states with programs approved to issue permits for those very same sites as the ANPRM contemplates. The WIIN Act extends permit authority to EPA only in “nonparticipating State[s],” i.e., those without an approved state permit program, and “Indian country.”¹⁰⁵ The WIIN Act provides for states to administer Subpart D coal ash regulations through a permit program that is “at least as protective as” the minimum criteria in regulations and that EPA has approved.¹⁰⁶ EPA’s authority extends to the ability to approve the “permit program,” not the permits themselves.¹⁰⁷ Once EPA has approved a permit program, the state is a “participating state” and its approved program “will operate in lieu of . . . implementation by the [EPA] of a permit program under paragraph (2)(B),” i.e., EPA’s permit program for nonparticipating states.¹⁰⁸ EPA’s approval of a permit program

in children has been identified”) (citation omitted); *Id.* at 4259 (“No safe level of lead exposure has been identified”) (citation omitted).

¹⁰³ Proposed 2026 CCR Rule, 91 Fed. Reg. at 19002 (quoting 80 Fed. Reg. at 21450).

¹⁰⁴ ANPRM, 91 Fed. Reg. at 43052 (“EPA is considering whether a general permit could be developed to allow owners and operators of CCR facilities to temporarily obtain permit coverage until an individual permit issued by the EPA or an approved state CCR permit program is in effect.”); *see also id.* at 43051 (noting that EPA has proposed “new compliance pathways that would allow site-specific considerations to be taken into account during permitting . . . under a federal or participating-State CCR permit” and that EPA is considering a general permit for “such facilities”).

¹⁰⁵ 42 U.S.C. §§ 6945(d)(2)(B), (d)(4)(B).

¹⁰⁶ *Id.* § 6945(d)(1).

¹⁰⁷ EPA’s ANPRM seems to suggest that only once a state “permit is issued and in effect” is its permit authority displaced. ANPRM, 91 Fed. Reg. at 43053.

¹⁰⁸ 42 U.S.C. § 6945(d)(1)(A).

thus displaces its ability to issue permits for sites and standards covered by that permit program.¹⁰⁹

Moreover, the issuance of any such permits also would cause enormous confusion (and, quite possibly, be illegal). It would be unclear to the regulated community and to concerned neighbors of sites whether EPA's general permit superseded the state requirements or supplemented them. Participating states with sites that obtain EPA's general permit with variances might treat those sites as unpermitted or require them to obtain a second permit from the state based on the state's approved program.

The WIIN Act specifically contemplates that a state's approved program may be more protective of health and the environment than the federal regulations.¹¹⁰ In such a state, there is a serious federalism concern with allowing EPA to issue a less protective federal permit. The ANPRM does not appear to contemplate what will happen if a state insists on compliance with its regulations for a unit that also claims coverage under such a general permit.

Alternatively, if the participating state treats the EPA-issued general permit as sufficient, even though the variances are not part of the state's approved program, then such a state may be disinclined to seek approval of its own amended permit program that includes variances. This would undermine the ANPRM's suggestion that the contemplated general permits would be temporary and simply filling the gap until the state "adopts [the variances] into its regulations and the EPA approves the revision."¹¹¹

V. ANY GENERAL PERMITS FOR COAL ASH MUST INCLUDE REGULAR OPPORTUNITIES FOR PUBLIC PARTICIPATION.

In the ANPRM, EPA requests comment on a number of issues that would determine whether any CCR general permit rule ensures adequate public participation and compliance with RCRA. In particular, EPA requests comment on (1) whether any general permit coverage should be time limited or temporary; (2) the information that should be included in the application for coverage; (3) whether public comment on individual applications for coverage under a general permit is appropriate; and (4) whether EPA should be required to issue a determination that coverage under a general permit is appropriate for a particular CCR unit.¹¹² As discussed above, EPA cannot issue general permits that include variances as the ANPRM contemplates. Not only would this violate RCRA's protectiveness standard, it also would violate the statute's public participation requirements and EPA's public participation regulations.

¹⁰⁹ Of course, EPA retains enforcement authority in participating states. 42 U.S.C. § 6945(d)(4)(B). Moreover, where EPA only partially approves a permit program, it will continue to have partial authority in the state. Alternatively, where wholly new sites are encompassed in federal regulations after EPA approves a program—such as the legacy ponds that were newly regulated by the 2024 CCR Rule—the approved state program cannot be read to displace EPA's authority for those sites; this is the case in Oklahoma, Georgia, and Texas, for example.

¹¹⁰ 42 U.S.C. 6945(d)(1)(C) (providing for the approval of state standards that "are at least as protective as" the federal criteria).

¹¹¹ ANPRM, 91 Fed. Reg. at 43053.

¹¹² *Id.*

RCRA requires and encourages public participation.¹¹³ This is consistent with RCRA's protectiveness standard, EPA's past statements on the role of public participation in ensuring that subpart D satisfies the protectiveness standard,¹¹⁴ and courts' recognition that public participation is essential to the legitimacy of environmental permits.¹¹⁵

As detailed in Commenters' Proposed Permitting Rule 2026 Comments, any CCR general permit must be temporary and include expiration dates.¹¹⁶ EPA has previously determined that permit expiration "provides a mechanism for regular review of the existing permit and its terms and conditions, and for incorporation of any new information and, if necessary, new conditions into the permit through a public process."¹¹⁷ EPA also has noted that permit expiration would help "to ensure sufficient opportunities for public participation during the life of the CCR unit."¹¹⁸ In contrast, permits without expiration dates arbitrarily cut out the public.

In the ANPRM, EPA implies that the general permits will be temporary and "until the state adopts these [variance] provisions into its regulations and the EPA approves [them]," but also acknowledges that "[i]n some states, this process can take years."¹¹⁹ However, EPA does not acknowledge that some participating states may choose *not* to adopt variance provisions into their regulations. In order to address any potential ambiguity related to how temporary these general permits may be, EPA must require any general permit to be limited to a time period that ensures meaningful opportunities for public participation.

With respect to the information that should be included in a general permit application, EPA must establish clearly specified, detailed instructions for minimum submissions to be included in applications.¹²⁰ This is especially necessary in light of the Proposed 2026 CCR Rule,

¹¹³ RCRA requires and encourages "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program" under the statute. 42 U.S.C. § 6974(b)(1).

¹¹⁴ See, e.g., 2015 CCR Rule, 80 Fed. Reg. at 21426–27 ("EPA believes that it cannot conclude that the RCRA subtitle D regulations will ensure 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."); see also *id.* at 21399.

¹¹⁵ *Gerber v. Norton*, 294 F.3d 173, 178–82 (D.C. Cir. 2002) (holding that the Fish and Wildlife Service violated public participation requirements under the Endangered Species Act when it failed to provide a site map of a proposed conservation area during a permit's public comment period and therefore did not receive, nor take into account, technical critiques calling into question the permit's legality); see also *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 993 (D.D.C. 1983) (holding that the Army Corps of Engineers violated public participation requirements in issuing a Clean Water Act permit in denying the public access to certain permitting documents and noting that "[o]nly when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion.") (internal citations omitted).

¹¹⁶ Proposed Permitting Rule 2026 Comments at 18–20.

¹¹⁷ Proposed Permitting Rule, 85 Fed. Reg. at 9953.

¹¹⁸ *Id.*

¹¹⁹ ANPRM, 91 Fed. Reg. at 43053. For example, in the first nine years after the WIIN Act was enacted, only four states obtained approvals.

¹²⁰ Proposed Permitting Rule 2026 Comments at 42–43.

which includes provisions that allow for site-specific considerations during permitting, including alternative groundwater monitoring systems and protection standards, alternative closure methods and completion timeframes, and alternative post-closure care.¹²¹ If finalized, all of these alternatives will require extensive investigation and documentation. Thus, any general permit rule must specify clear, minimum site-specific submissions for existing requirements, and for any new alternative compliance pathways that EPA may adopt.

In addition, EPA must provide opportunity for public comment on individual applications for general permit coverage and issue a determination on an individual application that is made available to the public.¹²² Under the Proposed Permitting Rule's general permit scheme, an owner or operator of a CCR unit would be able to seek coverage under a general permit simply by filing a request for coverage. There is no requirement for EPA to review, let alone approve, the request for coverage.¹²³ The general permit scheme does not provide opportunity for public comment on – *or even public notice of* – an owner or operator's application for coverage under the general permit.¹²⁴ Nor does the general permit scheme specify whether or how the public could ever learn of EPA's determination on the application or of a unit's coverage under the general permit.¹²⁵ This significant lack of public participation opportunities fails to satisfy RCRA and EPA's public participation requirements, and cannot be finalized in any EPA general permits for coal ash, such as those contemplated by the ANPRM.

In order to ensure that any general permit process provides meaningful opportunities for public participation, EPA must require that owners and operators post their applications for coverage on their publicly available CCR websites, EPA must provide time for public comment and a public hearing, and EPA must be required to issue a determination on the application that is made available to the public.¹²⁶ Moreover, EPA must apply all of the Part 124 provisions that

¹²¹ Proposed 2026 CCR Rule, 91 Fed. Reg. at 19021–23 (proposed 40 C.F.R. § 257.110–114).

¹²² See 2026 Proposed Permitting Rule 2026 Comments at 17-18, 22-24.

¹²³ *Waterkeeper All., Inc. v. Contra Waterkeeper All., Inc.*, 399 F.3d 486,499 (2d Cir. 2005) (holding that a Clean Water Act rule that “fail[ed] to provide for permitting authority review . . . plainly violates” statutory public participation “commandments and is otherwise arbitrary and capricious under the Administrative Procedure Act”). Moreover, EPA can and does require Agency review and public participation for some general permits, such as the “two-step general permit” for small municipal separate storm sewer systems under the Clean Water Act. See 40 C.F.R. § 122.28(d)(2) (requiring the EPA to make a determination of the completeness of a notice of intent for coverage under the general permit and, if EPA intends to authorize the permit, it must give public notice of and opportunity to comment and request a public hearing on its proposed authorization and the notice of intent).

¹²⁴ See Proposed Permitting Rule, 85 Fed. Reg. at 9980 (proposed 40 C.F.R. § 257.127).

¹²⁵ The regulations are woefully inadequate in that they provide EPA just 45 days to object to an owner or operator's notice of coverage. See Proposed Permitting Rule, 85 Fed. Reg. 9980 (proposed 40 C.F.R. § 257.127(b)(3)); Proposed Permitting Rule 2020 Comments at 39 n. 252 (noting that this period of time is “an eye blink in the life of an administrative agency”); Proposed Permitting Rule 2020 Comments at section III.C.1 (describing EPA's slow pace in other CCR contexts).

¹²⁶ The Clean Water Act contains similar language as RCRA regarding public participation, see 33 U.S.C. § 1251(e), and courts have held that Clean Water Act permit programs that fail to provide for public scrutiny and comment, such as on a potential permittee's notice of intent to seek coverage under a general permit, violate the Act's public participation requirements. See *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 503–04 (2d Cir. 2005); *Env't. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 856–58 (9th Cir. 2003), *cert. denied*, *Tex. Cities Coal. on Stormwater v. EPA*, 541 U.S. 1085 (2004).

are necessary to ensure adequate public participation, as detailed in Commenters' Proposed Permitting Rule 2026 Comments.¹²⁷

VI. THE PROPOSED ROLLBACK RULE WOULD NOT BE PROTECTIVE OF HUMAN HEALTH, AND ANY GENERAL PERMIT IMPLEMENTING THE RULE ALSO WOULD NEGATIVELY IMPACT HUMAN HEALTH.

EPA seeks comment on the health impacts related to general permits compared to individual permits.¹²⁸ Without more detail, this question is vague and Commenters are unable to provide substantive responses. Nonetheless, the adverse human health impacts of any permit scheme that would implement the variances in the Proposed 2026 CCR Rule would be grave, as detailed in comments on that proposal.¹²⁹

The negative health impacts would be exacerbated by a general permit scheme that functionally allows industry to self-permit. For example, in proposing the variances, EPA assumed that state permit authorities could make individualized, site-specific risk assessments.¹³⁰ But this assumption that the variances might be based on a “better understanding” of risk crumbles if owners and operators can opt into a general permit for the (potentially very long) period of time *before* the permitting agency analyzes site conditions and proposed measures.¹³¹

VII. RCRA DOES NOT ALLOW EPA TO CONSIDER ECONOMIC IMPACTS IN REGULATING COAL ASH.

EPA seeks comment on the economic impacts of promulgating regulations for general permits for coal ash units.¹³² This question is vague and Commenters are unable to provide substantive responses. (For this reason, EPA should be skeptical of any quantified economic impacts offered by the regulated community.) But there is a deeper problem with this question: EPA seeks information that RCRA does not allow it to consider.

RCRA requires EPA to establish minimum criteria for coal ash units that ensure “no reasonable probability of adverse effects on health or the environment from disposal of solid waste.”¹³³ EPA’s rulemaking authority does not allow EPA to take any factor unrelated to the protection of human health and the environment—such as economics—into account.¹³⁴ EPA has

¹²⁷ Proposed Permitting Rule 2026 Comments at 36-39.

¹²⁸ ANPRM, 91 Fed. Reg. at 43054.

¹²⁹ See, e.g., 2026 Rollback Comments at 53–54, 148–70, 245–52, 265–70, 312–15; see also Brenda Foos, *Risk Assessment Comments – EPA Proposal on Coal Combustion Residuals (CCR), Legacy/CCRMU Amendments*, June 10, 2026, Section III at 53–54.

¹³⁰ Proposed 2026 CCR Rule, 91 Fed. Reg. at 18973.

¹³¹ *Id.*; see also *id.* (noting that EPA rejected a variance approach in the 2015 Rule because of the “absence of a mandated oversight mechanism to ensure that the alternative standards would be technically appropriate”).

¹³² ANPRM, 91 Fed. Reg. at 43053–54.

¹³³ 42 U.S.C. § 6944(a); see also *USWAG*, 901 F.3d at 447.

¹³⁴ See *Michigan v. EPA*, 576 U.S. 743, 744 (2015) (stating that where a statute “expressly directs EPA to regulate on the basis of a discrete factor that does not include cost, the Act should not be read as

acknowledged this before.¹³⁵ The D.C. Circuit, too, has made this clear: “Under any reasonable reading of RCRA, there is no textual commitment of authority to the EPA to consider costs in the open-dump standards.”¹³⁶ To rely on economic impacts here would be arbitrary, capricious, and contrary to law.¹³⁷

VIII. CONCLUSION

For the reasons set forth above, Commenters urge EPA not to move forward with the general permits for coal ash described in the ANPRM.

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Sincerely,

Mary Rock
Gavin Kearney
Mychal Ozaeta
EARTHJUSTICE
311 S. Wacker Dr., Ste. 1400
Chicago, IL
(312) 800-8336
mrock@earthjustice.org
gkearney@earthjustice.org
mozaeta@earthjustice.org

Abel Russ
ENVIRONMENTAL INTEGRITY PROJECT
888 17th St. NW, Suite 810
Washington, DC 20006
(202) 294-3282
aruss@environmentalintegrity.org

Nick Torrey
SOUTHERN ENVIRONMENTAL LAW CENTER
Chapel Hill, NC

implicitly allowing consideration of cost anyway) (citing *Whitman v. American Trucking Ass’n*s, 531 U.S. 457, 469–72 (2001)).

¹³⁵ See, e.g., 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, 53520 (Aug. 28, 2020) (“EPA disagrees that RCRA section 4004(a) allows EPA to take into account non-risk considerations. [. . .] EPA has consistently interpreted the mandate in section 4004(a), standing alone, not to authorize consideration of costs or any other factor unrelated to the protection of human health and the environment.”)

¹³⁶ *USWAG*, 901 F.3d at 448; see also *id.* at 449 (“There is no explicit mention of costs in section 6944; nor is there any flexible language such as ‘appropriate and necessary’ that might allow the EPA to consider costs in its rulemaking.”) (citing *Michigan*, 576 U.S. at 755).

¹³⁷ See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ntorrey@selc.org

Fletcher Sams
ALTAMAHA RIVERKEEPER
Brunswick, GA
fletcher@altamahariverkeeper.org

Stephanie Stutts
CHATTAHOOCHEE RIVERKEEPER
Smyrna, GA
sstutts@chattahoochee.org

Mayra Mendez
CLEAN POWER LAKE COUNTY
Waukegan, IL
exec@cleanpowerlakecounty.org

Jesse Demonbreun-Chapman
COOSA RIVER BASIN INITIATIVE
Rome, GA
jesse@coosa.org

Indra Frank
HOOSIER ENVIRONMENTAL COUNCIL
Indianapolis, IN
coalash@hecweb.org

Rebecca Hammer
NATURAL RESOURCES DEFENSE COUNCIL
Washington, DC
rhammer@nrdc.org

Bridget Lee
SIERRA CLUB
Washington, DC
bridget.lee@sierraclub.org

Daniel Estrin
WATERKEEPER ALLIANCE
New York, NY
destrin@waterkeeper.org