IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WATERKEEPER ALLIANCE, INC., LEAD Agency, Inc., and SIERRA CLUB Plaintiffs, v. ANDREW WHEELER, ACTING ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY and U.S. ENVIRONMENTAL PROTECTION AGENCY Defendants.	Civil Action No. 1:18-cv-2230

MOTION OF PLAINTIFFS WATERKEEPER ALLIANCE, INC., LEAD AGENCY, INC., AND SIERRA CLUB FOR SUMMARY JUDGMENT, AND MEMORANDUM IN SUPPORT

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INTRODUCTION

Waterkeeper Alliance, Inc., LEAD Agency, Inc., and Sierra Club (collectively, "Waterkeeper") respectfully submit this motion seeking summary judgment on all claims. This case is about EPA's first-ever approval of a state permit program to regulate the disposal of coal combustion residuals ("CCR" or "coal ash"). Coal ash is one of the largest and most toxic solid waste streams in the nation, including large quantities of heavy metals that can cause cancer and other adverse health impacts including reproductive, neurological, respiratory, and developmental problems. There are five sites in Oklahoma with coal ash disposal units. Some of those units are coal ash landfills. Others are coal ash "impoundments," i.e., pits where coal ash mixed with water is disposed, sometimes called "ash ponds." All of the coal ash disposal sites in the state are located on or near rivers or lakes. At every one of the sites where groundwater has been tested for pollution, contaminants associated with coal ash have been found at unsafe concentrations.

In 2015, the U.S. Environmental Protection Agency ("EPA") promulgated the first-ever comprehensive federal regulations of coal ash disposal units under the Resource Conservation and Recovery Act ("RCRA"). *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015) ("2015 Rule"). When adopted, those regulations were "self-implementing," meaning that no state or federal authority oversaw their implementation.

In 2016, Congress amended RCRA to authorize EPA to approve state coal ash permit programs to implement and enforce the 2015 Rule, provided that state requirements are "at least as protective as" the federal criteria. This case arises because EPA approved Oklahoma's application for approval of its state coal ash program despite multiple legal flaws in EPA's approval process and Oklahoma's coal ash program. *See* EPA-HQ-OLEM-2017-0613-0051, 83 Fed. Reg. 30,356 (June 28, 2018) ("Final Program Approval"). First, EPA has not fulfilled its

duty to promulgate minimum guidelines for public participation in state coal ash programs, a task it must complete before approving any such programs. Second, Oklahoma's coal ash program deprives the public of legally required opportunities for public participation. Third, Oklahoma's coal ash program fails to guarantee protection of human health and the environment, as required by RCRA, because it unlawfully allows unlined coal ash impoundments to continue to operate. Fourth, Oklahoma's coal ash program does not satisfy RCRA mandates that coal ash disposal facilities continue to comply with requirements as protective as federal standards because the program grants such facilities "permits for life." Finally, EPA failed to respond to Waterkeeper's comments on two of these issues in its approval process, a fatal procedural flaw that also renders the Final Program Approval invalid.

EPA may not simply rubber-stamp state coal ash permit programs that will take the place of federal regulation in those states. RCRA imposes substantive requirements on such approvals that EPA has failed to fulfill. For that reason, this Court should find that EPA failed to issue minimum guidelines for public participation in state coal ash programs, find that EPA's approval of the Oklahoma coal ash program was arbitrary and unlawful, and vacate EPA's approval of Oklahoma's coal ash program.

JURISDICTION

RCRA authorizes a citizen suit against the EPA Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. 42 U.S.C. § 6972(a); *see also* 28 U.S.C. §§ 1331 (Federal Question jurisdiction), 1361 (action to compel an officer of the United States to perform his duty). As alleged in Count 1 of Waterkeeper's Complaint, the Administrator failed to perform

such a nondiscretionary duty.[1] Any action brought regarding such a failure may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. 42 U.S.C. § 6972(a). RCRA provides that the district court shall have jurisdiction to order the Administrator to perform the nondiscretionary act or duty. *Id.*

As to Counts 2 through 7, the Administrative Procedure Act ("APA") authorizes judicial review of final agency actions for which there is no other adequate remedy in a court. 5 U.S.C. § 704. While RCRA provides for "judicial review of final regulations," 42 U.S.C. § 6976(a), EPA's action is not a "regulation." EPA itself refers to its action as an "authorization," not a "regulation." *See* Final Program Approval, 83 Fed. Reg. at 30,356. Indeed, Congress explicitly provided for judicial review of EPA action regarding the authorization of state hazardous waste programs under the next subsection of RCRA,[2] but did not so provide under the subsection at issue here. Thus, with no adequate remedy under RCRA, Waterkeeper may seek review of EPA's action under the APA in this Court.[3]

STATEMENT OF THE CASE

STATUTORY AND REGULATORY BACKGROUND

I. The Resource Conservation and Recovery Act and the 2015 Rule

Congress enacted RCRA in 1976, amending the Solid Waste Disposal Act, *see* Pub. L. No. 89-272, 79 Stat. 997-1001 (1965), to establish a comprehensive federal program to regulate the handling and disposal of solid waste. *See* Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified

[1] As to Count 1, Plaintiffs satisfied the sixty-day notice requirement of RCRA, 42 U.S.C. § 6972(c), by registered letter dated July 26, 2018. *See* Complaint, Ex. B (ECF No. 1-2); Ex. F, Return Receipt from Notice.

[2] 42 U.S.C. § 6976(b) (citing *id*. § 6926).

[3] "Unless a statute provides otherwise, persons seeking review of agency action go first to district court rather than to a court of appeals." *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994).

as amended at 42 U.S.C. § 6901 *et seq.*). The goal of RCRA is to promote the protection of health and the environment and to conserve valuable material and energy resources by ensuring the safe treatment, storage, and disposal of solid waste. *See* 42 U.S.C. § 6902.

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

Subtitle D of RCRA specifically directs EPA to publish minimum criteria that differentiate "open dumps," which are prohibited, from "sanitary landfills," which are permitted. *See id.* §§ 6907(a), 6944(a). The criteria for sanitary landfills must guarantee "no reasonable probability of adverse effects on health or the environment from disposal of solid waste." *Id.* § 6944(a). EPA does not enforce Subtitle D regulations directly; instead, the standards are enforced through citizen suits and state plans to upgrade open dumps. *Id.* § 6945(a).

Under its Subtitle D authority, EPA promulgated in 2015 the first national minimum criteria for coal ash disposal units. *See* 80 Fed. Reg. at 21,302 (codified as amended at 40 C.F.R. pt. 257). The 2015 Rule established national minimum criteria for coal ash impoundments including location restrictions; design and operating criteria; groundwater monitoring, corrective action, and post-closure requirements; and recordkeeping, notification, and disclosure obligations. *See id.* The rule distinguished lined from unlined coal ash disposal units through a detailed technical definition. Existing coal ash impoundments qualified as "lined" *only* if they

had either: (i) a so-called "clay liner," meaning a two-foot layer of compacted soil that conducts liquid at rate of no more than 1 x 10^{-7} centimeters per second; (ii) a composite liner comprising the clay liner described in (i), overlain by a "geomembrane" liner with certain characteristics; or (iii) an "alternative" composite liner that includes both a geomembrane liner and a "lower component" with the same liquid flow rate as a clay liner. *See* 40 C.F.R. § 257.71(a)(1)-(3).

A coalition of environmental groups petitioned for review of the 2015 Rule. *See* EPA Answer ¶ 32. On August 21, 2018, the D.C. Circuit issued its decision in that case, agreeing with environmental petitioners on three issues. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426-34 (D.C. Cir. 2018) [hereinafter "*USWAG*"]. First, the 2015 Rule was unlawful inasmuch as it allowed unlined surface impoundments – under the definition above – to continue to operate. *See id.* at 430. Second, it was unlawful to classify "clay-lined" impoundments as lined. *See id.* at 432. Finally, EPA had failed to regulate so-called "legacy" impoundments at coal plants that were no longer in operation on the effective date of the rule. *See id.* at 434. In light of these holdings, the D.C. Circuit partially vacated the 2015 Rule, because these provisions had failed to guarantee "no reasonable probability of adverse effects on health or the environment" as required by RCRA section 4004(a). *See id*. at 426-34. One consequence of this is that under current law, a "lined surface impoundment" must have a liner that meets either criterion (ii) or criterion (iii) under 40 C.F.R. § 257.71(a)(1).

II. The Water Infrastructure Improvements for the Nation Act

As discussed above, neither EPA nor the states originally had authority to create permit programs to enforce the Part 257 regulations. In 2016, however, Congress passed the Water Infrastructure Improvements for the Nation Act ("WIIN Act"), Pub. L. No. 114-322, 130 Stat. 1628 (2016), an amendment to RCRA that directs EPA to approve State "permit program[s] . . . for regulation by the State of coal combustion residuals units" to operate "in lieu of" federal coal

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

EPA subsequently issued non-binding guidance to serve as "a technical resource to States that may be useful in developing and submitting a State CCRs Permit Program to EPA for approval." *See* EPA-HQ-OLEM-2017-0613-0006, Coal Combustion Residuals State Permit Program Guidance Document; Interim Final, at ii (Aug. 2017) ("Guidance Document"). EPA has acknowledged that no existing regulations setting out public participation requirements – or any other requirements – apply to the approval of state coal ash programs. *See* Final Program Approval, 83 Fed. Reg. at 30,358; EPA-HQ-OLEM-2017-0613-0073, Comment Summary and Response Document: Oklahoma CCR Permit Program Approval, at 8-9 (June 2018) ("EPA Response to Comments"); *see also* Complaint ¶¶ 64-72 (ECF No. 1); *infra* at 23-24.

III. Oklahoma's Environmental Permitting and Coal Ash Regulations

Oklahoma promulgated final coal ash regulations on September 16, 2016. *See* 33 Okla. Reg. 1469 (codified at Okla. Admin. Code. 252:517-1-1 *et seq.*). Oklahoma's regulations track the federal Part 257 regulations closely, with a few additions and modifications to adapt the regulations into a state permitting program and "ensure consistency in solid waste regulation within the state of Oklahoma." EPA-HQ-OLEM-2017-0613-0002, State of Oklahoma: Coal Combustion Residuals Permit Program Application Packet, at 4 (July 31, 2017) ("Oklahoma Application"). As a result, Oklahoma's coal ash program contains provisions nearly identical to

those vacated by the D.C. Circuit in *USWAG*, the only changes being that references to the Code of Federal Regulations were replaced with references to the relevant provisions of the Oklahoma Administrative Code. *See* Okla. Admin. Code 252:517-15-6(a) (allowing unlined impoundments to continue to operate); *id.* 252:517-11-2(a)(1)(A) (defining clay-lined impoundments as lined); *id.* 252:517-1-1(d) (exempting legacy impoundments).

Under Oklahoma law, permits for coal ash units are governed by the Oklahoma Uniform Environmental Permitting Act ("UEPA"), 27A Okla. Stat. § 2-14-101 *et seq*., with implementing regulations codified at Okla. Admin. Code 252:4-7-1 *et seq*. The UEPA establishes three "tiers" of permits, set out, in relevant part, at Okla. Admin. Code 252:4-7-58 through -60. *See* EPA-HQ-OLEM-2017-0613-0055, Oklahoma Department of Environmental Quality ("ODEQ") Process Response Clarifications, at 13 ("ODEQ Process Clarifications"). "Tier I" permits include "technical plans," "modification of plans for closure and/or post-closure," modifications of pre-existing permits to allow "lateral expansion within permitted boundaries," to grant "a request for less than twenty-five percent (25%) increase in permitted capacity for storage," to make other "minor changes," and "[a]ll other administrative approvals required by solid waste rules." *See* Okla. Admin. Code 252:4-7-58(2), (3). With the exception of notice of a landowner, there are no opportunities for public participation for Tier I permits under Oklahoma's permitting scheme. *See* 27A Okla. Stat. § 2-14-103(9); Okla. Admin. Code 252:4-7-2.

In adopting coal ash regulations, Oklahoma made use of its existing three-tiered permit regime. *See* Okla. Admin. Code 252:517-3-3 ("All permit applications are subject to the Oklahoma Uniform Environmental Permitting Act as well as the requirements of this Subchapter."). Certain plans required by Oklahoma to demonstrate compliance with the federal coal ash regulations, including coal ash units' "fugitive dust control plans," "run-on/runoff

control system plans," and modifications to closure or post-closure plans or other "technical plans," are classified by Oklahoma DEQ as "Tier I" permit modifications. *See* Final Program Approval, 83 Fed. Reg. at 30,358. Even if the original permit is classified as Tier II or Tier III, plans that modify that permit can be classified as Tier I under the implementing regulations. *See* Okla. Admin. Code 252:4-7-58(2)(A).

Oklahoma's coal ash program grants permits to coal ash disposal units "for the life" of the unit. *See Id.* 252:517-3-1(a). Modification is required only if a unit ceases or suspends operations and then resumes, *id.* -1(e), or if Oklahoma revokes the permit through an enforcement action. *See* 27A Okla. Stat. § 2-3-502(D); ODEQ Process Clarifications at 21 ("With the exception of a DEQ enforcement action to revoke a facility's permit, a facility's permit will not terminate until the facility successfully completes closure, post-closure and any corrective action requirements.").

STATEMENT OF FACTS

I. Coal Ash Poses a Serious Threat to Oklahomans.

Coal-fired power plants in the U.S. generate one of the largest and most toxic solid waste streams in the nation, including large quantities of heavy metals and metal compounds such as arsenic, boron, cadmium, chromium, lead, mercury, selenium, and thallium. EPA Answer ¶ 1 (ECF No. 13). These toxic chemicals can cause cancer and other adverse health impacts including reproductive, neurological, respiratory, and developmental problems. *Id*. EPA further admits that, for decades, in the absence of national standards requiring safe disposal, coal ash was dumped in thousands of unlined and unmonitored lagoons, landfills, pits, and mines, resulting in the widespread release of dangerous pollutants from coal ash to water, air, and soil, endangering human health and the environment. *Id*. ¶ 2.

Oklahoma has not escaped this scourge. There are five coal ash disposal sites in the state that Oklahoma and EPA concede are regulated under the federal and state coal ash rules. *See* Final Program Approval, 83 Fed. Reg. at 30,357 & n.4; EPA Response to Comments at 4. Those sites include both landfills and impoundments containing coal ash, at least some of which are unlined impoundments. *See* Oklahoma Gas & Electric Company ("OG&E") Amended Answer ¶ 48 (ECF No. 40)[4]; ODEQ Process Clarifications at 2, 5, 8-9; EPA-HQ-OLEM-2017-0613-0044, Comments of Waterkeeper Alliance, Sierra Club, LEAD Agency, Inc., and Earthjustice at 4 ("Environmental Comments").

These coal ash dumps are located adjacent to, or within a short distance of, rivers and lakes, *see* Environmental Comments at 3-6, and they are already leaching unsafe concentrations of coal ash contaminants into Oklahoma's groundwater. *See id*. The groundwater monitoring report from the Grand River Dam Authority coal ash landfill shows that groundwater there contains concentrations of arsenic multiple times above EPA's safe drinking water standard, as well as unsafe levels of boron, chloride, and sulfate. *Id*. at 5. Likewise, groundwater testing from 2016-17 at the Big Fork Ranch coal ash landfill, located adjacent to the Arkansas River in Noble County, Oklahoma, which receives coal ash from OG&E's nearby Sooner plant, revealed concentrations of boron, manganese, and sulfate exceeding EPA's health advisories. *Id*. at 6. Groundwater testing from 2016-17 at the coal ash landfill and two coal ash impoundments at the Western Farmers' Electric Cooperative's Hugo coal plant in Choctaw County, Oklahoma, also

[4] OG&E's admission that "it owns one inactive CCR surface impoundment in Oklahoma . . . [that] has a 6-inch soil and bentonite liner overlain with six inches of cement stabilized aggregate on both side slopes and pond bottom," OG&E Amended Answer ¶ 48, confirms that the referenced ash pond is unlined. *See* Okla. Admin. Code 252:517-11-2(a)(1); 40 C.F.R. § 257.71(a)(1).

revealed boron, sulfate, thallium, total dissolved solids, and molybdenum at levels exceeding applicable federal health advisories and safe drinking water standards. *Id*. at 5.

Finally, documented pollution of groundwater at the Public Service Company of Oklahoma's ("PSO") Northeastern plant, located adjacent to the Verdigris River, goes back more than a decade. *See* ODEQ Process Clarifications at 8 (EPA question noting "evidence of groundwater contamination" at PSO's Northeastern Plant "going back to 2008"); *id*. at 9 (noting "statistically significant increases" in coal ash pollutants including boron, chloride, fluoride, and sulfate, among others, in groundwater at the Northeastern plant's bottom ash pond); *see also* Utility Solid Waste Activities Group ("USWAG") and PSO Amended Answer ¶ 49 (ECF No. 38) (admitting that the "PSO facility in Oologah, Oklahoma detected certain CCR constituents during implementation of its groundwater monitoring program under the CCR rule").

Before Oklahoma adopted its coal ash regulations in 2016, at least one coal ash landfill, the Big Fork Ranch landfill, was exempted from solid waste regulation, while two other coal ash landfills – those at the Grand River Dam Authority plant and PSO's Northeastern plant – had permits dating back decades. *See* EPA-HQ-OLEM-2017-0613-0058, Consent Order ¶ 2, *In re Evans & Assocs. Constr. Co., Inc.* (Mar. 13, 2007) (noting that the Big Fork Ranch landfill was operating under a mining permit); ODEQ Process Clarifications at 5 (Grand River Dam Authority coal ash landfill originally permitted by the Oklahoma Department of Health in 1981); *id.* at 8 (Northeastern plant coal ash landfill originally permitted in July 1978).

II. EPA's Approval of Oklahoma's Coal Ash Program

EPA received Oklahoma's application for approval of its coal ash program – the first application of its kind – on August 3, 2017. *See* EPA Answer ¶ 50; USWAG & PSO Amended Answer ¶ 50; OG&E Answer ¶ 50; Oklahoma Answer ¶ 12 (ECF No. 39). EPA, then lead by Oklahoma's former Attorney General, Scott Pruitt, proposed approval of Oklahoma's program

by notice in the *Federal Register* dated January 16, 2018. *See* EPA-HQ-OLEM-2017-0613-0001, Oklahoma: Approval of State Coal Combustion Residuals State Permit Program, 83 Fed. Reg. 2100 (Jan. 16, 2018).

On March 19, 2018, Waterkeeper submitted comments opposing the approval. *See* Environmental Comments. Waterkeeper argued that EPA should deny Oklahoma's application, arguing among other points that: (a) EPA must promulgate enforceable regulations setting out minimum public participation requirements for state coal ash programs before approving any such program, *see* Environmental Comments at 41-43; (b) Oklahoma's program fails to afford the public opportunities to submit written or oral comments on permitting and post-permitting documents addressing compliance with regulatory requirements, as required by RCRA § 7004(b), 42 U.S.C. § 6974(b), *see* Environmental Comments at 28-32, 35-36; and (c) Oklahoma's practice of granting permits "for life" contravenes the WIIN Act because it allows permits to remain in force even when they do not require compliance with standards that are "at least as protective as" any revisions to federal standards. *See id.* at 20-22.

On June 28, 2018, EPA approved Oklahoma's coal ash program, with an effective date of July 30, 2018. *See* Final Program Approval. EPA's approval encompasses both Oklahoma's coal ash regulatory scheme as it will be applied to coal ash dumps in the state in the future, as well as permits issued to CCR units prior to EPA's approval of the program. *See* 83 Fed. Reg. at 30,357, 30,363-64; USWAG Answer ¶ 56; Oklahoma Answer ¶ 15; OG&E Answer ¶ 56.

STANDING

A victory for Waterkeeper would force EPA to issue public participation guidelines and would require a lawful coal ash plan for Oklahoma that will better protect human health and the environment. This outcome will provide benefits and redress injuries to the standing declarants from Sierra Club, Waterkeeper, and LEAD Agency, other members of these groups, and the

public at large. Since these goals are also germane to the purposes of these organizations, plaintiff organizations have standing in this matter.

Plaintiffs are membership organizations. Yaggi Decl. ¶ 5 (Ex. A); Hatley Decl. ¶ 3 (Ex. B); Armendariz Decl. ¶ 3 (Ex. C). "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Appalachian Voices v. McCarthy*, 989 F.Supp.2d 30, 46-47 (2013). As to members' "standing to sue in their own right," the Supreme Court has held that to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (internal citations and quotations omitted).

Standing may be based on members' "reasonable concerns" about the effects of pollution on "affiants' recreational, aesthetic, and economic interests," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000). In a proceeding with multiple plaintiffs seeking standing, "if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (citation omitted); *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017).

I. Plaintiffs' Members Have Standing to Sue in Their Own Right.

Three of Plantiffs' members are standing witnesses in this case: Casey Camp-Horinek, Earl Hatley, and Robert Clark Frayser. All three are injured by EPA's unlawful actions; their injuries would be redressed by an order requiring EPA to cease the violations described in the Complaint and to comply with the Resource Conservation and Recovery Act.

A. Plaintiffs' Members Suffer Injuries in Fact.

As demonstrated in their declarations,[5] Casey Camp-Horinek, Earl Hatley, and Robert Clark Frayser are injured by EPA's unlawful failure to issue public participation guidelines and unlawful approval of Oklahoma's coal ash program.

1. Camp-Horinek

Casey Camp-Horinek, a Sierra Club member, lives on the outskirts of Marland, Oklahoma, about two miles southeast of Big Fork Ranch, where OG&E dumps coal ash from the Sooner plant. Ex. D ¶¶ 2, 5. She is a member of the Ponca Tribe and the Ponca Tribal Council, and serves on the Board for Movement Rights and on the Advisory Board of Women's Earth and Climate Action Network. *Id.* ¶¶ 1, 4. As a Ponca councilwoman, mother, grandmother, and great-grandmother, environmental issues are very important to Ms. Camp-Horinek. *Id.* ¶ 6. She is gravely concerned about coal ash pollution and its effects on her family's health, including several of her grandchildren and her great-grandson who have asthma; one of her grandsons has been hospitalized for long periods due to his asthma. *Id.* ¶ 7.

Ms. Camp-Horinek's family is exposed to coal ash pollution in several ways, including trucks carrying coal ash to the Sooner plant that pass by her home. *Id.* ¶¶ 8-9. Ms. Camp-Horinek and her family have made many changes in their lives due to their concerns regarding

[5] Exhibits D, B and E, respectively.

coal ash pollution, including: no longer planting a vegetable garden; no longer eating trout that her husband catches at Big Fork Ranch; no longer making jam from sand plums from wild bushes along the Arkansas River; no longer eating wild mushrooms from along the Arkansas River; no longer line fishing for catfish in the Arkansas River and a nearby creek; and no longer eating deer hunted by her son. *Id.* ¶¶ 11-16. Due to concerns about contamination from coal ash at Big Fork Ranch, Ms. Camp-Horinek and her family have stopped drinking well water and instead buy drinking water. *Id.* ¶ 17.

For many years, Ms. Camp-Horinek has expressed her concerns about the environment to public agencies, including by submitting comments and testifying at and attending public hearings. *Id.* ¶ 18. She would take advantage of additional opportunities to testify regarding coal ash contamination at Big Fork Ranch and to provide her ideas about meaningful public participation on coal ash. *Id.* ¶ 19. Ms. Camp-Horinek wants the right to be heard by the Oklahoma Department of Environmental Quality and federal agencies about how dust pollution and pollution of the Arkansas River are affecting her and her family. *Id.* ¶ 20.

2. Hatley

Earl Hatley is the Grand Riverkeeper for the Local Environmental Action Demanded ("LEAD") Agency, located in Northeast Oklahoma. Ex. B ¶ 2. He co-founded LEAD Agency, a member of the Waterkeeper Alliance, and served as its Board President from 1997-2003. *Id.* ¶ 3. As Grand Riverkeeper, he is responsible for the Grand River, plus the Spring and Neosho Rivers. *Id.* ¶ 10. His work as Grand Riverkeeper includes monitoring the watershed for pollution, acting as an advocate for the waterbody, and addressing pollution issues when they arise. *Id.* ¶ 11. Mr. Hatley has served on federal and state advisory boards. *Id.* ¶ 14. His work also includes statewide and regional issues, such as fracking and mining. *Id.* ¶ 15. Mr. Hatley has visited

Lake Fort Gibson, located downstream of the Grand River Dam Authority coal ash landfill, since he was a child, fishing, sailing, swimming, and hanging out. *Id.* ¶ 16.

Mr. Hatley has engaged in public advocacy with government agencies for many years, including comments, testimony, and other advocacy before the Oklahoma Department of Environmental Quality and other agencies. *Id.* ¶ 18. This advocacy includes testimony at public hearings and comments on coal ash pollution. *Id.* ¶ 19. If Mr. Hatley had the opportunity to take part in additional public hearings, or submit additional public comments, concerning the coal ash dump at the Grand River Energy Center, as well as other coal ash dumps around Oklahoma, he would take advantage of those opportunities. *Id.* ¶ 21. As Grand Riverkeeper, he gathers information about the Grand River that would be useful to the Oklahoma Department of Environmental Quality and EPA as they make regulatory decisions concerning the Grand River Energy Center's coal ash dump, and he would share that information with them if possible. *Id.* As a founder of LEAD Agency, a Riverkeeper, and a long-time advocate for clean and safe water, Mr. Hatley wants to be heard before Oklahoma and federal agencies. *Id.* ¶ 23.

3. Frayser

Robert Clark Frayser is a member of LEAD Agency, which his sister co-founded in 1997. Ex. E ¶ 5. He has supported LEAD Agency's work in many ways, including working on its annual conferences, helping evaluate pollution in Grand Lake and nearby ponds, and promoting a program to test children's teeth for lead. *Id.* ¶ 6. He is concerned about pollution from coal and from coal-burning power plants. *Id.* ¶ 7. He is also concerned about coal ash pollution, which contains heavy metals, and knows of a coal ash dump near Choteau adjacent to the Grand River, as well as several others around Oklahoma. *Id.* ¶ 8.

Mr. Frayser sails on Lake Fort Gibson with his children and grandchildren. *Id.* ¶¶ 9-10. While Mr. Frayser and his family enjoy playing with water guns, swimming, and pulling each

other on a small rubber raft behind the sailboat, he is concerned that pollution from the coal ash dump upstream on the Grand River is contaminating Lake Fort Gibson. *Id.* ¶¶ 11-13. He has had to limit his time and his family's time swimming in Lake Fort Gibson due to his concerns about water pollution, including coal ash pollution, in the lake, and is concerned that the coal ash pollution may increase and degrade the lake even more. *Id.* ¶¶ 14-15.

Mr. Frayser believes that agencies like the Oklahoma DEQ need to listen to Oklahomans who care about the resources that the agencies protect. *Id.* ¶ 18. If he had the opportunity to take part in public hearings or submit public comments, he would take advantage of those opportunities. *Id.* ¶ 17.

4. Plaintiffs' Members' Injuries Are Concrete, Particularized, Actual, and Imminent.

The injuries described in Plaintiffs' members' declarations meet the standards for injury described in *Lujan* and its progeny.[6] Here, the injuries are particularized because Ms. Camp-Horinek, Mr. Hatley, and Mr. Frayser each want to engage with the public participation opportunities that EPA's conduct is denying, and EPA's conduct affects them in a personal and individualized way, *Lujan*, 504 U.S. at 560 n.1. Their injuries are concrete, and actual or imminent, because EPA's unlawful approval of the Oklahoma coal ash program without issuing guidelines for public participation denies them the opportunity to be heard on elements of this program that could prevent or reduce their injuries from poorly-regulated coal ash.

B. Plaintiffs' Injuries Are Traceable to EPA's Unlawful Conduct, and a Favorable Judgment in this Proceeding Would Redress Their Injuries.

The second prong of the standing test is met if the Plaintiff's injuries are "fairly traceable" to the challenged action by defendant. *Id*. at 560–561. For the third prong, it must be

[6] *See also Friends of the Earth, Inc.*, 528 U.S. at 180-181.

likely that the injury will be redressed by a favorable decision. *Id.* at 561. Here, the three standing witnesses whose declarations are attached all suffer impacts from EPA's conduct that could be redressed by an order requiring compliance with RCRA.

Count 1 of the Complaint alleges that EPA failed to publish minimum guidelines for public participation in state coal ash programs. Count 3 alleges that EPA unlawfully approved Oklahoma's coal ash program without publishing these guidelines. Count 4 alleges that EPA unlawfully approved Oklahoma's program notwithstanding its inadequate public participation opportunities. By their terms, these three claims can each clearly be traced to EPA action in failing to publish guidelines and unlawful approval of Oklahoma's program. Moreover, these actions clearly injure standing witnesses who are suffering harm from coal ash who want to be heard before public agencies. Ex. D ¶¶ 18-20; Ex. B ¶¶ 18-21, 16; Ex. E ¶¶ 16-18. An order requiring EPA to issue minimum guidelines, ensuring that Oklahoma's program met these guidelines, and requiring that the public participation opportunities in Oklahoma's program otherwise meet the requirements of RCRA, would redress these injuries.

Count 2 of the Complaint alleges that, due to a court decision invalidating parts of the 2015 Rule,[7] EPA's approval of Oklahoma's coal ash program was invalid. Count 5 alleges that EPA unlawfully approved an Oklahoma program that provided for "permits for life." Both of these claims can be directly traced to EPA's conduct in unlawfully approving the Oklahoma program. EPA's conduct injures standing witnesses who, as described in their declarations (Exs. D, B, E), already suffer the consequences of coal ash. These witnesses will further suffer consequences if EPA implements a partially invalidated regulation that ineffectively regulates coal ash pollution (Count 2) and allows permits for life that will not reflect updated, protective

[7] *USWAG*, 901 F.3d 414.

standards (Count 5). This Court could redress these injuries by an order requiring EPA to withdraw its approval of Oklahoma's coal ash program; to not re-propose this approval until it has issued a new, lawful version of the 2015 Rule that Oklahoma's program is "at least as protective as"; and to prohibit permits for life.

Count 6 alleges EPA's failure to respond to comments on its proposed approval of the Oklahoma coal as program regarding public participation guidelines, while Count 7 alleges EPA's failure to respond regarding permits for life. These counts are directly traceable to EPA's conduct, and injure standing witnesses' right to be heard and interest in an effective coal ash program. Ex. D ¶¶ 18-20; Ex. B ¶¶ 18-21, 16; Ex. E ¶¶ 16-18. An order requiring EPA to withdraw its approval of the Oklahoma program and respond fully to comments on any re-proposal of this approval would redress the injury to Plaintiffs' standing witnesses.

II. Plaintiffs Have Standing to Sue on Behalf of Their Members.

Under the first *Hunt* criterion cited above, "an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343. The preceding section demonstrates that Plaintiff's members have standing to sue in their own right.

Next, "the interests at stake [must be] germane to the organization's purpose." *Id*. All three Plaintiff organizations meet these criteria:

- The Waterkeeper Alliance strengthens and grows a global network of grassroots leaders protecting everyone's right to clean water, Ex. A ¶ 4; many of its Member and Affiliate Organizations are actively working to protect their watersheds from pollution caused by coal ash disposal sites, *id.* ¶14; the Waterkeeper Alliance has joined Member Organizations to stop the release of pollutants from individual sites, *id.* ¶15, and has

submitted comments opposing EPA's proposed approval of the Oklahoma coal ash program, *id.* ¶ 17.

- LEAD Agency, a member agency of Waterkeeper Alliance, works in Northeast Oklahoma on, among other things, battling against coal ash and other pollution from coal plants. Ex. B, ¶¶ 3, 9. LEAD Agency staff have testified at coal-ash related public hearings and have submitted comments on EPA's proposal to approve Oklahoma's coal ash program. *Id.* ¶ 9.
- Sierra Club works to address the ongoing problem of water and air quality impairment from coal ash landfills and impoundments, Ex. C ¶ 6; the Sierra Club and its members are concerned about environmental harms from mismanagement of coal ash disposal, *id.* ¶ 7; and the Sierra Club filed extensive comments and turned out over 1,900 member to public hearings on EPA's proposed coal ash rule, *id.* ¶¶ 8, 9.

The interests at stake in this litigation include the opportunity to participate in the development of effective regulation of coal ash, and a protective and lawful state coal ash program in Oklahoma. These interests are germane to the purposes of Plaintiffs Waterkeeper Alliance, LEAD Agency, and Sierra Club.

Finally, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Member participation is not required where a "suit raises a pure question of law" that does not require the consideration of the individual circumstances of any aggrieved member of the organization. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 597 (D.C. Cir. 2015), citing *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287–88 (1986) (additional citation omitted). Here, the litigation involves questions of law, Joint Proposed Briefing Schedule at 1-2

(ECF No. 32). Further, the claims asserted and relief sought in this proceeding do not require "individualized proof" regarding members, as, for example, no damages for individuals are sought. *Bldg. and Const. Trades Council of Buffalo, New York and Vicinity v. Downtown Development, Inc.*, 448 F.3d 138, 150 (2d Cir. 2006), citing *Hunt*, 432 U.S. at 344.

III. Plaintiffs Have Procedural Standing.

In addition to standing based on the substantive *Lujan* criteria, Plaintiffs' injuries support procedural standing. *See, e.g., Lujan*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy"); *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012) (procedures that were "plainly designed to protect the sort of interest alleged" support a claim of standing); *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 4 (D.C. Cir. 2005) (procedural injury could "cause a distinct risk to a particularized interest of the plaintiff") (citations and internal quotation marks omitted).

Plaintiffs' concrete injuries described above and in standing declarations also impair procedural rights connected to the violations described in this case. For example, EPA's failure to issue guidelines for public participation endangers Plaintiffs' members' ability to participate in the development of state coal ash plans in Oklahoma and other states. EPA's approval of Oklahoma's program notwithstanding its far-too-limited public participation opportunities hinders Plaintiffs' members' ability to participate in the regulation of coal ash units in the areas they live, work, and/or recreate. Finally, EPA's failure to respond to issues raised by petitioners in comments is also a procedural violation connected to Plaintiffs' ability to ensure that state coal ash plans are lawful and effective. These and the other injuries alleged from Defendants' unlawful conduct impair procedural rights and Plaintiffs' interest in strong coal ash plans, and provide a basis for standing in this litigation.

STANDARD OF REVIEW

In general, a federal court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party is entitled to summary judgment if "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Scott v. Harris*, 550 U.S. 372, 380 (2007); *see* Fed. R. Civ. P. 56(c).

In a case that seeks review of administrative action, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This inquiry must ordinarily be based on "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Summary judgment in administrative cases "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 160 (D.D.C. 2011); *see Deppenbrook v. Pension Benefit Guar. Corp.*, 778 F.3d 166, 171 (D.C. Cir. 2015).

The parties agree that this case raises only questions of law and questions reviewable on the administrative record, and therefore that this case is appropriate for summary judgment. *See* Joint Amended Proposed Briefing Schedule ¶ 3 (ECF No. 36).

ARGUMENT

The Final Program Approval is invalid and must be vacated. First, there is no genuine issue of material fact that EPA failed to publish required minimum guidelines for public participation in state coal ash programs. For that reason alone, the Final Program Approval is invalid as a matter of law. The Final Program Approval is likewise invalid because Oklahoma's permit program does not provide for adequate public participation under RCRA. Oklahoma's

program is further unlawful because it directly incorporates portions of the 2015 Rule that violate RCRA, and therefore itself violates RCRA, and because it grants "permits for life" to coal ash disposal units, in contravention of the WIIN Act's requirement that state programs remain up-to-date with federal coal ash regulations. Finally, the Final Program Approval is unlawful because EPA failed to respond to Waterkeeper's comments on the required public participation guidelines and the illegal "permits for life." For all these reasons, this Court must vacate the Final Program Approval, require EPA to issue the required public participation regulations, and prohibit EPA from approving any further state coal ash permit programs until it does so.

I. There Is No Genuine Issue of Material Fact that EPA Unlawfully Failed to Publish Minimum Guidelines for Public Participation in State Coal Ash Programs.

RCRA requires EPA to ensure broad citizen engagement in government actions: the Administrator, in cooperation with the states, "*shall* develop and publish minimum guidelines for public participation" in the "development, revision, implementation, and enforcement of any regulation, guideline, information, or program" under RCRA. 42 U.S.C. § 6974(b)(1) (emphasis added). These guidelines, if published, would afford citizens the opportunity to shape coal ash programs that have a direct impact on their health, to ensure that state governments hear these concerns while considering permit program alternatives, and ultimately to ensure proper safeguards at landfills and ponds, many of which are already known to be leaking dangerous chemicals. Members of Plaintiff organizations seek these opportunities to be heard regarding coal ash. Ex. D ¶¶ 18-20; Ex. B ¶¶ 18-21; Ex. E ¶¶ 16-18. EPA must issue these guidelines to require public participation. Instead, and contrary to RCRA, EPA has never published these guidelines.

Congress' use of the word "shall" means that EPA cannot avoid its duty to issue these guidelines. "[T]he word 'shall' usually creates a mandate"[8] and "is ordinarily [t]he language of command."[9] Here, EPA's mandate had its origins in a public participation provision first enacted decades ago [10] and made applicable to state coal ash program approvals when Congress authorized such approvals in 2016.[11] Although the statute does not specify a deadline for EPA to satisfy this mandate, the mandate must be carried out in time to ensure that any RCRA program – here, a state coal ash program – is subject to minimum public participation requirements. EPA's duty was, thus, triggered by the passage of the WIIN Act allowing for approval of state coal ash programs, and the agency was obligated to carry out that duty before approving any state coal ash programs. *See, e.g.*, *Sierra Club v. EPA*, 992 F.2d 337, 343 (D.C. Cir. 1993) (EPA discharged its duty by "establishing and enforcing upon the states federal public participation guidelines" before approving state plans) (citing *Citizens for a Better Env't. v. EPA*, 596 F.2d 720, 724-25 (7th Cir. 1979)). Because EPA did not do so, it is in violation of 42 U.S.C. § 6974(b)(1).

EPA's rules under other RCRA programs do not address the public participation requirements of 42 U.S.C. § 6974(b)(1) as to state permit programs regarding coal combustion residuals. *See* 40 C.F.R. Part 25 (applies to specific activities per 40 C.F.R. § 25.2(a), including approval of state hazardous waste programs), Part 239 (requirements for approval of state municipal solid waste landfill programs), and Part 256 (state solid waste management plans). Guidelines setting forth minimum public participation requirements for these specific RCRA

[8] *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018).
[9] *Allied Pilots Ass'n v. Pension Benefit Guar. Corp.*, 334 F.3d 93, 98 (D.C. Cir. 2003) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)) (internal quotation marks and citation omitted).
[10] Pub. L. No. 94-580, § 2, 90 Stat. 2826 (1976).
[11] WIIN Act, Pub. L. No. 114-322, Title II, § 2301, 130 Stat. 1736 (2016).

programs do not satisfy the mandate under 42 U.S.C. § 6974(b)(1) with regard to the coal ash programs at issue here.[12] Indeed, EPA itself recognizes that 40 C.F.R. Parts 25, 239, and 256, issued years ago, do not apply to state programs concerning coal combustion residuals.[13] Accordingly, EPA cannot rely on those rules to discharge its duty to develop public participation guidelines for state coal combustion residuals programs.

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

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

[12] *See, e.g., Citizens for a Better Env't v. EPA*, 596 F.2d at 722-23 (holding that EPA's prior adoption of public participation regulations for National Pollutant Discharge Elimination System ("NPDES") permits, but not for state NPDES program enforcement, did not satisfy 33 U.S.C. § 1251(e)).

[13] *See* EPA Response to Comments at 8 ("We note that the Part 256 standards for state solid waste management plans cited by the commenter are not applicable to the Oklahoma CCR program."); *id.* at 9 ("As part 25 for RCRA is limited to the hazardous waste program when approving state programs, part 25 would not apply to state public participation under OAC CCR standards"); *id.* at 10 ("Neither 40 CFR Part 25 or 256 are applicable to the Oklahoma CCR facilities as discussed above."); *see also* Guidance Document at 2-1 (noting that EPA "reviewed the requirements in 40 CFR parts 239, 256 and 258 as *potential models* for determining whether the statutory criteria have been met and has used these as a basis for this guidance" (emphasis added)).

prior promulgation of guidelines regarding citizen participation in the state enforcement process, violates the terms of the Clean Water Act and must be overturned"); *City of Dover v. EPA*, 956 F. Supp. 2d 272, 282 (D.D.C. 2013) (citing EPA regulations developed to implement CWA public participation requirement). Similarly, EPA's failure to discharge its nondiscretionary duty under RCRA is in derogation of public participation rights afforded by government to citizens under the statute, including 42 U.S.C. §§ 6972 and 6974(b).

The WIIN Act authorizes EPA to approve state coal ash permitting programs that are "at least as protective as" the federal criteria for CCR units under 40 C.F.R. part 257. 42 U.S.C. § 6945(d)(1)(B)(ii). However, nothing in the WIIN Act excludes state programs from existing RCRA requirements, including the mandatory duty imposed by 42 U.S.C. § 6974(b).[14] Moreover, the WIIN Act grants authority to EPA to specify what "form" state coal ash program applications must take.[15] Thus, EPA may define state program application requirements to include items not specifically included in the federal CCR regulations; indeed, EPA must be allowed to do so, since permitting is not part of those federal rules. Therefore, the WIIN Act does not block application of the public participation requirements of 42 U.S.C. § 6974(b).

EPA's approval of the Oklahoma state coal ash program, at issue in Counts 2-7 of this proceeding, provides an immediate example, and trigger, for the minimum guidelines and EPA's duty to comply with 42 U.S.C. § 6974(b). Further, EPA will soon consider coal ash program

[14] *See* 42 U.S.C. § 6945(d)(7) ("Effect of subsection – Nothing in this subsection affects any authority, regulatory determination, other law, or legal obligation on the day before [the date of enactment of the Water and Waste Act of 2016].").
[15] 42 U.S.C. § 6945(d)(1)(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 approvals and conditions . . . .").

approvals from other states.[16] There is no genuine issue of material fact that EPA has unlawfully failed to issue public participation guidelines. EPA must issue these guidelines to ensure that citizens, including members of Plaintiff organizations, have an opportunity to participate in the development of the Oklahoma coal ash program. Further, EPA's guidelines must ensure that these opportunities are available to citizens as to subsequent state coal ash programs.

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

The Final Program Approval must be vacated because Oklahoma's coal ash program violates RCRA. Less than a month after the Final Program Approval became effective, the D.C. Circuit issued its decision in *USWAG* partially vacating and remanding the 2015 Rule on the grounds that several provisions of that rule failed to guarantee "no reasonable probability of adverse effects on health or the environment," as required by RCRA § 4004(a). *USWAG*, 901 F.3d at 427-34; *see* 42 U.S.C. § 6944(a). Oklahoma's coal ash regulations contain provisions nearly identical to the provisions vacated by the D.C. Circuit. *See* Okla. Admin. Code 252:517-15-6(a), -11-2(a)(1)(A), -1-1(d). In particular, the D.C. Circuit held that the 2015 Rule's "approach of relying on leak detection followed by closure" for unlined impoundments was "arbitrary and contrary to RCRA." 901 F.3d at 429. Oklahoma is home to several such unlined impoundments, *see* Complaint ¶ 48, and Oklahoma's regulations will allow them to continue operating unless and until they leak.

As the decision of a federal court, the D.C. Circuit's ruling in *USWAG* applies retroactively such that "all parties charged with applying that decision, whether agency or court,

[16] *See* 83 Fed. Reg. 36,435, 36,441 (July 30, 2018) (noting that multiple states had submitted applications to EPA for approval of state coal ash programs, and others have discussed doing so).

state or federal, must treat it as if it had always been the law." *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect. . . ."); *Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 847 (D.C. Cir. 2001) ("[C]ourt judgments must be applied retroactively with few exceptions."). As a result, this Court must evaluate the validity of the Final Program Approval as if the D.C. Circuit had already issued its decision in *USWAG* before EPA took final action.

Under this rule, the Final Program Approval is invalid as a matter of law. The power granted to EPA under the WIIN Act to approve state coal ash programs did not supersede the underlying requirements of RCRA. A state coal ash program must be "at least as protective as" federal coal ash regulations, 42 U.S.C. § 6945(d)(1)(B), and those regulations must satisfy the RCRA protectiveness standard, *id.* § 6944(a). Interpreting the WIIN Act to authorize state coal ash programs based on invalid federal regulations would work an implied repeal of RCRA section 4004(a). Congress did not intend this extreme result when it passed the WIIN Act. *See id.* § 6945(d)(7) ("Nothing in this subsection affects any authority, regulatory determination, other law, or legal obligation in effect on the day before [the date of enactment of the Water and Waste Act of 2016.]"); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("[I]n approaching a claimed conflict, we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute."); *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014) ("Absent clearly expressed congressional intent to the contrary, it is [the court's] duty to harmonize [statutory] provisions and render each effective.").

Past agency practice supports Waterkeeper's interpretation of the effect of *USWAG*'s partial vacatur. A similar sequence of events unfolded in the early 1990s when the D.C. Circuit partially vacated EPA's regulations for hazardous waste deposited in municipal landfills. *See Sierra Club*, 992 F.2d 337 (vacating in part the final action taken at 56 Fed. Reg. 50,978 (Oct. 9, 1991) (codified as amended at 40 C.F.R. pt. 258)). After the decision, EPA proceeded with state program approvals under a provision of RCRA similar to the WIIN Act, *see* 42 U.S.C. § 6945(c), but concluded that it could only grant *partial* program approvals in light of the D.C. Circuit's decision. *See, e.g.*, 58 Fed. Reg. 65,985, 65,986 (Dec. 17, 1993) ("EPA is approving the Nebraska program for all parts except the exemption from ground-water monitoring at small facilities. This exemption was vacated from 40 CFR part 258 as a result of [*Sierra Club v. EPA*].").

In contrast, in this case, EPA approved Oklahoma's coal ash program in full, even though it incorporates regulations that violate RCRA. Therefore the Final Program Approval was unlawful and in excess of EPA's authority under the WIIN Act.

III. EPA's Approval of Oklahoma's Coal Ash Program Fails to Afford Required Public Participation Opportunities in Violation of RCRA and the APA.

A. Oklahoma's Coal Ash Program Does Not Afford Public Participation Opportunities Required by RCRA § 7004(b)(1), 42 U.S.C. § 6974(b)(1).

As described in detail below, EPA's approval of Oklahoma's coal ash program is also unlawful because Oklahoma's program fails to afford required public participation opportunities.

1. RCRA Mandates Extensive Public Participation Opportunities in Permitting and Post-Permit Decisions.

Under RCRA, "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." RCRA

§ 7004(b)(1), 42 U.S.C. § 6974(b)(1). This sweeping provision requires broad public participation opportunities in permitting, modification of permits, rulemaking, and beyond.

Without question, the public must be afforded an opportunity to review and comment on waste-related permitting and regulatory documents before the associated permit or regulations are finalized. *See U.S. Brewers Ass'n, Inc. v. EPA*, 600 F.2d 974, 981 n.4 (D.C. Cir. 1979) (holding that EPA satisfied RCRA's mandate for public participation in the development of regulations when it held a 60-day public comment period and considered thousands of comments in promulgating a final rule); *State of Ala. ex rel. Siegelman v. EPA*, 911 F.2d 499, 506 (11th Cir. 1990) (holding that EPA complied with 42 U.S.C. § 6974(b)(1) in issuing a waste permit when EPA made "relevant documents" available at multiple locations, held a public hearing, and opened an 86-day comment period, including time for comments after the hearing).

EPA has similarly interpreted 42 U.S.C. § 6974(b)(1) to require broad public participation opportunities in permitting. In the preamble to its final rule setting out requirements for approval of state plans to manage municipal solid waste, EPA explained:

> The public participation provisions in [§] 7004(b) . . . are designed to ensure that the public is informed of decisions affecting solid waste management in their community. This rule requires approved states to have public participation procedures for permit issuance and post-permit action . . . . EPA believes these requirements encourage public participation as prescribed under RCRA [§] 7004(b).

Final Rule: Subtitle D Regulated Facilities; State Permit Program Determination of Adequacy; State Implementation Rule, 63 Fed. Reg. 57,026, 57,034 (Oct. 23, 1998); *see also* Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule (STIR), 61 Fed. Reg. 2584, 2595 (Jan. 26, 1996) (recognizing "public involvement in permit decisions as an essential component of an effective permit program . . . [and] requiring . . . public review of and input to permit documents containing the applicable

site-specific design and operating conditions [as well as] consideration of comments received and notification to the public of the final permit decision").

Interpretations of the Clean Water Act's "nearly identical"[17] public participation provision, 33 U.S.C. § 1251(e),[18] further establish that RCRA requires public review and comment of regulations and permitting documents, including plans containing site-specific conditions for compliance with applicable requirements, before final decisions are made. *See American Coke & Coal Chems. Inst. v. E.P.A.*, 452 F.3d 930, 941 (D.C. Cir. 2006) (holding that EPA satisfied 33 U.S.C. § 1251(e) in a rulemaking when it held stakeholder meetings, opened a 60-day comment period that it later extended, considered late-submitted comments, and issued a response to comments); *Waterkeeper Alliance, Inc.*, 399 F.3d at 503.

The Second Circuit's decision in *Waterkeeper* is particularly instructive as to the types of permitting documents that must be made available for public review and comment. In that case, EPA had promulgated a rule regulating discharges from animal feeding operations under site-specific "nutrient management plans." *Id.* at 495. The court held that EPA violated 33 U.S.C. § 1251(e) by issuing a rule that "shield[ed]" site-specific permit conditions set out in the nutrient management plans "from public scrutiny and comment," *id.* at 503, and thus "prevent[ed] the public from calling for a hearing about – and then meaningfully commenting on – NPDES permits before they issue." *Id.* Because the nutrient management plans "embod[ied] all the relevant 'site specific nutrient management practices,'" they constituted "a *sine qua non* of the

[17] *Sierra Club*, 992 F.2d at 343.

[18] 33 U.S.C. § 1251(e) provides, in relevant part, that: "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." RCRA's provision is in fact even broader than the Clean Water Act's version, calling for public participation also in the "implementation" of any "guideline" or "information" under the statute. 42 U.S.C. § 6974(b)(1).

'regulation, standard, plan, or program'" at issue. *Id*. at 504. For that reason, to withhold them from public scrutiny violated 33 U.S.C. § 1251(e).

The obligation under 42 U.S.C. § 6974(b)(1) to offer the public an opportunity to review and comment on permits, permit applications and supporting documents applies not only to new waste permits, but also to significant modifications of such permits as well. *See* 61 Fed. Reg. at 2595 ("[O]pportunities for public review of and input to key post-permit decisions (e.g., significant permit modifications) is essential to effective public participation.… [T]he public should be involved in key decisions which affect their health and their community."); Alaska: Tentative Determination and Final Determination of Full Program Adequacy of the State of Alaska's Municipal Solid Waste Landfill Permit Program, 65 Fed. Reg. 453, 457 (Jan. 5, 2000) (basing approval of Alaska's municipal waste program, in part, on the state's representation that it would "provide additional public participation opportunities after a permit is issued, including . . . permit renewals and major modifications or variances").

Section 6974(b)(1) also requires that the public have an opportunity to testify at a public hearing on permits, at minimum when there is significant interest in the proposed permit. Courts interpreting 33 U.S.C. § 1251(e) have concluded that the opportunity to testify at a public hearing on permits is essential to meeting the statutory mandate. *See Waterkeeper*, 399 F.3d at 503; *see also Costle v. Pac. Legal Found.*, 445 U.S. 198, 204, 216 (1980) (holding that rules directing EPA to hold a hearing on a water permit if EPA "finds a significant degree of public interest in a proposed permit" are "fully consistent with the legislative purpose [expressed in 33 U.S.C. 1251(e)], and are valid"); *State of Ala. ex rel. Siegelman*, 911 F.2d at 506 (relying, in part, on the fact that EPA held a public hearing in holding that EPA satisfied 42 U.S.C. § 6974(b)(1) in issuing a waste permit).

2. Oklahoma Fails to Provide Required Public Participation Opportunities.

Oklahoma's coal ash program fails to provide the public participation opportunities required by RCRA. The state's program provides few or, in some cases, no opportunities for the public to comment on, or request a public hearing on, permit applications, permits, and other key permitting documents setting out site-specific measures that the operator must undertake to comply with applicable substantive requirements. The program also offers only very limited opportunities for public comment or hearing on modifications to those permits.

The lack of public participation opportunities on key permit documents is most glaring for existing coal ash landfills in Oklahoma that had already been granted permits by the state prior to EPA's approval of its program. As EPA admitted in approving Oklahoma's program:

> [A]ll existing CCR landfills in [Oklahoma] submitted Tier I modification requests to change the applicable standards in their permit from the previous state solid waste standards at OAC 252:215 to the new CCR standards at OAC 252:217. As a Tier I modification, the public would not have had opportunity for input into these 252:517 CCR landfill permits.

Final Program Approval, 83 Fed. Reg. at 30,363.[19] EPA further acknowledges that "the public will not have opportunity for comment on these 'permits for life' in the future unless the permit is modified under a Tier II or Tier III modification." *Id.*

The administrative record confirms that Oklahoma entirely deprived the public of the opportunity to comment or request a hearing on key permit documents for existing coal ash

[19] Oklahoma noted that, "[f]or previously permitted CCR landfills, each application and permit, including permit modifications, would have been required to provide the required public participation opportunities that were in place when those permits were issued." ODEQ Process Clarifications at 13. This does not cure the problem. As explained above, *supra* at 10, the coal ash landfills were originally permitted decades ago. The substantive requirements to which those landfills were subject were not those set out in the federal coal ash rule and corresponding Oklahoma regulation. Even if the public had an opportunity to comment then, it has had no opportunity to comment or testify as to whether the relevant permit documents meet the requirements of the federal coal ash regulations or Oklahoma's corresponding standards.

landfills, with no assurance of opportunities for comment in the future. For example, ODEQ approved the Closure Plan, Post-Closure Plan, Fugitive Dust Control Plan, and Run-On/Run-Off Control Plan for the coal ash landfill at the Grand River Dam Authority as a Tier I permit modification with no public participation whatsoever. *See* Environmental Comments, Ex. 3 Part 1 at pdf p. 2 (Grand River Dam Authority Tier I coal ash landfill permit application); *id.* Ex. 4 at pdf p. 4 (DEQ approval of that permit application as a Tier I permit). Likewise, ODEQ later processed as Tier I the Groundwater Sampling and Analysis Plan for that landfill. *See* Consent Order at pdf p. 20, *In re Evans & Assocs. Constr. Co., Inc.* (Mar. 13, 2007).

Importantly, EPA approved Oklahoma's program both prospectively and retrospectively: the approval encompasses both Oklahoma's coal ash regulatory scheme as it will be applied to coal ash disposal units in the future, as well as permits issued to coal ash units prior to EPA's approval of the program. *See* Final Program Approval, 83 Fed. Reg. at 30,357, 30,363-64; USWAG & PSO Amended Answer ¶ 56; Oklahoma Answer ¶ 15; OG&E Answer ¶ 56. The Grand River Dam Authority coal ash landfill permit documents thus received EPA's full approval notwithstanding the fact that Oklahoma afforded the public zero opportunity to comment on them prior to their approval. That alone is sufficient to render EPA's approval of Oklahoma's program unlawful under 42 U.S.C. § 6974(b)(1). *See Waterkeeper*, 399 F.3d at 503; *State of Ala. ex rel. Siegelman*, 911 F.2d at 506.

The record also makes clear that Oklahoma will continue depriving the public of opportunities to weigh in on key permitting documents for coal ash units going forward. A chart in the administrative record indicates that Oklahoma processes Fugitive Dust Control Plans, Run-on/Run-off Control Plans, Closure Plans, Post-Closure Plans, Groundwater Sampling and Analysis Plans, and Groundwater Monitoring Programs, at least at coal ash landfills, as Tier I

permits – the Tier for which no public participation is available. *See* EPA-HQ-OLEM-2017-0613-0053 (the chart). Indeed, EPA readily admits that certain plans required to set site-specific conditions for compliance with coal ash regulations, including "fugitive dust control plans," "run-on/runoff control system plans," and modifications to closure or post-closure plans or other "technical plans," are classified by Oklahoma as "Tier I" permits. *See* Final Program Approval, 83 Fed. Reg. at 30,358. Thus, there is no opportunity for public comment or hearing on those key documents – or the associated "permits for life" Oklahoma issues – prior to permit issuance. *See* 27A Okla. Stat. § 2-14-103(9); Okla. Admin. Code 252:4-7-2.

Finally, even when Oklahoma's program does provide for public review and comment in the initial permitting process, it fails to ensure that that participation is meaningful. Closure plans are a key example. New permit applications must include a closure plan, Okla. Admin. Code 252:517-3-6(a)(11)(D), thus making the closure plan subject to public review and comment before permit issuance, assuming new permits are classified as Tier II or III. *See* Oklahoma Application at 7; 27A Okla. Stat. § 2-14-302; Okla. Admin. Code. 252:4-7-59, -60. However, coal ash unit owners/operators may modify their closure plans at any time, Okla. Admin. Code 252:517-15-7(b)(3)(a), and modifications to closure plans are treated as Tier I permits. *See id.* 252:4-7-2, -58(2)(A)(iii); Final Program Approval, 83 Fed. Reg. at 30,358. The public, then, could provide extensive input on a closure plan during the initial permitting process, only to have the unit modify that closure plan – potentially only days after receiving its permit – wholly behind closed doors. This creates the possibility for bait-and-switch that deprives the public of meaningful opportunity to comment on closure plans – plans that, if inadequately protective, could subject Oklahoma communities to dangerous pollution for generations. *See, e.g.*, Environmental Comments at 12.

In sum, Oklahoma's coal ash program does not afford public participation opportunities in the development and implementation of numerous compliance proposals and compliance demonstration documents essential for the implementation of its regulations for coal ash units. By approving Oklahoma's coal ash program notwithstanding that program's failure to afford public participation opportunities on many critical permitting documents, EPA violated its duty to "provide[] for, encourage[], and assist[]" public participation in "any . . . program" under 42 U.S.C. § 6974(b)(1). EPA's approval of Oklahoma's coal ash program in contravention of those requirements is, thus, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

B. EPA's Approval of Oklahoma's Coal Ash Program Without First Publishing Minimum Guidelines for Public Participation Violates RCRA and the APA.

As demonstrated in the discussion of Count 1 above, there is no genuine issue of material fact that EPA has failed to discharge its nondiscretionary duty under RCRA[20] to issue minimum guidelines for public participation in, among other things, the development of programs. Despite its failure to issue these guidelines, EPA approved the state coal ash program for Oklahoma. 83 Fed. Reg. 30,356. This program suffers from extensive and unlawful failures to provide for public participation, as detailed in the above subsection ii. Independent of and in addition to those deficiencies, EPA's approval of Oklahoma's coal ash program without first issuing guidelines required by 42 U.S.C. § 6974(b) to ensure that Oklahoma's coal ash program met at least these minimum requirements is unlawful under RCRA and the APA.

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

C. Even if Existing Public Participation Regulations Applied to Oklahoma's Coal Ash Program, the Program Would Not Meet Their Requirements.

As explained above, *supra* at 23-24, no existing regulations set forth minimum public participation requirements applicable to EPA's approval of state coal ash programs under the WIIN Act. However, even if existing rules setting out public participation requirements for other RCRA programs applied here, Oklahoma's program would not satisfy them. 40 C.F.R. Part 239, which sets requirements for approval of state municipal solid waste landfill programs, requires that all "documents for permit determinations" be made available for public review and comment. *Id*. § 239.6(a)(1). As set out above, Oklahoma's program falls far short of that mandate.

The federal regulations that establish requirements for approval of state solid waste management plans, codified at 40 C.F.R Part 256, require a public hearing on permits if the State determines there is "significant" public interest in the permit. 40 C.F.R. § 256.63. If such hearings take place, Part 256 contains provisions to ensure meaningful notice of, access to, and information about such hearings. *See id*. (incorporating provisions of 40 C.F.R. § 25.5). Oklahoma does not require any public hearings for Tier I permits, the tier that Oklahoma has classified permits for "all existing [coal ash] landfills" in the state. Final Program Approval, 83 Fed. Reg. at 30,363. Moreover, the "public meetings" called for in Tier II and III permitting proceedings, *see* 27A Okla. Stat. § 2-14-303, lack many of the notice, access, and information mandates of 40 C.F.R. § 25.5, including 45-day notice of the hearing to a mailing list of interested persons or organizations and specifications for timing and location of hearings. For the same reasons, Oklahoma's program would not meet the mandates of 40 C.F.R. Part 25, which sets out the process for EPA approval of certain programs including state hazardous waste programs. *See* 40 C.F.R. § 25.2(a).

In sum, Oklahoma's program would fall far short of the public participation mandates in 40 C.F.R Parts 239, 256, and 25. Accordingly, even if those regulations applied to EPA's approval of state coal ash programs, its approval of Oklahoma's program still would be unlawful.

IV. EPA's Approval of Oklahoma's Coal Ash Program Violates RCRA and the APA Because the State's Grant of "Permits for Life" to Coal Ash Units Is Inconsistent with the WIIN Act.

The crux of the WIIN Act is that state coal ash programs must be "at least as protective as" the federal coal ash rule in order to be approved by EPA. *See* 42 U.S.C. § 6945(d)(1)(B), (C); *see also id*. § 6945(d)(1)(D)(ii)(I). This standard applies not just in evaluating whether a state program can receive initial approval, but also whether it may remain approved: state programs must continue to be as protective as the federal rule. If EPA revises the federal coal ash rule, the WIIN Act directs the agency to review approved state programs within three years of those revisions to determine whether the state program "continues to ensure that each [coal ash] unit located in the state" is complying with requirements at least as protective as those set forth in the revised federal coal ash standards. *Id.* § 6945(d)(1)(D)(i)(II), (ii)(I). If EPA finds that the state program does not continue to ensure compliance with requirements at least as protective as the revised federal standards, EPA must withdraw approval of the state program, which is not to be restored unless and until the State has "corrected the deficiencies" in its program. *Id*. § 6945(d)(1)(E); *see also id*. § 6945(d)(6); *USWAG*, 901 F.3d at 426 (citing 42 U.S.C. § 6945(d)(6) and explaining that "[t]he WIIN Act also provides that a Coal Residuals disposal site can only qualify as a 'sanitary landfill' if it is in full compliance with, among other things, the EPA's extant (*or successor*) regulations governing Coal Residuals waste sites." (emphasis added)).

EPA's approval of Oklahoma's coal ash program contravenes the WIIN Act because Oklahoma does not require permits for coal ash units to be revised to incorporate changes

necessary to ensure that the coal ash unit "continues to achieve compliance" with standards "at least as protective as" revised federal coal ash standards. *See* 42 U.S.C. § 6945(d)(1)(D)(i)(II), (D)(ii)(I), (E). Instead, Oklahoma grants coal ash units "permits for life,"[21] with no obligation to increase protections consistent with strengthened federal or state requirements. Oklahoma's program freezes permits in time, holding ash dump operators only to those standards in effect at the time of permit issuance, rather than ensuring those dumps limit pollution in accordance with any technological and scientific updates reflected in revisions to federal or state standards. EPA confirms that, "[w]ith the exception of an ODEQ enforcement action to revoke a facility's permit, a facility's permit will not terminate until the facility successfully completes closure, post-closure and any corrective action requirements." EPA Response to Comments at 12.

The impropriety of EPA's approval of Oklahoma's frozen-in-time permitting program is underscored by the fact that, at the time of that approval, EPA had already proposed to strengthen the federal coal ash rule.[22] Specifically, EPA's then-proposed "Phase One" revisions to the federal rule would add boron to list of coal ash pollutants triggering cleanup or, in certain instances, closure of impoundments under the 2015 coal ash rule. *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One); Proposed Rule, 83 Fed. Reg. 11,584 (Mar. 15, 2018). In that proposal, EPA promised still more changes to the coal ash

[21] *See* ODEQ Process Clarifications at 20 ("For purposes of CCR landfills, the Oklahoma Legislature has required DEQ to issue permits to be effective for the life of a given site. 27A O.S. § 2-10-301(D). The permits for CCR surface impoundments will also be issued for the life of the given site because they are considered solid waste disposal sites and regulated under the Oklahoma Solid Waste Management Act. 27A O.S. § 2-10-103(5)"); *see also* Oklahoma Application, Appendix A (containing OAC 252:517-3-1(a)).

[22] *See* EPA Answer ¶ 92, USWAG & PSO Amended Answer ¶ 92, and OG&E Amended Answer ¶ 92.

standards, reiterating the agency's plan to finalize the "Phase One" changes by June 2019 and to propose further, "Phase Two" changes to the rule. *Id*. at 11,587.[23]

Still more changes to the federal coal ash rule – including revisions enhancing the rule's protections – are to be expected and were foreseeable when EPA approved Oklahoma's program. RCRA directs EPA to "review[] and, where necessary, revise[]" all regulations implementing the statute every three years. 42 U.S.C. § 6912(b); *Appalachian Voices*, 989 F. Supp. 2d at 45 (holding that 42 U.S.C. § 6912(b) imposes "a continuing obligation on the EPA to review and revise its regulations"); *see also* 42 U.S.C. § 6907(a) (directing EPA to publish suggested guidelines for solid waste management "from time to time," including guidelines setting forth what constitutes open dumping). Congress intended RCRA programs to reflect updates to technology and science that improve environmental protection. *See, e.g.*, 42 U.S.C. § 6902(a)(9)-(10) (RCRA's objectives "are to promote the protection of health and the environment . . . by . . . promoting . . . new and improved methods of . . . environmentally safe disposal of nonrecoverable residues").[24] Thus, the federal standards will need further revisions

[23] EPA finalized limited "Phase I, Part 1" revisions to the federal coal ash rule on July 30, 2018. *See* 83 Fed. Reg. 36,435 (July 30, 2018). EPA left open the possibility of adding boron to the list of clean-up triggering pollutants in future revisions. *Id*. at 36,437 ("Provisions in the proposed rule that are not addressed in this rulemaking will be addressed in a subsequent rulemaking."). Although EPA has not yet proposed any "Phase II" revisions to the federal coal ash rule, the agency indicated that it intends to move forward with those revisions, as well as a "Phase I, Part 2" rulemaking. *See* Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2018, 83 Fed. Reg. 57,804, 57,941-42, 57,950-51 (Nov. 16, 2018).

[24] *See also* 42 U.S.C. § 6902(a)(9)-(10) (RCRA aims to "promot[e] the demonstration, construction, and application of solid waste management . . . systems which preserve and enhance the quality of air, water, and land resources"); *id*. § 6907(a)(1) (guidelines for solid waste management are to "provide a technical and economic description of the level of performance that can be attained by various *available* solid waste management practices . . . which provide for the protection of public health and the environment." (emphasis added)).

to incorporate advances in science and technology that lessen coal ash's impact on the environment.

Interpreting the WIIN's Act's requirements otherwise simply makes no sense. Updating standards to reflect advances in science and technology would be a nearly meaningless exercise, creating little more than paper tigers, if permits for existing sources were not revised to incorporate those updated standards. Indeed, EPA regulations consistently require that environmental permits, including waste permits, be updated to incorporate revised standards.[25] Allowing impoundments and landfills holding millions of tons of toxic coal ash to comply with stuck-in-time, soon-to-be-outdated standards defies both the letter and the purpose of RCRA.

In sum, Oklahoma's grant of "permits for life" to coal ash units is inconsistent with the WIIN Act's mandate that state coal ash programs ensure coal ash units located in the state meet standards "at least as protective as" changing federal standards. EPA's approval of Oklahoma's coal ash program thus contravenes 42 U.S.C. § 6945(d)(1) and 5 U.S.C. § 706(2)(A).

V. EPA Failed to Respond to Comments that Would Have Required Denying Oklahoma's Application for State Program Approval.

EPA failed to respond to significant comments submitted by Waterkeeper regarding fatal flaws in Oklahoma's coal ash program. *See* Complaint ¶¶ 99-113. The WIIN Act authorized

[25] *See, e.g.*, 40 C.F.R. § 270.50(d) (providing that a RCRA permit for a hazardous waste facility is to be reviewed five years after issuance and modified "as necessary" consistent with 40 C.F.R. § 270.41); *id*. § 239.4(b) (requiring state permit programs for municipal solid waste landfills to include "[a]n explanation of how the state will ensure that existing and new facilities are permitted or otherwise approved and in compliance with the relevant Subtitle D federal *revised* criteria" (emphasis added)); *see also* 40 C.F.R. § 70.1(b) (requiring air pollution sources to "have a permit to operate that assures compliance by the source with all applicable requirements"); *id*. § 70.2 (defining "applicable requirement" to mean, *inter alia*, any periodically updated standard limiting emissions of air pollutants and limiting the concentration of air pollutants in a given area); *id*. § 122.44(l)(2)(ii) (providing that water discharge permits may not "be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified").

EPA to approve state programs only after "public notice and an opportunity for public comment." 42 U.S.C. § 6945(d)(1)(B); *see also* 5 U.S.C. § 553(c). Notice and comment procedures impart on the agency a duty to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (quotations omitted), which includes the duty to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). "Significant" comments are "those comments which, if true, would require a change in the proposed rule." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018) (quoting *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003)). EPA did not respond to Waterkeeper's significant comments regarding EPA's failure to promulgate minimum public participation guidelines, *see supra* at 35-36, and the illegality of permits for life under the WIIN Act, *see supra* at 37-41.

First, Waterkeeper argued that "EPA may not proceed with final approval of Oklahoma's CCR program – and should not have tentatively approved the state's CCR program – unless and until it promulgates formal guidelines specifying the public participation opportunities that states must afford." Environmental Comments at 41. Waterkeeper specifically cited RCRA § 7004(b)(1) as the source of this duty and discussed why existing regulations did not discharge EPA's obligation under that provision. *Id.* at 41-42. EPA did not respond to this argument. EPA briefly acknowledged Waterkeeper's comment in its response to comments, *see* EPA Response to Comments at 13, and it admitted that Section 7004(b)(1) does apply in this context. *See id.* at 14 ("EPA therefore evaluated the adequacy of ODEQ's permit program . . . by reference to . . . statutory requirements for public participation in RCRA Section 7004(b).").

But, in the end, EPA merely recited that "RCRA section 4005(d) [the WIIN Act] does not require EPA to promulgate regulations for determining the adequacy of state programs." *Id*. EPA utterly failed to address the proper interpretation of Section 7004(b)(1) or its duties under that provision. This "conclusory" response failed to provide "a reasoned explanation for [EPA's] decision." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin*., 626 F.3d 84, 94 (D.C. Cir. 2010).

Second, Waterkeeper commented that Oklahoma's "grant of a permit for life is not permissible under the WIIN Act." Environmental Comments at 21. Waterkeeper specifically argued – as it reiterates here – that the provisions of the WIIN Act requiring periodic review of state programs prohibit the granting of permits for life. *See id.*; 42 U.S.C. § 6945(d)(1)(D). Neither the Final Program Approval nor accompanying documents addressed the substance of Waterkeeper's argument regarding the proper interpretation of the WIIN Act. Instead, EPA answered with the non-sequitur that "[n]othing in the *Federal rule* prohibits granting such permits for life." 83 Fed. Reg. at 30,363 (emphasis added); *see also* EPA Response to Comments at 12 (same). Responding to an argument Waterkeeper did not make does not satisfy EPA's obligation to respond to Waterkeeper's comments.

As explained above, both these infirmities – the failure to promulgate public participation guidelines and the grant of permits for life – require vacating the Final Program Approval either in whole or in part. *See supra* at 36-41. Both comments thus qualify as "significant" under the APA because they would "require a change" in the Final Program Approval. *Genuine Parts Co.*, 890 F.3d at 313. Therefore, the Final Program Approval was invalid.

CONCLUSION AND RELIEF

For the foregoing reasons and those set out in Waterkeeper's Complaint, Waterkeeper requests an Order:

a. finding that Defendants failed to discharge their nondiscretionary duty to issue minimum guidelines for public participation in state coal ash permit programs;

b. finding that EPA's approval of the Oklahoma coal ash permit program was arbitrary and unlawful;

c. vacating EPA's approval of the Oklahoma coal ash permit program and remanding to EPA for reconsideration consistent with the Court's determinations; and

d. providing any other appropriate relief.

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Respectfully submitted,

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