UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

North Dakota: Approval of State Coal Combustion Residuals Permit Program	)))))	Docket ID No: EPA-HQ-OLEM-2021-0051 *(Submitted via regulations.gov)*

COMMENTS OF DAKOTA RESOURCE COUNCIL, CURE, WESTERN ORGANIZATION OF RESOURCE COUNCILS, SIERRA CLUB, AND EARTHJUSTICE

July 15, 2025

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I. INTRODUCTION

The Environmental Protection Agency's ("EPA") decision on North Dakota's coal ash permitting program will have direct and long-term effects on North Dakotans' health and the resources they depend on for drinking, agriculture, recreation, and more. Coal ash is a toxic waste that contains a mix of health-harming pollutants, including toxins that cause cancer, reproductive issues, and neurological harms, among other impacts. According to data from both EPA and the coal ash industry, each of North Dakota's coal ash facilities has been contaminating the state's groundwater for years. This pollution impacts the many North Dakotans who rely on groundwater wells for drinking water, and those who fish, farm, and recreate near the state's coal ash dumps. And, unless this contamination is stopped and cleaned up correctly, members of the public could be saddled with the cost of efforts that do not solve the problem for decades to come. Comprehensive and effective regulation of coal ash in North Dakota is therefore paramount. EPA should not—and cannot, under federal law—delegate its authority over coal ash regulation to North Dakota unless the record demonstrates that North Dakota can *and will* regulate coal ash at least as protectively as federal requirements.

For years, North Dakota has been administering the coal ash program EPA now proposes to partially approve. The state amended its coal ash regulations in 2020, establishing a nearly identical permitting program to the one in operation today. Pursuant to those regulations, North Dakota issued permits to eight coal ash dumps across the state in 2022 and 2023 that remain in effect. And, as detailed in these comments from Dakota Resource Council, Western Organization of Resource Councils, Sierra Club, CURE, and Earthjustice ("Commenters"), these permits—and North Dakota's lax oversight of them—have long allowed coal ash dumps to violate both state and federal coal ash regulations.

In its proposed approval of North Dakota's coal ash permitting program ("Proposed Approval" or "North Dakota Proposed Approval"),[1] EPA ignores the robust, clear evidence of rampant noncompliance at North Dakota's coal ash dumps that has persisted under the state's watch. That evidence includes *EPA's own findings* that multiple sites are out of compliance with federal requirements and their nearly identical state analogs. Additional evidence from the owners and operators of North Dakota's coal ash dumps makes clear this problem is widespread. EPA's attempt to look the other way from this glaring evidence is unlawful; EPA must consider this evidence in its final decision.

It would also be unlawful for EPA to approve North Dakota's program when it is based on regulations that are plainly weaker than federal coal ash rules, and when it fails to require the state's permitting agency to pre-approve key coal ash compliance plans before issuing permits. Congress made clear that EPA cannot approve a state permitting program unless it is a "system of prior approvals and conditions" that is "at least as protective" as the federal rules—and on both of these requirements, North Dakota's program fails. The state program's significant barriers to public participation and enforcement renders it further inconsistent with federal law.

[1] North Dakota: Approval of State Coal Combustion Residuals Permit Program, 90 Fed. Reg. 20,985 (May 16, 2025) ("North Dakota Proposed Approval").

Finally, EPA's Proposed Approval shows signs of a rush job done to reach a final decision as quickly as possible and with insufficient regard for the consequences. EPA proposes not to approve several provisions in North Dakota's regulations that no longer exist. The agency also makes contradictory statements in its Proposed Approval, in some places stating that provisions are at least as protective as federal requirements and in other places stating those same provisions are not. It is unsurprising that errors like these would emerge when expediency is valued more than effectiveness.[2] Because it would likely be years before EPA exercises its authority to review North Dakota's program, if approved—and because Commenters are aware of no instances in which EPA has withdrawn approval of a state permitting program under the Resource Conservation and Recovery Act ("RCRA")—EPA must carefully and closely evaluate North Dakota's program *now* and get this decision right the first time. The health and wellbeing of North Dakotans, including Commenters' members, depend on it.

II. EPA'S PROPOSED DECISION WOULD HARM NORTH DAKOTA'S FARMERS, FISHERS, TRIBAL MEMBERS, PRIVATE WELL OWNERS, AND OTHER COMMUNITIES.

A. North Dakota's Toxic Coal Ash Problem

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

According to industry's own 2024 data, approximately sixty-seven million cubic yards of coal ash are stored at the sixteen coal ash dumps in North Dakota that have been regulated since 2015 under EPA's first coal combustion residuals ("CCR") regulations ("2015 CCR Rule").[3] These sixteen dumps are located at seven coal plants—Antelope Valley, Coal Creek, Coyote, Leland Olds, Milton R. Young, R.M. Heskett, and Stanton stations—and include six coal ash landfills and ten coal ash surface impoundments.[4] Some of these units have been closed by removal of ash.

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[2] *See* Letter from Jessica Bednarik, Duke Energy et al. to Hon. Lee Zeldin, then-Nominee to be U.S. EPA Administrator (Jan. 15, 2025) (requesting that EPA "[p]rioritize the expeditious approval of State CCR permit programs to operate in place of the federal rule") ("2025 Letter from Industry to Zeldin") (attached); EPA, Administrator Zeldin Releases Statement on POTUS' New Energy-Related EO Signed Today (Apr. 8, 2025) (stating that EPA will propose a determination on North Dakota's coal ash permitting program "before May 11"), https://www.epa.gov/newsreleases/administrator-zeldin-releases-statement-potus-new-energy-related-eo-signed-today?.

[3] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) ("2015 CCR Rule").

[4] Earthjustice, *Toxic Coal Ash in North Dakota: Addressing Coal Plants' Hazardous Legacy*, https://earthjustice.org/feature/coal-ash-states/north-dakota (updated July 7, 2025). Plant operators have divided up their coal ash units at these seven facilities in different ways over the years. At minimum, there

These sixteen coal ash dumps are just a fraction of those located in North Dakota. Approximately thirty-four older coal ash dumps are located at these same seven coal plants and at the W.J. Neal plant, which has no coal ash dumps regulated under the 2015 CCR Rule. These older dumps are regulated for the first time under EPA's 2024 CCR regulations ("2024 Legacy Rule").[5] Their owners and operators are not yet required to report the amount of coal ash in these older units, meaning it is currently unknown how much total coal ash sits in dump sites across North Dakota.

More than 16,000 people live within three miles of the eight plants with coal ash units covered under the 2015 or 2024 rules.[6] The R.M. Heskett facility has the largest surrounding population, and there are also more than 100 domestic, irrigation, or public water supply groundwater wells within two miles of that site. A total of 144 of these groundwater wells are within two miles of the eight plants with coal ash units in North Dakota.[7] Because no government entity regularly tests private wells for pollution, the people who rely on private wells near coal ash dumps likely would not know if they were being poisoned by coal ash contaminants unless they tested the water themselves.

North Dakota's coal ash dumps have been contaminating groundwater for decades. All facilities show evidence of groundwater contamination from the ash. However, only one facility, Great River Energy's Stanton Station, has even *begun* to assess potential corrective actions to address this contamination.[8] After more than two years of assessment, they have still not selected—let alone begun to implement—a remedy.[9] At the Coal Creek, R. M. Heskett, W. J. Neal, and Leland Olds stations, EPA identified groundwater contamination problems decades ago. Before EPA finalized the 2015 CCR Rule, it investigated groundwater contamination from coal ash at over 150 different facilities. At Coal Creek, EPA noted:

> A groundwater monitoring program was initiated at [Coal Creek] in 1979. According to EPA (2007), ground water monitoring at the site showed arsenic in excess of the primary [Maximum Contaminant Level (MCL)] in 1987 and selenium in excess of the primary MCL in 1992 and 1993. Down-gradient monitoring data also have shown sulfate and chloride above secondary MCLs and elevated levels

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are fifteen coal ash units regulated under the 2015 CCR Rule at these seven facilities. A discussion of the different counts of units can be found in EPA's Technical Support Document for the Approval of North Dakota's Coal Combustion Residuals Permit Program, Docket ID No. EPA-HQ-OLEM-2021-0051-0150, at 42–44 (May 16, 2025), ("ND Technical Support Document").

[5] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024) ("2024 Legacy Rule").

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

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

[8] WSP USA Inc., Annual Groundwater Report – 2022 Great River Energy, Stanton Station, at ii (Jan. 2023), https://ccr.greatriverenergy.com/wp-content/uploads/20230131-SS-CCR-Ann-GW-RPT-FNL.pdf.

[9] WSP USA Inc., Annual Coal Combustion Residuals Groundwater Monitoring and Corrective Action Report – 2024 Great River Energy, Stanton Station, at iv (Jan. 2025), https://ccr.greatriverenergy.com/wp-content/uploads/20250131-SS-2024-Ann-GW-RPT-Post.pdf.

> of boron. EPRI (2010) concedes that there were CCR-related onsite exceedances of arsenic, selenium, chromium, chloride, and sulfate.[10]

Similarly, "[a]ccording to EPA (2007), monitoring data at [the Heskett] site from 1998 show levels of sulfate and boron immediately down-gradient of an old ash pile in excess of the secondary MCL."[11] W. J. Neal[12] and Leland Olds[13] showed similar patterns of contamination.

Despite these long histories of groundwater contamination, only one of these facilities has begun to address the problem through corrective action planning. At the other facilities, the owners have avoided cleanup by blaming the contamination on an alleged "alternative source."[14]

Coal ash poses a threat to North Dakota's groundwater and the populations that rely on those water resources now and in the future. These communities deserve a coal ash regulatory program that actually addresses the harm coal ash contamination has been causing in the state for decades and continues to cause today.

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[10] Alexander Livnat, Damage Case Compendium, Technical Support Document, Volume IIa: Potential Damage Cases, Docket ID No. EPA-HQ-RCRA-2009-0640-12119, at 107 (footnotes omitted) (Dec. 18, 2014), https://www.regulations.gov/document/EPA-HQ-RCRA-2009-0640-12119 ("Excerpt of Damage Case Compendium Vol. IIa") (attached).

[11] *Id.* at 112.

[12] *Id.* at 115–116.

[13] Alexander Livnat, Damage Case Compendium, Technical Support Document, Volume IIb: Potential Damage Cases, Docket ID No. EPA-HQ-RCRA-2009-0640-12121, at 36–37 (Dec. 18, 2014), https://www.regulations.gov/document/EPA-HQ-RCRA-2009-0640-12121 ("Excerpt of Damage Case Compendium Vol. IIb") (attached).

[14] *See* Barr Engineering Co., 2024 Annual Groundwater Monitoring and Corrective Action Report AVS CCR Landfill Antelope Valley Station, at PDF p. 176 (Jan. 2025), https://www.basinelectric.com/_files/pdf/Coal_ash/2024-AVS-CCR-LF-GW-Report_Final.pdf; Barr, 2018 Annual Groundwater Monitoring and Corrective Action Report Slag Pond Area Coyote Station, at PDF p. 68 (Jan. 2019), https://www.ccr-cs.net/media/ybrntn0e/2018-amr-slag-pond-area-ccr.pdf; Barr, 2024 Annual Groundwater Monitoring and Corrective Action Report LOS CCR Landfill Leland Olds Station at PDF p. 119 (Jan. 2025), https://www.basinelectric.com/_files/pdf/Coal_ash/2024-LOS-CCR-LF-GW-Report_Final.pdf; Barr, 2021 Annual Groundwater Monitoring and Corrective Action Report Milton R. Young Station, at PDF p. 58 (Dec. 2021), https://cdn.prod.website-files.com/5ef212e2cdca1e094063db4e/61e87dd8db29bea91d67e6bb_2021%20Annual%20Groundwater%20Monitoring%20and%20Corrective%20Action%20Report.pdf; Barr, 2024 Annual Groundwater Monitoring and Corrective Action Report R.M. Heskett Station, at PDF p. 97 (Jan. 2025), https://www.montana-dakota.com/wp-content/uploads/2025/01/R.M.-Heskett-Station-2024-Annual-Groundwater-Monitoring-and-Corrective-Action-Report.pdf; WSP, 2024 Annual Coal Combustion Residuals Groundwater Monitoring Report, Rainbow Energy Center, Coal Creek Station (Jan. 31, 2025), PDF p. 73 https://ccr.rainbowenergycenter.com/wp-content/uploads/2025/02/2024-Annual-Groundwater-Report-Coal-Creek.pdf.

B. Commenters' Members Are Concerned About the Impacts of EPA's Proposed Approval on Their Health, Livelihoods, and Use of the State's Resources.

North Dakota residents are already harmed by coal ash contamination.[15] Coal ash pits at North Dakota coal plants have resulted in significant water pollution that impacts ranching, recreational activities, farming, and jeopardizes the health of communities near coal ash sites. Commenters' members are among those who suffer these harms.

Formed in 1978, Dakota Resource Council ("DRC") grew out of existing organizing efforts responding to impacts from coal development. DRC continues to work extensively in North Dakota's coal country today, fighting to protect communities—and the land and resources they depend on for drinking water, farming, ranching, and more—from the coal industry's toxic legacy, including its coal ash. DRC also works with communities that have historically relied on revenue from the coal industry to ensure they can transition to a more diverse economy as the state's coal plants reach the end of their useful lives and become even less economical.

DRC's members are impacted by coal ash pollution. As one DRC member explains, coal ash pollution directly harms landowners:

> A lot of the areas around these coal ash pits are unpopulated now because they basically moved everyone out. If anyone ever tries to drill a well out there again to build a house, they'll probably end up with contaminated water. That's the legacy we're dealing with — and it's why we can't afford to let the state go easy on oversight.

Another DRC member describes how coal ash pollution impacts the state's tribal communities:

> I live on Fort Berthold, and our community has already been dealing with pollution from oil development for years. A local study by a student at our tribal college found dangerously high levels of mercury in fish from Lake Sakakawea—especially near Indian Hills and Little Field Bay, where many tribal members fish to feed their families. Mercury is a neurotoxin that harms our health and our children's development.
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> If the state is allowed to weaken oversight of coal ash sites, we could be adding even more toxic contamination to the same waters we depend on. We already live with the consequences of poor regulation. EPA cannot let North Dakota take over this program when it has such a poor record of protecting our water and people.

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[15] *See generally* Earthjustice, Toxic Coal Ash in North Dakota: Addressing Coal Plants' Hazardous Legacy, https://earthjustice.org/feature/coal-ash-states/north-dakota (last updated July 7, 2025); Earthjustice & EIP, *Poisonous Coverup: The Widespread Failure of the Power Industry to Clean Up Coal Ash Dumps* (Nov. 3, 2022), https://earthjustice.org/wp-content/uploads/coal-ash-report_poisonous-coverup_earthjustice.pdf ("Poisonous Coverup") (attached).

DRC is a member group of the Western Organization of Resource Councils ("WORC"), which was formed in 1979 to advance the vision of a democratic, sustainable, and just society through community action. WORC is a regional network of ten grassroots community organizations with 19,935 members and 39 local chapters and affiliates in seven states, including North Dakota. WORC's members farm and ranch on lands overlying and neighboring federal, state, and privately-owned coal deposits. WORC is committed to building sustainable environmental and economic communities that balance economic growth with the health of people and stewardship of their land, water, and air resources. WORC and its first member groups were founded by ranch families whose land and livelihoods were threatened by the booming coal industry in the 1970s, and the organization has been at the forefront of shaping coal-related policies, including around coal ash, ever since.

For over ten years, Sierra Club has worked at both the local and national level to address the ongoing problem of water and air quality impairment from coal ash landfills and impoundments. Sierra Club's advocacy has involved efforts to close and clean up existing coal ash disposal sites, including litigation involving discharges from those sites into ground or surface water. Sierra Club's North Dakota Chapter explores, enjoys, and protects North Dakota's outdoors, wildlands, and natural resources.

CURE is a rural, nonprofit organization made up of people who care about the well-being of their neighbors, the health of the land and water, and the legacy we leave for future generations. CURE works in the areas of climate, energy, sustainability, and water with a focus on civic engagement and rural democracy flowing through all projects. CURE's members and supporters are also largely member-owners of distribution rural electric cooperatives ("RECs") that in turn own the large generation and transmission RECs who own and take energy from North Dakota coal plants.[16] For decades, CURE and its members have been engaged in energy democracy efforts specifically involving RECs that serve the majority of rural residents in Minnesota and North Dakota. CURE is a national leader in the REC reform movement. In service to aligning the priorities of Minnesota's RECs to their cooperative founding principles, CURE organizes member-owners to advocate for more democratic and sustainable REC practices, including pushing RECs to end their reliance on dirty electricity from coal and instead transition their electricity generation to renewable, community-based energy sources that would be cheaper for their member-owners and be a source of rural economic growth.

The region's distribution RECs and generation and transmission RECs, which supply energy to Minnesota's rural residents, own or financially support the coal plants in North Dakota that have coal ash dumps impacted by EPA's Proposed Approval. Minnkota Energy owns the

[16] For example, Great River Energy serves twenty-six distribution RECs, which serve 685,000 member-owners comprising a population of 1.7 million people, largely in Minnesota, using energy generated in North Dakota and elsewhere. *See* Great River Energy, Our Member-Owner Cooperatives, https://econdev.greatriverenergy.com/our-cooperatives (last visited July 14, 2025); Great River Energy, About, https://econdev.greatriverenergy.com/about (last visited July 14, 2025). Minnkota Power Cooperative similarly serves distribution RECs in Northwest Minnesota. *See* Minnkota Power Cooperative, https://www.minnkota.com/ (last visited July 14, 2025); Minnkota Power Cooperative, Our Power: Power Cooperatives, https://www.minnkota.com/minnkota-website/our-power/member-cooperatives (last visited July 14, 2025).

Coyote and Milton R. Young stations.[17] Although Great River Energy sold Coal Creek Station in 2022, the plant still provides a significant amount of the electricity used by Great River Energy.[18] Basin Electric Power Cooperative owns the Antelope Valley and Leland Olds stations.[19] Retired coal plants that are still subject to state and federal coal ash regulations, Stanton[20] and William J. Neal stations,[21] are also owned by these RECs.

CURE's members have a direct financial stake that is impacted by EPA's Proposed Approval. The REC member-owners that CURE advocates with and on behalf of have a direct financial interest in the regulation of coal ash facilities where their distribution REC's power provider is a potentially responsible party or owner. To the extent that facilities that should be remediated and closed under federal rules are allowed to continue accepting waste and delaying clean-up of groundwater contamination, member-owners will be left holding a heavier bill when the law is later fully enforced and clean-up becomes costlier and more complicated as contamination spreads outward over time. Thus, if these facilities are under-regulated by state regulators following EPA's Proposed Approval, this exposes REC member-owners to financial risk of much higher electrical rates to cover for poor planning and deferred cleanup.

Earthjustice is a nonprofit public interest environmental law organization that wields the power of law and the strength of partnership to protect people's health, preserve magnificent places and wildlife, advance clean energy, and combat climate change. Earthjustice led the fight for the nation's first regulations on coal ash and has remained on the frontlines to strengthen these safeguards ever since. Earthjustice also works to increase public awareness about the extent of coal ash contamination across the country and its impacts on communities, including by collecting and analyzing industry's own data on coal ash pollution in groundwater and contributing to multiple reports and other resources on coal ash pollution.

[17] Minnkota Power Cooperative, Our Power: Coal, https://www.minnkota.com/minnkota-website/our-power/coal (last visited July 14, 2025).
[18] Great River Energy, Electricity Sources, https://greatriverenergy.com/electricity-sources/ (last visited July 14, 2025) (stating that 38 percent of Great River Energy's electric needs was served by Rainbow Energy Center in 2024. Rainbow Energy Center is Coal Creek Station).
[19] Basin Electric Power Cooperative, Generation Facilities, https://www.basinelectric.com/about-us/Generation/index (last visited July 14, 2025) (click on "COAL" in filter for graphic).
[20] KX News, After 50 Years, the Stanton Station was Imploded (Oct. 11, 2018), https://www.kxnet.com/news/after-50-years-the-stanton-station-was-imploded/.
[21] Basin Electric Power Cooperative, Closed William J. Neal Station (WJN) 2024 Legacy CCR Rule Compliance, https://www.basinelectric.com/environment/coal-combustion-residuals-ccr-rule-compliance-data-and-information/William-J-Neal-Station (last visited July 14, 2025).

III. OVERVIEW OF FEDERAL COAL ASH REGULATION

A. Federal CCR Rulemakings

RCRA obligates and authorizes EPA to regulate CCR units. Pursuant to that authority, EPA promulgated the first national CCR regulations in 2015 and additional regulations in 2018, 2020, and 2024, collectively codified at 40 C.F.R. Part 257 ("Federal CCR Rules").[22]

EPA promulgated its 2015 CCR Rule in response to overwhelming evidence that unsafe coal ash disposal poses serious risks to human health and the environment.[23] In support of its rule, EPA pointed to the toxic and hazardous contaminants contained in coal ash that are associated with serious health and environmental effects, including arsenic, cadmium, chromium, lead, mercury, selenium, and thallium.[24] EPA documented "cancer in the skin, liver, bladder and lungs," "neurological and psychiatric effects," "cardiovascular effects," "damage to blood vessels," and "anemia" among the risks to humans associated with exposure to coal ash contaminants.[25] Further, EPA found that the improper management of coal ash across the country led to contamination of groundwater, air pollution, and catastrophic spills of ash into rivers, lakes, streams, and neighboring communities when dams or other structural components of landfills and impoundments failed.[26]

For certain coal ash landfills and surface impoundments, the 2015 CCR Rule established minimum criteria, including location restrictions, design requirements, operating requirements, and closure and post-closure requirements.[27] Some of these key protections include semi-annual groundwater monitoring requirements that trigger corrective action obligations at lined impoundments and closure obligations at unlined ones if exceedances of groundwater protection standards are identified; location restrictions to keep coal ash units out of unstable areas, wetlands, fault areas, seismic zones, and the groundwater table; structural stability criteria for

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[22] *See generally* 2015 CCR Rule, 80 Fed. Reg. 21,302; Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36,435 (July 30, 2018) ("Phase One, Part One Rule"); Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure, 85 Fed. Reg. 53,516, (Aug. 28, 2020) ("Part A Rule"); Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments, 85 Fed. Reg. 72,506 (Nov. 12, 2020) ("Part B Rule"); 2024 Legacy Rule, 89 Fed. Reg. 38,950.

[23] *See, e.g.*, 2015 CCR Rule, 80 Fed. Reg. at 21,302 ("The available information demonstrates that the risks posed to human health and the environment by certain CCR management units warrant regulatory controls."), 21,320 ("[T]he record is clear that current management of these wastes can present, and in many cases has presented, significant risks to human health and the environment."), 21,451 ("EPA concludes that current management practice of placing CCR waste in surface impoundments and landfills poses risks to human health and the environment . . . .").

[24] *Id.* at 21,311, 21,449–51.

[25] *Id.* at 21,451.

[26] *Id.* at 21,449, 21,456–57.

[27] *See generally* 40 C.F.R. Part 257.

impoundments; and comprehensive closure and post-closure requirements.[28] Any unit that fails to comply with these criteria is deemed an "open dump" and is subject to closure.[29]

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

- Delaying closure of unlined coal ash ponds until contamination was detected was unacceptable given the high probability of such contamination;
- Excluding from regulation inactive coal ash ponds at inactive power plants—termed "legacy" ponds—was unlawful given the risks they present; and
- Allowing inadequately lined ash ponds to continue operating failed to satisfy RCRA's Section 4004(a) protectiveness standard.[30]

The D.C. Circuit instructed EPA to strengthen the 2015 CCR Rule by requiring closure of all unlined impoundments, regulating legacy ash ponds, and requiring inadequately lined CCR surface impoundments to close.[31]

After an extended delay, EPA took action to regulate legacy coal ash ponds in a rule it issued in 2024.[32] In this 2024 Legacy Rule, EPA eliminated the regulatory exemption for legacy ponds and imposed regulatory safeguards on inactive landfills.[33] In so doing, EPA noted that the risks from legacy ponds and inactive landfills are "at least as significant" as the substantial public health and environmental risks posed by unlined surface impoundments and landfills already regulated by the 2015 CCR Rule.[34]

EPA issued other coal ash regulations between 2015 and 2024 largely in response to industry requests.[35] In 2018, EPA finalized "Phase One, Part One" of a wide-ranging regulatory proposal, which allowed for the use of "alternate performance standards," weakened

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[28] *Id.*
[29] 40 C.F.R. § 257.1(a); 2015 CCR Rule, 80 Fed. Reg. at 21,468.
[30] *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 430, 432 (D.C. Cir. 2018) ("*USWAG*").
[31] *Id.* at 429–30, 432.
[32] *See generally* 2024 Legacy Rule, 89 Fed. Reg. 38,950.
[33] *Id.* at 38,950.
[34] *Id.* at 38,951, 39,046.
[35] *See, e.g.*, Utility Solid Waste Activities Group, Petition for Rulemaking to Reconsider Provisions of the Coal Combustion Residuals Rule and Request to Hold in Abeyance Challenge to Coal Combustion Residuals Rule (May 12, 2017), https://www.epa.gov/sites/production/files/2017-06/documents/final_uswag_petition_for_reconsideration_5.12.2017.pdf; AES Puerto Rico LP, Petition for Rulemaking to Reconsider Provisions of the Coal Combustion Residuals Rule and Request to Hold in Abeyance Challenge to Coal Combustion Residuals Rule (May 31, 2017), https://www.epa.gov/sites/production/files/2017-06/documents/2017.05.31_aes_puerto_rico_lps_petition_for_reconsideration_and_rulemak.pdf.

groundwater protection standards for four pollutants, and extended deadlines by which leaking ponds had to close.[36] In August 2020, EPA promulgated its "Part A Rule" that, among other things, extended the deadline by which some coal ash units had to close and revised its alternate closure provision to include an enormous loophole enabling utilities to avoid their retrofit-or-close deadline for many additional years.[37] In November 2020, EPA finalized the "Part B Rule," which created an additional loophole allowing dangerous, unlined impoundments to make so-called "alternate liner demonstration[s]" to qualify as lined impoundments under the 2015 CCR Rule.[38] These rules flouted the D.C. Circuit's conclusion in *USWAG* that delaying cleanup of leaking ponds was unacceptable and its clear instruction that EPA must strengthen the 2015 CCR Rule to require closure of all unlined impoundments.[39]

In response to several industry challenges claiming that EPA had engaged in improper rulemaking, including in its 2020 Part A Rule, the D.C. Circuit recently affirmed several fundamental aspects of the 2015 CCR Rule. First, it held that the rule, "standing on its own, makes clear that operators [of coal ash units] cannot close their surface impoundments with groundwater leaching in and out of the unit and mixing with the coal residuals."[40] Second, the court explained that requiring operators of coal ash units "to discuss 'the engineering measures taken' before installation of the cover system 'to ensure that the groundwater had been removed from the unit,' and to describe the steps taken to control water and waste flow in and out of the surface impoundment'" is "a straightforward application . . . of the 2015 [CCR] Rule."[41] Third, the court confirmed that the 2015 CCR Rule plainly covers coal ash "settling tanks" as well as coal ash units that stopped receiving ash before October 2015 but continued to contain liquids and ash after that date.[42] Finally, the court affirmed EPA's refusal to treat the addition of coal ash to a closing unit as a "beneficial use" of that ash as defined under the 2015 CCR Rule.[43]

B. The Water Infrastructure Improvements for the Nation Act

EPA established the 2015 CCR Rule to be "self-implementing" and largely enforced through citizen suits.[44] At the time of the rule's promulgation, RCRA subtitle D neither authorized EPA to directly implement or enforce minimum national criteria for solid waste disposal facilities, nor required states to adopt, implement, or enforce EPA's minimum criteria.

In 2016, Congress passed the Water Infrastructure Improvements for the Nation Act ("WIIN Act").[45] The WIIN Act "amended RCRA Subtitle D to allow the EPA to approve State permitting programs 'to operate in lieu of [EPA] regulation of coal combustion residuals units in

[36] Phase One, Part One Rule, 83 Fed. Reg. 36,435–36.
[37] Part A Rule, 85 Fed. Reg. at 53,516–17.
[38] Part B Rule, 85 Fed. Reg. at 72,506.
[39] *USWAG*, 901 F.3d at 429–30.
[40] *Elec. Energy, Inc. v. EPA*, 106 F.4th 31, 41 (D.C. Cir. 2024).
[41] *Id.*
[42] *Id.* at 42.
[43] *Id.* at 43.
[44] 2015 CCR Rule, 80 Fed. Reg. at 21,309, 21,311; *see also* 42 U.S.C. § 6972.
[45] Pub. L. No. 114-322, 130 Stat. 1628 (2016) (codified at 42 U.S.C. § 6945(d)).

the State,' provided those programs are at least as environmentally protective as the existing (or successor) EPA regulations."[46] Specifically, the WIIN Act provides:

> (A) [] Each State may submit to the Administrator, in such form as the Administrator may establish, evidence of a permit program or other system of prior approval and conditions under State law for regulation by the State of coal combustion residuals units that are located in the State that, after approval by the Administrator, will operate in lieu of regulation of coal combustion residuals units in the State by—
>
> > (i) application of part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title); or
> >
> > (ii) implementation by the Administrator of a permit program under paragraph (2)(B).
>
> (B) [] Not later than 180 days after the date on which a State submits the evidence described in subparagraph (A), the Administrator, after public notice and an opportunity for public comment, shall approve, in whole or in part, a permit program or other system of prior approval and conditions submitted under subparagraph (A) if the Administrator determines that the program or other system requires each coal combustion residuals unit located in the State to achieve compliance with—
>
> > (i) the applicable criteria for coal combustion residuals units under part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title); or
> >
> > (ii) such other State criteria that the Administrator, after consultation with the State, determines to be at least as protective as the criteria described in clause (i).[47]

[46] *USWAG*, 901 F.3d at 426 (quoting 42 U.S.C. § 6945(d)(1)(A)).
[47] 42 U.S.C. § 6945(d)(1).

Since the WIIN Act's passage, EPA has approved applications for primacy from three states—Oklahoma,[48] Georgia,[49] and Texas[50]—and denied Alabama's primacy application.[51]

IV. APPROVING NORTH DAKOTA'S PROGRAM WOULD BE ARBITRARY AND CAPRICIOUS AND WOULD VIOLATE THE WIIN ACT BECAUSE NORTH DAKOTA'S PROGRAM IS NOT A SYSTEM OF PRIOR APPROVAL AND CONDITIONS.

EPA must deny North Dakota's primacy application because its coal ash program does not provide "prior approval" of essential information and planned actions or impose "conditions" necessary to ensure that a unit will achieve compliance with provisions at least as protective as the Federal CCR Rules.[52] The WIIN Act directs EPA to approve "a permit program or *other system of prior approval and conditions* . . . if . . . the program or other system requires each [CCR] unit located in the State to achieve compliance with" the Federal CCR Rules or State provisions that are "at least as protective."[53] North Dakota's program does not meet this standard because the North Dakota Department of Environmental Quality ("NDDEQ") issues coal ash permits without evaluating and approving fundamental information in groundwater monitoring and closure plans, among other information that identifies what a permittee is allowed to or prohibited from doing at a particular unit. Without this information, NDDEQ cannot ensure that its permits "require[] each unit . . . to achieve compliance" with the law.[54]

EPA elaborated on this mandate in its Alabama Primacy Denial:

> Permits must implement the underlying regulations by establishing clear and enforceable requirements that a facility must satisfy to comply with the underlying regulations. This includes reviewing application materials and determining which requirements apply, which applicable requirements have already been met, and which have not yet been met. The applicable requirements the permittee has not yet met must be included in the permit. ADEM [Alabama Department of Environmental Management] failed to do this in permits reviewed by EPA. The permit record indicates that the ACM [Assessment of Corrective Measures] at [Plant] Colbert had been submitted to ADEM prior to permit issuance, but *ADEM*

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[48] *See generally* Oklahoma: Approval of State Coal Combustion Residuals Permit Program, 83 Fed. Reg. 30,356 (June 28, 2018).

[49] *See generally* Georgia: Approval of State Coal Combustion Residuals Permit Program, 85 Fed. Reg. 1,269 (Jan. 10, 2020). In February 2024, EPA sent a letter to Georgia's Environmental Protection Division raising concerns that the state's incorrect interpretation of closure performance standards in the 2015 CCR Rule may mean the state's CCR permitting program is less protective than the Federal CCR Rules. *See generally* Letter from Jeaneanne M. Gettle, EPA, to Jeffrey Cown, GAEPD, Re: Plant Hammond Ash Pond 3 (Feb. 13, 2024) (attached).

[50] *See generally* Texas: Approval of State Coal Combustion Residuals Permit Program, 86 Fed. Reg. 33,892 (June 28, 2021).

[51] *See generally* Alabama: Denial of State Coal Combustion Residuals Permit Program, 89 Fed. Reg. 48,774 (June 7, 2024) ("Alabama Primacy Denial").

[52] 42 U.S.C. § 6945(d)(1)(B).

[53] *Id.* (emphasis added).

[54] *Id.*

> *did not determine in the permitting action whether the ACM met the requirements in the regulation, or whether a revised ACM must be submitted to address any deficiencies. ADEM simply copied and pasted corrective action requirements from the regulations into the permit, without applying those requirements to the specific facts at the site. That is not adequate oversight and implementation.*
>
> ADEM's failure to adjudicate the requirements applicable to [Plant] Colbert, or to review and either approve or disapprove submitted application materials, means its permit program is not operating as a 'system of prior approval.'[55]

In addition, EPA explained that due to Alabama's "lack of oversight and independent evaluation of facilities' proposed permit terms"—particularly the lack of evidence of "any evaluation or record of decision documenting that ADEM had critically evaluated the materials submitted as part of the permit applications, or otherwise documented its rationale for adopting those proposed permit terms prior to approving the application"—EPA "could not conclude that the Alabama CCR permits are as protective as the Federal CCR regulations" and therefore could not approve the primacy application.[56]

Like Alabama's CCR program, North Dakota's CCR program is not a "system of prior approval and conditions" and does not require each CCR unit in the state to meet standards at least as protective as EPA's. Notwithstanding provisions in North Dakota's rules that call for the scrutiny of CCR permit applications and the denial of applications that fail to demonstrate compliance with CCR standards,[57] NDDEQ neither conducts a meaningful review of CCR permit applications nor issues permits that ensure a CCR unit will comply with state or federal CCR rules.

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[55] Alabama Primacy Denial, 89 Fed. Reg. at 48,805 (emphasis added).

[56] *Id*. at 48,777; *c.f.* EPA, Comment and Response Document: Oklahoma CCR Permit Program Approval, Docket ID No. EPA-HQ-OLEM-2017-0613-0073, at 11 (June 28, 2018), https://www.regulations.gov/document/EPA-HQ-OLEM-2017-0613-0073 (asserting that Oklahoma's coal ash program is a system of prior approvals and noting that "[t]here are examples of [the permitting agency's] review of facility plans and applications shown in several Notices of Deficiency included in the docket for this final authorization, where the state requested additional actions following review of site-specific plans in permit applications").

[57] North Dakota's Administrative Code requires permit applications for solid waste management units to include, among other things, "the following information where applicable: . . . f. Facility engineering specifications *adequate to demonstrate the capability to fulfill* performance, design, and construction criteria provided by this article and enumerated in this subdivision; . . . (12) CCR unit, chapter 33.1-20-08; . . . j. *Demonstration of capability to fulfill* the ground water monitoring standards, sections 33.1-20-08-06 or 33.1-20-13-02; . . . (l) *Demonstrations of capability to fulfill* the closure standards, section 33.1-20-04.1-05 and otherwise provided by this article; [and] (m) *Demonstrations of capability to fulfill* the postclosure standards, section 33.1-20-04.1-09 and otherwise provided by this article . . . ." N.D. Admin. Code ("NDAC") § 33.1-20-03.1-02 (emphasis added). The basis for approval of a coal ash permit application "*must be* an application which demonstrates compliance with this article andNorth Dakota Century Code chapter 23.1-08." *Id.* § 33.1-20-03.1-03(2)(a) (emphasis added). Conversely, the basis for denial must be that an application "fails to demonstrate compliance with this article; [or] proposes construction, installation, or operation of a solid waste management unit or facility which will result in a violation of any part of this article," among other flaws. *Id.* § 33.1-20-03.1-03(2)(c).

Unlike the Federal CCR Rules, state CCR programs may not, under the plain terms of the WIIN Act, be self-implementing.[58] Rather, the agency charged with overseeing compliance must review and pre-approve—or, if appropriate, deny—regulated entities' proposed measures to achieve compliance with regulatory requirements.[59] Available evidence makes clear that North Dakota's CCR program is, as in Alabama, "not operating as a 'system of prior approval.'"[60]

NDDEQ's issuance of Permit No. 0038 for the surface impoundments at the Basin Electric Power Cooperative ("Basin Electric") Leland Olds Station on October 28, 2022 illustrates North Dakota's failure to operate a system of prior approval.[61] As noted in Section II.A, EPA identified groundwater contamination at Leland Olds Station decades ago and data from Basin Electric indicate groundwater contamination has continued.[62] NDDEQ issued Permit No. 0038 even though Basin Electric's application clearly failed to meet state regulatory requirements. Critical deficiencies in the application include:

- Insufficient site-specific technical information to demonstrate that Basin Electric's groundwater monitoring program satisfies state and federal coal ash requirements. To properly determine where to install and operate groundwater monitoring wells, permit applicants must characterize groundwater flow, including "seasonal and temporal fluctuations in ground water flow."[63] Basin Electric's permit application, however, omitted groundwater elevation data critical to determining groundwater flow. The permit application included a Groundwater Monitoring System Report[64] with two potentiometric maps for "representative normal and reverse flow events" (Figures 3a and 3b). Those maps were based on two sampling events in 2018 (July 23 and December 4).[65] The permit application did not include any potentiometric maps for six other baseline sampling events, or for any subsequent semi-annual monitoring events through June 2022.[66] In addition, Basin Electric failed to designate several wells in its multiunit

[58] 42 U.S.C. § 6945(d)(1)(B); Alabama Primacy Denial, 89 Fed. Reg. at 48,805.
[59] 42 U.S.C. § 6945(d)(1)(B).
[60] Alabama Primacy Denial, 89 Fed. Reg. at 48,805.
[61] Permit No. 0038 (attached).
[62] *See, e.g.*, Excerpt of Damage Case Compendium Vol. IIb at 36–37 (attached); Poisonous Coverup at tbl. A4 & App. A (describing methodology, including use of industry data) (attached).
[63] NDAC § 33.1-20-08-06(2)(b)(1); *see also* 40 C.F.R. § 257.91(b).
[64] AECOM, Pond 2 and Pond 3 Multiunit CCR Groundwater Monitoring System Report, Leland Olds Station at 5-1, figs. 3a & 3b (Apr. 2019) (attached) ("2019 Leland Olds Groundwater Monitoring System Report").
[65] *Id.*
[66] *See* AECOM, First Annual Groundwater Monitoring and Corrective Action Report, Fall 2017 – Spring 2019 Pond 2 and Pond 3 Multiunit, app. I – A (July 31, 2019), https://www.basinelectric.com/_files/pdf/Coal_ash/LOS-P2_3_GWCA_SAR_dated-073119.pdf (attached) (presenting groundwater monitoring elevations for all eight baseline sampling events). While AECOM claims that these measurements "were used to create potentiometric surface maps for the uppermost aquifer for each of the monitoring events" (*id.* at 1), the report does not include these maps—and in any event, this report was not included in Basin Electric's permit application. Subsequent reports that characterize groundwater elevations with potentiometric surface maps were available at the time Basin Electric submitted its permit application, but these reports also omitted from the application. *See*

Groundwater Monitoring System as upgradient or downgradient,[67] as North Dakota (and federal) regulations require,[68] leaving unclear whether it proposed to use those wells to establish background or to monitor pollution from the impoundments.

- Insufficient information to determine if Basin Electric's closure and post-closure plans for its CCR surface impoundments meet state and federal closure performance standards. North Dakota's regulations require Basin Electric to include these plans in its permit application.[69] Where the applicant proposes to close its coal ash ponds by leaving the waste in place, as at Leland Olds Station, the applicant must provide a closure plan detailing how it will meet applicable closure performance standards.[70] Those standards require applicants to eliminate free liquids from the surface impoundments prior to the installation of a cap, and to "[c]ontrol, minimize or eliminate, to the maximum extent feasible, postclosure infiltration" of groundwater through the units, among other requirements.[71] The closure and post-closure plans submitted by Basin Electric as part of

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AECOM, 2019 Annual Groundwater Monitoring and Corrective Action Report (August – December 2019) LOS Ponds 2 and 3 Multi-unit, at fig. 1 (Jan. 31, 2019), https://www.basinelectric.com/_files/pdf/Coal_ash/GWCA-2019-LOS-Multiunit.pdf ("2019 Leland Olds Ponds GWMCA Report") (attached); AECOM, 2020 Annual Groundwater Monitoring and Corrective Action Report LOS Ponds 2 and 3 Multi-unit, figs. 1 & 2 (Jan. 31, 2021), https://www.basinelectric.com/_files/pdf/Coal_ash/LOS-Multiunit_2020-GWCA_01312021.pdf ("2020 Leland Olds Ponds GWMCA Report") (attached); AECOM, 2021 Annual Groundwater Monitoring and Corrective Action Report LOS Ponds 2 and 3 Multi-unit, figs. 1 & 2 (Jan. 31, 2022), https://www.basinelectric.com/_files/pdf/Coal_ash/LOS-Multiunit-GWCA-2021-01312022.pdf (attached).

[67] 2019 Leland Olds Groundwater Monitoring System Report at 5-1 (attached).

[68] NDAC § 33.1-20-08-06(2)(c)(1); *see also* 40 C.F.R. § 257.91(c)(1).

[69] NDAC § 33.1-20-08-07(1)(b)(6).

[70] *Id.* § 33.1-20-08-07(3)(b)(1) ("The written closure plan must include: (a) A narrative description of how the CCR unit will be closed in accordance with this subsection."); 40 C.F.R. § 257.102(b)(1) ("The written closure plan must include, at a minimum, . . . [a] narrative description of how the CCR unit will be closed in accordance with this section."); *see also*, *e.g.*, Alabama Primacy Denial, 89 Fed. Reg. at 48,801 (denying primacy, in part, because the state permitting "approved the [closure] Plan without requiring Alabama Power to provide the information necessary to confirm that several critical closure requirements—which were not addressed or were insufficiently described—would be met. Specifically, neither the Closure Plan nor other materials in the Permit Application addressed how the performance standards in § 257.102(d)(2) will be met with respect to the saturated CCR that it appears will remain in the base of the consolidated unit"); EPA, Denial of Alternative Closure Deadline for General James M. Gavin Plant, Cheshire, Ohio, at 15 (Nov. 18, 2022) ("Final Gavin Denial") (denying Gavin Power, LLC's application to extend the deadline to cease use of a CCR surface impoundment based, in part, on EPA's findings that "the narrative description in the closure plan entirely fails to discuss the groundwater infiltrating into the impoundment, and to describe how, despite those continuous flows into the unit, the facility eliminated free liquids as required by 40 C.F.R. § 257.102(d)(2)(i). The closure plan also fails to describe any engineering measures taken to 'control, minimize, or eliminate to maximum extent feasible' either the post-closure infiltration of liquids from either the side or base of the units into the waste, or the post-closure releases of CCR or leachate to the groundwater. 40 C.F.R. § 257.102(d)(1)(i). Finally, the closure plan narrative includes no discussion of how Gavin has 'preclude[d] the probability of future impoundment of water, sediment, or slurry.' 40 C.F.R. § 257.102(d)(1)(ii)") (attached).

[71] NDAC § 33.1-20-08-07(d)(1)(a), (d)(2)(a); 40 C.F.R. § 257.102(d)(1)(i), (d)(2)(i).

> it permit application include no discussion of how Basin Electric will achieve these closure performance requirements.[72] Instead, the plans focus solely on addressing potential infiltration of precipitation from above. They contain no diagrams or information about the depths of the units or about groundwater elevations in the units, and no proposal for dewatering the unit or discussion of methods that will be used to prevent post-closure infiltration of water through the sides and bottom of the unit. Without these elements, it is impossible for NDDEQ to conclude that Basin Electric's proposed closure and post-closure plans will satisfy the performance standards for closure in place.

Even though Basin Electric's permit application lacked information necessary to demonstrate compliance with both state and federal CCR regulations, NDDEQ issued Permit No. 0038.

Evidence that NDDEQ is not operating its coal ash program as a "system of prior approval and conditions" is not limited to the record for Permit No. 0038. Commenters reviewed the regulatory docket and records provided pursuant to a thorough public records request to NDDEQ covering all of the CCR unit permits it has issued. Commenters were unable, however, to locate any review memo, evaluation, or record of decision demonstrating that the State critically evaluated permit application materials or otherwise documented its rationale for adopting draft permit terms prior to approving permit applications. The fact that NDDEQ could not even *find* certain documents that are "incorporated by reference" into Permit No. 0087 for Montana-Dakota Utilities' Heskett Station—and purportedly establish compliance requirements for the site—illustrates this lack of critical evaluation.[73]

In addition to contravening the WIIN Act's conditions for primacy, North Dakota's failure to require submission and pre-approval of key information—like how Basin Electric will achieve compliance with closure performance standards at its Leland Olds surface impoundments—is contrary to jurisprudence holding that the failure of agencies to review and, if appropriate, approve site-specific proposals for compliance with applicable law constitutes impermissible "self-regulation" and an improper abdication of agency duties.[74] Moreover, as demonstrated by the missing compliance documents for Heskett Station and described in more

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[72] *See* Basin Electric, Coal Combustion Residual Surface Impoundment Closure Plan, Leland Olds Station (Apr. 2018) ("Leland Olds Surface Impoundment Closure Plan") (attached); *see* Basin Electric, Coal Combustion Residual Surface Impoundment Post-Closure Plan, Leland Olds Station (Apr. 2018) (attached).

[73] *Compare* Permit No. 0087, Term. E.15 & Attach.1 (attached) *with* "Read Me (MDU 0087)" file (attached). The "Read Me (MDU 0087)" file was included in NDDEQ's response to Commenters' records request for coal ash permits and permitting documents, described more in Section VII.B.

[74] *See, e.g.*, *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498–502 (2d Cir. 2005) (EPA's Concentrated Animal Feeding Operation rule violated the Clean Water Act's mandate to ensure compliance with applicable requirements when it failed to require permitting authorities to review industry's nutrient management plans); *Env't Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 855–56 (9th Cir. 2003) (holding that EPA's rule for storm water management violated the Clean Water Act when it failed to require permitting authorities to review operators' site-specific "minimum measures" to reduce storm water discharges, and concluding that "programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable").

detail in Section VII below, the deficiencies create a permitting program that is exceedingly difficult to implement and enforce. What exactly a given site must do to satisfy state and federal CCR rules is not clear to the permittee or NDDEQ, and is certainly not clear to North Dakota residents whose health and wellbeing depend on compliance with the critical safeguards found in these rules.

North Dakota's failure to operate its CCR permit program as a "system of prior approval" does not only render the program ineligible for primacy and otherwise at odds with legal precedent, it also puts North Dakota residents and waters at serious risk. NDDEQ's issuance of Permit No. 0038 despite deficiencies with Basin Electric's groundwater monitoring plan is particularly troubling. It also issued a permit to Heskett Station—another site where EPA identified groundwater contamination decades ago and where evidence indicates such contamination has continued[75]—despite a similarly deficient groundwater monitoring system, as detailed in Section VI.B.2. Groundwater monitoring plans are foundational to the effective functioning of the state and federal CCR programs. Effective monitoring is needed to determine the presence, degree, and location of groundwater contamination, and these determinations drive the actions needed to clean up CCR units that pollute or may pollute North Dakota's waters. As EPA stated in the preamble to its first proposed federal CCR rule, "groundwater monitoring is the single most critical set of protective measures on which EPA is relying to protect human health and the environment."[76]

Effective closure plans are similarly vital to protecting residents' health. When a CCR surface impoundment is closed leaving waste in place, North Dakota and federal regulations make clear that the owner or operator must eliminate free liquids from the unit and take measures to minimize or eliminate the infiltration of any liquids into the unit after closure. If these measures are not taken, harmful contaminants will continue to leach out of the CCR and into groundwater and surface waters. Accordingly, NDDEQ's failure to require permit applicants to detail how they will meet these standards *before* issuing permits fails the WIIN Act's precondition that the program be a "system of prior approval." It also renders arbitrary and capricious any conclusion that the state's CCR program is "as protective as the Federal CCR regulations."[77] Primacy must be denied.

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[75] *See, e.g.*, Excerpt of Damage Case Compendium Vol. IIa at 112 (attached); Poisonous Coverup at tbl. A4 & App. A (describing methodology, including use of industry data) (attached).

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

[77] *See* Alabama Primacy Denial, 89 Fed. Reg. at 48,777. Indeed, as discussed in Section VI, the record shows that EPA has repeatedly identified multiple violations of the Federal CCR Rules at coal ash units in North Dakota, underscoring that NDDEQ is not engaging in adequate prior review to ensure compliance with required standards—and thus is putting North Dakotans at risk. S*ee, e.g.*, Attachment to email from EPA to NDDEQ re: potential concerns at ND permits, Docket ID No. EPA-HQ-OLEM-2021-0051-0127 (Jan. 3, 2024) (describing EPA's findings of "improper use of intrawell statistics, other statistical issues, many items missing in annual groundwater monitoring and corrective action (AGWMCA) reports, speculative alternative source demonstration (ASD) delaying assessment monitoring, and incomplete assessment of corrective measures (ACM))" at the Stanton, R.M. Heskett, and Coyote Stations) ("Jan.

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

EPA cannot grant primacy to North Dakota's CCR program unless it determines that the state's program is "at least as protective as" the requirements in the Federal CCR Rules.[78] As part of its determination, EPA proposes to evaluate the state's CCR regulations concerning "permitting requirements, requirements for compliance monitoring authority, requirements for enforcement authority, and requirements for intervention in civil enforcement proceedings," among other program aspects.[79] A review of North Dakota's regulations, even accepting EPA's proposed partial approval, makes clear that it lacks key definitions from, and includes weaker standards than, the Federal CCR Rules.

A. North Dakota's CCR Regulations Lack Definitions Found in the Federal CCR Rules That Are Critical to Protecting Human Health and the Environment.

Among the federal regulations that will not be incorporated into North Dakota's permit program, according to EPA's Proposed Approval, are all amendments made in the 2024 Legacy Rule.[80] As a result, surface impoundments, landfills, and other CCR Management Units in North Dakota that are newly regulated by that rule will remain subject to federal requirements. The 2024 Legacy Rule, however, includes several amendments that apply to *all* CCR units, including those units for which EPA proposes to grant North Dakota primacy. Among these is the addition of definitions that clarify the meaning of terms critical to the effectiveness of activities taken pursuant to Federal CCR Rules. EPA's proposal to approve North Dakota's permit program without these new clarifying definitions fails to meet the statutory requirement that state programs be "at least as protective" as the Federal CCR Rules.

Among the definitions added by the 2024 Legacy Rule, which apply to regulatory safeguards for *all* CCR units, are those for "[i]nfiltration," "[l]iquids," and "[c]ontains both CCR

2024 EPA Email Re: Permit Concerns"); EPA Memorandum re: Issues with ND CCR Units, Docket ID No. EPA-HQ-OLEM-2021-0051-0124 (Sept. 2024) (detailing noncompliance at the same Stations); *see also* EPA, Proposed Determination: Proposed Denial of the CCR Part B Alternate Liner Demonstration Application Great River Energy Coal Creek Station, Upstream Raise 91, Underwood, North Dakota, at 2 (Jan. 25, 2023) (proposing to deny Great River Energy's "Part B" application to allow continued use of the Upstream Raise 91 CCR surface impoundment due to: "1) an inadequate groundwater monitoring network; 2) evidence of a potential release from the impoundment and insufficient information to support the alternative source demonstration; 3) inadequate demonstration of meeting location restrictions; and 4) inadequate documentation for the design and performance of the impoundment liner.") ("Coal Creek Part B Proposed Determination") (attached).

[78] 42 U.S.C. § 6945(d)(1)(B)(ii); *see also USWAG*, 901 F.3d at 426 (explaining that EPA can approve state permitting programs under the WIIN Act "provided those programs are at least as environmentally protective as the existing (or successor) EPA regulations").

[79] *See, e.g.*, North Dakota Proposed Approval, 90 Fed. Reg. at 20,989–90.

[80] *Id.* at 20,995 (referencing 2024 Legacy Rule, 89 Fed. Reg. at 38,985).

and liquids."[81] These clarifying definitions are critical to ensure that the Federal CCR Rules protect groundwater and surface waters from coal ash's dangerous pollutants. They are also directly responsive to persistent noncompliance issues that EPA has noted at coal ash dumps throughout the country and that exist in North Dakota.

EPA proposed and ultimately adopted these definitions due to the repeated assertion by industry actors that the terms were significantly more limited than their plain meanings suggest and than EPA intended—an assertion that industry has relied on to justify unsafe CCR management practices.[82] For example, USWAG, an industry trade group, has repeatedly argued that the term "free liquids," as used in the 2015 CCR Rule, does not include groundwater. Misconstrued in this manner, the requirement that "[f]ree liquids must be eliminated" when closing a surface impoundment with waste in place (40 C.F.R. § 257.102(d)(2)(i)) allows industry to leave waste saturated in and contaminating groundwater in perpetuity.[83] Similarly, industry actors have asserted that "infiltration," as used in the Federal CCR Rules, only refers to the downward infiltration of precipitation into a CCR unit and not the infiltration of groundwater from the sides and below. According to this claim, the Rules' mandate that a CCR unit close in a manner that will "[c]ontrol, minimize, or eliminate . . . post-closure infiltration of liquids" only applies to rainwater and requires no measures to address liquids infiltrating coal ash from any other source.[84]

In addition to making these assertions in various comments to EPA, several coal companies and a coal industry trade association went so far as to claim before the D.C. Circuit that EPA had engaged in improper rulemaking by not adhering to industry's unreasonably narrow and unsafe construction of these key terms.[85] And even though the D.C. Circuit agreed with EPA that the 2015 CCR Rule, and not any subsequent EPA action, requires the elimination and preclusion of groundwater from closing surface impoundments,[86] industry actors have continued to push these claims through other avenues. Gavin Power LLC, a petitioner in the *Electric Energy* case, has sued EPA in the U.S. District Court for the Southern District of Ohio, challenging EPA's determination that Gavin Power's closure of a surface impoundment with

[81] 2024 Legacy Rule, 89 Fed. Reg. at 39,100; 40 C.F.R. § 257.53.
[82] *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982, 32,026 (May 18, 2023).
[83] *See, e.g.*, USWAG, Comments on Proposed Decision: Proposed Denial of Alternative Closure Deadline for General James M. Gavin Plant, at 2–3, 7, 9–28, Docket ID No. EPA-HQ-OLEM-2021-0590-0054 (Mar. 25, 2022) ("USWAG Comments on Gavin Decision") (attached). USWAG filed identical comments regarding proposed Part A decisions for the Clifty Creek, Spurlock, and Ottumwa plants. *See generally* USWAG, Comments on Proposed Decision: Proposed Denial of Alternative Closure Deadline for Clifty Creek Power Station, Docket ID No. EPA-HQ-OLEM-2021-0587-0044 (Mar. 25, 2022) (attached), USWAG, Comments on Proposed Decision: Conditional Approval of an Alternative Closure Deadline for H.L. Spurlock Power Station, Docket ID No. EPA-HQ-OLEM-2021-0595-0026 (Mar. 25, 2022) (attached), and USWAG, Comments on Proposed Decision: Proposed Denial of Alternative Closure Deadline for Ottumwa Generating Station, Docket ID No. EPA-HQ-OLEM-2021-0593-0031 (Mar. 25, 2022) (attached).
[84] USWAG Comments on Gavin Decision at 2 (attached).
[85] *See Elec. Energy*, 106 F. 4th at 31.
[86] *Id.* at 40–41

millions of cubic yards of coal ash sitting in groundwater violated the Federal CCR Rules.[87] In this matter, Gavin Power persists in its efforts to avoid responsibility for addressing groundwater contamination, now arguing that EPA's position is "a new interpretation of certain regulations," rather than a rulemaking.[88] Similarly, USWAG recently requested that EPA Administrator Zeldin take "immediate action" to resolve litigation over the 2024 Legacy Rule and voluntarily rescind its clarifying definitions of "liquids," "infiltration," and "contains both CCR and liquids."[89] A letter to Administrator Zeldin from several coal companies, including Basin Electric, makes an identical request.[90]

North Dakota uses regulatory language identical to that found in the Federal CCR Rules to describe the closure responsibilities of CCR unit owners and operators. For example, North Dakota's closure performance standard when leaving waste in place requires an owner or operator to "[c]ontrol, minimize, or eliminate, to the maximum extent feasible, postclosure *infiltration* of liquids into the waste . . . ."[91] North Dakota also requires owners and operators to "[e]liminate free *liquids*" prior to installing a final cover system.[92] North Dakota's failure to include the clarifying definitions for these terms from the 2024 Legacy Rule—which are now codified in the Federal CCR Rules—enables their misconstruction and renders North Dakota's program less protective than the federal program. The impact of this can be seen at Leland Olds Station, where NDDEQ issued Basin Electric a permit even though its closure and post-closure plans only address infiltration related to precipitation and fail to address how free liquids are eliminated from its unit before it is closed with waste in place.[93]

B. North Dakota's CCR Regulations Include Substantive Requirements That Are Less Protective Than Those in the Federal CCR Rules.

North Dakota's CCR regulations also include substantive requirements that are less protective than federal requirements, and thus its program fails to meet the standard prescribed in the WIIN Act. These include:

- Allowing coal ash to be added to CCR units during closure. North Dakota's regulations define "[g]rading" as "the placement of CCR only to the extent necessary to create sufficient differences in elevation to support stormwater drainage."[94] Elsewhere, North Dakota's regulations state that "grading" is a permissible part of the unit closure process.[95] This is less protective than the federal program, which prohibits the placement of CCR during unit closure.[96]

[87] *Gavin Power, LLC v. EPA*, Case No. 2:24-cv-41 (S.D. Ohio Mar. 27, 2024).
[88] First Amended Complaint, at ¶6, Case No. 2:24-cv-41 (S.D. Ohio Mar. 27, 2024) (attached).
[89] Letter from Daniel L. Chartier, USWAG Executive Director to Hon. Lee Zeldin, then-Nominee to be U.S. EPA Administrator (Jan. 16, 2025) (attached).
[90] 2025 Letter from Industry to Zeldin (attached).
[91] NDAC § 33.1-20-08-07(3)(d)(1)(a) (emphasis added).
[92] *Id.* § 33.1-20-08-07(3)(d)(2)(a) (emphasis added).
[93] *See* Section IV.
[94] *Id.* § 33.1-20-08-01(11).
[95] *Id.* § 33.1-20-01.1-03(10).
[96] 40 C.F.R. § 257.101(a)(1).

- Failing to impose a deadline by which existing surface impoundments and landfills are required to complete location restriction designations. North Dakota's regulations require that new landfills, and existing and new surface impoundments, be "constructed with a base that is a minimum of five feet [] above the upper limit of the uppermost aquifer," among other location restrictions.[97] For new landfills and impoundments, compliance must be demonstrated as part of a permit application.[98] No deadline exists, however, for existing units to make this demonstration, rendering the location restriction requirement unenforceable and less protective than the federal program.

- Failing to impose a deadline by which unlined surface impoundments must close. Under the Federal CCR Rules, the owner or operator of an existing unlined surface impoundment must cease placing waste in the impoundment and initiate closure "as soon as technically feasible" and no later than April 11, 2021.[99] The North Dakota regulations contain no such requirement. They state that "all existing unlined CCR surface impoundments are subject to the requirements of" NDAC section 33.1-20-08-08-07(2)(a).[100] However, the referenced section contains no requirements and simply says "[Reserved]."[101]

Beyond these specific shortcomings, EPA's Proposed Approval fails to satisfactorily explain how it arrived at the determination that North Dakota's permit program is at least as protective as the federal program. Per the U.S. Supreme Court, when making a decision such as this one, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[102] This Proposed Approval, however, includes contradictory statements such as those regarding the sufficiency of North Dakota's public reporting requirements, as discussed in Section VII.A below.

The Proposed Approval also appears to be based on a version of North Dakota's regulations that is not current. For example, several of the seventeen regulatory provisions for which EPA states North Dakota is not seeking approval do not exist in North Dakota's current regulations.[103] These include, but are not limited to, provisions related to non-groundwater releases, suspensions of groundwater monitoring, unlined impoundment standards vacated by the *USWAG* decision, determination that remediations of "Appendix II" constituents may not be necessary, alternate length of time for demonstrating that groundwater standards have not been exceeded, and corrective action procedures for non-groundwater releases.

In addition, EPA relies on a conclusory statement for its determination that North Dakota provisions that do not mirror federal language are nonetheless at least as protective: "The North

[97] NDAC § 33.1-20-08-03(1); *see also id.* § 33.1-20-08-03(2)–(5) (restricting location in wetlands, fault areas, seismic impact zones, and unstable areas).
[98] *Id.* §33.1-20-08-081(a).
[99] 40 C.F.R. § 257.101(a)(1).
[100] NDAC § 33.1-20-08-04(2)(a)(24).
[101] *Id.* §33.1-20-08-08-07(2)(a)
[102] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[103] North Dakota Proposed Approval, 90 Fed. Reg. at 20,994.

Dakota CCR permit program also contains State-specific language, references, definitions, and State-specific requirements that differ from the Federal CCR regulations, but which EPA has determined to be 'at least as protective as' the Federal criteria."[104] This does not meet the requirement that EPA "articulate a satisfactory explanation" for its proposed decision.

VI. APPROVING NORTH DAKOTA'S PROGRAM WOULD VIOLATE THE WIIN ACT AND BE ARBITRARY AND CAPRICIOUS BECAUSE NORTH DAKOTA'S PERMITS ALLOW VIOLATIONS OF STATE AND FEDERAL CCR REGULATIONS.

North Dakota has for years been administering the CCR program EPA now proposes to partially approve. NDDEQ has already issued eight CCR permits to coal ash units in the state, largely pursuant to state regulatory requirements that mirror those of the Federal CCR Rules. Yet, in its Proposed Approval, EPA improperly ignores how North Dakota is implementing its program. EPA erroneously deems NDDEQ's eight CCR permits "not relevant to the decision on the permit program" because the state has "committed to review and reissue these permits to ensure compliance with the Federally approved program, after EPA issues its final determination of adequacy."[105]

If EPA retains this position in its final decision and approves North Dakota's program without considering how the state is carrying out that program—including by ignoring the state's eight CCR permits—then EPA's approval would violate the WIIN Act's plain language and be arbitrary and capricious under the Administrative Procedure Act.

A. The WIIN Act Requires EPA to Consider How North Dakota Is Administering Its CCR Permitting Program.

The WIIN Act enables EPA to approve North Dakota's CCR permit program only upon determining that the program "requires *each* coal combustion residuals unit located in the State *to achieve compliance with*" the Federal CCR Rules or state rules that are "at least as protective."[106] This language compels EPA to evaluate North Dakota's program at the time of its application—including by considering the eight active CCR permits NDDEQ issued pursuant to the program—rather than base its decision upon speculation about how North Dakota might operate its program in the future.[107] Moreover, much of the regulatory language that North Dakota has relied upon in issuing these permits is identical to language in the Federal CCR Rules. This provides clear evidence that North Dakota understands and implements this language differently than EPA.

A state's CCR permits are essential to determining whether a state's program requires "each" CCR unit to "achieve compliance with" federal requirements or equally protective state

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[104] *Id.* at 20,995.
[105] *Id.*
[106] 42 U.S.C. § 6945(d)(1)(B) (emphasis added).
[107] Alabama Primacy Denial, 89 Fed. Reg. at 48,778 ("This direction necessarily includes Agency consideration of the existing record of what the State actually requires individual CCR units to do pursuant to the program that the state has submitted to EPA for approval").

requirements.[108] EPA itself acknowledged this in its Alabama Primacy Denial. There, EPA explained that it could not make this mandatory determination under the WIIN Act without considering "*both* a State's statute and regulations *and what the State actually requires individual CCR units to do, such as in permits or orders . . . .*"[109] EPA elaborated:

> [I]t would be both unreasonable and arbitrary and capricious to ignore issued permits since they are the best evidence of whether a State program does in fact require each CCR unit in the State to achieve compliance with the Federal CCR regulations or State standards that are at least as protective as the Federal regulations.[110]

EPA's conclusion in its Alabama Primacy Denial is consistent with statements in its Proposed Approval for North Dakota:

> EPA must evaluate the technical criteria that will be included in each permit issued under the State CCR permit program to determine whether they are the same as the Federal criteria, or to the extent they differ, whether the modified criteria are 'at least as protective as' the Federal requirements . . . [and that] an adequate State CCR permit program must ensure that . . . [e]xisting and new facilities are permitted or otherwise approved and in compliance with either 40 CFR part 257 or other State criteria.[111]

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

> Once a final CCR permit is issued by an approved State or pursuant to a Federal CCR permit program, [] the terms of the permit apply in lieu of the terms of the Federal CCR regulations and/or requirements in an approved State program, and RCRA section 4005(d)(3) provides a permit shield against direct enforcement of the applicable Federal or State CCR regulations . . . .[112]

In other words, once a permit is issued, a unit owner is bound to the permit's terms, and these determine whether the unit is required "to achieve compliance with" criteria that are "at least as protective as" federal requirements.

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[108] 42 U.S.C. § 6945(d)(1)(B).

[109] Alabama: Denial of State Coal Combustion Residuals Permit Program, 88 Fed. Reg. 55,220, 55,226 (Aug. 14, 2023) ("Alabama Proposed Primacy Denial") (emphasis added); *see also* Alabama Primacy Denial, 89 Fed. Reg. at 48,781 ("Section 4005(d)(1) of RCRA directs EPA to determine whether a State program 'requires each' CCR unit in the State 'to achieve compliance' with either the Federal standards or an alternative State program at least as protective as the Federal CCR regulations . . . Given that statutory directive, EPA concludes that it cannot ignore permits that are available prior to approval of a State CCR program, as in this case." (citation omitted)).

[110] Alabama Primacy Denial, 89 Fed. Reg. at 48,781.

[111] North Dakota Proposed Approval, 90 Fed. Reg. at 20,990.

[112] *Id.* at 20,989.

Permits are therefore essential components of a state program, and EPA must consider them to determine whether the program satisfies the conditions for primacy under the WIIN Act. EPA cannot ignore state-issued permits and still meet its statutory duty to determine whether a state's program requires "each" CCR unit "to achieve compliance with" the Federal CCR Rules or at-least-as-protective requirements.[113] EPA has abdicated its WIIN Act duties by ignoring the eight CCR permits North Dakota has already issued. Should EPA issue a final approval of North Dakota's program without considering the state's permitting practices, it would violate the WIIN Act, and its actions would be arbitrary and capricious under the Administrative Procedure Act.[114]

EPA unconvincingly attempts to justify its failure to consider North Dakota's permits. The agency first tries to supplant the WIIN Act's plain language standard with one of its own creation. In its Proposed Approval, EPA claims that the Act "directs EPA to determine that the State *has sufficient authority to* require compliance at all CCR units located within the State."[115] This construction of the WIIN Act is clearly wrong. The statute requires EPA to determine whether a state *actually* requires each CCR unit to achieve compliance, not just whether the state *has the authority* to do so. The WIIN Act's language could not be clearer: "the Administrator . . . shall approve . . . a permit program . . . if the Administrator determines that the program . . . *requires each coal combustion residuals unit located in the State to achieve compliance with*" federal requirements or at-least-as-protective state requirements.[116] A state agency that has the authority to implement standards that are at least as protective as those of the Federal CCR Rules but chooses not to is clearly not requiring each unit within the state to *achieve compliance with* federal requirements or their state equivalents. EPA's interpretation—which would insert "has sufficient authority to" into this plain language—is far from the "single, best meaning" of the statute.[117] EPA's interpretation is also a stark departure from its interpretation of this same language in its Alabama Primacy Denial, where it concluded that the statute compels consideration of "*both* a State's statute and regulations *and what the State actually requires individual CCR units to do*."[118]

EPA also tries to justify its decision to ignore North Dakota's permits on the ground that NDDEQ "committed to review and reissue [] permits to ensure compliance with the Federally approved program, after EPA issues its final determination of adequacy."[119] This justification fails too. As noted above, the WIIN Act requires EPA to evaluate a state's primacy application according to the program that exists at the time of application, specifically to determine whether

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[113] 42 U.S.C. § 6945(d)(1)(B).
[114] 5 U.S.C § 706(2)(A).
[115] North Dakota Proposed Approval, 90 Fed. Reg. at 20,989 (emphasis added); *see also id.* at 20,990 (stating that an adequate program must ensure the state "*has the authority to* impose requirements for CCR units adequate to ensure compliance with either 40 CFR part 257, subpart D, or such other State criteria that have been determined and approved by the Administrator to be at least as protective as 40 CFR part 257, subpart D") (emphasis added).
[116] 42 U.S.C. § 6945(d)(1)(B).
[117] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).
[118] Alabama Proposed Primacy Denial, 88 Fed. Reg. at 55,226 (emphasis added); *see also* Alabama Primacy Denial, 89 Fed. Reg. at 48,778. EPA also has not provided the requisite "reasoned analysis" for this about-face. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).
[119] North Dakota Proposed Approval, 90 Fed. Reg. at 20,995.

the program "requires"—in the present tense—units within the state to meet appropriate standards. It does not provide EPA with the discretion to approve a program based on its presumption that the state *will require* units to meet these standards at some point in the future.

EPA's reliance on North Dakota's commitment to future compliance is particularly senseless because EPA already has the information it needs to determine how NDDEQ would permit coal ash sites under a federally approved program. NDDEQ issued eight CCR permits in 2022 and 2023 pursuant to regulations that are virtually identical to the ones EPA is now proposing to approve. Although North Dakota amended its CCR regulations in 2024, those amendments made no changes to the vast majority of provisions setting forth performance standards and compliance requirements.[120] Indeed, EPA's proposed approval identifies only one relevant 2024 amendment, to the definition of "groundwater."[121]

Because the eight CCR permits NDDEQ issued in 2022 and 2023 are based on nearly identical regulations to the ones EPA proposes to approve, those permits are the best and most direct evidence of whether North Dakota's program requires each unit within the state to achieve compliance with standards at least as protective as the Federal CCR Rules.[122] EPA offers no reason to believe that NDDEQ would interpret unchanged regulations differently in the future than it did in 2022 or 2023. As EPA itself has acknowledged, "issued permits . . . are the best evidence of whether a State program does in fact require each CCR unit in the State to achieve compliance with the Federal CCR regulations or State standards that are at least as protective."[123] Thus, EPA's decision to ignore North Dakota's permits violates the WIIN Act and is arbitrary and capricious.

B. Evidence of How North Dakota Is Administering Its Program Makes Clear That the Program Is Not At Least As Protective As Federal Requirements.

EPA's decision to ignore North Dakota's permits for purposes of its proposed approval is especially arbitrary and capricious because the agency has in fact reviewed some of those permits and knows that North Dakota is allowing units to violate state regulations that mirror the standards found in the Federal CCR Rules. EPA states in its Technical Support Document that it "conducted a screening review of the state CCR permits"—specifically, permits for units at Stanton, Heskett, and Coyote stations—and that this "raise[d] concerns that additional groundwater monitoring wells, revised statistical analyses, and additional groundwater sampling are needed at CCR units to ensure the groundwater monitoring and corrective action requirements are met."[124] Over the past year, EPA informed North Dakota that issues with its

[120] *See* NDAC § 33.1-20-08 comparison document (showing differences between versions of the regulations in effect July 1, 2020 to October 1, 2024) (attached).
[121] North Dakota Proposed Approval, 90 Fed. Reg. at 20,989.
[122] *See, e.g.*, Letter from EPA to NDDEQ re: North Dakota's CCR permit program, Docket ID No. EPA-HQ-OLEM-2021-0051-0131, at 2 (Oct. 4, 2024) ("Whether issued permits comply with Federal requirements or a state program that is at least as protective is directly relevant to whether the state program requires each CCR unit in the state to achieve compliance.") ("Oct. 2024 Letter from EPA to NDDEQ").
[123] Alabama Primacy Denial, 89 Fed. Reg. at 48,781.
[124] ND Technical Support Document at 48.

CCR permits demonstrate "a consistent pattern of deficiencies," which the state declined to remedy despite being aware of them:

> As discussed in our previous conversations, EPA has identified what appears to be a consistent pattern of deficiencies in previously issued state permits that have not been addressed. The state permit information before EPA suggests that North Dakota may not be interpreting its state regulations in a manner that is as protective as the analogous federal regulations, *see* 40 C.F.R. § 257.90-98. For example, as discussed on our September 16, 2024 call —and as outlined in the issues document we provided on September 13, 2024—EPA identified deficiencies in the groundwater monitoring networks and statistical analyses of groundwater monitoring data. These issues raise concerns that additional groundwater monitoring wells, revised statistical analyses, and additional groundwater sampling are needed to ensure the groundwater monitoring and corrective action requirements are met. These implementation issues create the potential for serious environmental and health risks. To date, North Dakota has not provided evidence that these deficiencies will be addressed, nor has North Dakota provided written assurance that it will interpret and apply its regulations in a similarly rigorous manner.[125]

EPA's own rulemaking record is full of evidence that North Dakota's permits fail to require each CCR unit to achieve compliance with federal requirements or equally protective state requirements.

In addition, Commenters have closely reviewed permitting materials for coal ash units at Coal Creek, Heskett, and Leland Olds stations and identified additional evidence of noncompliance.

1. *North Dakota is allowing noncompliance at Rainbow Energy Center's Coal Creek Station*

NDDEQ's 2022 permit for Rainbow Energy Center's Coal Creek Station exemplifies this. In January 2023, EPA identified significant violations of the Federal CCR Rules at Coal Creek's "Upstream Raise 91" CCR surface impoundment ("Upstream Pond") when evaluating Rainbow Energy Center's Part B application for permission to use an "alternate liner." Among other violations, EPA found: (1) the Upstream Pond had "an inadequate groundwater monitoring network"; (2) "evidence of a potential release from the [Upstream Pond] and insufficient information to support the alternative source demonstration" ("ASD"); and (3) an "inadequate demonstration" that the Upstream Pond met location restrictions.[126]

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[125] Oct. 2024 Letter from EPA to NDDEQ at 3; *see also* Jan. 2024 EPA Email Re: Permit Concerns (noting "improper use of intrawell statistics, other statistical issues, many items missing in annual groundwater monitoring and corrective action [] reports, speculative alternative source demonstrations [] delaying assessment monitoring, and incomplete assessment of corrective measures []"); Letter from NDDEQ to EPA re: ND CCR Permit Program, Docket ID No. EPA-HQ-OLEM-2021-0051-0134, at PDF pp. 3–16 (Nov. 25, 2024) (describing "[i]ssues with ND CCR Units" as of September 2024).

[126] Coal Creek Part B Proposed Determination at 2 (attached).

a. Inadequate groundwater monitoring network

EPA found that Coal Creek "failed to perform the necessary site characterization to justify the number, spacing, and depth of site monitoring wells, and, as a consequence, the impoundment system for the [Upstream Pond] does not meet the requirements of 40 C.F.R. §§ 257.91(a)(2), (b), and (c)(2)."[127] Those federal provisions state:

> The owner or operator of a CCR unit must install a groundwater monitoring system that consists of a sufficient number of wells, installed at appropriate locations and depths, to yield groundwater samples from the uppermost aquifer . . . [and] [t]he number, spacing, and depths of monitoring systems shall be determined based upon site-specific technical information . . . .[128]

The provisions further specify that groundwater monitoring networks must include a "minimum of one upgradient and three downgradient monitoring wells" and the "downgradient monitoring system must be installed at the waste boundary."[129]

North Dakota's regulations have identical requirements that have been in place since at least 2020 and were in place at the time it issued a permit for Coal Creek. Specifically, NDAC Section 33.1-20-08-06(2)(a) states:

> The owner or operator of a CCR unit shall install a ground water monitoring system that consists of a sufficient number of wells, installed at appropriate locations and depths, to yield ground water samples from the uppermost aquifer . . . [and] [t]he number, spacing, and depths of monitoring systems shall be determined based upon site-specific technical information . . . .[130]

Like the federal provisions, North Dakota's regulations specify that groundwater monitoring networks must include a "minimum of one upgradient and three downgradient monitoring wells" and the "downgradient monitoring system must be installed at the waste boundary."[131]

The Upstream Pond has only the minimum of three downgradient monitoring wells[132] and at least one of these wells (MW-51) is "sited up to 200 feet away from the nearest edge of the delineated impoundment boundary"[133] rather than "at the waste boundary," in violation of both federal and North Dakota regulations.[134] NDDEQ approved this inadequate groundwater monitoring system in 2022 nonetheless.[135] In 2023, EPA evaluated this system and determined

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[127] *Id.* at 18.
[128] 40 C.F.R. §§ 257.91(a)–(b).
[129] *Id.* at 257.91(a)(2), (c)(1).
[130] NDAC § 33.1-20-08-06(2)(a)–(b).
[131] *Id.* at 33.1-20-08-06(2)(a), (c), (a)(2).
[132] WSP, 2024 Annual Coal Combustion Residuals Groundwater Monitoring Report, Rainbow Energy Center, Coal Creek Station (Jan. 31, 2025), at fig. 2 https://ccr.rainbowenergycenter.com/wp-content/uploads/2025/02/2024-Annual-Groundwater-Report-Coal-Creek.pdf ("Excerpt of 2024 Coal Creek GW Monitoring Report") (attached).
[133] Coal Creek Part B Proposed Determination at 15.
[134] 40 C.F.R. §§ 257.91(a)(2), (b), (c); NDAC § 33.1-20-08-06(1)(a)(2), (b), (c).
[135] Permit No. 0033 at 8 (attached).

that it does not comply with the standards found in the Federal and North Dakota CCR rules.[136] In the two and a half years that have passed since EPA identified these violations at Coal Creek, NDDEQ appears to have taken no action to require Rainbow Energy Center to bring Coal Creek's groundwater monitoring system into compliance.[137]

b. Non-compliant Alternate Source Demonstration

EPA also found that Rainbow Energy Center prepared a non-compliant ASD after detecting a statistically significant increase ("SSI") in the concentration of an "Appendix III" contaminant (chloride) at Coal Creek's Upstream Pond. Specifically, EPA said the ASD "fails to demonstrate either that a source other than the impoundment caused the SSI or the SSI resulted from natural variation in groundwater quality."[138]

Under the Federal CCR Rules, a facility with an insufficient ASD for an SSI must begin assessment monitoring within ninety days after the SSI is detected.[139] North Dakota's regulations require the same and have since at least 2020.[140] Assessment monitoring is the phase where coal plant owners must test for the most dangerous coal ash contaminants, including arsenic, cadmium, cobalt, lithium, molybdenum and others (referred to in the Federal CCR Rules as "Appendix IV" contaminants). It is only during this phase of monitoring that owners can identify whether these contaminants are present at dangerous levels, and if so, remediate the problem. Thus, if a site owner like Rainbow Energy Center does not proceed from detection to assessment monitoring, it will not proceed to remediating the problem and cleaning up the groundwater contamination.

EPA found that the ASD for Coal Creek's Upstream Pond was deficient in 2023 and Rainbow Energy Center should have started assessment monitoring more than a year ago pursuant to federal and state requirements.[141] However, nothing in the record for EPA's Proposed Approval indicates that North Dakota has required—via a modified permit, an enforcement action, or other administrative directive—Rainbow Energy Center to begin assessment monitoring. The Upstream Pond remains in detection monitoring as of Coal Creek's 2024 groundwater monitoring report, and no actions have been taken to address its contamination of groundwater.[142]

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[136] Coal Creek Part B Proposed Determination at 15.
[137] According to information Rainbow Energy Center submitted in June 2022 with its permit modification application for Permit No. 0033, the Upstream Pond continues to have a minimum of three downgradient wells, including MW-51, which continues to be far from the waste boundary. *See* Excerpt of WSP Golder, Groundwater Monitoring Plan: Coal Creek Station, Permit No. 0033, fig. 1 (June 30, 2022) (attached).
[138] Coal Creek Part B Proposed Determination at 34. EPA's analysis details how the evidence offered in support of the ASD is flawed. First, EPA rejects arguments that changes in personnel and laboratory processes account for the SSI, explaining "if the analytical changes were a source of such a consistent bias in the data, it is unlikely that this would impact only a single well." *Id.* at 35. EPA also finds arguments relating to potential shifts in groundwater flow substantially lacking in evidence. *Id.* at 36.
[139] 40 C.F.R. §§ 257.94(e), 257.95(b).
[140] NDAC § 33.1-20-08-06(4)(e), 5(b).
[141] 40 C.F.R. §§ 257.94(e), 257.95(b); NDAC § 33.1-20-08-06(4)(e), 5(b).
[142] Excerpt of 2024 Coal Creek GW Monitoring Report at iv (attached).

c. Inadequate demonstration of location restrictions

Finally, EPA found that Rainbow Energy Center failed to demonstrate that the Upstream Pond meets the location restrictions of the Federal CCR Rules. Specifically, the agency found that Rainbow Energy Center's 2018 location restriction assessment did not present "an assessment of underlying soil beyond the foundation materials" for the Upstream Pond, and as a result, "EPA was not able to confirm that Upstream Raise 91 meets the location restriction criteria for unstable areas in 40 C.F.R. § 257.64."[143]

Under the Federal CCR Rules, Rainbow Energy Center was required to "consider" "(1) [o]n-site or local soil conditions that may result in significant differential settling; (2) [o]n-site or local geologic or geomorphologic features; and (3) [o]n-site or local human-made features or events (both surface and subsurface)" in determining whether the Upstream Pond is in an "unstable area."[144] North Dakota's regulations require the same and have done so since at least 2020.[145] EPA determined in 2023 that Rainbow Energy Center's assessment violated the Federal CCR Rules—a determination made *after* NDDEQ issued a permit to Coal Creek, meaning NDDEQ did not identify this violation of its own identical regulations when permitting the site in 2022—and Commenters have found no evidence that North Dakota has taken any action to require Rainbow Energy Center to update this assessment in response to EPA's 2023 findings.[146]

This evidence of violations at Coal Creek makes clear that North Dakota is not implementing its program at least as protectively as the Federal CCR Rules. When NDDEQ issued its permit to Coal Creek in 2022, the site was in violation of both the Federal CCR Rules and North Dakota's CCR rules: inadequate groundwater monitoring network, failure to commence assessment monitoring despite an insufficient ASD, and inadequate demonstration of location restrictions. These violations persist there today, three years later, which is two-and-a-half years after EPA identified them. Commenters have found no evidence of action from NDDEQ to identify these violations at the time of permitting or after, or to ensure they are remedied, including by requiring Rainbow Energy Center to commence closure of the Upstream Pond given its failure to demonstrate that it meets the unstable area location restriction. Each of the violations EPA identified is based on federal regulations that have an analog in North Dakota's regulations.

2. *North Dakota is allowing noncompliance at Montana-Dakota Utilities' R.M Heskett Station.*

As noted above, EPA has informed North Dakota of ways in which Heskett Station is also out of compliance with federal and state requirements. Commenters reviewed permit and compliance materials for Heskett Station that they obtained through public records requests,

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[143] Coal Creek Part B Proposed Determination at 42–43.
[144] 40 C.F.R. § 257.64(b).
[145] NDAC § 33.1-20-08-03(5)(b).
[146] *See* Rainbow Energy Center, Upstream Raise 91 Surface Impoundment, https://ccr.rainbowenergycenter.com/upstream-raise-91-surface-impoundment/ (last visited July 13, 2025) (shows that a 2018 Location Restrictions Demonstration is the most recent such demonstration available) . Golder, Location Restrictions Demonstration – Upstream Raise 91, Great River Energy – Coal Creek Station (Oct. 16, 2018), https://ccr.rainbowenergycenter.com/wp-content/uploads/2021/10/2018-upstream-raise-91-surface-impoundment-location-restrictions-demonstration.pdf.

including the permit NDDEQ issued to Heskett in 2023 (Permit No. 0087). Commenters found rampant violations, particularly with respect to the groundwater monitoring program operated by Montana-Dakota Utilities Company ("MDU") at the site.

a. Insufficient groundwater monitoring network

MDU submitted a state permit application in 2021, which included a Groundwater Monitoring Plan that demonstrates its deficient groundwater monitoring network. For example, one of the purported downgradient wells, MW-1-90, is not located on the waste boundary; it is approximately 150–200 feet beyond the boundary and on the other side of an unregulated evaporation pond.[147] MDU also did not take eight baseline samples for MW-1-90 before including it in the monitoring network, though these samples are needed to establish accurate estimates of variability and are required for new groundwater monitoring wells under the Federal CCR Rules and North Dakota's CCR rules.[148] Instead, MDU said that baseline samples would be collected semi-annually at MW-1-90, meaning that it would take four years to collect enough baseline samples to properly include MW-1-90 in the Heskett network.[149] Because MW-1-90 does not meet the criteria for a downgradient well, the network is left with the bare minimum of one upgradient and three downgradient wells.[150]

Regulations require an owner or operator who chooses to employ the minimum number of wells to provide a justification for that choice, i.e. to explain how they will nonetheless be able to meet groundwater monitoring standards.[151] MDU's Groundwater Monitoring Network Certification and permit application fail to include such a justification. Not surprisingly, MDU's groundwater monitoring system leaves large areas of the downgradient unit boundary unmonitored, such as an approximately 500-foot area south of MW-80R and an approximately 1500-foot area between MW-80R and MW-2-90.[152] This is insufficient and leaves potential contaminant pathways unmonitored.

b. Weak and noncompliant Groundwater Monitoring Statistical Evaluation Plan

The Groundwater Monitoring Statistical Method Selection Certification included in MDU's 2021 permit application and approved by NDDEQ in Permit No. 0087 mischaracterizes the statistical performance standards found in 40 C.F.R. section 257.93(g)(2) and NDAC section 33.1-20-08-06(03)(g)(2) in a manner that lessens their protectiveness. Any statistical method has the potential to produce false positives (a finding that significant groundwater contamination exists when it does not) and false negatives (a finding that groundwater contamination does not exist when it does). The Federal CCR Rules and North Dakota's CCR rules establish a minimum required Type I (false positive) rate to effectively create a maximum false negative rate, i.e. to

[147] Excerpt of Barr, Groundwater Monitoring Plan for Heskett Station, figs. 1 & 2 (Jan. 2021) (attached) ("Excerpt of 2021 Heskett GW Monitoring Plan").
[148] 40 C.F.R. § 257.94(b), NDAC § 33.1-20-08-06(4)(b).
[149] 2021 Heskett GW Monitoring Plan Excerpt at 8 (attached).
[150] 40 C.F.R. § 257.91(a)(2), (c)(1), NDAC § 33.1-20-08-06(2)(c).
[151] 40 C.F.R. § 257.91(f).
[152] Excerpt of 2021 Heskett GW Monitoring Plan at figs. 1 & 2 (attached).

ensure that the statistical method used is environmentally protective and does not skew too heavily toward producing false negatives.

MDU's Groundwater Monitoring Statistical Method Selection Certification turns this on its head. Instead of establishing a maximum false *negative* rate, MDU's approved statistical method establishes a maximum false *positive* rate, stating: "Minimize the Type I (false positive) error: if an individual well comparison method is used, *the Type I [false positive] error level must not exceed 0.01* and if a multiple comparison method is used, *the Type I [false positive] error level must not exceed 0.05*."[153] By establishing this maximum false positive rate, MDU's statistical method allows unlimited false negative rates that could lead to undetected SSIs (detection monitoring exceedances) and undetected "Statistically Significant Levels" of Appendix IV pollutants (assessment monitoring exceedances). NDDEQ's approval of this statistical method means Heskett can comply with Permit No. 0087 without complying with state and federal requirements. Therefore, the NDDEQ permit is less protective than the federal program.

c. Incomplete Annual Groundwater Monitoring and Corrective Action reports

The 2021 Sampling and Analysis Plan submitted with MDU's 2021 permit application states that "each annual [Groundwater Monitoring and Corrective Action] report" will outline "specific details" of the selected "statistical evaluation methods."[154] However, MDU's Groundwater Monitoring and Corrective Action reports do not contain this information. The reports only identify the wells and constituents for which SSIs were detected; they do not identify statistical methods or provide statistical calculations.[155] Even though NDDEQ has modified Permit No. 0087 since MDU submitted its 2021 Sampling and Analysis Plan, it has not required MDU to amend its annual Groundwater Monitoring and Corrective Action reports to address these deficiencies and to ensure that future reports are compliant with 40 C.F.R. section 257.105(h)(4) and NDAC section 33.1-20-08-06(3)(f)(6). This leaves NDDEQ, EPA, and the public without sufficient information to review required statistical analyses to determine if Heskett has achieved compliance with Federal CCR Rules and North Dakota's CCR rules.

d. Failure to proceed to assessment monitoring despite repeated detection of SSIs

MDU has detected SSIs at Heskett every year since its first monitoring event in 2017. However, MDU has not conducted assessment monitoring even though ASDs do not demonstrate that the SSIs are from a source other than the CCR unit. SSIs of several constituents (chloride, fluoride, sulfate, and Total Dissolved Solids ("TDS")) have been detected repeatedly and consistently, despite MDU's deficient statistical analyses and through two iterations of its groundwater monitoring system, the most recent of which has only the minimum number of

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[153] Excerpt of Barr, Statistical Method Selection Certification for Heskett Station, at 3 (Oct. 2017) (emphasis added) (attached).

[154] Excerpt of Barr, Groundwater Sampling and Analysis Plan for Heskett Station, at 9 (Jan. 2021) (attached).

[155] All annual GWMCA reports since 2017 can be found at Montana-Dakota Utilities Co., Groundwater Monitoring, https://www.montana-dakota.com/energy-efficiency/ccr-rule/r-m-heskett-station/groundwater-monitoring/ (last visited July 13, 2025).

downgradient wells. Despite this overwhelming evidence of the need for assessment monitoring, NDDEQ has failed to require it. The table below summarizes the SSIs and ASD rationales for the wells at the site based on information presented in Heskett's annual Groundwater Monitoring and Corrective Action reports since 2017.

Table 1: SSIs at Heskett Wells and ASD Rationales

Well	Constituent and ASD rationale		Dates of SSIs
MW-104	Sulfate TDS	Natural variability or Other (Evaporation Pond, a non CCR unit)	• October 2017 • April 2018 • October 2018 • April 2019 • September 2019 • April 2020 • September 2020 • March 2021 • August 2021
MW-105	Chloride	Natural variability (pre-landfill values and geologic background)	• October 2017 • April 2018 • October 2018 • April 2019 • September 2019 • April 2020 • September 2020 • August 2021
MW-2-90	Fluoride	Natural variability (pre-landfill values and geologic background)	• April 2018 • October 2018 • April 2019 • September 2019 • September 2020 • March 2021 • August 2021
MW-2-90	Calcium	Natural variation (pre-landfill values, upgradient groundwater, and geologic background)	• May 2022
MW-3- 90	Calcium	Natural variation (pre-landfill values, upgradient groundwater, and geologic background)	• May 2022
MW-80R	Calcium	Natural variation (pre-landfill values, upgradient groundwater, and geologic background) and statistical methods	• May 2023
MW-80R	Chloride	Natural variation (pre-landfill values, upgradient groundwater, and geologic background)	• May 2022 • October 2022 • May 2023

MW1-90	Fluoride, TDS	Natural variation and/or Other (Evaporation Pond, a non-CCR unit)	• May 2022 • May 2023 (Fluoride only)

When relying upon an ASD, NDAC section 33.1-20-08(4)(e)(2) and 40 C.F.R. section 257.94(e)(2) require an owner or operator to "demonstrate" that an alternative source was responsible for the SSI. These provisions do not require mere certification that an alternate source exists; they require *a written demonstration that contains sufficient information to support the conclusion* that the alternative source exists. Detection of an SSI in a downgradient compliance well creates a presumption that the source of the SSI is the CCR unit being monitored. Site-specific facts are needed to rebut this presumption and justify a conclusion that another source is hydraulically connected to the well and is responsible for the SSIs. None of the Heskett ASDs meet this requirement, and any single noncompliant ASD should have forced the site into the assessment monitoring phase.

To justify its chloride and fluoride ASDs, MDU consistently cites historical groundwater data from the 1980s where high levels of chloride were present.[156] However, these historic data are not more valid to characterize groundwater conditions today than the data currently collected under the Groundwater Monitoring Plan. Data from 1986 does not explain why, consistently from 2017 through 2023, wells that are downgradient from the CCR unit have statistically higher levels of chloride than those that are upgradient from the CCR unit.

To justify its sulfate, TDS, and calcium ASDs, MDU cites to the fact that "gypsum crystals are documented discontinuously throughout the upper 30 feet of the surface materials" at the site, and that this "can be a source of high sulfate concentrations in groundwater" and can similarly be a source of TDS or calcium.[157] MDU provides no evidence, however, establishing that the presence of gypsum distinctly impacts and is hydraulically connected to downgradient wells with SSIs and not any other wells in the network.

MDU has also relied on lab leach tests conducted with ash from the pond to justify its ASDs. The ash used in these tests was leached in acidic water (pH of 4.2) in a lab and the resulting water was analyzed for chloride.[158] Because test results did not match the monitored chloride concentrations, MDU claimed the contaminated groundwater sampled at compliance wells could not have come from the CCR unit. However, the lab results do not provide a valid comparison for several reasons, including because groundwater is close to neutral pH and leaching would occur differently than it does in the lab with water at 4.2 pH; metals may have

[156] *See e.g.,* Barr, 2018 Annual Groundwater Monitoring and Corrective Action Report for Heskett Station, at 5 (Jan. 2019), https://www.montana-dakota.com/wp-content/uploads/PDFs/Conservation/Heskett/Groundwater/R.M.-Heskett-Station-2018-Annual-Groundwater-and-Corrective-Action-Report.pdf ("Excerpt of 2018 Heskett Annual GW and Corrective Action Report") (attached); Barr, 2019 Annual Groundwater Monitoring and Corrective Action Report for Heskett Station, at 6 (Jan. 2020), https://www.montana-dakota.com/wp-content/uploads/PDFs/Conservation/Heskett/Groundwater/R.M.-Heskett-Station-2019-Annual-Groundwater-and-Corrective-Action-Report.pdf ("Excerpt of 2019 Heskett Annual GW and Corrective Action Report") (attached).

[157] *See e.g.,* Excerpt of 2019 Heskett Annual GW and Corrective Action Report at 5 (attached).

[158] Excerpt of 2018 Heskett Annual GW and Corrective Action Report at 3–5 (attached).

leached from the ash before it was collected; and contact time was different. More importantly, this approach ignores hydrology data about groundwater flow, which indicate the compliance monitoring wells are hydraulically connected to the CCR unit and that groundwater is flowing from the unit to the wells.

3. *North Dakota is allowing noncompliance at Basin Electric's Leland Olds Station.*

As noted above, EPA has also informed North Dakota of ways in which Leland Olds Station is out of compliance with federal and state requirements. Commenters reviewed permit and compliance materials for the site obtained through public records requests, including the permit NDDEQ issued to Leland Olds' surface impoundments in 2022 (Permit No. 0038), and found significant violations.

a. Inadequate multiunit groundwater monitoring system

NDDEQ approved a multiunit Groundwater Monitoring System for Leland Olds that did not comply with state and federal requirements. Basin Electric submitted a 2019 Groundwater Monitoring System Report with its 2022 permit application that identified only one upgradient well (MW-2017-1) and one downgradient well (MW-2017-5) in the system.[159] The five other wells in the system (MW-2017-2, MW-2017-3, MW-2017-4, MW-2017-6, MW-2017-7) were described as "[p]osition [v]ariable [w]ells."[160] This is inadequate. Both the federal and state regulations require at least one upgradient and three downgradient wells, along with additional wells, as needed to meet the performance standards in 40 C.F.R. section 257.91(a) and NDAC section 33.1-20-08-06(2)(a).[161] Basin Electric's proposed Groundwater Monitoring System did not meet those requirements and NDDEQ approved it anyway. Basin Electric has since updated its system to have the appropriate number of wells, but NDDEQ should not have approved the Groundwater Monitoring System before these updates were made.

b. Noncompliant closure plan

NDDEQ approved a closure plan at Leland Olds that does not require compliance with either 40 C.F.R. section 257.102(d) or NDAC section 33.1-20-08-07-3(d). Basin Electric submitted a closure plan with its permit application in 2022. This closure plan was incomplete, in part, because it did not include any information about the depths at which ash is stored or about groundwater levels in Ash Ponds 2 and 3.[162] However, it is possible to determine that some of the ash in the ponds may have been sitting in groundwater based on a comparison of the ash storage elevations summarized in the History of Construction document submitted with the permit application and the groundwater elevation measurements in Table 2 of the approved Groundwater Monitoring System.[163] Since the ponds were closed leaving some ash in place, ash

[159] 2019 Leland Olds Groundwater Monitoring System Report at 5-1 (attached).
[160] *Id*.
[161] 40 C.F.R. § 257.91(c), NDAC § 33.1-20-08-06(2)(c).
[162] *See generally* Leland Olds Surface Impoundment Closure Plan (attached).
[163] *Compare* Basin Electric, Coal Combustion Residual Surface Impoundment History of Construction Documentation, at tbl. 1 (Apr. 2018) (attached) (showing that the surface impoundment complex is storing ash at an elevation of 1,672 feet) *with* 2019 Leland Olds Groundwater Monitoring System Report

may still remain in groundwater. This does not meet the closure performance standards in 40 C.F.R. section 275.102(d) and NDAC section 33.1-20-08-07-3(d) and yet NDDEQ's permit does not require Basin Electric to take any action to eliminate free liquids from the units or prevent infiltration of groundwater into the units, as required.

c. Sampling and Analysis Plan lacks key requirements

NDDEQ approved a Sampling and Analysis Plan for Leland Olds that does not include all groundwater reporting requirements. As a result, Basin Electric's annual Groundwater Monitoring and Corrective Action reports are missing data. Both 40 C.F.R. section 257.90(e)(3) and NDAC section 33.1-20-08-06-1(a)(1)(e)(3) require annual Groundwater Monitoring and Corrective Action reports to include all data obtained under the regulations during the reporting period. The Sampling and Analysis Plan acknowledges this requirement but goes on to state that the permittee may "elect to prepare sampling and analysis summary reports after each sampling event to satisfy this reporting requirement and to be included as an attached element of the Annual report."[164]

A summary of the data is not a permissible substitute for the analytical data. Laboratory analytical reports include important quality assurance data and field notes, which provide context for the results and allow assessment of their validity. Issuing a permit that accepts a data summary instead of laboratory analytical reports allows Heskett to operate out of compliance with state and federal regulations while being in compliance with the permit. Because of this flaw in the Sampling and Analysis Plan, the 2019 and 2020 annual Groundwater Monitoring and Corrective Action reports do not contain the required analytical data and field notes from groundwater sampling events, including field parameters such as temperature and pH, in violation of the state and federal requirements.[165]

d. Improper Alternate Source Demonstration

Basin Electric's 2020 Groundwater Monitoring and Corrective Action report includes an ASD for the pH SSI that is illogical and infeasible. It attributes elevated pH findings to faulty well construction, specifically partially cured grout.[166] However, the elevated pH was detected multiple times from April 2018 through November 2019, and uncured cement does not explain elevated pH that is found over that length of time.[167] The approved Sampling and Analysis Plan specified that SSIs are not reproducible.[168] Moreover, if the well was deficient, NDDEQ should have required Basin Electric to replace it. This did not happen. Basin Electric continued to

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at tbl. 2 (attached) (showing that groundwater elevations near the ponds reach up to 1687.9 feet). These elevations were recorded in slightly different elevation systems, but should not be off by more than one to three feet.

[164] AECOM, Sampling and Analysis Plan CCR Monitoring Program Former Ponds 2 and 3 Multi-Unit Leland Olds Generating Station, at 2-2 (June 22, 2022) ("2022 Leland Olds Ponds Sampling & Analysis Plan") (attached).

[165] 2019 Leland Olds Ponds GWMCA Report (attached); 2020 Leland Olds Ponds GWMCA Report (attached).

[166] 2020 Leland Olds Ponds GWMCA Report at ii (attached).

[167] 2019 Leland Olds Ponds GWMCA Report at tbl. 3 (attached).

[168] 2022 Leland Olds Ponds Sampling & Analysis Plan at 5-1 (attached).

resample the well, which it claimed was faultily constructed, and disregard the results. This ASD is not sufficient to rebut evidence that there was an SSI for pH.

Heskett was required to begin assessment monitoring no more than ninety days after the SSI was detected, per its proposed Sampling and Analysis Plan as well as state and federal regulations.[169] That ninety-day deadline was before NDDEQ issued Permit No. 0038 in October 2022. Despite this, Heskett was not conducting assessment monitoring in October 2022, and Permit No. 0038 does not acknowledge this violation or impose a compliance schedule to address it.

e. Apparent failure to permit or regulate a CCR unit at Leland Olds.

Even though NDDEQ has issued Permits Nos. 0038 and 0143 for Leland Olds, an unpermitted CCR unit appears to remain at the facility. In the center of the facility, Google Earth maps depict a location where what appears to be ash is dry-handled on the ground with bulldozers and earthmoving equipment.[170] Further, the 2018 CCR Closure Plan for the Ash Ponds states: "A temporary bottom ash handling system consisting of above-ground concrete weirs, ash collection, and dewatering areas was placed into operation ending the transport of CCRs to the surface impoundments prior to effective date of the CCR Rule (October 19, 2015)."[171] Google Earth satellite imagery indicates that Basin Electric is placing ash on the ground (i.e., there is no separation between the bottom of the unit and the ground). This would constitute a CCR unit and, barring any unexplained exemption, it should be regulated as an existing CCR unit under both the Federal CCR Rules and North Dakota's CCR regulations. If the unit was created after October 15, 2015, it would be subject to the full suite of requirements for new CCR units under both state and federal regulations, which appear to have been completely disregarded.

As demonstrated in this section, widespread and continuing noncompliance at multiple CCR units permitted by NDDEQ leaves no doubt that North Dakota is not administering its program as protectively as federal law requires. Each of the three sites discussed above—Coal Creek, Heskett, and Leland Olds—has been contaminating groundwater for decades according to EPA's own damage cases, and recent data from industry indicate that contamination has continued.[172] Permitting and reporting documents further demonstrate violations of both state and federal CCR rules. Because NDDEQ's permits do not require "each" CCR unit in the state to achieve compliance with federal requirements or equally protective state criteria—and because EPA has ample evidence of this fact—the WIIN Act requires EPA to deny primacy.[173]

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[169] 40 C.F.R. §§ 257.94(e), NDAC § 33.1-20-08-06(4)(e)(1).
[170] *See* map developed using Google Earth at https://www.google.com/maps/place/47%C2%B016'43.5%22N+101%C2%B019'18.0%22W/@47.2787516,-101.3242376,480m/.
[171] Leland Olds Surface Impoundment Closure Plan at 3 (attached).
[172] Excerpt of Damage Case Compendium Vol. IIa at 107, 112 (attached); Excerpt of Damage Case Compendium Vol IIb at 36–37 (attached); Poisonous Coverup at tbl. A4 & App. A (describing methodology, including use of industry data).
[173] 42 U.S.C. § 6945(d)(1)(B).

C. Proposed EPA Budget Cuts Will Further Impair North Dakota's Ability to Administer a Protective Coal Ash Permit Program.

NDDEQ is already failing to pre-approve essential permitting information and to issue coal ash permits that ensure "each [CCR] unit located in the State [] achieve[s] compliance with" federal, or similarly protective, standards, as required by the WIIN Act.[174] The Trump Administration's proposed fiscal year 2026 budget threatens to make matters worse.

The Administration's proposed budget slashes funding for state environmental programs, including solid and hazardous waste management programs. As proposed, the fiscal year 2026 budget would cut EPA's total budget by about fifty-four percent.[175] This would include the elimination of most categorical grants to state environmental agencies, valued at about $1 billion.[176]

The cuts would be particularly damaging to waste management programs operated under RCRA. According to EPA, funds for waste programs and management would fall from the fiscal year 2024 level of $74,277,000 to $40,399,000 in fiscal year 2026, a decrease of more than 42 percent.[177] The reduction in total "[w]orkyears" for EPA staff is also dramatic, dropping from 289.6 to 203.2, a reduction of almost 30 percent.[178] If this budget is finalized, states will not be able to rely on support from EPA regional offices to cover any shortfalls in program administration and will receive less funding from EPA finance their own programs.

This dramatic reduction in federal funding for RCRA programs would significantly diminish North Dakota's ability to administer a sufficiently protective CCR permit program. In response to the Administration's fiscal year 2026 budget proposal, NDDEQ Director Glatt stated that EPA's proposed cuts to state categorical grants—which help states implement federal environmental programs, like the CCR permit program— "would have a very negative impact on the states," which do "90 percent of the protection and enforcement work."[179] Glatt further indicated that EPA's proposed budget threatens to upend state budgeting processes and undermine infrastructure repairs and maintenance, and could cause states—which are responsible for implementing much of the federal environmental program—to return delegated programs to EPA.

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[174] *Id.* § 6945(d)(1)(B).
[175] Excerpt of EPA, FY 2026, EPA Budget in Brief, Publication Number EPA-190-25-001, at 3 (May 2025)(attached).
[176] *See id.*
[177] Excerpt of EPA, Fiscal Year 2026, Justification of Appropriation, Estimates for the Committee on Appropriations, at 300–03, (June 2025) https://insideepa.com/sites/insideepa.com/files/documents/2025/jun/epa2025_1125.pdf (attached).
[178] *Id.* One "work year" is also known as one "full-time equivalent employee," totaling 2,080 hours of work. *See, e.g.*, Congressional Research Service, Federal Workforce Statistics Sources: OPM and OMB (Sept. 29, 2023), https://www.congress.gov/crs_external_products/R/PDF/R43590/R43590.22.pdf.
[179] D. Reeves, FY26 Budget Plan Seen 'Fundamentally Altering' EPA-State Relationships, at 1, Inside EPA, (June 10, 2025), https://insideepa.com/daily-news/fy26-budget-plan-seen-fundamentally-altering-epa-state-relationships (attached).

A far more damaging and likely prospect is that North Dakota, with insufficient resources, will administer a CCR permit program that is even less effective at protecting the health and environment of North Dakota residents. State budgets commonly devote far fewer resources to solid waste management than to other state programs, such as hazardous waste management. The result is less oversight, fewer inspections, long delays in permit decisions, lack of enforcement, and the inability to effectively address releases of toxic pollutants from solid waste dumps. Prior to final approval, North Dakota must demonstrate that adequate funding for a CCR permit program is available and will remain available for the foreseeable future, particularly in light of the proposed federal budget cuts.

VII. APPROVING NORTH DAKOTA'S PROGRAM WOULD CREATE A REGULATORY SYSTEM WITH CONFLICTING LEGAL REQUIREMENTS AND INADEQUATE TRANSPARENCY THAT IMPAIRS THE PUBLIC'S ENFORCEMENT RIGHTS.

A. The Regulatory Patchwork Created by the Proposed Partial Approval Is Practically Unworkable and Less Protective Than the Federal Regulations.

EPA proposes to partially approve North Dakota's CCR permit program by not approving seventeen State regulations that conflict with federal regulatory requirements.[180] EPA also identifies an additional seven provisions found in the Federal CCR Rules that do not have a state analog and will continue to apply to CCR units in North Dakota.[181] Although the WIIN Act does provide for partial program approvals, proposing to do so in such a piecemeal manner will create confusion and make certain aspects of this dual oversight difficult, if not impossible, to implement.

The WIIN Act empowers EPA to create at the federal level and approve at the state level "system[s] of prior approval"[182] that make it easier for industry and impacted communities to understand how coal ash safeguards apply to a given unit. This should enable stakeholders to understand a unit's obligations and restrictions by reviewing permits, and to evaluate the unit's compliance through reports that compare monitoring data to those obligations and restrictions. With its Proposed Approval, however, EPA risks creating a system in North Dakota that relies on two sets of regulations that include conflicting standards.

EPA proposes to allow dual oversight in several areas that are critical to ensuring that CCR units operate in a manner that protects human health and the environment. For example, North Dakota's regulations include standards for an "alternative composite liner" for surface impoundments that are less protective than those in the Federal CCR Rules.[183] Similarly, North Dakota's regulations include a less protective "alternative groundwater protection standard."[184] Rather than require strengthening these standards as a condition of approval, EPA would allow North Dakota to retain them.

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[180] North Dakota Proposed Approval, 90 Fed. Reg. at 20,994.
[181] *Id.* at 20,995.
[182] 42 U.S.C. § 6945(d)(1).
[183] North Dakota Proposed Approval, 90 Fed. Reg. at 20,994.
[184] *Id.*

This will create an unnecessarily complicated and confusing regulatory framework. North Dakota will likely issue permits that approve site standards and activities that are consistent with state regulations but out of compliance with federal requirements. EPA will presumably also issue permits to North Dakota units that cover those areas over which it has retained authority once it creates a federal permit program. Given the different regulatory standards being applied, EPA permits will likely conflict with existing North Dakota permits. This is clearly an inefficient use of limited agency resources. It will also make it needlessly confusing for community members who live and recreate near coal ash units to understand the measures a site owner is obligated to take to ensure their safety and well-being.

EPA also proposes to retain authority over certain requirements that it cannot effectively implement unless it were also to retain authority over other requirements that it proposes to delegate to North Dakota. For example, EPA proposes to retain authority over requirements for endangered species found at 40 C.F.R. section 257.3-2.[185] This section prescribes, among other things, that CCR units "shall not result in the destruction or adverse modification of the critical habitat of endangered or threatened species" including through any "direct or indirect alteration . . . which appreciably diminishes the likelihood of the survival and recovery" of such a species.[186] An Endangered Species Act ("ESA") consultation may determine, however, that this standard can only be met through modifications to permit conditions that EPA proposes to delegate to North Dakota, such as fugitive dust control or operation of a corrective action remedy. In such circumstances, it is unclear how EPA would be able to meet the ESA obligations it proposes to retain given its proposed delegation of other, related provisions to North Dakota.

EPA's proposal to continue to apply federal requirements for surface water raises a similar conflict.[187] These requirements contemplate situations in which a CCR unit needs to obtain a National Pollution Discharge Elimination System ("NPDES") permit to address the discharge of pollutants into surface water.[188] At the same time, North Dakota operates an authorized NPDES permit program. Should EPA determine that 40 C.F.R. section 257.3-3 requires pretreatment of wastewater before discharge at a CCR unit in North Dakota, it is unclear how such a requirement would be effectuated, i.e. would EPA issue its own NPDES permit? Would or could EPA compel North Dakota to issue a sufficiently protective NPDES permit? This lack of clarity would be particularly troublesome in instances where North Dakota has already issued an NPDES permit and EPA determines that requirements stronger than those within it are needed to meet federal requirements.

Finally, should EPA choose to finalize its approval of North Dakota's application, it should clarify what it means when stating that the federal CCR website requirements found at 40 C.F.R. section 257.107(a) will "continue to apply directly to each regulated CCR unit" in North Dakota.[189] It is unclear how this assertion comports with EPA's statement that it has "preliminarily determined that the North Dakota CCR regulations contain all of the technical

[185] *Id.* at 20,995.
[186] 40 C.F.R. §§ 257.3-2(b), (c)(2).
[187] North Dakota Proposed Approval, 90 Fed. Reg. at 20,995.
[188] 40 C.F.R. § 257.3-3.
[189] North Dakota Proposed Approval, 90 Fed. Reg. at 20,995.

elements of the Federal CCR regulations, including . . . CCR website posting requirements."[190] If EPA intends for the publicly accessible internet site requirements found in 40 C.F.R. section 257.107[191] to continue to apply, then these requirements will obligate a CCR unit owner or operator to post documents indicating compliance with sections of the Federal CCR Rules that would no longer apply in North Dakota if EPA finalizes its approval. For example, a CCR unit owner in North Dakota would no longer be required to make the location restriction demonstrations referenced in 40 C.F.R. section 257.105(e), which are required to be placed on CCR websites per 40 C.F.R. section 257.107(e). Instead, the owner will be required to comply with the "Location Standards" found in NDAC section 31.2-20-08-03.[192] EPA should clarify what requirements in 40 C.F.R. section 257.107(a) it believes are not addressed in the North Dakota program and how it expects CCR unit owners or operators to meet 40 C.F.R. section 257.107(a) requirements if North Dakota's application is approved.

B. North Dakota's Program Is Less Protective than Federal Requirements on Public Participation and Enforcement.

1. *North Dakota's program does not provide public access to key permitting documents that are essential to understanding a site's compliance requirements and identifying when a site is noncompliant.*

The public's right to enforce the law is central to RCRA regulatory programs. "RCRA section 7004(b), which applies to all RCRA programs, directs that 'public participation in the development, revision, implementation, and enforcement of any . . . program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."[193] Under RCRA Section 7002, "any person may commence a civil action . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order" issued pursuant to RCRA.[194]

The Federal CCR Rules contain robust reporting requirements that ensure owners or operators of CCR units publish extensive information about their sites.[195] EPA was clear when it promulgated the 2015 CCR Rule that these reporting requirements are meant to effectuate the public's enforcement rights under RCRA:

> EPA has developed a number of provisions designed to facilitate citizens to enforce the rule pursuant to RCRA section 7002. Chief among these is the requirement to publicly post monitoring data, along with critical documentation of facility

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[190] *Id.*
[191] Commenters assume that EPA's intent is to require all of the reporting requirements of 40 C.F.R. Section 257.107 even though the Proposed Approval refers specifically to 40 C.F.R. Section 257.107*(a)*. EPA should clarify.
[192] *See* North Dakota Proposed Approval, 90 Fed. Reg. at 20,995 (for those provisions included in the partial approval, "the North Dakota CCR permit program will apply in lieu of the Federal regulations").
[193] *Id.* at 20,989 (quoting 42 U.S.C. § 6974(b)(1)).
[194] 42 U.S.C. § 6972(a).
[195] *See generally* 40 C.F.R. § 257.107.

> operations, so that the public will have access to the information to monitor activities at CCR disposal facilities.[196]

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

> The Agency cannot conclude that the regulations promulgated in this rule will ensure there is no reasonable probability of adverse effects on health or the environment unless there is a mechanism for states and citizens, as the entities responsible for enforcing the rule, to effectively monitor or oversee its implementation.[197]

Since promulgating the 2015 CCR Rule, EPA has emphasized that citizen enforcement remains a key mechanism for ensuring compliance in approved state programs[198] Primacy does not change the essential role of citizen enforcement and does not change the critical importance of robust reporting requirements to enable it.

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

EPA states in its Proposed Approval:

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

[196] 2024 Legacy Rule, 89 Fed. Reg. at 48,788 (quoting the preamble to the 2015 CCR Rule, 80 Fed. Reg. at 21,335).

[197] 2015 CCR Rule, 80 Fed. Reg. at 21,338; *see also id*. at 21,426–27 ("EPA believes that it cannot conclude that the RCRA subtitle D regulations will ensure that there is no reasonable probability of adverse effects on health or the environment, unless there are mechanisms for states and citizens to monitor the situation . . . so they can determine when intervention is appropriate."); *id.* at 21,339 ("[A] key component of EPA's support for determining that the rule achieves the statutory standard is the existence of a mechanism for states and citizens to monitor the situation, such as when groundwater monitoring shows evidence of potential contamination, so that they can determine when intervention is appropriate. The existence of effective oversight measures provides critical support for the statutory finding . . . .").

[198] *See* Texas: Approval of State Coal Combustion Residuals Permit Program, 86 Fed. Reg. at 33,900 ("[T]he right to file a RCRA citizen suit pertaining to CCR facilities in Texas is unaffected by EPA's approval . . . Citizen suits are authorized by RCRA section 7002(a). Citizens' ability to file RCRA citizen suits are not affected by RCRA section 4005(d), establishing a process for approving state CCR programs. See 42 U.S.C. § 6945(d)(7). Likewise, EPA's approval of the Texas CCR permit program does not affect citizens' ability to file RCRA citizen suits.").

> public; and (3) Public comments on permit determinations are considered and significant comments are responded to in the permit record.[199]

EPA "preliminarily determined that North Dakota's approach to public participation requirements provides adequate opportunities for public participation in the permitting process sufficient to meet the standard for program approval."[200] EPA further concluded that North Dakota's program provides for adequate public enforcement because:

> Under [North Dakota Century Code ("NDCC")] 23.1–08–23, North Dakota has specific authorities for intervention as a matter of right, and NDDEQ's rules provide for persons adversely affected by a violation to commence a civil action . . . [and] [u]nder the North Dakota Environmental Law Enforcement Act of 1975, NDCC 32–40–06, any person aggrieved by a violation of any environmental statute, rule, or regulation may bring an action in the appropriate district court for enforcement and/or damages.[201]

However, EPA's conclusion is wrong. North Dakota's program does not require permits or essential permitting information to be made available to the public, a failure that fundamentally undermines both public participation and enforcement. Facilities seeking a CCR permit in North Dakota must provide certain documentation with their permit applications. For example, facilities with inactive CCR surface impoundments must provide the following:[202]

- CCR fugitive dust control plans;[203]
- Initial inflow design flood control system plans;[204]
- Documentation related to location restrictions;[205]
- Closure plans;[206]
- Documentation related to liner design criteria;[207] and
- Documentation demonstrating the "capability to fulfill [] ground water monitoring standards."[208]

[199] North Dakota Proposed Approval, 90 Fed. Reg. at 20,991.
[200] *Id.* at 20,992.
[201] *Id.* at 20,993.
[202] *See* NDAC § 33.1-20-08-07(1)(b)
[203] *Id.* § 33.1-20-08-05(1)(b)(5) (applied to inactive impoundments through *id.* § 33.1-20-08-07(1)(a)).
[204] *Id.* § 33.1-20-08-05(3)(c)(3)(a) (applied to inactive impoundments through *id.* § 33.1-20-08-07(1)(a)).
[205] *Id.* § 33.1-20-08-05(1)(b)(2).
[206] *Id.* § 33.1-20-08-07(d)(2)(a) (applied to inactive impoundments through *id.* § 33.1-20-08-07(1)(a)).
[207] *Id.* § 33.1-20-08-04(2)(a)(1)) (applied to inactive impoundments through *id.* § 33.1-20-08-07(1)(a)).
[208] *Id.* § 33.1-20-03.1-02(6)(j).

NDDEQ then reviews and issues a CCR permit based on this and other information in the application,[209] and the permit explicitly requires that the permittee comply with plans set out in its permit application (among other documents).[210]

Yet, North Dakota's program does not require final permits, permit applications, or other permitting documents relied upon and referenced in the permits and applications to be publicly available, despite claims to the contrary made by EPA (in its proposed decision) and North Dakota (in its program narrative).[211] None of the regulations they rely upon to support their claims requires that the public have access to these essential permitting documents:

- NDAC section 33.1–20–03.1–02(4) requires permit applicants to "publish a public notice indicating that an application has been submitted to the department" and further indicating "the type and location of the unit or facility." It does not require public access to the application.

- NDCC section 23.1–08–09(1) requires NDDEQ to "give public notice" that it is "considering an application for a solid waste management facility" and to "state the name of the applicant, the location of the facility, and a description of the facility." It does not require NDDEQ to make the application public.

- NDAC section 33.1-20-03.1-03(3) requires NDDEQ to make "available for public review and comment" a *draft permit*, but not the final permit or the permit application and other underlying permit documents.

Indeed, as both EPA and North Dakota acknowledge, NDDEQ may decide to provide public access to applications as a "matter of *policy*," but they are not required to do so as a matter of law.[212]

Access to permit applications, in addition to final permits themselves, is especially important because North Dakota's permits are very short on detail. Those permits—which Commenters gained access to only by submitting public records requests with NDDEQ, as discussed below—are roughly eight pages of largely boilerplate provisions and contain virtually no site-specific terms.[213] The only way to ascertain any site-specific requirements or operating

[209] *Id.* § 33.1-20-03.1-03(2).
[210] *See*, *e.g.*, Permit No. 0038 at Term E.15.
[211] North Dakota Proposed Approval, 90 Fed. Reg. at 20,991–92; ND Technical Support Document at 12–13.
[212] North Dakota Proposed Approval, 90 Fed. Reg. at 20,990 (emphasis added); *see also id.* at 20,991 ("*Per State policy*" (emphasis added) NDDEQ posts public notice of draft CCR permits to its website where "[t]he public can view and download the application, review documents, and contact the State to request the application.").
[213] *See* Permit No. 0038 (Leland Olds surface impoundments) (attached), Permit No. 0143 (Leland Olds landfill) (attached), Permit No. 0043 (Stanton) (attached), Permit No. 0087 (Heskett) (attached), Permit No. 0159 (Milton R. Young) (attached), Permit No. 0182 (Coyote) (attached), Permit No. 0033 (Coal Creek) (attached), Permit No. 0160 (Antelope Valley) (attached).

conditions for a permitted unit is through review of the applications and associated documentation that is "incorporated by reference" in the permits.

As a matter of practice, NDDEQ does not provide access to permit applications or final permits for CCR units. While they are technically available via public records request, the saga of Commenters' efforts to obtain these documents illustrates that public access is difficult, time consuming, and, for many, prohibitively expensive. Commenters attempted to access North Dakota's eight CCR permits even before EPA published its proposed decision. Upon discovering that the permits were not available online, commenters submitted a records request for those permits on April 17, 2025.[214] NDDEQ completed commenters' request and produced the eight permits on April 25, 2025.[215] However, those eight permits are primarily copy-and-paste provisions from North Dakota's regulations and provide virtually no application of these regulations to site-specific conditions at the permitted unit. In addition, those permits "incorporated by reference" thousands of pages of material dating back decades (in some cases, to the 1980s) that are identified on "historical documents lists." The lists were attached to the permits, but the materials listed were not.[216] Those materials were also not available on NDDEQ's website.

On May 5, Commenters amended their records request with NDDEQ to clarify they wanted: "each document listed in Attachment 1 [the historical documents list] of each of the eight permits that NDDEQ provided on 4/25/2025 (permit nos. 0038, 0143, 0160, 0043, 0087, 0159, 0182, and 0033), which are 'incorporated by reference' into each permit pursuant to provision E.15 of each permit."[217] NDDEQ subsequently produced those materials in batches over several weeks and for substantial fees:

- On May 23, NDDEQ sent an email indicating that it had "completed it[s] search" for the requested materials for Coyote Station, and that the records would be released "[w]hen a record of payment" for the search "is received."[218] Commenters paid the fee, totaling $25.63, that same day.[219] The records were not released for five more days, on May 28.[220] Notably, this was the same day EPA denied commenters' May 16 request for an extension of time to file comments on EPA's Proposed Approval,[221] which commenters requested "because those

[214] Email from Piette to NDDEQ re: NDDEQ CCR permits records request (Apr. 17, 2025) (attached).
[215] Email from NDDEQ to Piette re: ORR 20250417-01 (Apr. 25, 2025) (attached).
[216] *See* Permit No. 0038 (Leland Olds surface impoundments) (attached), Permit No. 0143 (Leland Olds landfill) (attached), Permit No. 0043 (Stanton) (attached), Permit No. 0087 (Heskett) (attached), Permit No. 0159 (Milton R. Young) (attached), Permit No. 0182 (Coyote) (attached), Permit No. 0033 (Coal Creek) (attached), Permit No. 0160 (Antelope Valley) (attached).
[217] Email from Piette to NDDEQ re: ORR 20250417-01 (May 5, 2025) (attached).
[218] Email from NDDEQ to Piette re: Otter Tail invoice (May 23, 2025) (attached).
[219] Payment confirmation (May 23, 2025) (Otter Tail records) (attached).
[220] Email from NDDEQ to Piette re: Otter Tail invoice (May 28, 2025) (attached).
[221] Letter from Crossland to Skokos re: request for 120-day comment period (May 28, 2025) (attached).

impacted by the decision do not yet have information that is essential to their comments."[222]

- On May 28, NDDEQ sent an email indicating that it had completed its search for requested material for units at Antelope Valley and Leland Olds stations and would release those materials upon payment.[223] Commenters paid the search fee, totaling $198.59, and received the records the same day.[224]

- On June 12, NDDEQ sent a final email indicating that it had completed its search for remaining requested materials and would release those materials upon payment.[225] Commenters paid the search fee, totaling $320.31, and received the records the same day.[226] The records were for the remaining permitted units at the Stanton, Heskett, Young, and Coal Creek Stations.

Ultimately, it took Commenters nearly two months (from April 17 to June 12), and cost them $544.53, to get access to the permit application materials that detail site-specific conditions and compliance obligations for the CCR units permitted by NDDEQ. Under the Federal CCR Rules, these same documents must be posted online and readily available for free for anyone with internet access.[227] Without access to the permits and plans with which permittees are required to comply, which are not among the documents that NDDEQ requires permittees to publish, it is impossible for the public to know the site-specific conditions required by a permit. Thus it is also impossible for the public to know whether and to what extent a unit's posted compliance documents deviate from its permit terms.

Commenters' first-hand experience with how time-consuming and costly it is to access CCR permitting records contravenes EPA's proposed determination that North Dakota's permit program "will ensure that: (1) Documents for permit determinations are made available for public review and comment,"[228] a proposed determination that flies in the face of EPA's prior conclusion that public access to "critical documentation of facility operations" is "[c]hief among" the Federal CCR Rules provisions "designed to facilitate citizens to enforce the [federal CCR] rule pursuant to RCRA section 7002."[229] It is also wholly inconsistent with RCRA's direction that "public participation in the . . . implementation, and enforcement" of the Federal CCR Rules "be provided for, encouraged, and assisted . . . ."[230]

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[222] Letter from Skokos et al. to Lloyd re: request for 120-day comment period, at 1 (May 16, 2025) (attached).
[223] Email from NDDEQ to Piette re: Basin CCR invoice (May 28, 2025) (attached).
[224] Payment confirmation (May 28, 2025) (Basin CCR records) (attached); Email from NDDEQ to Piette re: Basin CCR records (May 28, 2025) (attached).
[225] Email from NDDEQ to Piette re: GRE, MDU, Minnkota, Rainbow invoice (June 12, 2025) (attached).
[226] Payment confirmation (June 12, 2025) (GRE, MDU, Minnkota, Rainbow records) (attached); Email from NDDEQ to Piette re: GRE, MDU, Minnkota, Rainbow records (June 12, 2025) (attached).
[227] 40 C.F.R. §§ 257.105, 257.107.
[228] North Dakota Proposed Approval, 90 Fed. Reg. at 20,991.
[229] 2024 Legacy Rule, 89 Fed. Reg. at 48,788 (quoting the preamble to the 2015 CCR Rule, 80 Fed. Reg. at 21,335).
[230] 42 U.S.C. § 6974(b)(1)).

Because substantive, detailed requirements are not in NDDEQ's *draft* permits—the only permit document North Dakota's regulations *require* the state agency to post—the public cannot review the proposed and approved compliance approaches that are the heart of the permit.[231] All proposed compliance approaches required by NDAC section 33.1-20-03.1-02 are purportedly embedded in the applications, but those applications are not publicly accessible. This process does not meet the public participation and enforcement requirements of RCRA and—given the importance of citizen enforcement to ensuring compliance with the Federal CCR Rules and RCRA's underlying protectiveness standard—also renders North Dakota's program not "at least as protective as" the Federal CCR Rules.[232] North Dakota's program must be changed to require public access to all essential permitting documents, including draft permits, final permits, and permit applications and other permitting materials so that the public can understand a permitted site's compliance requirements and can identify when a site is violating those requirements.

2. *Other aspects of North Dakota's program render its public participation and enforcement requirements inadequate.*

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

- The information required to be in the public notice is inadequate. NDCC section 23.1-08-09 requires NDDEQ to give public notice that it is "considering an application" for a coal ash permit and to include the following information in the notice: (1) the name of the applicant, (2) the location of the facility, and (3) a description of the facility. This is insufficient. The public also must know who to contact with questions, how to get a copy of the draft permit and permitting record, and how to submit comments.

- Contrary to statements in EPA's Proposed Approval, North Dakota's regulations do not require NDDEQ to prepare or provide public access to any "application review memo" or similar document explaining the agency's decision. EPA cites NDAC section 33.1-20-02.1-03 for this proposition, but that provision of North Dakota's regulations applies to general permits, not CCR permits, and also does not require preparation of an "application review memo" or similar document.[233]

- North Dakota's program allows significant changes to permits without any public participation because its definition of "major modification," the standard that triggers public review, is too narrow. Under North Dakota's regulations, major

[231] Commenters reiterate that, in practice, many required plans and other proposed compliance approaches have not been included in permit applications, despite North Dakota regulatory mandates to include them. To be able to enforce the CCR rules at sites where plans or compliance approaches proposed by the permittee are incorporated into the permit, Commenters need access to the permits, full permit applications, and supporting materials—*and* those applications and supporting materials must be complete.
[232] 42 U.S.C. § 6944(a); *see* 2015 CCR Rule, 80 Fed. Reg. at 21,338, 21,426–27, 21,339.
[233] North Dakota Proposed Approval, 90 Fed. Reg. at 20,991.

modifications do not include changes to detailed compliance approaches in site-specific plans required by the Federal CCR Rules.[234] Determining whether these plans will achieve compliance with the Federal CCR Rules or North Dakota's coal ash regulations requires judgment and consideration of facility-specific conditions. These are the most critical decisions NDDEQ makes at the time of permit issuance and the ones that benefit most from public input. Requiring public input on decisions NDDEQ makes at the time of initial permit issuance but then allowing NDDEQ to supersede those decisions without public input through a permit modification undermines any meaningful opportunity for public participation.

While NDAC section 33.1-20-02.1-07(4)(j) includes a catch-all for "changes that could have an adverse effect on the safety, health, or welfare of nearby residents, property owners, or the environment," this language is not sufficiently clear and gives NDDEQ virtually unlimited discretion to determine whether and which changes to detailed compliance approaches in site-specific plans are "major."

Without clear language in North Dakota's regulations that changes to detailed compliance approaches in site-specific plans are "major modifications," NDDEQ could make such changes—allowing sites to meet less protective criteria than state or federal coal ash requirements—without ever providing the public with notice or an opportunity to comment on this change. North Dakota's regulations must be amended to clarify that changes to plans required by federal or state coal ash requirements—other than administrative changes (e.g. changing the names of points of contact at the facility)—require adequate public notice and opportunity to comment

VIII. CONCLUSION

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

[234] NDAC § 33.1-20-02.1-07(4) ("The following changes at a permitted solid waste management unit or facility require a major permit modification: a. A change to the facility boundaries or acreage; b. An increase in average daily solid waste specified in the permit or permit application, calculated by weight or volume for any twelve consecutive months; c. A change in the solid waste characteristics; d. An increase or decrease in finished height or finished slope of a landfill; e. Any increase in landfill trench or excavation depth; f. A change in facility site development which will result in impact to or encroachment into a one hundred-year floodplain, a ravine, a wetland, or a drainageway; g. A change in site drainage or management of runoff or run-on; h. A change in facility site development which will result in disposal of wastes closer to site boundaries than originally approved; i. The addition of solid waste management units, which, if sited independently, would require a permit; or j. Other changes that could have an adverse effect on the safety, health, or welfare of nearby residents, property owners, or the environment.").

Sincerely,

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