



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 257

[EPA-HQ-OLEM-2021-0051; FRL-12769-01-OLEM]

North Dakota: Approval of State Coal Combustion Residuals Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of availability; request for comments.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is proposing to approve North Dakota Coal Combustion Residuals (CCR) partial permit program under the Resource Conservation and Recovery Act (RCRA). After reviewing the CCR permit program application submitted by the North Dakota Department of Environmental Quality (NDDEQ), EPA has preliminarily determined that North Dakota's CCR permit program meets the standard for partial approval under RCRA. If approved, North Dakota's CCR permit program will operate in lieu of the Federal CCR program with the exception of the specific provisions noted below. EPA is seeking comment on this proposal during a 60-day public comment period and will be holding a hybrid in-person and virtual public hearing on EPA's preliminary approval of North Dakota's partial CCR permit program.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. *Public hearing:* EPA will hold an in-person and online hybrid public hearing on July 8, 2025.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OLEM-2021-0051, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method).

Follow the online instructions for submitting comments.

- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Land and Emergency Management (OLEM) Docket, Mail Code 28221T, 1200 Pennsylvania Ave. N.W., Washington, DC 20460.
- *Hand Delivery or Courier* (by scheduled appointment only): EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m.-4:30 p.m., Monday-Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Michelle Lloyd, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, MC: 5304T, Washington, DC 20460; telephone number: (202) 566-0560; e-mail address: lloyd.michelle@epa.gov. For more information on this document please visit <https://www.epa.gov/coalash>.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Public Participation
 - A. Written Comments
 - B. Participation in Hybrid Public Hearing
- II. General Information
 - A. Overview of Proposed Action
 - B. Background
 - C. Statutory Authority
- III. The North Dakota Application
- IV. EPA Analysis of the North Dakota Application–Basis for Approval
 - A. Adequacy of the North Dakota Permit Program
 - 1. Guidelines for Permitting
 - 2. Guidelines for Public Participation
 - 3. Guidelines for Compliance Monitoring Authority
 - 4. Guidelines for Enforcement Authority

5. Intervention in Civil Enforcement Proceedings
 - B. Adequacy of Technical Criteria
 1. North Dakota CCR Units and Resources
 2. North Dakota CCR Regulations
 3. North Dakota Partial Program
 - C. North Dakota's Permits Issued Under the State CCR Regulations
 1. North Dakota's Permits Issued Under the State CCR Regulations are Not Part of the Permit Program Evidence Under Review
 2. Status of North Dakota's Previously-Issued Permits Issued Under the State CCR Regulations
- V. Proposed Action

List of Acronyms

CBI Confidential Business Information
CCR coal combustion residuals
CFR Code of Federal Regulations
EPA Environmental Protection Agency
MSWLF municipal solid waste landfill
NDAC North Dakota Administrative Code
NDCC North Dakota Century Code
NDDEQ North Dakota Department of Environmental Quality
MCL maximum contaminant level
OLEM Office of Land and Emergency Management
RCRA Resource Conservation and Recovery Act
STAG State and Tribal Assistance Grant
USWAG Utility Solid Waste Activities Group
WIIN Water Infrastructure Improvements for the Nation

I. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2021-0051, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional

submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

B. Participation in Hybrid Public Hearing

EPA will begin pre-registering speakers for the hybrid public hearing upon publication of this document in the *Federal Register*. To register to speak at the hearing, please use the online registration form available on EPA's CCR website (<https://www.epa.gov/coalash/forms/public-hearing-north-dakotas-coal-combustion-residuals-permit-program>) or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to register to speak at the hearing. Both in-person and virtual hearing attendees are requested to pre-register at the link provided above. The last day to pre-register to speak at the hearing will be July 2, 2025.

EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule. Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk or via the Q&A functionality of the online platform. EPA will make every effort to accommodate all speakers who arrive and register, although preferences on speaking times may not be able to be fulfilled.

Each commenter will have five (5) minutes to provide oral testimony. EPA encourages commenters to provide EPA with a copy of their oral testimony electronically by emailing it to the person listed in the **FOR FURTHER INFORMATION CONTACT** section. EPA also recommends submitting the text of your oral comments as written comments to the rulemaking docket. If EPA is anticipating a high attendance, the time allotment per testimony may be shortened to no shorter than three (3) minutes per person to accommodate all those wishing to provide testimony and who have pre-registered. While EPA will make every effort to accommodate all speakers who do not preregister, opportunities to speak may be limited based upon the number of pre-registered speakers. Therefore, EPA strongly encourages anyone

wishing to speak to preregister. Participation in the public hearing does not preclude any entity or individual from submitting a written comment.

EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing are posted online at EPA's CCR website at <https://www.epa.gov/coalash/forms/public-hearing-north-dakotas-coal-combustion-residuals-permit-program>. While EPA expects the hearing to go forward as set forth above, please monitor our website or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to determine if there are any updates. EPA does not intend to publish a document in the *Federal Register* announcing updates.

If you require the services of an interpreter or special accommodations such as audio transcription or closed captioning, please pre-register for the hearing and describe your needs on the registration form by June 24, 2025. Alternatively, registrants may notify the person listed in the **FOR FURTHER INFORMATION CONTACT** section of any special needs. EPA may not be able to arrange accommodations without advance notice.

II. General Information

A. Overview of Proposed Action

On April 17, 2015, EPA published a final rule creating 40 CFR part 257, subpart D, which establishes a comprehensive set of minimum Federal requirements for the disposal of CCR in landfills and surface impoundments (80 FR 21302) (“Federal CCR regulations”).¹ Section 2301 of the 2016 Water Infrastructure Improvements for the Nation (WIIN) Act

¹ Unless otherwise specified, all references to part 257 and part 239 in this document are to title 40 of the Code of Federal Regulations (CFR).

amended RCRA section 4005 to create a new subsection (d) that requires EPA to establish a Federal CCR permitting program. See 42 U.S.C. 6945(d).

As amended, RCRA section 4005(d) also allows States to seek approval for a State CCR permit program that will operate in lieu of a Federal CCR permit program in the State. The statute provides that within 180 days after a State submits a complete application to the Administrator for approval, EPA shall approve the State permit program if the Administrator determines that the State program requires each CCR unit located in the State to achieve compliance with either the Federal requirements or other State requirements that EPA determines, after consultation with the State, are at least as protective as those included in the Federal CCR regulations. See 42 U.S.C. 6945(d)(1)(B).

On March 10, 2023, the NDDEQ submitted its State CCR permit program application to EPA Region 8 requesting approval of the State's partial CCR permit program.² EPA is proposing to approve the North Dakota partial CCR permit program pursuant to RCRA section 4005(d)(1)(B). 42 U.S.C. 6945(d)(1)(B). The fact that North Dakota is seeking approval of a partial program does not mean it must subsequently apply for full program approval. However, North Dakota could apply for revised partial program approval or full program approval at some point in the future if it chooses to do so. If approved, the North Dakota CCR permit program would operate in lieu of the Federal CCR program (codified at 40 CFR part 257, subpart D), with the exception of the provisions specifically identified below for which the State is not seeking approval and for which the corresponding provisions of the Federal CCR program would remain in effect. For the approved provisions, EPA would retain its inspection and enforcement authorities under RCRA sections 3007 and 3008, 42 U.S.C. 6927 and 6928, consistent with EPA's ongoing oversight authority under RCRA. See 42 U.S.C. 6945(d)(4)(B).

² North Dakota Coal Combustion Residuals Permit Program Submittal. North Dakota Department of Environmental Quality. Transmitted by email from Diana Trussell, Division of Waste Management, Manager, Solid Waste Program, to Regional Administrator Becker, Region 8 Regional Administrator at the USEPA. March 2023.

EPA has also engaged Federally recognized Tribes within the State of North Dakota in consultation and coordination regarding the program approval for the NDDEQ. EPA has established opportunities for an informational session and consultation, beginning with an initial conference call on May 28, 2021. Tribal consultation has been and will continue to be conducted in accordance with the EPA policy on Consultation and Coordination with Indian Tribes (<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>). After the informational session, no Tribes sought further Tribal consultation.

B. Background

CCR are generated from the combustion of coal, including solid fuels classified as anthracite, bituminous coal, subbituminous coal, and lignite, for the purpose of generating steam to power a generator to produce electricity or electricity and other thermal energy by electric utilities and independent power producers. CCR, commonly known as coal ash, include fly ash, bottom ash, boiler slag, and flue gas desulfurization materials. CCR can be sent offsite for disposal or beneficial use or disposed of in on-site landfills or surface impoundments. This section summarizes EPA's regulatory actions on CCR to date to provide relevant background on this proposed approval of North Dakota's partial CCR permit program.

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

On August 5, 2016, EPA published a direct final rule (81 FR 51802) in response to an order issued by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Utility Solid Waste Activities Group, et al. v. EPA*, No. 15-1219 (D.C. Cir. 2015). The

direct final rule removed certain provisions of the Federal CCR regulations at 40 CFR 257.100(b), (c), and (d) related to the “early closure” of inactive CCR surface impoundments by April 17, 2018, that had been vacated by the D.C. Circuit.³ The direct final rule extended the deadlines for owners and operators of inactive CCR surface impoundments who had taken advantage of the “early closure” provisions of 40 CFR 257.100 to bring the units into compliance with the Federal CCR regulations’ substantive requirements, but did not otherwise amend the Federal CCR regulations or impose new requirements on those units.

On March 15, 2018, EPA proposed to amend the Federal CCR regulations (83 FR 11584) (“March 2018 Proposed Rule”). The March 2018 Proposed Rule: (1) Addressed provisions of the final rule that had been remanded back to the Agency on June 14, 2016, by the D.C. Circuit; (2) Provided States with approved CCR permit programs (or EPA where it is the permitting authority) under RCRA section 4005(d) the ability to set certain alternative performance standards; and (3) Addressed an additional issue that had arisen since the April 2015 publication of the final rule. In addition, EPA proposed provisions that would allow States (or EPA where it is the permitting authority) the ability to incorporate flexibilities into their CCR permit programs. These flexibilities would also be available to facilities with EPA-issued CCR permits, and included: (1) Clarification on the type and magnitude of non-groundwater releases that would require a facility to comply with some or all of the corrective action procedures set forth in 40 CFR 257.96 through 257.98 in meeting their obligation to clean up the release; (2) The addition of boron to the list of constituents in appendix IV of 40 CFR part 257 that trigger corrective action; (3) The determination of the requirement for proper height of woody and grassy vegetation for slope protection; (4) A revision of the current regulations to allow the use of CCR in the construction of final cover systems for CCR units closing pursuant to 40 CFR 257.101 that

³ The D.C. Circuit also vacated the phrase “not to exceed a height of 6 inches above the slope of the dike” within 40 CFR 257.73(a)(4), 257.73(d)(1)(iv), 257.74(a)(4), and 257.74(d)(1)(iv). EPA proposed slope protection requirements in its March 2018 Proposed Rule (83 FR 11584, March 15, 2018) but has not yet finalized such requirements.

are closing with waste-in-place; and (5) The addition of a new paragraph to 40 CFR 257.103 to allow facilities to qualify for the alternative closure provisions based on the continued need to manage non-CCR wastestreams in the unit.

On July 30, 2018, EPA finalized many of the proposed provisions described above (83 FR 36435) (“July 2018 Final Rule”). Specifically, EPA amended the CCR regulations to: (1) Provide States with approved CCR permit programs under the 2016 WIIN Act (or EPA when it is the permitting authority) the ability to use alternative performance standards; (2) Revise the groundwater protection standards for four constituents in appendix IV to 40 CFR part 257 for which maximum contaminant levels (MCL) under the Safe Drinking Water Act have not been established; and (3) Provide additional time to facilities, triggered by 40 CFR 257.101(a)(1) and (b)(1)(i), to cease receiving waste and initiate closure.

On August 28, 2020, EPA published a final rule (85 FR 53516) (“Part A Final Rule”). The rule revises portions of the Federal CCR regulations to: (1) Accurately reflect the D.C. Circuit’s merits decision in *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018) (“*USWAG*”), which vacated and remanded to EPA the provisions at 40 CFR 257.101(a), 257.71(a)(1)(i) and 257.50(e); (2) Finalize a new deadline of April 11, 2021, in 40 CFR 257.101(a) and (b)(1)(i), by which CCR surface impoundments must cease receipt of waste in light of the 2018 *USWAG* decision and the D.C. Circuit’s subsequent decision in *Waterkeeper Alliance Inc. v. EPA*, No. 18–1289 (D.C. Cir. 2019); (3) Finalize alternative closure provisions at 40 CFR 257.103 in order to allow facilities to request additional time to develop alternative capacity to manage their wastestreams (both CCR and/or non-CCR) to achieve cease receipt of waste and initiate closure of their CCR surface impoundments; and (4) Finalize two proposed amendments from an August 14, 2019 proposed rule (84 FR 40353), specifically, the addition of an executive summary to the annual groundwater monitoring and corrective action reports under 40 CFR 257.90(e) and amend the requirements for posting to the publicly accessible CCR Internet sites under 40 CFR 257.107.

On November 12, 2020, EPA published another final rule making additional revisions to Federal CCR regulations (85 FR 72506) (“Part B Final Rule”). This rule finalized procedures to allow a limited number of facilities to demonstrate to EPA or a Participating State Director that, based on groundwater data and the design of a particular surface impoundment, the unit has and will continue to ensure there is no reasonable probability of adverse effects to human health and the environment.

On May 8, 2024, EPA finalized a number of further amendments to the Federal CCR regulations (89 FR 38950) (“Legacy CCR Surface Impoundments and CCR Management Units Final Rule”). This rule is currently being challenged in the D.C. Circuit. See *City Utilities of Springfield, Missouri v. EPA*, No. 24-1200 (January 31, 2025). This final rule imposed regulatory requirements for legacy CCR surface impoundments and CCR management units at active CCR facilities and at inactive CCR facilities with a legacy CCR surface impoundment. In addition, the final rule made several technical corrections to the existing regulations, such as correcting certain citations and harmonizing definitions. On November 8, 2024, EPA published a direct final rule to correct errors in the Legacy CCR Surface Impoundments and CCR Management Units Final Rule. 89 FR 88650.

C. Statutory Authority

EPA is issuing this proposed action pursuant to RCRA sections 4005(d) and 7004(b)(1). See 42 U.S.C. 6945(d) and 6974(b)(1). As amended by section 2301 of the 2016 WIIN Act, RCRA section 4005(d) instructs the EPA to establish a Federal permit program similar to those under RCRA subtitle C and other environmental statutes and authorizes States to develop their own CCR permitting programs that go into effect in lieu of the Federal permit program upon approval by EPA. See 42 U.S.C. 6945(d).

Under RCRA section 4005(d)(1)(A), 42 U.S.C. 6945(d)(1)(A), States seeking approval of a State CCR program must 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.” The statute provides that EPA shall approve a State CCR permit program if the Administrator determines that the State program will require each CCR unit located in the State to achieve compliance with either: (1) The Federal CCR requirements at 40 CFR part 257, subpart D; or (2) Other State criteria that the Administrator, after consultation with the State, determines to be “at least as protective as” the Federal requirements. 42 U.S.C. 6945(d)(1)(B). The Administrator must make a final determination, after providing for public notice and an opportunity for public comment, within 180 days of receiving a State’s complete submittal of the information specified in RCRA section 4005(d)(1)(A). 42 U.S.C. 6945(d)(1)(B). EPA may approve a State CCR permit program in whole or in part. *Id.* Once approved, the State permit program operates in lieu of the Federal requirements. 42 U.S.C. 6945(d)(1)(A). In a State with a partial program, only the State requirements that have been approved by EPA operate in lieu of the Federal requirements, and facilities remain responsible for compliance with all remaining Federal requirements in 40 CFR part 257.

As noted above, the Federal CCR regulations are self-implementing, meaning that CCR landfills and surface impoundments must comply with the terms of the regulations prior to obtaining a Federal permit or permit issued by an approved State. Noncompliance with the Federal CCR regulations can be the subject of an enforcement action brought directly against the facility. Once a final CCR permit is issued by an approved State or pursuant to a Federal CCR permit program, however, 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 (meaning the permit’s terms become the enforceable requirements for the permittee).⁴

⁴ See U.S. Environmental Protection Agency. Coal Combustion Residuals State Permit Program Guidance Document; Interim Final, August 2017, Office of Land and Emergency Management, Washington, DC 20460 (providing that the 180-day deadline does not start until EPA determines the application is complete).

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.” 42 U.S.C. 6974(b)(1). Accordingly, EPA considers permitting requirements, requirements for compliance monitoring authority, requirements for enforcement authority, and requirements for intervention in civil enforcement proceedings in evaluating State CCR permit program applications.

Once a State CCR permit program is approved, the Administrator must review the approved program not less frequently than every 12 years, no later than three years after a revision to an applicable section of 40 CFR part 257, subpart D, and no later than one year after any unauthorized significant release from a CCR unit located in the State. EPA also must review an approved State CCR permit program at the request of another State alleging that the soil, groundwater, or surface water of the requesting State is or is likely to be adversely affected by a release from a CCR unit in the approved State. See 42 U.S.C. 6945(d)(1)(D)(i)(I) through(IV).

In a State with an approved State CCR permit program, EPA may commence administrative or judicial enforcement actions under RCRA section 3008, 42 U.S.C. 6928, if the State requests assistance or if EPA determines that an EPA enforcement action is likely to be necessary to ensure that a CCR unit is operating in accordance with the criteria of the State’s permit program. 42 U.S.C. 6945(d)(4). EPA can enforce any Federal requirements that remain in effect (i.e., those for which there is no corresponding approved State provision). EPA may also exercise its inspection and information gathering authorities under RCRA section 3007 in a State with an approved program. 42 U.S.C. 6927.

III. The North Dakota Application

EPA began working with NDDEQ in November 2019 as the State developed its application for the State’s partial CCR permit program.⁵ As it has with other States, EPA discussed with NDDEQ the process for EPA to review and approve the State’s CCR permit program, NDDEQ’s anticipated timeline for submitting a CCR permit program application to EPA, and NDDEQ’s regulations for issuing permits. On September 21, 2020, the NDDEQ submitted its initial State CCR partial permit program application to EPA Region 8 for approval.

EPA reviewed NDDEQ’s initial submission, held multiple meetings with the NDDEQ, and sent comments to NDDEQ regarding the application. In 2020 and 2021, EPA and NDDEQ discussed the State’s adoption of certain provisions in the March 2018 Proposed Rule. Because this rule had not been finalized in relevant part, EPA advised the State that it would need to submit a record to justify those aspects of the State program if those non-finalized provisions were to be included. As a result, NDDEQ is not seeking approval of these provisions in its current application.

EPA also noted several differences in the State’s technical regulations and the State’s application for the partial permit program, including the need to further describe the public participation process for CCR permits in North Dakota. Following these discussions, NDDEQ submitted a revised application on May 21, 2021. Upon review of NDDEQ’s revised application, EPA determined that the definition of “ground water” in the NDDEQ’s State Rules at North Dakota Administrative Code (NDAC) section 33.1-20-01.1-03 was not as protective as the definition of “groundwater” in 40 CFR 257.53. Therefore, on February 23, 2023, after consultation with EPA, NDDEQ amended its regulations to update the definition of “ground water” as it applies to CCR units to be identical to the Federal definition. On March 10, 2023, NDDEQ submitted a revised partial CCR permit program application.

IV. EPA Analysis of the North Dakota Application–Basis for Approval

⁵ A summary of the meetings with, and emails shared between, EPA and NDDEQ is included in the Technical Support Document. Records of these interactions are included in the docket for this action.

RCRA section 4005(d) requires EPA to evaluate two components of a State CCR permitting program to determine whether it meets the standard for approval: the program itself, and the technical criteria that will be included in each permit issued under the State program. This section discusses EPA's review of both requirements under RCRA section 4005(d) and the criteria EPA uses to conduct this review.

First, EPA must evaluate the permit program itself (or other system of prior approval and conditions). See 42 U.S.C. 6945(d)(1)(A) through (B). RCRA section 4005(d)(1)(A) directs the State to provide evidence of a State permit program's compliance with RCRA requirements in such form as determined by the Administrator. In turn, RCRA section 4005(d)(1)(B) directs EPA to approve the State program based upon a determination that the program "requires each coal combustion residuals unit located in the state to achieve compliance with the applicable [Federal or State] criteria." In other words, the statute directs EPA to determine that the State has sufficient authority to require compliance at all CCR units located within the State. See also 42 U.S.C. 6945(d)(1)(D)(ii)(I). To make this determination, EPA evaluates the State's authority to issue permits and impose conditions in those permits, as well as the State's authority to conduct compliance monitoring and enforcement.

During this review of the State permit program, EPA also determines whether the program contains procedures consistent with the public-participation directive in RCRA section 7004(b). 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." 42 U.S.C. 6974(b)(1). To make this determination, EPA evaluates the State's public participation procedures for issuing permits and for intervention in civil enforcement proceedings.

Although 40 CFR part 239 applies to the approval of State Municipal Solid Waste Landfill (MSWLF) programs under RCRA section 4005(c)(1) rather than EPA's evaluation of

CCR permit programs under RCRA section 4005(d), the specific criteria outlined in that regulation provide a helpful framework to examine the relevant aspects of a State's CCR permit program. States are familiar with these criteria because all States have MSWLF programs that have been approved pursuant to these regulations, and the regulations are generally regarded as protective and appropriate.

Consequently, EPA relied on the four categories of criteria outlined in 40 CFR part 239 as guidelines to evaluate the North Dakota CCR permit program: permitting requirements, requirements for compliance monitoring authority, requirements for enforcement authority, and requirements for intervention in civil enforcement proceedings.

Second, 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. See 42 U.S.C. 6945(d)(1)(B). Only if both components meet the statutory requirements may EPA approve the program. See 42 U.S.C. 6945(d)(1). EPA makes this determination by comparing the State's technical criteria to the corresponding Federal criteria and, where necessary, evaluating whether a different State criteria is at least as protective as the Federal criteria.

Upon careful review, and as discussed in more detail below, EPA has preliminarily determined that the North Dakota CCR permit program includes all the elements of an adequate State CCR permit program. It also contains all the technical criteria in 40 CFR part 257, subpart D, except for the provisions specifically discussed below that North Dakota has not included in its partial permit program. Consequently, EPA is proposing to approve the North Dakota permit program "in part" by approval the entirety of North Dakota's application, which does not encompass the full scope of Federal criteria as presently constituted. 42 U.S.C. 6945(d)(1)(B).

EPA's full analysis of the North Dakota CCR permit program, and how the North Dakota regulations differ from the Federal requirements, can be found in the Technical Support

Document. EPA determined that the North Dakota CCR permit program application was complete and notified North Dakota of its determination by letter dated May XX, 2025.⁶

A. Adequacy of the North Dakota Permit Program

Section 4005(d)(1)(A) of RCRA, 42 U.S.C. 6945(d)(1)(A), requires a State seeking State CCR permit program approval to submit to EPA, “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.” Although the statute directs EPA to establish the form of such evidence, the statute does not require EPA to promulgate regulations governing the process or standard for determining the adequacy of such State programs. EPA, therefore, developed the *Coal Combustion Residuals State Permit Program Guidance Document; Interim Final* (82 FR 38685, August 15, 2017) (the “Guidance Document”). The Guidance Document provides recommendations on a process and standards that States may choose to use to apply for EPA approval of its CCR permit programs, based on the standards in RCRA section 4005(d), existing regulations at 40 CFR part 239, and the Agency’s experience in reviewing and approving State programs.

EPA evaluated the North Dakota CCR permit program using the process and statutory and regulatory standards discussed in sections II.C. and IV.A. of this preamble. EPA’s findings are summarized below and provided in more detail in the Technical Support Document located in the docket supporting this preliminary determination.

1. Guidelines for Permitting

In EPA’s judgment, an adequate State CCR permit program must ensure that: (1) Existing and new facilities are permitted or otherwise approved and in compliance with either 40 CFR part 257 or other State criteria; (2) The State has the authority to collect all information necessary to issue permits that are adequate to ensure compliance with relevant 40 CFR part 257,

⁶ The North Dakota application, EPA’s completeness determination letter, and the Technical Support Document are available in the docket supporting this action.

subpart D requirements; and (3) 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.

All owners and operators of existing and new CCR units in North Dakota are required to comply with State CCR rules found at NDAC Chapter 33.1-20-08, and to obtain a permit in accordance with NDAC section 33.1-20-02.1 and NDAC section 33.1-20-03.1. The State CCR regulations require every person who treats or transports solid waste or operates a solid waste management unit or facility, including CCR units, to have a valid permit issued by the NDDEQ. See NDAC section 33.1-20-01.1, 33.1-20.02.1. Permit application requirements can be found in NDAC section 33.1-20-03.1-02. Once a permit application has been submitted, NDDEQ will decide whether to approve the application, return it for clarification and additional information, or deny the application. See NDAC section 33.1-20-03.1-03. If the application is approved, NDDEQ will prepare a draft permit and publish a public notice in all daily newspapers of general circulation within the State of its preliminary determination to issue a permit. See NDAC section 33.1-20-03.2-03. The public may submit comments within 30 days of the notice and NDDEQ will consider all written comments in its final determination. See NDAC 33.1-20-03.2-03. Additionally, NDDEQ may hold a public hearing if there is significant public interest. Then, NDDEQ addresses public comments on the draft permit and makes the response to comments publicly available. See NDAC section 33.1-20-03.1-03(3b). NDDEQ has 120 days to review and approve or disapprove the application. See NDAC section 33.1-20-03.1-04. Then, NDDEQ issues the final permit decision and notifies the applicant and public commenters. As a matter of policy, NDDEQ's Solid Waste Program posts all final permits for 30 days on the NDDEQ website at: <https://deq.nd.gov/PublicNotice.aspx> and <https://deq.nd.gov/wm/PublicNotices/default.aspx>. A notice is sent out through NDDEQ's

listserv stating that a final permit has been posted on NDDEQ's website. This policy applies to all permit applications for major modifications, new applications, and renewals.

A permit may be modified, suspended, revoked, or denied by NDDEQ for various reasons, including: (1) Circumstances that do not meet the purpose and provisions of NDDEQ's solid waste regulations, the provisions of the permit, or the plans and specifications submitted as part of the permit application; or (2) Violations of any applicable laws or rules. See NDAC section 33.1-20-02.1-07. The State's regulations specify what changes are major modifications. See NDAC section 33.1-20-02.1-07(4). Other changes to the permit may be made by written notice to and approval by NDDEQ, such as a change in the frequency of monitoring and reporting, waste sampling or analysis method, schedules of compliance, and revised cost estimates for closure and post-closure care. See NDAC section 33.1-20-02.1-07(3). An application for modification of a solid waste management unit or facility must follow the procedures and provisions in NDAC section 33.1-20-03.1-02.

The permit duration for all solid waste management facilities, including CCR facilities, is no more than ten years from the date of issuance. See the statute at North Dakota Century Code (NDCC) section 23.1-08-09(1). All permits are nontransferable. NDCC section 23.1-08-09(1). An application for renewal of any permit must be submitted at least sixty days prior to the expiration date. See NDAC section 33.1-20-02.1-08. The application for renewal must follow the procedures and provisions of NDAC section 33.1-20-03.1-02. The conditions of an expired permit continue until the effective date of a new permit if the permittee has submitted a timely and complete application for a new permit and NDDEQ, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit. See NDAC section 33.1-20-02.1-08. Permit renewals are subject to the same requirements as new permit applications and are therefore also subject to a 30-day public comment period and the optional public hearing, consistent with NDAC section 33.1-20-03.1-03(3). Id.

NDDEQ has the authority to collect all information necessary to issue permits that are adequate to ensure compliance with NDAC Chapter 33.1-20-08. Specifically, NDAC section 33.1-20-02.1-04 requires permit compliance such that “all solid waste management facilities and activities must be performed, constructed, operated, and closed in a manner consistent with the permit application and subject to any modifications specified through permit conditions.” In addition, NDAC section 33.1-20-03.1-02(6) specifies the information that applicants for a solid waste permit, including a CCR unit permit, are required to submit to show compliance with the solid waste rules.

EPA has preliminarily determined that North Dakota’s approach to CCR permit applications and approvals meets the standard for program approval.

2. Guidelines for Public Participation

Based on RCRA section 7004, 42 U.S.C. 6974, it 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 public; and (3) Public comments on permit determinations are considered and significant comments are responded to in the permit record. EPA’s review of North Dakota’s CCR permit program indicates that the State has adopted public participation procedures that allow interested parties to talk openly and frankly about permit issues and search for mutually agreeable solutions to differences in views. An overview of North Dakota’s public participation provisions is provided below.

a. Public Notice and Participation in the CCR Permit Application Process

The State program provides public notice in several ways and at several different stages of the permitting process, which taken together ensure that documents for permit determinations are subject to public review and comment. NDDEQ requires State CCR permit applicants to provide notice to the public. Under NDAC section 33.1-20-03.1-02, NDDEQ requires an applicant for a new solid waste management facility permit to publish a notice to the public that

an application for a new permit, permit modification, or renewal of a permit has been submitted to the State. The notice must indicate the type and location of the unit or facility and must be published in two separate publications of the official county newspaper of the county in which the facility is or will be located. Pursuant to NDAC 33.1-20-03.1-02, applicants proposing a solid waste management unit in a mining permit area for disposal of CCR must also file a copy of the application with the Public Service Commission in accordance with NDAC section 69-05.2-19.02(1). In addition to these obligations on the permit applicant, the North Dakota program also requires the State itself to provide notice to the public. NDCC 23.1-08-09 provides that NDDEQ shall give public notice upon receipt of a permit application in the official newspaper of the county in which the facility is to be located, noting the State is considering an application for a solid waste management facility. The notice must include the name of the applicant, the location of the facility, and a description of the facility.

If NDDEQ makes a preliminary determination to issue a permit for a solid waste management facility, NDDEQ prepares an application review memo and draft permit. See NDAC section 33.1-20-02.1-03. The application review memo briefly describes the principal facts and the significant factual, legal, procedural, and policy questions that were considered in preparing the draft permit. It also includes a facility description, the activity subject to the permit, the type and quantities of wastes to be disposed, the permit conditions, actions on any requested variances, the procedures for reaching a final permit decision, and contact information. NDAC section 33.1-20-03.1-03(3) requires the State to publish public notice for a draft solid waste management facility permit in the official county newspaper of the county in which the solid waste management unit or the facility is located and daily newspaper of general circulation in the area of the facility. Per State policy, the public notice is posted on the NDDEQ Division of Waste Management's website under the Public Comments and Notices section. The public can view and download the application, review documents, and contact the State to request the application. The State transmits its notice of preliminary determination to issue a permit in

writing to each unit of local government having jurisdiction over the area in which the facility is or will be located, and to each State agency having any authority under State law with respect to the construction and operation of the facility. The public notice is also sent to NDDEQ's email listserv group, which transmits the notice to all members of the public that have signed up to receive electronic public notices from NDDEQ. The State may also use other methods to provide direct notice to persons potentially affected by the permitting action.

NDDEQ accepts public comment on the draft permit during a 30-day public comment period. NDAC 33.1-20-03.1-03 specifies that interested persons may submit written comments on the draft permit during that time, and all written comments will be considered in NDDEQ's final determination. In addition, whenever a final permit decision is made, NDDEQ makes available to the public a written response to all significant comments on the draft permit raised during the public hearing and public comment period. See NDDEQ's statute at NDCC section 23.1-01-11. This response will also specify which provisions, if any, in the draft permit have been changed in the final permit decision and the reasons for the change. The public comment period may be extended for permit applications with significant public interest. NDDEQ has discretion to grant extensions based on public interest. To request an extension of the public comment period, a written comment must be submitted as listed in the public notice. The public notice states, "During that period, any interested person may submit written comments and request a public hearing by stating the nature of specific issues to be raised." This applies to all permit applications for major modifications, new and/or renewals. NDAC 33.1-20-02.1-07(5) and 33.1-20-02.1-08 (citing to NDAC 33.1-20-03.1-02); See NDAC 33.1-20-03.1-03 (in which "the draft permit" includes new permits, permits with major modifications, and permit renewals). NDAC 33.1-20-03.1-03(3)(b) provides that NDDEQ may hold such a hearing if it determines that there is a significant public interest in a hearing. That provision further provides that a public notice will be issued in the same manner as the for a draft permit and that the hearing will be held at least fifteen days after the public notice has been published.

In addition, NDAC 33.1-20-08-06(6)(e) requires a public meeting with interested and affected persons whereby the owner or operator must discuss results of the assessment of remedial measures at least 30 days prior to selection of a corrective action remedy.

The State's provisions for open records laws are found in section 6 of Article XI of the North Dakota Constitution and section 44-04 of the NDAC.

b. Challenges to Permit Decisions

NDCC 23.1-01-11 provides that any person aggrieved by a permit decision may file an appeal in district court within 30 days of notification of the permit decision. NDCC 28-32-40 grants any person aggrieved by any NDDEQ decision the right to request a rehearing. In accordance with NDCC 28-32-42, any party to a proceeding may appeal NDDEQ's final order or decision to district court within 30 days of the order or decision. Petitions to reopen a hearing or for a rehearing may be made under NDCC 98-02-04.

EPA has 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. The provisions described above meet the three criteria listed at the beginning of this section by providing several means by which documents for draft and final permit determinations are made available for public review and comment, as well as ensuring that public comments on permit determinations are considered and significant comments are responded to in the permit record.

3. Guidelines for Compliance Monitoring Authority

It is EPA's judgment that an adequate permit program should provide the State with the authority to gather information about compliance, perform inspections, and ensure that information it gathers is suitable for enforcement. NDDEQ has compliance monitoring authority under NDCC 23.1-08-18 and NDAC 33.1-20-04.1-04(2). Specifically, the State has statutory authorities to conduct inspections (including monitoring and testing) and enter a site for the purposes of determining compliance. See (1) NDAC 33.1-20-04.1-04(2) for the authority to

obtain records and information, (2) NDCC 23.1-08-18 for the authority to conduct monitoring and testing, and (3) NDCC 23.1-08-18 for the authority to access any site or premise subject to the permit program or the records location. In addition, NDCC 23.1-08-18 provides that NDDEQ “may inspect all solid waste management activities and facilities, at all reasonable times, to ensure compliance with the laws of this state, the provisions of this chapter, and the rules authorized under this chapter.”

In addition, NDAC section 33.1-20-03.1-02(6) specifies the information that applicants for a solid waste permit, including a CCR unit permit, are required to submit to show compliance with the solid waste rules:

- The site characterization in NDAC section 33.1-20-13-01 and a demonstration that the site fulfills the location standards of NDAC section 33.1-20-04.1-01. The location standards for CCR units are found in NDAC section 33.1-20-08- 03;
- Soil survey and segregation of suitable plant growth material;
- Demonstrations of capability to fulfill the general facility standards of NDAC section 33.1-20-04.1-02;
- Facility engineering specifications adequate to demonstrate the capability to fulfill performance, design, and construction criteria provided for CCR units in NDAC chapter 33.1-20-08;
- The plan of operation required in NDAC section 33.1-20-04.1-03. Operation requirements for CCR units are in NDAC section 33.1-20-08-05;
- The place where the operating record is or will be kept, NDAC section 33.1-20-04.1-04.
- Requirements for recordkeeping, notification, and posting of information to the internet are in NDAC section 33.1-20-08-08;
- Demonstration of capability to fulfill the ground water monitoring standards, NDAC section 33.1-20-08-06 or 33.1-20-13-02;
- Construction quality assurance and quality control;

- Demonstrations of capability to fulfill the closure standards, NDAC section 33.1-20-04.1-05 and otherwise provided by the solid waste rules;
- Demonstrations of capability to fulfill the post-closure standards, NDAC section 33.1-20-04.1-09 and otherwise provided by the solid waste rules; and
- An environmental compliance disclosure statement as required by NDCC section 23.1-08-17.

The State has authorities and guidelines for inspections, analysis and monitoring, which allow the State to: (1) Verify the accuracy of information submitted by owners or operators of the CCR unit; (2) Verify the adequacy of methods (including sampling) used by owners or operators in developing that information; (3) Produce evidence admissible in an enforcement proceeding; and (4) Receive and ensure proper consideration of information submitted by the public. See NDAC 33.1-20-04.1-04(2) for the authority to obtain all records and information necessary to determine compliance with State requirements. An owner or operator shall provide a copy of any document in its operating record upon NDDEQ's request. NDDEQ verifies all plans and reports for completeness, accuracy, and compliance. NDDEQ uses guidelines based on standard industry practices to verify the adequacy of methods used. Any alternate method, including supporting documentation, must be evaluated and approved by the State. Waste samples must be analyzed in a State approved and certified laboratory. The State employs quality assurance and chain-of-custody procedures from their Quality Assurance Manual, which was approved by EPA Region 8.⁷ In addition, the State ensures that it receives and ensures proper consideration of compliance information submitted by the public as North Dakota places a high priority on addressing public comments and investigating and tracking complaints in NDDEQ's Complaints Database.

⁷ North Dakota Department of Environmental Quality. 2022. Quality Management Plan for the Department of Environmental Quality. Revision 12. Document Applicable for 5 years from date of EPA Region 8 RQAM Signature. August.

EPA has preliminarily determined that these compliance monitoring authorities are adequate, and that this aspect of the North Dakota CCR permit program meets the standard for program approval.

4. Guidelines for Enforcement Authority

It is EPA's judgment that an adequate State CCR permit program should provide the State with adequate enforcement authority to administer its State CCR permit program, including the authority to: (1) Restrain any person from engaging in activity which may damage human health or the environment; (2) Sue to enjoin prohibited activity, and (3) Sue to recover civil penalties for prohibited activity.

NDDEQ has adequate enforcement authority under the State's statutory authorities to immediately address activities that may endanger or cause damage to human health and the environment. NDCC 23.1-08-20 contains the authorities for injunction proceedings, whereby the State may maintain an action in the name of the State enjoining the action or for an order directing compliance. NDCC 23.1-08-03 contains the powers and duties of the State to prepare, issue, modify, revoke, and enforce orders after investigation, inspection, notice, and hearing requiring remedial measures for solid waste management as necessary or appropriate.

NDDEQ can sue in superior court for permanent and temporary injunctions, restraining orders, and other relief for activities that violate the State program. The authorities for these actions are contained in NDCC 23.1-08-20 and NDCC 23.1-08-03. The State has the authority to bring an administrative action to assess civil penalties for violations of the State's program. NDCC 23.1-08-23 provides the authority to assess a civil penalty up to \$12,500 per day per violation of the Code, State rules, or conditions of permits. The State also utilizes the same penalty policies, procedures, and penalty calculation matrix as the other portions of the State's

RCRA program. The State also utilizes EPA's RCRA Civil Penalty Policy⁸ as a guide where circumstances dictate assessment of a penalty.

EPA has preliminarily determined that this aspect of the North Dakota CCR permit program meets the standard for program approval.

5. Intervention in Civil Enforcement Proceedings

Based on RCRA section 7004, it is EPA's judgment that an adequate State CCR permit program should provide an opportunity for citizen intervention in civil enforcement proceedings. Specifically, the State must either: (1) Provide for citizen intervention as a matter of right, or (2) Have in place a process to (a) Provide notice and opportunity for public involvement in civil enforcement actions, (b) Investigate and provide responses to citizen complaints about violations, and (c) Not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation.

The State program meets this first requirement. Under 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. This NDDEQ provision is specific to CCR or any permit condition, rule, order, limitation, or other requirement implementing the chapter relating to CCR. Under 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.

NDDEQ actively investigates and provides responses to citizen complaints, but it has not been the policy of NDDEQ to provide notice and opportunity for public involvement in proposed settlements of civil enforcement actions. NDDEQ does not oppose justified citizen interventions

⁸ EPA, Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy, available at <https://www.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-civil-penalty-policy>.

in accordance with NDCC section 23.1-08-23. However, since the State program meets the first requirement, it does not need to meet (2)(a) and (2)(c).

Because the State statute provides for intervention as a right in any civil action, and thus meets the first requirement, EPA has preliminarily determined that these authorities provide for an adequate level of citizen involvement in the enforcement process, and that this aspect of the North Dakota CCR permit program meets the standard for program approval.

B. Adequacy of Technical Criteria

EPA conducted an analysis of North Dakota's CCR permit program application, including a thorough analysis of North Dakota statutory authorities for the CCR program, as well as its regulations at NDAC Chapter 33.1-20-08 of the Solid Waste Management Rules and NDCC 23.1-08 Solid Waste Management and Land Protection. As noted, North Dakota has requested approval of its partial CCR permit program, which is described further below.

1. North Dakota CCR Units and Resources

NDDEQ has identified 15 disposal units that are currently or have been used for disposal of CCR wastes (7 landfills and 8 surface impoundments) at 7 facilities in North Dakota.⁹ EPA has preliminarily determined that NDDEQ has demonstrated that it has the personnel and funding to administer a permit program that is at least as protective as the Federal requirements.¹⁰ North Dakota indicates that the State program is funded from two sources: permit fees and State general funds appropriated to NDDEQ. NDDEQ anticipates that the total funds for administering the Solid Waste Program, including the CCR permit program, will continue to be approximately \$2.2 million. In addition, NDDEQ applied for EPA State and Tribal Assistance Grants (STAG) funding for Fiscal Years 2021 through 2023. In total, NDDEQ has received \$571,396 in STAG funding to develop its CCR permit program. If EPA receives

⁹ For more information on the specific facilities covered by the North Dakota CCR Permit Program, see pages 25-26 of the Narrative, which is included in the docket for this action.

¹⁰ The discussion on State personnel and funding is included on pages 26-30 of the Narrative, which is included in the docket for this action, and is described further in the Technical Support Document.

future appropriations, if approved, NDDEQ can continue to apply and receive funds for implementation of its CCR permit program. EPA has preliminarily determined that the NDDEQ staffing and funding are adequate for NDDEQ to administer the CCR permit program.

2. North Dakota CCR Regulations

EPA has preliminarily determined that the portions of the North Dakota CCR permit program that were submitted for approval meet the standard for approval under RCRA section 4005(d)(1)(B)(i), 42 U.S.C. 6945(d)(1)(B)(i). To make this preliminary determination, EPA compared the technical requirements in the North Dakota CCR regulations at NDAC Chapter 33.1-20-08 to the Federal CCR regulations at 40 CFR part 257 to determine whether they differed from the Federal requirements, and if so, whether those differences met the standard in RCRA sections 4005(d)(1)(B)(ii) and (C), 42 U.S.C. 6945(d)(1)(B)(ii) and (C).

NDDEQ derives its authority to operate the Solid Waste Program in North Dakota from the Solid Waste Management and Land Protection Act, NDCC Chapter 23.1-08. NDDEQ largely adopted by reference the requirements at 40 CFR part 257, subpart D. See NDAC Chapter 33.1-20-08. Specifically, on July 1, 2020, North Dakota adopted by reference 40 CFR part 257, subpart D, as amended through the July 2018 Final Rule, and as modified by the *USWAG* decision. In addition, North Dakota adopted certain provisions from the March 2018 Proposed Rule, which provided certain flexibilities that were never finalized in the Federal CCR regulations, and the July 2018 final rule, which was challenged in the *Waterkeeper* litigation before the D.C. Circuit and is being reconsidered by EPA; therefore, EPA is not able to approve the majority of these flexibility provisions. For this reason, NDDEQ is no longer seeking approval for the majority of these flexibility provisions, which are described more in the Technical Support Document. In addition, on February 23, 2023, after consultation with EPA, NDDEQ amended its State regulations to update the definition of “ground water” as it applies to CCR facilities. With these exceptions, the technical requirements are analogous to the Federal regulations, and therefore are at least as protective.

In addition to the technical criteria in NDAC Chapter 33.1-20-08, North Dakota has adopted State-specific permit requirements in NDAC 33.1-20-02; public participation requirements in NDAC 33.1-20-03.1-02, NDAC 33.1-20-03.1-03, NDCC 23.1-08-09, and NDAC 33.1-20-08-06; and State financial assurance requirements in NDAC 33.1-20-14. For certain activities, North Dakota has additional requirements for CCR units, described more in the Technical Support Document.

3. North Dakota Partial Program

NDDEQ is seeking approval of its partial State CCR permit program pursuant to RCRA section 4005(d). NDDEQ's rules mirror the Federal regulations promulgated through July 30, 2018, and as subsequently modified to comply with the D.C. Circuit's decision in *USWAG*. NDDEQ has not amended its State CCR regulations to incorporate the Federal Part A Final Rule, the Part B Final Rule, or the Legacy CCR Surface Impoundments and CCR Management Units Final Rule. Additionally, NDDEQ initially sought approval for provisions it adopted from the March 2018 Proposed Rule and the July 2018 Final Rule, but now is not seeking approval for a majority of those provisions. The two categories of provisions for which North Dakota is not seeking approval are: (1) State solid waste management regulations, and (2) Provisions that are in the Federal CCR regulations, but that the State does not have an analog to, or the analog is not as protective as the Federal regulation.

First, North Dakota is not seeking approval for the following 17 provisions of the State regulations:

1. NDAC section 33.1-20-01.1-14; this State provision allows for certain variances, which could be less protective than the Federal CCR regulations. Therefore, this provision will not apply to CCR units;
2. NDAC section 33.1-20-02.1-03; this State provision allows the State to issue general permits for certain solid waste activities, which could be less protective than the Federal CCR regulations. Therefore, this provision will not apply to CCR units;

3. The definition of *Nonground water releases* at NDAC section 33.1-20-08-01(19); this State provision contains corrective action procedures to remedy eligible non-ground water releases, which is less protective than the Federal CCR regulations;
4. NDAC section 33.1-20-08-02(3); this State provision is the analog to the Federal exclusion of inactive surface impoundments at inactive facilities, found at 40 CFR 257.50(e), that was vacated in *USWAG* and revised in the Legacy CCR Surface Impoundments and CCR Management Units Final Rule. This provision is less protective than the Federal CCR regulations;
5. NDAC section 33.1-20-08-04(2)(a)(1)(b); this State provision contains requirements for an alternative composite liner using recognized and generally accepted good engineering practices, which is less protective than the Federal CCR regulations;
6. NDAC section 33.1-20-08-06(1)(f); the State provision for the suspension of ground water monitoring requirements, which is less protective than the Federal CCR regulations;
7. NDAC section 33.1-20-08-06(5)(h)(2); the alternative groundwater protection standard concentrations for cobalt, lead, lithium, and molybdenum; this provision was challenged in *Waterkeeper* and is under reconsideration by the Agency. Therefore, the State is not seeking approval for this provision;
8. NDAC section 33.1-20-08-06(5)(g)(5); this State provision is the analog to the Federal requirement that unlined CCR surface impoundments must retrofit or close after an assessment of corrective measures is required, found at 40 CFR 257.95(g)(5), which references a provision that was vacated in *USWAG*. This provision is less protective than the Federal CCR regulations;
9. NDAC section 33.1-20-08-06(7)(b)(2); the State provision allows for a corrective action remedy to attain a risk-based groundwater concentration that is protective of human health and the environment, which is less protective than the Federal CCR regulations;

10. NDAC section 33.1-20-08-06(7)(e); this State provision states that the NDDEQ determination that a remediation of a release of a constituent listed in appendix II may not be necessary, which is less protective than the Federal CCR regulations;
11. NDAC section 33.1-20-08-06(8)(c)(4); this State provision authorizes the NDDEQ to specify an alternative length of time to demonstrate that concentrations of constituents listed in appendix II have not exceeded the ground water protection standards, which is less protective than the Federal CCR regulations;
12. NDAC section 33.1-20-08-06(9); this State provision contains corrective action procedures to remedy eligible nonground water releases. Also, NDDEQ is not applying for any references to NDAC section 33.1-20-08-06(9), including NDAC section 33.1-20-08-05(5)(b)(5), NDAC section 33.1-20-08-06(1)(d), NDAC section 33.1-20-08-08(1)(h)(15) for the notification of discovery of a nonground water release, and NDAC section 33.1-20-08-08(1)(h)(16) as this State provision relates to the submission of a report documenting the completion of the corrective action. These provisions are less protective than the Federal CCR regulations;
13. NDAC section 33.1-20-08-07(2)(a); this State provision relates to the date for unlined surface impoundments to cease receipt of waste, which is less protective than the Federal CCR regulations;
14. NDAC section 33.1-20-08-07(2)(b)(1)(a); this State provision relates to the date for unlined surface impoundments to cease receipt of waste, which is less protective than the Federal CCR regulations;
15. NDAC section 33.1-20-08-07(3)(d)(4); this State provision relates to the use of CCR in design and construction of final cover system, which is less protective than the Federal CCR regulations;
16. NDAC section 33.1-20-08-07(4); this State provision is the analog to the Federal alternative closure requirements of CCR units, found at 40 CFR 257.103. This includes

no alternative capacity for non-CCR wastestreams. NDDEQ has not amended its regulations to adopt the Federal CCR regulation provisions in the Part A Final Rule; and

17. Paragraphs (2) and (3) of NDAC section 33.1-20-08-07(5)(c); these State provisions relate to the alternate post-closure period. Also, NDAC section 33.1-20-08-08(1)(i)(14) relating to the notification of a demonstration including long-term performance data supporting the reduced post-closure care period. These provisions are less protective than the Federal CCR regulations.

Second, the following 7 provisions are incorporated by 40 CFR 257.52 into the Federal CCR regulations or are otherwise included in the Federal CCR regulations, but the State does not have an analog or the analog is not as protective as the Federal CCR regulation. For these provisions, the corresponding Federal CCR regulation will continue to apply directly to each regulated CCR unit:

1. NDAC section 33.1-20-04.1-01(2)(a)(3) for floodplains; the Federal requirements for floodplains, found at 40 CFR 257.3-1;
2. NDAC section 33.1-20-04.1-01(2)(a)(7) for endangered species; the Federal requirements for endangered species, found at 40 CFR 257.3-2;
3. NDAC section 33.1-20-04.1-02(3) for surface water; the Federal requirements for surface water, found at 40 CFR 257.3-3;
4. 40 CFR 257.71(d) for alternate liner demonstrations;
5. 40 CFR 257.90(e)(6) for a groundwater monitoring annual report summary;
6. 40 CFR 257.107(a) CCR website requirements;
7. Amendments made in the Legacy CCR Surface Impoundments and CCR Management Units Final Rule.¹¹

¹¹ The provisions that changed in 40 CFR part 257, subpart D as a result of the finalization of the “Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments” rule (89 FR 38985, May 8, 2024) and the technical corrections direct final rule (89 FR 88650, November 8, 2024) are included in a file titled “Guide to Legacy CCR Surface Impoundments and CCR Management Units Final Rule Regulatory Text Changes” and is available in the docket.

With the exception of the 24 provisions noted above, EPA has preliminarily determined that the North Dakota CCR regulations contain all of the technical elements of the Federal CCR regulations, including requirements for location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, recordkeeping, notification and CCR website posting requirements. The North 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.

The effect of approving a partial State CCR program is that, except for the provisions for which EPA has not granted approval, the North Dakota CCR permit program will apply in lieu of the Federal regulations. For the State provisions that will not be approved upon finalization, the corresponding Federal requirements will continue to apply directly to facilities, and therefore facilities must comply with both the Federal requirements and the State requirements. In the case of provisions for which there is no Federal analog, but EPA is not approving the provision because it is not as protective as the Federal CCR regulations, such provisions will not apply to facilities in North Dakota and will therefore be moot.

C. North Dakota’s Permits Issued Under the State CCR Regulations

Pursuant to North Dakota’s CCR regulations, the owner or operator of an existing CCR unit that received CCR on or after October 19, 2015, was required to apply to NDDEQ to modify any existing permit to comply with the State’s CCR regulations by July 1, 2022. NDAC section 33.1-20-08-2(9). All owners and operators of CCR units within the State applied for a modified permit. Subsequently, NDDEQ issued modified permits to the owners and/or operators of all CCR units in the State.

1. North Dakota’s Permits Issued Under the State CCR Regulations are Not Part of the Permit Program Evidence Under Review

On March 10, 2023, NDDEQ submitted its revised State partial CCR permit program application and requested approval of the State's partial CCR permit program. From 2023 to 2025, EPA and NDDEQ met several times to discuss the program application and the existing State CCR permits. In these conversations, EPA and NDDEQ discussed, among other topics, technical aspects of these permits including monitored natural attenuation, groundwater monitoring, and alternative source demonstrations.¹²

Following these discussions, North Dakota subsequently indicated to EPA that it does not seek to have their existing permits approved as part of their partial program. Instead, NDDEQ committed to review and reissue these permits to ensure compliance with the Federally approved program, after EPA issues its final determination of adequacy.¹³ Therefore, EPA has treated these existing permits as outside the program evidence submitted for EPA review and thus not relevant to the decision on the permit program. See 42 U.S.C. 6945(d)(1)(A), and (d)(1)(B). EPA is basing its proposed decision on information in the program application package, as outlined in EPA's 2017 Guidance Document,¹⁴ submitted by NDDEQ on March 10, 2023.

2. Status of North Dakota's Previously-Issued Permits Issued Under the State CCR Regulations

Because North Dakota has chosen to exclude its previously-issued permits from the scope of its permit program application, those permits also would not become effective under RCRA as a consequence of an EPA final approval action. Thus, any permits issued prior to EPA's

¹² The Agency included the technical documents that EPA reviewed as part of the NDDEQ permit review and these are summarized in the Technical Support Document and the documents are in the docket for this action.

¹³ In a March 10, 2025 letter, NDDEQ stated that upon approval of the North Dakota CCR permit program, the State commits to: 1) review and amend, as appropriate, all existing permits scheduled to expire in 2025 and 2026; 2) review and amend, as appropriate, all existing permits scheduled to expire in or after 2027; and 3) all actions on existing permits will follow the public notification and comment requirements in the Federally approved CCR program. North Dakota sent a subsequent letter on April 11, 2025 that stated NDDEQ would consider all permits issued under the state program to be Federally enforceable and committed to reviewing all existing permits to ensure compliance with the Federally approved program. EPA reached out to NDDEQ to follow-up on the meaning of this letter because it could be read as being inconsistent with the March 10, 2025 letter. During this conversation, the State explained it intended to take action in accordance with its March 10, 2025 letter and suggested EPA could disregard the April 11, 2025 letter. A summary of the communication between EPA and NDDEQ is included in the Technical Support Document and records of the interactions are included in the docket for this action.

¹⁴ See Chapter 4—Permit Program Application Checklist.

approval of the State's partial program would not provide facilities with the Federal permit shield in RCRA sections 4005(d)(3) and (d)(6). 42 U.S.C. 6945(d)(3) and (d)(6). Instead, these permits only become a part of the State's approved program and give rise to the Federal permit shield once renewed or reissued "in accordance with" the approved program. 42 U.S.C. 6945(d)(6)(A). Similarly, RCRA section 4005(d)(3)(A) makes clear that in the absence of a permit "under" an approved State program, facilities would still need to comply with the Federal regulations. EPA intends to review the reissued permits in conjunction with the program review required by RCRA section 4005(d)(1)(D)(i) and 4005(d)(1)(D)(ii). 42 U.S.C. 6945(d)(1)(D)(i), (ii).

V. Proposed Action

EPA has preliminarily determined that the North Dakota partial CCR permit program meets the statutory standard for approval. Therefore, in accordance with 42 U.S.C. 6945(d), EPA is proposing to approve the North Dakota partial CCR permit program.

Lee Zeldin,
Administrator.