



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 257

[EPA-HQ-OLEM-2021-0051; FRL-12769-02-OLEM]

North Dakota: Approval of State Coal Combustion Residuals Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Availability of final decision.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is approving the 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 determined that North Dakota's partial CCR permit program meets the standard for approval under RCRA. North Dakota's CCR permit program will operate in lieu of the Federal CCR program with the exception of the specific provisions noted below.

DATES: This action is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2021-0051. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

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 notification please visit <https://www.epa.gov/coal-combustion-residuals>.

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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. General Information

A. Summary of Final Action

EPA is taking final action to approve of North Dakota's partial CCR permit program because the Agency finds that the State's program requires each CCR unit in the State to achieve compliance with the minimum requirements in the Federal CCR regulations or with alternative requirements that EPA has determined to be at least as protective as the requirements of the Federal CCR regulations in 40 CFR part 257, subpart D, for the reasons set forth in the Proposed Approval (90 FR 20985, May 16, 2025), addendum to the proposed approval (90 FR 38619, August 11, 2025), and this final action. See, 42 U.S.C. 6945(d)(1)(B).

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.

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) (2015 CCR Rule). 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. EPA has since amended 40 CFR part 257, subpart D on August 5, 2016 (81 FR 51802), July 30, 2018 (83 FR 36435), August 28, 2020 (85 FR 53516), November 12, 2020 (85 FR 72506), May 8, 2024 (89 FR 38950), and November 8, 2024 (89 FR 88650). More information on these rules is provided in the Technical Support Document in the docket for this document.

C. Statutory Authority

EPA is issuing this 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 Water Infrastructure Improvements for the Nation (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 in the State, 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).¹

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).

¹ 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).

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.

II. The North Dakota Application

Starting in November 2019, EPA began working with NDDEQ as the State developed its Application for the State's CCR permit program, and, over the course of several years, EPA had many interactions with NDDEQ about the development of a State CCR permit program. 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.

On May 16, 2025, EPA proposed to approve the North Dakota CCR permit program (Proposed Approval).

On June 26, 2025, NDDEQ informed EPA of rule changes to the North Dakota Administrative Code (NDAC) Chapters 33.1-20-02, 33.1-20-03, and 33.1-20-08 of the Solid Waste Management Rules that the State completed in 2024.^{2,3} The rule changes became effective on October 1, 2024. The March 2023 application indicated that certain provisions would be added to and removed from the N.D.A.C. chapter 33.1-20-08, as applicable, the next time the State rules are updated.

On July 3, 2025, NDDEQ sent EPA the updated rule package with an annotated version of the CCR regulations, which is included in the docket for this action. From the North Dakota Legislative Council Package Submittal 2024,⁴ the amended rules regarding CCR are related to the changes to the Federal CCR regulations that EPA made in 2018 and 2020. Some of the amended rules were required in order for the State's CCR Permit Program Package to be approvable for the relevant provisions. The remainder of the rules are not related to any federal statute or regulation.

² NDDEQ 2024. North Dakota Solid Waste Management Rules NDCC Chapter 23.1-08 and NDAC Article 33.1-20.

³ NDDEQ 2024. Tracked Changes NDAC Article 33.1-20. October.

⁴ NDDEQ 2024. ND Legislative Council Package Submittal 2024, including written testimony of Diana Trussell, Solid Waste Program Manager. September.

The 2024 updates to the State's rules incorporated the two categories of provisions for which North Dakota did not seek approval of in its March 10, 2023 application. EPA included 24 items for which the State did not seek approval in the proposed approval (90 FR 20994, 20995, May 16, 2025). In addition to addressing the partial program elements, NDDEQ made conforming rule changes to grammar, formatting, and requiring documents to be submitted to the State in facility permit applications.

On August 11, 2025, EPA issued a notice of availability and request for comment on EPA's analysis of NDDEQ's rule changes and how those impact EPA's proposed approval of the North Dakota CCR permit program. 90 FR 38619. EPA reopened the comment period to propose its intention to approve additional revisions to the North Dakota CCR permit program which, if finalized, will provide North Dakota with additional authority to implement a State CCR permit program. The Agency reopened the comment period to accept comments on the proposed revisions and EPA's evaluation of the changes. Additionally, EPA prepared an additional evaluation of North Dakota's CCR permit program submittal in light of these revisions to the State program. EPA's evaluation can be found in the docket in a document titled "Addendum to the Technical Support Document for the Approval of North Dakota's Coal Combustion Residuals Permit Program, dated July 2025."

III. EPA Analysis of the North Dakota Application-Basis for Approval

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 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 of 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 16, 2025.⁵

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

⁵ The North Dakota application, EPA’s completeness determination letter, and the Technical Support Document are available in the docket supporting this action.

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 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, 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 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 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 8.⁶ 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.

EPA has 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

⁶ North Dakota Department of Environmental Quality. 2022. Quality Management Plan for the Department of Environmental Quality. Revision 12. Document Applicable for five years from date of EPA Region 8 RQAM Signature. August.

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 Policy⁷ as a guide where circumstances dictate assessment of a penalty.

EPA has 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)

⁷ 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>.

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 the 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 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 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 (seven landfills and eight surface impoundments) at seven facilities in North Dakota.⁸ EPA has 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 for these 15 units.⁹ 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 future appropriations, if approved, NDDEQ can continue to apply and receive funds for implementation of its CCR permit program. EPA has determined that the NDDEQ staffing and funding are adequate for NDDEQ to administer the CCR permit program.

2. North Dakota CCR Regulations

EPA has 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 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

⁸ 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.

⁹ 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.

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. In the Proposed Approval, EPA included a list of 24 items for which NDDEQ did not seek approval of in its March 10, 2023 application. However, as discussed at 90 FR 38619 through 38620 and in the Addendum to the Technical Support Document, NDDEQ updated its regulations at NDAC Chapters 33.1-20-01.1 (General Provisions), 33.1-20-02.1 (Applicability), and 33.1-20-08 (Disposal of Coal Combustion Residuals (CCR) in Landfills and Surface Impoundments) in 2024. North Dakota’s CCR regulations reflect the Federal CCR regulations.

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.

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 Previously-Issued Permits Under the Unapproved 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.¹⁰

Following these discussions, North Dakota subsequently indicated to EPA that it does not seek to have its existing permits included in the partial CCR permit program submitted for approval. Instead, NDDEQ committed to review and reissue these permits in full to ensure compliance with the Federally approved program, after EPA issues its final determination of adequacy.¹¹ Therefore, EPA has treated these existing permits as outside the program evidence

¹⁰ 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.

¹¹ 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

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).

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

Because North Dakota has chosen to exclude its previously issued permits from the scope of its permit program application, those permits are not effective under RCRA as a consequence of this final approval action. Thus, any permits issued prior to EPA's approval of the State's partial permit program do 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 will 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 are still directly subject to the Federal CCR 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).

D. Public Comment Period

EPA announced its proposal to approve the North Dakota partial CCR permit program, and a 60-day public comment period on May 16, 2025 (90 FR 20985). EPA also held a public hearing on July 8, 2025. The public hearing provided interested persons the opportunity to present information, views, or arguments concerning EPA's proposal. Oral comments received during the public hearing are documented in the transcript of the hearing, which, along with the

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.

written comments received during the public comment period, is included in the docket for this Action.

On August 11, 2025, EPA reopened the comment period for an additional 15-day public comment period to propose its intention to approve additional revisions to the North Dakota CCR permit program which, if finalized, will provide North Dakota with additional authority to implement a State CCR permit program.

E. EPA Responses to Major Comments on the Proposed Determination

EPA received 21 written public comments and seven comments from the public hearing during the initial comment period, and eight written public comments on the reopened comment period. The major comments received by EPA focused on three primary topics: 1) Partial Program and North Dakota Adoption of the Federal Regulations, 2) Public Participation, and 3) North Dakota CCR Permits. EPA's responses to individual comments are provided in the Response to Comments document included in the docket for this Action.

1. Partial Program and North Dakota Adoption of the Federal Regulations

Comment summary: A few commenters mentioned that North Dakota is seeking a partial program approval because of revisions in the federal program but it was unclear to the commenters about what NDDEQ adopted, what was excluded from the State program approval, and what the effect of the partial program would be for North Dakota. Other commenters said that North Dakota met the necessary criteria for a partial program approval.

Comment response: EPA determined that partial program approval is appropriate, in part because North Dakota's regulations include some provisions that NDDEQ did not adopt from the current Federal CCR regulations. North Dakota's CCR regulations reflect the Federal CCR program through December 14, 2020; however, the Federal CCR regulations have changed since then as a result of the litigation and the Legacy CCR surface impoundments and CCR management units final rule. As such, North Dakota submitted to EPA for approval only those aspects of its CCR program that are consistent with the current Federal CCR regulations.

Accordingly, the below three items will not be covered under the State's partial permit program as NDDEQ did not adopt the provisions. Therefore, these will continue to be regulated under the Federal CCR regulations:

1. Amendments made in 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). These changes are detailed in the corresponding *Federal Register* documents. NDDEQ did not adopt changes with regards to these final rules.
2. 40 CFR 257.71(d) for alternate liner demonstrations; and
3. 40 CFR 257.95(h)(2): the alternative groundwater protection standard concentrations for cobalt, lead, lithium, and molybdenum; the D.C. Circuit remanded this provision back to EPA for reconsideration. *Waterkeeper Alliance, Inc. v. EPA*, No. 18-1289, Doc. 1777351 (D.C. Cir March 13, 2019). This provision currently remains under reconsideration by the Agency.

With the exception of the three items noted above, EPA has 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 operate in lieu of the Federal regulations. For the State provisions that are not 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.

2. Public Participation

Comment summary: Some commenters mentioned that NDDEQ does not offer adequate public participation opportunities in the North Dakota CCR permit program during the permit comment period. Those commenters indicated difficulty accessing draft permits during the comment period and were concerned about major permit modifications taking place without public input. Other commenters stated that there are ample opportunities for public participation throughout the permit review process.

Comment response: EPA determined that NDDEQ's approach to public participation provides adequate opportunities for participation in the permitting process sufficient to meet the standard for program approval. 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.

Per NDAC 33.1-20-03.1-03(3)(a), interested persons may submit written comments to the department on the draft permit within thirty days of the final public notice and all written comments must be considered by NDDEQ. Per NDAC 33.1-20-03.1-03(3)(b), NDDEQ may hold a hearing if there is significant public interest and that the hearing will be before the department and at least 15 days after the public notice has been published. Once the comment period has been completed, the public can request records from NDDEQ through its Open Records process. Information on this process can be found in the following link:

<https://deq.nd.gov/OpenRecords.aspx>.

3. North Dakota CCR Permits

Comment summary: Commenters state that RCRA obligates and authorizes EPA to regulate CCR units and that EPA promulgated the Federal CCR regulations. Commenters maintain that the 2015 CCR Rule was a response to “overwhelming evidence” that CCR disposal poses serious risks to human health and the environment because it contains many toxic and hazardous contaminants including arsenic, cadmium, chromium, lead, mercury, selenium, and thallium and those contaminants are responsible for a wide range of adverse health and environmental effects.

Commenters note that the 2015 CCR Rule established minimum criteria, including location restrictions, design requirements, operating requirements, and closure and post-closure requirements. Commenters note that the provisions include requirements for semi-annual groundwater monitoring, corrective action, location restrictions, structural stability criteria for impoundments, and comprehensive closure and post-closure requirements. Commenters state that any unit that fails to comply with these criteria is deemed an “open dump” and is subject to closure.

Commenters note that the 2015 CCR Rule was challenged in court, 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 and held that: delaying closure of unlined

CCR ponds until contamination was detected was unacceptable given the high probability of such contamination; excluding from regulation inactive CCR 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. Commenters further state that the D.C. Circuit instructed EPA to strengthen the 2015 CCR Rule by requiring closure of all unlined impoundments, regulating legacy ponds, and requiring inadequately lined CCR surface impoundments to close.

Commenters note that EPA regulated legacy ponds in a 2024 rule and the Agency imposed regulatory safeguards on inactive landfills. Commenters assert that the risks from legacy ponds and inactive landfills are “at least as significant” as active unlined surface impoundments and landfills already regulated by the 2015 CCR Rule. Commenters further note that EPA issued other CCR regulations between 2015 and 2024 largely in response to industry requests. Commenters describe and discuss these additional rules.

Commenters state that EPA established the 2015 CCR Rule to be “self-implementing” and largely enforced through citizen suits and that 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. Commenters note that in 2016, RCRA was amended to allow the EPA to approve State permitting programs to operate in lieu of EPA regulation of CCR units in a State and cited and quoted RCRA sections 4005(d)(1)(A) and (B). Commenters state that EPA has approved applications from three States—Oklahoma, Georgia, and Texas—and denied Alabama’s application.

Commenters conclude that EPA must deny North Dakota’s CCR permit program because the commenters maintain that the State program does not provide prior approval of essential information and planned actions or impose necessary conditions that will ensure CCR units in the State will achieve compliance with provisions at least as protective as the Federal CCR regulations. Commenters assert that North Dakota’s program does not meet this standard because

the State issues CCR permits without subjecting the applications to sufficient scrutiny with respect to fundamental issues like groundwater monitoring and closure plans. Commenters state that adequate permits cannot be issued without such information.

Commenters cite to EPA's discussion of the Colbert permit in the Alabama denial (Proposed 88 FR 55220, August 14, 2023; Final 89 FR 48774, June 7, 2024) wherein EPA concluded Alabama's CCR permit program was not operating as a system of prior approval because, as an example, EPA stated that Alabama failed to implement an adequate corrective actions program at Colbert even though the facility provided an Assessment of Corrective Measures (ACM) before the State issued a permit for the facility's CCR units. Commenters note that EPA went on to explain that Alabama's CCR program did not have sufficient oversight and did not provide an independent evaluation of proposed permit terms or a sufficient evaluation of the information in the permit records. Commenters then assert that North Dakota's CCR program has the same problems as Alabama's program. Commenters acknowledge that NDDEQ's regulations require scrutiny of CCR permit applications, but the commenters maintain that NDDEQ does not conduct meaningful reviews of permit applications or issues permits that ensure CCR units in the State comply with the minimum level of protectiveness.

Commenters state that EPA cannot approve 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 regulations. Commenters note that the State has already issued eight CCR permits pursuant to the program EPA proposes to approve and that mirrors the Federal CCR regulations. Commenters assert that EPA improperly ignored the State CCR permits and therefore ignored how the State is implementing its program. Commenters assert that EPA erroneously determined in the proposed approval that the North Dakota CCR permits are not relevant to the decision on the permit program because the State will have to review and reissue the permits after program approval.

Commenters argue that the language in RCRA section 4005(d)(1)(B) requires EPA to evaluate North Dakota's implementation of its State program at the time of its application because to do otherwise is to base the decision upon speculation about how North Dakota might operate its program in the future. Commenters also maintain that because the North Dakota rule language mirrors the Federal CCR regulations that is it clear that NDDEQ understands the regulations and has determined to implement the regulatory language differently than EPA. Commenters point to EPA's denial of Alabama's CCR permit program to support their conclusion that CCR permits are essential to determining whether a State's program requires each CCR unit to achieve compliance with at least the minimum level of protection. Commenters quote EPA's Alabama determination wherein EPA stated that the Agency must consider "both a State's statute and regulations and what the State actually requires individual CCR units to do, such as in permits or orders . . ." Commenters further quoted EPA's Alabama determination: "[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."

Commenters then state that EPA's conclusion in its Alabama determination is consistent with statements in its Proposed Approval for North Dakota and quotes that determination: 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."

Commenters then note that in the Alabama determination that EPA argued that RCRA section 4005(d) requires EPA to consider what the State actually requires for individual CCR

units by evaluating permits given the permit shield provisions. Commenters note that EPA indicated such review is important because 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.

Commenters argue that it is essential for EPA to review State permits because they are essential components of a State program, and that EPA must consider them to determine whether the program satisfies the conditions in RCRA section 4005(d). Commenters therefore argue that 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 regulations or "at least as protective" requirements. Commenters maintain that EPA has abdicated its duties by ignoring the eight CCR permits North Dakota has already issued. Commenters state that EPA should not issue a final approval of North Dakota's CCR permit program without considering the State's permitting practices, and that to do so would violate RCRA and the Administrative Procedure Act.

Commenters state that EPA's proposal is an unconvincing attempt to justify its failure to consider North Dakota's permits. Commenters argue that EPA first tries to supplant the plain language standard in RCRA with one of its own creation. Commenters state that EPA is wrong in claiming that RCRA directs EPA to determine that the State has sufficient authority to require compliance at all CCR units located within the State. Commenters instead maintain that RCRA 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 commenter quotes RCRA section 4005(d)(1)(B) and states the language could not be clearer. Commenters argue that it does not matter if a State agency has the authority to issue compliant permits if the State does not actually require such compliance. Comments assert EPA's interpretation improperly adds "has sufficient authority to" into this plain language and that the Agency's interpretation is far from the single, best meaning of the statute. Commenters also believe that EPA's interpretation is a

stark departure from the interpretation in the Alabama determination that did consider State issued permits.

Commenters believe EPA's requirement that North Dakota review and reissue the State permits to ensure compliance with the Federally approved program, after EPA issues its final determination of adequacy, is not an adequate justification for the new interpretation.

Commenters assert that RCRA section 4005(d) requires EPA to evaluate a State program as it exists at the time of application and specifically evaluate what the State program requires units in the State to do in the present tense and that the statute does not provide EPA with the discretion to approve a program based on its presumption that the State will issue proper permits in the future.

Commenters argue that EPA's reliance on North Dakota's commitment to future compliance is senseless because, according to the commenters, the previously issued permits provide all the evidence that is necessary.

Commenters discuss that 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. They argue that 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." Thus, commenters state that EPA's decision to ignore North Dakota's permits violates the WIIN Act and is arbitrary and capricious.

Commenters assert that EPA's decision to not review North Dakota's permits is especially arbitrary and capricious. According to the commenters, the Agency did review some of those permits and the Agency knows that North Dakota's CCR permits are not sufficient to

assure compliance even though the State regulations mirror the standards found in the Federal CCR regulations. Commenters also maintain that EPA conducted a screening review of the North Dakota CCR permits for units at Stanton, Heskett, and Coyote stations and raised concerns with groundwater monitoring networks, statistical analyses, and corrective action. Commenters also quote a letter from EPA to North Dakota from 2024 that states that as of that time, North Dakota had not fixed the issues EPA identified or assured the Agency that the State would interpret the regulations in the same manner as EPA.

Commenters maintain that the record for this action 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. Commenters state that they have also closely reviewed permitting materials for CCR units at Coal Creek, Heskett, and Leland Olds stations and identified additional evidence of noncompliance.

Comment response: EPA acknowledges and generally agrees with the statutory and regulatory background provided in the comments. EPA does not agree with the comment that RCRA compels a review of permits as part of a State CCR permit program review process, where, as here, approval of a State CCR permit program does not include approval of existing State issued CCR permits. The Agency recognizes this is different from EPA's consideration of permits in the denial of approval of Alabama's CCR permit program. In that case, EPA considered the permits as part of EPA's action, because in effect the State made clear that it intended for its existing permits to become effective under the Federally approved program. See 89 FR 48776. By contrast, EPA is excluding North Dakota's previously issued permits from the approval action, because the State indicated to EPA that it intends to revisit the permits after program approval. EPA's consideration of permits in each action is therefore consistent with both States' expressed intentions. To adopt a rigid rule that existing State permits must be required in every case without considering the scope of the State's submitted program would limit the Agency's discretion accorded to it by RCRA to define the scope of an acceptable CCR

permit program and it would constrain EPA's ability to deploy its limited resources. Finally, after approval but before permit reissue, CCR units in the State will be subject to direct application of the Federal CCR regulations until the State takes comment on and issues the permits under the approved State CCR permit program.

Nor does excluding review of the State permits in this action mean that they are forever unreviewable. Instead of relying on a pre-approval review of permits, the Agency will have an opportunity to comment on State CCR permits as they are proposed after EPA has approved the State CCR permit program. The public can also comment on all of the proposed permits and, if either EPA or the public believe the permits are not at least as protective as the regulations require, those permits can be challenged both administratively and in court. Specifically, NDCC section 23.1-08-23 allows citizen intervention specific to CCR or any permit condition, rule, order, limitation, or other requirement implementing the chapter relating to CCR. Furthermore, RCRA contains both mandatory and discretionary review authority and EPA will have opportunities to review State CCR permits issued after the State has developed some expertise in issuing and overseeing CCR permits. EPA believes it is important for the State to have primary control of the permitting process and this is particularly true in the absence of a Federal CCR permit rule.

As an initial matter, the statute provides EPA with considerable discretion to define the scope of an approvable State CCR permit program. First, RCRA section 4005(d)(1)(A) directs States seeking approval of a permit program to 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 [S]tate law for regulation by the State of coal combustion residuals units that are located in the State...after approval by the Administrator, [such State program] will operate in lieu of regulation of coal combustion residuals units in the State

Next, RCRA section 4005(d)(1)(B) states that:

[n]ot 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 [State CCR] permit program . . . 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 Federal CCR regulations]; or
- (ii) such other State criteria that the Administrator, after consultation with the state, determines to be at least as protective as the criteria in clause (i) [i.e. the Federal CCR regulations].

Taken together, RCRA sections 4005(d)(1)(A) and 4005(d)(1)(B) address both the substantive standard that EPA must use when deciding whether to approve a State CCR permit program application and the procedural steps that trigger EPA’s duty to approve such a program. Substantively, the State program must either directly implement the Federal standards for CCR units or be “at least as protective” as those Federal standards. RCRA section 4005(d)(1)(B)(ii). Procedurally, the State must present “evidence of a [CCR] permit program” in “such form as the Administrator may establish.” RCRA section 4005(d)(1)(A). This statutory language expressly affords EPA the discretion to define the contours of a complete State CCR permit program application. EPA’s discretion is further reinforced by the fact that RCRA section 4005(d) does not contain an express textual directive requiring the review of individual site-level permits. Lastly, when determining what to include in a State CCR permit program review, the Agency may also consider the allocation of limited resources and priorities as reviewing permits prior to approval is highly resource intensive. RCRA sections 4005(d)(1)(A) and (B) thus provide EPA with the authority to define the process and substance required for an approvable CCR permit program application, and nothing in the statute requires consideration of permits or implementation as part of the application where EPA is not proposing to make the permits part of the approved program.

EPA defined the State application process in August 2017 when the Agency published the Guidance Document for States seeking to develop and submit CCR permit programs for EPA approval. The Guidance Document states that EPA may approve a State’s proposed CCR permit program only if the State’s application “provide[s] evidence that the State program is at least as protective” as Federal CCR regulations. Such evidence includes, among other things, evidence

that the State's program will ensure that each CCR unit in the State achieves compliance with Federal regulations or with another system that EPA has determined is at least as protective as those regulations. The guidance further states that EPA will deem a State's application to be complete only once the application contains enough information for EPA to determine whether the proposed State program satisfies RCRA section 4005(d)(1)(B), i.e., whether the proposed State program is at least as protective as Federal regulations. The Guidance Document further explained that the 180-day period for EPA action under the WIIN Act will begin to run after EPA has determined that the State's application is complete.

Notably absent from the Guidance Document is any requirement that States submit permit information. In the case of the Alabama denial, the Agency had concerns about Alabama's State-issued permits, that the State at that time was not receptive to the Agency's input, and Alabama asked that EPA proceed nevertheless. See 89 FR 48776. As discussed throughout the Alabama proposed and final actions, the Agency was concerned that approval of that State's CCR permit program would also mean approval of, and permit shields for, the State CCR permits that the Agency believed to be flawed. EPA concluded this was an unreasonable result in light of the language in RCRA section 4005(d)(1)(B) and the Agency therefore determined that under those circumstances, the statute required it to review the State-issued permits as part of the approval process.

As discussed above, the statute provides the Agency with discretion to define the approach for State CCR permit program reviews, and, further, that there are practical resource implications that support the approach we are taking in this action. In addition, RCRA provides other mechanisms to ensure that State CCR permits are at least as protective as the Federal CCR regulations without requiring review of State CCR permits during the program approval process. First, States are issuing CCR permits for the first time and, while states have experience issuing RCRA permits for municipal solid waste landfills, the CCR regulations are relatively recent and it often takes regulators time to properly implement a new program. Notably, the State CCR

program review provisions in RCRA section 4005(d)(1)(D) do not require EPA to conduct a review of a State program until 12 years after approval of the program, absent a release from a CCR unit in the State or an update in the Federal CCR regulations requiring revision to the State's CCR permit program. The statutory terms appear to recognize that a review soon after approval is neither productive nor necessary absent some triggering event or evidence that a State is not implementing its program properly after approval. Further, EPA believes it is unfair to subject a State that was proactive and issued CCR permits before its CCR permit program was approved to additional scrutiny where the State does not expect those permits to be part of the approved program. All the more so, given that the statute provides the latitude to exclude previously issued State CCR permits from the review of the program and to require the State to reissue those permits after the program is approved. CCR units in the State will be subject to direct application of the Federal CCR regulations until the State takes comment on and issues the permits under the approved program. North Dakota confirmed its understanding of an agreement with the scope of review in a March 10, 2025, letter stating in part that the State permits will be reopened, reviewed, and "amended as appropriate to ensure compliance with the Federally approved CCR program..." and in an April 11, 2025, letter wherein the State committed to "reviewing all existing CCR permits...to ensure compliance with the Federally approved CCR program..." Furthermore, NDDEQ was in discussions with EPA over the months prior to issuance of the proposal and the Agency explained its potential concerns with respect to certain groundwater monitoring and corrective action requirements in the State's permits. The State acknowledged EPA's concerns and any issues with North Dakota's CCR permits can be addressed during the post approval issuance of the CCR permits.

Post approval, North Dakota will have the authority to issue permits that are as protective as the Federal standards, and EPA has every confidence in North Dakota to issue such permits. That said, the approved program requires permits to be proposed for comment and both EPA and citizens can comment on the permits if there are concerns that aspects of the permits are not

sufficient. North Dakota will be required to respond to such comments and if concerns remain after permit issuance the permits can be challenged administratively and in court. This approach EPA is taking in this action provides the State sufficient time to develop the necessary expertise in issuing CCR permits while at the same time providing sufficient oversight authority and opportunity to check the State's proposed permits before a permit shield attaches. This approach also places all States in the same position vis-à-vis program approval and does not punish the States that acted proactively to develop and implement CCR programs in their States.

The second practical consideration that supports this program review approach is the fact that the statute requires State programs to be approved within 180 days of EPA determining that an application is complete. In light of discretion accorded to the Agency by the statute and the fact that in this case the State does not seek to have its existing State permits included in the approved State CCR permit program, EPA declines to adopt a position that would require it to consider implementation issues in every instance.

In the Guidance Document, EPA listed the elements required in a complete application. The Guidance Document does not discuss that an application must include information on implementation (e.g., draft or final permits). Where EPA reviews a State CCR permit program application without permits or other implementation related information, EPA is able to complete that process within 180 days, but the process is still quite involved. First, EPA must draft a proposed response to the State's application and publishes a notice of its proposed determination in the *Federal Register*, a step that generally takes 60 to 90 days. Next, EPA provides a comment period of 60 days for the public to comment on the State application and EPA's proposed approval, approval of a partial program, or disapproval. The public notice and comment requirement is statutory. See RCRA section 4005. U.S.C. 6945(d)(1)(B). After the comment period, and before taking final action, EPA must respond to any public comments and prepare for publication a final decision document, which takes at least another 90 days.

In practice, EPA approved the CCR permit programs for Georgia, Oklahoma and Texas within the 180 day statutory period. Conversely, Alabama notified EPA on February 17, 2023, that it would not supplement its permit application and that EPA should proceed to review the application as submitted, and the Agency did not take final action on the denial until June 7, 2024, or 476 days later. Even then, EPA would not have been able to complete the review within that time without dedicating additional staff to the review. Reviewing the Alabama program required more staff time than EPA's review of the previous State programs because, first, reviewing CCR permits is a highly technical and fact specific evaluation and, second, the review of the permits led to a larger number of comments on the Alabama proposal. EPA's experience with the Alabama review shows that reviewing permits and other implementation related information placed a heavy burden on EPA's limited resources.

EPA simply does not have the resources to conduct a review like that described in Alabama for every State seeking approval of a CCR permit program if the Agency wants to be able to approve the State programs currently in development in even close to a timely manner. RCRA section 4005(d)(1) promotes cooperative Federalism and envisions States taking a lead role in the regulation of CCR units, and taking on that role as quickly as possible. EPA taking over a year to approve every State would extend EPA's actions approving State programs late into the decade if not into next decade, thereby frustrating the outcome Congress intended. These practical considerations support EPA's decision to exercise the discretion provided in the statute.

EPA's approach in this approval action is fully consistent with the review provisions of RCRA section 4005(d)(1)(D) and RCRA generally. Specifically, in addition to EPA's general authority to comment on proposed permits and challenge final State CCR permits after approval of a State CCR permit program, the statute also places an affirmative duty on EPA to periodically review State CCR permit programs and provides the Agency authority to review the programs in its discretion if the Agency believes a State is not ensuring each CCR unit is subject to requirements at least as protective as the Federal CCR rule. Specifically, RCRA section

4005(d)(1)(D)(i) requires EPA to review State CCR permit programs: from time to time, as necessary, but not less frequently than once every 12 years; not later than three years after EPA revises the CCR regulations; not later than one year after the date of an unauthorized significant release (as defined by the EPA) from a CCR unit; and, on request of any State that asserts that it is or is likely to be adversely affected by a release or potential release from a CCR unit located in another State. Thus, EPA can conduct a review at any time it determines that a State is not implementing a sufficiently protective program and the Agency must evaluate if there is a significant release in a State or a State demonstrates a problem from a CCR unit in another State. These review provisions provide EPA with sufficient authority to ensure permits issued after approval of a State CCR permit program are as protective as required.

Further, if EPA concludes after review that a State program is deficient, it must notify the State and the Agency must withdraw the State program if it is determined that the State did not adequately address the identified deficiencies. See RCRA sections 4005(d)(1)(D)(ii) (setting forth the bases for withdrawal of a CCR permit program) and 4005(d)(1)(E) (addressing withdrawal and reinstatement of a State CCR permit program). Notably, the bases for withdrawal all relate to a State's failure to ensure CCR units are subject to and/or complying with requirements as least as protective as the Federal CCR regulations. Specifically, the Agency is required to provide a notice of deficiency to a State if the Agency determines: the State program needs to be revised or corrected to ensure that the permit program continues to ensure that each CCR unit in the State is subject to at least the minimum level of protections set forth in RCRA section 4005(d)(1)(B); the State program does not require each CCR unit in the State to meet the minimum level of protections set forth in RCRA section 4005(d)(1)(B); the State approves or fails to revoke a permit for a CCR unit that has a release that adversely affects or is likely to adversely affect the soil, groundwater, or surface water of another State. See RCRA section 4005(d)(1)(D)(ii). Thus, the review and withdrawal provisions in the statute provide EPA with the discretion to review implementation and enforcement of a State CCR permit program at any

time it believes there is a problem, and the statute requires EPA to act to protect human health and the environment when it is demonstrated that a CCR unit has an unauthorized release. Further, EPA's approach in this matter is consistent with the oversight mechanism in RCRA section 4005(d) because it will allow States the opportunity to fix problems when reissuing permits without requiring EPA to take on the resource burden of issuing CCR permits.

For all these reasons, EPA is taking final action on the proposed approach to program review.

IV. Approval of the North Dakota CCR Permit Program

The partial North Dakota CCR permit program, as described in its Application and Units II and III, is approved. Because this is a partial program approval, only the State requirements that have been approved will operate in lieu of the analogous Federal requirements. Accordingly, owners and operators of CCR units in North Dakota will remain responsible for compliance with all applicable requirements in 40 CFR part 257 for which North Dakota did not seek approval that are listed in Unit III.B. EPA will implement these provisions under the Federal CCR program, until and unless North Dakota submits a revised CCR permit program application and receives approval for these provisions. A permit issued by a State is not a shield for noncompliance with these 40 CFR part 257 provisions. For all CCR units in the State, the Federal regulations at 40 CFR part 257 will remain in effect until such time that NDDEQ permits those units under its approved CCR permit program after providing an opportunity to comment on the entire permit consistent with the process required for new permits.

RCRA section 4005(d)(1)(D) specifies that EPA will review a State CCR permit program:

- From time to time, as the Administrator determines necessary, but not less frequently than once every 12 years;

- Not later than three years after the date on which the Administrator revises the applicable criteria for CCR units under part 257 of title 40, CFR (or successor regulations promulgated pursuant to RCRA sections 1008(a)(3) and 4004(a));
- Not later than one year after the date of a significant release (as defined by the Administrator), that was not authorized at the time the release occurred, from a CCR unit located in the State; and
- In request of any other State that asserts that the soil, groundwater, or surface water of the State is or is likely to be adversely affected by a release or potential release from a CCR unit located in the State for which the program was approved.

RCRA section 4005(d)(4)(B) also provides that in a State with an approved CCR permitting program, the Administrator may commence an administrative or judicial enforcement action under RCRA section 3008 if:

- The State requests that the Administrator provide assistance in the performance of an enforcement action; or
- After consideration of any other administrative or judicial enforcement action involving the CCR unit, the Administrator determines that an enforcement action is likely to be necessary to ensure that the CCR unit is operating in accordance with the criteria established under the State's permit program.

V. Final Action

In accordance with 42 U.S.C. 6945(d), EPA is approving the North Dakota partial CCR permit program.

Lee Zeldin,
Administrator.

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