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EPN Comments on
Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program; Reopening of Comment Period
EPA-HQ-OLEM-2019-0361; FRL-7080-06-OLEM
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The Environmental Protection Network (EPN) harnesses the expertise of more than 800 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

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Executive Summary

The Environmental Protection Network (EPN) appreciates the opportunity to comment on EPA's proposed Federal Coal Combustion Residuals (CCR) Permit Program during this reopening of the public comment period. While reopening the comment period provides an additional opportunity for public input, it does not cure the fundamental deficiencies in the proposal or the public notice supporting it.

Since EPA ("the Agency") first proposed the federal CCR permitting program in February 2020, the Agency has advanced a substantially different regulatory approach through CCR permitting in its April 2026 proposed amendments to the CCR regulations under a separate docket.[1] Those proposed amendments contemplate a regulatory framework that would rely heavily on risk assessments to support the establishment of facility-specific requirements and regulatory decisions in permits. This would place authority for establishing minimum national criteria for safe management of CCR required under the Resource Conservation and Recovery Act (RCRA) sections 1008(a) and 4004(a) in the hands of individual permit writers. This would result in more complex decisions and novel conditions in CCR permits than originally presented to the public in 2020. EPA has not explained how these proposals relate to one another or acknowledged how and why its interpretation has changed over the past six years of the CCR permitting authority provided by the Water Infrastructure Improvements for the Nation (WIIN) Act. As a result, commenters are asked to evaluate an outdated proposal without a clear understanding of EPA's current intentions or legal rationale, contrary to the principles of informed notice-and-comment rulemaking.

More fundamentally, the 2026 proposal raises significant legal and policy concerns regarding the role of CCR permits under RCRA, as amended by the WIIN Act. Congress authorized EPA to implement a CCR permit program requiring compliance with nationally applicable criteria established by the Administrator through regulation in 40 CFR Part 257. RCRA did not authorize EPA to establish alternate standards in permits through broad permit writer discretion. EPN has submitted previous comments under a different docket opposing this approach.[2] However, if the 2026 proposals are finalized and CCR permits become the primary mechanism for establishing substantive environmental requirements, they will function as site-specific rulemakings rather than compliance instruments. Such permits would therefore require substantially greater procedural safeguards, transparency, public participation, and federal oversight than EPA has proposed. While EPN remains opposed to this regulatory approach as inconsistent with RCRA, some of these comments recommend necessary changes to this proposal to accommodate EPA's new regulatory approach in the event the April 2026 proposal is finalized.

EPA must reject omnibus authority and permit-by-rule, clarify appropriate general permit framework, establish CCR permit-specific administrative procedures under 40 CFR Part 124 that are appropriate to implement this program, and provide necessary criteria for and oversight of state CCR permit programs, in order to ensure that CCR permits require compliance with nationally applicable, minimum criteria for management of CCR established under subpart D.

[1] https://www.environmentalprotectionnetwork.org/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric-utilities-legacy-ccrmu-amendments/, EPA-HQ-OLEM-2020-0107-1707.

[2] Id.

The following comments identify the principal legal, procedural, and technical deficiencies in the proposal and recommend revisions which should be incorporated in a re-proposal. EPA must re-propose the federal CCR permit program rulemaking with an updated preamble and regulatory text that accurately reflect its currently intended regulatory approach and supporting legal rationale. This is necessary to ensure that any final federal CCR permit program remains consistent with RCRA as amended by the WIIN Act, principles of administrative law, and the requirements of the Administrative Procedure Act (APA).

I. The Public Notice for This Proposal Does Not Meet Applicable Requirements

The APA requires[3] that a notice of proposed rulemaking include the terms or substance of the proposed rule or a description of the subjects and issues involved. Generally speaking, the notice requirement of §553 is satisfied when the agency affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process. RCRA Section 7004 (b) requires, "Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information or program under this Act shall be provided for, encouraged, and assisted by the Administrator and the States."[4] The reopening of this comment period fails to meet these requirements.

In February 2020, EPA published this proposal in the *Federal Register*. EPA explained that because the WIIN Act simply directed the Administrator to "implement a permit program," and did not provide any more specificity, EPA based the proposal on experience with other environmental permit programs. "In the absence of more explicit Congressional direction, EPA has chosen to rely on its collective experience implementing the existing regulations under the various permit programs across the Agency to develop this proposal."[5] EPA further explained that it, "...identified a variety of approaches, considering best practices and lessons learned, that have been incorporated into this proposed federal CCR permitting program, which is streamlined, efficient, and effective at requiring each CCR unit to achieve compliance with the requirements of subpart D."[6]

Additionally, EPA explained that in some cases, elements of other permit programs were adopted with modification "to reflect the more homogenous nature of CCR facilities. In comparison to many hazardous waste management facilities, CCR facilities handle fewer types of waste with a limited range of constituents, and typically involve a more limited range of waste management activities."[7] In other words, EPA chose elements of existing permit programs which would result in a streamlined permit program, because regulated activities did not differ significantly among CCR units and facilities. The initial comment period on the proposal was 60 days, but this was extended twice and then re-opened briefly until August 2020.

EPA took no additional action on this proposal after August 2020 until the comment period was re-opened on May 28, 2026. That notice provided a brief description of changes to subpart D since August 2020, as well as a very brief summary of subpart D changes that were proposed on April 13, 2026:

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[3] 5 U.S.C. §§ 553(b) - (c).

[4] 42 U.S. Code § 6974

[5] 85 FR 9943.

[6] Id.

[7] Id.

> Additionally, EPA proposed to establish new provisions that would allow a CCR permit authority to establish alternative requirements in light of site-specific conditions for the groundwater monitoring and corrective action points of compliance, the cleanup levels for corrective action, the appropriate closure requirements, closure timeframes; and extend the closure deadlines timeframes for CCR units where CCR is being extracted from the unit for beneficial use during closure.

This represents a significant change to EPA's planned approach to federal CCR permits as described in the February 2020 proposal—i.e., instead of implementing performance standards established in subpart D, a CCR permit could now establish such standards in each permitting action. Another significant change is that the February 2020 proposal declined to establish minimum administrative criteria for state permits, but the April 2026 proposed changes to subpart D would allow participating (i.e., approved) states to establish national minimum criteria required by RCRA section 1008(a) in their CCR permits. In the notice reopening the public comment period, EPA has not provided any explanation of why it believes the original proposal is still valid in light of this new and starkly different approach to CCR regulation and permits. Rather, EPA directs commenters to provide input of three specific issues unrelated to its change in regulatory approach: deadlines for permit applications, criteria for tiering application deadlines, and electronic permitting.

In a separate docket, the April 2026 subpart D proposal states that the WIIN Act "provides an opportunity to move away from the "one-size-fits-all" regulatory approach necessitated by the previous statutory structure."[8] This is quite different from the stated goal of the program in the February 2020 proposal as previously cited. The April 2026 subpart D proposal goes on to state that the *Utility Solid Waste Activities Group v. EPA* (USWAG) decision

> leaves intact a permitting regime which, buttressed by an adequate demonstration that the "no reasonable probability" standard would be met, could still account for site-specific variability. The record established here and through comments to this proposal may support defining an acceptable level of leakage on a unit or site-specific basis. Such case-by-case analysis may enable each regulatory authority to opt not to close facilities immediately upon monitoring revealing risks but rather enable owners or operators to flexibly comply with an ongoing monitoring regime which guarantees safety.[9]

This focus on site-specific variability and standards is at odds with the description of the regulated universe as "homogenous" in the February 2020 proposal. The USWAG decision was issued prior to February 2020; its issuance does not explain EPA's change in interpretation of the WIIN Act permit provisions from February 2020 to April 2026.

Further, on July 13, 2026, EPA issued an Advance Notice of Proposed Rulemaking (ANPRM) about federal CCR general permits:

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[8] 91 FR 18973.

[9] *Utility Solid Waste Activities v. Environmental Protection Agency*, No. 15-1219 (D.C. Cir. 2018)

> On April 13, 2026, the EPA proposed to establish new compliance pathways that would allow site-specific considerations to be taken into account during permitting for owners or operators of CCR units complying with groundwater monitoring, corrective action, and closure requirements under a federal or participating-State CCR permit. The EPA is considering whether a general permit could be developed to allow such facilities to temporarily obtain permit coverage until an individual permit issued by EPA or an approved state CCR permit program is in effect.[10]

This language is a somewhat misleading characterization of the proposed subpart D amendments.[11] Nonetheless, implementing site-specific provisions like these is the opposite of the purpose of general permits as described in the February 2020 proposal. Rather than establishing site-specific performance standards based on site-specific variabilities, the February 2020 proposal described general permits as appropriate for CCR units which are similar to one another and subject to the same subpart D requirements:

> The EPA is proposing that the Administrator could issue a general CCR permit to an identified category of CCR units involving the same, or substantially similar, operations, which are all subject to the same applicable requirements of subpart D and would require the same permit terms and conditions to achieve compliance with subpart D.[12]

The February 2020 federal CCR permit program proposal, the April 2026 subpart D proposal, and the July 2026 General Permit ANPRM were all conducted under different dockets. Given the interrelated nature of the proposals, and the fact that the comment periods overlap, it is implausible that EPA intends to consider comments on these same issues (i.e. what permit authorities are provided in the WIIN Act, the role of permits, and the purpose and content of a general permit) independently in each rulemaking, or that there is a possibility EPA will come to different conclusions about these same issues in the separate regulatory actions. Yet the proposals contain conflicting statements about EPA's intentions and rationales. At best, this is confusing. At worst, EPA has re-opened a comment period on a proposal it has no intention of finalizing in order to allow its rationales from another docket to be placed in this docket by commenters, to support a final regulation that is completely different than the proposal, under the guise of addressing comments. This is not how logical outgrowth is supposed to work.

This docket lacks any current interpretations of the WIIN Act CCR permitting authority from EPA, an acknowledgment this interpretation has changed, or any explanation of what occurred since February 2020 that would cause EPA to change this interpretation or its characterization of the regulated universe of CCR units as similar to one another. The docket for the April 2026 subpart D

[10] 91 FR 43051.

[11] This language describes the April 13, 2026, proposal as establishing new "compliance pathways," but in actuality the proposal would establish new "compliance destinations." The current subpart D has established performance standards that require prevention of releases, monitoring to detect releases, and cleanup of releases where they occur. The proposed amendments would allow permit writers to establish their own performance standards in permits for each facility, based on vague and unenforceable criteria, which would allow releases to occur as long as human health impacts are estimated below 1 in 10,000 elevated cancer risk, and for noncancer risks there would be no "deleterious effects" (an undefined term).

[12] 85 FR 9953.

proposal fails to explain this as well, and doesn't reference EPA's February 2020 interpretation and characterization or acknowledge the disparities.

The context of EPA's intentions for the CCR permitting program (i.e., the purpose of the permits and their intended content) is critical to providing adequate opportunity for public comment on the proposal. If permits establish alternate groundwater protection standards, closure standards, corrective action endpoints, or other substantive environmental performance standards that are not already established in subpart D, the permit effectively becomes a site-specific rulemaking rather than an implementation instrument. From the perspective of administrative processes and procedures, as well as appeals and legal challenges, a rulemaking is completely different from a permit and these regulations would require completely different permit content requirements and administrative procedures.

EPA cannot rely on a reopened comment period to allow commenters to place current EPA rationale from a different docket into this docket, in order to support a final permit program regulation that is materially different from the original proposal and the supporting information provided by EPA in its notice to the public. Other commenters would not have the opportunity to comment on this material. Forcing commenters to speculate regarding EPA's current legal interpretation, rationale, and intended implementation in order to provide comments on this proposal is inconsistent with the notice-and-comment requirements of the APA and the public participation requirements in section 7004 of RCRA. EPA must therefore withdraw the current proposal and issue a revised proposal that accurately reflects the Agency's current regulatory approach, rationale, and CCR permitting plans.

The following comments in **Sections II** through **VI** are necessary whether or not EPA finalizes any of its proposed permit flexibilities in the April 2026 proposal to amend subpart D. While EPN remains opposed to adoption of the April 2026 proposals because they are not consistent with RCRA, comments on this proposal are provided in **Section VII** regarding necessary changes in the event that EPA decides to finalize the April 2026 proposals for permit flexibilities.

II. This Proposal Does Not Meet RCRA Requirements

A. Omnibus Authority Must Not Be Adopted

1. RCRA does not provide omnibus authority for CCR permits

a. Congress provided narrow permitting authority for CCR

Congress provided EPA with a one-sentence long statement of CCR permitting authority at section 4005(d)(B)(2)[13] that is tied closely and only to criteria established by the Administrator in regulation (i.e., Part 257):

> (B) IMPLEMENTATION OF PERMIT PROGRAM. – In the case of a nonparticipating State and subject to the availability of appropriations specifically provided in an appropriations Act to carry out a program in a nonparticipating State, the Administrator shall implement a permit program to require each coal

[13] Codified at 42 USC § 6945.

combustion residuals unit located in the nonparticipating State to achieve compliance with applicable criteria established by the Administrator under part 257 of Title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 10008(a)(3) and 4004(a)).

By comparison, the permitting authorities in the RCRA Hazardous Waste program are numerous and lengthy. They are found in paragraphs (a) through (h) of RCRA section 3005 and include: a requirement that a facility must be in compliance prior to permit issuance; new units must have a permit prior to construction; deadlines for EPA to issue permits; maximum permit terms (duration); requirements for permit writers to consider advancements in control and monitoring technology during permit renewal; and requirements for waste minimization programs.

Other environmental permit programs that EPA relied on as models also have more numerous and extensive authorities, found in: Title V of the Clean Air Act (CAA), Section 402 of the Clean Water Act (CWA) for National Pollutant Discharge Elimination System (NPDES) permits, and the Underground Injection Control (UIC) program under Sections 1421 through 1425 of the Safe Drinking Water Act (SDWA). In comparison to any other permit program, RCRA 4005(d)(2)(B) is a very brief and narrow statement of authority. It does not include omnibus authority.

b. This decision by Congress seems intentional

The WIIN Act amended the solid waste (i.e., Subtitle D) portion of RCRA[14] to provide EPA with both permitting and enforcement authorities for CCR. When conferring enforcement authority, Congress directed EPA to use RCRA Hazardous Waste enforcement authorities in sections 3007 and 3008, without any further explanation or amendment. However, when conferring permitting authority, Congress did not refer to RCRA Hazardous Waste permit authorities in section 3005. Instead, Congress provided the one-sentence authority cited above.

The fact that Congress treated enforcement and permitting authorities differently indicates that Congress did not intend to provide RCRA Hazardous Waste authorities in section 3005 for CCR. EPA cannot give itself authorities Congress has declined to provide.

2. EPA's rationale for inclusion of an omnibus authority is inadequate

This proposal fails to provide any reasonable explanation, supported by facts, that warrants inclusion of an omnibus authority in the federal CCR permit program.

a. EPA's claim that omnibus is key to an effective program is undermined by the fact that most EPA permit programs do not have omnibus authority

In the 2020 preamble, EPA explains that, "In developing this proposal, EPA considered experience gained in the RCRA Subtitle C hazardous waste permitting program, CAA Title V permitting program, SDWA Underground Injection Control (UIC) permitting for Class VI wells, and CWA National Pollutant Discharge Elimination System (NPDES) permitting. EPA identified a variety of approaches, considering best practices and lessons learned, that have been incorporated into this

[14] This was necessary because RCRA did not provide federal permitting or enforcement authority for solid waste prior to the WIIN Act.

proposed federal CCR permitting program, which is streamlined, efficient, and effective at requiring each CCR unit to achieve compliance with the requirements of subpart D." [15]
In the discussion of proposed §257.141(c) EPA explains in the preamble that, "Based on its experience implementing the subtitle C [RCRA hazardous waste] permit program, EPA considers this [omnibus] authority to be a key component of an effective permit program." However, none of the programs EPA considered as models for this program include omnibus authority except RCRA hazardous waste. This indicates that an omnibus authority is not a component of most effective permit programs.

b. The April 2026 proposed subpart D amendments do not serve as a rationale for omnibus authority

The proposal to adopt flexible, risk-based approaches in subpart D, if finalized, does not serve as a rationale to adopt omnibus authority in the federal CCR permit program. EPA did not consider the RCRA hazardous waste program as a model for its April 2026 proposed subpart D amendments to adopt risk-based regulatory approaches. Instead, as in 2015, EPA relied on the Municipal Solid Waste (MSW) program. In fact, many of the proposed flexibilities are either not available or recommended in RCRA hazardous waste. For example, EPA RCRA hazardous waste guidance on "point of compliance" recommends, for most cleanups, "that regulators set the point of compliance throughout the area of contaminated groundwater, or when waste is left in place, at and beyond the boundary of the waste management area encompassing the original source(s) of groundwater contamination."[16,17] In other words, if this guidance were applied in the CCR program, the point of compliance would typically be at the downgradient CCR unit boundary (or everywhere in the plume, if clean closure was conducted).

With respect to other proposed subpart D flexibilities, RCRA hazardous waste program criteria for similar risk-based approaches are very different from criteria in the subpart D proposals. As an initial matter, the RCRA hazardous waste program does not have a relevant counterpart for alternate closure standards which would leave CCR in contact with liquids, because disposal of bulk liquids into regulated units is prohibited. Removal of liquids is, therefore, not generally necessary at closure. Next, the alternate groundwater protection standard criteria proposed for permit writers in §257.111(c) are different and much less comprehensive than criteria established for the same purpose in §264.94, which include consideration of persistence and permanence of contaminants, agricultural exposure pathways and surface water impacts.

Therefore, the omnibus provision, which for federal permit programs is exclusive to RCRA hazardous waste permitting, cannot be justified by the regulatory approach in the April 2026 proposal.

3. Contextually, RCRA does not support omnibus authority for CCR permits

Omnibus authority requires application of a protectiveness standard; RCRA does not apply the 4004(a) protectiveness standard to CCR permits. In proposed §257.141(c), EPA attempts to invoke

[15] 85 FR 9543.
[16] "Handbook of Groundwater Protection and Cleanup Policies for RCRA Corrective Action," EPA530-R-04-030, April 2004, p. 6.3.
[17] Id, p. 1.1

the 4004(a) protectiveness standard language in order to make the omnibus proposal seem consistent with RCRA. It is not. There is no language in section 4005(d)(2)(B) that applies the protectiveness standard in 4004(a) to CCR permits. Consistent with that paragraph, 4004(a) applies the protectiveness standard to criteria in regulations which are promulgated by the Administrator under section 1008, but not to permits:

> SEC. 4004. (a) CRITERIA FOR SANITARY LANDFILLS. – Not later than one year after the date of enactment of this section, after consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this Act. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility. Such regulations may provide for the classification of the types of sanitary landfills.[18]

There is no basis in the RCRA statute for EPA to claim omnibus authority is needed in CCR permits to satisfy the protectiveness standard, because RCRA does not directly require that they do. RCRA applies the protectiveness standard to the regulations themselves, and then subsequently requires the permits to require compliance with the regulations. EPA cannot short circuit the statute to link the protectiveness standard directly to permits, either to evade its responsibility to promulgate protective national regulations, or to add authorities to the federal CCR permit program which Congress did not confer.

4. EPA's omnibus discussion in the 2020 preamble is misleading and inaccurate

In the 2020 preamble, EPA attempts to confuse the omnibus issue by discussing the proposals in paragraphs §§257.141(a) and (c) together, as though they both serve an omnibus purpose. They do not.

Proposed §257.141(a) describes the fundamental purpose of a permit, to identify applicable requirements, and describe the actions permittees must take to comply with them. All federal permit programs, including the ones EPA considered in developing the proposal, have a provision that serves this purpose (i.e., adjudication of requirements). This is not an omnibus provision. This provision, or one like it, is necessary and present in every environmental permit program.

Proposed §257.141(c) describes an omnibus authority similar to the one in RCRA section 3005. It allows EPA to go beyond the underlying regulations, to add provisions in permits that are necessary for protectiveness but are not related to, or necessary to implement, provisions in the underlying regulations. This unique RCRA hazardous waste permit authority, granted to that program by Congress in section 3005(c)(3), is separate and distinct from proposed §257.141(a).

B. Proposed Public Notice and Administrative Procedures Are Inadequate

In the 2020 proposal, EPA proposed a series of decisions about the administrative requirements that would be necessary in a federal CCR program. Very little rationale was provided, in particular about

[18] 42 USC § 6944

the provisions in Part 124 used by other programs which EPA proposed not to adopt for CCR permits. EPA did not propose to adopt adequate procedures to ensure CCR permits are issued with adequate notice and opportunity for input, as required by the APA and RCRA section 7004.

1. Additional Part 124 requirements must be adopted

40 CFR Part 124 "Procedures for Decisionmaking" contains administrative procedural requirements for issuing, modifying, revoking and reissuing, or terminating permits issued by EPA and states. EPA proposed to adopt many provisions in Part 124 Subpart A for federal CCR permits ("RCRA CCR permits") but excluded, without explanation, certain requirements that are appropriate for CCR permits.

a. Coordination with state officials

Requirements for public notice to state officials responsible for CWA plan development and Public Water Supply Supervision in §124.10(c)(1)(iv) and (x) must be adopted for RCRA CCR permits. A primary goal of subpart D, and of the RCRA CCR permit which will ultimately replace it as the source of applicable RCRA requirements, is to prevent contamination of groundwater. CCR units are frequently in close proximity to surface waters, which can be impacted by contaminated groundwater flowing from a CCR unit. State officials, who are themselves responsible for complying with federal requirements under these other statutes regarding the quality of these water resources, must be notified in a timely and formal manner of the issuance of CCR permits so that they have adequate time to comment on the measures required in the permit to address impacts to groundwater and surface waters, such as groundwater monitoring and corrective action. This is necessary to ensure the protectiveness of a CCR permit, and it is warranted due to the close relationship between CCR leachate, groundwater contamination, and surface water contamination.

b. Additional CCR-specific requirements are needed

EPA explicitly states it is not proposing to adopt any of the existing Part 124 requirements beyond Subpart A for the CCR program, but does not explain why it is not proposing to establish a separate Subpart in Part 124 for CCR. "By contrast, EPA is not proposing to adopt any of the requirements in subparts B, C, D, or G of part 124 as part of the federal CCR permitting program because these subparts contain procedures specific to individual federal programs, i.e., RCRA hazardous waste management facilities, CAA prevention of significant deterioration (PSD) permits, and SDWA UIC permits."[19] EPA has proposed that many Part A procedures used in these other programs are appropriate for federal CCR permits; there is no reason to conclude without any analysis or explanation that the requirements in the other subparts to Part 124 are not also appropriate for CCR permits. When considering the provisions in these other subparts individually, some appear relevant to CCR permits. An additional subpart to Part 124, subpart H, must be established for CCR permits. This subpart should include the following requirements.

- Provisions similar to those in §124.31 for RCRA hazardous waste permits, which require pre-application public notice and a hearing process. In particular, this will be important if any of the recently proposed risk-based provisions are adopted in subpart D. The responsible party(ies) who signed the permit application should be required to attend the

[19] 85 FR 9945.

public meeting. Public notice of the meeting must be posted on the CCR compliance website, in addition to notification to interested parties.

- Requirements similar to those in §§124.42(a) and (b) for CAA Permits in Class I areas, but they must be adapted for groundwater and surface water. Class I areas under CAA section 162(a) are designated regions where air quality is most rigorously protected to prevent significant deterioration. Equivalent groundwater and surface water bodies could include sole source aquifers under SDWA sections 1424(e) and 1427 and Outstanding National Resource Waters under CWA section 303. Specifically, these enhanced notification requirements must apply for permits issued to any CCR units located above or within two miles of a sole source aquifer or adjacent to an Outstanding National Resource Water body.

2. Requirements for state CCR permit programs

EPA is proposing to adopt many provisions in Part 124 because they are appropriate for federal CCR permits but to exclude language that would apply these requirements to state CCR permits. EPA provides no explanation for this approach. The WIIN Act treats both federal and state permits the same in the sense that either type of permit, once issued and effective, replaces subpart D as the source of RCRA requirements applicable to a CCR unit. There is no basis in statute for state CCR permit programs to have less stringent or different procedural requirements than the federal CCR permit program.

EPA's failure to establish commensurate administrative requirements for state CCR permit programs is also inconsistent with the other federal permit programs cited as models for the proposal (NPDES, UIC, and RCRA hazardous waste). These other permit programs not only apply specified Part 124 Subpart A requirements to state permit programs, they also have established regulations for those state programs as companions to their respective regulations for federal permits. Specifically, RCRA hazardous waste federal permit requirements are in Part 270, and corresponding requirements for state permit programs are in Part 271 and Part 124 Subpart B; the NPDES program establishes federal permit requirements in Part 122, and corresponding requirements for state permit programs in Part 123 and Part 124 Subpart D; the Title V program establishes federal permit requirements in part 71, and corresponding requirements for state permits are in Part 70; and the UIC program establishes requirements for state, tribal and federal permit programs in Parts 124, 144, 145 and 146. By comparison, EPA's proposal for the CCR permit program is incomplete and insufficient.

The same decisions are made—which requirements in subpart D apply to each CCR unit and what the unit must do to comply with them—in both state and federal CCR permits. EPA's proposal to exclude provisions that apply the Part 124 procedural requirements to state CCR permits is arbitrary and capricious. EPA must adopt the corresponding state program requirements for every Part 124 provision that EPA adopts for federal CCR permits in the final rule.

Additional evidence of the arbitrary and capricious nature of these exclusions is EPA's proposal that the general permit provisions in §257.127 would be available to states. "Consistent with this proposal, states would be able, but not required, to incorporate general permits and permits by rule into their programs submitted for approval to the Administrator. This could be considered as an option for permitting CCR units when developing state programs."[20] EPA provides no explanation

[20] 85 FR 9945.

or reason to propose that §257.127 would apply to states but no other administrative or procedural provisions would apply to states.

C. The Final Rule Must Require All Owners and Operators To Be Permittees

In response to the February 2020 proposal, EPA received numerous comments from industry objecting to the proposed requirement that all owners and operators must sign permit documents, including applications. However, none of these comments explain how the joint and several liability provisions in RCRA can be maintained if a permit is not issued to all owners and operators of the CCR unit(s) covered by the permit. Subpart D applies to all owners and operators of a CCR unit; so must a permit that takes its place, once it is issued and effective, as the source of RCRA CCR regulatory requirements. EPA must preserve RCRA's joint and several liability in any permits issued in the CCR program.

Utilities have uniquely complex ownership structures. It is understandable that it would be cumbersome for every owner and operator to sign every permit submission. The proposal contained language that could be used in a one-time certification, to be submitted by an owner or operator who wished to waive signature of such documents while still acknowledging their liability.[21] Finalizing this proposal would address commenters' concerns while preserving joint and several liability.

Proposed §257.130(a)(2) is a streamlined version of the provisions commonly known as the "Designated Representative" provisions in the CAA Acid Rain Program. The Acid Rain Program was designed to regulate the same utility industry regulated by the CCR program, to accommodate its complex ownership structures. The Designated Representative provisions are likely to be more complex than necessary for CCR permits for two reasons: (1) the Acid Rain Program entailed a cap and trade program, in addition to permitting, and (2) the program was designed to accommodate in-person national emissions credit trading events; this required redundancy procedures to ensure Designated Representative availability that likely exceed those needed to ensure timely, electronic submittal of CCR permit documents. However, elements of the Designated Representative approach were designed for the purpose of issuing permits to multiple owners and operators of facilities in this industry, and the industry has demonstrated it can comply with them.

EPN supported adoption of proposed §257.130(a)(2) or similar provisions. Whichever procedures EPA adopts to allow owners and operators to delegate submittal of permit documents while preserving joint and several liability of the CCR regulations, the following elements must be included:

- A requirement for each owner and operator to designate a particular representative (i.e., an individual, named person) and alternate(s), as appropriate, to submit permit documents on their behalf.
- A requirement for each owner and operator to acknowledge their responsibility and liability regarding any submittal provided by their designated representative, and in general with the permit that is issued and modified.

[21] See proposed § 257.130(a)(2).

- An acknowledgement by each owner and operator of the procedures for changing their designation, that they are responsible for submitting changes, and that they are liable for actions taken by their representative(s) until they designated a different person.

III. The General Permit Proposal Is Insufficient

A. Application Requirements

EPA's proposal does not include minimum information required in a general permit application. The proposal does include a requirement to request coverage under the general permit to EPA. Although there is not an explicit requirement for EPA to review the request, the proposed requirement for its submittal and the 45-day review period implies such a review will occur.

In order for a general permit to require compliance with all applicable requirements of subpart D, it must be written for specific types of CCR units which are all subject to the same subpart D requirements. These criteria for eligibility must be included in the general permit as enforceable requirements. The Administrator must review information about the CCR unit relevant to these criteria in order to determine whether to object to coverage or not. In order to conduct this review, the Administrator must have access to sufficiently detailed information about the CCR unit and its operations.

EPA does not explain what information in §§257.130 and 257.131 would not be necessary to evaluate the appropriateness of coverage under a general permit. All of the information needed for EPA to write an individual permit is necessary to determine the appropriateness of coverage under a general permit, unless the general permit is only written for specific types of CCR units which are not subject to some of the subpart D requirements (e.g., existing landfills are not subject to four of the five location standards). In this case, information that is needed for the purpose of demonstrating compliance with the other four locations standards would not be necessary in a request for coverage, as long as it has no relevance to applicability of other subpart D requirements. However, EPA does not explain this or put any of these application completeness standards or boundaries in the proposed general permit provisions. If specific application requirements cannot be determined in advance of issuance of a general permit, then a clear requirement for applications to "contain all information necessary to demonstrate eligibility for the general permit based on the eligibility criteria established in the general permit" must be included in §257.127(b)(2).

B. EPA Must Provide Clarity Regarding General Permit Enforceability

General permits provide streamlining and efficiency, but they also reduce oversight by EPA. As a result, noncompliance with the general permit procedures is more likely than with an individual permit. The details of eligibility and the content of a general permit (i.e., what permit terms and conditions must be included, at what level of detail, in order for the permit to require that each CCR eligible CCR unit will be required to comply with subpart D requirements) will be resolved when a specific general permit is proposed. However, EPA must provide clarification in the final rule about minimum administrative procedures required in the general permit process that will meet the requirements in RCRA section 4005(d)(2)(B) that a general permit must require each eligible CCR unit to comply with all applicable subpart D requirements.. This includes an explanation of the procedures EPA is adopting that will allow administrative noncompliance with the general permit process to be addressed.

Because EPA only has 45 days to review a notice of intent to be covered by a general permit, EPA could, at least infrequently, fail to deny coverage for an ineligible application. The final regulation must establish clear requirements that indicate a facility which fails to meet the eligibility criteria for a general permit at any time will not be covered by the general permit for the duration of that failure, even if this ineligibility existed at the time a request for coverage was submitted to EPA and EPA failed to object. The regulations must require that, in such a case, the facility would not have an effective permit or a permit shield and would be subject to enforcement for any failure to comply with applicable self-implementing requirements in subpart D, as well as failure to obtain a permit. This is the only way to maintain the citizen suit enforceability required by RCRA section 7002. This is also consistent with the general permit proposal - in exchange for a streamlined permitting action, the facility will forgo the benefit of individual EPA oversight of its compliance approaches. When obtaining a general permit, a facility will agree to be subject to general permit requirements that are more similar to the self-implementing regulations than an individual permit could be. EPA must not adopt general permit provisions which could create a lapse in applicability, where neither the subpart D regulations apply, nor is the facility subject to a permit which requires compliance with them. RCRA section 4005(d)(3) requires that effective and enforceable requirements be in place through either application of the regulations or a permit that requires compliance with them (or, in the case of state permits, requirements that may be equally or more protective). If a facility is not eligible for coverage under a general permit, then that general permit would not require compliance with all applicable requirements of subpart D. The only conclusion in such a situation that would meet RCRA requirements is to determine that the self-implementing requirements in subpart D would apply to the ineligible CCR unit(s).

IV. The Compliance Schedule Proposal in §257.141 Must Not Be Finalized

A. The intent of the proposal is not clear

The proposal contains statements that create an internal contradiction in the proposal and makes EPA's intentions regarding compliance schedules unclear. Proposed §257.142 would allow a permit applicant already violating Subpart D to receive a permit with extra time to comply through future compliance milestones. Proposed §257.125 states that compliance with an effective permit constitutes compliance with Subpart D for enforcement purposes. Yet §257.142 also says the schedule is "supplemental to" and does not "sanction" noncompliance with the requirements of subpart D.

The proposal does not explain how a permittee can simultaneously be deemed compliant through the permit shield and remain liable for the underlying Subpart D violation. Nor does EPA specify whether the original Subpart D deadline would remain an independently enforceable permit condition, whether penalties would continue to accrue for failure to meet that deadline, or whether enforcement would be limited to a failure to satisfy the future milestones in the compliance schedule. This ambiguity makes commenting on the proposal difficult and, if finalized, would materially impair enforcement.

B. Compliance schedules are inconsistent with RCRA

EPA's compliance schedule proposal relies on an interpretation of RCRA that conflicts with clear Congressional mandates and provisions:

- Congress requires minimum national standards for management of solid waste that satisfy requirements in section 1008(a) and the protectiveness standard in 4004(a).
- Congress provided EPA with enforcement authorities for CCR in RCRA sections 3007 and 3008. In the same action, Congress required that EPA implement a federal permit program to require each CCR unit to achieve compliance with subpart D requirements, and authorized EPA approval of state programs.[22]
- Congress specified that, once an effective permit is issued by EPA or an approved state, which must require compliance with the regulations required under Section 1008(a), that those regulations no longer apply and CCR units must only comply with the permit.[23]

Despite these mandates and conferred authority, without any supporting language in the statute, EPA is proposing to suspend the applicability of requirements in the regulations required by 1008(a), including any that are necessary to meet the protectiveness standard in 4004(a), for an unspecified amount of time in permits. EPA is proposing this can happen simply because a facility is not complying with the requirements for any reason, up to and including willful noncompliance. EPA offers no rationale for this proposal.

EPA must delete proposed §257.142 and all related references to compliance schedules. Congress directed EPA to implement a permit program that requires each CCR unit to achieve compliance with the applicable criteria in Part 257. It did not authorize EPA to use permit issuance to postpone requirements whose regulatory deadlines have already passed or to substitute future permit milestones for current compliance obligations.

1. Compliance schedules are inconsistent with the federal permit authority language

The WIIN Act requires EPA to implement a program to require each CCR unit to achieve compliance with subpart D.[24] EPA's compliance schedule proposal assumes that the word "eventually" is implied at the end of this sentence in the statute. But that is not what Congress intended. The plain meanings of the words "require" and "achieve" do not include inherent delay. EPA's interpretation that it can delay applicability of subpart D requirements—even ones that have been applicable for years—simply because the facility has not complied with them previously, is without a basis in the statute.

2. Compliance schedules are inconsistent with the RCRA permit shield language

Congress treats subpart D, federal CCR permits, and approved-state CCR permits interchangeably in RCRA section 4005(d)(3)—at the time that either type of permit is issued and effective, subpart D no longer applies and permit contains all RCRA requirements with which the CCR units must comply. This strongly suggests that permits must require a CCR unit to achieve compliance with applicable criteria no later than the date on which the permit is effective. Otherwise, for the duration of the compliance schedule there would cease to be minimum criteria established under RCRA

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[22] See RCRA Sections 4005(d)(1), 4005(d)(2)(B), 4005(d)(3)(B).
[23] See RCRA Section 4005(d)(3).
[24] RCRA 4005(d)(2)(B).

section 1008(a) applicable to the permitted CCR unit. EPA offers no evidence this approach meets the requirements of 1008(a) or the protectiveness standard in 4004(a).

3. Compliance schedules are not appropriate in the CCR permit program

It is understandable that EPA would want the ability to resolve minor noncompliance in the process of permit issuance, to issue permits timely while preserving the enforcement program's independence and ability to prioritize their workload. However, minor noncompliance could be resolved quickly without the need for a compliance schedule. Compliance schedules for significant noncompliance would constitute the majority of the scope and duration of delay in the applicability of requirements under this proposal. This means the potential harm of this proposal is significant.

a. The WIIN Act does not require them

Under RCRA, EPA typically does not issue permits to facilities which are out of compliance. There is a prohibition in RCRA section 3005(c) against doing so. This prohibition does not apply to CCR permits. Therefore, EPA does not need provisions for compliance schedules in this program.

b. Other options are available which do not violate RCRA

While issuing a permit to a noncompliant facility is not ideal, it is allowed. There are better alternatives to this than to create a compliance schedule authority not provided in the statute. Other options include: diligently enforcing the CCR regulations, adding noncompliance to the list of reasons which a permit can be denied in §257.133(a), and simply delaying permit issuance until a facility becomes compliant—either voluntarily or through enforcement. Maintaining the effectiveness of all applicable requirements in subpart D is essential to the purpose of the program and is required by RCRA; EPA must find a way to deal with noncompliant facilities that avoids rendering applicable subpart D requirements unenforceable for any period of time.

If EPA decides it will not issue permits to noncompliant facilities and this results in a backlog of permit applications, there is no environmental harm to this. The regulations in subpart D will remain in place. Having a backlog of unapproved permit applications is much less harmful than the current backlog of unresolved enforcement cases EPA has chosen to maintain. The harms and potential harms of the widespread noncompliance of CCR facilities, to the program as well as to health and the environment, far outweigh the administrative harms of a permit backlog. There is no reason to prioritize resolution of permit applications, particularly when EPA's proposed approach to doing so may preclude the possibility of enforcement.

Issuing a permit without a compliance schedule to a facility that is out of compliance would be more protective than issuing a permit with a compliance schedule. This is more consistent with RCRA; EPA is obligated to require each CCR unit to achieve compliance with applicable requirements of subpart D. EPA is not obligated to extend compliance timeframes in a CCR permit to afford facilities more time to comply. It is a facility's obligation to comply with subpart D, and with a permit it ultimately receives. Failure to do so does not warrant a compliance extension. Issuance of permits without compliance schedules would still result in permits that require CCR units to achieve compliance with subpart D and it would preserve the continued applicability and enforceability of subpart D requirements. It also would be more administratively efficient—once facilities understand that they will not be given extra time, they are more likely to comply as soon as feasible. The proposal is less administratively efficient because it incentivizes noncompliance. If a permit can be issued which resolves enforcement liability through deadline extensions without penalty, facilities are less likely to comply with subpart D requirements and more likely to want permit modifications more often to extend the compliance schedules.

EPA's own proposal illustrates the concern. It identifies as a possible candidate for a compliance schedule a unit that failed to stop receiving waste even though the applicable deadline had passed. Permitting continued operation under future milestones would replace an existing and enforceable deadline with a later one. Nothing in RCRA section 4005(d)(2)(B) authorizes EPA to use a permit to grant that relief.

EPA should instead require applicants to disclose all existing noncompliance and should resolve material violations before permit issuance through voluntary correction or an appropriate enforcement instrument. EPA must add material noncompliance as a basis for permit denial under proposed §257.133. Where an enforcement order or consent decree establishes a compliance plan, the permit may incorporate that plan only after liability, penalties, economic benefit, interim protections, and enforceability have been addressed through the enforcement process. The permit must not independently extend an applicable subpart D deadline or shield the permittee from liability for noncompliance after permit issuance.

c. EPA must enforce the CCR regulations rather than engineer permit processes to replace proper enforcement

While the specific actions EPA may take to enforce the requirements of a program are discretionary, EPA is obligated to implement a program to enforce its regulations. EPA has stated that enforcing environmental regulations is a key part of achieving the benefits of environmental regulations.[25] Additionally, appropriations law[26] requires that when Congress appropriates money[27] to EPA to conduct work it is authorized to do, EPA is obligated to spend that money for the purpose Congress intended. EPA receives appropriations for civil and criminal enforcement of RCRA regulations; it must conduct this work.

In the nearly 10 years since the WIIN Act provided enforcement authority in the CCR program, EPA has acknowledged widespread noncompliance in the industry, identified a National Enforcement and Compliance Initiative (NECI) for CCR, and received appropriations to conduct enforcement. During this time, EPA has reached a handful of settlements that have not typically resolved all identified violations. No judicial enforcement actions have been taken. EPA is now refusing[28] to conduct enforcement of CCR regulations unless the Imminent Hazard provisions in

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[25] Environmental Protection Agency, Basic Information on Enforcement. https://www.epa.gov/enforcement/basic-information-enforcement

[26] 31 U.S.C. § 1301

[27] See, for example, EPA's 2027 Budget Congressional Justification, Environmental Programs and Management (EPM) funds for Civil Enforcement and Criminal Enforcement. https://www.epa.gov/system/files/documents/2026-06/tab-04_environmental-programs-and-management.pdf

[28] "Implementing National Enforcement and Compliance Initiatives Consistently with Executive Orders and Agency Priorities," Jeffrey A. Hall, March 12, 2025. https://www.epa.gov/system/files/documents/2025-03/necimemo-20250312.pdf

RCRA section 7003 apply. By any measure, EPA has failed to meet its enforcement responsibilities in the RCRA CCR program.

The compliance schedule proposal seems intended to work around this lack of enforcement results. However, it will incentivize continued noncompliance and worsen compliance rates in the CCR program. The best way to ensure timely permit issuance is to issue permits that require compliance with subpart D requirements without modification, and to begin to enforce subpart D violations, with appropriate penalties that deter future noncompliance. This will motivate facilities across the industry to achieve compliance as soon as possible. Shifting enforcement responsibility to the permit program is inefficient and inappropriate, and ultimately not authorized by RCRA.

d. The benefits of enforcement cannot be achieved through permits

Compliance schedules developed in permits would lack the protections or remedies of an enforcement action. An enforcement order or judicial consent decree can establish injunctive obligations while preserving liability, imposing appropriate penalties, recovering the economic benefit of delayed compliance, and deterring future violations. A permit compliance schedule would provide additional time without necessarily imposing any penalty or offsetting the economic benefit derived from noncompliance. Facilities that complied on time would receive no comparable benefit, while facilities that delayed compliance could receive additional time through the permitting process. That structure would weaken incentives for timely compliance throughout the regulated industry.

A primary goal of an enforcement action is to offset economic benefit gained through noncompliance.[29] Compliance schedules in CCR permits would allow the facility a schedule with extra time to achieve compliance, but would not require a penalty to offset the economic benefit the facility has gained by its failure to conduct required actions. This approach provides the wrong incentives. It does not deter future noncompliance, which is another goal of the enforcement program. Rather, it incentivizes noncompliance.

Compliance schedules in CCR permits would encourage noncompliance with subpart D rather than deter it. Permits would only require immediate compliance for facilities already in compliance and would give noncompliant facilities compliance extensions without any monetary or other legal penalty, even if the delays in compliance caused harm to health or the environment. Owners and operators of CCR units will have no incentive to comply with subpart D prior to permit issuance, if they know that being out of compliance can result in additional time to comply with no penalties. The CCR industry shares this understanding of compliance schedules in permits. This is demonstrated by their enthusiastic support[30] for the compliance schedule proposal in previously submitted comments, and their request that EPA make it clear that compliance schedules should be included not only in initial permits but in permit modifications. Industry views compliance schedules as a free pass to avoid penalties, not only for past violations but also for future ones. Given the length of time it is expected to take to issue permits, this could amount to decades of noncompliance and lack of protectiveness.

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[29] EPA Memorandum, "Revisions to the 1990 RCRA Civil Penalty Policy," John Peter Suarez, June 23, 2003, p. 28.

[30] See, for example, comments submitted by Utilities Solid Waste Activities Group (USWAG), EPA-HQ-OLEM-2019-0361-0330; National Mining Association, EPA-HQ-OLEM-2019-0361-0109; Ameren Corporation, EPA-HQ-OLEM-2019-0361-0341, EPA-HQ-OLEM-2019-0361-0342; American Coal Council, EPA-HQ-OLEM-2019-0361-0104; American Public Power Association, EPA-HQ-OLEM-2019-0361-0335.

Additionally, compliance schedules in permits do not achieve additional protectiveness. Handing out free passes for numerous or long-term violations undermines the protectiveness of the subpart D regulations. The resolution of violations achieved by a compliance schedule in a permit is simply legal and administrative; substantively, the facility's failure to conduct actions required by subpart D would be ongoing, as would the environmental impacts of such failure. For the duration of any compliance schedules established in a permit, any protectiveness ensured by the applicable subpart D requirements would not be ensured.

e. Compliance schedules in CCR permits would hamper enforcement

Typically, EPA's enforcement program prioritizes actions when violations are ongoing and enforcement is needed to stop them (i.e., injunctive relief). This means it is unlikely—although not impossible—that the enforcement program will act to claim penalties for past violations once a permit is issued that contains a compliance schedule to correct them. As a result, compliance schedules in permits undercut the full value of federal enforcement because they allow facilities to realize the economic benefits of noncompliance.

Even worse, the compliance schedule proposal could restrict citizen enforcement. The standards for citizen enforcement under RCRA section 7002 are different from those for enforcement by EPA. EPA's compliance schedule proposal puts citizen enforcement at risk, even as members of the public continue to experience harms or potential harms from noncompliance allowed by a permit.

The potential harms of this proposal outweigh any potential benefits. It is inappropriate, at odds with RCRA requirements, contrary to the goals and policies of the EPA enforcement program, and ultimately may result in failure of the CCR program to achieve mandated protectiveness. Issuing a compliance schedule in a permit creates a permit shield that precludes enforcement after permit issuance, even during the time when the CCR unit will not be in compliance with subpart D. This inappropriately usurps enforcement discretion.

In summary, EPA must delete proposed §257.142, as well as the reference to §257.142 in proposed §124.56 and the provisions in proposed §257.151(c)(8) referencing permit modifications to add or extend compliance schedules. EPA should also state expressly that permit issuance does not extinguish liability for violations occurring before the permit's effective date and that every applicable requirement whose deadline has passed must be satisfied when the permit becomes effective, unless a judicial order or independently enforceable administrative order expressly provides otherwise.

C. If Finalized, Compliance Schedules Must Be Limited

If EPA nevertheless retains compliance schedule authority, EPN offers the following recommendations only as alternatives and without waiving its objection to that authority. At minimum, the final rule must preserve liability and penalty accrual for pre-permit violations; prohibit schedules that authorize continued receipt of waste beyond an existing deadline; require a finding that the schedule is at least as protective and expeditious as an enforcement order; require interim measures protecting health and the environment; preserve citizen enforcement of the underlying requirement; and require public disclosure of the violations, their duration, associated economic benefit, and EPA's reasons for using a permit rather than enforcement.

Given the discretionary nature of EPA's enforcement program and the length of time it can take for EPA to conduct and finalize an enforcement action, it is plausible that compliance could be achieved more quickly through issuance of a permit with a compliance schedule than by waiting for an enforcement action that might never occur.[31] However, the compliance schedule proposal is not limited to those situations. In order for the proposal to claim this as a reasonable basis to support the inclusion of compliance schedule provisions in the CCR permit program, they must have limits. Compliance schedules must only be used only in situations where enforcement is unlikely to achieve a significantly better outcome in terms of timeliness of compliance and deterrence to discourage future violations. Such limitations must include:

- A time limit on the length of time for which a compliance schedule may be granted. EPN suggests this would be no longer than two years. While EPA should have better information about how long it takes to resolve enforcement cases, this length of time seems commensurate with the advantage gained by a relatively immediate resolution to noncompliance rather than waiting for an enforcement action to be taken and completed (i.e., settled or litigated.)
- A limit on the maximum statutory allowable penalty calculation for all noncompliance addressed in a compliance schedule. During periods of violation, potential penalties accrue. A compliance schedule in a permit would stop that accrual. This maximum allowable penalty calculation is a measure of the number and duration of violations. If the statutory maximum allowable penalty associated with the violations addressed in the compliance schedule exceeds a dollar amount that reflects numerous and/or lengthy ongoing violations, then the economic benefit of the noncompliance has been significant. This level of noncompliance must be deterred. Such a facility should be referred to enforcement and no permit should be issued until the violations are resolved. This maximum statutory allowable penalty for all violations addressed in a compliance schedule developed in a permit must be equal to or less than the statutory maximum allowable penalty for six months of a single, ongoing RCRA violation.

V. The Permit by Rule Proposed in §257.128 Must Not Be Finalized

If minimum national criteria in subpart D are inappropriately prescriptive for CCR units, as EPA stated in the April 2026 proposal, then so is a permit by rule. The permit by rule proposed in §257.128 is essentially a restatement of the subpart D requirements, and it provides no review or oversight by EPA. This proposal is not necessary, given the small numbers of CCR units EPA expects to permit federally. A permit-by-rule approach is fundamentally inconsistent with EPA's simultaneous April 2026 proposal to rely more heavily upon facility-specific risk determinations. Adopting both proposals at the same time would be the very definition of arbitrary and capricious.

VI. Specific Errors and Omissions in Proposed Regulatory Text

The following changes are needed to be consistent with RCRA and the mandate that CCR permits require compliance with the requirements established in subpart D.

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[31] This is especially likely given EPA's current guidance limiting CCR enforcement actions. See, EPA Memorandum, "Implementing National Enforcement and Compliance Initiatives Consistently with Executive Orders and Agency Priorities," Jeffrey A. Hall, March 12, 2025.

A. Monitoring

The proposal in §124.6(d)(3) to adopt only monitoring requirements in §257.140(k) is incomplete. Rather than only referencing monitoring requirements established under the standard term and condition in proposed §257.140, monitoring requirements in §257.73(d) and (e), §257.74(d) and (f), §257.80(c), §257.83, §257.84, §§257.90 through 95 and §257.98 must also be included in a permit.

B. Application Deadlines When State Program Approval Is Withdrawn

The proposal at §257.129(b) must include a maximum timeframe to be given in the *Federal Register* notice for facilities to apply for a federal CCR permit. If EPA withdraws program approval, it will be due to issuance of permits that are not protective or which do not require compliance with subpart D requirements, or equivalent requirements approved in a state. Each facility in the state would already have been required to submit a permit application to the state, which would have ostensibly been sufficiently complete to meet the requirements for EPA to approve the state program in the first place. This means the bulk of the information needed in a federal permit application would already be prepared by facilities at the time of program denial. Facilities would have had prior notice that EPA was considering taking back the program in a proposed action to withdraw approval of the state program. For these reasons, the maximum timeframe for facilities to apply for federal permits after EPA withdraws approval of a state program should be six months. In no case would there be any basis for this deadline to be longer than the deadline for initial applications which EPA adopts when finalizing this rule.

C. Remove Inappropriate Uses of Protectiveness Standard Language

Some language in the February 2020 proposal is incorrect in that it confuses the role of minimum criteria required by RCRA section 1008(a) in subpart D, with the role of federal CCR permits in RCRA section 4005(d)(2)(B). The minimum criteria established under RCRA section 1008(a) must meet the RCRA protectiveness standard to, "ensure no reasonable probability of adverse effects on health or the environment." Federal CCR permits issued under RCRA section 4005(d)(2)(B) must "require each [CCR] unit…to achieve compliance with applicable criteria…"

The language in proposed §257.141(a) conflates these standards and employs the wrong statutory standard by using the word "ensure" instead of "require." This language must be changed to align with the proper statutory standard, to ensure the proper standard is in place for permit issuance and review:

> (a) Case-by-case. In addition to the standard conditions in §257.140, the Administrator shall establish permit terms and conditions in a CCR permit, on a case-by-case basis, in accordance with the requirements and procedures of this subpart. At a minimum, each CCR permit must include all permit terms and conditions necessary to ~~ensure~~ **<u>require</u>** compliance with subpart D of this part.

However, this comment is complicated due to EPA's recent proposal to amend subpart D, which also conflates the statutory requirements, as it attempts to abandon EPA's longstanding practice of establishing minimum national criteria in regulations and instead provide vague authorities to permit writers to establish minimum national criteria in permits. It is not known now which proposed amendments to subpart D will be finalized and then withstand any legal challenges. In order for Subpart E to satisfy RCRA requirements regardless how the proposed subpart D amendments are resolved, if any of those proposed permit flexibilities are adopted, then language in §257.141(a) must be revised to say, "...each CCR permit must include all permit terms and conditions necessary to **require** compliance with subpart D of this part **and to ensure no reasonable probability of adverse effects on health or the environment**." In this way, federal CCR permits will be required to meet both the protectiveness standard and the requirements in RCRA section 4005(d)(2)(B), in accordance with the April 2026 proposed subpart D amendments.

D. Additional Basis for EPA-Initiated Permit Modification

EPA must add language allowing EPA-initiated permit modifications when a change in the regulations renders a permit deficient at requiring compliance with all applicable requirements. Paragraph §257.150(a)(6) should be added, "a change to the regulations in 40 CFR part 257 subpart D has resulted in a situation where the permit no longer requires compliance with all applicable requirements and the permittees have not submitted a timely and complete permit application for the necessary permit modifications." This would be a situation where the permit would not require compliance with all applicable requirements in subpart D, which is a violation of RCRA. EPA must have authority to rectify it without relying on action by the permittees.

E. Clarify Title of Proposed §257.151 To Require Applications for Permit Modifications

The title of §257.151 should be changed to "Required Applications for Permit Modifications." The proposed title makes it seem like the described situations are ones in which a permittee may choose to request a permit modification. They must not be optional. The situations described here are ones in which a permit no longer requires compliance with all applicable requirements in subpart D. Such a permit must be modified. Failure of the permittee to submit a timely and complete application for the necessary modification must be a violation subject to enforcement.

F. Permit Modifications to Remove or Relax Requirements Must Always Be Major

In proposed §257.151(c)(2) everything including and after the word "but" must be deleted. Even where changes to subpart D undergo public notice, removal or relaxation of any permit terms or conditions must be subject to public notice and comment. Otherwise, the benefit of the public notice and comment on the original permit is mooted. Additionally, this language is inconsistent with the overall proposed criteria for major modifications – even if a regulatory change went through notice and comment, the resulting, necessary changes to compliance approaches in plans could be complex and require application of technical judgment, which would warrant an opportunity for public comment.

G. Format of Permit Application Materials

Diligent and adequate permit issuance requires a permit writer to have sufficient information to support all decisions made in the permit writing process. A permit writer must not only have the necessary information, but they must have it in a format in which it can be reviewed for technical accuracy. All numbers, writing and labels on a map must be provided at a scale (size) that is readable. Data in tables must be properly labeled and readable. Further, in order for a permit writer to be able to review the analyses of data presented in the permit application, and those conclusions, data tables must be provided in an electronic format that can be copied, manipulated and analyzed, as needed, during the process of reviewing the application and drafting the permit. The same is true for members of the public to have adequate opportunity for independent review and public comment on a permitting action.

Existing subpart D requirements, such as calculation of background levels and statistical analysis of monitoring results, require complex calculations and data analysis which are often conducted using software. These calculations and analyses cannot be reviewed for accuracy through visual inspection of tables and text in a .pdf document. A permit writer must have the ability to review the analysis independently in order to approve these analytical approaches and results as ones that will achieve compliance with applicable requirements in subpart D. To conduct a review through independent analysis, a permit writer could use the same methodologies used by the permit applicants to check the results for accuracy or to verify conclusions that seem dubious or inconsistent with the data set. For example, a permit writer may want to double check calculations if a proposed background level is much higher than the highest monitored value in the background data set. A permit writer could also conduct independent analysis to verify the appropriateness of the data analysis methods proposed by the permittee as a compliance approach to be included in the permit requirements. For example, if a permittee proposes to use a statistical method that is not recommended in the Unified Guidance,[32] a permit writer may run the data set through ProUCL in order to verify that the proposed method meets the requirements in §§257.93(f)(5) and (g) by comparing its results to results using any applicable methods recommended in §257.93(f), prior to approving it in the permit.

In order for a permit writer to be able to review the permit application, all data tables must be submitted in an Excel-compatible format. This would not increase costs or time needed to submit an application, because permittees have the data in this format; otherwise, they would not be able to conduct analyses themselves. These documents must not be "locked" to editing or copying, or require a password for doing so, which would prevent a permit writer or the public from using the data for review purposes. If application data are not submitted in this way, a permit writer cannot truly review the proposed compliance approaches and make the decisions necessary and inherent in permit issuance. The same is true for the public during the comment period. EPA must add language in proposed §257.131(e) to require that a copy of any site data be submitted in an Excel-compatible format that is unlocked and usable by the permit writer or the public during the review process and any public comment period. This change is even more critical if EPA adopts any of the risk-based permit flexibilities in the April 2026 subpart D proposal. Risk assessments are based on complex models, which cannot be reviewed for accuracy by reading displayed results and conclusions.

EPA should also consider requiring maps to be presented in a format that allows zooming in and out, to ensure that data on the maps that is typically presented in relatively small fonts, such as well ID labels and contour elevations, can be viewed by permit writers with accuracy.

The following comments in Section VII would be necessary for CCR permits to meet the requirements of RCRA and APA if EPA finalizes any of its proposed permit flexibilities in the April 2026 proposal to amend subpart D, which would result in permits that act as rulemakings. EPN maintains it previously noted objections to the April 2026 proposal.

[32] "Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities (Unified Guidance)," EPA 530-R-09-007, March 2009.

VII. Recently Proposed Amendments to Subpart D Would Require Additional Changes to the 2020 Federal CCR Permitting Proposal

In the WIIN Act, Congress authorized EPA to issue permits and approve state permit programs that require compliance with nationally applicable criteria established through rulemaking under Part 257. Congress did not authorize EPA - or a state - to establish new environmental performance standards through individual permitting actions. However, EPA has proposed amendments to subpart D which would require such a permitting approach. The proposed April 2026 subpart D amendments would result in CCR permits that would effectively become site-specific rulemakings by another name. Such decisions require procedural safeguards equivalent to rulemaking, including a complete administrative record, meaningful public participation, transparent technical analyses, and clear standards governing agency discretion. The 2020 proposal does not include sufficient procedural requirements to issue this type of permit.

A. EPA Would Need To Establish Additional State Program Requirements in Part 124

The role and purpose of state permits would change dramatically if the proposed changes to subpart D are finalized. States would be able to establish, in permits, the minimum criteria required by RCRA section 1008(a) that have historically been established by the Administrator in regulation, for particular CCR units.

Requirements for state CCR permit programs are needed. As noted previously, every federal permit program EPA has cited as a model in the 2020 proposal has regulatory requirements for state permits. The CCR program must do the same. This is even more critical if EPA provides state permit writers with the broad authority to implement RCRA section 1008(a), to establish "national" minimum standards for individual facilities, which must meet the protectiveness standard in RCRA 4004(a). EPA must establish administrative requirements for state programs (which the Interim Final guidance has not done, as guidance cannot establish requirements) both in a sister regulation and in Part 124. They must include equivalent administrative and procedural requirements for all requirements adopted for federal permits. These must include requirements for draft permit, permit modification, public notice and comment, petitions, appeals, administrative record and statements of basis.

B. EPA Would Need To Establish an EPA-Specific Comment Period and Objection Process To Review State Criteria

When approving a state CCR program, the WIIN Act requires that EPA review state program requirements. A state program can either require CCR units to comply with subpart D or with other requirements that EPA determines are at least as protective as subpart D. RCRA 4005(d)(1)(B). If a state program allows substantive requirements to be established in permits, EPA cannot assess the protectiveness of the program without reviewing these requirements in each permit. EPA review must compare the state requirements to subpart D requirements, and the review must occur prior to final issuance of a permit. Even after the permit is drafted, it is subject to change based on public participation and revision. The only way for EPA to evaluate the protectiveness of site-specific requirements, established in a permit issued by an approved state, is to review the permit after it is issued as a draft and amended, as appropriate, in response to any public comments received, but before it is issued as a final permit.

EPA has developed a process for this type of oversight and review of a state permit, in 40 CFR 70.8(c). The process for CAA Title V permit issuance includes a 45-day comment period for EPA (only) to review a permit. This 45-day EPA comment period occurs after a draft permit has been issued for public comment, and then amended as appropriate, but prior to final permit issuance. During the 45-day EPA review period, EPA may object to the permit by specifying the basis for the objection (i.e., the permit term(s) - or the absence of permit terms - which result in a failure to meet statutory or regulatory requirements). In response to EPA's comments, the state may issue an amended, final permit; may re-issue a draft permit addressing all of EPA's comments; or may decide not to issue the permit at all and leave the federal regulations in place. In the case of a permit modification, the state may leave in place the existing state permit to which EPA has not objected or may issue a final permit modification that includes only the modifications to which EPA has not objected. EPA must adopt these procedural requirements in the CCR program if the requirements of state programs are to be established in state permits. This is the only way to satisfy the requirements for EPA review and approval of state program requirements, in accordance with RCRA section 4005(d)(1)(B), when such requirements are established at various times in various permitting actions if the permits are issued after the state program is approved.

C. Additional Specific Errors and Omissions in Proposed Regulatory Text

The administrative procedures in the 2020 proposal are wholly inadequate to implement a permit program in which the permit itself will establish minimum criteria required under RCRA section 1008(a)(3) based on risk assessments. When permits establish substantive environmental standards rather than merely implementing standards established by regulation, the permitting process effectively becomes the primary vehicle for environmental decision making. In that circumstance, EPA must substantially strengthen administrative procedures, public participation, technical documentation requirements, and federal oversight. Otherwise, nationally applicable environmental protections become increasingly dependent upon individual permitting decisions that may vary substantially among facilities and states. Permits like these require additional public notice and oversight. In particular, issuance of a RCRA permit which determines how much groundwater contamination a unit is allowed to contribute to an aquifer would require close coordination with permit programs that are responsible for protecting and restoring those groundwater resources, and the surface waters they often discharge to in the CCR program. The following suggested changes are, at a minimum, what would be required in a permit program to implement the recently proposed changes to subpart D.

1. Part 124 requirements

a. Program overview

Proposed §257.120(a)(6) states that EPA may issue or deny a permit for one or more CCR units at a facility without simultaneously issuing or denying a permit for all the CCR units at the facility. Language must be added to exclude permits that contain requirements based on a risk assessment. The protectiveness standard in RCRA section 4004(a) applies to solid waste management at a facility. The margin of risk that a facility can present before exceeding the threshold established by the protectiveness standard (i.e., that which presents a reasonable probability of adverse effects on health or the environment) applies to all solid waste management at the entire facility. EPA cannot allow a facility to exceed this threshold by creating multiple regulatory schemes (e.g., partial program approvals, multiple federal permits issued to different CCR units at the same facility) that each independently apply the same protectiveness standard multiple times without considering how much of the allowable risk margin has been consumed by the other regulatory actions..

In order to determine whether the protectiveness standard is met, risks from all solid waste (CCR) management at the facility must be considered and quantified together, and assessed for protectiveness together, even if their requirements are not established in the same permit. While it is not necessary for EPA to revisit decisions made under an approved state CCR permit program, the margin of allowed risk consumed by state-approved CCR management must be accounted for in application by EPA of the protectiveness standard when issuing federal permits to the remaining CCR units.[33] The public must have the opportunity to comment on this determination. This precludes issuing a permit only to some CCR units at a facility where other CCR management remains unpermitted, if a risk assessment has only considered risks from certain units.

b. Consolidated permitting

Where a site-specific groundwater protection, closure or corrective action standard is established in a CCR permit, and where the groundwater from the unit migrates to a surface water body within a mile of the CCR unit, that permit must be processed in a consolidated manner with the NPDES permit. See §124.4(c)(1) or (c)(2). Although RCRA section 1008(a)(2) requires that standards established under RCRA section 1008(a) protect groundwater and surface water resources, the proposed amendments to subpart D for risk-based flexibilities provide no such protections. Processing the CCR permit in a coordinated manner with any required NPDES permit that regulates a groundwater discharge to surface water would allow the permittees to design controls or treatment that satisfy all requirements pertaining to the contaminated groundwater.

c. Public participation

Hearings. The changes EPA proposed to public hearing requirements in §124.12(a)(3) must not be adopted in the final rule. EPA proposed to adopt requirements pertaining to permits other than RCRA hazardous waste permits, rather than the requirement applicable to RCRA hazardous waste permits. EPA should have less discretion to deny a request for a public hearing for the type of permits needed if the proposed amendments to subpart D are adopted. Establishing site-specific performance standards based on risk assessments in a permit would involve a series of decisions based on a lengthy record with a large amount of technical information. The number and significance of those decisions warrants public hearing requirements that must be no less stringent than for other RCRA permits. Additionally, EPA should add language that encourages a public meeting in conjunction with the public hearing, when site-specific performance standards are established or modified in the permit, to review and explain the decisions made by the permit writer and the underlying facts that support them.

Public Comment on Permit Application. In the 2020 proposal, EPA declined to adopt procedures in §124.31 for pre-application public notice and public meetings. EPA said that the fact that compliance reports, which would constitute the majority of a permit application, had been available

[33] And vice versa. RCRA 4004(a).

on public compliance websites for years, made public notice and comment on an application unnecessary. If EPA finalizes the proposed amendments to subpart D, the permit content will change and so will the content of the permit applications. The proposed criteria for decision making in §257.100 through §257.112 include information and reports that are not all included in currently required compliance reports, particularly risk assessments and evaluations. This information would be newly developed. An opportunity for public participation on the permit application, before EPA begins drafting a permit, would be appropriate based on the fact that regulatory requirements would be established in the permit based on a complex technical record. This is no less complicated than decisions made in RCRA hazardous waste permits, and similar public participation requirements are appropriate.

Corresponding changes are needed in §257.130(b) to include in the list of information needed for completeness a record of the pre-application public hearing and any comments received, and how they were addressed. If comments were received regarding incompleteness of the permit application, and the alleged incompleteness is not resolved, EPA must explain why the permit application was processed without the additional information in the Statement of Basis that accompanies the draft permit.

d. Permit duration

EPA must amend §257.126 if subpart D amendments are finalized without clearly requiring that any risk assessment underlying permit requirements must be based on all potential future land uses of both the facility and adjacent properties. Risk guidance in EPA cleanup programs require consideration of all potential future land uses, but the April 2026 proposal seemed to allow risk assessment based on current land use. EPN submitted previous comments opposing this and continues to oppose this proposal. However, if EPA chooses to finalize subpart D amendments to allow risk-based approaches in permits without requiring consideration of all potential future land uses, then the risk assessments must be reviewed periodically. Risk assessments based on current conditions, rather than future potential conditions, are subject to change. Any permit that contains a site-specific standard based on such a risk assessment must be re-opened periodically to ensure protectiveness. RCRA section 2006 requires review of regulations every three years; since in this scenario CCR permits serve as rulemakings, a three-year permit term would be consistent with the statute.

e. Application completeness

Information needed to establish permit-based requirements. The proposed standard for permit application completeness in the first paragraph of §257.131 must be changed to include the following bolded language:

> The owner and operator must provide in the application all of the information necessary for the Administrator to determine the applicability of the technical criteria in subpart D of this part to each CCR unit at the facility, to establish the permit conditions necessary to **require each CCR unit to** achieve compliance with these technical criteria, and to **establish any alternate requirements needed to** ensure there is no reasonable probability of adverse effects on health or the environment from the solid waste management of CCR at such facility.

Additional Technical Information. EPA must provide examples in paragraph §257.131(d) that include information necessary to review and determine appropriate permit terms related to location restrictions in §257.60 through §257.64, such as identification of: floodplains, area of seismic activity, wetlands, fault lines, areas of instability.

Requirements to include risk information are needed. EPA must add a paragraph, §257.131(g), to require other information in applications about a CCR facility relevant to risk factors and any criteria finalized in the proposed new section of subpart D (§257.110 through §257.112). This information must be sufficient to determine the applicability of these provisions and to establish permit conditions that require compliance with subpart D. This includes, at a minimum: state classifications of aquifers below the facility in accordance with EPA's 2024 guidance on Beneficial Use Designation at Superfund Sites; nearby public water systems; water quality assessments of nearby surface waters and whether they are threatened or impaired under CWA section 303(d) for pollutants relevant to Appendix III or IV constituents; all reasonably anticipated future land use of the facility (i.e., after the facility is no longer owned by parties who will operate it as a utility) and of all adjacent properties within a mile; all exposure pathways considered in any risk analysis included in the application.

f. Permit conditions

Proposed standard permit conditions must be removed. EPA must delete standard permit conditions in proposed §§257.140(b) and (n). The term in §257.140(b) is related to the issuance of a permit without an expiration date; it requires periodic review and resubmittal of a permit application to ensure that EPA has up-to-date information. As discussed previously, any permit which contains site-specific technical requirements based on a risk assessment that only considered current land use and receptors, in accordance with the April 2026 subpart D proposal, must expire. Even if EPA decides to issue permits that don't expire when the permit terms are not based on a risk assessment, this term would not belong in all permits, and therefore should not be included in §257.140.

Incorporation by reference. The proposed provision in §257.141(b) to allow permit conditions to reference requirements in subpart D rather than detailing them in the permit must not be finalized. Since 2020, EPA has acted to decrease the clarity of requirements in subpart D and to increase the complexity and number of decisions to be made in CCR permits. Extensive, in-depth review of all proposals, statements and evidence in an application must be conducted by the permit writer. The permit writer must consider the statute and case law, as well as numerous agency guidance documents, in order to determine approval or denial of proposed permit content and to explain these decisions in the context of risk in the statement of basis. Rather than incorporating subpart D by reference, the requirements must be clearly stated in the permit and the criteria and information considered by the permit writer must be clearly detailed in the statement of basis. It is not that much work to copy and paste the reg text into a new electronic permit document; this clarity is needed in this new permitting context. The public must be able to identify every applicable requirement, every approved site-specific alternative, and every supporting technical finding within the permit itself without reconstructing the permit writer's decisions from multiple documents.

VIII. Conclusion

EPA must withdraw the current proposal and issue a revised proposal that accurately reflects its current regulatory approach and legal interpretation. The changes required to adapt the February 2020 proposal to align with the new regulatory approach in the April 2026 subpart D proposal are simply too numerous and wide-ranging to be adopted in final regulations without providing public notice of them and an opportunity to comment. Any final federal CCR permitting program must reject omnibus permitting authority and permit-by-rule, establish CCR-specific permitting procedures under 40 CFR Part 124, establish state program-specific administrative procedures for CCR permit under a new subpart in 40 CFR Part 124 or a state counterpart to Part 257 subpart E, and preserve environmental protections through transparent, science-based, and publicly accountable decision-making.

These recommendations are intended to ensure that any final federal CCR permitting program remains faithful to RCRA, as amended by the WIIN Act, the APA, and the fundamental principles of administrative law while continuing to fulfill Congress' mandate of preventing releases from CCR management and protecting health and the environment.