ORAL ARGUMENT SCHEDULED FOR JANUARY 19, 2022

Case No. 20-5174

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WATERKEEPER ALLIANCE, INC., *et al.*,
Plaintiffs/Appellants

v.

MICHAEL REGAN, Administrator, U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendants/Appellees,

and

STATE OF OKLAHOMA, *et al.*,
Intervenor-Defendants/Appellees

Appeal from the U.S. District Court for the District of Columbia
No. 1:18-cv-02230 (Hon. John D. Bates)

FINAL BRIEF OF INTERVENOR-DEFENDANTS/APPELLEES

STATE OF OKLAHOMA, OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY, OKLAHOMA GAS AND ELECTRIC COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA, AND UTILITY SOLID WASTE ACTIVITIES GROUP

(Names and addresses of counsel appear inside cover)

December 3, 2021

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES, AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28 and D.C. Circuit Rules 26.1 and 28(a)(1), Intervenor-Defendants-Appellees hereby certify as follows:

1. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Plaintiffs-Appellants.

2. Ruling Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

3. Related Cases

Plaintiffs-Appellants in this case have also filed a petition for review in this Court, which they have stated is protective. *Waterkeeper Alliance, Inc. v. Regan*, D.C. Cir. No. 18-1266. The Court is holding the petition for review in abeyance.

4. Corporate Disclosure Statements

Oklahoma Gas and Electric Company ("OG&E") is a corporation organized and existing under the laws of the state of Oklahoma, and has its principal office in Oklahoma City, Oklahoma. OG&E is engaged in generating, transmitting, distributing, and selling electric energy to the public in parts of central and eastern Oklahoma and western Arkansas and is a public utility under Section 201 of the

Federal Power Act. OG&E is a wholly-owned subsidiary of OGE Energy Corp., a holding company that is exempt from registration under the Public Utility Holding Company Act of 2005. The common stock of OGE Energy Corp. is publicly traded and listed on the New York Stock Exchange. OGE Energy Corp. has no parent company, and no publicly held company has a ten percent or greater ownership interest in OGE Energy Corp.

Public Service Company of Oklahoma ("PSO") is PSO is an electric utility company serving more than 550,000 customers in eastern and southwestern Oklahoma. PSO has nearly 3,800 megawatts of generating capacity, including wind, gas, and coal-based generation. PSO is a wholly-owned subsidiary of American Electric Power, Inc. ("AEP"), a publicly-owned company. AEP has no parent company, and no publicly held company has ten percent or greater ownership interest in AEP.

The Utility Solid Waste Activities Group ("USWAG") is an association of approximately one hundred and thirty utilities, utility operating companies, and trade associations representing electric companies, utilities, and cooperatives. USWAG represents its members in rulemaking and administrative proceedings before the Environmental Protection Agency under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, and in litigation arising from such proceedings that affect its members. USWAG has no parent company. USWAG does not have any

outstanding securities in the hands of the public, and no publicly held company has a ten percent or greater ownership interest in USWAG.

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GLOSSARY

EPA	United States Environmental Protection Agency
Improvements Act	Water Infrastructure Improvements for the Nation Act
J.A.	Joint Appendix
RCRA	Resource Conservation and Recovery Act

INTRODUCTION

Congress directed the Environmental Protection Agency ("EPA") under the Water Infrastructure Improvements for the Nation Act (the "Improvements Act") to approve state coal ash permitting programs where they are at least as protective as the federal regulations. EPA faithfully implemented that directive in approving Oklahoma's coal ash program, which incorporates the federal regulations—including various public participation and public posting requirements—and adds an additional layer of state oversight that goes beyond the federal regulations.

Plaintiffs-Appellants (collectively, "Waterkeeper") lob various challenges to EPA's approval of Oklahoma's coal ash program under the Improvements Act, but they are nothing more than expression of their general disdain for state-implemented coal ash programs. Waterkeeper has opposed EPA's attempt to approve *any* state coal ash program, including Oklahoma's and subsequently those of Texas and Georgia, and has registered its distrust in state-implemented coal ash programs in related federal coal ash rulemakings.[1] This persistent and unfounded

[1] *See* J.A. 201-07 [Comment submitted by Jennifer Cassel, Earthjustice et al., EPA-HQ-OLEM-2017-0613-0044] (urging denial of Oklahoma coal ash permit program); Comment submitted by Zachary M. Fabish, Senior Attorney, Sierra Club, EPA-HQ-OLEM-2018-0533-0371 (urging denial of Georgia coal ash permit program); Comment submitted by Dru Spiller, Assistant Attorney, Sierra Club et al., EPA-HQ-2020-0508-0038 (urging denial of Texas coal ash permit program); Comment submitted by Lisa Evans, Earthjustice et al., EPA-HQ-OLEM-2017-0286-2136, at 95 ("Where states have been presented with information about harm to human health or the environment from [coal ash] units, they have often turned a

challenge to EPA's faithful implementation of the Improvements Act runs afoul of Congressional directive and was accordingly rejected by the district court, and should be rejected here again.

STATUTES AND REGULATIONS

Except for the statutes contained in the addendum to this brief, all pertinent statutes and regulations appear in the brief and addendum of Plaintiffs-Appellants Waterkeeper.

STATEMENT OF THE CASE

I. Regulation of Coal Combustion Residuals in Oklahoma

Even before Congress enacted the Resource Conservation and Recovery Act (RCRA), Pub. L. No. 94-580, § 2, 90 Stat. 2795 (1976), Oklahoma regulated solid waste management within its borders to "protect the public health and welfare" and "prevent water pollution or air pollution." 1970 Okla. Sess. Laws c. 69, § 2. It did so by creating a regulatory framework that required a permit for the disposal of solid wastes and prohibited disposal without a permit. *Id.* The first state permit for a coal combustion residuals ("coal ash") landfill was issued in 1978. J.A. 283 [DEQ Process Response Clarifications, EPA-HQ-OLEM-2017-0613-0055, at 8].

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blind eye or rubber-stamped inadequate plans that reduce pollution only minimally, if at all.").

Meanwhile, although Congress passed RCRA in 1976, the Environmental Protection Agency (EPA) did not promulgate any regulations specifically concerning coal ash disposal for nearly forty years thereafter.[2] Indeed, in 1980, Congress exempted coal ash from hazardous waste regulation under RCRA Subtitle C until EPA further studied the issue and reported to Congress. *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 39 (D.D.C. 2013). The EPA "concluded that coal combustion waste streams generally do not exhibit hazardous characteristics under [1988] RCRA regulations … [and that] current waste management practices appear to be adequate for protecting human health and the environment." Report to Congress: Wastes from the Combustion of Coal by Electric Utility Power Plants, EPA at 7-11 (1988). EPA then issued two regulatory determinations, in 1993 and 2000, finding that while coal ash did not warrant regulation as hazardous waste, EPA should instead develop federal non-hazardous waste regulatory controls. 58 Fed. Reg. 42,466 (Aug. 9, 1993); 65 Fed. Reg. 32,214 (May 22, 2000). However, following the 2000 regulatory determination, little was done in terms of federal regulation of coal ash. *See Appalachian Voices*, 989 F. Supp. 2d at 39-40.

[2] Until that time, coal ash disposal was subject to the general "criteria for classification of solid waste disposal facilities and practices" at 40 C.F.R. Part 257, Subpart A.

During this time, Oklahoma was actively regulating coal ash disposal.[3] To consolidate and streamline environmental regulation in Oklahoma, the Legislature enacted the Oklahoma Environmental Quality Act and the Oklahoma Uniform Environmental Permitting Act (the "Uniform Permitting Act"). 1992 Okla. Sess. Laws p. 2059, *as amended by* 1993 Okla. Sess. Laws p. 392; 1994 Okla. Sess. Laws p. 1870. In addition to providing a uniform process for environmental regulation enforcement, the Uniform Permitting Act also provides "for uniform permitting provisions regarding notices and public participation opportunities that apply consistently." Okla. Stat tit. 27A, § 2-14-102.

In 2015, EPA promulgated its first-ever rule directly regulating coal ash disposal. J.A. 104 [80 Fed. Reg. 21,302 (Apr. 17, 2015), *codified at* 40 C.F.R. Part 257, Subpart D]. Regulated under RCRA's Subtitle D nonhazardous waste program, this rule relied on "self-implementing" regulation, meaning the facilities themselves are responsible for ensuring compliance with the federal standards. *Id.* at 21,330-39. Specifically, "the rule does not require permits, does not require states to adopt or implement these requirements, and EPA cannot enforce these requirements." *Id.* at 21,309; *see also* J.A. 170 [83 Fed. Reg. 30,356, 30,360 (June 28, 2018)] (the federal "rules were meant to be implemented directly by the regulated facility, without the

[3] *See, e.g.*, J.A. 281 [DEQ Process Response Clarifications, EPA-HQ-OLEM-2017-0613-0055, at 6] (recounting groundwater monitoring activities at coal ash site since 1994).

oversight of any regulatory authority"). Accordingly, when promulgated, the only means of enforcing the federal coal ash disposal requirements was through citizen or state suits. J.A. 106 [80 Fed. Reg. at 21,309]. To facilitate such suits, the rule included public website and annual reporting requirements. J.A. 118 [*Id.* at 21,399].

In contrast, Oklahoma's permitting regime is not dependent solely on citizen enforcement. Under a permitting system, the state can both respond to citizen concerns through a comprehensive complaint process, *see* Okla. Stat. tit. 27A, §§ 2-3-101(F), 2-3-202(A)(3),[4] *and* exercise its own authority to inspect and ensure compliance with the terms of the permit. Specifically, the Oklahoma Department of Environmental Quality (the "Department") maintains the authority to access facilities to investigate any alleged violations of disposal regulations, as well as conduct inspections of construction, operation, closure, and maintenance of coal residual units and the collection of scientific samples. *See id.* §§ 2-3-202, 2-3-501, 2-10-202(A)(4)-(5).

If the Department finds or suspects any violation, it has a wide variety of enforcement mechanisms at its disposal. For example, the Department can issue a

[4] "An entire division of [the Department], Environmental Complaints and Local Services (ECLS), is devoted to investigating and resolving citizen complaints." J.A. 276 [DEQ Process Response Clarifications, *supra* n.2, at 1]. In addition, the Department maintains a 24/7 environmental complaints hotline that sends complaints to local field personnel for rapid response. The hotline number is prominently displayed on DEQ's website's home page. http://www.deq.state.ok.us/.

notice of violation, which may take the form of warning letters, inspection notices, consent orders, or final orders. *Id.* § 2-3-502; Okla. Admin. Code § 252:4-9-1; *see also* J.A. 279, 284-85 [DEQ Process Response Clarifications, *supra* n.2, at 4, 9-10]. The latter two typically include delineated tasks and deadlines and may include punitive measures such as cash penalties. *See* Okla. Admin. Code § 252:4-9-2; Okla. Stat. tit. 27A, § 2-3-502. Consent orders are legally enforceable documents that require facilities to comply with regulations during a time in which they are in non-compliance, seeking a permit, or awaiting approval of permit modification. *See generally* Okla. Stat. tit. 27A, § 2-3-502. The Department also oversees remediation efforts. *Id.* § 2-10-202(A)(4). And regulated entities are subject to action in state court for injunctive relief, civil penalties, and criminal prosecution. *See id.* § 2-3-504.

Faced in 2015 with new federal regulation of coal ash—an environmental issue Oklahoma regulated for decades—Oklahoma had several options. Oklahoma could have stayed course and allowed the new federal requirements to be self-implementing while also operating its own permit regime that had separate requirements and standards. Alternatively, it could have repealed the state permit regime, or adopted and mirrored the new federal regime, and thus allowed coal ash to be regulated solely by a self-implemented regulatory structure governed by the federal regulations. Instead, Oklahoma chose a third option that would provide

greater oversight, enforcement authority, and environmental protection than the first two: on September 26, 2016, the Department promulgated a permitting program that adopted all the EPA Part 257 coal ash substantive requirements, but did so within a permitting, rather than self-implementing, regulatory enforcement structure. *See* Okla. Admin. Code § 252:517-1-1 *et seq.* And in some instances, the substance of Oklahoma's rules is more stringent than the federal rules. *See, e.g.*, J.A. 170-71 [83 Fed. Reg. at 30,360-61] (threatened and endangered species protections); J.A. 177 [EPA Comment Summary and Response, EPA-HQ-OLEM-2017-0613-0073, at 3] (public water supply, recreation areas, and scenic river protections); Okla. Admin. Code § 252:517-7-1 *et seq.* (subsurface investigation requirements); Okla. Admin. Code § 252:517-17-1 *et seq.* (financial assurance requirements).[5]

In December 2016, after Oklahoma proactively adopted these new coal ash regulations, Congress enacted the Improvements Act, amending RCRA. *See* Pub. L.

[5] In addition to the requirement of permits, the State's permitting program goes beyond the self-implementing regulatory structure by requiring regulated entities to submit ongoing reports and updates to the Department for review and approval. *See* Okla. Admin. Code § 252:517-9-1(g) (requiring submittal of annual groundwater monitoring and corrective action reports to the Department for approval); Okla. Admin. Code §§ 252:517-11-4(a)(2)(c), 252:517-11-5(a)(2)(c) (requiring submittal of the initial hazard potential classification assessment and each subsequent periodic classification assessment to the Department for approval); and Okla. Admin. Code §§ 252:517-11-4(d)(4), 252:517-11-5(d)(4) (requiring submittal of the initial structural stability assessment and each subsequent periodic assessment to the Department for approval).

No. 114-322, § 2301, 130 Stat. 1628, 1736-40 (codified at 42 U.S.C. § 6945(d)). Under the Improvements Act, States may submit to the EPA Administrator for approval "a permit program … for regulation by the State of coal combustion residuals units that are located in the State that, after approval by the Administrator, will operate in lieu of regulation of coal combustion residuals units in the State by" the Part 257 rules or by a future federal permitting program. 42 U.S.C. § 6945(d)(1)(A). The Administrator must approve a submitted state program within 180 days if the program requires coal ash disposal facilities within the state to comply either with "the applicable criteria for coal combustion residuals units under part 257" or other criteria "at least as protective as" the Part 257 criteria. *Id.* § 6945(d)(1)(B).

Following approval, the Administrator must again review a State coal ash permitting program under a variety of circumstances:

- Within at least 3 years after EPA revision of the Part 257 rules,
- Within at least 1 year after any significant unauthorized release from a coal ash disposal facility,
- Upon request of any other state alleging to be at risk from coal ash disposal facilities located in the approved state, and
- In any event, at least once every 12 years.

Id. § 6945(d)(1)(D)(i). The Improvements Act gives a State the right to notice and an opportunity to be heard if the Administrator determines that revision in the State program is necessary to be as protective as Part 257, that the State has not implemented a permitting program as protective as Part 257, or that the State has approved or failed to revoke a permit for a facility from which a release puts another state at risk. *Id.* § 6945(d)(1)(D)(ii). If the State fails to correct such deficiencies after notice and public hearing, the Administrator may withdraw approval of a State permit program, with reinstatement after the deficiencies have been corrected. *Id.* § 6945(d)(1)(E).

Oklahoma, having already adopted all the Part 257 substantive requirements into the state permitting program, submitted its program for the Improvements Act approval on August 3, 2017. J.A. 167 [83 Fed. Reg. at 30,357]. After a notice and comment period, EPA formally approved Oklahoma's permitting program on June 28, 2018. J.A. 166 [*Id.* at 30,356].

II. Procedural History

After EPA approved Oklahoma's program as at least as protective as EPA's Part 257 rules, this Court decided *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018). That decision vacated discrete portions of the Part 257 rules, all relating to regulation of existing surface impoundments, remanding those regulations for further consideration by EPA. *See id.*

Appellants in this case then brought suit challenging EPA's approval of Oklahoma's permitting program under the Improvements Act. The State of Oklahoma, its Department of Environmental Quality, as well as several industry participants, intervened in this suit. On summary judgment, the court below partially vacated and remanded EPA's approval of Oklahoma's program to the extent Oklahoma's program was inconsistent with RCRA as interpreted by this Court's decision in *Utility Solid Waste Activities Group*. J.A. 85-88 [Mem. Op. at 11-14]. But the district court rejected Appellants' challenges to the remainder of EPA's approval related to public participation requirements and to Oklahoma's law that regulates solid waste entities operating under permit requirements for the life of the regulated facility. J.A. 89-99 [Mem. Op. at 15-25].

Since the decision below, EPA made changes to its Part 257 rules in light of *Utility Solid Waste Activities Group*, requiring unlined impoundments to retrofit or close, classifying clay-lined coal ash surface impoundments as unlined, establishing a date by which unlined surface impoundments and those that fail to meet aquifer restriction requirements must close, and providing alternative closure provisions for certain impoundments. 85 Fed. Reg. 53,516 (Aug. 28, 2020). Oklahoma incorporated these updated federal rules into the State's coal ash program, and the new rules became effective on September 15, 2021. 38.24 Okla. Reg. 1810 (Sept. 1, 2021).

Oklahoma, however, has not reflexively adopted all the new federal regulations to be part of Oklahoma's permitting program, instead sometimes choosing more stringent standards or those better suited to local conditions. For example, the new federal rules allow for the State Director to issue a certification in lieu of a professional engineer, 83 Fed. Reg. 36,435, 36,436 (July 30, 2018), but Oklahoma declined to add this rule, preferring to have professional engineers make such determinations as contemplated in the original 2015 federal coal ash regulations. *See* Solid Waste Management Advisory Council January 14, 2021 Meeting Minutes at 22. Oklahoma also did not adopt a rule that would allow State Directors flexibility to suspend groundwater monitoring requirements if there is evidence that no potential for migration of hazardous constituents to the uppermost aquifer during the active life of the unit and during post-closure care, 83 Fed. Reg. at 36,436, because Oklahoma does not have geological conditions that would make it possible for the "no migration" condition to apply. *See* Solid Waste Management Advisory Council Jan. 14, 2021 Meeting Minutes at 22-23. Having adopted new rules that are at least as protective as the new federal rules, the Department is currently in the process of preparing an application for EPA approval of the revised program. *See* 42 U.S.C. § 6945(d)(1)(D)(i)(II).

During the litigation below, three coal ash disposal facilities contained surface impoundments. J.A. 71 [Ex. 1, Young Decl. ¶ 5]. Since then, one surface

impoundment has completed a "clean closure," meaning that all coal ash was removed and disposed of at an approved landfill, and all affected areas were decontaminated as confirmed by groundwater monitoring protocols. *See* Okla. Admin. Code § 252:517-15-7(c). Another impoundment was comprised of two units: one of the units has completed a clean closure, and the other unit is currently in the process of clean closure. The third and final impoundment is operating under a consent order, and it will close no later than October 17, 2028, under the alternative closure requirements associated with the permanent cessation of its remaining coal-fired boiler.

SUMMARY OF ARGUMENT

I. Waterkeeper's RCRA citizen-suit claim fails because it is premised on the faulty argument that RCRA's omnibus public participation provision at 42 U.S.C. § 6974(b)(1) imposes a non-discretionary duty for EPA to promulgate public participation regulations as a pre-condition to EPA's approval of state coal ash permit programs under the Improvements Act. Nothing in the plain language of that provision requires EPA to promulgate such regulations in the first instance, let alone establishes a statutory pre-condition for EPA to approve state coal ash permit programs under the Improvements Act.

Even assuming, for purposes of argument, that RCRA requires promulgation of such regulations, the Agency met this requirement when it promulgated the

federal coal ash rule in 2015. EPA did this by requiring facilities under the rule to post compliance information on publicly available websites and requiring public meetings in specified circumstances, and in so doing specifically referenced § 6974(b)(1) as the authority for this public participation element of the rule. Under the Improvements Act, state coal ash permit programs must include, at a minimum, these public participation provisions. There is no statutory basis for Waterkeeper to argue that EPA must set *different* public participation standards for state coal ash permit programs than for the federal program. Because EPA has promulgated valid public participation regulations under the federal coal ash rule, which apply equally to state permit programs under the Improvements Act, Waterkeeper's claim that EPA failed to promulgate public participation regulations prior to approving state permit programs—and that therefore the Agency's approval of the Oklahoma state coal ash permit program was unlawful—must be rejected.

II. EPA acted reasonably and well within its discretion in determining that Oklahoma's robust public participation in coal ash permit program meets the generalized language of RCRA's public participation provision in 42 U.S.C. § 6974(b)(1). This provision, which provides in relevant part that "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be

provided for, encouraged, and assisted by the Administrator and the States," speaks in broad generalities and does not specify any particular statutory pre-requisites. Nonetheless, Waterkeeper contends that Oklahoma's public participation program is not enough to satisfy RCRA all while providing no legal measure against which to judge it.

Even assuming, for purposes of argument, that this broad statutory directive is even justiciable, Oklahoma's public participation regime provides ample notice and opportunity for public comment and involvement throughout the issuance and amendment process for coal ash permits in the State and goes beyond the public participation elements of the federal coal ash rule. EPA's approval of this mature and well-developed public participation program as consistent with RCRA's broad public participation provision is well-supported by the record.

III. The Improvements Act does not preclude Oklahoma's so-called "permits for life" regulatory regime. These permits are a protective regulatory mechanism for ensuring that coal ash permittees comply with all applicable regulatory conditions throughout the existence of the permitted coal ash unit. Waterkeeper's argument that such permits are somehow fixed in time and cannot change to stay abreast with changes in the federal coal ash rule is incorrect.

The Improvements Act establishes a statutory mechanism for ensuring that approved state coal ash programs update their regulations as necessary to remain as

protective of the federal coal ash rules or risk losing approval and having EPA reinstitute statutory control under the federal coal ash rule. And under Oklahoma's coal ash permit program, permittees are subject to all applicable laws and rules, including "afterwards as changed." In fact, since EPA's approval of its coal ash permit program, Oklahoma has updated its coal ash permit conditions on several occasions to reflect changes in the federal coal ash rule. This process is compliant with Congress's directive in the Improvements Act, which EPA and Oklahoma have faithfully implemented.

ARGUMENT

Intervenors recognize that, pursuant to D.C. Circuit Rule 28(d), an intervenor brief must avoid repetition of facts or legal arguments made in the principal appellee's brief. Upon reviewing EPA's Response Brief filed October 12, 2021, Intervenors believe that EPA has comprehensively addressed the challenges raised by Waterkeeper in Section V (failure to respond to public comments) of its Opening Brief as well as the jurisdictional question raised by the Court. Thus, the arguments presented below respond only to the arguments raised in Sections I and II (failure to promulgate public participation guidelines) and Sections III and IV (adequacy of Oklahoma coal ash permit program) of Waterkeeper's Opening Brief.

I. EPA has issued public participation guidelines for state coal ash permit programs.

RCRA does not require the Agency to promulgate binding regulations for public participation in state coal ash permit programs. As detailed in EPA's Brief, RCRA does not require publication of coal ash public participation guidelines prior to approving state programs under the Improvements Act and, to the extent EPA must issue guidelines for public participation in state coal ash permit programs, it met this requirement when it issued the Interim Final Guidance. *See* Fed. Appellees' Br. 20-32.

But even if EPA was required to promulgate binding public participation *regulations* applicable specifically to coal ash programs, it met this requirement when it promulgated the coal ash rule. The public participation procedures in 42 U.S.C. § 6974(b)(1) apply to the implementation and enforcement of "any regulation" under RCRA, including EPA's self-implementing coal ash rule. Thus, to the extent RCRA requires public participation regulations rather than guidelines, EPA met this obligation with regard to the coal ash program when it developed the federal coal ash rule.[6]

[6] Unlike its challenge to EPA's final approval of the Oklahoma state coal ash permit program, the Court is not limited to legal rationales proffered in a rulemaking when evaluating Waterkeeper's claim that EPA failed to fulfill a non-discretionary duty to promulgate public participation guidelines under 42 U.S.C. § 6974(b); rather, a non-discretionary duty claim is a question of statutory interpretation. *See, e.g.*, *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225,

Specifically, EPA met this aspect of RCRA by requiring facilities to post compliance information on publicly available websites and requiring public meetings in limited circumstances. *See* J.A. 115-16 [80 Fed. Reg. at 21,338-39] (noting that its authority to require posting of coal ash compliance data on company websites stems from § 6974(b)(1)). These federal regulations require hearings for corrective action decisions, 40 C.F.R. § 257.96(e), a process for fugitive dust complaints, *id.* § 257.80(b)(3), (c), and online posting of key documents related to the design and operation of the coal ash unit, *id.* § 257.107. EPA explained that the federal rule's "'transparency' requirements serve as a key component by ensuring that the entities primarily responsible for enforcing the requirements [of the coal ash rule] have access to the information necessary to determine whether enforcement is warranted." J.A. 116 [80 Fed. Reg. at 21,339].

Waterkeeper cannot now argue that the public website posting and public meeting provisions in the coal ash rule fail to meet any obligation EPA may have with respect to public participation guidelines under 42 U.S.C. § 6974(b). After all, following promulgation of the coal ash rule, Plaintiff-Appellant Waterkeeper Alliance challenged the coal ash rule's public website posting requirements as not

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227 (D.C. Cir. 2009); *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 95 (D.D.C. 2001). Thus, the arguments herein properly provide additional rationales supporting EPA's actions.

sufficient to meet the requirements of 42 U.S.C. § 6974(b). The challenge was rejected by this Court. *Utility Solid Waste Activities Group*, 901 F.3d at 434-35.

Nor does Waterkeeper dispute that the Improvements Act requires state permit programs to either mirror the federal coal ash rule or be as protective as those provisions, meaning that, at most, Congress intended any state coal ash permit program must provide for an equivalent level of public participation as the federal rule. Oklahoma's public participation requirements are far more robust than the federal requirements described above. *See infra* Part II.

Instead, Waterkeeper apparently believes that EPA must set *different* public participation standards for state coal ash permit programs than for the federal program. But there is no support for this in the statute.

The Improvements Act states that a state coal ash permit program must be approved by EPA if the program requires compliance with "the applicable criteria for coal combustion residuals units under part 257 of title 40, Code of Federal Regulations" or "such other State criteria that the Administrator, after consultation with the State, determines to be as least as protective as the criteria" in 40 C.F.R. Part 257. 42 U.S.C. § 6945(d)(1)(B). This language contains no carve out for public participation requirements. Congress was aware of the coal ash rule provisions at the time it passed the Improvements Act. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is

knowledgeable about existing law pertinent to the legislation it enacts."). If it had intended EPA to issue additional public participation guidelines specifically for state coal ash permit programs, it would have said so. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

In fact, because the coal ash rule when originally promulgated was designed to be self-implementing, the federal coal ash rule should in theory impose more exacting public participation requirements than would be necessary for permit programs with built-in governmental oversight. As EPA explained: "Under [RCRA], EPA must establish national criteria that will operate effectively in the absence of any guaranteed regulatory oversight (*i.e.*, a permitting program), to achieve the statutory standard of 'no reasonable probability of adverse effects on health or the environment' at all sites subject to the standards." *See* J.A. 117 [80 Fed. Reg. at 21,371]. Thus, the original coal ash rule program required more detailed public participation and notification requirements because it relied on the public to oversee implementation of the coal ash rule. *Id.* at 21,338-39. As a result, the coal ash rule in conjunction with the Improvements Act requires states to adopt standards at least as protective as the robust federal rule to obtain EPA approval of their state coal ash permit programs. It is nonsensical to argue, as Waterkeeper

evidently does, that the Improvements Act silently requires separate and higher public participation requirements for state permitting programs than for the federal self-implementing rule.

In short, the Improvements Act demands that state permit programs mirror the federal rule's public participation elements or contain a scheme that is as protective. To the extent EPA was required to issue binding regulations governing public participation in the implementation of the coal ash rule—including through state coal ash permit programs—it did so when it promulgated the coal ash rule in 2015. For this additional reason, Waterkeeper's claim that EPA failed to promulgate public participation regulations prior to approving state permit programs—and that therefore the Agency's approval of the Oklahoma state coal ash permit program was unlawful—must be rejected.

II. Oklahoma's robust public participation provisions do not render EPA's approval arbitrary and capricious.

Waterkeeper challenges EPA's approval as violating 42 U.S.C. § 6974(b)(1), which states in relevant part: "Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." This highly generalized language gives EPA and the States the widest of discretion in fashioning public participation opportunities. *See* Fed. Appellees' Br. 33-39; J.A. 90-92 [Mem. Op. at 16-18]. Indeed, such

discretion is so wide as to render whether EPA has complied with the provision nonjusticiable because of a "clear absence of judicially manageable standards" to adjudicate whether that discretion has been properly exercised. *Reynolds v. Sims*, 377 U.S. 533, 582 (1964); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019); *City of Dover v. U.S. E.P.A.*, 956 F. Supp. 2d 272, 282-83 (D.D.C. 2013) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

To put a finer point on it, does RCRA specifically require public access to permitting documents? Online posting of those documents? Pre-approval public notice? Opportunity for public comment? A public hearing? Multiple public hearings? A full and formal trial-like procedure for every major and minor permitting action? The text of RCRA does not speak to any of these things, yet Waterkeeper contends that Oklahoma's public participation program is not enough to satisfy RCRA all while providing no legal measure against which to judge it.

Regardless, Oklahoma's public participation regime is robust, has stood the test of time across multiple environmental regulatory programs, and goes beyond the public participation elements of the federal coal ash rule. EPA's approval of them as consistent with § 6974(b)(1) is by no means arbitrary.

A. Oklahoma's coal ash permit program incorporates a robust public participation regime.

As described earlier, Oklahoma's coal ash public participation rules stem from the Uniform Permitting Act, which functions to "provide for uniform

permitting provisions regarding notices and public participation opportunities that apply consistently and uniformly to applications for permits and other permit authorizations issued by the Department of Environmental Quality." Okla. Stat. tit. 27A, § 2-14-101. All of Oklahoma's environmental permits, including coal ash permits, are subject to the Uniform Permitting Act and its implementing regulations, which has been in use for decades. *Id.* §§ 2-14-101 *et seq.*; Okla. Admin. Code 252:4, subchapter 7.

The Uniform Permitting Act utilizes a three-tiered system that provides public participation opportunities specifically tailored to the type of regulated activity at issue. The most significant actions are given the most public participation process. *See* Okla. Stat. tit. 27A, § 2-14-201(B)(1)(a) (requiring that "the significance of the potential impact of the type of activity on the environment" be one of four factors in determining tiered level of public participation).

Tier III permitting includes multiple opportunities for public participation. *See* J.A. 184 [EPA Comment Summary and Response, EPA-HQ-OLEM-2017-0613-0073, at 10]; Okla. Admin. Code § 252:4, App'x C (Permitting Process Summary). The public first receives notice of application filing, Okla. Stat. tit. 27A, § 2-14-301(A), which includes the right to request a process meeting—a meeting open to the public, held by the Department, to explain the permitting process and public participation opportunities, *id.* § 2-14-103(5). Public

participation in the process continues with a notice of draft permit or draft denial and an opportunity for the public to provide written comment to the Department as well as an opportunity to request a formal public meeting. *Id.* § 2-14-302. And of course, notice is also given to alert the public about any such meeting. *Id.* § 2-14-303(1). The Department will issue a response to comments along with either (1) a denial of permit application or (2) *another* notice of proposed permit and the right to request a formal administrative permit hearing before an administrative law judge prior to issuance of a permit. *Id.* § 2-14-103(11). Upon final issuance or denial of a permit for a Tier III application, the Department provides public notice of the final permit decision and the availability of the response to comments, if any. *Id.* § 2-14-304(F). All notices described above are published in a local paper of general circulation in the county where the facility is located and the permitting documents (*e.g.*, applications, draft permits, and proposed permits) are placed in a local building open to the public, like a local public library, for the local public to review. *Id.* §§ 2-14-301, 302, 304. In the coal ash context, for example, Tier III applications are required for new permits for off-site units and significant modifications of off-site permits. Okla. Admin. Code § 252:4-7-60.

Tier II permitting similarly includes many of the public participation rights detailed above, such as notice of permit application filing, notice of draft permit or draft denial, opportunity for the public to provide written comment, and

opportunity for a formal public meeting. Okla. Stat. tit. 27A, § 2-14-103(10). Tier II applications pertain to new permits for on-site coal ash units and non-Tier I modifications of on-site coal ash permits. Okla. Admin. Code § 252:4-7-59. Past examples of Tier II applications include facility proposals to modify a unit's liner or to change the waste type. *See* J.A. 288 [DEQ Process Response Clarifications, *supra* n.2, at 13].

Tier I is a basic process for only the most routine activities that requires application, notice to the landowner, and review by the Department. Okla. Stat. tit. 27A, § 2-14-103(9). Tier I applications address issues such as minor modifications and approval of technical plans. Okla. Admin. Code § 252:4-7-58; *see also, e.g.*, *id.* § 252:4-7-58(2)(A)(iv) (administrative modification of all permits and other authorizations); *id.* § 252:4-7-58(3)(B) (permit transfers); *id.* § 252:4-7-58(3)(D) (technical plans). Tier I is for "those things that are basically administrative decisions which can be made by a technical supervisor." J.A. 92 [Mem. Op. at 18] (quoting J.A. 168 [83 Fed. Reg. at 30,358]).

Moreover, Oklahoma provides for public participation in the reconsideration of a final permit decision. Specifically, a party who filed comments on a draft permit or participated in the public hearing for the permit may seek reconsideration of a final permit decision, where the final permit decision allegedly interferes with the legal rights of the party seeking review. Okla. Admin. Code §§ 252:4-9-32(e),

252:4-7-20. Such reconsideration decisions, or refusals to reconsider, are subject to judicial review. *Id.* § 252:4-9-32(e)(5); Okla. Stat. tit.75, § 307. Similarly, citizens have a right to be notified whenever the Department seeks to revise its regulations, Okla. Stat. tit. 27A, § 2-10-201(B), and of course the Department provides opportunities for the public to participate in the rulemaking process, Okla. Admin. Code § 252:4-5-5 (right to comment at rulemaking hearing). And regardless of tier level, Oklahoma invites public participation through a complaint process. Okla. Stat. tit. 27A, §§ 1-1-204, 2-3-101(F)(1), 2-3-104; Okla. Admin. Code § 252:4-11-1 to 4-11-6 (right to file a complaint); *id.* § 252:4-11-5(b) (right to participate in mediation of unresolved complaint); *see also supra* n.3 and accompanying text; Fed. Appellees' Br. 44. Thus, the court below correctly held that "approval of these elaborate public participation measures as part of Oklahoma's plan cannot be considered arbitrary or capricious." J.A. 92 [Mem. Op. at 18].

A key component of the tiered system is that it matches the level of available opportunities for public participation to the significance of the proposed change. By utilizing a tiered system to classify permitting events, appropriate levels of public participation are supported and encouraged within a framework that provides for efficient processing of permit applications without undue delay. Thus, although they are the focus of Waterkeeper's attacks, Tier I applications have fewer public participation opportunities as a matter of regulatory efficiency. "Tier I

is the category for those things that are basically administrative decisions which can be made by a technical supervisor with no public participation except for the landowner." Okla. Admin. Code § 252:4-7-2. The Tier I designation that Waterkeeper complains of does not indicate a flaw; rather, it evidences the fact that Oklahoma's tiered permitting regime prudently recognizes and acknowledges the difference between a ministerial decision and a significant modification. And public participation opportunities are tailored accordingly. There is no fault in that.

Recent public participation in regulation of Oklahoma coal ash facilities provides a good example of the tiered system at work. Following the change in Oklahoma's coal ash regulations in 2016, permit applications at all three tier levels were filed with the Department so that the five coal ash facilities in Oklahoma would be brought into compliance. *See* J.A. 71-72 [Ex. 1, Young Decl. ¶¶ 7-10]. For example, one of the facilities filed a Tier III application for a new permit with the Department. J.A. 71-72 [*Id.* ¶ 7]. A Tier III permit application was required because the facility was an existing coal ash landfill that had not previously been permitted by the Department of Environmental Quality, but instead by the Department of Mines. *Id.* Published documentation included: the Tier III application; notice of the filing of the application; the Department's notice of deficiency, identifying 15 items for revision; applicant's revisions in response to the notice of deficiency; the draft permit; notice of the draft permit, including

notice of the opportunity for a public meeting (none was requested); revised maps; public comments; the Department's response to public comments; and notice of the proposed permit, including notice of the opportunity to request an administrative hearing. J.A. 72 [*Id.* ¶ 10].

Meanwhile, Tier II applications were filed on behalf of three facilities seeking permits for existing surface impoundments. J.A. 72 [*Id.* ¶ 8]. All of the Tier II applications were published on the Department's website and were reviewed by the Department. J.A. 72 [*Id.* ¶¶ 8, 10].

Finally, the Department processed Tier I modifications at three facilities, which granted permit modifications for existing coal ash landfills. J.A. 72 [*Id.* ¶ 9]. All existing landfills that had permits were processed under Tier I because they were already regulated under Oklahoma's solid waste management rules, prior to Oklahoma's adoption of the 2016 coal ash rules. Since the previous solid waste management program for landfills and the current coal ash program are substantially the same, the permit changes were at best ministerial, not substantive.

Waterkeeper zeroes in solely on one of these landfill permit modifications, *see* Appellants' Br. 42-44, but as explained, because these modifications were only to transition the permits between two nearly identical permit regimes, they were administrative changes at best. *See also* J.A. 173 [83 Fed. Reg. at 30,363]. While Waterkeeper raises hypothetical concerns about the technical plans at issue in this

permit, neither Waterkeeper nor the public at large are without opportunities to raise those concerns to the Department: again, all these documents are public and any member of the public can submit comments through the Department's complaint process, requiring formal response by the Department.

The proven adequacy of Oklahoma's public participation system is also demonstrated by its broad application to multiple environmental programs. *See* Okla. Stat. tit. 27A, §§ 2-14-102; 2-14-104; *cf. also* J.A. 172 [83 Fed. Reg. at 30,362] (Oklahoma's public participation program for coal ash facilities is "consistent with the requirements for all other Oklahoma solid waste disposal facilities"). In fact, all of Oklahoma's environmental permitting programs are built upon the Uniform Permitting Act. To be sure, some programs incorporate heightened federal public notice and participation requirements that are not present in the coal ash program, but this is because that level of public participation is required in order for those programs to be federally delegated. *See* Okla. Admin. Code § 252:4-7-13(f) (requiring applicants for NPDES permits, RCRA permits, and Underground Injection Control permits to comply with additional notice provisions of federal requirements adopted by reference as the Department's rules); *id.* § 252:4-7-13(g) (requiring applicants for Clean Air Act permits to comply with additional notice provisions). But unlike those other federally delegated programs, RCRA does not specify any particular requirements for public

participation opportunities in coal ash regulation that Oklahoma has not already provided. *See* Fed. Appellees' Br. 34, 36-37.

Thus, as a matter of both law and experience, Oklahoma's coal ash permitting program provides for extensive and context-sensitive public participation. Even if a standard for public participation compliant with 42 U.S.C. § 6974(b)(1) was ascertainable, EPA's approval of Oklahoma's program was by no means arbitrary and capricious.

B. Oklahoma's permit program exceeds the public participation process under the federal coal ash rule.

To the extent that RCRA imposes any justiciable public participation requirements on state programs in order to be approved, it is that state programs must be "at least as protective as" the federal coal ash rules. 42 U.S.C. § 6945(d)(1)(B). Oklahoma has met and exceeded that standard. In fact, Waterkeeper will not be better off in the absence of Oklahoma's public participation program; rather, they will have fewer opportunities to participate in coal ash disposal regulation. The current alternative is the federal "self-implementing" program that does not require, as compared to Oklahoma's program, facilities to provide as much notice, comment opportunities, public hearing rights, or efficient complaint and dispute resolution mechanisms beyond the costly and time-consuming citizen suit remedy. Far from failing to meet RCRA's general public participation requirements under 42 U.S.C. § 6974(b)(1),

Oklahoma's permit program exceeds any public participation process set forth in RCRA.

The public participation procedures in 42 U.S.C. § 6974(b)(1) apply to the implementation and enforcement of any regulation under RCRA, including EPA's self-implementing coal ash rule. As argued above, to the extent RCRA requires EPA to publish public participation requirements via regulation rather than guidelines, EPA met its public participation obligations with regard to the coal ash program when it developed the federal coal ash rule. *See supra* Part I. Specifically, EPA met this aspect of RCRA by requiring facilities to post compliance information on publicly available websites, 40 C.F.R. § 257.107, hearings for corrective action decisions, *id.* § 257.96(e), a process for fugitive dust complaints, *id.* § 257.80(b)(3), (c), and online posting of key documents related to the design and operation of the coal ash unit, *id.* § 257.107.

Meanwhile, Oklahoma met (and exceeded) these public participation guidelines, in rules "at least as protective as" the public participation rules in the federal coal ash rule, because Oklahoma's program contains all of the public participation features of the federal rule—and so much more. *See* Okla. Admin. Code § 252:517-9-7(e) (public meeting to discuss corrective action); *id.* § 252:517-13-1 (requiring companies to log citizen complaints related to fugitive dust and describe how they responded); *id.* § 252:517-19-3 (general internet posting

requirements). For instance, the surface impoundments in Oklahoma were required to submit Tier II permit applications to ensure compliance with the new state coal ash regulations. *See* J.A. 71-72 [Ex. 1, Young Decl. ¶¶ 7-8]. These permit applications incorporate various documents required under the federal rule, including closure plans and post-closure plans, fugitive dust plans, and inspection reports. The federal rule requires companies to simply post these documents online. Under the Oklahoma program, the public has an opportunity to actually comment and provide input on these plans, as well as the myriad other Tier II and Tier III rights described above.

With respect to Tier I permit modifications, Oklahoma's permit program requires that all the information subject to the Tier I permit process, such as Fugitive Dust Control Plans, Run-On/Run-Off Control Plans, Closure Plans, Post-Closure Plans, Groundwater Sampling and Analysis Plans, and Groundwater Monitoring Programs at landfills be recorded, reported, and posted to each permittee's publicly available website for public review in the same manner as set forth in the federal rule. Okla. Admin. Code § 252:517-19-3. The public has full access to all permit applications and modifications (including modifications to closure plans) under the Tier I permit program. And all permitting documents are available for inspection and copying through the Oklahoma Open Records Act. *See* Okla. Stat. tit. 51, §§ 24A.1-24A.32. Neither the federal rule nor RCRA's general

public participation provision at § 6974(b)(1) requires anything more. Oklahoma thus provides at least as much, and in many instances greater, public participation in its program than the federal rule. This more than meets the Improvement Act's "at least as protective as" standard, and therefore EPA was by law required to approve Oklahoma's permitting program. 42 U.S.C. § 6945(d)(1)(B).

What's more, Oklahoma's program includes opportunities for public participation in the rulemaking process. Okla. Admin. Code § 252:4-5-3 (right to petition for rulemaking); *id.* § 252:4-5-5 (right to comment at rulemaking hearing). This means that Oklahoma allows persons to file comments to proposed public participation regulations, including the very regulations Waterkeeper complains about here. To the extent that Waterkeeper has concerns about, for example, how Oklahoma's rules categorize particular activities under the tiered system, Waterkeeper could have addressed that during Oklahoma's coal ash rulemaking. *That* is the appropriate forum for Waterkeeper's public participation complaints, not a federal suit to enforce standardless RCRA provisions and to invent requirements found nowhere in federal law. Waterkeeper chose not to seek changes to the Tier I permitting process in the state notice-and-comment process. They cannot do so here.

III. Oklahoma's issuance of permits that impose continuing regulatory responsibilities throughout the life of the facility does not violate the Improvements Act.

Oklahoma law provides that "[p]ermits shall be issued for the life of the [coal ash] unit." Okla. Admin. Code § 252:517-3-1(A). This guarantees that "there will be continued regulatory oversight throughout" the unit's existence. J.A. 186 [EPA Comment Summary and Response, EPA-HQ-OLEM-2017-0613-0073, at 12]. It means, for example, the inspection requirements on coal ash facilities will persist for the life of the unit. *See* Okla. Admin. Code § 252:517-13-4 & -5. Similarly, the monitoring requirements will persist for the life of the unit. *See id.* § 252:517-9-1. And the requirement that facilities inform the Department of the need for, and official assessment of, corrective measures after findings of statistically significant levels of specific constituents in the groundwater will persist for the life of the unit. *Id.* § 252:517-9-7. Even after the life of the unit, certain facilities are required to undergo a post-closure monitoring period for a minimum of 30 years. *Id.* § 252:517-15-9(c).

Coal ash facilities will be subject to Oklahoma's permit requirements throughout the life of the unit, with requirements subject to change during the lifecycle that impose new regulatory obligations on permittees. Oklahoma law provides that "permittees are subject to the laws and rules of the [Department] as they exist on the date of filing an application ***and afterwards as changed***." *Id.*

§ 252:4-7-3 (emphasis added). Permits are also subject to modification and revocation when such laws and rules are violated. *See* Okla. Stat. tit. 27A, §§ 2-3-502(D); 2-10-302(B); J.A. 285 [DEQ Process Response Clarifications, *supra* n.2, at 10].

Waterkeeper challenges EPA's approval of this aspect of Oklahoma's program as inconsistent with the Improvements Act's requirement that a state program be at least as protective as federal regulations. Appellants' Br. 49-53. The district court properly rejected that argument, holding that the text of the Improvements Act does not "require[] that a state pass a law or promulgate a regulation explicitly tying its coal residuals program standards to the federal requirements." J.A. 94 [Mem. Op. at 20]. "Rather," the court continued, the Improvements Act "leaves the task of determining whether a state program is adequately protective to the EPA." *Id.* (citing 42 U.S.C. § 6945(d)(1)).

Specifically, the Improvements Act requires approval of submitted state permit programs if EPA determines the state criteria is "at least as protective as" EPA's Part 257 rules. 42 U.S.C. § 6945(d)(1)(B). After approval, the Improvements Act then establishes a regular review process by which approved states are allowed the opportunity to ensure their permit programs are duly updated to remain "as protective as" any new federal regulations and that permittees are brought into compliance. *See id.* § 6945(d)(1)(D), (E). When EPA "revises the

applicable [Part 257] criteria," the statute specifies, EPA must review approved state programs within three years. *Id.* § 6945(d)(1)(D)(i)(II). The statute then provides a process for EPA to notify the state of any deficiencies and for program approval withdrawal if such deficiencies are not corrected. *Id.* § 6945(d)(1)(D)(ii) - (E). In this way, the Improvements Act allows a specific time-period and process for a state to update its program or enact new regulations as necessary to remain "as protective as" the federal coal ash rule.

Waterkeeper argues that EPA's approval of Oklahoma's program was invalid because, although Oklahoma's program was as protective as federal requirements when it was approved, Oklahoma's program does not explicitly require itself or permits issued under it to be updated any time new federal criteria are promulgated. Appellants' Br. 51-52. But rather than require an explicit update provision, the Improvements Act, as detailed above, sets forth a timeline for ensuring approved state programs remain as protective as federal regulations pursuant to a process that begins when any relevant federal regulation is revised. Oklahoma's program allows changes in response to federal revisions and explicitly requires imposition of such changed regulatory requirements on permittees. *See* Okla. Admin. Code § 252:4-7-3. Accordingly, approval of Oklahoma's program was consistent with the Improvements Act.

In other words, rather than require an explicit "auto-update" provision in a state program, the Improvements Act tells EPA to within a specified time review state permit programs to ensure that the state program *in fact* requires facilities in the state to comply with regulations at least as protective as the Part 257 regulations when those regulations are changed. If Oklahoma were to fail to do so, the consequence would be a notice of deficiency and, if uncorrected, withdrawal of approval pursuant to the processes and procedures laid out in the Improvements Act. 42 U.S.C. § 6945(d)(1)(E). The district court held that, reading Oklahoma law and the Improvements Act together, "Oklahoma's program … mandates continual compliance with state regulations, which in turn must track federal standards lest the state permitting program's approval be withdrawn." J.A. 95 [Mem. Op. at 21]. But nothing in the Improvements Act requires disapproving Oklahoma's program before any such process is allowed to play out.

Indeed, far from creating unalterable "forever permits" or a regulatory "loophole" for permittees, Appellants' Br. 51, Oklahoma's program has continued to change with the federal rules. As the court below noted, Oklahoma required "the updating of existing permits based on changes to Oklahoma's laws around coal residuals after the federal 2015 Final Rule." J.A. 95 [Mem. Op. at 21] (citing Okla. Admin. Code § 252:517-1-7(b)(2) (requiring the submission within 180 days of a "permit modification application … to ensure compliance with" Oklahoma's

regulatory changes); *see also* J.A. 71 [Ex. 1, Young Decl. ¶ 6]. Nor does anything in Oklahoma law indicate such acts are "one-off measures," Appellants' Br. 53; to the contrary, Oklahoma has already updated its regulation to conform with updated EPA regulations in the wake of *Utility Solid Waste Activities Group*, *see* 38.24 Okla. Reg. 1810; *see also* J.A. 284, 288 [DEQ Process Response Clarifications, EPA-HQ-OLEM-2017-0613-0055, at 9, 13] (providing other examples of other prior permit modifications).

Waterkeeper points to various changes in federal regulations since its original coal ash rule, Appellants' Br. 52, but Oklahoma has adopted rules substantially the same as the federal rules in each of these instances. *Compare* 40 C.F.R. § 257.95(h)(2)-(3) *with* Okla. Admin. Code § 252:517-9-6-(h)(2)-(3) (setting numeric groundwater protection standards for lead, lithium, molybdenum, and cobalt); *compare* 40 C.F.R. § 257.90(e)(6) *with* Okla. Admin. Code § 252:517-9-1(e)(6) (requiring a summary of groundwater data in coal ash units' annual groundwater reports); *compare* 40 C.F.R. § 257.107 *with* Okla. Admin. Code § 252:517-19-3(a) (establishing requirements for publicly accessible coal ash internet sites). And these updates to Oklahoma's program are currently in effect and binding on permittees. *See* 38.24 Okla. Reg. 265-66 (Sept. 1, 2021) (stating Oklahoma's revised coal ash rules became effective Sept. 15, 2021).

Thus, the district court correctly concluded "Oklahoma has … demonstrated the capacity and willingness to require permit modifications when such [federal regulatory] changes do arise." J.A. 95-96 [Mem. Op. at 21-22]. Approval of this program was not arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Court should reject Waterkeepers claims.

Respectfully submitted,

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DATED: December 3, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and D.C. Circuit Rule 32(e)(2)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this brief contains 8,059 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 pt. Times New Roman font.

DATED: December 3, 2021

/s/ Douglas H. Green
Douglas H. Green

CERTIFICATE OF SERVICE

Pursuant Federal Rule of Appellate Procedure 25 and D.C. Circuit Rule 25(c), I hereby certify that I have this 3rd day of December 2021, served a copy of the foregoing Final Brief of Intervenor-Defendants-Appellees, including the Addendum thereto, on all counsel of record electronically through the Court's CM/ECF system or by U.S. mail, postage prepaid.

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