ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WATERKEEPER ALLIANCE, INC., *et al.*, *Petitioners,* v. MICHAEL REGAN, Administrator, U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondents.*	Case No. 20-5174

PROOF REPLY BRIEF FOR ENVIRONMENTAL PETITIONERS

Jennifer Cassel
Earthjustice
311 S. Wacker Dr., Suite 1400
Chicago, IL 60601
(773) 332-6785
jcassel@earthjustice.org

Charles McPhedran
Earthjustice
1617 JFK Blvd., Suite 1130
Philadelphia, PA 19103
(215) 717-4521
cmcphedran@earthjustice.org

Counsel for Environmental Petitioners Local Environmental Action Demanded Agency, Inc., Sierra Club, and Waterkeeper Alliance, Inc.

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GLOSSARY

APA Administrative Procedure Act

EPA United States Environmental Protection Agency

JA Joint Appendix

RCRA Resource Conservation and Recovery Act

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in an addendum to the Opening Brief for Environmental Petitioners.

SUMMARY OF ARGUMENT

The Resource Conservation and Recovery Act ("RCRA") directs the United States Environmental Protection Agency ("EPA") to "provide[] for, encourage[], and assist[]" public participation, and requires EPA to publish minimum public participation guidelines for state programs. 42 U.S.C. § 6974(b)(1). The Water and Infrastructure Improvements for the Nation Act ("Improvements Act"), which amended RCRA, authorizes state coal ash programs to be implemented by states in place of the federal coal ash rule, but directs EPA to approve only those state programs that are "at least as protective" as the federal coal ash rule. *Id.* § 6945(d)(1)(B)(ii). Because EPA failed to publish minimum public participation guidelines prior to authorizing Oklahoma's coal ash program, and approved that program even though it shuts the door on public participation and grants never-expiring permits, EPA's action is arbitrary and unlawful.

ARGUMENT

EPA was required, but failed, to publish minimum guidelines for public participation in state coal ash programs. EPA's authorization of Oklahoma's coal ash program without first having published those minimum guidelines violates its

obligations under RCRA and the Administrative Procedure Act ("APA"). Authorization of the Oklahoma coal ash program was also arbitrary, capricious, and unlawful because the program grants permits that do not expire and deprives Oklahomans of the opportunity to participate in permitting proceedings related to the operation, management, and closure of coal ash disposal unit—actions with long-term, potentially devastating impacts to Oklahoma's air and water and the communities that depend on them. Finally, EPA's authorization was unlawful because EPA failed to respond to significant comments and thereby failed to engage in the reasoned decision-making demanded by the APA. To ensure that residents have the opportunities required by RCRA to weigh in on decisions that affect their communities for centuries, this court should vacate EPA's approval of Oklahoma's coal ash program.

I. EPA FAILED TO DISCHARGE ITS DUTY UNDER RCRA TO ISSUE GUIDELINES FOR PUBLIC PARTICIPATION IN STATE COAL ASH PROGRAMS.

Public involvement is at the center of RCRA's statutory scheme, which provides 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 [EPA] Administrator and the States." 42 U.S.C. § 6974(b)(1). Moreover, in cooperation with states, EPA "shall develop and publish minimum guidelines for public participation in such

processes." *Id.* These provisions express Congress' mandate to EPA that the public must be heard in RCRA proceedings.

However, EPA has never developed and published these required minimum guidelines for state coal ash programs under RCRA. In the proceeding below, the Court agreed with Environmental Petitioners ("Waterkeeper") that the deadline for EPA's action was "clearly discernable" under the statutory scheme, and found that EPA's rules under other RCRA programs do not address this requirement, while ultimately concluding that EPA had satisfied its duty through interim guidance. Memorandum Opinion at 8-10, Waterkeeper All., Inc. v. Wheeler, No. 18-2230 (D.D.C. Apr. 15, 2020), ECF No. 56 (JA____-__) ("Memorandum Opinion"). This Court reviews *de novo* the District Court's summary judgment decision on Count 1. *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1128 (D.C. Cir. 1997).

On appeal, EPA repeats its arguments below that the absence of an explicit date certain in RCRA for publication of minimum guidelines means that EPA faces no nondiscretionary duty, and that Waterkeeper's suit alleging that these guidelines must be published before approval of state programs therefore must fail. EPA Br. at 21. The District Court disagreed with EPA, finding that "[f]or this provision to have any effect, EPA must 'develop and publish minimum guidelines' at least before the agency authorizes a state program, lest they have no practical effect." Memorandum Opinion at 8 (JA____). That conclusion aligns with this Court's

holding in analogous circumstances. *See Sierra Club v. EPA*, 992 F.2d 337, 343 (D.C. Cir. 1993) (EPA discharged its duty by "establishing and enforcing upon the states federal public participation guidelines" before approving state plans) (citation omitted).

EPA attempts to distinguish a Seventh Circuit holding that guidelines regarding public participation in the state enforcement process must "be established prior to the ratification of a state program" based on the text of a Clean Water Act provision that varies from RCRA. EPA Br. at 23-24, citing *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 725 (7th Cir. 1979) and 33 U.S.C. § 1342(b). But the Court also relied on another provision of the Clean Water Act, 33 U.S.C. § 1251(e), that directs the Administrator to "develop and publish" guidelines in support of its holding that EPA must promulgate guidelines before acting on state programs. *Citizens for a Better Env't*, 596 F.2d at 723-24.

As below, EPA offers its Guidance Document in satisfaction of its duty under RCRA. EPA Br. at 30-32, citing EPA, *Coal Combustion Residuals State Permit Program Guidance Document; Interim Final*, Docket ID No. EPA-HQ-OLEM-2017-0613-0006 (Aug. 2017) ("Guidance Document") (JA____-__). But, by its terms, this document cannot discharge EPA's duty. EPA concedes in its Brief that this document only describes public participation principles that EPA "believes" are part of an adequate permit program. The Guidance Document thus

creates no enforceable rights: indeed, the document itself states that it is not a rulemaking or regulation that presents substantive or procedural rights (Guidance Document at ii) (JA____). Further, EPA's brief (at 32) concedes that the Guidance Document is not legally binding and only "a technical resource to States." *Id.*, citing Guidance Document at ii (JA____). Nothing in this nonbinding, technical resource in which EPA "believes" can satisfy EPA's statutory mandate.[1]

As it did below, EPA claims that RCRA's requirement to "develop and publish minimum guidelines for public participation" does not require it to publish regulations, specifically, that "guidelines" as used in the statute is not the same as "regulations," which EPA did not specify. EPA Br. at 25-30. EPA attempts to distinguish case authority cited by Waterkeeper, but does not contest that the cited cases use "regulations" and "guidance" interchangeably, and apply "publish" or "develop and publish" as "promulgate." *U.S. Brewers Ass'n, Inc., v. EPA*, 600 F.2d 974, 980-82 (D.C. Cir. 1979); *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 55 (D.D.C. 2013); EPA Br. at 28-29.

[1] EPA has apparently abandoned its argument, rejected by the District Court, that it satisfied its duty under 42 U.S.C. § 6974 by issuing general public-participation guidelines under 40 C.F.R. § 25.1. EPA Cross-Mot. Summ. J. at 14, Waterkeeper All., Inc. v. Wheeler, No. 18-2230 (D.D.C. May 13, 2019), ECF No. 45 (JA____); Memorandum Opinion (JA____).

Intervenors offer the novel theory, not advanced by EPA below or in this Court, that EPA's issuance of the federal coal ash rule should satisfy EPA's duty to issue minimum guidelines for public participation under RCRA. Int. Br. at 12-13, 16-20. According to Intervenors, provisions in this rule regarding posting information on websites and "public meetings in limited circumstances," Int. Br. at 17, meet the statutory requirement to "develop and publish minimum guidelines for public participation." 42 U.S.C. § 6974(b)(1). But EPA designed the federal coal ash rule, issued under Subtitle D of RCRA in 2015, to be self-implementing and not require permits. 80 Fed. Reg. 21,302, 21,309 (Apr. 17, 2015). The Improvements Act, enacted in 2016, authorizes both federal and state permitting programs. Pub. L. No. 114-322, 130 Stat. 1628 (2016). The federal coal ash rule could not have addressed public participation requirements in permitting programs resulting from a statute enacted after the rule. Moreover, permitting programs routinely allow for public engagement, likely more engagement than a self-executing rule would allow. For these reasons, the federal rule did not satisfy EPA's statutory duties regarding public participation under 42 U.S.C. § 6974(b)(1).

Finally, EPA miscasts the explicit statutory requirement for "minimum" guidelines, that is, a minimum floor for public participation, as permitting it to issue no guidelines at all. EPA first claims to face no requirement under RCRA to

issue guidelines at all, and then, if such guidelines were required, claims that a statement of what EPA "believes," not regulations, would suffice. The absence of guidelines cannot suffice to set minimum criteria for public participation in the implementation of state programs. EPA's argument must be rejected.

II. EPA'S APPROVAL OF OKLAHOMA'S COAL ASH PROGRAM WITHOUT FIRST PUBLISHING MINIMUM GUIDELINES FOR PUBLIC PARTICIPATION VIOLATES RCRA AND THE APA.

EPA would have this Court render Congress' words meaningless by finding that 42 U.S.C. § 6974(b)(1) is nothing more than a miscellaneous musing that EPA can largely ignore. *See* EPA Br. at 5, 22. EPA is wrong. Congress directed EPA to issue "minimum guidelines" for a broad scope of actions under RCRA,[2] a mandate that would have no effect if EPA did not issues those guidelines until after it approves a state RCRA program. As the District Court correctly recognized,[3] to make Congress' mandate meaningful—as this Court must, *see Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019)—those public participation guidelines had to be issued before Oklahoma's coal ash permitting

[2] Including "in the *development*, revision, *implementation*, and enforcement of any regulation, guideline, information, or *program* under this chapter . . . ." 42 U.S.C. § 6974(b)(1) (emphasis added).

[3] "For this provision to have any effect, EPA must 'develop and publish minimum guidelines' at least before the agency authorizes a state program, lest they have no practical effect." Memorandum Opinion at 8 (JA____).

program was approved. Because, as explained herein, EPA failed to discharge that duty, its approval of Oklahoma's coal ash program violated the APA.

EPA's argument that the Clean Water Act evidences that Congress "knew how to impose" a sequencing requirement when it wanted to, *see* EPA Br. at 24, falls flat. No explicit sequencing requirement for its public participation mandate is contained in the Clean Water Act. While Congress specified that State water programs may not be approved until certain regulations have been adopted, it did not mention the public participation standards required by 33 U.S.C § 1251(e), which EPA concedes, EPA Br. at 23, are "substantially similar" to RCRA's public participation mandate. *See* 33 U.S.C. § 1342(b); *id.* § 1314(i)(2) (directing EPA to issue "guidelines establishing the minimum procedural and other elements of any State program under section 1342" with no reference to Section 1251(e)). The Seventh Circuit nonetheless concluded that 33 U.S.C § 1251(e) requires public participation standards to be adopted before state programs are approved. *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 724-25 (7th Cir. 1979). The same is true of RCRA's near-identical provision at 42 U.S.C. § 6974(b)(1).

III. EPA ABUSED ITS DISCRETION IN APPROVING OKLAHOMA'S COAL ASH PROGRAM.

A. RCRA cabins EPA's discretion.

EPA asserts that 42 U.S.C. § 6974(b) grants it near-boundless discretion in evaluating and approving the public participation provisions of state coal ash

programs, including the Oklahoma program at issue here. *See* EPA Br. at 34-39. EPA overstates its discretion. Legislative history and case law concerning a near-identical provision in the Clean Water Act make that clear.

When deliberating the Clean Water Act—whose public participation mandate at 33 U.S.C. § 1251(e) mirrors 42 U.S.C. § 6974(b)—Congress declared that "the public must have a genuine opportunity to speak on the issue of protection of its waters" and "[c]itizen groups . . . are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests." *Nat. Res. Def. Council v. EPA,* 859 F.2d 156, 177 (D.C. Cir. 1988) (internal citations omitted). Although Congress did not list each specific public participation mechanism required to satisfy 33 U.S.C. § 1251(e), it left no doubt that EPA may not shut the door, or allow states to shut the door, on residents' input into key decisions affecting their communities and environment. *See id.* at 178 (holding that 33 U.S.C. § 1251(e) requires states to provide for private intervention in state enforcement actions); *Citizens for a Better Env't,* 596 F.2d at 726 (concluding that merely requiring an agency to respond to residents' complaints fails to satisfy 33 U.S.C. § 1251(e)'s mandate for public participation in enforcement); *Waterkeeper All., Inc., v. EPA,* 399 F.3d 486, 503-04 (2d Cir. 2005) (holding that EPA failed to satisfy 33 U.S.C. § 1251(e) when it shielded nutrient management plans from public scrutiny and comment). Accordingly, 33 U.S.C. §

1251(e) imposes on EPA justiciable, non-discretionary obligations that EPA may not ignore.

Because 42 U.S.C. § 6974(b)(1) is nearly identical to 33 U.S.C. § 1251(e), the same conclusion applies.[4] *See United States v. Doost*, No. 19-3079, 2021 WL 2799964, *3 (D.C. Cir. July 6, 2021). EPA may not shrug off its duty to "provide[] for, encourage[], and assist[]" public participation in RCRA programs.

B. By Depriving the Public of Opportunities to Participate in Many Coal Ash Permitting Proceedings, EPA Abused its Discretion.

EPA failed to "provide[] for, encourage, and assist" public participation in Oklahoma's coal ash program because it deprived the public of any meaningful—and in several cases, any—opportunity to participate in permitting proceedings that affect residents' health and environment. No matter how many times EPA repeats that Tier I permits under Oklahoma's permitting system are mere "administrative" decisions, *see* EPA Br. at 15, 42-43, saying it does not make it so. The plans and analyses that the Oklahoma Department of Environmental Quality ("Department") approved as Tier I permit modifications included at least one

[4] EPA attempts to distract from this clear conclusion by pointing to other public participation provisions in the Clean Water Act. Those other provisions, however, do not affect the holding by multiple appellate courts, including this Court, that EPA violates 33 U.S.C. § 1251(e) when it fails to provide for adequate public participation. *See Nat. Res. Def. Council*, 859 F.2d at 178; *Citizens for a Better Env't*, 596 F.2d at 726; *Waterkeeper All., Inc.*, 399 F.3d at 503-04.

Closure Plan, Post-Closure Plan, Fugitive Dust Control Plan, Run-on/Run-off Control Plan, and Groundwater Sampling and Analysis Plan. *See* Waterkeeper's Opening Br. at 42-43. Moreover, the record before EPA clearly indicated that the Department planned to continue treating such documents as Tier I. *See id.* at 9, 46.

These permit modifications are far from purely "administrative" decisions. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011) (concluding that rules were not "purely administrative" when they "alter ownership rights to water on public lands; increase the barriers to public involvement in grazing management; and substantially delay enforcement on failing allotments, in ways that will have a substantive effect on special status species"); *see also Vt. Dep't of Pub. Serv. v. United States*, 684 F.3d 149, 158 (D.C. Cir. 2012) (a "ministerial" decision is one that "does not require [the agency] to adjudicate substantive compliance issues under [the Clean Water Act] or state law"). They involve evaluating complex compliance plans with potentially significant, long-lasting impacts on Oklahomans and their environment. *See* Waterkeeper's Opening Br. at 43-44. Depriving the public of opportunities to review and offer comment on such plans before they are approved means that residents of communities where coal ash dumps are located will have no input into whether coal ash is left in place, potentially polluting water for centuries, or whether a groundwater monitoring program appropriately locates—and triggers clean-up of—coal-ash-polluted

groundwater. They are precisely the type of permitting decisions that require the Department to "adjudicate substantive compliance issues" and are thus neither administrative nor ministerial. *See Vt. Dep't of Pub. Serv.*, 684 F.3d at 158; *W. Watersheds Project*, 632 F.3d at 498.

EPA's reliance on the Department's assertion that "the Oklahoma Uniform Environmental Permitting Act [requires] consideration of potential environmental impact" when determining the proper Tier, and that "significant modifications to closure plans would be designated as Tier II and subject to Tier II public-participation requirements," EPA Br. at 44, does not right EPA's wrong. The record before EPA was clear that the Department was not, in fact, classifying permit modifications with potentially major environmental implications as Tier II or III permit modifications. EPA explained in the federal coal ash rule that "groundwater monitoring is the *single most critical set of protective measures* on which EPA is relying to protect human health and the environment" at coal ash dumps, 75 Fed. Reg. 35,128, 35,205 (June 21, 2010) (emphasis added); if groundwater monitoring programs do not require public participation, it is not clear that anything does. Given the Department's classification of multiple significant permit modifications as Tier I and its statement that protecting industry from

citizen enforcement was a primary aim in developing the state's coal ash program,[5] EPA's reliance on Department assurances was not just suspect, it was arbitrary.

Nor is EPA's highly flawed decision cured by its statement, tucked into a footnote, that by the time the Department modified the permits for the Grand River Dam Authority and Northeastern coal ash landfills, those landfills were already subject to groundwater monitoring requirements. *See* EPA Br. at 47 n.7. EPA does not even assert—let alone demonstrate—that Oklahomans had opportunities to review and comment on any prior modifications to those landfills' permits that might have required compliance with rules identical or substantially similar to the coal ash rule, or that those opportunities allowed for meaningful input. Without proof of such opportunities and their continued availability, EPA could not reasonably find Oklahoma's program compliant with 42 U.S.C. § 6974(b)(1).

In summary, EPA was required, but failed, to provide for public participation opportunities in the permitting of Oklahoma's coal ash landfills and

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[5] *See* Comments of Waterkeeper Alliance, Sierra Club, Local Environmental Action Demanded, Inc., and Earthjustice at 18, *Comments on Oklahoma: Approval of State Coal Combustion Residuals State Permit Program*, Docket ID No. EPA-HQ-OLEM-2017-0613-0044, 83 Fed. Reg. 30,356 (June 28, 2018) (JA____) ("Environmental Comments") (citing minutes reporting that a Department official told the Oklahoma Environmental Quality Board that the Department decided to promulgate state coal ash regulations "after internal discussions and stakeholder meetings revealed clear reasons for doing so. The reasons include: . . . [t]he [Department] has been told by industry the complying with the state rules may offer some protection from citizen suits . . . .").

ponds. Because EPA did not provide for such opportunities—and instead approved a program that entirely deprives Oklahomans of participation opportunities on permits with major implications for their health and environment—EPA's approval of Oklahoma's coal ash program was arbitrary, capricious, and contrary to law.

IV. BECAUSE "PERMITS FOR LIFE" ALLOW OBSOLETE PERMITS TO CONTINUE IN EFFECT INDEFINITELY, EPA'S APPROVAL OF OKLAHOMA'S COAL ASH PROGRAM WAS ARBITRARY AND UNLAWFUL.

EPA argues that the Improvements Act, and Oklahoma's own regulatory scheme, provide continuing oversight and review of the Oklahoma program (EPA Br. at 48-52). But because these federal and state provisions include no requirement that the "permits for life" issued to Oklahoma coal ash disposal sites be promptly updated to remain "at least as protective" as the federal coal ash rule, it fails the basic minimum criteria of the Improvements Act.

Within three years after revising the federal rule—which EPA is required to review and revise, if necessary, every three years pursuant to 42 U.S.C. §6912(b)—EPA must review approved state programs to ensure that they continue to meet the "at least as protective" standard; if they do not, the state must revise its rules to ensure coal ash disposal units comply with requirements at least as protective as those in the revised federal coal ash standards.
42 U.S.C. §§ 6945(d)(1)(D)(i)(II), (d)(1)(D)(ii)(I). Thus, state programs must continue to be *at least as protective* as federal rules, subject to withdrawal of

approval by EPA. *Id.* § 6945(d)(1)(E). But the Oklahoma program, as approved by EPA, grants permits for the life of a facility.[6] Because Oklahoma's program shields "permits for life" from any requirement to incorporate changes to federal standards, the Oklahoma program allows obsolete permits to continue forever, and fails the "at least as protective" requirement.

EPA says that the Act's scheme of revisions of state and federal regulations should be sufficient. EPA Br. at 50-51. EPA offers the tepid claims that permits for life are not prohibited by the Improvements Act and that Congress could have prevented them. *Id.* at 49-50. EPA speculates that states might exercise an "option" to update their rules to maintain program approval, or that states might later change permits after a program update. EPA Br. at 51. But none of these optional, halfway measures address the core issue: Oklahoma has not established a requirement to update the forever permits. Their unchanging terms are not "at least as protective" and are therefore unlawful under the Act.

[6] *See* Okla. Dep't of Env't Quality, *Oklahoma Department of Environmental Quality . . . Process Response Clarifications* at 20, Docket ID No. EPA-HQ-OLEM-2017-0613-0055, (JA____) ("Oklahoma Process Clarifications") (for coal ash landfills, the Oklahoma Legislature requires permits to be effective for the life of a given site; permits for coal ash surface impoundments will also be issued for the life of the given site because they are regulated under the Oklahoma Solid Waste Management Act).

Moreover, the "permits for life" developed by Oklahoma and endorsed by EPA have the consequence, intended or unintended, of shutting out the public from any future opportunities to be heard, as a permit will not necessarily be modified or updated and thereby subject to public engagement during the course of its "life." This result is inconsistent with the principles regarding public participation in RCRA, 42 U.S.C. § 6974(b)(1), and described in detail herein and in Waterkeeper's Opening Brief.

The State of Oklahoma and its industry co-intervenors argue that various regulatory provisions will still apply to certain aspects of facility operation. Int. Br. at 33. However, none of the provisions cited require that facilities update their obsolete permits. Intervenors' claim that these provisions are "subject to change" or that permittees are subject to laws and rules "afterward as changed" (Br. at 33) provides no reassurance: this does not ensure that these permits will actually change, and says nothing about whether permits will be "at least as protective" as federal requirements, as is required by RCRA. Intervenors' attempt to rely on the cycle of federal and state updates, *id.* at 34-36, is as unavailing as EPA's similar argument where permits for life remain unchanged.

None of the partial solutions offered by EPA and Intervenors address the core problem: Oklahoma's "permits for life" scheme allows obsolete permits to

continue in force regardless of changes in applicable regulations. EPA's approval of Oklahoma's "permits for life" program is therefore unlawful and arbitrary.

V. EPA FAILED TO RESPOND TO SIGNIFICANT COMMENTS IN VIOLATION OF THE APA.

EPA failed to respond to Waterkeeper's significant comments, rendering its approval of Oklahoma's coal ash program arbitrary, capricious, and contrary to law. EPA admits that, in response to Waterkeeper's comment that EPA was required by 42 U.S.C. § 6974(b)(1) to issue minimum public participation guidelines prior to approving Oklahoma's coal ash program, it stated that "RCRA section 4005(d) [42 U.S.C. § 6945(d)] does not require EPA to promulgate regulations for determining the adequacy of state programs . . . ." EPA Br. at 53 (emphasis added). Nowhere did EPA address Waterkeeper's comment[7] that RCRA's public participation mandate at 42 U.S.C. § 6974(b)(1) requires promulgation of those minimum guidelines.[8] Nor does EPA even acknowledge the comment in the "Responses to Major Comments on the Proposed Determination" section of the Final Program Approval,[9] even though Waterkeeper's comment

[7] Environmental Comments at 41-43 (JA____-__).
[8] *See* EPA, *Comment Summary and Response Document* at 14, Docket ID No. EPA-HQ-OLEM-2017-0613-0073 (June 2018) ("EPA Response to Comments") (JA____).
[9] *See* Oklahoma: Approval of State Coal Combustion Residuals Permit Program, Docket ID No. EPA-HQ-OLEM-2017-0613-0051, 83 Fed. Reg. 30,356, 30,361-63 (June 28, 2018) (JA____-__) ("Final Program Approval").

easily meets the test for "significant." *See* Waterkeeper's Opening Br. at 54-57. The record thus belies EPA's claims, *see* EPA Br. at 53, that it considered and responded to the comment. *See Getty v. Fed. Savs. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("[s]tating that a factor was considered . . . is **not** a substitute for considering it.") (emphasis added).

EPA likewise fell short in its response to Waterkeeper's comments on the unlawfulness of permits for life. EPA wrote, "nothing in the Federal rule prohibits such permits," EPA Response to Comments at 12 (JA____), but did not address Waterkeeper's comment[10] that the Improvements Act bars permits for life. EPA's statement that Oklahoma's program would provide "continued regulatory oversight throughout" the life of the permit[11] also comes up short; it is precisely the type of vague "nod" to a comment that does not pass muster under the APA. *See Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), *cert. granted sub nom. Arkansas v. Gresham*, 141 S. Ct. 890 (2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking").

EPA suggests that its failure to respond adequately to Waterkeeper's comments may be ignored because Waterkeeper brought this suit challenging

[10] *See* Environmental Comments at 20-22 (JA____-__).
[11] EPA Br. at 16, 54; EPA Response to Comments at 12 (JA____).

EPA's authorization of Oklahoma's coal ash program and EPA has responded to Waterkeeper's argument in briefing. *See* EPA Br. at 2, 52, 55. EPA is mistaken. Compliance with the APA cannot, and does not, depend on whether a commenter later sues the agency committing the APA violation. Reasoned decision-making is required while decision-making is underway, not after. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (explaining that, if an agency does not provide adequate grounds for its decision, a court may remand for the agency to "offer a fuller explanation of the agency's reasoning *at the time of the agency action*") (internal quotations omitted); *Id.* at 1908 (rejecting agency justifications advanced in litigation as "impermissible post-hoc rationalizations") (internal quotations omitted).

Nor can EPA's failure to respond adequately to comments be brushed aside because Waterkeeper was not "confused" by its responses. *See* EPA Br. at 16, 55. Commenters' confusion—or lack thereof—is not the standard for whether an agency's response to comments is adequate. Adequacy turns not on the subjective understanding of the commenter, but rather on whether the agency "articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (abrogated

on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). If a commenter has no trouble understanding an inadequate response, that does not make it any less inadequate.

EPA's failure to respond to Waterkeeper's comments reveals that it did not perform the reasoned decision-making the APA requires. *See Gresham*, 950 F.3d at 103; *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) ("An agency's failure to respond to relevant and significant public comments generally demonstrates that the agency's decision was not 'based on a consideration of the relevant factors") (internal quotations omitted). Because EPA did not fulfill its obligation to "consider and respond to significant comments received during the period for public comment," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015), EPA's approval of Oklahoma's program violated the APA.

CONCLUSION AND RELIEF REQUESTED

For the reasons given above, Petitioners request that the Court:

(1) find that Defendants failed to discharge their nondiscretionary duty to issue minimum guidelines for public participation in state coal ash permit programs;

(2) hold that EPA's approval of the Oklahoma coal ash permit program was arbitrary and unlawful;

(3) vacate EPA's approval of the Oklahoma coal ash permit program and remand it to EPA for reconsideration consistent with the Court's determinations; and

(4) provide any other appropriate relief.

DATED: November 12, 2021

Respectfully Submitted,

/s/ Jennifer Cassel
Jennifer Cassel
Earthjustice
311 S. Wacker Dr., Suite 1400
Chicago, IL 60601
(773) 332-6785
jcassel@earthjustice.org

Charles McPhedran
Earthjustice
1617 JFK Blvd., Suite 1130
Philadelphia, PA 19103
(215) 717-4521
cmcphedran@earthjustice.org

Counsel for Environmental Petitioners Local Environmental Action Demanded Agency, Inc., Sierra Club, and Waterkeeper Alliance, Inc.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman font. I further certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), it contains 4,664 words according to the word-count feature of Microsoft Word.

DATED: Nov. 12, 2021

/s/ Charles McPhedran

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2021, I have served the foregoing Proof Reply Brief for Environmental Petitioners**,** including the Addendum thereto, on all registered counsel through the Court's electronic filing system (ECF).

/s/ Charles McPhedran