ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1035 (consolidated with Nos. 23-1036, 23-1037, 23-1038)

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

ELECTRIC ENERGY, INC., *et al.*,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency

JOINT OPENING BRIEF OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), Petitioners Electric Energy, Inc., Luminant Generation Company LLC, Coleto Creek Power, LLC, Miami Fort Power Company LLC, Zimmer Power Company LLC, Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC, Kincaid Generation, L.L.C., Utility Solid Waste Activities Group, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, Wheeling Power Company, and Gavin Power, LLC state as follows:

I. Parties and *Amici*

a. Petitioners:

Petitioners in Case No. 23-1035 are Electric Energy, Inc., Luminant Generation Company LLC, Coleto Creek Power, LLC, Miami Fort Power Company LLC, Zimmer Power Company LLC, Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Kincaid Generation, L.L.C.

Petitioner in Case No. 23-1036 is Utility Solid Waste Activities Group ("USWAG").[1]

[1] USWAG members Tennessee Valley Authority and the Edison Electric Institute are not participating in this litigation.

Petitioners in Case No. 23-1037 are Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and Wheeling Power Company.

Petitioner in Case No. 23-1038 is Gavin Power, LLC.

b. Intervenors and *Amici Curiae*:

Respondent-Intervenor is Sierra Club.

There are currently no *amici curiae* in these consolidated cases.

c. Respondents:

Respondents are the United States Environmental Protection Agency (EPA) and Michael S. Regan, EPA Administrator.

II. Rulings Under Review

Petitioners challenge EPA's final action entitled "Denial of Alternative Closure Deadline for General James M. Gavin Plant, Cheshire, Ohio" ("Final Gavin Denial"). EPA-HQ-OLEM-2021-0590-0100 (Nov. 18, 2022); *see also* 87 Fed. Reg. 72,989 (Nov. 28, 2022).

III. Related Cases

Four consolidated cases (Case Nos. 23-1035, 23-1036, 23-1037, and 23-1038) seek review of the agency action challenged here. The Final Gavin Denial reaffirms and imposes some of the same regulations and requirements promulgated by EPA

on January 11, 2022, which are at issue in *Elec. Energy, Inc. v. EPA*, No. 22-1056 (D.C. Cir. filed Apr. 8, 2022) (consolidated with Case No. 22-1058).

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Electric Energy, Inc., Luminant Generation Company LLC, Coleto Creek Power, LLC, Miami Fort Power Company LLC, Zimmer Power Company LLC, Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC, Kincaid Generation, L.L.C. (collectively "EEI Petitioners"); Utility Solid Waste Activities Group ("USWAG"); Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, Wheeling Power Company; and Gavin Power, LLC submit the following corporate disclosure statements:

Electric Energy, Inc. is a subsidiary of Illinois Power Generating Company, an Illinois corporation, which owns 80% of Electric Energy, Inc.'s common stock. Illinois Power Generating Company in turn is a wholly owned subsidiary of Illinois Power Resources, LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of IPH, LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Operations Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Intermediate Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Corp., a publicly held corporation

incorporated under the laws of Delaware. Vistra Corp. is publicly traded on the NYSE under the symbol "VST." To EEI Petitioners' knowledge, except for Brookfield Asset Management Inc. and The Vanguard Group, Inc., in each case together with their respective affiliates and managed entities, there are no publicly traded corporations that own more than 10% of Vistra Corp.'s stock.

The remaining 20% of Electric Energy, Inc.'s common stock is owned by Kentucky Utilities Company ("Kentucky Utilities"). Kentucky Utilities is a wholly owned subsidiary of LG&E and KU Energy LLC ("LKE"), a holding company, which in turn is an indirect, wholly owned subsidiary of PPL Corporation. To EEI Petitioners' knowledge, other than PPL Corporation, no publicly held company owns 10% or more of any LKE membership interest or Kentucky Utilities' shareholding interests. PPL Corporation is a publicly traded corporation under the symbol "PPL." To EEI Petitioners' knowledge, except for The Vanguard Group, Inc., together with its respective affiliates and managed entities, no publicly held company has a 10% or greater ownership interest in PPL Corporation.

Luminant Generation Company LLC and **Coleto Creek Power, LLC** are each wholly owned subsidiaries of Vistra Asset Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Operations Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Intermediate Company LLC, a Delaware limited liability

company, which in turn is a wholly owned subsidiary of Vistra Corp., a publicly held corporation incorporated under the laws of Delaware. Vistra Corp. is publicly traded on the NYSE under the symbol "VST." To EEI Petitioners' knowledge, except for Brookfield Asset Management Inc. and The Vanguard Group, Inc., in each case together with their respective affiliates and managed entities, there are no publicly traded corporations that own more than 10% of Vistra Corp.'s stock.

Miami Fort Power Company LLC and **Zimmer Power Company LLC** are each wholly owned subsidiaries of Luminant Coal Generation LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Luminant Commercial Asset Management LLC, an Ohio limited liability company, which in turn is a wholly owned subsidiary of Vistra Operations Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Intermediate Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Corp., a publicly held corporation incorporated under the laws of Delaware. Vistra Corp. is publicly traded on the NYSE under the symbol "VST." To EEI Petitioners' knowledge, except for Brookfield Asset Management Inc. and The Vanguard Group, Inc., in each case together with their respective affiliates and managed entities, there are no publicly traded corporations that own more than 10% of Vistra Corp.'s stock.

Dynegy Midwest Generation, LLC is a wholly owned subsidiary of Dynegy Coal HoldCo, LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Operations Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Intermediate Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Corp., a publicly held corporation incorporated under the laws of Delaware. Vistra Corp. is publicly traded on the NYSE under the symbol "VST." To EEI Petitioners' knowledge, except for Brookfield Asset Management Inc. and The Vanguard Group, Inc., in each case together with their respective affiliates and managed entities, there are no publicly traded corporations that own more than 10% of Vistra Corp.'s stock.

Illinois Power Generating Company and **Illinois Power Resources Generating, LLC** are each wholly owned subsidiaries of Illinois Power Resources, LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of IPH, LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Operations Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Intermediate Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Corp., a publicly held corporation incorporated under the laws of Delaware. Vistra Corp. is publicly traded on the NYSE under the symbol

"VST." To EEI Petitioners' knowledge, except for Brookfield Asset Management Inc. and The Vanguard Group, Inc., in each case together with their respective affiliates and managed entities, there are no publicly traded corporations that own more than 10% of Vistra Corp.'s stock.

Kincaid Generation, L.L.C. is a wholly owned subsidiary of Dynegy Resources Generating HoldCo, LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of EquiPower Resources Corp., a Delaware corporation, which in turn is a wholly owned subsidiary of Vistra Operations Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Intermediate Company LLC, a Delaware limited liability company, which in turn is a wholly owned subsidiary of Vistra Corp., a publicly held corporation incorporated under the laws of Delaware. Vistra Corp. is publicly traded on the NYSE under the symbol "VST." To EEI Petitioners' knowledge, except for Brookfield Asset Management Inc. and The Vanguard Group, Inc., in each case together with their respective affiliates and managed entities, there are no publicly traded corporations that own more than 10% of Vistra Corp.'s stock.

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 rulemakings 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.

Appalachian Power Company, **Indiana Michigan Power Company**, **Kentucky Power Company**, **Public Service Company of Oklahoma**, **Southwestern Electric Power Company**, and **Wheeling Power Company** are electric utilities, which are wholly owned subsidiaries of American Electric Power Company, Inc. ("AEP"). AEP is publicly traded. To Petitioners' knowledge, there are no publicly traded corporations that own more than 10% of AEP's stock.

Gavin Power, LLC, the entity that operates the General James M. Gavin Plant, is a wholly-owned subsidiary of Lightstone Generation LLC. Lightstone Generation LLC is owned by ArcLight Energy Partners Fund VI, L.P. ("ArcLight Fund VI") (50% share of ownership), Blackstone Energy Partners II NQ L.P. ("BEP II") (approximately 26% share of ownership), Blackstone Capital Partners VII NQ L.P. ("BCP VII") (approximately 19% share of ownership), and certain other Blackstone funds (approximately 5% ownership).

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GLOSSARY[2]

APA	Administrative Procedure Act
CCR	Coal combustion residuals
EPA	U.S. Environmental Protection Agency
RCRA	Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 *et seq*.
USWAG	Utility Solid Waste Activities Group
WBWT	Waste below the water table

[2] This Glossary uses terminology presented in the opening brief in *Elec. Energy, Inc. v. EPA*, No. 22-1056 and consolidated cases (D.C. Cir. filed Dec. 6, 2022).

INTRODUCTION

This case, like related Case No. 22-1056, is about EPA's revisions to the regulations that govern coal combustion residuals—commonly called "CCR"—which is a type of waste generated at coal-fueled power plants and managed in impoundments and landfills (collectively, "CCR units"). In 2015, pursuant to the Resource Conservation and Recovery Act ("RCRA"), EPA promulgated "self-implementing" regulations governing the disposal of CCR in CCR units (the "2015 Rule"), and Petitioners began implementing those regulations at their facilities.

On January 11, 2022, without prior notice and comment, and without acknowledging its abrupt change in position or considering companies' investment-backed reliance on the existing regulatory provisions, EPA substantively revised the requirements of the 2015 Rule. It did so through a series of interrelated documents, including a press release, official correspondence, and proposed denials of companies' applications for extension of the closure deadline for their individual CCR units. One of those proposed denials concerned the General James M. Gavin Plant ("Gavin Plant") in Ohio operated by Gavin Power, LLC ("Gavin"). The new requirements that EPA announced on January 11, 2022 (the "2022 Rule"), including in a discrete section of EPA's proposed denial of Gavin's application, are collectively the subject of Case No. 22-1056. Petitioners in that case contend that the 2022 Rule is an unlawful legislative rule that must be vacated because it was

issued without following the procedural requirements of RCRA and the Administrative Procedure Act ("APA"), among other errors.

EPA has sought to evade review in Case No. 22-1056 for over a year by contending that the requirements of the 2022 Rule are not final. However, on November 18, 2022, EPA finalized its proposed denial of Gavin's extension request based on the 2022 Rule's new prohibition on closing CCR units in place with "waste below the water table." *See* JA__[EPA, *Final Decision: Denial of Alternative Closure Deadline for General James M. Gavin Plant* (Nov. 18, 2022) ("Final Gavin Denial")]; *see also* 87 Fed. Reg. 72,989 (Nov. 28, 2022) (notice of availability of final decision). EPA contended that the requirements set out in the decision were final and, invoking RCRA's jurisdictional provision, 42 U.S.C. §6976(a)(1), asserted that petitions for review must be filed in this Court within ninety days. JA__-__[Final Gavin Denial at 5-6].

In light of EPA's position on jurisdiction, Petitioners in Case No. 22-1056, and others, filed protective petitions for review of EPA's Final Gavin Denial. While Petitioners in Case No. 22-1056 maintain that EPA's 2022 Rule is final agency action subject to this Court's jurisdiction without the need for additional petitions for review, should the Court conclude that the 2022 Rule was not final, the same waste-below-the-water-table prohibition and related closure requirements were

reaffirmed and separately announced in the Final Gavin Denial, which EPA concedes is final and reviewable in this Court.

Either way, the new closure requirements are unlawful legislative rules that do not satisfy the procedural requirements of RCRA or the APA, and the Court should vacate them. The requirements reflected in the Final Gavin Denial suffer from the same defects that rendered the 2022 Rule unlawful from the outset, including that EPA failed to promulgate the requirements as regulations; failed to consult with the States prior to their promulgation; failed to reconcile the new requirements with the existing regulatory text; and failed to consider Petitioners' reliance interests in the existing requirements. Indeed, EPA has conceded that the component parts of the 2022 Rule do not appear in the text of the existing regulations and has initiated an ongoing rulemaking taking comment on whether to amend the Code of Federal Regulations to formally promulgate them. But no amount of post hoc rulemaking can cure EPA's failure to *first* comply with RCRA and APA procedural requirements *before* attempting to promulgate and enforce the new closure requirements, as it has clearly done in the Final Gavin Denial and other agency actions.

Beyond the portion of the 2022 Rule reflected in the Final Gavin Denial, the Court does not have jurisdiction. Petitioner Gavin filed a protective petition for an additional reason: EPA has suggested that this Court has exclusive jurisdiction over

EPA's compliance assessments in the Final Gavin Denial, where it *applied* portions of the 2022 Rule and other regulations specifically to the Gavin Plant. That is incorrect—this Court lacks jurisdiction over those issues, which can be litigated only in a federal district court. If the Court disagrees and concludes that it has jurisdiction, however, then the Court should vacate that site-specific decision as well because EPA's compliance assessment of the Gavin Plant exceeds EPA's authority under the regulations and is unsupported by the record.

In sum, there are two appropriate alternative outcomes for this case and Case No. 22-1056. *First*, the Court should vacate the 2022 Rule in Case No. 22-1056 and dismiss these protective petitions for lack of jurisdiction. *Second*, if the Court concludes that it lacks jurisdiction in Case No. 22-1056, then it should review EPA's waste-below-the-water-table prohibition as it re-appeared in the Final Gavin Denial and vacate that rule without addressing the merits of EPA's site-specific determinations related to the Gavin Plant. Whichever route the Court takes, it should make clear that EPA's purported waste-below-the-water-table prohibition is unlawful and unenforceable because EPA promulgated that requirement and the related closure requirements in violation of RCRA and the APA.

EPA has sought to avoid judicial review of the 2022 Rule for nearly two years while proceeding to implement its new requirements in the real world by communicating them to States and regulated parties, including in the Final Gavin

Denial itself. This Catch-22 facing Petitioners is exactly the situation Congress sought to prevent by requiring EPA to follow specific statutory procedures *before* it can promulgate and enforce RCRA regulations and requirements and granting this Court jurisdiction to enforce those procedures when EPA fails to do so, as it has here.

JURISDICTIONAL STATEMENT

These protective petitions for review challenge EPA's November 28, 2022 restatement of one portion of the 2022 Rule, namely the prohibition against "waste-below-the-water-table" that is challenged in *Electric Energy, Inc. v. EPA*, Case No. 22-1056. *See* Petition for Review, Doc. 1942829, *Electric Energy, Inc. v. EPA*, No. 22-1056 (D.C. Cir. Apr. 8, 2022).

Petitioners here filed these protective petitions in the event that this Court agrees with EPA and concludes that it lacks jurisdiction over, or otherwise dismisses, Case No. 22-1056. *See, e.g.*, *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1095 (D.C. Cir. 1997) (urging petitioners to file "protective petition[s]" within the statutory period); *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 912 (D.C. Cir. 1985) ("admonish[ing] petitioners of the wisdom of filing protective petitions for review during the statutory period").

If the Court concludes that EPA's new waste-below-the-water-table prohibition was not final in January 2022, then it undoubtedly became final in

November 2022, when EPA included it in its final decision denying Gavin's application for a regulatory extension on that basis. *See* JA__[Final Gavin Denial]; 87 Fed. Reg. at 72,989; *infra* at 36-37. Thus, the Court would have jurisdiction to review the new prohibition as described in the Final Gavin Denial under 42 U.S.C. §6976(a)(1). If the Court vacates the 2022 Rule in Case No. 22-1056 (including the waste-below-the-water-table prohibition), as it should, then the Court need not consider these protective petitions.

As discussed in Section VI, *infra* at 51-55, this Court does not have jurisdiction under 42 U.S.C. §6976(a)(1) to review any issue other than the validity of the generally applicable regulations and requirements adopted by EPA in the 2022 Rule and repeated in part in the Final Gavin Denial. The Court lacks jurisdiction to consider EPA's Gavin-specific compliance assessments, which are EPA's application of regulatory requirements to an individual facility. Challenges to such actions belong in the district court.

Petitioners have standing because EPA has repeatedly asserted that its waste-below-the-water-table prohibition and related requirements apply to company Petitioners' facilities, imposing significant costs on company Petitioners and USWAG members and threatening these entities with sanctions for noncompliance. *Infra* at 32-35 (discussing Petitioners' standing).

Petitioners timely filed protective petitions for review of the Final Gavin Denial on February 16, 2023. Docs. 1986457, 1986447, 1986504, 1986478; 42 U.S.C. §6976(a)(1).

STATEMENT OF ISSUES

1. Whether this Court has jurisdiction to review the waste-below-the-water-table prohibition as stated in the Final Gavin Denial, or if instead that prohibition should be reviewed in Case No. 22-1056.
2. Whether EPA's adoption of the waste-below-the-water-table prohibition as a legislative rule failed to comply with statutory procedural prerequisites, including that CCR criteria must be promulgated through notice-and-comment rulemaking.
3. Whether the new prohibition and related requirements are contrary to law or arbitrary and capricious.
4. Whether this Court lacks jurisdiction under 42 U.S.C. §6976(a)(1) to review the Gavin-specific compliance assessments in the Final Gavin Denial.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included in the addendum.

STATEMENT OF THE CASE

This case and Case No. 22-1056 arise under RCRA and concern EPA's announcement of new regulatory criteria governing the closure of CCR units.

I. Statutory and Regulatory Background

RCRA provides the statutory framework for the regulation of solid waste. Subtitle D provides for collaborative federal and State regulation of non-hazardous solid waste, while Subtitle C governs hazardous waste under a more stringent federal scheme. EPA regulates CCR as non-hazardous solid waste under the less stringent Subtitle D criteria.

"EPA's principal role under Subtitle D is to announce federal guidelines for state management of nonhazardous wastes[.]" *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 423 (D.C. Cir. 2018) ("*USWAG*"). EPA's guidelines "provide minimum criteria to be used by the States to define those solid waste management practices which constitute the [prohibited] open dumping of solid waste." 42 U.S.C. §6907(a)(3). With respect to CCR, States may adopt State regulatory programs that, once approved by EPA, operate "in lieu of" EPA's criteria. *Id*. §6945(d). Where States do not, EPA can enforce the criteria, which remain self-implementing through certifications from Qualified Professional Engineers until EPA establishes its own permit program (which it has not). *Id*.

Congress requires EPA to follow the procedural requirements of the APA and additional statutory procedures in RCRA before promulgating new criteria. New Subtitle D criteria must be "promulgate[d] [as] regulations" "after consultation with the States, and after notice and public hearings." *Id.* §6944(a); *see also id.* §§6907(a), 6974(b)(1). And EPA must "notify [Congress] a reasonable time before publishing any suggested guidelines or proposed regulations under [RCRA] of the content of such proposed suggested guidelines or proposed regulations." *Id.* §6907(b).

II. The 2015 Rule

After years of regulatory review, risk assessment, consultations with States, public input, and reports to Congress, EPA promulgated the first RCRA criteria specific to CCR in 2015. 80 Fed. Reg. 21,301 (Apr. 17, 2015). Petitioners refer to these criteria, which are codified at 40 C.F.R. Part 257, Subpart D, as the "2015 Rule."

Consistent with RCRA's statutory framework at the time, the criteria are self-implementing standards "that owners or operators of regulated units can implement without any interaction with regulatory officials." 80 Fed. Reg. at 21,330. To that end, the regulations set forth "sufficiently objective and technically precise" requirements to enable implementation by regulated parties and their Qualified Professional Engineers. *Id.* at 21,335.

The 2015 Rule includes restrictions on the location of CCR units (*e.g.*, in relation to wetlands or seismic zones); requirements for groundwater monitoring and analysis for specified constituents; requirements for "corrective action" (*e.g.*, groundwater remediation) when monitored levels exceed regulatory thresholds; deadlines for facilities to stop adding material to CCR units that do not meet regulatory criteria for operating units; and closure and post-closure care requirements. *Id*. at 21,304-05.

As to closure requirements, the 2015 Rule provides that a CCR unit may be closed "*either* by leaving the CCR in place and installing a final cover system *or* through removal of the CCR and decontamination of the CCR unit" (the latter of which is commonly referred to as "clean closure"). 40 C.F.R. §257.102(a) (emphases added). As EPA explained at the time, the 2015 Rule does not "require clean closure nor … establish restrictions on the situations in which clean closure would be appropriate," but instead "allows the owner or operator to determine whether clean closure or closure with the waste in place is appropriate for their particular unit." 80 Fed. Reg. at 21,412. Indeed, EPA "anticipate[d] that facilities w[ould] mostly likely *not* clean close their units, given the expense and difficulty of such an operation." 75 Fed. Reg. 35,128, 35,208 (June 21, 2010) (emphasis added). Where the operator chooses closure-in-place, in order to protect groundwater, the

regulations require post-closure groundwater monitoring and corrective action for a minimum of thirty years. 40 C.F.R. §257.104(c).

The regulations establish "sufficiently objective and technically precise" closure performance standards for both closure options. 80 Fed. Reg. at 21,335. As to the closure-in-place option at issue here, the performance standard requires that "[f]ree liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues" "sufficient to support the final cover system." 40 C.F.R. §257.102(d)(2). And, post-closure, "[t]he final rule requires that *any final cover system* control, minimize or eliminate, to the maximum extent practicable, post-closure infiltration of liquids into the waste and releases of leachate (in addition to CCR or contaminated run-off) to the ground or surface waters." 80 Fed. Reg. at 21,413 (emphasis added) (referencing regulatory language in 40 C.F.R. §257.102(d)(1)(i)); *see also* 40 C.F.R. §257.102(b)(1)(iii) ("The closure plan must also discuss how the final cover system will achieve the performance standards specified in paragraph (d) of this section."); 80 Fed. Reg. at 21,413 ("final cover system" must "minimize" "infiltration" and "releases of leachate"). So that "a qualified professional engineer will be able to certify that [the closure performance standards] have been met," *id*. at 21,335, EPA established "sufficiently objective and technically precise" requirements for the final cover system, *see, e.g.*, 40 C.F.R. §257.102(d)(3).

When it issued the 2015 Rule, EPA was aware that many CCR impoundments "come in direct contact with the water table." JA__-__[EPA, *Human and Ecological Risk Assessment of Coal Combustion Residuals* at 5-10 (Dec. 2014) ("Risk Assessment")]. But EPA did not finalize its proposal (from 2010) to ban placement of CCR below the "natural water table" through a "location restriction" and did not, as proposed, include a definition of "natural water table" in the 2015 Rule. 75 Fed. Reg. at 35,199; 80 Fed. Reg. at 21,361-62. And EPA explained at the time that the 2015 Rule does not "require clean closure nor … establish restrictions on the situations when clean closure would be appropriate." 80 Fed. Reg. at 21,412. In response to comments on this issue, EPA explained that the 2015 Rule does *not* limit closure options based on proximity to the water table:

> Comment: "Will removal of CCR be required in cases where the base of an existing or abandoned surface impoundment or landfill is shown to be below the natural water table?"
>
> EPA Response: "If a unit fails to meet the location criteria applicable to existing CCR units, the unit must initiate closure as required under the rule. … *This rule does not require clean closure of any unit*."

EPA, *Comment Summary and Response Document, Vol. 9*, EPA-HQ-RCRA-2009-0640-12132, at 197 (Dec. 2014) (emphasis added).

Since the promulgation of the 2015 Rule, regulated companies, including the company Petitioners and USWAG members, have been implementing the 2015 Rule with significant investments at their facilities, including planning, commencing, and

completing closure of CCR units; monitoring groundwater; and undertaking corrective action as necessary.

III. The 2020 Part A Rule

In response to this Court's holding in *USWAG* regarding the regulations addressing the continued operation of unlined impoundments, EPA promulgated amendments to the 2015 Rule, known as the "Part A" revisions. 85 Fed. Reg. 53,516 (Aug. 28, 2020). As relevant here, EPA set a deadline by which unlined surface impoundments must cease receiving CCR and initiate closure, along with new provisions allowing facilities to seek temporary extensions of that "cease receipt" deadline if they lack "alternative disposal capacity." 40 C.F.R. §§257.101(a)(1), 257.103(f)(1).

To obtain an extension, applicants must demonstrate that, among other things, the facility "is in compliance with all of the requirements of this subpart." *Id.* §257.103(f)(1)(iii), (f)(2)(iii). Before granting an extension, EPA voluntarily posts its proposed approval or denial on the agency's website for limited public comment, but "[t]his process is not a rulemaking" that is intended to satisfy the procedural requirements for promulgating new RCRA criteria. *See* 85 Fed. Reg. at 53,552.

Applications for extensions were due by November 30, 2020. 40 C.F.R. §257.103(f)(3)(i). Dozens of companies, including Petitioner Gavin, other company

Petitioners, and USWAG members, submitted Part A applications seeking an extension of the cease receipt deadline. *See* SA-2 ¶3; SA-8 ¶3.[3]

IV. EPA's Promulgation of New CCR Criteria in January 2022

A. The 2022 Rule

In the 2022 Rule (the subject of Case No. 22-1056), EPA revised at least two key components of the existing regulations to more stringent criteria: (1) the closure options and performance standards in 40 C.F.R. §257.102; and (2) the scope and coverage of the CCR regulations as set forth in 40 C.F.R. §257.50 and §257.53. Only the revisions to the closure performance standards are at issue in the present case.

As to the closure requirements in the 2022 Rule, EPA announced a new classification of closing CCR units—namely, "surface impoundments or landfills … with coal ash in contact with groundwater"—and announced for the first time that these units may only utilize the closure-by-removal option. EPA, "EPA Takes Key Steps to Protect Groundwater from Coal Ash Contamination" (Jan. 11, 2022), https://tinyurl.com/4zt2hrtd ("EPA's January 2022 Press Release"). EPA purported to prohibit such units from utilizing the closure-in-place option in 40 C.F.R. §257.102(d). *Id*. ("[S]urface impoundments or landfills cannot be closed

[3] Pursuant to Circuit Rule 28(a)(7), Petitioners have provided evidence of their standing in a separate addendum, cited as SA-#.

with coal ash in contact with groundwater."). EPA described the new requirement as a prohibition against closing in place with "waste below the water table" or "WBWT." Petitioners' Motion for Leave to Submit Extra-Record Documents at Ex. B, Doc. 1967068, No. 22-1056 (D.C. Cir. Sept. 30, 2022) ("We are calling this work: waste below the water table (WBWT).").

EPA's new prohibition was based on new definitions of the terms "infiltration" and "free liquids" used in the closure performance standards in 40 C.F.R. §257.102(d)(1)(i) and (2)(i). The 2022 Rule defines "infiltration" to mean "*any liquid* passing into or through the CCR unit by filtering or *permeating from any direction*, including the top, *sides, and bottom of the unit*." JA__[EPA, *Proposed Decision: Proposed Denial of Alternative Closure Deadline for General James M. Gavin Plant* at 47 (Jan. 11, 2022) ("Proposed Gavin Denial")] (emphases added). And EPA redefined "free liquids" to mean "the freestanding liquid in the impoundment and … all separable porewater in the impoundment, whether the porewater was derived from sluiced water"—meaning the water that transports CCR from a power plant to an impoundment—"or groundwater that intersects the impoundment." JA__[*Id.* at 46]. Taken together, EPA contended that these definitions create a prohibition against closing CCR units in place with waste below the water table.

B. The Proposed Gavin Denial

The new closure requirements in the 2022 Rule were contained in a coordinated blitz of agency press statements and publications on January 11, 2022, that included the proposed denial of Gavin's application for an extension of the regulatory cease receipt deadline for the Bottom Ash Pond at the Gavin Plant. Gavin's demonstration was timely submitted on November 30, 2020, and was deemed complete by EPA on January 11, 2022.

Gavin's demonstration requested approval to continue to receive CCR and non-CCR waste streams at the Bottom Ash Pond until May 4, 2023. JA__[Gavin Power, LLC, *Site-Specific Alternative Deadline Demonstration to Initiate Closure of CCR Surface Impoundment, Gavin Plant Bottom Ash Pond* at 1 (Nov. 30, 2020)]. This additional period of time (beyond the default April 11, 2021 closure deadline) was necessary to enable the Gavin Plant: (1) to convert the wet-sluicing bottom ash handling equipment in each of the two power generating units to a dry-handling system, and (2) to design and commission a temporary wastewater treatment system to treat the facility's non-CCR waste streams during Bottom Ash Pond closure and construction of a process water pond. JA__,__[*Id.* at 14, 28].

EPA proposed to deny Gavin's request on January 11, 2022. In doing so, EPA acknowledged that Gavin's plan to construct a dry-handling system for the plant's bottom ash and a new basin for non-CCR waste streams was "the option with the

shortest compliance schedule," JA__-__[Proposed Gavin Denial at 30-31], and thus that Gavin could not construct the dry handling system for bottom ash any faster than May 2023—Gavin's requested extension. Nonetheless, EPA proposed to deny the extension because, EPA asserted, "Gavin has not demonstrated that the facility is in compliance with all the requirements of 257 subpart D." JA__[*Id*. at 15]. Among other issues, EPA proposed "to determine that Gavin has not adequately demonstrated compliance with the closure regulations at 40 C.F.R. §257.102(b) and (d)" with regard to both the Bottom Ash Pond, for which Gavin sought an extension of the closure deadline, and the Fly Ash Reservoir, a separate surface impoundment at the plant that was not the subject of Gavin's extension request. JA__[*Id*. at 39].

EPA also failed to acknowledge that the Fly Ash Reservoir had already been closed for nearly six months by the time of the Proposed Gavin Denial. AEP Generation Resources, Inc., the former owner of the Gavin Plant, explained to EPA that it had prepared a closure plan in 2013 and a revision in 2016 as part of an application to the Ohio Environmental Protection Agency to close the basin, consistent with the self-implementing 2015 Rule. *See* JA__[Comments of AEP Generation Resource Inc. at 10 (Mar. 24, 2022)]. On September 16, 2016, Ohio issued Permit to Install No. DSWPTI1086919, which permitted closure of the Fly Ash Reservoir with CCR in place in accordance with the closure plan. JA__[Ohio, Permit to Install No. DSWPTI1086919 (Sept. 16, 2016)]. After approximately four

years of construction, in accordance with the 2015 Rule, a Qualified Professional Engineer signed and certified on July 30, 2021, that the Fly Ash Reservoir had completed closure and that the closure met the requirements of both the written closure plan and the 2015 Rule—*i.e.*, EPA's codified closure regulations. *See* JA__[Gavin Power, LLC, *Notification of Closure and Closure Certification* (July 30, 2021)] (providing Notification of Closure Stingy Run Fly Ash Reservoir). Nevertheless, EPA undertook to evaluate the Fly Ash Reservoir closure for compliance with the new closure requirements announced on January 11, 2022, that are challenged in Case No. 22-1056 (including in the Proposed Gavin Denial itself).

In addition to these specific comments concerning the Fly Ash Reservoir closure, numerous commenters raised concerns regarding EPA's "significant shift in policy from long standing regulations, guidance, and interpretations of closure requirements." *See* JA__[Comments of Association of State and Territorial Solid Waste Management Officials at 1 (Mar. 23, 2022)]; *see also* JA__,__[Comments of American Public Power Association (APPA) and Large Public Power Council (LPPC) (Mar. 25, 2022), Comments of Utility Solid Waste Activities Group (USWAG) (Mar. 25, 2022) ("USWAG Comments")]. Commenters also noted that, unlike the specific "technically precise" cover system requirements EPA issued to enable self-implementation of the closure performance standard, there are no similar

"technically precise" requirements addressing horizontal groundwater flow. *See* JA__[USWAG Comments at 24].

As to the Bottom Ash Pond that was the subject of the extension request, despite Gavin's position that it had met the requirements of 40 C.F.R. §257.103(f)(1) to support an alternative closure deadline of May 4, 2023, Gavin nonetheless informed EPA in public comments that Gavin would voluntarily undertake measures to address EPA's proposed findings regarding closure timing and closure design for the Bottom Ash Pond. *First*, Gavin accelerated the initiation of the Bottom Ash Pond closure by six months. JA__[Comments of Gavin Power, LLC at 80 (Mar. 25, 2022) ("Gavin Comments")]. This required Gavin to (i) work with its contractors to accelerate the relevant construction and delivery schedules and (ii) obtain permission from the regional transmission organization to move the dates of the facility outage. *Second*, Gavin redesigned the project to close the Bottom Ash Pond by removing the CCR rather than closing with CCR in place. *Id.*

V. The Final Gavin Denial

On November 28, 2022, EPA finalized its denial of Gavin's extension request and published a notice of availability of its decision in the Federal Register. 87 Fed. Reg. at 72,989. EPA premised its denial of the extension for the Bottom Ash Pond in part on the closure requirements in the 2022 Rule, as applied to the separate Fly Ash Reservoir at the plant—which was no longer in operation and had *completed*

closure. JA__[Final Gavin Denial at 5]; *see also* Doc. 2006963 at 3 (conceding that Fly Ash Reservoir closure was "paramount" decision in EPA's denial). EPA found that, applying the closure requirements in the 2022 Rule, the Fly Ash Reservoir was not "closed consistent with 40 C.F.R. §257.102(d)" (the closure performance standard for closure-in-place). JA__[Final Gavin Denial at 5].

The Final Gavin Denial rejected Gavin's proposed May 4, 2023 "cease receipt" deadline for the Bottom Ash Pond and, instead, imposed an April 12, 2023 deadline—22 days earlier.[4] 87 Fed. Reg. at 72,989.

A. The Final Gavin Denial Reaffirms the 2022 Rule and Applies It to the Gavin Plant

The Final Gavin Denial reaffirms the closure requirements in the 2022 Rule as binding law applicable to all regulated parties in at least three ways.

First, EPA repeated, and attempted to buttress, the new categorical prohibition against closing a CCR unit in place under 40 C.F.R. §257.102(d) where there is any CCR "in contact with groundwater." JA__[Final Gavin Denial at 19]. According to EPA, "the performance standards in 40 C.F.R. §257.102(d) for closure with waste in place" can be met only where "after closure of the unit has been completed, the

[4] Gavin subsequently met EPA's deadline to initiate closure at tremendous expense, operational challenge, and disruption. *See* SA-3 ¶7. EPA's compliance assessment and closure requirements in the Final Gavin Denial continue to cause Gavin injury. *See infra* at 32-34, 51-55; *see also* SA-3 ¶8.

groundwater *is no longer in contact* with the waste in the closed unit." JA__[*Id*. at 28] (emphasis added). Confirming the absolute and categorical nature of the prohibition, EPA stated that where "at least a portion of the CCR in the [closed unit] remains in contact with groundwater" "[t]hese facts alone" mean that the owner cannot demonstrate "that the closure of the [unit] meets the performance standards in 40 C.F.R. §257.102(d)." JA__[*Id*. at 19]. EPA stated that its new prohibition "must be met at every unit." JA__[*Id*. at 32].

To support the categorical prohibition, EPA asserted that where CCR is "in contact with groundwater" in a closed CCR impoundment, the "groundwater … freely migrates in and out of the CCR remaining in the closed unit." JA__[*Id.* at 33]. According to EPA, an impoundment closed with CCR in contact with groundwater will have "groundwater that flows into and out of the unlined impoundment" "continuously," and "the closed unit will continue leaking indefinitely." JA__[*Id.* at 29]. Such contact, EPA concluded, causes "the continued formation of leachate in the closed unit [and] the continued releases of that leachate into the surrounding groundwater." JA__[*Id.* at 31]. However, with respect to the Fly Ash Reservoir at the Gavin Plant, EPA only concluded that the "contact between the waste and groundwater provides a *potential* for waste constituents to be dissolved, suspended, or otherwise transported in the groundwater to migrate out of the closed unit." JA__[*Id.* at 38] (emphasis added).

Second, EPA repeated its new definitions of "free liquids" and "infiltration," which had been announced for the first time in January 2022. EPA stated that "free liquids" include "freestanding liquid in the impoundment and … all separable porewater in the impoundment, whether the porewater was derived from sluiced water, stormwater runoff, or groundwater that migrates into the impoundment." JA__[*Id.* at 34]. According to EPA, its definition of "free liquids" "thus obligates the facility" to "permanently remove[]" groundwater from the unit. *Id.*

EPA stated that the term "infiltration" for purposes of the closure performance standard "refers to any kind of movement of liquid into a CCR unit from any direction, including the top, sides, and bottom of the unit." JA__[*Id.* at 25]. As the basis for its definition of "infiltration," EPA relied on two "general usage" dictionary definitions, which, it claimed, do not "limit[] the source or direction by which the infiltration occurs." JA__[*Id.* at 34-35].

Third, EPA relied on a new definition of a third term—"impound"—that further alters the meaning of the general performance standard in 40 C.F.R. §257.102(d)(1). For purposes of applying the performance standard in 40 C.F.R. §257.102(d)(1)(ii)—which requires that a CCR unit closing with CCR in place must do so in a manner that will "[p]reclude the probability of future impoundment of water, sediment, or slurry"—EPA now defines "impound" to mean "to confine within an enclosure or within limits," JA__[*id.* at 39], even though the 2015 Rule

defines "impoundment" as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR," 40 C.F.R. §257.53. According to EPA, with this new definition in place, neither Gavin's Fly Ash Reservoir nor "any other unlined CCR impoundment" with CCR in contact with groundwater can "me[e]t this [performance] standard." JA__[Final Gavin Denial at 39].

B. EPA's Other Facility-Specific Findings in the Final Gavin Denial

In addition to the Fly Ash Reservoir findings, EPA's Final Gavin Denial also finalized a facility compliance assessment as to other issues, applying regulations and requirements specifically to the Gavin Plant.

First, EPA determined that certain of Gavin's alternate source demonstrations (showing that concentrations of specific constituents in individual groundwater monitoring wells at the Gavin Plant CCR units were caused by sources other than the respective CCR unit) were not sufficiently supported under the regulations. *See* JA__-__[*Id.* at 54-70]. However, each of Gavin's alternate source demonstrations was prepared and certified by a Qualified Professional Engineer in accordance with the self-implementing 2015 Rule, 40 C.F.R. §257.94(e). *See, e.g.*, JA__[Gavin Power, LLC, *2018 Annual Groundwater Monitoring and Corrective Action Report* at App. A (Jan. 31, 2019)] (Gavin Bottom Ash Complex Alternate Source

Demonstration Report dated July 3, 2018, including professional engineer certification).

Second, EPA took issue with aspects of Gavin's statistical method used when assessing groundwater monitoring data, including the treatment of background monitoring well data and the decision not to pool background data. JA__-__[Final Gavin Denial at 49-54]. However, Gavin's statistical method was reviewed and certified by a Qualified Professional Engineer in 2017 as being "appropriate for evaluating the groundwater monitoring data for [each of the CCR units] of the Gavin Power Plant in accordance with the requirements of 40 C.F.R. 257.93." JA__[ERM, *Statistical Method Certification* at 3 (Oct. 16, 2017)].

Third, EPA determined that Gavin failed to demonstrate that the groundwater monitoring networks for the Fly Ash Reservoir, Residual Waste Landfill, and Bottom Ash Pond CCR units complied with certain regulatory requirements. JA__[Final Gavin Denial at 5]. While Gavin disagreed with EPA's findings, JA__-__,__-__[Gavin Comments at 23-34, 60-68], Gavin nonetheless voluntarily installed additional monitoring wells at all three CCR units, JA__,__[*id*. at 28, 61]. A Qualified Professional Engineer reviewed the necessary design and installation information and certified that both the original monitoring networks and the updated monitoring networks complied with the relevant regulations. JA__-__[*Id*. at 69-70].

VI. EPA Continues to Implement the Closure Requirements Reaffirmed in the Final Gavin Denial

Following its issuance of the Final Gavin Denial, EPA has continued to implement the waste-below-the-water-table prohibition and its related regulatory definitions, now citing the Final Gavin Denial as support.

A. The Legacy Impoundment Proposal

On May 18, 2023, EPA published a Federal Register notice proposing revisions to 40 C.F.R. Part 257, Subpart D. 88 Fed. Reg. 31,982 (May 18, 2023) ("Legacy Proposal"). EPA's Legacy Proposal would impose requirements for inactive impoundments at inactive facilities ("legacy" units, which were originally excluded from the 2015 Rule) in response to this Court's *USWAG* decision. In addition, the proposal would expand the scope of the 2015 Rule to include "CCR management units," an entirely new category of regulated units at active facilities that EPA proposes to define as "any area of land on which any non-containerized accumulation of CCR is received, placed, or otherwise managed at any time, that is not a CCR unit," including "CCR units that closed prior to October 17, 2015" (the effective date of the 2015 CCR Rule). *Id*. at 32,034.

In the Legacy Proposal, EPA cited the Final Gavin Denial as authority for the agency's position. *Id*. at 31,992-95 (citing "Final Decision on Request for Extension of Closure Date Submitted by Gavin Power, LLC, 87 FR 72989 (November 15, 2022)"). EPA repeated that "free liquids" means "both standing liquids in the

impoundment as well as porewater in any sediment or CCR," including from "groundwater." *Id*. at 31,992-93. And EPA repeated that "infiltration" means "the migration or movement of liquid into or through a CCR unit from any direction, including the top, sides, and bottom of the unit." *Id*. at 32,025. Based on these definitions, EPA repeated the prohibition against closure-in-place where there is any contact between CCR and groundwater. *Id*. ("[C]omplying with the closure performance standards" requires that "groundwater will no longer be in contact with the waste in the closed unit.").

EPA acknowledged, however, that "[c]oncerns have been raised that the existing regulations do not clearly support the above description" of the closure performance standards. *Id*. "For example," EPA explained, "some have argued that the term 'infiltration' only refers to the movement of water into a unit from the surface through a cover system, or that the regulations do not require facilities to eliminate 'free liquids' derived from groundwater." *Id*. at 32,025-26. EPA "strongly disagree[d]" with those views. *Id*. at 32,026. Nevertheless, EPA "request[ed] comments on whether to include a regulatory definition of the term 'liquids,' which could specify that the term includes free water, porewater, standing water, and groundwater" and "whether to adopt a regulatory definition of the term 'infiltration,' consistent with [the] term's plain meaning and the [general usage] dictionary definitions referenced above." *Id*.

B. The Proposed Denial of Alabama's CCR Program

On August 14, 2023, EPA proposed to disapprove the State of Alabama's CCR permitting program, which Alabama had submitted for EPA review pursuant to RCRA. 88 Fed. Reg. 55,220 (Aug. 14, 2023). EPA's proposed disapproval is based on EPA's conclusion that, while the text of Alabama's program "mirrored the provisions in the Federal CCR regulations," *id*. at 55,222, Alabama would permit CCR units to utilize the closure-in-place option under those regulations "while leaving waste (*i.e.*, CCR) below the water table (WBWT)," *id*. at 55,224.

According to EPA, prior to Alabama's submission of its program to EPA in December 2021, EPA communicated with State officials at least 68 times over the prior four years (from January 4, 2018, to December 29, 2021) regarding "the development of a state CCR program." *See* EPA, *Volume II: Technical Support Document for the Proposed Notice to Deny Alabama's Coal Combustion Residuals Permit Program, Communication Between EPA and ADEM*, EPA-HQ-OLEM-2022-0903-0134, at 1 (Aug. 2023), https://www.regulations.gov/document/EPA-HQ-OLEM-2022-0903-0134 ("EPA-Alabama Communication Log"). According to EPA's own description of these pre-submission communications, none mentioned a prohibition against "waste below the water table" or "WBWT." *See id*. at 1-7.

However, as described by EPA, "[l]ess than a month" *after* Alabama's submission, "on January 11, 2022, EPA published several proposed decisions" on

companies' Part A extension requests, including the Proposed Gavin Denial (reflecting a portion of the January 2022 Rule) addressing "clos[ure] [of] unlined CCR surface impoundments with, among other things, waste remaining in groundwater." 88 Fed. Reg. at 55,229. On January 11, 2022, EPA emailed Alabama officials "copies of the proposed decisions that EPA released on several Part A alternative closure demonstrations, including the Gavin Power Plant proposed decision." EPA-Alabama Communication Log at 7. On March 15, 2022, "EPA sent a list to" Alabama officials of CCR "surface impoundments [in Alabama] that have closed or are closing with waste that will remain in place below the water table." 88 Fed. Reg. at 55,229-30. And on March 16, 2022, EPA Region 4 (which includes Alabama) convened a telephonic meeting with all of the State agencies in the region to convey "EPA's position that surface impoundments or landfills cannot be closed with coal ash in contact with groundwater" as stated "in Section III.E.1" of EPA's proposed decision on "Gavin Power LLC's extension request." Petitioners' Motion for Leave to Submit Extra-Record Documents, Ex. C at 1, Doc. 1967068, No. 22-1056 (D.C. Cir. Sept. 30, 2022) (citing JA__-__[Proposed Gavin Denial at 39-51]). Specifically, EPA planned to discuss the "[i]mpact" of EPA's "clarification on infiltration, closure in place with waste below the water table, etc." *Id.*, Ex. C at 2. EPA Region 4 confirmed EPA's position that "[s]ome aspects of Part A decisions impact all facilities—such as interpretation of closing in place with waste below the

water table (WBWT)[.]" *Id*., Ex. D. On the March 16, 2022 call, "the R4 WBWT List (including Alabama) was presented." EPA-Alabama Communication Log at 7.

EPA then proposed to deny Alabama's submission in August 2023 because Alabama's permit program did not adhere to the waste-below-the-water-table prohibition first described in the 2022 Rule and repeated in the Final Gavin Denial. According to EPA, under the Alabama regulations (the "express terms" of which "mirror[ed]" the federal regulations), State officials had issued permits "to unlined surface impoundments that have closed or are closing with waste that will remain in place below the water table." 88 Fed. Reg. at 55,225, 55,230; *see also id*. at 55,224 ("[F]acilities … were closing (or had already closed) unlined CCR surface impoundments while leaving waste (*i.e.*, CCR) below the water table (WBWT)."). EPA contended that such permits do not "comply[] with all [of] the necessary requirements in the Federal regulations." *Id*. at 55,229.

In support of this assertion, EPA cited to the Final Gavin Denial *nine times*, including for the definitions of "free liquid" and "infiltration" that EPA announced for the first time in the 2022 Rule. *See, e.g.*, *id*. at 55,236 n.32 ("free liquid" includes "groundwater"). And EPA confirmed that, "*in the final decision denying an extension* under Part A for Gavin Generating Station, EPA expressly rejected the various interpretations of the regulatory text that [Alabama] offers" and "also *explained its decision* to rely on the plain language meaning of 'infiltration,'

explicitly rejecting [Alabama's] interpretation that the term refers only to the vertical migration of liquid through the cover system." *Id*. at 55,237 (emphases added).

SUMMARY OF THE ARGUMENT

Standing. Petitioners have standing to challenge the Final Gavin Denial because Petitioner Gavin, other company Petitioners, and USWAG members are "'the object of'" the agency's unlawfully promulgated requirements. *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022). EPA's new CCR criteria increase the company Petitioners' and USWAG members' regulatory burden and threaten them with penalties under RCRA.

I. This Court has jurisdiction to review the challenged CCR requirements as they were issued in January 2022 because they were final as issued, purport to impose new obligations on regulated parties and States, and are otherwise reviewable. Should this Court conclude that the 2022 Rule as announced on January 11, 2022, was *not* final agency action, then it has jurisdiction in this appeal to review the unlawful waste-below-the-water-table prohibition, which EPA repeated in the Final Gavin Denial. At a minimum, that prohibition acquired the force of law when EPA reaffirmed it in an indisputably final agency action that the agency itself described as promulgating RCRA requirements.

II. EPA's waste-below-the-water-table prohibition and related closure requirements are a legislative rule. EPA: (1) relies on the prohibition, as specifically

stated in the Final Gavin Denial, as the legislative basis for other agency actions; (2) explicitly invokes its legislative authority under RCRA when restating the prohibition in the Final Gavin Denial; and (3) effectively amends the existing regulatory text in 40 C.F.R. Part 257, Subpart D, by way of its decision in the Final Gavin Denial. In short, EPA's decision-making in the Final Gavin Denial involved broad applications of more general principles rather than case-specific individual determinations and bears the hallmarks of legislative rulemaking.

III. EPA failed to comply with the procedural requirements of RCRA and the APA in issuing the closure requirements in the Final Gavin Denial, and thus they should be vacated. EPA has conceded that the limited process it used to issue the Final Gavin Denial is not a rulemaking. And EPA failed to publish the proposed revisions in the Federal Register; failed to promulgate the requirements as regulations in the Code of Federal Regulations; failed to consult with the States prior to their promulgation; and failed to notify Congress of its proposed revisions.

IV. EPA's new criteria are invalid for the additional reason that EPA's decision was arbitrary and capricious. EPA neglected the most basic requirements of reasoned decision-making by failing even to acknowledge its change in position or to consider the reliance interests of regulated parties. The new requirements also deprived company Petitioners and USWAG members of fair notice.

V. Vacatur of the Final Gavin Denial is the proper remedy. EPA's paramount basis for the Final Gavin Denial was the unlawful waste-below-the-water-table prohibition, and EPA did not indicate that any portion of the decision was severable. Vacatur would not cause disruptions because EPA's codified CCR regulations remain in effect, and EPA may seek to enforce those codified regulations in individual cases.

VI. This Court has no jurisdiction under RCRA to review EPA's Gavin-specific compliance assessments in the Final Gavin Denial. Such facility-specific findings are only reviewable in the district court. Even if this Court had jurisdiction, those assessments would have to be set aside as unlawful.

STANDING

This Court has jurisdiction under Article III if "at least one group of petitioners" has standing to challenge the waste-below-the-water-table prohibition in the 2022 Rule as reflected in the Final Gavin Denial. *West Virginia*, 142 S. Ct. at 2606. For purposes of the standing analysis, "a federal court must assume *arguendo* the merits of [a challenger's] legal claim," *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), including that EPA's new regulations and requirements are reviewable under RCRA, *see Scenic Am., Inc. v. DOT*, 836 F.3d 42, 55 (D.C. Cir. 2016); *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012).

Where petitioners are "the 'object of'" an agency action, it is "self-evident" that they have standing to seek judicial review. *Maine Lobstermen's Ass'n v. NMFS*, 70 F.4th 582, 592 (D.C. Cir. 2023) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Here, Petitioners are the intended "object of" EPA's CCR rules, including the new requirements in the 2022 Rule and the Final Gavin Denial. Petitioner Gavin is the owner of the Gavin Plant, the object of EPA's Final Gavin Denial. The other company Petitioners own and operate coal-fueled power plants with CCR units in Arkansas, Illinois, Indiana, Kentucky, Ohio, Oklahoma, Texas, Virginia, and West Virginia. SA-8 ¶3; SA-30 ¶3. USWAG is an association of approximately 130 utilities and utility operating companies (including most of the company Petitioners) and trade associations in the power-generation industry.[5] SA-4-5.

EPA's new waste-below-the-water-table prohibition injures company Petitioners and USWAG members by, for example, reclassifying dozens of CCR units as "surface impoundments … with coal ash in contact with groundwater" and imposing a new rule that purports to bar them from completing their longstanding

[5] USWAG regularly represents its members on regulatory matters, including CCR issues. USWAG has associational standing because it seeks relief germane to its associational purposes, the participation of individual members is not required, and many of its members have standing in their own right. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

plans to utilize the closure-in-place option as authorized by the 2015 Rule, thus imposing significant costs. *See* SA-30-31 ¶4; *see also* SA-36-37. EPA contends that its new prohibition "must be met at every unit." JA__[Final Gavin Denial at 32]. And EPA has denied regulatory extensions, as in the Final Gavin Denial. *See* SA-2 ¶4; *see also* JA__[Final Gavin Denial at 19] (concluding that "at least a portion of the CCR in [Gavin's closed CCR unit] remains in contact with groundwater" and that "[t]hese facts alone" justified the denial); *Kurtz v. Baker*, 829 F.2d 1133, 1141 (D.C. Cir. 1987) ("the denial of a benefit … is a basis for standing").

EPA has cited the waste-below-the-water-table prohibition in the Final Gavin Denial as the basis for its proposed denial of Alabama's CCR program, where a number of USWAG members operate CCR units, *see* 88 Fed. Reg. at 55,237, as well as for its Legacy Proposal, which EPA contends would expand the scope of the regulations at company Petitioners' and USWAG members' facilities, *see id*. at 31,992-95; SA-9 ¶5. And company Petitioners and USWAG members face a new threat of civil penalties under RCRA because EPA's new prohibition purports to apply with the same force of law as existing regulations that govern their CCR units. *See Corbett v. TSA*, 19 F.4th 478, 483 (D.C. Cir. 2021) (standing where the "target[s]" of agency rules "face[] the threat of enforcement and ensuing penalties should [they] fail to comply"). Vacatur of these new requirements would fully

redress injuries caused by the waste-below-the-water-table prohibition by restoring the closure-in-place option in the 2015 Rule.

ARGUMENT

I. If the Court Finds That It Lacks Jurisdiction in Case No. 22-1056, Then It Has Jurisdiction to Review EPA's Admittedly Final Waste-Below-The-Water-Table Prohibition in This Appeal.

RCRA vests this Court with exclusive jurisdiction over challenges to any "action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter." 42 U.S.C. §6976(a)(1); *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000). Agency action is reviewable under RCRA if it "partakes of the fundamental characteristic of a regulation, *i.e.*, that it has the force of law." *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007) (internal citation and quotation marks omitted). "[T]he question of whether an agency document is a final 'regulation ... or requirement' under RCRA is substantially similar to the question of whether it is a legislative rule under the APA." *Id*. at 226. In addition, functional amendments to existing rules are "action[s] of the Administrator in promulgating any regulation … or requirement" independent of the nominal function of the particular documents in which EPA chooses to announce the requirements. 42 U.S.C. §6976(a)(1); *see Battery Recyclers*, 208 F.3d at 1058 (the statute's "jurisdictional provision does not limit review to … actual regulations" as labeled by the agency).

For the reasons set forth by Petitioners in Case No. 22-1056, this Court has jurisdiction to review the challenged CCR requirements as they were issued in January 2022 because they were final as issued, purport to impose new obligations on regulated parties and States, and are otherwise reviewable. *See* Joint Opening Brief of Petitioners at 33-57, Doc. 1976606, No. 22-1056 (D.C. Cir. Dec. 6, 2022). Petitioners filed protective petitions for review in this case challenging EPA's prohibition on closure-in-place with waste below the water table as contained in the Final Gavin Denial to preserve their right to judicial review in the event that the Court concludes that it lacks jurisdiction in Case No. 22-1056.

Should this Court conclude that the 2022 Rule as announced on January 11, 2022, was *not* final agency action, then it has jurisdiction in this appeal to review the unlawful waste-below-the-water-table prohibition, which EPA repeated in the Final Gavin Denial. At a minimum, that prohibition acquired the force of law when EPA reaffirmed it in an indisputably final agency action that the agency itself described as promulgating RCRA requirements. *See* JA__-__[Final Gavin Denial at 5-6] ("Because this final [agency] action promulgates requirements under [RCRA] … petitions for review of this final action must be filed in the [D.C. Circuit] within ninety days of the date this final action is published in the Federal Register." (citing 42 U.S.C. §6976(a)(1))); 87 Fed. Reg. at 72,989 (same).

EPA issued the decision as "Final" and published a Notice of Availability of Final Decision reciting the prohibition in the Federal Register, 87 Fed. Reg. at 72,989-90. *See Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (considering "the Agency's own characterization of the action" and "whether the action was published in the Federal Register" (internal citation and quotation marks omitted)). Although this Court has "eschew[ed] the notion that labels are definitive," *id.*, EPA plainly has reached the culmination of its decision-making process on its requirement that CCR facilities may not close with CCR below the water table, even assuming for the sake of argument that the agency had not already done so in January 2022.

The Final Gavin Denial, like the January 2022 pronouncements, also uses language that purports to set out a generally applicable rule with the force of law. EPA makes clear its view that its new requirements "must be met at every unit," JA__[Final Gavin Denial at 32], and that EPA intends to enforce those requirements on an ongoing basis—notwithstanding the text of existing CCR criteria codified at 40 C.F.R. Part 257. *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) (finding it "clear" that agency document "does purport to bind applicants" where document mandated action by applicants and bound agency officials to a certain position when reviewing applications).

The Final Gavin Denial "reaffirm[ed]" EPA's position that CCR surface impoundments "cannot be closed with coal ash in contact with groundwater." EPA, "EPA Takes Final Action to Protect Groundwater from Coal Ash Contamination at Ohio Facility" (Nov. 18, 2022), https://tinyurl.com/42r7n3zc. Both the Final Gavin Denial itself and the Notice of Availability of Final Decision restated the 2022 Rule's waste-below-the-water-table prohibition in denying Gavin's Part A extension application. *See* JA__[Final Gavin Denial at 19]; *see also* 87 Fed. Reg. at 72,990. In doing so, EPA repeated nearly verbatim the language it used when it first announced the prohibition in the interrelated documents issued on January 11, 2022. *See* EPA's January 2022 Press Release ("[S]urface impoundments or landfills cannot be closed with coal ash in contact with groundwater.").

This Court has refused to endorse exactly this sort of strategy by an agency to "immuniz[e] its lawmaking from judicial review" by making "[l]aw ... without notice and comment" or "public participation." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000); *see also, e.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) (vacating RCRA requirement announced and applied in company-specific determination).

II. The Waste-Below-The-Water-Table Prohibition Is a Legislative Rule.

In addition to being final, EPA's waste-below-the-water-table prohibition and related closure requirements in the Final Gavin Denial are, as they were in the 2022

Rule, a legislative rule promulgated in violation of the procedural requirements for EPA rulemaking under RCRA and the APA. The prohibition constitutes final agency action with binding legal and practical consequences for regulated parties and States and effectively amends the 2015 Rule, which is itself a binding and enforcement-backed legislative rule promulgated through notice and comment.

To determine whether an agency pronouncement is a legislative rule, the Court asks:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993). "If the answer to *any* of these questions is affirmative, we have a legislative, not an interpretative rule." *Id.* (emphasis added). Here, with respect to the waste-below-the-water-table prohibition as contained in the Final Gavin Denial, the answer to not just one of these questions—but three of them—is affirmative, and thus "we have a legislative … rule." *Id.*

First, EPA is treating the closure requirements in the Final Gavin Denial as the legislative basis for other agency actions. In its proposed disapproval of Alabama's CCR program, for example, EPA invokes the waste-below-the-water-table prohibition as articulated in the Final Gavin Denial. *See* 88 Fed. Reg. at 55,224

("[F]acilities [in Alabama] were closing (or had already closed) unlined CCR surface impoundments while leaving waste (*i.e.*, CCR) below the water table (WBWT)."). In doing so, EPA authoritatively cites the Final Gavin Denial nine times. *See, e.g.*, *id*. at 55,236 n.32 (per Final Gavin Denial, "free liquid" includes "groundwater"); *id*. at 55,237 (describing "the final decision denying an extension under Part A for Gavin Generating Station" as EPA's "*decision* to rely on the plain language meaning of 'infiltration.'"); *id*. at 55,229 (facilities closing with waste below the water table as permitted by Alabama do not "comply[] with all [of] the necessary requirements in the Federal regulations."). Indeed, it *could only be* because of Alabama's alleged failure to adhere to the 2022 Rule (including as set forth in the Final Gavin Denial), which is not contained in the Code of Federal Regulations, that EPA found noncompliance, because the "express terms" of Alabama's regulations "mirror[ed]" the codified federal regulations. *Id*. at 55,225. Because EPA is using the Final Gavin Denial to fill the "legislative gap" in its basis for disapproving Alabama's CCR program—a statutory right conferred upon States by Congress, 42 U.S.C. §6945(d)(1)(A)—the Final Gavin Denial is a legislative rule, *Am. Mining Congress*, 995 F.3d at 1112. And, of course, EPA also used the new prohibition as the basis for denying Gavin's request for an extension.

Second, EPA explicitly invokes its legislative authority under RCRA to support the new requirements in the Final Gavin Denial. In particular, EPA claimed

that its choice of a definition of "infiltration"—the lynchpin of the waste-below-the-water-table prohibition—"achieves [EPA's] statutory mandate" and "directly advances RCRA's stated regulatory purpose." JA__,__[Final Gavin Denial at 37, 40]. EPA's "explicit[] invo[cation] [of its] general legislative authority" demonstrates that EPA is engaging in legislative rulemaking. *Conference Grp. LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). EPA's statutory justification for its choice of a definition—instead of other different definitions it considered—is properly part of a legislative rulemaking to revise the regulations—it is not an excuse for refusing to conduct such a rulemaking in the first place. If and when EPA promulgates new definitions of "free liquids" and "infiltration" *in the "existing regulatory text,"* as EPA has suggested it may, *supra* at 26, then the question of whether those definitions are consistent with the statutory text and supported by the record can be subjected to public scrutiny and judicial review.

Third, the Final Gavin Denial effectively amends the existing regulatory text. In its recent Legacy Proposal, EPA concedes that its definitions of "free liquid" (to include all "groundwater") and "infiltration" (to include lateral flow of "groundwater") do not appear in "[t]he part 257 regulations." 88 Fed. Reg. at 31,992. Indeed, in that notice, EPA seeks public comment on "[w]hether to revise the existing regulatory text" to prospectively include definitions of "liquid" and "infiltration" to implement its position. *Id*. at 32,026. EPA says it is doing so

because "[c]oncerns have been raised that the existing regulations do not clearly support [EPA's] description" of those terms. *Id*. at 32,025-26.

EPA would indeed be required "to revise the existing regulatory text," *id*. at 32,026, if it wishes to include these definitions in 40 C.F.R. Part 257. The term "infiltration" is not defined at all in the existing regulatory text. *See* 40 C.F.R. §257.53. And EPA's new definition conflicts with its prior description of the term "infiltration" as applying "only" to "percolation" "through the cap." JA_[Risk Assessment at K-1]. The definition of "free liquids" in the 2015 Rule also does not include "groundwater" but instead includes only "liquids that readily separate from the solid portion of a waste under ambient temperature and pressure." *See* 40 C.F.R. §257.53. "Groundwater" is a *separate* defined term in the very same regulatory section and not listed in the definition of "free liquids." *See id*.

Moreover, EPA's decision-making in the Final Gavin Denial "involve[d] broad applications of more general principles rather than case-specific individual determinations" and, for that reason too, it bears "the hallmarks of legislative rulemaking." *Neustar v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) (internal citation and quotation marks omitted). As to "infiltration," for example, EPA did not simply rely on that term's plain meaning, but it actively decided, as among various different definitions, to select a particular "general usage definition." JA__[Final Gavin Denial at 35]. In the Proposed Gavin Denial, EPA proposed the general usage

definition of "infiltration" from the Merriam-Webster dictionary. JA__[Proposed Gavin Denial at 47]. Commenters explained that "other common usage dictionaries contain several different definitions" that conflict with EPA's definition and further that technical definitions properly treated "infiltration" as the "'flow of water from the land surface into the subsurface,'" not the lateral flow of groundwater. *See* JA__-__[USWAG Comments at 19-23] (quoting USGS Dictionary of Water Terms). In the Final Gavin Denial, EPA *decided* to adopt a general usage definition derived from both the Merriam-Webster dictionary (as proposed) and the Cambridge English Dictionary—apparently rejecting the USGS definition. JA__[Final Gavin Denial at 35]. Similarly, in the ongoing Legacy Proposal, EPA has proposed (for the first time) to revise the *codified* regulations to include a definition of "liquid" from the general usage Merriam-Webster dictionary. 88 Fed. Reg. at 31,992. That EPA had *already* selected and imposed that same definition in issuing the Final Gavin Denial (six months earlier) is further confirmation that it, too, is a legislative rule like the Legacy Proposal.

III. EPA Did Not Satisfy the Procedural Requirements of RCRA or the APA in Issuing the Waste-Below-The-Water-Table Prohibition.

Because the waste-below-the-water-table prohibition in the Final Gavin Denial was a "regulation or requirement" under RCRA and a "legislative rule" under the APA, EPA was required to—but did not—comply with the procedural requirements of both statutes.

Under RCRA, EPA must promulgate solid-waste criteria as "regulations" and only "after notice," "public hearings," "consultation with the States," and notice to Congress. 42 U.S.C. §§6944(a), 6974(b)(1), 6907(a). Under the APA, EPA is required to publish proposed rules and their supporting data and rationales in the Federal Register and thereafter allow interested parties to comment. *See* 5 U.S.C. §553(b).

EPA failed to comply with these requirements here. EPA did not propose or justify its categorical prohibition or its definitions of "infiltration" and "free liquids" in the Federal Register, *id*., or "promulgate" them as "regulations," 42 U.S.C. §6944(a), as it did with respect to the existing requirements and definitions in the 2015 Rule. Instead, EPA issued them outside of the Federal Register and the Code of Federal Regulations. Rather than "consult[ing] with the States," *id*., or "cooperat[ing] with the States," *id*. §§6974(b)(1), 6907(a), EPA unilaterally dictated the prohibition without seeking any input from States at all and then ordered them to fall in line. *See supra* at 13-19. Nor did EPA provide any notice to Congress of the new requirements prior to issuing them. 42 U.S.C. §6907(b). EPA's evasion of the procedural limits on its delegated authority to promulgate solid-waste criteria under RCRA requires vacatur. *See, e.g.*, *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1349 (2021) (vacating agency orders where statutory scheme showed Congress intended agency to use specific procedures).

Nor did EPA provide meaningful opportunity for public comment or somehow cure the procedural defects in the 2022 Rule by accepting limited public comment in the context of the Proposed Gavin Denial. EPA concedes that the site-specific Part A "process is *not a rulemaking*" that is intended to satisfy the procedural requirements for promulgating new RCRA criteria. *See* 85 Fed. Reg. at 53,552 (emphasis added). And while commenters explained to EPA why the waste-below-the-water-table prohibition and supporting definitions in the 2022 Rule were unlawful, EPA treated the requirements as final from the outset. *See supra* at 13-19. "An agency may not introduce a proposed rule in this crabwise fashion," "[n]or [can] the defect [be] cured" by the fact that some regulated parties attempted to comment. *McLouth*, 838 F.2d at 1323 (procedural violation where agency accepted comments on individual determinations and finalized a pre-determined, broadly applicable rule).

IV. The Waste-Below-The-Water-Table Prohibition Is Arbitrary and Capricious and Otherwise Unlawful.

A. EPA Did Not Reasonably Explain Its Change in Position.

The Final Gavin Denial is also arbitrary and capricious because EPA failed to explain its departure from the existing regulatory text and EPA's contemporaneous explanations of the 2015 Rule. A "central principle of administrative law is that" when an agency changes its "past practices and official policies [it] must at a

minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

Here, *after* the Final Gavin Denial was issued, EPA has acknowledged concerns that its waste-below-the-water-table prohibition is not discernible from the text of the existing codified regulations and is hedging its bets. In the Legacy Proposal issued in May 2023, EPA acknowledges that the key components of the prohibition—the definitions of "free liquid" and "infiltration"—do not appear in "[t]he part 257 regulations," and it seeks public comment on "[w]hether to revise the existing regulatory text" to include new definitions. 88 Fed. Reg. at 31,992, 32,026. And in doing so (six months *after* the Final Gavin Denial), EPA belatedly attempts to explain its rationale, claiming that it was "unable to quantitatively model" the risks associated with "CCR disposal below the water table" in the 2014 Risk Assessment (supporting the 2015 Rule) and that it has only now "become apparent that the practice of disposing of CCR below the water table is more common than previously understood." *Id*. at 32,009, 32,011.

But EPA's claim after the Final Gavin Denial to have some new knowledge regarding CCR below the water table is not grounds for altering, without notice and comment, the existing CCR regulations as EPA has done in the 2022 Rule and Final Gavin Denial. Instead, the agency must take up a new rulemaking. In the Final Gavin Denial, EPA failed to acknowledge its change in position at all—much less

provide a reasoned explanation or new information warranting a change, as it is trying to do now in the Legacy Proposal. Instead, EPA insisted in the Final Gavin Denial that its waste-below-the-water-table prohibition reflects "EPA's long-standing positions governing the closure of surface impoundments under RCRA." JA__[Final Gavin Denial at 16]. "That argument flatly defies the plain text of the official [regulations], repeated official agency statements, and [years] of agency practice." *Am. Wild Horse*, 873 F.3d at 924; *supra* at 9-13. EPA's "failure even to acknowledge" that it was changing its position makes EPA's decision arbitrary and capricious. *Id.* at 927-28.

B. EPA Failed to Consider Reliance Interests, and Its Change in Position Deprived Petitioners of Fair Notice.

EPA also failed to consider Petitioners' reasonable reliance on the plain language of the existing regulations and EPA's prior explanations. The Due Process Clause guarantees individuals "an opportunity [1] to know what the law is and [2] to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Those "[t]raditional concepts of due process" are "incorporated into administrative law." *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). Moreover, in changing its position, an agency must "assess whether there [are] reliance interests, determine whether they [are] significant, and weigh any such interests against competing policy concerns." *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).

Here, EPA failed to consider significant reliance interests. EPA's failure to consider this aspect of the problem is particularly evident in the Final Gavin Denial itself—*before* EPA issued the Final Gavin Denial (indeed, before it issued the Proposed Gavin Denial), the prior owner of the Gavin Plant had *completed* closure of the Fly Ash Reservoir (after four years of work), and its professional engineer had certified compliance with the closure performance standards in 40 C.F.R. §257.102(d). JA__[Gavin Power, LLC, *Notification of Closure and Closure Certification* (July 30, 2021)] (providing Notification of Closure Stingy Run Fly Ash Reservoir); JA__[Ohio, Permit to Install No. DSWPTI1086919 (Sept. 16, 2016)]. Yet EPA retroactively judged the compliance of the Gavin Plant based on purported noncompliance with the requirements in the 2022 Rule, which was announced nearly six months *after* closure of the Fly Ash Reservoir (in July 2021) and long after it was too late to avoid the massive investments made in reliance on EPA's prior position. Even assuming that EPA could impose its new position retroactively, at minimum it was arbitrary and capricious for the agency to ignore these substantial reliance interests entirely.

Other company Petitioners and USWAG members have likewise relied on the 2015 Rule. Under the 2015 Rule, closure plans were required to be certified by October 2016; monitoring networks were required to be in-service by October 2017; and requests for Part A extensions due to lack of "alternative disposal capacity"—

including certification of compliance with the regulations—were due by November 2020. 40 C.F.R. §§257.90(b)&(e), 257.102(b)(2)(i)&(iii), 257.103(f)(3). Company Petitioners and USWAG members undertook all of these activities in reliance on the 2015 Rule, as EPA applied it at the time. *See* SA-5-6 ¶5; SA-8 ¶3; SA-30 ¶3. "It [is] arbitrary or capricious to ignore such matters." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA's position threatens to impose retroactive liability on regulated parties who lacked fair notice of EPA's new requirements and thus violates the "fundamental principle in our legal system … that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). For all of the reasons explained above, EPA's about-face in the 2022 Rule and the Final Gavin Denial deprived the industry of fair warning here.

V. The Proper Remedy Is Vacatur.

If the Court exercises jurisdiction in this case (as opposed to Case No. 22-1056), the Final Gavin Denial should be vacated. The "paramount" basis for the denial was EPA's view that the Fly Ash Reservoir did not meet the waste-below-the-water table prohibition and related closure requirements. Doc. 2006963 at 3; JA__[Final Gavin Denial at 5]. And EPA did not assert that it intended any portion of the decision to be severable or function independently of the other portions. *See North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984) ("Whether an

administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent.").

This is not a case where setting aside unlawful action risks disruptive consequences. EPA's CCR regulatory scheme will remain in place, including its discretion to enforce the existing criteria, 42 U.S.C. §6945(d)(4)(A), (B), approve State plans, *id*. §6945(d)(1), and promulgate federal permit requirements, *id.* §6945(d)(2)(B). If EPA concludes that the new requirements in the 2022 Rule and the Final Gavin Denial are necessary additions to this regulatory scheme, it may attempt to issue them again in a procedurally valid manner that reflects reasoned decision-making, *see NRDC v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020), as EPA now seemingly believes it can do in the Legacy Proposal, *see* 88 Fed. Reg. at 32,025-26.

Accordingly, this Court should vacate the Final Gavin Denial and thereby prevent EPA from taking further action to enforce EPA's new prohibition against waste-below-the-water-table and its associated closure requirements promulgated in that action. *See United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *Appalachian Power*, 208 F.3d at 1028 ("For the reasons stated, we find setting aside EPA's Guidance to be the appropriate remedy.").

VI. The Court Lacks Jurisdiction to Review EPA's Gavin-Specific Compliance Assessments, and They Are in Any Case Unlawful.

This Court lacks jurisdiction to review EPA's Gavin-specific compliance assessments in the Final Gavin Denial. And even if this Court had jurisdiction, it would have to set aside those assessments as unlawful.[6]

A. This Court Lacks Jurisdiction to Review the Gavin-Specific Compliance Assessments.

Absent a statutory mandate, Courts of Appeals lack original jurisdiction, and RCRA does not provide this Court with jurisdiction to directly review an assessment that is specific to a single plant. *See* 42 U.S.C. §6976(a)(1) (jurisdiction over review of EPA action "promulgating any regulation, or requirement under this chapter"); *Hazardous Waste Treatment Council ("HWTC") v. EPA*, 910 F.2d 974, 976 (D.C. Cir. 1990); *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (42 U.S.C. §6976(a)(1) is "a limitation on [this Court's] jurisdiction").

Gavin filed its protective petition in this case because EPA asserted in its Final Gavin Denial that this Court has jurisdiction over any challenge to that action under 42 U.S.C. §6976(a)(1). 87 Fed. Reg. at 72,989. However, contrary to EPA's assertion, the compliance assessment portion of EPA's decision does not constitute promulgation of requirements and is not subject to RCRA's judicial review provision because it is *not* "a decision of uniform or widespread application."

[6] Section VI of Petitioners' Opening Brief is offered only by Petitioner Gavin.

HWTC, 910 F.2d at 976. Rather, it is merely "application of [a] regulation" to a specific facility, and challenges to such action, which involve fact-intensive inquiries at individual facilities, belong in the district court. *Utah Power & Light Co. v. EPA*, 553 F.2d 215, 218 (D.C. Cir. 1977); *see also HWTC*, 910 F.2d at 976. At the appropriate time and in the appropriate court, Gavin will challenge, as necessary, EPA's application of its regulations governing alternate source demonstrations; statistical methods; groundwater monitoring network requirements; closure performance standards; closure plan requirements; and Part A extensions to the particular factual circumstances at the Gavin Plant's CCR units. But only the district courts have jurisdiction over those challenges. *See HWTC*, 910 F.2d at 976 (D.C. Circuit lacks jurisdiction over EPA action concerning "a single well in a single town"); *Utah Power & Light*, 553 F.2d at 217-18 (D.C. Circuit lacks jurisdiction over EPA's application of its regulations to three electricity generating units).

B. In Any Event, the Assessments Are Contrary to Law and Unsupported by the Record.

Even if the Court had jurisdiction to review EPA's Gavin-specific compliance assessments (it does not), the assessments are contrary to the plain language of the regulations on which Gavin has relied for years and are unsupported by the record. As EPA explained in promulgating the 2015 Rule, the CCR regulatory requirements are "self-implementing," meaning that they "apply directly to the facility." 80 Fed. Reg. at 21,311. EPA thus required that a Qualified Professional Engineer review

and certify compliance with requirements of the 2015 Rule to "provide[] critical support that the rule would achieve the statutory standard." *See id.*

EPA emphasized that "the integrity of both the professional engineer and the professional oversight of boards licensing professional engineers are sufficient to prevent any abuses," *id.* at 21,336, in part because practicing under the title Professional Engineer "requires following a code of ethics with the potential of losing his/her license for negligence," *id*. at 21,337.

EPA reaffirmed the central role of the Qualified Professional Engineer's review and certification in the CCR regulations even after Congress amended RCRA in December 2016 to give EPA statutory authority to develop a federal CCR permitting program (in the absence of an EPA-approved state permitting program). *See* 83 Fed. Reg. 36,435, 36,447 (July 30, 2018) (Qualified Professional Engineers' "third-party verification provided critical support that the rule would achieve the statutory standard").

Each of the groundwater-monitoring related regulatory requirements EPA assessed in the Final Gavin Denial (found in 40 C.F.R. §§257.91, 257.93 and 257.94, *see* 87 Fed. Reg. at 72,990) rely upon the certification of a Qualified Professional Engineer. *See* 40 C.F.R. §§257.91(f), 257.93(f)(6), 257.94(e)(2). Similarly, each of the closure-related regulatory requirements EPA assessed in the Final Gavin Denial (found in 40 C.F.R. §257.102(b) and 257.102(d), *see* 87 Fed. Reg. at 72,990) rely

upon the certification of a Qualified Professional Engineer. *See* 40 C.F.R. §257.102(b)(4), (d)(3)(iii). And in every instance, Gavin obtained a Qualified Professional Engineer's certification for each regulatory requirement at issue. *See, e.g.*, JA__[Geosyntec, *Groundwater Monitoring System Network Evaluation, Gavin - BAC* (July 26, 2016)]; JA__[ERM, *Statistical Method Certification* at 3 (Oct. 16, 2017)]; JA__[ERM, *Errata Sheet to Gavin Bottom Ash Pond 2019 Annual Groundwater Monitoring and Corrective Action Report* at 40, 74 (Oct. 16, 2020)]; JA__[American Electric Power Service Corp., *Closure Plan, Stingy Run Fly Ash Pond* at 2 (Oct. 2016)]; JA__[Gavin Power, LLC, *Notification of Closure and Closure Certification* (July 30, 2021)].

"It is axiomatic that an agency must adhere to its own regulations," *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986), and the relevant regulations clearly contemplate that the Qualified Professional Engineer certifications establish compliance with the requirements. Nonetheless, EPA now improperly second-guesses nearly all of Gavin's Qualified Professional Engineers' professional judgments, contrary to the regulations and EPA's own determination that the 2015 Rule's standards were "sufficiently objective and technically precise that a qualified professional engineer will be able to certify that they have been met." 80 Fed. Reg. at 21,337. EPA failed to provide any indication prior to January 2022 that Gavin could not rely on the certifications to demonstrate compliance, despite

the fact that the certifications were available to EPA, the State, and the general public on Gavin's public website *for years*. *See supra* at 17-18. As such, EPA provided Gavin with no "fair warning of the conduct [it now says the CCR rule] prohibits or requires," *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) (collecting cases), creating "unfair surprise" with regard to actions that, in some cases, were completed in their entirety years ago, *see Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007).

Finally, because RCRA provides for penal sanctions, any deference due to EPA in interpreting its own regulations cannot overcome the due process limits requiring fair warning of the conduct the statute prohibits or requires. *See Gates & Fox Co.*, 790 F.2d at 156; *see also Kisor v. Wilkie*, 139 S.Ct. 2400, 2417-18 (2019) (A court "may not defer to a new interpretation … that creates 'unfair surprise' to regulated parties.").

CONCLUSION

The Court should grant the petitions for review in Case No. 22-1056 and dismiss these protective petitions for lack of jurisdiction. If the Court declines to exercise jurisdiction in Case No. 22-1056, it should grant these petitions and vacate the Final Gavin Denial.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this document complies the Court's Order of August 8, 2023, because it contains 12,522 words, as counted by Microsoft Word, excluding the parts excluded by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1). This document also complies with typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: September 15, 2023

s/ P. Stephen Gidiere III
P. Stephen Gidiere III

CERTIFICATE OF SERVICE

I certify that on this 15th day of September, 2023, a copy of the foregoing document was served electronically through the Court's CM/ECF system on all registered counsel.

Dated: September 15, 2023

s/ P. Stephen Gidiere III
P. Stephen Gidiere III