Comments of the Attorneys General of Illinois, Arizona, Colorado, Delaware, the District of Columbia, Maryland, Michigan, Minnesota, and New Mexico

Via Electronic Transmission on Regulations.Gov

June 17, 2026

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
EPA Docket Center, Office of Water, Office of Science and Technology, Docket
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: The U.S. Environmental Protection Agency's Proposed "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category-Unmanaged Residual Leachate," 91 Fed. Reg. 28,487 (May 18, 2026), Docket ID No. EPA-HQ-OW-2009-0819

Dear Administrator Zeldin:

The Attorneys General of Illinois, Arizona, Colorado, Delaware, the District of Columbia, Maryland, Michigan, Minnesota, and New Mexico ("States") respectfully submit these comments on the Environmental Protection Agency's ("EPA" or the "Agency") proposal entitled "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category-Unmanaged Residual Leachate," 91 Fed. Reg. 28,487 (May 18, 2026) (the "Proposal"). In the Proposal, EPA proposes to amend regulations governing unmanaged combustion residual leachate at steam electric power generating point sources, previously amended by a final Agency rule at 89 Fed. Reg. 40,198 (May 9, 2024) (the "2024 Rule").

In this Proposal, EPA ignores the Clean Water Act's mandate to continually strengthen the best available technology for reducing toxic pollution that leaks from coal ash impoundments into our States' navigable waterways. Instead of retaining the existing, protective national technology standard, EPA proposes to shift the responsibility for deciding how to best limit this toxic pollution onto individual state regulators. Even worse, EPA has indicated that state regulators must accommodate data center growth at the expense of clean water. The States urge EPA to withdraw its Proposal.

I. Background

A. Unmanaged combustion residual leachate contains toxic pollutants such as mercury that threatens navigable waterways within our States

When a coal power plant burns fuel to create electricity, a residual waste product called coal ash is left over. Coal ash is often stored on-site at the plant in two types of waste management units: 1) a dry landfill or 2) mixed with water and pumped into a man-made coal

ash pond, also called a surface impoundment. In both waste management units, water that percolates through the coal ash in the landfill or ash pond creates combustion residual leachate ("CRL"). At some units, a leachate-management system can be used to capture combustion residual leachate before it leaks. However, combustion residual leachate that is not managed can instead escape the landfill or ash pond and migrate into nearby groundwater. Unmanaged leachate can migrate through groundwater and ultimately find its way into nearby lakes, rivers, or other surface waters. The risk of groundwater contamination is even greater when leachate is stored in waste management units without a liner, where typically the base of the surface impoundment is bare soil.

Combustion residual leachate contains a host of toxic chemicals, such as mercury and arsenic, that pose numerous dangers to human health. An EPA risk assessment found that living near ash ponds and unlined landfills increases the risk of damage to the liver, kidney, lungs and other organs due to exposure to toxic metals like cadmium, cobalt, lead, thallium, and other pollutants at concentrations far above levels that are considered safe. The risks to infants are particularly acute.[1] Discharges of leachate can harm receiving waters, accumulate in fish, and contaminate drinking water with consequences including "cancer, cardiovascular disease, neurological disorders, kidney and liver damage, and lowered IQs in children." 80 Fed. Reg. 67,838, 67,840 (Nov. 3, 2015).

Coal power plants generate massive quantities of combustion residual leachate: a single landfill can generate more than 800,000 cubic meters of leachate in one year, representing an estimated annual volume of 26.8 to 42.8 million cubic meters (over 11 billion gallons),[2] making combustion residual leachates one of the largest industrial sources of toxic wastewater in the country. As of 2015, wastewater from steam electric plants overall accounted for "about 30 percent of all toxic pollutants discharged into surface waters by all industrial categories regulated" under the CWA, 80 Fed. Reg. at 67,839–40, and, as of 2019, leachate alone "would qualify as the 18th-largest source of water pollution in the nation, producing more toxic-weighted pound equivalents than the entire coal mining industry." *See Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1004 (5th Cir. 2019).

B. The Clean Water Act requires regulation and permitting of all discharges

The Clean Water Act ("CWA" or "Act") was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). It prohibits "discharge of any pollutant by any person" into "navigable waters" unless under a permit. *Id*. at §§ 1311(a), 1362(7), (12). The U.S. Supreme Court has ruled that discharges that

[1] *See* EPA, Environmental Assessment for Final Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (April 2024), https://perma.cc/7GFN-285B.
[2] Chad Able et al., *Assessment of Combustion Residual Leachate Volume, Composition, and Treatment Costs*, 457 J. Hazard. Mater. 131731 (2023), https://pubmed.ncbi.nlm.nih.gov/37320908/.

reach surface water by means of flowing through groundwater may be regulated if the discharge is a "functional equivalent" a direct discharge from a point source. *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020).

The Agency uses "effluent limitation guidelines" ("ELGs") as a tool to achieve the statute's goal by regulating discharges of pollutants into navigable waters from categories of point sources. 33 U.S.C. § 1314(b). ELGs place requirements on regulated facilities to meet pollution limits which are established based on the use of pollution control technology. *See Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 927 (5th Cir. 1998). ELGs are then implemented through the National Pollutant Discharge Elimination System ("NPDES") permit program, which is often an authority delegated to individual states. The ELG's are technology-forcing, meaning that the Act "should force agencies and permit applicants to adopt technologies that achieve the greatest reductions in pollution." *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 563–64 (2d Cir. 2015).

Two technological standards in the CWA are relevant for the Proposal: "best practicable control technology currently available" ("BPT"), 33. U.S.C. § 1314(b)(1)(B) and "best available technology economically achievable" ("BAT"). *Id*. at § 1314(b)(2)(B). BPT is the less stringent and "first step" standard, *EPA v. Nat'l Crushed Stone*, 449 U.S. 65, 75 n.14 (1980), and represents "the average of the best levels of performance by existing plants." *Chem. Manuf. Ass'n v. EPA*, 870 F.2d 177, 203 (5th Cir. 1989) (citing 52 Fed. Reg. 42,525).

BAT, the stricter standard, has applied to discharges of toxic pollutants since March 31, 1989. *See* 33 U.S.C. § 1311(b)(2)(C). When setting BAT, EPA "must set discharge limits that reflect the amount of pollutant that would be discharged by a point source employing the best available technology that EPA determines to be economically feasible across the category or subcategory as a whole." *Tex. Oil & Gas*, 161 F.3d at 928. The Supreme Court has ruled that BAT must achieve "reasonable further progress" toward eliminating pollution. *See Southwestern Elec.*, 920 F.3d at 1003, 1006 (citing *Nat'l Crushed Stone*, 449 U.S. at 75).

C. EPA regulation of combustion residual leachate

The first ELGs established for combustion residual leachate in 1982 determined that surface impoundments were the "best practicable control technology currently available" for coal residual leachate. *See* 80 Fed. Reg. at 67,854. In 2015, EPA revised the ELGs for coal power plants, setting "the first federal limitations on the levels of toxic metals in wastewater that can be discharged from steam electric facilities, based on technology improvements . . . over the preceding three decades." 84 Fed. Reg 64,620, 64,624 (Nov. 22, 2019). However, the 2015 regulations determined that the "best available technology economically achievable" for leachate was surface impoundments, making no change from the requirements of the 1982 rule.

Environmental groups challenged the 2015 rule, arguing that EPA acted arbitrarily when setting surface impoundments as BAT for leachate. The U.S. Circuit Court for the Fifth Circuit agreed and, in 2019, vacated the leachate regulations. The court found that EPA's action was "not

permitted by the [CWA's] statutory scheme," *Southwestern Elec.*, 920 F.3d at 1025, because it set BAT for leachate as surface impoundments, the same technology the Agency set as BPT in 1982, "without offering any explanation for why that prior standard is now BAT," undermining the Act's technology-forcing effect. *Id*. at 1025. In a 2020 rulemaking, EPA noted the decision vacating leachate ELGs but only stated an intention to "address this vacatur in a subsequent action." 85 Fed. Reg. 64,650, 64,655 (Oct. 13, 2020). When ELGs are vacated by a court, the permit writing authorities then must determine wastewater requirements "on a case-by-case basis using [best professional judgment]." 2024 Rule at 40,203 (citing 40 C.F.R. 124.3(c)(2)).

While EPA considered how to address the rule's vacatur, the U.S. Supreme Court established Agency authority to regulate discharges that reach surface water as the "functional equivalent" of a direct discharge from a point source. *Maui*, 590 U.S. 165. The opinion confirms that EPA has the authority to address unmanaged combustion residual leachate that leaks from a surface impoundment, through groundwater, into a navigable waterway.

D. EPA's 2024 rule directly addresses unmanaged CRL for the first time

In 2024, EPA issued a new rule revising ELGs for several wastewater discharges from coal power plants, including combustion residual leachate. Following instruction from *Southwestern Elec.*, EPA determined that the best available technology economically achievable for managed combustion residual leachate can yield no discharges of pollution at all, i.e., a zero-discharge standard. 2024 Rule at 40,199–200.

However, EPA determined that a zero-discharge standard for unmanaged leachate would have "unacceptably high costs" and stablished a separate subcategory within its own BAT determination. *Id*. at 40,247–48. Instead, BAT for unmanaged leachate was determined to be a technology called chemical precipitation that EPA found was available and economically achievable. *Id*. at 40,250–51. In support of its finding, EPA described that several coal plants have long used chemical precipitation to limit toxic leachate and that other types of facilities use similar systems to treat chemically similar wastewater, including coal mines. *Id*. Importantly, EPA did not determine that every single landfill or coal ash pond produces unmanaged CRL. Rather, it is up to the permitting authority or facility owner/operator to determine whether a leak from a surface impoundment is the functional equivalent of a direct discharge from a point source to a navigable water under *Maui*. 2024 Rule at 40,248.

The 2024 Rule's requirements have yet to come into effect. In 2025, EPA extended the compliance deadlines for meeting the requirements of the 2024 Rule, 90 Fed. Reg. 61,328 (Dec. 31, 2025), and modified the extension rule at 91 Fed. Reg. 4016 (Jan. 30, 2026).

E. EPA's 2026 Proposal relies on case-by-case determination of the best available technology using permitting agencies' best professional judgment

Instead of determining that any particular technology is the "best available," EPA proposes to "rely on discretion of the permitting authority to set case-by-case BAT limitations . . . after evaluating site-specific factors relevant to the treatment to [sic] of unmanaged CRL." Proposal at 28,497. This approach is defined in EPA's regulations as relying on the permit writer's "best professional judgment" ("BPJ"). 40 C.F.R. § 125.3. EPA asserts that the Act allows permit writers to determine effluent limitations on a "case-by-case basis using the permit writer's BPJ" when a previously promulgated effluent limitation was "withdrawn by the EPA[.]" Proposal at 28,490. EPA's changed view is largely based on what it now sees as the high cost of chemical precipitation, the BAT that EPA chose in the 2024 Rule. *Id*. at 28,500.

II. The States oppose EPA's proposal to weaken controls on unmanaged leachate

Vigorous implementation of the Act's NPDES permitting program ensures that discharges to navigable waters comply with permits that account for capabilities of treatment technologies and impacts on water quality. In particular, federal effluent limitation guidelines provide a stable regulatory floor that guides permitting nationwide. The regulatory floor is essential for our States because minimum national standards protect our waters against upstream, out-of-state pollution that our States cannot directly regulate. Strong ELGs ensure that upstream discharges are subject to minimum nationwide standards, empowering our States to protect our surface waters without being undermined by lower standards in other states.

EPA's Proposal will weaken ELGs applicable to discharges of unmanaged CRL from coal power plants. As described below, EPA's proposal abdicates its responsibility to establish the best available technology to limit unmanaged CRL discharges to individual permitting agencies, violating the Act's directive to eliminate water pollution. Furthermore, EPA's proposal is arbitrary and capricious because it fails to take into account the reliance interests of States in strong, uniform ELGs on unmanaged CRL discharges. Troublingly, EPA also indicates that permitting authorities should consider the needs of data centers when determining how to limit toxic pollution. The States urge EPA to withdraw this unlawful proposal.

A. EPA cannot choose permit writers' best professional judgment as the best available technology to control toxic pollution under the CWA

In 2024, EPA fulfilled its statutory duty to select the best available technology to limit toxic mercury and arsenic pollution from unmanaged leachate that seeps through groundwater into the navigable waters of our States. EPA's current proposal, however, abdicates that statutory responsibility to pick the best available technology and imposes that responsibility on permitting agencies, shifting the regulatory burden to the States without justification. EPA cannot abdicate its statutory duty and the Proposal, if adopted, would violate the Clean Water Act.

The Act requires that EPA "shall" publish effluent limitation guidelines to carry out the overall statutory goal of eliminating water pollution. 33 U.S.C. s 1314(b). The ELGs are "the rulemaking device prescribed by the CWA to set national effluent limitations for categories and subcategories of point sources." *Texas Oil & Gas*, 161 F.3d at 927. By relying on case-by-case determinations, EPA proposes to ignore this statutory requirement to set a national standard.

EPA's proposed approach also contravenes the statute's goal of advancing pollution control technology. As the U.S. Supreme Court and several other courts have held, the Act "provides for increasingly stringent effluent limitations," *Nat'l Crushed Stone*, 449 U.S. at 69, and is "technology-forcing." *Nat. Res. Def. Council*, 808 F.3d at 563–64. As discussed in the 2024 Rule, legislative history further shows the technology-forcing intent of the CWA. *See* 2024 Rule at 40,202 (citing Statement of Senator Muskie (October 4, 1972), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, at 170. (U.S. Senate, Committee on Public Works, Serial No. 93-1, January 1973)). As opposed to a uniform national standard that sets a clear limit on effluent, the Proposal's case-by-case approach fails to press forward this important statutory goal.

While EPA correctly states that the CWA provides permitting authorities with the ability to permit discharges based on their best professional judgment, neither the cited statutory provisions nor the underlying EPA regulations can support rescinding an already-promulgated BAT and replacing it with BPJ. When properly applied, permit writers may apply best professional judgment to write case-by-case effluent limitations "*prior to* the taking of necessary implementing actions relating to" CWA requirements. 33 U.S.C. § 1342 (emphasis added). For this reason, EPA has relied on BPJ to fill gaps in narrow sets of circumstances, such as when EPA is temporarily unable to choose BAT due to a lack of data. *See* 2024 Rule at 40,228–29, citing *Southwestern Elec.*, 920 F.3d at 1021. However, because EPA already found data sufficient to promulgate BAT for unmanaged CRL in 2024, that circumstance is not present here.

Second, Agency regulations state that BPJ may be applied "to the extent that EPA-promulgated effluent limitations are inapplicable." 40 C.F.R. § 125(c)(3). This provision is validly applied when "an EPA-promulgated ELG has been remanded by a court[.]" Proposal at 28,490. Indeed, after *Southwestern Elec.* vacated EPA's choice of BAT in the 2015 Rule, the Agency applied BPJ pending a new rulemaking. But EPA completed that rulemaking in 2024 and no court has vacated those regulations.

The regulations also allow the use of BPJ where "promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation[.]" 40 C.F.R. § 125(c)(3). The Proposal does not explicitly rely on this provision to justify its choice, but it too does not apply because EPA has already applied ELGs to all unmanaged leachate.

EPA's standardless approach violates the CWA's explicit directive that EPA determine the best available technology, as well as the statute's intent to continually improve pollution control. While the statue allows use of case-by-case permitting in limited circumstances while EPA

gathers necessary information to set a technology standard, the Proposal would apply the "best professional judgment" standard to an ongoing, continuously accumulating stream of toxic effluent from potentially hundreds of surface impoundments at coal plants across the country that may operate for decades to come. This proposed approach is contrary to law.

B. EPA must affirm that impoundment ponds are an impermissible choice under case-by-case permit review

Even if permit writers were allowed to choose a control technology for unmanaged leachate on a case-by-case basis, EPA is required by the CWA, applicable case law, and the administrative record to prohibit the use of impoundment ponds as the best available technology. Rather than limiting effluent, impoundment ponds are the source of groundwater contamination and cannot constitute the "best available technology."

EPA, recognizing the environmental harm caused by storing coal ash in impoundment ponds, does not specifically list it as an option for limiting effluent from unmanaged leachate. *See* Proposal at 28,496. EPA does, however, list several other control technologies and "*in situ"* coal ash handling practices that it asserts could limit discharges from unmanaged CRL. *Id*. Elsewhere, the Proposal appears to anticipate that permitting authorities, when employing their best professional judgment, will choose surface impoundments as the best available technology, asserting that "permitting authorities must *consider* more stringent limitations beyond those based on surface impoundments," *Id*. at 28,502 (emphasis added).

In the 2024 Rule,[3] EPA found that surface impoundments could not be chosen as BAT for the ELGs, because surface impoundments do not represent "reasonable further progress" toward eliminating pollution and are "largely ineffective" at removing dissolved metals. *See Southwestern Elec.,* 920 F.3d at 1003, 1006 (citing *Nat'l Crushed Stone,* 449 U.S. at 75).

EPA must clarify that surface impoundments are not a valid control technology to apply to the full range of unmanaged CRL discharges. Indeed, the administrative record shows coal ash impoundment ponds are not the best available technology to limit effluent discharges from polluting navigable waters because it is less stringent and would remove fewer pollutants than the other options it is explicitly considering.

C. EPA's consideration of cost to data centers is contrary to the CWA

EPA proposes to expand the factors that permitting authorities must consider far beyond the scope of previous regulations, apparently also encouraging permitting authorities to consider

[3] Entirely different circumstances applied when the 2024 Rule did not "rule out the possibility" that permit writers could apply surface impoundments in permits in particularized cases. 2024 Rule at 40,282. As described above, the 2024 Rule applied BPJ in specific, limited circumstances, such as legacy wastewater ponds at closed facilities where no new coal ash was being added. In the Proposal, EPA would apply BPJ on all impoundment ponds across the country, even at active facilities that will add coal ash and toxic pollutants to ponds an in an open-ended manner for decades into the foreseeable future.

whether requiring protective limits on toxic pollution would hurt data center development. This expansion of the BAT determination process violates the CWA.

The Act requires EPA to consider specific factors when setting BAT, including "the cost of achieving . . . effluent reduction." 33 U.S.C. § 1314(b)(1)(B). Courts have interpreted the economic achievability requirement as a test of whether the regulations can be "reasonably borne" by the industry as a whole and does not focus on the effect of ELGs on individual facilities. *Chem. Mfrs. Ass'n,* 870 F.2d at 262. EPA's regulations for setting standards on a case-by-case basis when promulgated BAT effluent limitations are inapplicable mirror the statute, also stating that the permit writer must consider the "cost of achieving . . . effluent reduction," 40 C.F.R. §125.3(d)(3)(v), and thus likewise are focused on the effect of regulation on the specific regulated industry.

EPA's proposal elaborates on these regulatory requirements, recommending that the permit authority "should consider" several factors including "changes in local energy demand" when crafting a BAT standard for a permit on a case-by-case basis. Proposal at 28,498. This factor is an apparent reference to demand from any nearby data centers, as made clear in other parts of the Proposal.

In the same subsection of the Proposal, EPA boasts that its proposal is "tailored to the dynamic energy market of today, by providing permitting authorities with the flexibility to make regulatory decisions[.]" *Id*. at 24,498. This description parallels earlier instances in the Proposal, where EPA asserted its regulatory rollback is needed because of "the artificial intelligence (AI) and data center revolution[.]" *Id*. at 28,492. Furthermore, EPA cites Executive Orders on accelerating data center development as an impetus for this rollback: *Removing Barriers to American Leadership in Artificial Intelligence*, Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 31, 2025); *Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241*, Exec. Order No. 14,261, 90 Fed. Reg. 15,517 (Apr. 8, 2025) (demanding increases in coal for "construction of artificial intelligence (AI) data processing centers"). And in the press release announcing the Proposal, the EPA Administrator cited power demand from the data center industry as a central motivation for removing environmental safeguards.[4]

The question of whether limiting toxic pollution would restrain data centers cannot be properly considered among the "costs of achieving . . . effluent reduction." Data center development is far outside of the range of factors the CWA allows a permit writer to consider on a case-by-case basis. EPA must affirm that requiring permit writers to consider energy demand does not extend to accommodation of data center development.

[4] EPA Press Release (May 14, 2026), https://perma.cc/LL6F-QH3D.

D. EPA failed to consider States' reliance interests on a strong regulation setting a uniform nationwide BAT for this massive volume of pollution

EPA entirely failed to consider the reliance interests of the States in retaining nationwide, uniform regulations calculated toward eliminating toxic pollution in the waters that our residents use to swim, fish, and drink. By ignoring these reliance interests, EPA's Proposal is arbitrary and capricious.

Illinois

Illinois has adopted laws and regulations to address groundwater pollution from coal ash ponds and landfills located within its borders. In 2019, the Illinois General Assembly passed the Coal Ash Pollution Prevention Act, Pub. Act 101-171 (amending 415 ILCS 5/1 et seq.), which mandated comprehensive rules governing the construction, operation, and closure of CCR surface impoundments including groundwater monitoring standards. *See* 415 ILCS 5/22.59. Illinois has proceeded to enforce these standards, recently requiring closure and removal of three ash ponds at a former coal power plant near the Vermilion River.[5] Among other requirements, the plant owner agreed to a groundwater collection plan on the site to ensure no adverse impacts to the river.

However, Illinois is beset by several coal plants on or near its borders. Many of these plants are situated on interstate waterways, making toxic pollution from coal ash a major threat. In Gibson County, Indiana, a coal plant with several unlined ash ponds and landfills lies on banks of the Wabash River directly across from Illinois.[6] That facility was built over shallow sand and gravel aquifers, and the residual ash sits directly in groundwater year-round because the bottom layer of ash is below the water table. *See* Duke Gibson Generating Station North and South Ash Basin System Modified Closure & Post Closure Plans, December 16, 2016. The Illinois Environmental Protection Agency has declared the Wabash River as impaired for toxic metals and the Illinois Department of Public Health has declared a fish advisory for mercury contamination.[7] Similarly, a coal plant in Missouri[8] lies on the Missouri River. From the plant, the Missouri River flows east and empties into the Mississippi River near Granite City, Illinois, where the river is impaired for mercury.[9]

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[5] Illinois Attorney General, *Attorney General Raoul Announces Settlement with Dynegy Midwest Generation over Coal Ash Pollution* (June 9, 2023), https://perma.cc/5H5R-FSDF.
[6] Duke Energy, CCR Rule Compliance Data & Information for Gibson Station (last visited June 9, 2026), https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.
[7] Ill. Environmental Protection Agency, U.S. EPA's Partial Approval of 2024 303(d) List of Impaired Waters, Appendix 1 (Dec. 2024), https://perma.cc/2PQS-SWWF; *see also* EPA, How's My Waterway, https://mywaterway.epa.gov/waterbody-report/IL_EPA/IL_B-01/2024; Ill. Dept. of Pub. Health, Fish Advisories for Wabash River (last visited June 9, 2026), https://perma.cc/WD9D-T3NE.
[8] Ameren, CCR Rule Compliance Data and Information for Labadie Energy Center (last visited June 9, 2026), https://www.ameren.com/sustainability/waste/ccr/compliance-reports/labadie.
[9] Illinois' 2024 303(d) list; *see also* U.S. EPA, How's My Waterway (last visited June 9, 2026), https://mywaterway.epa.gov/waterbody-report/IL_EPA/IL_J-02/2024.

Colorado

Colorado has several coal ash ponds with unmanaged leachate.[10] In recent years, EPA has entered into consent decrees under RCRA addressing groundwater contamination from at least two of these sites.[11] Colorado's Water Quality Control Division applies EPA's ELGs in discharge permits and relies on EPA's technology-based standards where there are no state-specific standards.[12] By removing an across-the-board technology-based standard and instead relying on permit writers to craft case-by-case limits, the proposed rule increases regulatory burdens on Colorado and could result in less robust water quality protections.

E. EPA's Proposal ignores the massive administrative burden imposed on state agencies

EPA's Proposal is also arbitrary and capricious because it fails to consider the immense administrative burden it imposes on state permitting agencies. The Proposal would removing a federal standard and instead foist responsibility onto state permit writers to determine BAT on a case-by-case basis for every individual coal ash pond or landfill. Because many of the undersigned States are delegated to implement the federal NPDES permitting program, this administrative burden will force additional expenditure of resources to ensure appropriate protection of our States' waters. As guidance for permitting agencies on selecting BAT on a case-by-case basis, EPA offers a non-exhaustive list of a dozen factors that States "should consider" when writing a permit for toxic discharges. Proposal at 28,498. Rather than working toward implementing a clear, uniform national standard, the Proposal turns permitting into a multi-factor balancing test.

The Proposal additionally seeks to turn environmental agencies into energy regulators. In addition to factors relating to site conditions and the nature of the groundwater pollution, the Proposal would require state permitting agencies to consider how requiring pollution controls would affect "pending must-run orders or similar demands that a utility stay in operation longer than planned." *Id*. at 28,498. The additional burden on environmental regulators to effectively

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[10] Tamara Chuang, "Chemical contamination from 7 Colorado coal-fired power plants found during groundwater monitoring," COLO. SUN (Mar. 19, 2019), https://coloradosun.com/2019/03/19/colorado-coal-ash-water-contamination/.

[11] EPA Press Release (May 23, 2022), "EPA reaches settlement with Public Service Company of Colorado over allegations of noncompliance with Coal Combustion Residual Regulations," https://www.epa.gov/newsreleases/epa-reaches-settlement-public-service-company-colorado-over-allegations-noncompliance; EPA Press Release (Oct. 9, 2024), "EPA settles with Public Service Company of Colorado for failure to meet coal ash regulations at Cherokee Generating Station," https://www.epa.gov/newsreleases/epa-settles-public-service-company-colorado-failure-meet-coal-ash-regulations-cherokee.

[12] *See* 5 Code Colo. Regs. § 1002-62(2) ("If the Commission has not so promulgated effluent limitation guidelines for any particular industry, but that industry is subject to numeric effluent limitation guidelines promulgated by the United States Environmental Protection Agency ("EPA") pursuant to the Federal Water Pollution Control Act of 1972, the effluent from these industries shall be subject to the corresponding numeric effluent limitations in the applicable EPA guidelines and shall not be subject to the effluent limitations of paragraph 62.5 below."); see also 40 C.F.R. § 401.12(i) (noting that the Clean Water Act requires state-issued permits to apply limits established by EPA for point source discharges).

conduct an energy modeling exercise will likely require consultation with state energy agencies, increasing the challenge further.

In the 2024 Rule, EPA noted that the burden on permitting agencies would be decreased by selection of chemical precipitation as BAT, since it "replaces BPJ determination [so] permitting authorities can avoid BPJ analyses that they otherwise would have performed[.]" 2024 Rule at 40,251. In this Proposal, EPA entirely ignores the immense burden it is placing on States. For this reason, the Proposal is arbitrary and capricious.

III. Conclusion

By withdrawing uniform national technology standards for unmanaged coal residual leachate, EPA's Proposal constitutes a double bind for water quality in the undersigned States. On one side, the States that wish to protect water quality find themselves abandoned by EPA—on their own to regulate toxics from coal ash ponds and landfills through laborious individual case-by-case determinations. On the other side, EPA's standardless determination could open the door for other states who have proven lax at regulating coal ash to continue business as usual. Compounding its abdication of duty, EPA indicates that the demands of data center development should lead to weaker environmental standards. The States urge EPA to heed follow Clean Water Act's requirement to adopt continually stronger technology standards and withdraw its Proposal.

STATE OF ILLINOIS
KWAME RAOUL
ATTORNEY GENERAL

/s/ *Jason E. James*
Jason E. James
Assistant Attorney General
Joanna Brinkman
Complex Litigation Counsel
Matthew J. Dunn
Chief, Environmental Enforcement/
Asbestos Litigation Division
Roger Johnson
Mallory Meade
Assistant Attorneys General
Illinois Attorney General's Office
201 W. Pointe Drive, Suite 7
Belleville, IL 62226
(217) 843-0322
jason.james@ilag.gov

STATE OF ARIZONA
KRIS MAYES
ATTORNEY GENERAL

/s/ *Kirsten Engel*
Kirsten Engel
Special Attorney General
Environmental Protection Unit
2005 N. Central Ave.
Phoenix, AZ 85085
(520) 209-4020
Kirsten.Engel@azag.gov

STATE OF COLORADO
PHILIP J. WEISER
ATTORNEY GENERAL

/s/ *Carrie Noteboom*
Carrie Noteboom
Assistant Deputy Attorney General
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
(720) 508-6000
carrie.noteboom@coag.gov

STATE OF DELAWARE
KATHLEEN JENNINGS
ATTORNEY GENERAL

/s/ *Ian Liston*
Ian Liston
Director of Impact Litigation
Vanessa L. Kassab
Ralph K. Durstein III
Deputy Attorneys General
Delaware Department of Justice State Office Building
820 North French Street
Wilmington, DE 19801
(302) 683-8899
Ian.Liston@delaware.gov

DISTRICT OF COLUMBIA
BRIAN L. SCHWALB
Attorney General

/s/ Lauren Cullum
Lauren Cullum
Special Assistant Attorney General
Office of the Attorney General
for the District of Columbia
400 6th Street, N.W., 9th Floor
Washington, D.C. 20001
lauren.cullum@dc.gov

STATE OF MARYLAND
ANTHONY G. BROWN
ATTORNEY GENERAL

/s/ *Steven J. Goldstein*
Steven J. Goldstein
Assistant Attorney General
Office of the Attorney General of Maryland
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6414
sgoldstein@oag.maryland.gov

STATE OF MICHIGAN
DANA NESSEL
ATTORNEY GENERAL

/s/ *Benjamin C. Houston*
Benjamin C. Houston
Assistant Attorney General
Michigan Department of Attorney General
Environment, Natural Resources, and Agriculture Division
6th Floor, G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909

STATE OF MINNESOTA
KEITH ELLISON
ATTORNEY GENERAL

/s/ *Cat Rios-Keating*
Cat Rios-Keating
Special Assistant Attorney General
Office of the Minnesota Attorney General
445 Minnesota St., Suite 600
St. Paul, MN 55101
(651) 300-7302
Catherine.Rios-Keating@ag.state.mn.us

STATE OF NEW MEXICO
RAÚL TORREZ
ATTORNEY GENERAL

/s/ William Grantham
William Grantham
Assistant Attorney General
408 Galisteo Street
Santa Fe, New Mexico 87501
(505) 717-3520
wgrantham@nmdoj.gov