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Kirkland Alert

## EPA Proposes Rule to Expand Requirements for Coal Ash at Power Plants: Notable Features, Implications and Next Steps

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On May 18, 2023, the U.S. Environmental Protection Agency (“EPA” or the “Agency”) published in the Federal Register a proposed rule (the “Proposed Rule”) expanding its regulatory framework for coal combustion residuals (“CCR”, also known as coal ash) located in disposal sites the Agency has newly defined as “legacy CCR surface impoundments” and “CCR management units” (“CCRMUs”). Legacy CCR surface impoundments are inactive surface impoundments at inactive power plants, whereas CCRMUs include a variety of locations – at both active and inactive power plants – aside from CCR landfills and surface impoundments where CCR is nonetheless placed or managed (e.g., structural fill sites, evaporation ponds, certain haul roads).<sup>1</sup> Neither legacy CCR surface impoundments nor CCRMUs are currently regulated at the federal level, and the Proposed Rule, if adopted, would require owners and operators of hundreds of facilities<sup>2</sup> to assess how their CCR is managed and, if necessary, implement groundwater monitoring and corrective action protocols, report findings to the EPA, and ultimately initiate closure of legacy CCR surface impoundments and CCRMUs.<sup>3</sup> This *Alert* provides background on the Proposed Rule, summarizes its notable features, describes possible implications and charts next steps.

### Background — The Prior Coal Ash Rule and Legal Challenges

The Proposed Rule is EPA’s latest update to its regulatory framework for CCR. The framework was created in April 2015, when EPA finalized its first set of regulations for the disposal of CCR from power plants under Subtitle D of the Resource Conservation and Recovery Act (“RCRA”).<sup>4</sup> Commonly referred to as the Coal Ash Rule and designed

to minimize contamination and public health risks associated with CCR disposal, the 2015 regulations established corrective action requirements, closure and post-closure requirements, technical standards, as well as inspection, monitoring, recordkeeping, and reporting requirements for CCR landfills<sup>5</sup> and CCR surface impoundments.<sup>6</sup> Specifically, the Coal Ash Rule required owners and operators of unlined CCR surface impoundments to initiate closure within six months of detecting a leak; unlined impoundments that were not leaking could continue to operate.<sup>7</sup> The Coal Ash Rule also regulated inactive surface impoundments at active power plants, but it exempted inactive surface impoundments at inactive plants. The Coal Ash Rule is self-implementing, meaning that regulated entities must comply without any action by a regulatory agency, and enforcement is enabled in part through citizen suits (i.e., suits by private citizens, rather than regulators, to enforce federal environmental requirements).<sup>8</sup>

Environmental groups and regulated entities challenged the Coal Ash Rule and a related 2018 amendment in *Utility Solid Waste Activities Group v. EPA* (“USWAG Case”).<sup>9</sup> In the USWAG Case, the D.C. Circuit held that EPA acted arbitrarily and capriciously by regulating inactive surface impoundments at active power plants while exempting inactive surface impoundments at inactive power plants (referred to as “legacy ponds”), because the D.C. Circuit found that legacy ponds pose similar environmental risks as inactive impoundments at active plants and are more prone to leakage.<sup>10</sup>

The challenges prompted EPA to revise the regulatory framework in a series of rulemakings allowing a potential closure deadline extension for unlined CCR surface impoundments and a potential waiver from closure requirements for unlined impoundments<sup>11</sup> based on Agency approval of facility demonstrations.<sup>12</sup> Notably, none of the submitted facility demonstrations seeking relief under these rulemakings have been successfully approved by EPA to date.<sup>13</sup>

In addition, the USWAG Case specifically led EPA to publish in October 2020 an advanced notice of proposed rulemaking (“ANPR”) to solicit comments and data on inactive surface impoundments at inactive power plants, providing the foundation for the Proposed Rule.<sup>14</sup> In an overlapping development, environmental groups sued EPA two years after the ANPR in *Statewide Organizing for Community Empowerment, et al. v. EPA* (“Statewide Case”), asserting that the Agency failed to regulate inactive surface impoundments at inactive plants and arguing that the Agency violated section 2002(b) of RCRA by failing to review and, if necessary, revise its exemption for “inactive CCR landfills.”<sup>15</sup> In response, EPA proposed a consent decree that would require EPA to review (and, if necessary) sign a proposed rule by May 5, 2023, as well as to issue a final rule by May 6, 2024 – a timeline that the industry group USWAG

characterized in a public comment as not “realistic.”<sup>16</sup> On May 3, 2023, the District Court for the District of Columbia granted EPA’s motion to enter the consent decree, subjecting the Proposed Rule to the May 5, 2023 (proposed) and May 6, 2024 (final) deadlines.<sup>17</sup>

## Notable Features of the Proposed Rule

The Proposed Rule will regulate legacy CCR surface impoundments and CCR management units (“CCRMUs”). The scope, requirements and timing for each type of disposal site is discussed in more detail below.

### Legacy CCR Surface Impoundments

#### *Scope*

In the USWAG Case, as previewed above, the D.C. Circuit vacated and remanded the provision that exempted inactive impoundments at inactive power plants from the Coal Ash Rule.<sup>18</sup> The provisions on legacy CCR surface impoundments in the Proposed Rule are a direct response to the USWAG Case.<sup>19</sup> The Proposed Rule defines legacy CCR surface impoundments more specifically as “a surface impoundment that is located at a power plant that ceased generating power prior to October 19, 2015, and the surface impoundment contained both CCR and liquids on or after the effective date of the 2015 CCR Rule (i.e., October 19, 2015).”<sup>20</sup> With respect to legacy CCR surface impoundments, EPA reports the Proposed Rule is not expected to affect current power plant operations, since it applies only to “legacy contamination or inactive units that no longer support current power plant operations.”<sup>21</sup>

However, EPA requests further comment on an option to define legacy CCR surface impoundments as a CCR impoundment that no longer receives CCR but contains both CCR and liquids on or after the effective date of the final rule (no later than May 6, 2024) – not the 2015 Coal Ash Rule.<sup>22</sup> EPA posits that this alternative definition would be easier to implement, and while it may exclude approximately 29 units across the country that have completed closure or taken steps to remove liquids, the groundwater contamination risks presented by such units may nonetheless be addressed by the Proposed Rule’s requirements for CCRMUs.<sup>23</sup>

#### *Requirements*

Pursuant to the Proposed Rule, owners and operators of legacy CCR surface impoundments must prepare documentation describing the applicability of the rule to any legacy CCR impoundment at that facility, including information on current site conditions, the boundaries of the unit, and the proximity of the unit to surface water bodies, among other things.<sup>24</sup> Owners and operators of inactive facilities that complete closure of legacy CCR surface impoundments prior to the effective date of the final rule are required to post online documentation stating they have met the existing standards for closure in 40 C.F.R. § 257.102(c); otherwise, the unit will be regulated as a legacy CCR surface impoundment.<sup>25</sup> The Proposed Rule also requires owners and operators to establish security controls to prevent people, whether knowingly or unknowingly, from entering onto legacy CCR surface impoundments.<sup>26</sup>

Given the D.C. Circuit's directive in the USWAG Case, the Proposed Rule requires legacy CCR surface impoundments to comply with certain existing requirements to inactive impoundments at active facilities, including those relating to groundwater monitoring systems, closure, and cleanup, but excluding those relating to location restrictions and liner design criteria. Notably, owners and operators of legacy CCR surface impoundments are to install the groundwater monitoring system as required in 40 C.F.R. § 257.91,<sup>27</sup> comply with existing groundwater sampling and analysis requirements for CCR surface impoundments in 40 C.F.R. § 257.93,<sup>28</sup> and execute the detection monitoring program and assessment monitoring program in 40 C.F.R. §§ 257.94 and 257.95, including corrective action for exceedances of groundwater protection standards.<sup>29</sup> In addition, the Proposed Rule requires owners and operators to prepare an annual groundwater monitoring and corrective action report<sup>30</sup> and to initiate closure (including the preparation of a written closure plan and post-closure plan).<sup>31</sup>

### *Timing*

EPA notes that, generally, it is proposing "expedited timeframes" for legacy CCR surface impoundments to comply with the regulations, arguing that most facilities are already familiar with the requirements because owners and operators have likely implemented them for other units at active sites.<sup>32</sup> The Agency specifically expedited the requirement to prepare and post the first annual groundwater monitoring and corrective action report, in part to allow the public to review the results.<sup>33</sup> The Proposed Rule will require all legacy CCR surface impoundments to initiate closure within 12 months of the effective date of the final rule, instead of relying on existing timelines in 40 C.F.R. § 257.101(a).<sup>34</sup> The timing of important requirements of the Proposed Rule are summarized below.

<i>Requirement</i>	<i>Deadline (Months after effective date of final rule)<sup>35</sup></i>
Submit applicability documentation for the legacy CCR surface impoundment	0
Implement site security measurements	0
Install groundwater monitoring system	6
Develop groundwater sampling and analysis program	6
Prepare the annual groundwater monitoring and corrective action report	January 31 of the year following installation of the groundwater monitoring system
Initiate closure and prepare written closure plan and post-closure care plan	12
Initiate detection monitoring and assessment monitoring	24

## CCR Management Units (“CCRMUs”)

### *Scope*

The Proposed Rule will also regulate CCRMUs, which are broadly defined to include any area of land on which any non-containerized accumulations of CCR are received, placed, or otherwise managed, that is not a CCR landfill, CCR surface impoundment, or an expansion of either a CCR landfill or surface impoundment (i.e., that is not a CCR unit as defined in 40 C.F.R. § 257.53).<sup>36</sup> The provisions impacting CCRMUs apply to both inactive and active power plants, in contrast to the provisions on legacy CCR surface impoundments that EPA anticipates will apply only to inactive power plants.

EPA identifies a variety of sites it believes are – and are not – CCRMUs to clarify the scope of the definition. It anticipates CCRMUs to include, among others, historical solid waste management units that closed prior to the effective date of the Coal Ash Rule; inactive CCR landfills; and any other areas where solid waste management of CCR on

the ground has occurred, such as structural fill sites, CCR placed below currently regulated CCR units, evaporation ponds, secondary or tertiary finishing ponds that have not been properly cleaned up, and haul roads made of CCR where such use does not satisfy the definition of beneficial use.<sup>37</sup> In contrast, EPA does not anticipate the following to constitute CCRMUs (and therefore be subject to the Proposed Rule): closed or inactive process water ponds, cooling water ponds, wastewater treatment ponds, and stormwater holding ponds or aeration ponds; areas or units where exclusively non-CCR waste is managed; containerized CCR (e.g., silos); and CCR used in roadbed and associated embankments.<sup>38</sup>

### *Requirements*

Similar to the requirements for legacy CCR surface impoundments, the Proposed Rule requires owners and operators of facilities with one or more CCR units to identify whether they have any CCRMUs onsite and, if so, comply with certain existing requirements. Specifically, owners and operators must (i) conduct evaluations to identify and delineate any CCRMU present by reviewing available records, conducting a physical facility inspection, and completing any fieldwork necessary to fill data gaps, and (ii) document their findings in a Facility Evaluation Report that must be stored at the facility and posted on the owner or operator's CCR website.<sup>39</sup> The Facility Evaluation Report must include a discussion of any known spills or releases of CCR from each CCRMU, as well as any record or knowledge of structural instability or groundwater contamination of each CCRMU.<sup>40</sup>

Certain existing requirements are triggered once an owner or operator identifies any CCRMU, including groundwater monitoring, corrective action, closure, and post-closure care requirements, as well as certain recordkeeping, notification, and website reporting requirements.<sup>41</sup> Of note, EPA proposes that the same groundwater monitoring and corrective action requirements that would apply to legacy CCR surface impoundments would also apply to CCRMUs, reasoning that these groundwater monitoring and corrective action requirements are "essentially the same requirements that have been applied to both hazardous waste and municipal solid waste disposal units for decades."<sup>42</sup> Although EPA proposes to apply the existing closure and post-closure criteria for CCR units in 40 C.F.R. §§ 257.101 and 257.104, respectively, to CCRMUs, it also solicits comments on whether to mandate closure of a CCRMU at all.<sup>43</sup>

### *Timing*



Since many of the requirements for legacy CCR surface impoundments and CCRMUs are shared, many of the key deadlines identified below are also shared. Importantly, EPA nonetheless requests comment on the feasibility to meet the proposed deadlines for CCRMUs.<sup>44</sup>

<i>Requirement</i>	<i>Deadline (Months after effective date of final rule)<sup>45</sup></i>
Initiate evaluations to identify any CCRMU	0
Complete the Facility Evaluation Report	3
Install groundwater monitoring system	6
Develop groundwater sampling and analysis program	6
Prepare the annual groundwater monitoring and corrective action report	January 31 of the year following installation of the groundwater monitoring system
Initiate closure and prepare written closure plan and post-closure care plan	12
Initiate detection monitoring and assessment monitoring	24

## Implications and Next Steps

The Proposed Rule is likely to have significant compliance implications for companies in the utilities sector. As an initial matter, the CCR regulatory framework remains in flux: EPA has promulgated the Proposed Rule against a backdrop of various rulemakings and ongoing lawsuits challenging those rulemakings; the Agency also requests comments on key components of the Proposed Rule, including on the definition of legacy CCR surface impoundments, the requirement to close CCRMUs, and the proposed compliance timeline for CCRMUs.

The Proposed Rule is also likely to increase compliance costs for owners and operators of inactive power plants – as well as the owners and operators of any facilities with one or more CCR units – because they will have to evaluate their facilities to determine whether the Proposed Rule applies and, if so, how. Companies that may have purchased sites with former power plants or inactive CCR sites on the basis that the site was closed in accordance with federal law may nonetheless face these compliance costs and requirements under the broader CCR regulatory framework, even though they had no connection with prior disposal activities. Compliance costs may include groundwater monitoring, corrective action, and closure requirements for any owners or operators that do have responsibility for legacy CCR surface impoundments or CCRMUs.

The Proposed Rule is open for a 60-day public comment period that runs until July 17, 2023.<sup>46</sup> EPA is also hosting an in-person public hearing to discuss the Proposed Rule on June 28, 2023, as well as a virtual public hearing on July 12, 2023.<sup>47</sup> Pursuant to the consent decree in the Statewide Case, EPA must publish its final rule by no later than May 6, 2024.<sup>48</sup> We will continue to monitor the development of the Proposed Rule, as well as any related regulatory activity, to provide updates and guidance as needed. As the regulatory framework continues to evolve, the Kirkland environmental team continues to track relevant regulatory and litigation developments to assist clients in integrating changing compliance requirements in their businesses.

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1. See [Proposed Rule – Supplementary Information \(IV\)\(A\)\(1\), Scope – Definition of Legacy CCR Surface Impoundments](#), Federal Register, dated May 18, 2023; see also [Proposed Rule – Supplementary Information \(IV\)\(B\)\(4\)\(a\), Definition of CCR Management Unit](#), Federal Register, dated May 18, 2023; see also 40 C.F.R. § 257.53 (defining CCR unit as “any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR unit, or a combination of more than one of these units, based on the context of the paragraph(s) in which it is used. This term includes both new and existing units, unless otherwise specified.”). ↩

2. See 40 C.F.R. § 257.53 (defining facility as “all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, disposing, or otherwise conducting solid waste management of CCR. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).”). ↩

3. “[EPA Announces Latest Action to Protect Communities from Coal Ash Contamination](#),” EPA, dated May 17, 2023; “[Frequent Questions About the 2015 Coal Ash Disposal Rule – How and where is coal ash currently generated and disposed?](#)” EPA, last updated October 2, 2022.↩



4. 42 U.S.C. § 6901 *et seq.*; *see also* [“Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities,”](#) Federal Register, dated April 17, 2015. ↩

5. *See* 40 C.F.R. § 257.53 (defining CCR landfill as “an area of land or an excavation that receives CCR and which is not a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine, or a cave. For purposes of this subpart, a CCR landfill also includes sand and gravel pits and quarries that receive CCR, CCR piles, and any practice that does not meet the definition of a beneficial use of CCR.”). ↩

6. [“Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities,”](#) Federal Register, dated April 17, 2015; *see also* 40 C.F.R. § 257.53 (defining CCR surface 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.”). ↩

7. 40 C.F.R. § 257.101(a)(1). ↩

8. *See* [“Frequent Questions about the 2015 Coal Ash Disposal Rule, What is the role of citizens in implementation? In the development and/or revision of SWMPs?”](#), EPA, last updated Oct. 6, 2022. ↩

9. *See* *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018); *see also* *Waterkeeper Alliance, Inc., et al. v. EPA*, No. 18-1289 (D.C. Cir. Oct. 22, 2018). ↩

10. *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 432 (D.C. Cir. 2018). ↩

11. *See* 40 C.F.R. § 257.101(a); 40 C.F.R. § 257.71(a)(3); *see also* [“Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure,”](#) Federal Register, dated August 28, 2020. ↩

12. [“Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments,”](#) Federal Register, dated November 12, 2020. ↩

13. *See* [“Coal Combustion Residuals \(CCR\) Part A Implementation,”](#) EPA, last updated May 10, 2023; *see also* [“Coal Combustion Residuals \(CCR\) Part B Implementation,”](#) EPA, last updated April 11, 2023; *see also* [“EPA Announces Latest Actions to Protect Groundwater and Communities from Coal Ash Contamination,”](#) EPA, dated January 25, 2023. ↩

14. [“Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments,”](#) Federal Register, dated October 14, 2020. ↩

15. *Statewide Organizing or Community Empowerment, et al v. EPA*, No. 1:22-cv-02562-JDB (D.D.C.); *see also* 42 U.S.C. § 6912(b) (requiring the Agency to review and, where necessary, revise regulations promulgated under RCRA not less frequently than every three years); 42 C.F.R. § 25.50(d) (exempting from CCR regulations those CCR landfills that have ceased receiving CCR prior to October 19, 2015, the effective date of the Coal Ash Rule; “inactive CCR landfill” is not a defined term in the Coal Ash Rule). ↩

16. [“Proposed Consent Decree: Resource Conservation and Recovery Act Citizen Suit,”](#) EPA, Feb. 3, 2023; *see also* [Comment submitted by Utility Solid Waste Activities Group \(USWAG\)](#), EPA, dated Mar. 6, 2023. ↩

17. *Statewide Organizing for Community Empowerment et al., v. EPA*, No. 22-cv-2562 (D.D.C.). ↩

18. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018); *see also* [“Proposed Changes for Legacy Coal Combustion Residuals Surface Impoundments and CCR Management Units – Rule Summary,”](#) EPA, dated May 18, 2023. ↩

19. *Id.* ↩

20. [Proposed Rule – Supplementary Information \(IV\)\(A\)\(1\), Scope – Definition of Legacy CCR Surface Impoundments](#), Federal Register, dated May 18, 2023. ↩

21. [“EPA Announces Latest Action to Protect Communities from Coal Ash Contamination,”](#) EPA, dated May 17, 2023. ↩

22. [Proposed Rule – Supplementary Information \(IV\)\(A\)\(1\)\(a\)\(iii\), Response to Comments and Proposed Option](#), Federal Register, dated May 18, 2023.↩

23. *Id.* ↩

24. [Proposed Rule § 257.100\(f\)\(1\)\(i\)](#). ↩

25. [Proposed Rule – Supplementary Information \(IV\)\(A\)\(2\)\(b\)\(iii\), Certification of Closure by Removal for Legacy CCR Surface Impoundments](#), Federal Register, dated May 18, 2023. ↩

26. [Proposed Rule § 257.100\(f\)\(3\)\(iii\)](#). ↩

27. [Proposed Rule § 257.100\(f\)\(4\)\(1\)](#). ↩

28. [Proposed Rule § 257.100\(f\)\(4\)\(ii\)](#). ↩

29. [Proposed Rule § 257.100\(f\)\(4\)](#). ↩

30. Proposed Rule § 257.100(f)(4)(iv). ↩

31. Proposed Rule §§ 257.100(f)(5)(i), (ii), 257.101(e). ↩

32. [Proposed Rule – Supplementary Information \(IV\)\(A\)\(2\)\(a\)\(ii\), Compliance Deadlines](#), Federal Register, dated May 13, 2023. ↩

33. [Proposed Rule – Supplementary Information \(IV\)\(A\)\(2\)\(f\)\(v\), Initial Groundwater Monitoring and Corrective Action Report for Legacy CCR Surface Impoundments](#), Federal Register, dated May 13, 2023. ↩

34. [Proposed Rule – Supplementary Information \(IV\)\(A\)\(2\)\(g\), Closure and Post-Closure Care criteria for Legacy CCR Surface Impoundments](#), Federal Register, dated May 13, 2023. ↩

35. The Proposed Rule assumes the effective date is six months from publication of the final rule. See [Proposed Rule – Supplementary Information \(IV\)\(A\)\(2\)\(ii\), Compliance Deadlines](#), Federal Register, dated May 13, 2023.↩

36. See [Proposed Rule – Supplementary Information \(IV\)\(B\)\(4\)\(a\), Definition of CCR Management Unit, Federal Register](#), dated May 18, 2023; see also 40 C.F.R. § 257.53 (defining CCR unit as “any CCR landfill, CCR surface impoundment, or lateral expansion of a CCR unit, or a combination of more than one of these units, based on the context of the paragraph(s) in which it is used. This term includes both new and existing units, unless otherwise specified.”). ↩

37. See [Proposed Rule – Supplementary Information \(IV\)\(B\)\(4\)\(a\), Definition of CCR Management Unit, Federal Register](#), dated May 18, 2023. ↩

38. *Id.* ↩

39. See Proposed Rule §§ 257.105(f)(25), 257.107(f)(24). ↩

40. See Proposed Rule § 257.75(c).↩

41. See generally [Proposed Rule – Supplementary Information \(IV\)\(B\)\(3\), Summary of CCR Management Unit Proposal](#), Federal Register, dated May 18, 2023. ↩

42. [Proposed Rule – Supplementary Information \(IV\)\(B\)\(6\)\(b\), Groundwater Monitoring and Corrective Action Requirements for CCR Management Units](#), Federal Register, dated May 18, 2023. ↩

43. [Proposed Rule – Supplementary Information \(IV\)\(B\)\(6\)\(c\), Closure and Post-Closure Care Criteria for CCR Management Units, Supplementary Information \(IV\)\(B\)\(6\)\(c\)\(i\), Criteria for Conducting Closure of CCRMU and Requirement to Close](#), Federal Register, dated May 18, 2023. ↩

44. See [Proposed Rule – Supplementary Information \(IV\)\(B\)\(3\), Summary of CCR Management Unit Proposal](#), Federal Register, dated May 13, 2023. ↩

45. The Proposed Rule assumes the effective date is six months from publication of the final rule. See [Proposed Rule – Supplementary Information \(IV\)\(B\)\(3\), Summary of CCR Management Unit Proposal](#), Federal Register, dated May 13, 2023. ↩

46. [“Proposed Changes for Legacy Coal Combustion Residuals Surface Impoundments and CCR Management Units – Rule Summary,”](#) EPA, dated May 18, 2023. ↩

47. *Id.* ↩

48. *Statewide Organizing or Community Empowerment, et al v. EPA*, No. 1:22-cv-02562-JDB (D.D.C.); *see also* [“Proposed Consent Decree: Resource Conservation and Recovery Act Citizen Suit,”](#) EPA, Feb. 3, 2023. ↩

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