

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

In the Matter of:	)	
	)	R2018-20
AMENDMENTS TO	)	(Rulemaking – Air)
35 ILL. ADM. CODE 225.233,	)	
MULTI-POLLUTANT STANDARDS (MPS)	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY** and **STATUS REPORT IN SUPPORT OF ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY**, copies of which are attached hereto and herewith served upon you.

Respectfully Submitted,



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Dated: February 2, 2018

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

In the Matter of: )  
 ) R2018–20  
AMENDMENTS TO ) (Rulemaking – Air)  
35 ILL. ADM. CODE 225.233, )  
MULTI-POLLUTANT STANDARDS (MPS) )

**ENVIRONMENTAL ORGANIZATIONS’ MOTION TO STAY**

NOW COME Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club, (collectively, “Environmental Organizations,”), pursuant to Section 101.514 of the Illinois Pollution Control Board (“Board”) Rules, 35 Ill. Adm. Code 101.514, and for the foregoing reasons, request this proceeding be stayed. This rule was proposed under very different circumstances than exist today. Dynegy will no longer exist as a standalone company within a matter of months, and federal law has effectively prevented the new owners – Vistra Energy – from participating. In short, the wrong company is currently at the table. For the sake of judicial economy, and to ensure the Board has before it all necessary information to make an informed decision on this proposed rule – including, most importantly, the new owner’s position on the substance of the rulemaking – this proposal should not go forward until the merger with Dynegy and Vistra Energy closes in the second quarter of 2018 and the new company can express its opinion on the rule change.

**I. Background**

This rulemaking is a result of Dynegy’s<sup>1</sup> request to the Illinois Environmental Protection Agency (“IEPA” or “Agency”) to amend the Multi-Pollutant Standard (“MPS”) in 35 Ill. Admin. Code 225, Control of Emissions from Large Combustion Sources. Dynegy is currently the

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<sup>1</sup> Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC and Electric Energy, Inc. (collectively, “Dynegy”)

owner of all electrical generating units subject to the MPS. IEPA Statement of Reasons (“SR”) at 3. The units are currently in two separate MPS groups that are subject to different MPS emission rates. *Id.* The IEPA explained that, around November of 2016, Dynegy approached the Agency and requested several changes to the MPS which would “provide the company with additional operational flexibility and economic stability.” SR at 3. In large part, the company “requested that the NO<sub>x</sub> annual, NO<sub>x</sub> seasonal, and SO<sub>2</sub> annual emission rates be replaced with mass emission limits to provide the company with additional operational flexibility and economic stability. In response, the Illinois EPA developed proposed rule revisions that address Dynegy’s requests...” *Id.* After nearly a year of negotiations and rule development, the Agency submitted the instant proposed rulemaking on October 2, 2017, which the Agency stated is intended to provide the flexibility that Dynegy requested. *See* SR at 1, 3. The timeline is of particular import here, because on October 30, 2017, Dynegy and Vistra Energy publicly announced a “merger of Dynegy into Vistra Energy with Vistra Energy surviving.” Vistra Energy and Dynegy, *Creating the Leading Integrated Power Company, Investor Presentation* at 8 (Oct. 30, 2017).<sup>2</sup> Although this deal has been branded as a “merger,” in Dynegy’s and Vistra’s own words, only Vistra will “survive.”

A company’s financial situation serves as an insufficient basis when regulating on matters of public health; however, given that this is a major basis being asserted by IEPA and Dynegy in this rulemaking, of note is the fact that the surviving company’s financial position is expected to be far different from Dynegy’s current situation.<sup>3</sup> In announcing the deal, Vistra and

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<sup>2</sup> Available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjgyODE5fENoaWxkSUQ9MzkyNDg0fFR5cGU9MQ==&t=1>.

<sup>3</sup> Please note that we are not waiving any right to advocate any position regarding the relevance of the company’s financial position to this rulemaking. Rather, Dynegy’s financial position is relevant to this particular motion because proponents of this rulemaking have used Dynegy’s economics as a major basis for this rulemaking, and that basis will soon undergo extraordinary changes in a matter of months.

Dynegy estimated that the merger will create nearly \$4 billion in equity value.<sup>4</sup> This is a far cry from Dynegy's claims in this rulemaking that the MPS change is necessary to "allow[] Dynegy to make economically rational decisions on how to run its plants ... given the uncertain economic and regulatory landscape the plants currently face." *Prefiled Testimony of Dean Ellis* at 2 (Dec. 11, 2017). Those economic circumstances are changing in the near future. In fact, at the hearing, Mr. Ellis, Dynegy's Executive Vice President for Regulatory and Government Affairs, confirmed that the transition is expected to close at some point in the second quarter of 2018. Jan. 18, 2018 Hr'g Tr. at 118.

Once the merger closes – just a few months from now – Dynegy will cease to exist as a standalone company. Significant changes in leadership (discussed further below) will take place, and "tax synergies, operational improvements," and other mechanisms and improvements will create \$4 billion in value.<sup>5</sup> Due to federal antitrust regulations, Dynegy has been unable to seek Vistra's input in the current proceeding; thus, it is unknown whether, in a few months' time, the new owners will wish to pursue the current proposed rule modifications, maintain the current rule, or propose additional or different modifications.

Therefore, the Environmental Organizations request that this proceeding be stayed until such time as Vistra's input can be sought and included. The ultimate goal of this rulemaking is to conduct fact-finding, but the work done thus far and any work from now until the merger closes may be for naught if Vistra disagrees with Dynegy on the substance of the rule or if the new company's economic position changes such that the company's economic argument for the

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<sup>4</sup> *Vistra Energy and Dynegy to Combine to Create Leading Integrated Power Company* (Oct. 30, 2017), available at <https://investor.vistraenergy.com/investor-relations/news/press-release-details/2017/Vistra-Energy-And-Dynegy-To-Combine-To-Create-Leading-Integrated-Power-Company/default.aspx>.

<sup>5</sup> *Vistra Energy and Dynegy to Combine to Create Leading Integrated Power Company* (Oct. 30, 2017), available at <https://investor.vistraenergy.com/investor-relations/news/press-release-details/2017/Vistra-Energy-And-Dynegy-To-Combine-To-Create-Leading-Integrated-Power-Company/default.aspx>

rule change is no longer valid. Given the companies' intent to close the merger during the second quarter of 2018, this would amount to a stay of no more than five months – potentially less. Therefore, the Environmental Organizations request this proceeding be stayed until the merger closes and the new company can express its views on the rulemaking and update financial and other information now in the record to support the need for the rule changes.

## **II. Legal Authority**

It is not uncommon for the Board to stay rulemaking proceedings pursuant to its authority under 35 Ill. Adm. Code 101.514. “The decision to grant or deny a motion for stay is ‘vested in the sound discretion of the Board.’” *In the Matter of: Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-19* slip op. at 2 (July 25, 2013) (quoting *People v. State Oil Co.*, PCB 97-103 slip op. at 2 (May 15, 2003), *aff'd zsub nom. State Oil Co. v. PCB*, 822 N.E.2d 876, 291 Ill. Dec. 1 (2nd Dist. 2004)). The Board is known to grant motions to stay “in the interest of conserving resources.” *In the Matter of: Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-19* slip op. at 2 (July 25, 2013); *In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742) R09-9* slip op. at 3 (Nov. 5, 2009). Moreover, the Board has granted motions to stay rulemaking proceedings in order for proponents of a rulemaking to more thoroughly assess their proposal. *See, e.g., In the Matter of: Emergency Rulemaking Regarding Regulations of Coke/Bulk Terminals: New 35 Ill. Adm. Code 213, R14-20* slip op. at 1-2 (July 10, 2014); *In the Matter of: Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-19* slip op. at 2 (July 25, 2013); *In the Matter of:*

*Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742) R09-9* slip op. at 3 (Nov. 5, 2009).

### **III. Impact of the Merger**

This rulemaking is premised on accommodating the economic needs of Dynegy, yet within months, the company's financial situation will be completely different, and Dynegy will no longer be the final arbiter of whether the terms of this rulemaking are appropriate and whether this rulemaking is even necessary. This rulemaking was initiated by Dynegy nearly a year before the merger was even announced to the public. As Mr. Ellis stated in prefiled testimony, this proposal would "allow[] *Dynegy to make economically rational decisions* on how to run its plants while complying with the MPS, which will help to ensure the viability of the entire Illinois fleet..." *Prefiled Testimony of Dean Ellis* (Dec. 11, 2017) (emphasis added). In several months, however, Dynegy will no longer be the decision-makers.

Once Dynegy is absorbed into Vistra, Vistra's current leadership will have significantly greater control over the company's activities than those now employed at Dynegy. Under the new entity, Dynegy will be taking on Vistra's name, eight of the eleven board members will be from Vistra Energy, and 79% of pro forma ownership will be Vistra Energy shareholders. Vistra Energy and Dynegy, *Creating the Leading Integrated Power Company, Investor Presentation* at 8. In fact, following absorption, eight of the nine people that will directly report to the Vistra CEO are currently employed at Vistra and the ninth is currently employed at Luminant. Letter from Curt Morgan, President and Chief Executive Officer, Vistra (Dec. 1, 2017).<sup>6</sup> At least one of Dynegy's representative in this proceeding, Mr. Ellis, will not continue on with the new company. Jan. 18, 2018 Hr'g Tr. at 120:8-10. Finally, because Dynegy is the self-described "ultimate parent company" of Dynegy Midwest Generation, LLC, Illinois Power Generating

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<sup>6</sup> Available at <https://ih.advmf.com/p.php?pid=nmona&article=76214163&symbol=DYNC>

Company, Illinois Power Resources Generating, LLC and Electric Energy, Inc., *see Public Comment of Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Electric Energy, Inc., PCB No. 2018-20* at 1 (Oct, 31, 2017), Vistra would inherently become their ultimate parent company following the merger.

The merger is structured so that the decisions of Vistra's affiliates could significantly outweigh those made by former Dynegy affiliates, yet Vistra has played no role in these proceedings. Instead, federal antitrust laws prevented Vistra from coordinating with Dynegy on this issue. *See* Jan. 18, 2018 Hr'g Tr. at 119:18-19. According to Mr. Ellis, "we have not conferred with Vistra in any regard, either specific to our testimony [in this rulemaking] or even the proceeding in general." *Id.* at 118:24-119:2. When asked whether "any of the conclusions that you drew in your testimony... reflect the opinion of Vistra as well," Mr. Ellis maintained "We definitely can't speak for Vistra, and we haven't coordinated any of these or discussed any of these policy-type issues." *Id.* at 119:8-17.

Even if it were appropriate to base this rulemaking on Dynegy's stated economic needs, Vistra is a different company with a different economic situation, different business strategy,<sup>7</sup> different leadership, and likely a different opinion from Dynegy about future plans and needs. Those plans cannot yet be discerned. When asked in part whether Vistra agrees with Mr. Ellis's conclusion that up to 3,000 megawatts of power may shut down if the MPS is not revised, Mr. Ellis maintained that Dynegy cannot speak for Vistra and has not coordinated with them on this. Jan. 18, 2018 Hr'g Tr. at 119:10-17. Therefore, Dynegy has not discussed with Vistra its

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<sup>7</sup> Vistra Energy is a self-described "premier Texas-based energy company focused on the competitive energy and power generation markets through operation as the largest retailer and generator of electricity in the growing Texas market." Vistra owns TXU Energy which sells "value-added services," and Luminant, which includes a generation fleet of 2,300 MW of nuclear, 8,000 MW of coal and 7,500 MW of natural gas. Vistra Energy "About", available at <https://www.vistraenergy.com/about/>. In contrast, Dynegy owns 28,000 MW of coal, oil and natural gas generation which it sells into six different ISO regions. "About Dynegy", available at <https://www.dynegy.com/about-dynegy>; Dynegy Facilities List, available at <https://www.dynegy.com/sites/default/files/Dynegy%20Generating%20Asset%20List.pdf>.

position on continued operation of scrubbers, (*Id.* at 113), potential plant retirements (*Id.* at 119), or the economic viability of specific units (*Id.* at 141-142). And, while Dynegy presented testimony on what it “expects” or “does not expect” to happen with regard to those scenarios, counsel for Dynegy emphasized that “[n]one of this testimony should be viewed as binding upon Vistra or speaking on behalf of Vistra.” *Id.* at 119.

Moreover, currently Vistra lacks sufficient information to come to its own informed conclusions on whether this rulemaking is necessary. When asked whether “Vistra has taken a look to see if costs could be brought down in a way that would allow the [uneconomic electric generating] units to... economically operate,” Mr. Ellis replied “I don’t believe Vistra has looked at Dynegy’s plants. Vistra has its own cost initiative to look at its own plants, but I’m not aware, nor would I believe, that Vistra has taken a look at Dynegy’s plants.” *Id.* 140:24-141:9.

The contents of the proposed MPS revisions are the product of extensive negotiations and communications with Dyegy that may be moot once Vistra assumes control. For example, according to IEPA, the specific caps for NO<sub>x</sub> and SO<sub>2</sub> “are the result of negotiations between the Agency and Dynegy in discussions prior to the proposal.” *Illinois Environmental Protection Agency’s Responses to Prefiled Questions*, 23-33 (Jan. 12, 2018). The fact that the emission caps in the revised MPS will not decrease following the shutdown of an electric generating units (EGUs) is also the result of close discussion and negotiation between Dynegy and IEPA. The record shows that IEPA shared a draft with Dynegy that would have required decreased caps, but according to David Bloomberg a manager in IEPA’s Air Quality Planning Section, Dynegy objected to it and IEPA accommodated its objection. January 17, 2018 hearing, 122:8. Finally, the amounts by which caps would decrease were EGUs to be transferred were hand-picked by

Dynegy. See *Environmental Groups' Prefiled Questions for Rory Davis, Engineer, Air Pollution Control Division, Illinois Environmental Protection Agency* at Attachment K (Jan. 2, 2018).

Vistra may have a very different view on these issues that are critical to the design of the revised rule. Vistra has stated publicly, “[t]he Merger will result in changes to the board of directors that may affect the strategy and operations of the combined company.... This new composition of the board of directors may affect the combined company’s business strategy and operating decisions following the completion of the Merger.” Dynegy, *Form 8-K* at 12 (Dec. 19, 2017).<sup>8</sup>

Given these circumstances, it makes little sense to proceed with a rulemaking that was designed by one company, but will be implemented by a different one.

#### **IV. The Purpose of the Rulemaking Process Is Frustrated Without Vistra’s Input**

A key purpose of Pollution Control Board rulemakings is to develop a meaningful record regarding the justification, content, and effect of the proposal on which the PCB can base its decision. Without the soon-to-be-owner Vistra’s participation, it is impossible to develop an adequate record at this time. Indeed, without Vistra’s participation, it is impossible for the Board or the public to verify that this rulemaking is even necessary or that its content is appropriate. Furthermore, without Vistra at the table, the Board and the public cannot obtain meaningful predictions and assurances about many of the effects of this rulemaking.

Dynegy’s answers to the Board’s and the public’s questions are not binding on Vistra, and Dynegy has stated that the merger may affect the strategy and operations of the combined company. It therefore follows that any of Dynegy’s assurances or predictions about the future

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<sup>8</sup> Available at <http://services.corporate-ir.net/SEC/Document.Service?id=P3VybD1hSFIwY0RvdkwyRndhUzUwWlc1cmQybDZZWEprTG1OdmJTOWtiM2R1Ykc5aFpDNXdhSEEvWVdOMGFXOXVQVkJFUmlacGNHRm5aVDB4TVRrME5qSXpOaVp6ZFdKemFXUTIOVGM9JnR5cGU9MiZmbj1EeW5lZ3lJbmNfOEtMjAxNzEyMTkucGRm>.

are unreliable. For example, one of the prefiled questions that the Board submitted to Dynegy asked whether the company plans to continue burning low sulfur coal at all MPS units. *Responses to Illinois Pollution Control Board's Prefiled Questions for Rick Diericx and Dean Ellis* at 1 (Jan. 12, 2018). Dynegy told the Board that it planned to continue to do so except in limited circumstances. *Id.* However, it may be the case after the merger that Vistra intends to operate in a different manner. The public and stakeholders, too, have dozens of questions about what the effects of this rulemaking will be, such as whether it will lead to the shutdown of more controlled units, whether it will cause units with pollution controls to operate without those controls, and whether this will lead to a decrease in actual emissions. Without Vistra participating in these discussions, Dynegy's answers are not predictive of the actual future of the company—they are essentially irrelevant.

Staying this rulemaking until accurate information can be obtained from Vistra about future plans is essential for the PCB to have an accurate record on which to base its decision. It would also conserve limited resources which are currently being expended for a rulemaking that could change course in just a few months.<sup>9</sup>

**V. No Party Will Be Prejudiced By Delay**

No party would be prejudiced by a stay of the proceeding. If a rule change is found to be appropriate, it can take effect at any time. Dynegy has not asserted that it cannot comply with the current rule. In fact, the opposite is true – in response to a question from the Illinois Attorney General's Office, Dynegy answered that it “is in compliance with the current MPS and is able to demonstrate compliance in accordance with the MPS.” January 17-18, 2018 Hr'g Ex. 18 at 3.

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<sup>9</sup> If it turns out that the new company (after the merger) is still interested in pursuing the revision that is currently under consideration, that fact can be established quickly, and the process can move forward with minimal delay, providing an opportunity for the new company and interested parties to update the factual record with any changes that are appropriate in light of the company's changed circumstances.

Dynegy is able to comply with all applicable rules and regulations at present and we have seen no evidence that it would not be able to do so in the future.

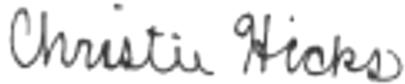
Further, Dynegy has not demonstrated financial exigencies that require an immediate change to the MPS. There has been no testimony to indicate that a few months' delay would have a particularly detrimental impact on Dynegy's fleet. In fact, Dynegy identified a number of variables unrelated to this rulemaking that impact its business decisions, including when to run particular units more or less and whether and when to retire any units. Factors considered in whether and when to run units include such external factors as the price of natural gas. Jan. 18, 2018 Hr'g Tr. at 148. As Mr. Ellis testified, "Dynegy does not anticipate that the adoption of the MPS revision alone will result in any additional units being retired or mothballed. Any decisions to retire or mothball additional units will be based on a number of factors... along with a number of operating scenarios." *Id.* at 151.

## **VI. Conclusion**

The facts underlying the purported need for this rule amendment have materially changed. Until such time as the new owners' input can be sought and considered in this rulemaking, the Board should stay this rulemaking. Based on Dynegy and Vistra's statements that the merger will close during the second quarter of this year, the stay would be less than six months. This is a reasonable delay to ensure that scarce resources are not expended unnecessarily in the event that the new owners have a different point of view on the MPS than the current leadership and that the PCB has before it accurate information about the company that will be operating these EGUs. Therefore, the Environmental Organizations respectfully request that the Board stay this rulemaking until the close of the Dynegy-Vistra merger and the

new company can express its view on the rule change and provide essential, updated information for this proceeding.

Respectfully submitted,



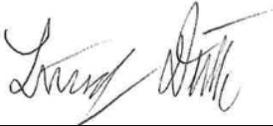
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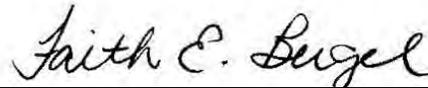
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Dated: February 2, 2018

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**STATUS REPORT IN SUPPORT OF ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY**

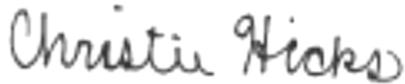
Pursuant to Section 101.514 of the Pollution Control Board's ("Board") Rules, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club provide the foregoing status report describing the progress of the instant proceeding thus far.

1. On October 2, 2017, the Illinois Environmental Protection Agency ("Agency") submitted its proposed amendments to the Multi-Pollutant Standards, 35 Ill. Adm. Code 225.233, along with a Motion for Expedited Review.
2. On October 10 and 16, respectively, the Illinois Attorney General's Office and Sierra Club responded to the Motion to Expedite Review. Also on October 16, Dynege Responded in support of the Motion to Expedite.
3. On October 19, the Board accepted the proposal for hearing and denied the Motion for Expedited Review, but directed the Clerk to proceed to first notice publication of the rule amendments. The Board directed the hearing officer to schedule at least two hearings. The Board also requested an Economic Impact Study from the Department of Commerce and Economic Opportunity.
4. A prehearing conference was held on October 30, 2017 to establish hearing dates, locations and times, as well as deadlines for prefiled testimony and questions.
5. On November 8, 2017, the Hearing Officer issued a scheduling order.
6. On November 22, 2017, the Environmental Organizations requested a modification of hearing hours to accommodate public comment after business hours on January 17, 2018. Dynege replied on November 28, the Environmental Organizations replied on November 30, and the hearing officer ruled on December 14, 2017 extending public comment hours until 7:00pm.
7. Prefiled testimony was filed by Dynege, the Agency, and the Illinois Attorney General's Office on December 11, 2017. Prefiled questions were filed on January 2, 2018. Prefiled answers were filed on January 12, 2018.

8. Public Hearings were held on January 17 and January 18, 2018 in Peoria, Illinois.
9. At the time of the Peoria hearings, a schedule for prefiled testimony, questions, and answers was set in advance of the March 6 and 7 Public Hearings, scheduled to take place in Edwardsville, Illinois.

No other stay of proceeding has been requested.

Respectfully Submitted,



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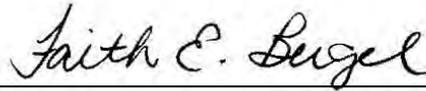
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Dated: February 2, 2018

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of the foregoing **NOTICE OF FILING, ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY, and STATUS REPORT IN SUPPORT OF ENVIRONMENTAL ORGANIZATIONS' MOTION TO STAY** on behalf of the Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association, and Sierra Club (collectively, "Environmental Organizations") in R2018-20 were served upon the attached service list by e-mail on February 2, 2018.

Respectfully Submitted,



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