

Olson, Joanne

From: Olson, Joanne
Sent: Tuesday, April 19, 2016 12:07 PM
To: ssylvester@atg.state.il.us; JGignac@atg.state.il.us; EWallace@atg.state.il.us; mdunn@atg.state.il.us; AArmstrong@atg.state.il.us; AAntoniolli@schiffhardin.com; MSmallwood@ameren.com; Gary.King@arcadis-us.com; SKnowles@ameren.com; SWhitworth@ameren.com; rcipriano@schiffhardin.com; MBollinger@ameren.com; sdavis@aiec.coop; sue.corcoran@cwlp.com; christine.zeman@cwlp.com; Mark.Cullen@cwlp.com; david.rieser@klgates.com; Rick.Diericx@Dynegy.com; Phil.L.Morris@dynegy.com; Irichart@ecojusticecollaborative.org; bruceparker@electricenergyinc.com; Zigmund.Karpa@exeloncorp.com; aruss@environmentalintegrity.org; jdexter@elpc.org; jcassel@elpc.org; mbitul@mwe.com; WILLIAM.PAFF@ROCKLANDCAPITAL.COM; thecomptons311@comcast.net; robert.s.elvert@exxonmobil.com; rkohlhase@f-w.com; info@yourwaterwellandpump.com; pmcnamara@simapc.com; jmnorman@htc.net; llurkins@ilfb.org; weibel@isgs.illinois.edu; ADavis@ierg.org; apalumbo@ierg.org; cathy.c.taylor@dom.com; donald.hintz@dom.com; Stephen.Frank@nrg.com; sf@nijmanfranzetti.com; Sharene.Shealey@nrg.com; Keith.Schmidt@nrg.com; rfisher@ppi.coop; Jennifer.Martin@heplerbroom.com; arehn@prairierivers.org; trotche@prairierivers.org; Ireuss@psgc-llc.com; pdequattro@psgc-llc.com; jack.darin@sierraclub.org; fbugel@gmail.com; cindy.skrukrud@sierraclub.org; terri.treacy@sierraclub.org; katrina.phillips@sierraclub.org; jmclaurin@sipower.org; lhopkins@sipower.org
Cc: Cobb, Rick; Olson, Joanne; Buscher, Bill; Zimmer, Amy; Jennings, James M.; Sofat, Sanjay; Kim, John J.
Subject: IEPA Stakeholder Meeting on the Coal Ash Rulemaking
Attachments: Meeting Notice.pdf; IEPA Amended CCW Proposal Outreach.pdf; Map & Directions.pdf

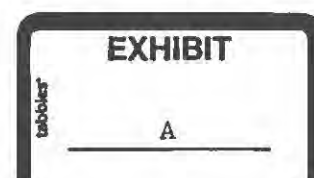
Dear Stakeholder,

Attached you will find the Agency's amended proposal for Part 841, Coal Combustion Waste Surface Impoundments at Power Generating Facilities. The Agency will hold a stakeholder meeting for all interested parties on **May 3, 2016**, at the Illinois EPA's Springfield Office, 1021 North Grand Ave East, Sangamo Conference Room, from **1:30 pm to 3:30 pm** (see attached meeting notice and map). Please feel free to forward the meeting notice and amended proposal to other parties who may be interested in attending the stakeholder meeting. The Agency will accept written comments by email until May 10, 2016. All comments should be sent to me at joanne.olson@illinois.gov.

The attached draft rule language has not been submitted to the Illinois Pollution Control Board. After conducting the outreach meeting on May 3, 2016, and reviewing any written comments received, the Agency will file a pleading containing the Agency's preferred path moving forward in the Part 841 rulemaking.

Thanks,

Joanne M. Olson
Illinois Environmental Protection Agency
1021 North Grand Avenue East, P.O. Box 19276
Springfield, IL 62794-9276
Phone: 217-782-5544 / Fax: 217-782-9807
joanne.olson@illinois.gov



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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217) 782-2829
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 • (312) 814-6026

BRUCE RAUNER, GOVERNOR

LISA BONNETT, DIRECTOR

MEMORANDUM

DATE: April 19, 2016
TO: Stakeholders
FROM: Illinois EPA
SUBJECT: Stakeholder Meeting on Draft Regulations for Coal Combustion Waste Surface Impoundments at Power Generating Facilities

Meeting Purpose

In October 2013, the Illinois Environmental Protection Agency (Illinois EPA or Agency) proposed to the Illinois Pollution Control Board (Board) general rules for groundwater monitoring, corrective action, and closure of coal combustion waste surface impoundments at power generating facilities in a new Part 841 of Title 35 of the Illinois Administrative Code. Between February 26 and July 24, 2014, the Board held numerous hearings on the Illinois EPA's rulemaking proposal. In April 2015, USEPA finalized its federal Coal Combustion Residuals (CCR) rule. 80 Fed. Reg. 21302 (April 17, 2015). Thereafter the Board, at the Agency's request, has stayed the rulemaking.

Illinois EPA has developed an amended regulatory proposal in light of the federal CCR rule. The Agency now seeks to conduct outreach with stakeholders on its amended regulatory proposal and questions posed by the Board in its March 17, 2016 Order.

The Stakeholder meeting will be held on May 3, 2016, at the Illinois EPA's Springfield Office, 1021 North Grand Ave East, Sangamo Conference Room, from 1:30 pm to 3:30 pm.

The North Entrance (see attached map) is the closest entrance near the Sangamo Conference Room. The North Entrance parking lot can be accessed from 11th St. to the east or Converse St. to the north. Additional parking is available in the fenced lot north of the Illinois EPA. Guests are required to check in at the guard station. There will be signs inside the building directing you to the Sangamo Room where the meeting will be held.

The Agency will accept written comments until May 10, 2016. The Agency encourages stakeholders to submit comments before the outreach meeting to facilitate discussion during the meeting. Comments should be emailed to joanne.olson@illinois.gov.

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TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE G: WASTE DISPOSAL
CHAPTER I: POLLUTION CONTROL BOARD
SUBCHAPTER j: COAL COMBUSTION WASTE SURFACE IMPOUNDMENTS

PART 841
COAL COMBUSTION
WASTE SURFACE IMPOUNDMENTS AT POWER GENERATING FACILITIES

SUBPART A: GENERAL

Section	
841.100	Purpose
841.105	Applicability
841.110	Definitions
841.115	Groundwater Quality Standards
841.120	Groundwater Management Zone Application
841.125	Public Notice
841.130	Construction and Operating Permit
841.135	Severability

AUTHORITY: Implementing Sections 12 and 22 of the Environmental Protection Act [415 ILCS 5/12 and 22] and authorized by Sections 13, 22, 27, and 28 of the Environmental Protection Act [415 ILCS 5/13, 22, 27, and 28].

SOURCE: Adopted in R__-__ at __ Ill. Reg.____, effective _____.

SUBPART A: GENERAL

Section 841.100 Purpose

This Part establishes requirements for corrective action and closure of surface impoundments containing coal combustion waste at electric utilities and independent power producers. This part is intended to work in conjunction with the federal requirements found in "Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments," 40 C.F.R. Part 257, Subpart D.

Section 841.105 Applicability

- a) Except as specified in subsection (b) of this Section, this Part applies to all surface impoundments containing coal combustion waste at electric utilities and independent power producers.
- b) This Part does not apply to any surface impoundment:
 - 1) operated under a solid waste landfill permit issued by the Agency;

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- 2) operated pursuant to procedural requirements for a landfill exempt from permits under 35 Ill. Adm. Code 815;
- 3) subject to 35 Ill. Adm. Code 840;
- 4) that completed closure of the CCW surface impoundment as specified in a construction permit or groundwater management zone approved by the Agency or state construction permit issued by the Agency prior to (INSERT EFFECTIVE DATE); and
- 5) used to only collect stormwater runoff.

Section 841.110 Definitions

Unless otherwise specified, the definitions of the Environmental Protection Act (Act) [415 ILCS 5] apply to this Part. The following definitions also apply:

"Agency" means the Illinois Environmental Protection Agency.

"Board" means the Illinois Pollution Control Board.

"Coal combustion waste" or "CCW" means any fly ash, bottom ash, slag, or flue gas or fluid bed boiler desulfurization by-products generated as a result of the combustion of:

- (1) *coal, or*
- (2) *coal in combination with: (i) fuel grade petroleum coke, (ii) other fossil fuel, or (iii) both fuel grade petroleum coke and other fossil fuel, or*
- (3) *coal (with or without: (i) fuel grade petroleum coke, (ii) other fossil fuel, or (iii) both fuel grade petroleum coke and other fossil fuel) in combination with no more than 20% of tire derived fuel or wood or other materials by weight of the materials combusted; provided that the coal is burned with other materials, the Agency has made a written determination that the storage or disposal of the resultant wastes in accordance with the provisions of item (r) of Section 21 would result in no environmental impact greater than that of wastes generated as a result of the combustion of coal alone, and the storage disposal of the resultant wastes would not violate applicable federal law. [415 ILCS 5/3.140]*

"Facility" means all contiguous land and structures, other appurtenances, and improvements on the land, used for treating, storing, disposing or otherwise

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conducting solid waste management of CCW. A facility may consist of several treatment, storage, or disposal operational units.

"Groundwater" means underground water which occurs within the saturated zone and geologic materials where the fluid pressure in the pore space is equal to or greater than atmospheric pressure. [415 ILCS 5/3.210]

"Operator" means the person responsible for the operation and maintenance of a surface impoundment.

"Owner" means a person who has an interest, directly or indirectly, in land, including a leasehold interest, on which a person operates and maintains a unit. The "owner" is the "operator" if there is no other person who is operating and maintaining a surface impoundment.

"Surface impoundment" means a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCW and liquids, and the unit treats, stores or disposes of CCW.

Section 841.115 Groundwater Quality Standards

- a) The owner or operator shall comply with the groundwater standards in 35 Ill. Adm. Code 620 except as provided in subsection (b).
- b) When any CCW surface impoundment is located above or within Class IV groundwater, the Class IV groundwater quality standards for the following chemical constituents shall be as follows:

Constituent	Standard (mg/L unless otherwise noted)
Antimony	0.006
Arsenic	0.010
Barium	2
Beryllium	0.004
Cadmium	0.005
Chromium	0.1
Cobalt	background
Fluoride	4.0
Lead	background
Lithium	background
Mercury	0.002
Molybdenum	background
Thallium	0.002
Radium 226 and 226 combined	5 pCi/L

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- c) The compliance point for the chemical constituents listed in subsection (b) is at the edge of the waste boundary.

Section 841.120 Groundwater Management Zone

- a) When a surface impoundment containing coal combustion waste causes or contributes to a violation of the groundwater quality standards set forth in Section 841.115 of this Part, the owner or operator of the surface impoundment may seek a groundwater management zone pursuant to 35 Ill. Adm. Code 620.250.
- b) All groundwater management zones approved by the Agency must contain a groundwater monitoring plan and a corrective action plan, which may include closure, designed to achieve compliance with the groundwater quality standards set forth in Section 841.115.
- c) All groundwater management zone applications submitted pursuant to subsection (a) must contain the following:
 - 1) Facility information, including name, address and county where the surface impoundment is located;
 - 2) Identification of specific units (operating or closed) present at the facility:
 - A) CCW landfill;
 - B) CCW surface impoundment;
 - C) waste pile; or
 - D) other units that may be causing groundwater contamination.
 - 3) Maps and engineering drawings showing the facility, surface impoundments and other units at the facility.
 - 4) Statement of the groundwater classification(s) at the facility.
 - 5) Identification of the chemical constituents released to the groundwater.
 - 6) Description of how groundwater will be monitored to determine the rate and extent of the release, and if it has migrated off site.
 - 7) Schedule for investigation of the extent of the release.
 - 8) Results of available soil testing and groundwater monitoring associated with a release from the surface impoundment, locations and depths of samples, and monitoring well construction details with well logs.

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- 9) Remedy
 - A) Description of selected remedy and why it was chosen;
 - B) Results of groundwater contaminant transport modeling showing how the selected remedy will achieve compliance with the applicable groundwater standards;
 - C) Description of the fate and transport of contaminants with selected remedy over time; and
 - D) A statement of how groundwater at the facility will be monitored following implementation of the remedy to ensure that the groundwater standards have been attained.
- 10) information requested by the Agency, necessary for its review of the groundwater management zone application.

Section 841.125 Public Notice for Groundwater Management Zone Applications

- a) The Agency shall post all applications to create new or modify existing groundwater management zones, submitted pursuant to this Part, on the Agency's webpage for a period not shorter than 30 days.
- b) The Agency shall accept written comments for a period of 30 days beginning on the day the groundwater management zone application is posted on the Agency's webpage.
- c) The Agency is not required to hold a public hearing pursuant to 35 Ill. Adm. Code 164 or prepare a written response to comments received.
- d) The Agency shall take any comments received into consideration in making its final decision and shall post the its final decisions on groundwater management zone application on the Agency's webpage for a period not shorter than 30 days.

Section 841.130 Construction and Operating Permit

- a) No person shall implement corrective action or closure of a CCW surface impoundment, or modify a CCW surface impoundment without a construction permit issued by the Agency. Activities requiring a permit under this subsection include but are not limited to the following:
 - 1) constructing the final cover or cap on the surface impoundment;
 - 2) dewatering;

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- 3) pumping and treating groundwater;
 - 4) removal of all the waste; and
 - 5) Grout curtains or other groundwater containment structures;
- b) No person shall cause or allow the use or operation of CCW surface impoundment without a state operating permit issued under 35 Ill. Adm. Code 309. Subpart B. Any CCW surface impoundments without a state operating permit on the {EFFECTIVE DATE OF THE RULE} must obtain a state operating permit within 3 years of {EFFECTIVE DATE OF THE RULE}.
- c) Owners or operators of CCW surface impoundments must maintain an operating permit for 30 years after closure of the CCW surface impoundment has been completed, or until the groundwater quality standards in Section 841.115(b) have been met, whichever is later.

Section 841.135 Severability

If any Section, subsection, sentence or clause of this Part shall be adjudged unconstitutional, void, invalid, or otherwise unlawful, such adjudication shall not affect the validity of this Part as a whole, or any Section, subsection, sentence, or clause thereof not adjudged unconstitutional, void, invalid, or otherwise unlawful.

Illinois Environmental Protection Agency
 1021 North Grand Avenue, East
 Springfield, IL

Meeting Sign In

Meeting Date 5/3/2016 Meeting Name ASH IMPOUNDMENT OUTREACH

<u>Participant Name</u>	<u>Representing</u>	<u>Telephone/Fax Number</u>
<u>Thomas L. Davis</u>	<u>Dynegy</u>	<u>618-343-7757</u>
<u>Phil Harvey</u>	<u>ATD</u>	<u>314-423-1874</u>
<u>DAN Wimmer</u>	<u>DEO/UCD</u>	<u>217-558-2445</u>
<u>Antoinette Polumbo</u>	<u>IERG</u>	<u>217-522-5512</u>
<u>Stephen Sylvester</u>	<u>AGO</u>	<u>312-814-2087</u>
<u>JAMES GIGNAC</u>	<u>AGO</u>	<u>312-814-0660</u>
<u>Michael Bollinger</u>	<u>Ameren</u>	<u>314 554 3652</u>
<u>Andrew Reh</u>	<u>Prairie River Network</u>	<u>208-505-6181</u>
<u>P. J. Becke</u>	<u>CWLP</u>	<u>217-757-8610</u>
<u>Christie Dem</u>	<u>"</u>	<u>²⁷ 757-9116</u>
<u>LEONARD Hopkins</u>	<u>So IL POWER Coop</u>	<u>(618)964-2268</u>
<u>Maureen McCarthy</u>	<u>IEPA</u>	
<u>Gary King</u>	<u>Arcadis</u>	<u>(217)787-7398</u>
<u>Susan Franzetti</u>	<u>Nijman Franzetti</u>	<u>(312)251-5590</u>
<u>Nate Rozic</u>	<u>NRG ENERGY</u>	<u>(724)597-8630</u>
<u>Steve Frank</u>	<u>NRG Energy</u>	<u>724-597-8310</u>
<u>Terrri Treacy</u>	<u>Sierra Club</u>	<u>618-521-1030</u>

EXHIBIT

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Illinois Environmental Protection Agency
 1021 North Grand Avenue, East
 Springfield, IL

Meeting Sign In

Meeting Date 5/3/2016 Meeting Name ASH IMPOUNDMENT OUTREACH

<u>Participant Name</u>	<u>Representing</u>	<u>Telephone/Fax Number</u>
<u>RICK DIERRX</u>	<u>Dynogy</u>	<u>618-343-7701</u>
<u>Juliana Orino</u>	<u>Hepler Brown</u>	<u>217 523-4900</u>
<u>TYLER ROTCHE</u>	<u>PRAIRIE RIVERS NETWORK</u>	<u>217.344.2371</u>
<u>JASON COLEMAN</u>	<u>CWRP</u>	<u>217 757-8210 x1108</u>
<u>Alisha Anker</u>	<u>PPI</u>	<u>217-331-5621</u>
<u>CARL KAMP</u>	<u>IEPA/PWS</u>	<u>217-785-4787</u>
<u>Bill Buscher</u>	<u>" "</u>	<u>" " "</u>
<u>Lynn Dunaway</u>	<u>" "</u>	<u>" " "</u>
<u>Amy Zimmer</u>	<u>" "</u>	<u>" " "</u>
<u>RICK Cobb</u>	<u>" "</u>	<u>" " "</u>
<u>Darvin LeCrone</u>	<u>" "</u>	<u>" " "</u>
<u>Joanne Olson</u>	<u>" / DLC</u>	<u>" " "</u>
<u>Kerit Schmidt</u>	<u>NRG</u>	<u>724 597 8193</u>
<u>LAW RICHARD</u>	<u>Eco-Justice Collaborative</u>	<u>773-556-3417</u>
<u>Sharene Shealey</u>	<u>NRG</u>	<u>724-255-3220</u>
<u>Larry Rauss</u>	<u>Prairie State</u>	<u>618-824-7517</u>
<u>David Riesen</u>	<u>Koch Gads</u>	<u>312 807-4519</u>
<u>Cindy Skunk</u>	<u>Sierra Club</u>	<u>312-251-1680</u>

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Amendments to Illinois EPA's Part 841 Regulatory Proposal

EXHIBIT

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Part 841: Amended Proposal

- ▶ Utilizes the Agency's existing permit programs
 - carry out closure and corrective action through a state construction permit
 - carry out post-closure requirements through a state operating permit
- ▶ Modifies Illinois' groundwater quality standards to match federal rule
 - Illinois' Class IV GWQS = federal Appendix IV standards
- ▶ Applies to all CCW surface impoundments at power generating facilities
- ▶ Provides guidance on GMZ application requirements
- ▶ Provides public participation in the corrective action and closure process



Part 841: Amended Proposal

- ▶ Must meet the minimum requirements in the federal rule, but the Agency may impose additional requirements through the GMZ, construction permit, and operating permits
- ▶ If there is no groundwater quality standard violation, a GMZ is not required, but a state construction permit is required to complete closure activities
- ▶ Must maintain a state operating permit independent of the NPDES permit, which is not required after all surface water discharges have been eliminated



Programmatic Steps / Process

- ▶ Apply for state operating permit (if the site doesn't have one)
- ▶ Apply for & obtain a GMZ (if Illinois' GWQS violation).
- ▶ After GMZ is approved, apply for construction permit.
- ▶ Apply for a 404 permit and 401 Certification, as necessary
- ▶ Implement Agency approved closure or corrective action
- ▶ Maintain operating permit for 30 years post closure (e.g. post closure care)



Operating Permit

- ▶ WHO: All CCW surface impoundments
- ▶ WHEN: Within 3 yrs of the effective date of the rule
- ▶ WHY: Ensure groundwater monitoring & care/maintenance continues throughout the post closure care period of 30 years
- ▶ Modifications: May be necessary as the facility/unit moves through operation into closure and post closure
- ▶ Separate application from GMZ
- ▶ Possibly combined with construction permit application



Operating Permit

- ▶ 90 day issuance deadline
- ▶ Expire/renewal every five years
- ▶ Public notice not required because it is provided through the GMZ application
- ▶ A single operating permit can be issued to a facility with multiple ash ponds
- ▶ Must be maintained for 30 years after closure



Groundwater Management Zone

- ▶ WHO: Anyone with a Illinois groundwater standard violation
- ▶ WHEN: After a confirmed violation of the groundwater quality standard.
- ▶ WHY: Ensure adequate corrective action; alleviate ongoing violation of groundwater quality standard during corrective action;



Groundwater Management Zone

HOW:

- ▶ Section 841.120 provides list of required contents for GMZ application
- ▶ Compiles a GMZ application and submits to Agency
- ▶ Agency meets/discusses with regulated entity to discuss GMZ application
- ▶ Agency review's GMZ application - and evaluates the chosen closure or corrective action
- ▶ Public participation
- ▶ Agency approves/disapproves GMZ



Groundwater Management Zone

- ▶ All GMZ applications must be posted on the Agency's webpage for at least 30 days
- ▶ 30 day comment period
- ▶ No public hearings required
- ▶ Agency will take comments received into consideration in making its final decision
- ▶ Final Agency decision must be posted on the Agency's webpage



Construction Permit

- ▶ WHO: All CCW surface impoundments closing or performing corrective action
- ▶ WHY: Under current rules in Part 309, the modification of existing treatment systems, including removal from service and closure, requires a construction permit
- ▶ WHEN: Before closure/corrective action begins, and after a GMZ is obtained if there is GWQS violation



Construction Permit

- ▶ Must be issued/denied 90 days after application is received
- ▶ Public notice not required because it is provided through the GMZ application
- ▶ Expires every three years
- ▶ Can be issued to a facility or to a specific ash pond



Surface Water Protection

- ▶ For all sites that have a discharge to a WOTUS, the facility must have a NPDES Permit, independent of the requirements in the federal rule or the Agency's proposed Part 841.
- ▶ NPDES Permit has TBELs and WQBELs to protect surface water quality.
- ▶ 401 Certifications for discharge of dredge and fill materials into a WOTUS is required.



Groundwater Quality Standards

- ▶ Same for all CCW surface impoundments in Illinois
- ▶ Federal Appendix IV constituents apply at the waste boundary
- ▶ Otherwise, the Class I, Class II standards apply 25 feet from the toe of the impoundment, 15 below
- ▶ Part 620 Class I, and Class II will be amended to include all Appendix IV constituents



Stability and Location Requirements

- ▶ Stability and location requirements are self implementing under the federal rule (placement over an aquifer, seismic impact zones, wetlands, fault areas, and unstable areas).
- ▶ Determinations of whether closure is required under the federal rule will be made by the facility. Closure, however, will occur through the Agency process set forth above.
- ▶ DNR has jurisdiction over dam safety/structural issues, which includes CCW surface impoundments.



Why This Approach:

- ▶ Eases implementation of the federal rule
- ▶ Provides Agency oversight
- ▶ Provides accountability to the public that these facilities will properly retire CCW surface impoundments
- ▶ Provides regulatory certainty to Industry
- ▶ Does not duplicate federal requirements
- ▶ Codifies existing practices
- ▶ Integrates state and federal regulations



Board's Question #1

Should state rules adopt at least the federal minimum criteria into their regulations?



Board's Question #2

Should state rules require financial assurance?



Board's Question #3

Should state rules address CCW surface impoundments located at inactive generating facilities?



Discussion?



We want your comments!

Send written comments to:

joanne.olson@illinois.gov

On or before May 10, 2016



SETTLEMENT AGREEMENT

WHEREAS, on April 17, 2015, the United States Environmental Protection Agency (“EPA”) published a regulation promulgated pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.* (“RCRA”), titled “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities,” 80 Fed. Reg. 21,302 (Apr. 17, 2015) (“Final Rule”);

WHEREAS, Clean Water Action, Environmental Integrity Project, Hoosier Environmental Council, PennEnvironment, Prairie Rivers Network, Sierra Club, Tennessee Clean Water Network, and Waterkeeper Alliance (collectively “Environmental-Petitioners”) and Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, Beneficial Reuse Management, Lafarge North America Inc., Lafarge Midwest, Inc., Lafarge Building Materials Inc., Associated Electric Cooperative, Inc., City of Springfield, Missouri Board of Public Utilities, and AES Puerto Rico, LP (collectively “Industry-Petitioners”), have petitioned for review of the Final Rule in the United States Court of Appeals for the District of Columbia (the “Court”) in seven separate actions consolidated under D.C. Circuit Case No. 15-1219 (the “Pending Action”);

WHEREAS, in response to certain of the claims in the Pending Action, Respondent EPA has determined that it is prudent to reconsider through further administrative proceedings certain specific provisions of the Final Rule (“Reconsidered Provisions”) and to file with the Court a Motion to Remand the Reconsidered Provisions (“Motion to Remand”), said Motion being unopposed by Environmental-Petitioners and Industry-Petitioners, except that the undersigned Industry-Petitioners take no position on the remand of Reconsidered Provision D and the remand and vacatur of Reconsidered Provision B; the remaining Industry-Petitioners have authorized counsel for the undersigned Industry Petitioners to state that the issues addressed in the Motion

EXHIBIT

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to Remand are not among the issues they are pursuing in the Pending Action and that they accordingly take no position on the Motion to Remand;

WHEREAS, the Reconsidered Provisions call for the following:

A. Remand with vacatur of the of the phrase "not to exceed 6 inches above the slope of the dike" within 40 C.F.R. §§ 257.73(a)(4), 257.73(d)(1)(iv), 257.74(a)(4), and 257.74(d)(1)(iv);

B. Remand with vacatur of 40 C.F.R. § 257.100, *except* for the following clause contained in 40 C.F.R. § 257.100(a): "Inactive CCR surface impoundments are subject to all of the requirements of this subpart applicable to existing CCR surface impoundments;" Such vacatur shall be effective as set forth in the Motion to Remand;

C. Remand without vacatur of:

1. The sentence in 40 C.F.R. § 257.90(d) that provides: "The owner or operator of the CCR unit must comply with all applicable requirements in 257.96, 257.97, and 257.98;" and

2. The phrase in 40 C.F.R. § 257.96(a) that provides "or immediately upon detection of a release from a CCR unit," said remand for the purpose of proposing to clarify the type and magnitude of non-groundwater releases that would require a facility to comply with some or all of the corrective action procedures set forth in 40 C.F.R. §§ 257.96-257.98 in meeting their obligation to clean up the release;

D. Remand without vacatur of Appendix IV to the Final Rule for the sole purpose of proposing that Boron be added to the list of constituents in Appendix IV that trigger assessment monitoring and corrective action; and

E. Remand without vacatur of 40 C.F.R. § 257.103(a) and § 257.103(b) for further consideration of whether to expand this provision to situations in which a facility needs to continue to manage waste streams other than CCR in the waste unit;

WHEREAS the remand, and vacatur where applicable, of the Reconsidered Provisions may have some effect on one or more of the Environmental and/or Industry Petitioners or members thereof, and the Parties agree to attempt to address those effects through this Settlement Agreement (“Agreement”); and

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the identified issues without further litigation;

NOW, THEREFORE, the Environmental-Petitioners, the undersigned Industry-Petitioners, and EPA, each intending to be bound by this Agreement, hereby agree as follows:

I. PARTIES

1. The Parties to this Agreement are Environmental-Petitioners, the undersigned Industry-Petitioners, and EPA (collectively the “Parties”). The Parties understand that Gina McCarthy was sued in her official capacity as Administrator of the United States Environmental Protection Agency and that the obligations arising under this Agreement are to be performed by EPA and not by Gina McCarthy in her individual capacity.

2. This Agreement applies to, is binding upon, and inures to the benefit of Environmental-Petitioners and the undersigned Industry-Petitioners (and their successors, assigns, and designees) and EPA.

II. ACTIONS TO BE TAKEN BY EPA

3. EPA shall publish a proposed rule or rules (“Remand Rule”) to:

A. In response to the vacatur and remand of the provisions requiring "vegetative slopes of dikes not to exceed a height of 6 inches above the slope of the dike" in 40 C.F.R. §§ 257.73(a)(4), 257.73(d)(1)(iv), 257.74(a)(4), and 257.74(d)(1)(iv), establish requirements relating to the use of vegetation as slope protection on CCR surface impoundment dikes;

B. Clarify the type and magnitude of non-groundwater releases that would require a facility to comply with some or all of the corrective action procedures set forth in 40 C.F.R. §§ 257.96-257.98 in meeting their obligation to clean up the release; and

C. Add Boron to the list of contaminants in Appendix IV of the Final Rule that trigger the assessment monitoring and corrective action requirements under the Final Rule.

4. EPA shall issue the proposed Remand Rule(s) described in paragraph 3 above as soon as practicable. EPA presently intends to take final action on the matters set forth in paragraph 3 above (the Remand Rule) within three years of an Order from the Court granting the Motion for Remand. Any final rule or rules issued with regard to the remanded issues will be based on the comments received on the proposed Remand Rule(s) and other pertinent information and data. Nothing herein shall be construed to prejudge the substance, findings or provisions of any final Remand Rule(s) issued by EPA pursuant to this Agreement.

5. In order to ameliorate the effects to those owners or operators who relied on the early closure provision (40 C.F.R. § 257.100) that EPA seeks to vacate through the Motion to Remand, EPA shall propose a rule (the "Extension Rule") that is applicable only to those owners or operators that by December 17, 2015, submitted notification of their intent to initiate closure of an inactive CCR surface impoundment pursuant to 40 C.F.R. § 257.100(b) and placed such notification on the owner or operator's CCR Web site by January 18, 2016, as required by 40

C.F.R. § 257.107(i)(1). The proposed Extension Rule shall extend by 525 days (the approximate number of days between the signature date of the Final Rule, December 19, 2014, and an Order from the Court granting the Motion to Remand), the following deadlines ("Extension Period"):

A. Deadline to complete the demonstrations for compliance with the location restrictions, set forth in 40 C.F.R. §§ 257.60(c)(1), 257.61(c)(1), 257.62(c)(1), 257.63(c)(1), 257.64(d)(1));

B. Deadline to document whether the CCR impoundment is lined or unlined, set forth in 40 C.F.R. § 257.71(a)(1);

C. Deadline to install permanent markers, set forth in 40 C.F.R. § 257.73(a)(1);

D. Deadline to document the CCR unit's history of construction set forth in 40 C.F.R. § 257.73(c)(1);

E. Deadline to complete the initial hazard potential classification assessment, initial structural stability assessment, and initial safety factor assessment set forth in 40 C.F.R. § 257.73(f)(1);

F. Deadline to prepare an Emergency Action Plan, set forth in 40 C.F.R. § 257.73(a)(3);

G. Deadline to prepare a fugitive dust control plan set forth in 40 C.F.R. § 257.80(b)(5);

H. Deadline to prepare an initial inflow design flood control system plan set forth in 40 C.F.R. § 257.82(c)(3);

I. Deadline to initiate weekly inspections of the CCR unit and monthly monitoring of CCR unit instrumentation set forth in 40 C.F.R. § 257.83(a)(2);

J. Deadline to complete the initial annual inspection of the CCR unit set forth in 40 C.F.R. § 257.83(b)(3);

K. Deadline to install the groundwater monitoring system, and begin monitoring, set forth in 40 C.F.R. § 257.90(b):

L. Deadline to prepare an initial groundwater monitoring and corrective action report, set forth in 40 C.F.R. § 257.90(e):

M. Deadline to prepare a written closure plan, set forth in 40 C.F.R. § 257.102(b)(2); and

N. Deadline to prepare a written post-closure care plan, set forth in 40 C.F.R. § 257.104(d)(2).

6. EPA shall issue the proposed Extension Rule within 60 days of an Order from the Court granting the Motion for Remand. EPA will transmit the proposed Extension Rule to the Office of the Federal Register as expeditiously as possible thereafter for publication. EPA will make its best efforts to sign a notice taking final action on the proposed Extension Rule within 120 days of the close of the comment period, but will in any event sign a notice taking final action no later than April 17, 2017. EPA will transmit the signed notice to the Office of the Federal Register as expeditiously as possible thereafter for publication.

7. The Parties agree that EPA may satisfy the requirements set forth in Paragraphs 5 and 6 of this Agreement through the promulgation of a direct final Extension Rule, which it may issue simultaneously with the proposed Extension Rule. If EPA receives adverse comments on such direct final Extension Rule and as a consequence withdraws it, EPA will inform the Parties and continue to proceed with the proposed Extension Rule referenced in Paragraph 6.

8. If the number of days between the signature date of the Final Rule (December 19, 2014) and issuance of the Order granting the Motion to Remand turns out to be greater than 525 days, the number of days comprising the extension period in the proposed Extension Rule described in Paragraph 5 shall automatically be increased to reflect the actual number of days between signature of the Final Rule (December 19, 2014) and the issuance of the Order granting the Motion to Remand.

III. ACTIONS BY PETITIONERS AND REMEDIES FOR NON-PERFORMANCE

9. Environmental-Petitioners and the undersigned Industry-Petitioners agree to the dismissal of their claims challenging the Remanded Provisions as set forth in EPA's Motion for Remand, said dismissal to become effective upon issuance of an Order from the Court granting the Motion to Remand. Specifically, the undersigned Industry-Petitioners agree to dismissal of their claims described in their Brief submitted to the Court (Doc. No. 1589625) at issues III,D and III,E (lack of notice of two specific criteria) and IV,C,ii (Alternative Closure as applied to non-CCR waste), and Environmental-Petitioners agree to dismissal of their claims described in their Brief submitted to the Court (Doc. No. 1589399) at issues IV (early closure provision) and V (Boron as a covered contaminant).

10. In the event EPA fails to issue a Final Remand Rule(s) within the time periods set forth in paragraph 4 above or sign a notice taking final action on the proposed Extension Rule by April 17, 2017, the undersigned Petitioners' sole remedy is to initiate an action under the Administrative Procedure Act, 5 U.S.C. §§ 551-706, asserting unreasonable delay by EPA in concluding proceedings on the Final Remand Rule(s) or taking final action in issuing the Extension Rule. EPA fully intends to issue the Final Remand Rule(s) within the time periods set forth in paragraph 4 above and to sign a notice taking final action on the proposed Extension

Rule by April 17, 2017. Nevertheless, because future events cannot be predicted, nothing herein shall be deemed to waive any defense to any action alleging unreasonable delay by EPA in issuing the Final Remand Rule(s) or signing a notice taking final action on the proposed Extension Rule. Any such filed challenge renders any remaining EPA obligations under this Agreement pertaining to the Challenged Rule (i.e., the Remand Rule or Extension Rule, whichever is challenged) null and void.

11. Under no circumstances shall any provision of this Agreement be the basis for any action for specific performance, mandamus, or any other remedy seeking to compel EPA to take any of the actions referenced in this Agreement. The Parties agree that contempt of court is not an available remedy for a breach of this Agreement. Nothing herein prevents any party from bringing an action asserting that EPA has unreasonably delayed taking some action.

12. Nothing herein shall prohibit any Petitioner from challenging the Final Remand Rule(s) or Extension Rule upon their promulgation.

IV. EFFECTIVE DATE

13. This Agreement shall not become effective unless and until it is executed by the representatives of all Parties and until the Court issues an Order granting the Motion to Remand. The Agreement may be executed in counterparts.

14. In the event the Agreement is executed by representatives of all Parties but the Court does not issue an Order granting the Motion to Remand substantially in the form set forth in the Motion to Remand, the Parties may attempt to renegotiate this Agreement to conform with the actions of the Court. In such event, nothing herein shall obligate any Party to agree to a modified Settlement Agreement.

V. GENERAL PROVISIONS

15. The Parties may agree in writing to modify any term of this Agreement. Except for the modification referred to in paragraph 8, above, any such written modification must be executed by all Parties.

16. This Agreement was negotiated between the undersigned Petitioners and EPA in good faith and jointly drafted by the Parties. The Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

17. This Agreement contains all terms and conditions agreed upon by the Parties. All statements, representations, promises, agreements, or negotiations, oral or otherwise, among the Parties or counsel that are not included herein are specifically superseded by this Agreement and shall have no force or effect.

18. This Agreement shall not constitute or be construed as an admission or adjudication by the United States or EPA or by any other person or entity of any question of fact or law with respect to any of the claims raised in the Pending Action, nor is it an admission of violation of any law, rule, regulation, or policy by the United States or EPA.

19. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to EPA under RCRA, general principles of administrative law, or under any other statutes or regulations, nor shall it in any way be deemed to limit EPA's discretion in adopting any final rule or taking any other administrative action.

20. Nothing in this Agreement shall be construed to limit EPA's authority to alter, amend, or revise any final rule, guidance, permit, interpretation or other administrative action that EPA has issued or may issue, or to promulgate superseding regulations. Correspondingly, nothing herein shall be construed to limit the undersigned Petitioners' ability to seek

administrative or judicial review of any such alteration, amendment, revision, superseding regulation or administrative action.

21. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, RCRA, 40 U.S.C. §§ 6901 *et seq.*, or any other law or regulation, either substantive or procedural.

22. Nothing in this Agreement shall be construed to confer upon a district or appellate court jurisdiction to review any decision to be made by EPA pursuant to this Agreement that would not otherwise be reviewable by such court, or to otherwise confer upon a district court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals under section 7006 of RCRA, 42 U.S.C. § 6976.

23. If a subsequent change in law alters or relieves EPA of any of its obligations concerning the matters addressed in this Agreement, then this Agreement shall be amended to conform to such changes.

24. Nothing in this Agreement shall be construed to make any other person or entity not executing this Agreement a third-party beneficiary to this Agreement.

25. This Agreement shall not be admitted against EPA for any purpose in any proceeding, except an action for unreasonable delay or non-compliance with any obligation set forth herein.

26. EPA will promptly notify the undersigned Petitioners if it believes that it will be unable to meet one or more of the dates specified in Paragraphs 4 or 6 above because of any of the following circumstances beyond its control: (a) a government shutdown; (b) an extreme

weather event that renders EPA staff unable to complete the work necessary to meet the deadlines; (c) a catastrophic environmental event (e.g., natural disaster or environmental accident) that results in the necessary diversion of EPA staff resources away from the work needed to meet the deadlines in this Agreement. Should EPA be unable to meet the dates in Paragraphs 4 or 6 due to one or more of the specific circumstances listed in this paragraph, then any resulting failure by EPA to meet that date shall not constitute a failure to comply with the terms of this Agreement, and the date or dates so affected shall be extended one business day for each day of the unavoidable delay, unless the Parties agree to a longer period. In the event that EPA invokes this provision, it will provide the undersigned Petitioners with reasonable notice and explanation for any unavoidable delay.

27. The individuals signing this Agreement on behalf of the Parties hereby certify that they are authorized to bind their respective parties to this Agreement.

28. This Agreement shall be governed and construed under the laws of the United States.

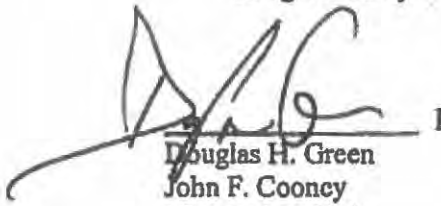
29. Any notice required or made with respect to this Agreement shall be in writing and shall be effective upon receipt. For any matter relating to this Agreement, notice shall be sent to a Party by sending such notice to signatories for such Party listed below.

30. The headings contained in this Agreement are for convenience only and shall not be construed as having any substantive effect.

31. Counsel for the following Industry Petitioners have authorized counsel for the undersigned Industry Petitioners to state that the issues addressed in this Agreement, including but not limited to the issues set out in the fourth Whereas Clause and numbered paragraph nine of this Agreement, are not among the issues they are pursuing in the Pending Action and that

they accordingly take no position on the terms of this Agreement: Beneficial Reuse Management, Lafarge North America Inc., Lafarge Midwest, Inc., Lafarge Building Materials Inc., Associated Electric Cooperative, Inc., City of Springfield, Missouri Board of Public Utilities, and AES Puerto Rico, LP.

So agreed to by:



Date: 4/13/16

Douglas H. Green
John F. Cooney
Margaret K. Kuhn
Venable LLP
575 7th Street NW
Washington, DC 20002
(202) 344-4483
dhgreen@venable.com

On behalf of: *Utility Solid Waste Activities Group, Edison Electric Institute, American Public Power Association, and National Rural Electric Cooperative Association*



Date: 4/18/16

Perry M. Rosen
U.S. Department of Justice
Environment & Natural Resources Div.
PO Box 7611, Ben Franklin Station
Washington, DC 20044

Laurel Celeste
U.S. Environmental Protection Agency
Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code 2344A
Washington, D.C. 20460
Tel: 202-564-1751

On behalf of: *United States Environmental Protection Agency*



Date: 4/14/2016

Mary Whittle
Earthjustice
1617 JFK Blvd., Suite 1675
Philadelphia, PA 19103
(215) 717-4524
mwhittle@earthjustice.org

Matthew Gerhart

Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
mgerhart@earthjustice.org

Lisa Evans
Earthjustice
21 Ocean Ave.
Marblehead, MA 01945
(781) 631-4119
levans@earthjustice.org

On behalf of: *Clean Water Action,
Comité Dialogo Ambiental, Inc.,
Environmental Integrity Project,
Hoosier Environmental Council,
PennEnvironment, Prairie Rivers
Network, Sierra Club, Tennessee Clean
Water Network, and Waterkeeper
Alliance*

Electronic Filing - Received, Clerk's Office : 07/15/2016

ORAL ARGUMENT NOT YET SCHEDULED

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

UTILITY SOLID WASTE ACTIVITIES
GROUP, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

No. 15-1219
(and consolidated cases)

**RESPONDENT EPA'S UNOPPOSED MOTION FOR
VOLUNTARY REMAND OF SPECIFIC REGULATORY PROVISIONS**

OF COUNSEL:

LAUREL CELESTE
U.S. Environmental Protection Agency
Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code 2344A
Washington, D.C. 20460
Tel: (202) 564-1751

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Div.

PERRY M. ROSEN
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044
Tel: (202) 353-7792

DATE: April 18, 2016

Counsel for Respondents

EXHIBIT

E

Respondents, Environmental Protection Agency and Administrator Gina McCarthy (collectively “EPA”), respectfully move the Court to remand certain provisions of the Final Rule titled “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities,” 80 Fed. Reg. 21,302 (April 17, 2015) (the “Rule” or “Final Rule”), to EPA for further proceedings. The proposed remanded provisions are specific subsections of a set of comprehensive regulations that EPA promulgated to address the management and disposal of coal combustion residuals (“CCR”), which is solid waste subject to regulation under the Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.* (“RCRA”).

The regulatory provisions EPA seeks to remand (“Reconsidered Provisions”) are a subset of the provisions being challenged by Industry and Environmental Petitioners in the above-captioned action. While EPA is on this date filing its brief opposing Petitioners’ challenges to most of the provisions Petitioners assert were improperly promulgated, upon review of Petitioners’ briefs EPA determined that it is prudent to seek remand of a subset of the challenged provisions (the Reconsidered Provisions) for further consideration or review.

As detailed below, EPA seeks remand without vacatur of some of the Reconsidered Provisions and remand with vacatur as to other Reconsidered Provisions. No Petitioner opposes this Motion. The positions of both Industry and

Environmental Petitioners as to EPA's request to remand each of the Reconsidered Provisions is set out more fully in Section II, *infra*.

I. BACKGROUND

A. Statutory Background

EPA regulates the disposal of solid wastes not presently classified as "hazardous" under Subtitle D of RCRA. Under Subtitle D, Congress directed EPA to promulgate regulations defining when a facility is deemed to be a sanitary landfill, which for these purposes includes both landfills and surface impoundments. 42 U.S.C. §6944(a). In making this determination, there must be, in EPA's view, "no reasonable probability of adverse effects on health or the environment from disposal of solid waste" *Id.*

The regulations generated by EPA to ensure that facilities qualify as a sanitary landfill take the form of "minimum criteria." *See* 42 U.S.C. §6907(a). If a waste unit fails to comply with the regulatory criteria established by EPA to be classified as a sanitary landfill, the unit is deemed to be an "open dump," which is prohibited under the statute. 42 U.S.C. §§6944, 6903(14). A facility operating an open dump must either retrofit the unit to come into compliance with the regulatory criteria or close the unit pursuant to the closure procedures promulgated by EPA. 42 U.S.C. §6945; 80 Fed. Reg. at 21,310/2.

B. Regulation of Coal Combustion Residuals Under RCRA

Coal combustion residuals (CCR) are by-products of the combustion of coal. 80 Fed. Reg. at 21,303. CCR contains contaminants such as mercury, cadmium, and arsenic, which are associated with serious health and environmental effects. *Id.* at 21,311. When improperly managed, CCR (and the contaminants in it) can leak into groundwater, blow into the air as dust, and/or be released to surface waters and to the land through structural failures of the landfills and impoundments which retain CCR. *Id.* at 21,449, 21,456-57.

On April 17, 2015, EPA issued the Final Rule, which for the first time comprehensively regulates the disposal and handling of CCR, under Subtitle D. 80 Fed. Reg. at 21,302/1. The Rule sets out specific nationally-applicable minimum criteria for the safe disposal of CCR in landfills and impoundments, including: location restrictions; liner design criteria; structural integrity requirements; operating criteria; groundwater monitoring and corrective actions; closure and post-closure requirements; and recordkeeping and notification requirements. 40 C.F.R. §§257.60-64, 70-74, 80-84, 90-98, 100-07. Failure to comply with these criteria results in the unit being deemed an “open dump” and, therefore, potentially subject to closure. 40 C.F.R. §257.1(a); 80 Fed. Reg. at 21,468.

II. PROVISIONS FOR WHICH REMAND IS SOUGHT

While both Industry and Environmental Petitioners generally support the Rule, both challenged specific provisions of the Rule or subsections thereof. *See* Ind. Br. (Doc. 1589399) at 3 (“Industry Petitioners challenge select provisions of EPA’s final rule”), 8-9 (describing Industry’s general support for the rule, seeking vacatur of only specific provisions), 52-53 (setting out the specific provisions challenged); Env. Br. (Doc. 1589625) at 51-52 (similar). Upon review of Petitioners’ briefs, EPA has determined that, with regard to certain provisions included in the Rule, it is prudent to seek remand of certain specified provisions.

Accordingly, EPA seeks remand of the following provisions *with vacatur*, as follows:

A. All aspects of 40 C.F.R. §§257.73 and 257.74 shall remain in place except that EPA seeks remand with vacatur *only* of the phrase “not to exceed a height of 6 inches above the slope of the dike” within 40 C.F.R. §§257.73(a)(4), 257.73(d)(1)(iv), 257.74(a)(4), and 257.74(d)(1)(iv). These subsections require surface impoundment dikes to be maintained with vegetated slopes and include a requirement that the vegetation not exceed a height of six inches above the slope of the dike. EPA seeks remand with vacatur of just the portion of the cited provisions related to the height restriction of the vegetation. Remand with vacatur is

appropriate because EPA did not provide meaningful notice and comment with regard to this requirement.

B. 40 C.F.R. §257.100, as written, exempts an inactive surface impoundment from certain post-closure requirements if, *inter alia*, it is closed under the Rule's required procedures no later than April 17, 2018. Because EPA did not provide notice or an opportunity to comment on this exemption during the rulemaking, EPA seeks remand with vacatur of this provision, except for a single sentence. Specifically, EPA seeks vacatur of 40 C.F.R. §257.100 *except* for the following clause contained in 40 C.F.R. §257.100(a): "Inactive CCR surface impoundments are subject to all of the requirements of this subpart applicable to existing CCR surface impoundments." The retention of this language is necessary to clarify that vacatur of the balance of section 257.100 does not affect other regulatory requirements throughout the Rule applicable to CCR surface impoundments, whether active or inactive.

With regard to the vacatur of 40 C.F.R. §257.100, EPA moves the Court to stay the effectiveness of its Order vacating 40 C.F.R. §257.100 for at least 120 days, until after EPA issues a new final rule revising certain deadlines contained in the Final Rule that are affected by the vacatur of this provision. The new final rule will provide facilities that become subject to post-closure requirements as a result of the vacatur of the exemption in 40 C.F.R. §257.100 with adequate time to come

into compliance, and all parties agree that it is appropriate for this new rulemaking to be completed before vacatur of 40 C.F.R. §257.100 takes effect, provided that the new rulemaking can be completed in a timely manner.

EPA presently intends to utilize expedited rulemaking procedures which, if successful, will allow for completion of the new rulemaking in 120 days. In the event EPA is unable to promulgate an expedited final rule, the Agency has further committed to completing this new rulemaking, at the latest, by April 2017. EPA proposes to file a status report, not later than 120 days from the date of the Court's Order, informing the Court and the parties whether the new final rule was in fact finalized within 120 days, and if not, what the current status of the rulemaking is. If the rulemaking was not completed within 120 days, EPA will file additional status reports at 60-day intervals until the new rulemaking is completed. Should EPA be unable to complete the new rulemaking by April 2017, all parties retain their rights to file an appropriate motion with the Court to seek continuation or termination of the stay of the Court's vacatur order. EPA reserves its rights to file any appropriate response to such motion. EPA respectfully requests that the Court retain jurisdiction over this matter to effectuate this process.

EPA further seeks to remand the following provisions *without vacatur*, as follows:

C. To allow EPA to propose to clarify the type and magnitude of non-groundwater releases that would require a facility to comply with some or all of the specific corrective action procedures set forth in 40 C.F.R. §§257.96-257.98 in meeting their obligation to clean up the release, EPA seeks remand without vacatur of:

1. The sentence in 40 C.F.R. §257.90(d) that provides: "The owner or operator of the CCR unit must comply with all applicable requirements in 257.96, 257.97, and 257.98;" and

2. The phrase in 40 C.F.R. §257.96(a) that provides "or immediately upon detection of a release from a CCR unit."

EPA does not seek vacatur of these provisions or any portion thereof nor does this request for remand affect any other obligation under the challenged Final Rule to remediate, address, or otherwise take actions required under the Rule in the event CCR constituent contaminants are released to the environment, e.g., detected at statistically significant levels exceeding groundwater protection.

D. EPA seeks remand without vacatur of Appendix IV to the Rule for the sole purpose of proposing that Boron be added to the list of constituents in Appendix IV that trigger assessment monitoring and corrective action. Because

EPA would be proposing to add a specific contaminant to the constituents listed in Appendix IV, there is no provision to vacate.

E. EPA seeks remand without vacatur of 40 C.F.R. §257.103(a) and 40 C.F.R. §257.103(b) for further consideration of whether to expand these provisions to situations in which a facility needs to continue to manage waste streams other than CCR in the waste unit. These provisions establish Alternative Closure procedures that may be utilized in the event an impoundment required to be closed under the Rule cannot locate suitable alternative capacity for disposal of CCR. Because EPA would be considering whether to extend the Alternative Closure temporary exemption to a new subclass of impoundments, there is no provision to vacate.

Environmental-Petitioners in all consolidated cases report that they have no objection to EPA's requests for remand/vacatur as specifically outlined in Section II.A-E above. Industry-Petitioners Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, and American Public Power Association report that they have no objection to EPA's requests for remand/vacatur as outlined in Sections II.A, C and E above and take no position with regard to the requests in Section II.B and D above. The remaining Industry-Petitioners have advised that the issues addressed in the Motion to Remand are not among the issues they are pursuing in the Pending Action and that they accordingly

take no position on the Motion to Remand. All Petitioners report that they have no intention to file any response to this motion.

ARGUMENT

III. VOLUNTARY REMAND IS APPROPRIATE TO CURE DEFICIENCIES IN THE RULE

As this Court has stated, “[w]e commonly grant such motions [to remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.” *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). *See also Anchor Line Ltd. v. Fed. Maritime Comm’n*, 299 F.2d 124, 125 (D.C. Cir. 1962) (“[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency”). “Administrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts.” *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)).

As outlined above, the Petitioners agree with and support much of the Rule and seek to remand and/or vacate only certain provisions. “Whether a regulation is severable depends on the issuing agency’s intent.” *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). *See also Davis County Solid Waste Mgmt. &*

Energy Recovery Special Serv. Dist. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997).

Here, EPA expressly declared that the various regulatory requirements are, in fact, severable, 80 Fed. Reg. at 21,305/3, and Petitioners do not contend otherwise.

Further, Petitioners do not object to the remand and/or vacatur of the above-identified Reconsidered Provisions as specifically described, with the balance of the Rule remaining in place, subject to Petitioners' claims in their respective merits briefs that certain *other* subsections of the Rule should be remanded and/or vacated. Accordingly, the specified Remanded Provisions should be remanded and/or vacated as described.

IV. REMAND WITHOUT VACATUR IS APPROPRIATE FOR DESIGNATED PROVISIONS OF THE RULE

As outlined above, EPA seeks remand without vacatur of the provisions at issue in Sections II.C-E above. In their briefs to the Court, Petitioners did not seek to vacate the provisions at issue in Section II.D or Section II.E. Ind. Pet. Br at 39; Env. Pet Br at 51-52. Moreover, no party objects to remand without vacatur of any of the provisions set forth in Section II.C-E. (Industry Petitioners take no position regarding Section II.D). Accordingly, the relief sought in this Motion should be granted. Nevertheless, EPA briefly addresses the criteria applied by this Court in considering whether to remand without vacatur.

This Court's "traditional position" is to remand without vacatur "where vacating would have serious adverse implications for public health and the

environment.” *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (Rogers, J., concurring in part) (granting remand without vacatur on rehearing to “at least temporarily preserve the environmental values covered by [the rule]” notwithstanding the “fundamental flaws” identified by the court.). *See also EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015) (remanding without vacatur in light of the “substantial disruption” vacatur would have for emissions trading markets); *Mississippi v. EPA*, 744 F.3d 1334, 1362 (D.C. Cir. 2013) (remanding so as not to “sacrifice” the environmental protection afforded by the CAA rule), *cert. denied*, 135 S. Ct. 53 (2014); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (choosing to remand rule “rather than eliminate any federal control at all”).¹

As outlined above, the criteria promulgated in the Final Rule were established based on EPA’s statutory obligation to establish criteria necessary to protect against probable harm to health or the environment. In each case for which EPA seeks remand without vacatur, it is important that the environmental protections contained in the Remanded Provisions remain in place. The provisions identified in Section II.C above deal with the type and magnitude of non-groundwater releases that would require a facility to comply with some or all of the

¹ The cases cited herein generally apply the factors outlined in *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (“*Allied Signal* factors”).

specific corrective action procedures set forth in 40 C.F.R. §§257.96-257.98.

While there may be releases that are sufficiently insignificant such that adherence to all of the specific corrective action procedures set forth in these provisions is not necessary (and could be counterproductive), it is critical that until the nature and scope of such releases are determined, the corrective action requirements remain applicable, because they are designed to establish measures necessary to correct leaking CCR impoundments or related waste units.

The provision described in Section II.D above, is the Appendix that lists the contaminants contained in CCR waste for which the substantive regulatory criteria apply. The purpose of the remand is to consider adding Boron, a CCR constituent, to the list of covered contaminants. Vacating Appendix IV would result in no CCR constituent pollutants being covered by the Rule during the remand period. No party has argued that these other constituent pollutants should not be covered by the Rule, and no Party seeks to vacate Appendix IV.

Finally, in Section II.E, EPA seeks remand without vacatur of 40 C.F.R. §257.103(a). This provision presently provides that when a CCR waste unit is determined to be leaking covered pollutants in excess of allowable thresholds, but the operator certifies that there is no immediate alternative disposal capacity available for CCR waste it generates, it may continue to deposit CCR waste in the unit until adequate alternative capacity can be located. As EPA found, this

accommodation was deemed necessary because in its absence many facilities might need to immediately close and thereby stop providing electrical power, which EPA determined would likely result in hardships that outweigh those associated with the temporary continued disposal of CCR at the unit. 80 Fed. Reg. at 21,423.

The purpose of the remand of this issue is to consider whether to expand this accommodation to situations in which a facility needs to continue to manage waste streams other than CCR in the waste unit in order to address the same concern -- harm caused by the elimination of the processes necessary to provide electrical power. Vacating this provision would eliminate the accommodation as it already applies, which would thereby potentially trigger the significant harm from the potential loss of electrical power it was designed to address.

The Final Rule being challenged is the first comprehensive regulation of waste units handling CCR. Thus, unlike in some other cases, there is no prior rule that could be imposed in the interim while EPA proceeds to reconsider these issues on remand. Further, as outlined, no Petitioner objects to remand of these three provisions without vacatur. Accordingly, the provisions identified in sections Issues II.C-E above should be remanded without vacatur.²

² In considering whether to remand without vacatur, this Court also generally evaluates the likelihood that the agency will be able to cure the rule's deficiency on remand. *NRDC v. EPA*, 571 F.3d 1245, 1276 (D.C. Cir. 2009); *Nat'l Ass'n of*

CONCLUSION

For the foregoing reasons, Respondent's motion for remand and partial vacatur should be granted.

Respectfully submitted,

OF COUNSEL:

LAUREL CELESTE
U.S. Environmental Protection Agency
Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code 2344A
Washington, D.C. 20460
Tel: (202) 564-1272

DATE: April 18, 2016

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Div.

/s/ Perry M. Rosen
PERRY M. ROSEN
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044
Tel: (202) 353-7792

Counsel for Respondents

Clean Water Agencies v. EPA, 734 F.3d 1115, 1161 (D.C. Cir. 2013). The parties have agreed on a process by which EPA will take affirmative steps to consider whether and how to address the concerns raised by Petitioners, i.e., the alleged deficiencies.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondent EPA's Unopposed Motion for Voluntary Remand of Specific Regulatory Provisions was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties, who have registered with the Court's CM/ECF system.

Date: April 18, 2016

/s/ Perry M. Rosen
Perry M. Rosen
Counsel for Respondents

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1219

September Term, 2015

EPA-80FR21302

Filed On: June 14, 2016

Utility Solid Waste Activities Group, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Waterkeeper Alliance, et al.,

Intervenors

Consolidated with 15-1221, 15-1222,
15-1223, 15-1227, 15-1228, 15-1229

BEFORE: Rogers, Kavanaugh, and Wilkins, Circuit Judges

ORDER

Upon consideration of the unopposed motion for voluntary remand of specific regulatory provisions, it is

ORDERED that the motion be granted. The following provisions are hereby remanded with vacatur to the agency for further proceedings: 1) the phrase "not to exceed a height of 6 inches above the slope of the dike" within 40 C.F.R. §§ 257.73(a)(4), 257.73(d)(1)(iv), 257.74(a)(4), and 257.74(d)(1)(iv); and 2) all of 40 C.F.R. § 257.100, except for the clause in § 257.100(a) that reads "inactive CCR surface impoundments are subject to all of the requirements of this subpart applicable to existing CCR surface impoundments." Vacatur of 40 C.F.R. § 257.100 is stayed to allow EPA to promulgate a new rule revising certain deadlines that are affected by the vacatur of this provision. EPA shall file a status report within 120 days of the date of this order. If the rulemaking is not completed by that time, EPA shall file status reports every 60 days thereafter until it is completed.

EXHIBIT

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1219

September Term, 2015

The Clerk is directed to sever the issues related to 40 C.F.R. § 257.100 and assign them docket No. 16-1183, captioned Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, and American Public Power Association v. Environmental Protection Agency. All petitioners in these consolidated cases are deemed petitioners in No. 16-1183, and any intervenor in these consolidated cases who wishes to participate as an intervenor in No. 16-1183 must so notify the court in writing, along with a corporate disclosure statement, within 30 days of the date of this order.

The following provisions are hereby remanded without vacatur to the agency for further proceedings: 1) the sentence in 40 C.F.R. § 257.90(d) that reads "The owner or operator of the CCR unit must comply with all applicable requirements in 257.96, 257.97, and 257.98."; 2) the phrase in 40 C.F.R. § 257.96(a) that reads "or immediately upon detection of a release from a CCR unit"; 3) all of Appendix IV; and 4) all of 40 C.F.R. § 257.103 (a) and (b).

The Clerk is directed to enter the balance of the briefing schedule. As the parties prepare their final briefs, they must remove from them the portions of the briefs that are no longer relevant because the matters have been remanded to the agency.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith a certified copy of this order to the agency in lieu of partial formal mandate.

Per Curiam