

ORAL ARGUMENT NOT YET SCHEDULED

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

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UTILITY SOLID WASTE ACTIVITIES		)	
GROUP, et al.,		)	
		)	
Petitioners,		)	
		)	
v.		)	No. 15-1219
		)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL		)	
PROTECTION AGENCY, et al.,		)	
		)	
Respondents.		)	
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**RESPONDENT EPA’S UNOPPOSED MOTION FOR  
VOLUNTARY REMAND OF SPECIFIC REGULATORY PROVISIONS**

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DATE: April 18, 2016

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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”).<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup>

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<sup>2</sup> 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,

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*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