ORAL ARGUMENT SCHEDULED: NOVEMBER 20, 2017

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

UTILITY SOLID WASTE ACTIVITIES GROUP, et al.,	)	
Petitioners,	)	
v.	)	No. 15-1219
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	

RESPONDENTS' MOTION FOR VOLUNTARY REMAND OF SIX SPECIFIC PROVISIONS OF THE CHALLENGED RULE

As previously reported to the Court, on September 13, 2017, Respondent Environmental Protection Agency ("EPA") granted two petitions for administrative reconsideration ("Reconsideration Petitions"), finding that it was appropriate and in the public interest for EPA to reconsider the regulation at issue in this case, 80 Fed. Reg. 21,302 (April 17, 2015) ("Rule" or "CCR Rule"). This Court has explained that when an agency makes such a determination, the proper path is to request abeyance of any court challenges to the Rule or seek remand of the Rule or the relevant portions thereof. *Anchor Line Limited v. Federal Maritime Commission*, 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."); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524, n.3 (D.C. Cir. 1993). Based on its general grant of reconsideration, EPA so moved the Court to hold this case in abeyance pending its reconsideration (Doc. 1693477, "Abeyance Motion"), which the Court has directed the parties to address at the November 20, 2017 oral argument. Sept. 27, 2017 Order ("Scheduling Order," Doc. 1695151).

EPA has now identified specific provisions of the Rule it will be reconsidering, including certain provisions that are challenged in this case. EPA, therefore, now requests that these provisions be remanded to the Agency. Specifically, EPA seeks remand of five specific subsections of the Rule (identified *infra*) that are the subject of four issues asserted by Industry Petitioners in this proceeding. EPA seeks remand of these provisions without vacatur, and thus they remain in place and fully applicable unless and until, upon remand and pursuant to a new rulemaking process, EPA decides to repeal or revise those provisions. Because the parties challenging these provisions (Industry Petitioners) report that they have no objection to this Motion, and because Environmental Petitioners neither challenge these provisions nor would they suffer prejudice from remand because the provisions shall be remanded without vacatur, EPA's motion to remand these provisions should be granted.

EPA further seeks to remand one provision that is the subject of a claim raised by Environmental Petitioners. EPA seeks such remand because the subject provision could be directly impacted by EPA's remand of provisions related to one issue raised by Industry Petitioners (the "Inactive Units" issue). In an effort to avoid potentially inconsistent application of related provisions and for reasons of judicial economy, the provision that sets forth the applicability of the Rule's requirements to "Legacy Units," 40 C.F.R. §257.50(e), should be remanded. Environmental Petitioners object to remand of this provision as well as to remand of the provisions that are the subject of Industry Petitioners' claims, and intend to file a response to this Motion.

FACTUAL BACKGROUND

On April 17, 2015, EPA promulgated the CCR Rule under Subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"), which governs the disposal of solid waste presently classified as non-hazardous. The Rule sets forth comprehensive requirements in the form of nationally-applicable minimum criteria for the safe disposal of coal combustion residuals ("CCR"), a by-product of the operation of coal-fired power plants, in properly constructed and maintained landfills and impoundments. 80 Fed. Reg. at 21,302-03. Failure to comply with many of these criteria/requirements generally results in a covered CCR facility being deemed an "open dump," which is thereby required

to upgrade or close within specified time periods. 40 C.F.R. §257.1(a). Under the provisions of subtitle D applicable at the time of promulgation, the CCR Rule's requirements applied directly to regulated facilities without federal or EPA-approved state permit programs, and the requirements were only enforceable through citizen suits. 42 U.S.C. §6973; 80 Fed. Reg. at 21,309-11.

In July 2015, Industry and Environmental Petitioners filed separate Petitions for Review, each generally supporting the comprehensive CCR Rule as a whole but challenging specific provisions. On April 18, 2016, EPA filed an unopposed motion seeking remand of nine provisions of the Rule challenged by Petitioners, some with vacatur and some without vacatur. Doc. 1609250 ("Initial Remand Motion"). EPA sought this remand because, *inter alia*, it determined that the application and breadth of the provisions should be clarified, reexamined, limited, expanded and/or be subjected to further public comment. *Id*. at pp. 4-9.

On December 16, 2016, twenty months after the Rule was promulgated and six months after the Court granted EPA's Initial Remand Motion (Doc. 1619358), Congress enacted the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628 ("WIIN Act"). The Act made several fundamental changes to EPA's regulation of CCR, by: (a) instituting a program under which States could seek EPA approval of a State permitting program that would allow the State to issue individualized facility permits to operate in lieu of the national

criteria in the Rule, provided EPA determines that the State program is at least as protective as the requirements/criteria set forth in the Rule (or successor regulations); (b) requiring EPA to institute a permit program in the absence of an approved State program, subject to receiving a specific appropriation for that purpose; and (c) granting EPA authority to institute administrative or judicial enforcement actions against facilities that are in violation of State or Federal requirements. 42 U.S.C. §6945(d).

Five months later, on May 12, 2017, Industry Petitioner Utility Solid Waste Activities Group ("USWAG") submitted to EPA a Reconsideration Petition, requesting that certain provisions of the Rule it challenges in this litigation, as well as other provisions not subject to challenge here, be reconsidered by EPA, based largely on the intervening WIIN Act. On May 31, 2017 another Industry Petitioner, AES Puerto Rico LP, sought reconsideration of the provisions related to "CCR Piles." *See* discussion, *infra*. In August of this year, EPA began implementing the WIIN Act by publishing for comment its guidance to States as to how to proceed with establishing a State permitting program. 82 Fed. Reg. 38,685 (Aug. 15, 2017).

On September 13, 2017, EPA announced that, in light of the issues raised in the Reconsideration Petitions, it is appropriate and in the public interest for EPA to reconsider the Rule. EPA then immediately filed its Abeyance Motion. Pursuant

to the Court's Scheduling Order, EPA will be filing a status report on November 15, 2017 that will set forth a timetable for its reconsideration process.

NATURE OF THE REMAND SOUGHT

There presently are twelve issues before the Court, six to be addressed at oral argument and six that have been submitted on the briefs without argument. Scheduling Order at 1-2. Of these, EPA seeks remand of the provisions challenged in five issues. Using the list of issues set forth in the Court's Scheduling Order and the Joint Provisional Argument Structure Proposal (Doc. 1693499) incorporated therein, the provisions proposed for remand are the following:

Provisions for Which Remand is Sought	**Industry Petitioners' Brief Section**	**Issue Description in Petitioners' Brief**	**Label Used Herein**
40 C.F.R. §257.50(c) 40 C.F.R. §257.100	II	"EPA Lacks Authority to Impose RCRA's 'Open Dump' Prohibition on Inactive Surface Impoundments"	"Inactive Impoundments"
40 C.F.R. §257.53, definition of Beneficial Use, subsection (4)	IV,A	"The 12,400 Ton Threshold in the Fourth CCR Beneficial Use Condition is Based Upon Fundamentally Mistaken Assumptions"	"12,400 Ton Threshold"
	III,B	"EPA failed to Provide Notice of the 12,400 Ton Condition in the	

		Definition of Beneficial Use"	
40 C.F.R. §257.95(h)(2)	IV,F	"EPA's Elimination of Risk-Based Compliance Alternative is Arbitrary and Capricious"	"Alternative Groundwater Protection Standards"
40 C.F.R. §257.53, definition of CCR Pile	IV,B III,A	"EPA's Regulation of CCR Piles is Arbitrary and Capricious" "EPA Failed to Provide Notice of the Rule's Regulation of CCR Stored for Beneficial Use"	"CCR Piles"
Provisions for Which Remand is Sought	**Envtl. Petitioners' Brief Section**	**Issue Description in Petitioners' Brief**	**Label Used Herein**
40 C.F.R. §257.50(e)	III	"Legacy Ponds Must be Regulated"	"Legacy Ponds"

The 12,400 Ton Threshold and Alternative Groundwater Protection Standards issues have been submitted on the briefs, while the other three issues are scheduled for argument on November 20, 2017. EPA reiterates, as it explained in its Abeyance Motion, that due to the reconsideration (and now remand request), counsel for EPA will likely be unable to represent EPA's present position on these issues at oral argument.

ARGUMENT

I. STANDARD OF REVIEW FOR A MOTION FOR REMAND

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal its initial action. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*. ("*State Farm*"), 463 U.S. 29, 42 (1983). Granting a request for voluntary remand is consistent with this principle, as "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. General Elec. Co*., 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)). *See also, Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977). Granting an agency's motion for remand also serves the interests of judicial economy: "Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978). *See also*, *Ethyl Corp. v. Browner*, 989 F.2d at 524, n.3.

For these reasons, "[g]enerally courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (D.D.C. 2012). *See also SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). EPA's

request for remand here is grounded in its reasonable (and good faith) decision to reconsider the rule in light of the WIIN Act and other factors explained below.

Because EPA is not seeking vacatur of any provisions, it is not required to (and does not in this Motion) confess error as a precondition for remand. *Limnia, Inc. v. Dept. of Energy*, 857 F.3d 379, 388 (D.C. Cir. 2017); *Ethyl*, 989 F.2d at 524; *SKF USA*, 254 F.3d at 1029. Instead, the agency must merely "express its intention to take further action on remand with respect to its original decision." *Bayshore Community Hospital v. Hargan*, 2017 WL 4857426 at *3 (D.D.C. October 25, 2017).

Such "further action" does not need to be detailed nor can it be, since it is improper for an agency to detail (or determine) its likely future actions until it goes through a thorough reconsideration process. Instead, an agency need merely report an "intention to reconsider, re-review, or modify the original agency decision...." *Limnia*, 857 F.3d at 387. The basis for such reconsideration, re-review or modification need only be stated in the most general terms, i.e., terms that evidence that remand is not being sought in bad faith. *See, e.g.*, *SKF USA*, 254 F.3d at 1028 (an agency legitimately seeks remand when it intends to "reconsider its decision because of intervening events outside of the agency's control, ... to reconsider its previous position, [or where the agency] believes that its original decision was incorrect on the merits and it wishes to change the

result"); *Bayshore*, 2017 WL 4857426 at *3 (citing numerous cases) ("Courts have found voluntary remand to be appropriate when new evidence comes to light after the agency made its decision, intervening events beyond the agency's control arise after the agency has acted and could affect the validity of the agency's decision, or other 'substantial and legitimate concerns' warrant a remand."). So long as "the agency's concern is substantial and legitimate, a remand is usually appropriate." *SKF USA*, 254 F.3d at 1029.

Having sought abeyance based on its decision to generally reconsider the Rule, EPA has now identified specific issues that it will be reconsidering. It is doing so based on the factors the courts recognize as more than adequate to support remand, including "further considering the governing statute" (e.g., Inactive and Legacy Impoundments), the "correctness of its decision" (e.g., 12,400 ton issue), "new evidence" (e.g., math error on 12,400 ton threshold), "intervening events beyond the agency's control" (e.g., effects of WIIN Act on all of the issues), and other "substantial and legitimate concerns" (all issues). *See* cases cited, *supra*.

II. EPA HAS ESTABLISHED ADEQUATE BASES FOR THE SPECIFIC PROVISIONS IT SEEKS TO REMAND

As outlined in EPA's Abeyance Motion, the enactment of the WIIN Act subsequent to the promulgation of the Rule provides an opportunity for EPA to potentially alter the regulatory mechanisms through which EPA can ensure that the disposal of CCR will not result in a "reasonable probability of adverse effects on

health or the environment." 42 U.S.C. § 6944(a). The WIIN Act does this by providing EPA with the very tools it has long recognized – and described in the subject rulemaking – it lacked to carry out its statutory responsibility in a more targeted, site-specific manner where appropriate; those tools being primarily a State (or EPA) permitting system with EPA oversight and enforcement. EPA's determination to revisit the requirements for the disposal, management and storage of CCR to assess how and where these new statutory tools can or should be implemented, is basis alone to grant remand, as further detailed below. There are, however, additional bases for remand that apply to particular provisions of the Rule that further support remand.

A. Remand of the Alternative Groundwater Protection Standards Provision

The CCR Rule requires facilities to cease deposits of CCR into impoundments and to close the unit when groundwater monitoring reveals that covered constituents are present in levels that exceed the maximum contaminant level ("MCL") for that given pollutant as established under the Safe Drinking Water Act. 40 C.F.R. §257.101(a)(1). For the four covered constituents for which an MCL has not been established, the *Proposed* Rule called for engineers to make subjective but technically-based evaluations of the concentration level to which the human population could be exposed that is likely to be without appreciable risk of

deleterious effects during a lifetime. *See* proposed 40 C.F.R. §257.95(h) (printed at 75 Fed. Reg. 35,128, 35,249-50 (June 21, 2010)).

The Final Rule instead applies an objective standard, setting groundwater protection standards at background levels for those constituents lacking an MCL. 40 C.F.R. §257.95(h)(2). Thus, for the four contaminants that lack an MCL, a unit would have to take corrective action or initiate closure if groundwater monitoring reveals levels of these contaminants slightly above the level that naturally occurs in the aquifer (background), even in the absence of affirmative evidence that such level will result in a "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 U.S.C. § 6944(a).

EPA explained that it rejected its proposed engineer-determined alternative to assessing the appropriate standard for the non-MCL contaminants because there is no "regulatory entity available to judge the reasonableness of the desired alternatives." 80 Fed. Reg. at 21,398/2. The WIIN Act, which authorizes potential alternative regulatory mechanisms, specifically site-specific and targeted requirements that are subject to oversight and EPA enforcement, could potentially provide an alternative framework to address this issue on a site-specific basis. EPA intends to reconsider the requirement set out in 40 C.F.R. §257.95(h)(2), (3) in light of the intervening WIIN Act and other considerations. Accordingly, remand in this case is reasonable and appropriate. *See*, *e.g.*, *National Fuel Gas*

Supply Corp. v. FERC, 899 F.2d 1244, 1249-50 (D.C. Cir. 1990) (granting a voluntary remand "comports with the general principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review"); *SKF*, 254 F.3d at 1028-29 (same); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 24-26 (D.D.C. 2008) (same for intervening facts, e.g., enactment of the WIIN Act).

B. Remand of the CCR Piles Provision

RCRA calls for the regulation of the disposal of waste and defines "disposal" as the "placing of any solid waste or hazardous waste into or on any land …." 42 U.S.C. §6903(3). Consequently, "CCR piles," which are subject to all of the Rule's regulatory criteria, are defined as any "non-containerized accumulation of solid, non-flowing CCR that is placed on the land." 40 C.F.R. §257.53. At the same time, CCR that is put to a "beneficial use" in a manner that is protective of the environment, such as being encapsulated as a substitute for virgin materials in concrete, plastic and rubber, is not considered to be "disposal" and is therefore not subject to the Rule's requirements. 80 Fed. Reg. at 21,347-49. An issue arises, therefore, about the status of temporary CCR piles, i.e., those piles of CCR placed on the ground which are to be put to a beneficial use.

The Rule clarifies that CCR in a pile on the ground at the site of a manufacturer incorporating the CCR into its encapsulated product is a temporary

pile, not a "CCR Pile" subject to the Rule's criteria, because its location is objective evidence that it will be put to a beneficial use within a reasonable time. 40 C.F.R. §257.53; 80 Fed. Reg. at 21,354-56. EPA found, however, that it could not apply such an approach to the identical pile of CCR located onsite at the coal-combustion facility prior to transfer to the manufacturer, and thus such a pile is a CCR Pile subject to all of the regulatory requirements of the Rule. *Id*.

EPA made this distinction in part because it lacked the oversight and enforcement authority to ensure that the pile of CCR at the coal-combustion facility would, in fact, be transferred to a manufacturer within a reasonable period of time. *See, e.g., id*. at 21,355 (explaining that promulgating a time limit on CCR held at the coal-combustion facility is not a solution, given the lack of EPA oversight authority to ensure that such time limit is met). As outlined, the WIIN Act, through State (or EPA) permitting and EPA oversight and enforcement, provides the very type of authority that could potentially address this issue on a site-specific basis. EPA's desire to remand this provision to consider this possibility is quite reasonable and certainly not motivated by bad faith.

C. Remand of the 12,400 Ton Threshold Provision

In order to qualify as a "beneficial use" that is not subject to the Rule's technical criteria, the user must, among other things, demonstrate that environmental releases are comparable to or lower than those from analogous

products or will be at or below regulatory and health-based benchmarks for human and ecological receptors during use. This specific requirement applies, however, *only* to CCR piles that exceed 12,400 tons. 40 C.F.R. §257.53. EPA chose 12,400 tons as the threshold based on data submitted by CCR landfill operators, demonstrating that this amount of CCR approximated the smallest landfill in EPA's database. 80 Fed. Reg. at 21,352. Since there is no scale to determine the weight of a CCR Pile, tonnage is calculated based on other factors, such as height, depth and surface area of the pile.

After the Final Rule was issued, Industry representatives submitted a post-record letter explaining that the review of data submitted by Industry was based on mistaken calculations. Ind. Br. 33. Industry-Petitioners explain that, based on their calculations, the smallest landfill in the database actually held 80,000 tons of CCR, over six times the 12,400 ton level chosen by EPA as the threshold.

EPA has conceded that the 12,400 ton threshold is based on what it later learned was a math error. EPA Br.54-56. EPA nevertheless defended that threshold arguing that: (a) EPA is required only to base its Rule on the information before it at the time of the rulemaking; (b) Petitioners failed to adequately allege prejudice resulting from the error; and (c) EPA may rely on other data or information to support its position. *Id*.

After EPA filed its brief, Environmental Petitioners argued that the Industry representative that identified the miscalculation made its own miscalculations and that it further based its conclusion on incorrect assumptions. Env. Intervenor Br. 14-16 (Doc. 1634054). Yet, Environmental Petitioners offer nothing to support the view that 12,400 tons actually reflects the smallest landfill in the database. Indeed, Environmental Petitioners' explanation of the miscalculations and incorrect assumptions only further clouds the question of what the correct threshold should be. For example, Environmental Petitioners submit that EPA should have used alternative methodologies to calculate the smallest landfill in the database or to otherwise calculate the appropriate threshold (e.g., calculating landfill volume "at closure" rather than "as built."). *Id*. at 16-17.

Although EPA could choose to continue to defend the 12,400 ton threshold on the alternative grounds outlined above, that does not preclude the Agency from determining upon reflection that the better course is to reexamine this technical issue to ensure that the Agency has "gotten it right." It is well settled that remand is appropriate when the agency concedes that an error has been made and that reexamination is appropriate. *See, e.g.*, *Ethyl Corp*., 989 F.2d at 524 ("We commonly grant such motions [for voluntary 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.");

INS v. Ventura, 537 U.S. 12, 16 (2002) (granting "remand to the agency for additional investigation or explanation"). Given the various positions of the parties on the appropriate data, methodologies, and assumptions to be applied in generating this important and precise threshold, it is appropriate for the Court to remand this issue for EPA's further analysis and consideration.

D. Remand of the Provision Applying Requirements to Inactive Impoundments

Industry Petitioners contend that RCRA does not support the regulation of "Inactive Impoundments," 40 C.F.R. §§257.50(c), 257.100, which are impoundments where the operator has ceased accepting CCR. USWAG Br. at 12-22. They assert that because the definition of an "open dump" is an impoundment where CCR "is disposed of," EPA purportedly has no statutory authority to regulate Inactive Impoundments.

In the preamble to the Rule, EPA described a different view of the statute. Acknowledging that the provisions at issue are ambiguous, EPA exercised its authority to interpret the statute as, in fact, granting it authority to regulate Inactive Impoundments. EPA now seeks to revisit its analysis of its statutory authority as well as its ability to, assuming EPA has such authority, exercise policy judgment as to how best apply its regulatory authority over Inactive Impoundments. This is a proper basis for remand. *SKF USA*, 254 F.3d at 1029 (The agency can explain, "for example, that it wished to consider further the governing statute, or the

procedures that were followed. It might simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies.").

EPA's interpretations of statutes it administers are not "carved in stone" but must be evaluated "on a continuing basis." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005). As the Supreme Court explained, such reevaluation is logical to occur "in response to changed factual circumstances, or a *change in administrations*." *Id*. (Emphasis added). Moreover, to the extent EPA confirms that it has statutory authority over Inactive Impoundments, it can explore its degree of flexibility in how it exercises that statutory authority, which is a separate basis for remand. *See, e.g., Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012), quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part), explaining that a revised rulemaking based

> on a reevaluation of which policy would be better in light of the facts is well within an agency's discretion, and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bound established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."

Accordingly, the provisions calling for the regulation of Inactive Impoundments should be remanded.

E. Remand of the Legacy Impoundments Issue

In contrast to Inactive Impoundments, EPA concluded that it would not regulate Legacy Impoundments, which are impoundments that not only no longer receive CCR but which also are located at facilities that no longer produce electricity. 40 C.F.R. §257.50(e). Environmental Petitioners challenge this provision, arguing that the statute requires EPA to regulate such units.

While no party has sought administrative reconsideration of this provision, EPA believes that it is significantly intertwined with the Inactive Impoundments issue such that it should be remanded. For instance, EPA could determine that because Inactive Impoundments no longer receive CCR, they should still be regulated but in a manner that is different than active impoundments. Because Legacy Impoundments also no longer receive CCR, it follows that regulation of these impoundments may be directly impacted by EPA's reconsidered views on the regulation of Inactive Impoundments. Accordingly, it is logical to remand the Legacy Impoundments along with the Inactive Impoundments provision.

III. REMAND WOULD NOT RESULT IN UNDUE PREJUDICE TO ANY PARTY

The present motion is essentially no different than the Initial Remand Motion granted by the Court. *See* p. 4, *supra*. The only significant difference is that Environmental Petitioners object to the requested remand here, when they did not object to the Initial Remand. But mere objection is not a basis to reject a

motion by an agency to remand specific provisions of a rule that the Agency has now determined merit further agency review and/or revision. *See, e.g.*, *Ethyl Corp.*, 989 F.2d at 524; *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417-18 (6th Cir. 2004).

Nor is an objection on any of the bases that Environmental Petitioners raised in response to the Abeyance Motion (e.g., length of time it took to promulgate the CCR Rule, court determinations could be helpful to the agency moving forward, failure to show "extraordinary cause,"), an adequate (or applicable) basis to deny remand. Indeed, there is a fundamental difference between abeyance (which can be granted for any reason) and remand: the former seeking to hold off further court review because it makes sense to do so, in this case in light of new agency action, and the latter to implement the agency's inherent authority to reconsider its own administrative determinations before being subjected to judicial review. *See* p. 7-8, *supra*. Accordingly, "[t]o properly oppose an agency's motion for voluntary remand, the nonmoving party must clearly articulate countervailing reasons why it will be 'unduly prejudiced' by the remand." *Bayshore*, 2017 WL 4857426 at *3 (citations omitted).

Except perhaps with regard to the provision defining Legacy Impoundments, Environmental Petitioners have *no basis* to establish prejudice from remand because they are not challenging the provisions requested for remand. Further, this

Motion does not seek to vacate those provisions, so they shall remain in place and enforceable. The very purpose of remanding an EPA-promulgated rule without vacatur is to preserve the environmental protections afforded by the Rule during the Agency's reconsideration process. *See, e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (Rogers, J., concurring in part); *Mississippi v. EPA*, 744 F.3d 1334, 1362 (D.C. Cir. 2013). As Intervenors on behalf of EPA, Environmental Petitioners have in fact responded to Industry challenges to the provisions identified for remand by arguing that they should remain in place as promulgated. Those provisions *will* remain in place when remanded unless and until the Agency revises or rescinds them in a future rulemaking, which Petitioners can then challenge. Accordingly, Environmental Petitioners have no basis to assert prejudice from remand of these provisions.

As to the Legacy Impoundments issue, Environmental Petitioners will argue that it is important to have this issue decided now so that, in their view, the Court will find that EPA *must* regulate these units. But courts generally will not entertain a petition for review where, as here, further agency action might render the issue moot and judicial review unnecessary. *Sierra Club v. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987). To the extent Petitioners assert (as they did in response to the Abeyance Motion) that a decision of the Court will be helpful in guiding EPA in its reconsideration on this issue, that decision would be

akin to an advisory opinion, which this Court does not issue. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Alton & Southern Ry. Co. v. International Ass'n of Machinists*, 463 F.2d 872, 880 n.13 ("The courts do not give advisory opinions to government agencies any more than to private parties."). Doing so "clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 545 (1978) (citation omitted).

EPA is committed to reexamining its authority to regulate Inactive Impoundments and its methodology for doing so, which, as explained, could likely apply by extension to whether and how EPA regulates Legacy Impoundments. Where EPA is committed to reconsidering the provision at issue under a proposed timetable (to be submitted to the Court on November 15, 2017), remand to allow EPA to reconsider is the appropriate course.

IV. THE TIMING OF THIS MOTION IS NOT A BASIS TO DENY REMAND

Remand motions may be submitted at any time, as they are based on the actions to be taken by the agency going forward, not the schedule of briefing or argument before the Court. *See, e.g.*, *Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1982) (granting voluntary remand after decision but before vote on *en banc* review); *Alliance for the Wild Rockies*, No. 04-1813, 2009 WL 2015407, *1 (granting voluntary remand without vacatur after oral argument); *Southwestern*

Bell Tel. Co. v. FCC, 10 F.3d 892, 896 (D.C. Cir. 1993) (granting motion for remand after opening briefs had been filed); *Massachusetts Dept. of Public Utils. v. FERC*, No. 92-1169, 1993 WL 341004, at *1 (D.C. Cir. Aug. 3, 1993) (same).

EPA believes that it has raised this request for remand of specific provisions in a timely manner, given the enactment of the WIIN Act well after the promulgation of the Rule and the Initial Remediation Motion, the change in administrations, the subsequent filing of the Reconsideration Petitions, and other factors discussed above. Nevertheless, EPA regrets that these factors have resulted in its filing this motion so close to oral argument, which has caused inconvenience to both the Court and the other parties. But inconvenience is not a basis to deny a legitimate request for remand. As outlined above, the courts respect an agency's inherent right to reconsider its rulemakings, and that is precisely what is happening here, albeit later in the process than would otherwise be convenient.

CONCLUSION

For the foregoing reasons, the Court should issue an Order remanding the following provisions without vacatur: 40 C.F.R. §§257.50(c), 257.100, 40 C.F.R. §257.53, definition of Beneficial Use, subsection (4), 40 C.F.R. §257.95(h)(2), 40 C.F.R. §257.53, definition of CCR Pile, and 40 C.F.R. §257.50(e).

Respectfully submitted,

Date: November 7, 2017

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CERTIFICATE OF COMPLIANCE

The undersigned states that this Motion complies with the typeface style requirements of Fed. R. App. P. 27(d)(1)(E) because the Motion was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type, and that this Motion complies with the length requirements of Fed. R. App. P. 27(d)(2), as this Motion contains 5,197 words.

Date: November 7, 2017

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion 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: November 7, 2017

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