ORAL ARGUMENT SCHEDULED: OCTOBER 17, 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 TO CONTINUE ORAL ARGUMENT AND HOLD THESE PROCEEDINGS IN ABEYANCE

On September 13, 2017, Respondents United States Environmental Protection Agency and E. Scott Pruitt, in his official capacity as Administrator (collectively "EPA"), responded to two petitions for administrative reconsideration ("Reconsideration Petitions") of the regulation that is the subject of this Petition for Review (the "Rule"), by informing those petitioners that EPA has determined that it is appropriate and in the public interest for EPA to reconsider the Rule. Because the results of that administrative reconsideration by EPA may significantly impact the issues being addressed in this action, EPA respectfully moves the Court to: (a) continue the date for oral argument, which is presently

scheduled for October 17, 2017; (b) hold all proceedings in abeyance; and (c) order EPA, within 120 days of the Court's Order on this Motion, to report to the Court which portions of the Rule, if any, it intends to reconsider through further rulemaking.[1]

Industry Petitioners state that they support this Motion, as the two Industry Petitioners described herein requested in their Reconsideration Petitions that Industry Petitioners' challenges to the Rule in this case be held in abeyance pending EPA's reconsideration of the Rule. Environmental Petitioners state that they object to this Motion and intend to file a response.

In support of this motion, EPA states as follows:

1. These consolidated petitions for review challenge an EPA final rule issued under Subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"), entitled "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities," 80 Fed.

[1] On this date the Parties filed their Joint Provisional Argument Structure Proposal and Request to Dismiss Issues from the Case as Moot ("Argument Structure Proposal"). That proposal is provisional because it is EPA's position that in light of this Motion for Abeyance, the Court should not establish an argument structure at this time. EPA does, however, request that in conjunction with ruling on this Motion for Abeyance, that the Court dismiss the issues identified by Industry Petitioners in the Argument Structure Proposal as moot, i.e., those issues should be dismissed rather than held in abeyance.

Reg. 21,302 (April 17, 2015) (the "Rule"). Subtitle D of RCRA governs the disposal of solid waste presently classified as non-hazardous.

2. The Rule sets forth a set of 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. These substantive requirements/criteria generally include: (a) location restrictions (40 C.F.R. §§ 257.60-64); (b) liner design criteria (40 C.F.R. §§ 257.70-72); (c) structural integrity requirements (40 C.F.R. §§ 257.73-74); (d) operating criteria: (40 C.F.R. §§ 257.80-84); (e) groundwater monitoring and corrective action requirements; (40 C.F.R. §§ 257.90-98); (f) closure and post-closure requirements; (40 C.F.R. §§ 257.100-04); and (g) recordkeeping, notification and website posting requirements (40 C.F.R. §§ 257.105-07). Failure to comply with many of these criteria generally results in a covered 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); 80 Fed. Reg. at 21,468. Both Industry Petitioners and Environmental Petitioners have challenged specific requirements/criteria within some of the aforementioned categories.

3. On May 12, 2017, the Utility Solid Waste Activities Group ("USWAG"), an Industry Petitioner in these proceedings, submitted to EPA a

Reconsideration Petition, requesting that all of the provisions it challenges in this litigation (as well as other provisions not subject to challenge here) be reconsidered by EPA, most particularly on the basis of intervening legislation that they suggest will have an impact on the application and enforcement of these requirements. Ex. A.

4. Specifically, on December 16, 2016, twenty months after the Rule was promulgated, Congress enacted the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628, which at section 2301 sets forth an amendment to Section 4005 of the Solid Waste Disposal Act, 42 U.S.C. § 6945. That amendment made several fundamental changes to Subtitle D of RCRA, 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 that would 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; (b) granting EPA authority to issue permits, 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). Prior to this amendment, Subtitle D was generally described as "self-implementing," as EPA had no

statutory authority to bring an enforcement action against a facility that was in violation of any Federal requirements/criteria promulgated by EPA. 42 U.S.C. §6973; 80 Fed. Reg. at 21,309-11. USWAG's administrative reconsideration petition asserts that these new statutory processes allow EPA to take a wholly different view as to how to apply and structure requirements/criteria, since *site-specific* requirements applied through a permit issued to a specific facility would be available as a method of ensuring compliance with RCRA requirements, and those requirements would be enforceable by EPA.

5. On May 31, 2017, AES Puerto Rico LP ("AES"), submitted a separate Reconsideration Petition, which called for reconsideration of those provisions of the Rule that explain that CCR piles that are held at the operator's facility are subject to certain of the afore-mentioned requirements even where the operator intends to eventually transport the CCR to a facility to be put to a recognized beneficial use. Beneficial use activities are generally not subject to the requirements/criteria. Ex. B.

6. On August 15, 2017, EPA published for comment in the Federal Register "Coal Combustion Residuals State Permit Program Guidance Document, Interim Final," setting forth guidance to States as to how to proceed with establishing a State permitting program. 82 Fed. Reg. 38,685 (Aug. 15, 2017), Guidance Document at Ex. C. To date, EPA has received applications from two

States seeking approval for their CCR permit programs. Several other States have thus far expressed interest in applying for approval under this new statutory provision.

7. By letter dated September 13, 2017, and pursuant to 42 U.S.C. § 6974(a), EPA Administrator Pruitt announced that, in light of the issues raised in the administrative petitions, as well as the new authorities provided in the recently enacted Water Infrastructure Improvements for the Nation Act, it is appropriate and in the public interest for EPA to reconsider the Rule. Ex. D ("Reconsideration Letter").

8. EPA plans to undertake a careful review of the Rule, in view of the issues raised in the administrative petitions, and, if warranted, to conduct further rulemaking to revise the Rule or portions thereof.

9. EPA's reconsideration pursuant to the afore-mentioned Reconsideration Petitions covers issues raised by Industry Petitioners in this action (as well as additional issues raised by USWAG that are not before the Court). How EPA treats these issues may be affected by the intervening legislation. For instance, one issue raised by Industry Petitioners in this litigation is whether facilities must clean certain contaminants to background levels rather than facility or State-derived alternatives. Industry Brief (Doc. 1634091). EPA explained in its Rulemaking that it chose not to adopt in the final Rule a proposed provision that

would have allowed facility engineers to establish alternative risk-based standards for determining whether to clean up contamination or close the unit, in part because there was no mandated State or federal entity with enforcement authority to oversee the facility's judgements. 80 Fed. Reg. at 21,405; 21,407. *See also, id.* at 21,335 (noting that provisions were included in the Rule to "partially compensate for one of the more significant limitations under the authorities currently applicable to CCR: The lack of any guaranteed regulatory oversight mechanism."). The new oversight and enforcement authorities available under the revised statutory structure may affect how EPA addresses this issue.

10. As to the many issues presented in this case, it would be exceedingly difficult for litigation counsel for EPA to represent at oral argument EPA's conclusive position as to various aspects of these issues, while EPA is in the process of reconsidering its position on those very issues. Similarly, it would be improper for counsel for EPA to speculate as to the likely outcome of the reconsideration on any particular issue.

11. Although the Reconsideration Petitions relate to the issues in this litigation raised by Industry Petitioners, the issues in this case are so intertwined that consideration by this Court, including the issues raised by Environmental Petitioners, should be held in abeyance pending EPA's reconsideration. For example, the Rule presently applies the requirements/criteria to any impoundment

where CCR is stored, regardless of whether it is continuing to accept CCR into the impoundment, but not if the impoundment is located at an inactive facility, which in this case refers to a facility that is no longer generating electricity. 40 C.F.R. §§257.50(e). Industry Petitioners contend that RCRA does not support the regulation of *any* impoundments where the operator has ceased accepting CCR, even if it continues to be stored there. USWAG Br. (Doc. 1634091) at 12-22. Conversely, Environmental Petitioners contend that RCRA requires EPA to regulate all CCR already in an impoundment, regardless of whether the facility is still generating electricity. Env. Pet. Br. (Doc. 1634025) at 31-46. Thus, reconsideration of the portion of the Rule raised by Industry Petitioners would have a direct impact on the arguments raised by Environmental Petitioners.

12. Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*"); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010). EPA's interpretations of statutes it administers are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations

omitted). *See also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012) (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'") (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). Reconsideration is particularly appropriate where there has been a fundamental change in the statute pursuant to which the regulation was promulgated, and that is especially true when the statutory change potentially alters the structure of the regulatory regime.

13. For the foregoing reasons, continuance of the oral argument and abeyance of all proceedings in this Court is warranted. An abeyance would preserve the resources of the Court and the parties, as it is possible that EPA's reconsideration of the Rule could result in further rulemaking that would revise or rescind some or all of the portions of the Rule at issue in this proceeding, thereby obviating the need for judicial resolution of some or all of the issues addressed in the parties' briefs.

WHEREFORE, EPA respectfully requests that the Court issue an order: (a) staying oral argument presently scheduled for October 17, 2017, (b) holding all proceedings in this case in abeyance pending the completion of EPA's

administrative reconsideration process; (c) dismissing as moot the issues identified by Petitioners in the Joint Provisional Argument Structure Proposal and Request to Dismiss Issues From the Case as Moot; and (d) directing EPA to report to the Court, within 120 days of its Order on this Motion, those portions of the Rule, if any, it intends to reconsider through further rulemaking.

Respectfully submitted this 18th day of September, 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 2,042 words, excluding the parts of the Motion exempt under Fed. R. App. P. 32 (a)(7)(B)(iii).

Date: September 18, 2017

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondents' Motion to Continue Oral Argument and Hold These Proceedings in Abeyance, 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: September 18, 2017

/s/ *Perry M. Rosen*
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