ORAL ARGUMENT SCHEDULED: OCTOBER 17, 2017

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

No. 15-1219 (and consolidated cases)

UTILITY SOLID WASTE ACTIVITIES GROUP, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

ENVIRONMENTAL PETITIONERS' AND INTERVENOR-RESPONDENTS' OPPOSITION TO EPA'S MOTION TO CONTINUE ORAL ARGUMENT AND HOLD THESE PROCEEDINGS IN ABEYANCE

INTRODUCTION

Environmental Petitioners and Intervenor-Respondents Clean Water Action, Environmental Integrity Project, Hoosier Environmental Council, PennEnvironment, Prairie Rivers Network, Sierra Club, Tennessee Clean Water Network, and Waterkeeper Alliance, and Environmental Intervenor-Respondent Comité Dialogo Ambiental, Inc. (collectively "Environmental Organizations") respectfully oppose Respondents United States Environmental Protection Agency

and E. Scott Pruitt's (collectively "EPA") Motion to Continue Oral Argument and Hold These Proceedings in Abeyance ("EPA Mot.").

EPA's motion does not demonstrate the "extraordinary cause" required to postpone oral argument. EPA filed its motion more than two years after EPA issued the Coal Ash Rule[1] at issue in this proceeding, more than one year after these consolidated cases were fully briefed, and mere weeks before argument. The Coal Ash Rule itself was only issued by EPA after years of unlawful delay, and after the Environmental Organizations secured an order requiring EPA to take final action.[2] Although EPA bases its motion on the new Administration's intention to "undertake a careful review of the Rule" and potentially initiate a new rulemaking, EPA Mot. at 6, this does not qualify as "extraordinary cause" to postpone argument and resolution of disputed legal issues concerning a rule that remains in effect and will govern the storage and disposal of toxic coal ash for the indefinite future.

Holding argument and reaching a merits decision based on the record that EPA produced at the time that it issued the Rule would not harm EPA's ability to reconsider the Rule. To the contrary, judicial resolution of the issues in this

[1] The rule at issue in these proceedings is entitled "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities," 80 Fed. Reg. 21,302 (Apr. 17, 2015) (codified at 40 C.F.R. pts. 257 & 261), and is referred to herein as the "Coal Ash Rule."

[2] *See infra* note 4.

proceeding would assist the agency in reconsideration, because, as EPA acknowledges, the issues raised in this litigation overlap heavily with the issues raised in industry's petitions for reconsideration.[3] Given that these issues have been fully briefed and will remain relevant to any new rulemaking the agency may decide to initiate, judicial economy requires proceeding to a merits decision.

Finally, EPA suggests that recent legislation, the Water Infrastructure Improvements for the Nation Act, justifies an abeyance. But the Act made no changes to the fundamental statutory standard governing the Rule. While the recent legislation authorizes potential changes in state permitting of coal ash disposal facilities and enforcement of the Rule, it does not require any such changes. In the absence of future actions by EPA and the states, which may or may not someday occur, there has been no on-the-ground change in the Coal Ash Rule's applicability.

In sum, the Environmental Organizations respectfully request that the Court deny EPA's motion and hold argument on October 17.

[3] EPA attached the industry petitions for reconsideration to its motion as Attachments A and B.

BACKGROUND

I. COAL ASH DISPOSAL POSES GRAVE RISKS TO HUMAN HEALTH AND THE ENVIRONMENT.

Coal-fired power plants in the United States burn more than 800 million tons of coal every year, producing more than 110 million tons of solid waste in the form of fly ash, bottom ash, scrubber sludge, and boiler slag (collectively, "coal ash"). 80 Fed. Reg. at 21,303, JA158. Coal naturally contains toxic chemicals, and these chemicals are concentrated in coal ash when the coal is burned. 75 Fed. Reg. 35,128, 35,138 (June 21, 2010), JA12. In addition, Clean Air Act regulations have required coal plants to capture increasing amounts of toxic emissions at the smokestack, like mercury and other heavy metals, and these pollutants end up in coal ash. *Id.* at 35,139, JA13. Consequently, coal ash is a toxic brew of carcinogens, neurotoxins, and poisons—including arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium and thallium. *See id.* at 35,139, 35,153, 35,168, JA13, 27, 42. When this dangerous waste is not disposed of properly, the toxic chemicals are re-released to air, groundwater, surface water and soil.

Coal-fired power plants dispose of coal ash primarily in two ways: by placing coal ash in dry landfills or by using water to facilitate the transport of ash to surface impoundments that store the mixture of water and ash. 80 Fed. Reg. at 21,303, JA158. EPA found in 2014 that there are at least 310 landfills and 885

surface impoundments in the United States. EPA-HQ-RCRA-2009-0640-12034 at 2-3, 9-27, JA1096, 1117 [hereinafter, RIA]. Surface impoundments hold their toxic sludge behind earthen dikes, often many stories tall, with pits spanning hundreds of acres, impounding millions of tons of liquid industrial waste. *See id.* at 2-19 n.79, JA1097.

Until 1995, most ash impoundments and landfills were constructed without a liner on the bottom that could prevent toxic chemicals from leaking into underlying groundwater. *Id.* at 21,324, JA179. EPA estimates that about 65 percent of existing surface impoundments have no liner whatsoever. RIA at 3-4 n.105, JA1108; EPA-HQ-RCRA-2009-0640-11993 at 5-5, Table 5-3, JA1041 [hereinafter, RA]. EPA estimates that only six percent of the total coal ash disposed in surface impoundments is placed in impoundments that have "composite" liner systems, which consist of a layer of clay overlaid by a geomembrane, both of sufficient thickness and low permeability to meet the requirements of the rule. RIA at 3-13, JA1109.

The catastrophic collapse of coal ash impoundments has caused great harm, including environmental destruction and substantial economic loss. 75 Fed. Reg. at 35,147, JA21. From 1999 through 2009, there were 35 coal ash spills at 25 different coal plants. 80 Fed. Reg. at 21,327, JA182. While catastrophic failures of coal ash impoundments often generate headlines, slow-moving coal ash

disasters are more common. *See id.* at 21,457, JA312; *see also* Damage Case Compendium, EPA-HQ-RCRA-2009-0640-12118 – 12122 (in part at JA1123-1283). Disposal of coal ash in landfills and impoundments that lack composite liners to prevent leaking is a recipe for disaster because hazardous chemicals leak out of landfills and wet impoundments, poisoning underlying groundwater and nearby surface waters. 80 Fed. Reg. at 21,325, JA180. EPA has documented 157 sites[4] in 32 states where coal ash mismanagement has caused damage to human health and the environment. *Id.*

II. FEDERAL REGULATION OF COAL ASH

Congress enacted the Resource Conservation and Recovery Act, or RCRA, "to establish a comprehensive federal program to regulate the handling of solid wastes." *Envtl. Def. Fund v. EPA*, 852 F.2d 1309, 1310 (D.C. Cir. 1988). Under Subtitle D of RCRA, EPA is responsible for "promulgat[ing] regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps." 42 U.S.C. § 6944(a). An "open dump" is defined as a solid waste facility that does not meet federal minimum criteria, *id.* § 6903(14), and is prohibited under the statute. *Id.*

[4] EPA's damage case spreadsheet erroneously numbered two potential damage cases as number 16. Consequently, the total number of damage cases on EPA's list is 158. *See* EPA-HQ-RCRA-2009-0640-12123.

§ 6944(a). The statute directs, "[a]t a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump *only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility*." *Id*. (emphasis added).

Pursuant to court order, EPA published the final Coal Ash Rule on April 17, 2015, which comprises EPA's first-ever regulation of the storage and disposal of coal ash. 80 Fed. Reg. 21,302, JA156.[5] The final rule regulates the disposal of coal ash under Subtitle D of RCRA and establishes national minimum criteria for existing and new landfills and surface impoundments. 80 Fed. Reg. at 21,304-08, JA159-63. The final rule does not require that surface impoundments be phased out, nor does it address all inactive dumps. *Id*. at 21,468, 21,474, 21,490, JA323, 329, 345.

In July 2015, seven groups of petitioners, including Environmental Petitioners, filed petitions for review of the final rule. Briefing was completed on

[5] *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30 (D.D.C. 2013). Environmental Organizations sought a court order compelling EPA to issue the Coal Ash Rule because of EPA's long history of delaying regulatory action on coal ash, going all the way back to EPA's failure to submit a statutorily mandated report to Congress on coal ash in 1982 and publish a regulatory determination on coal ash six months later. *See* 42 U.S.C. § 6921(b)(3)(C). EPA did not publish a final determination regarding the need for coal ash regulation until May 2000. See U.S. EPA, Final Regulatory Determination on Wastes from the Combustion of Fossil Fuels, 65 Fed. Reg. 32,214 (May 22, 2000).

September 6, 2016. On August 3, 2017, the Court scheduled argument for October 17. ECF Doc. No. 1687136. Approximately four weeks prior to argument, EPA filed the instant motion to postpone the argument and hold the proceedings in abeyance for 120 days, after which EPA would inform the court of which portions of the Rule, if any, it intends to reconsider through a new rulemaking. EPA Mot. at 10.

LEGAL STANDARD

"When a case has been set for oral argument, it may not be continued by stipulation of the parties, but only by order of the court upon a motion evidencing extraordinary cause for a continuance." D.C. Cir. R. 34(g). "The Court disfavors motions to postpone oral argument and will grant them only upon a showing of 'extraordinary cause.'" D.C. Cir. Handbook of Practice and Internal Procedures at 49, § XI(B) (Jan. 26, 2017). In reviewing a motion to hold a case in abeyance, the court "may also take account of the traditional factors in granting a stay, including the likelihood that the movant will prevail when the case is finally adjudicated." *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (citing *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

ARGUMENT

I. EPA HAS NOT DEMONSTRATED EXTRAORDINARY CAUSE FOR POSTPONING ARGUMENT AND HOLDING THIS CASE IN ABEYANCE.

EPA does not come close to meeting the high bar of demonstrating "extraordinary cause for a continuance," D.C. Cir. R. 34(g), particularly in light of the harm that Environmental Organizations' members will suffer from additional delay. Environmental Organizations' members regularly drink, fish in, and recreate in water contaminated by coal ash. *See* Envtl. Pet. Opening Br., ECF Doc. No. 1634025 at 15-19 (summarizing standing declarations). As EPA itself has concluded, exposure to coal ash can damage people's health by causing cancer and other diseases and can cause severe harm to the environment, including aquatic life, wildlife and waterways. *E.g.*, RA at 5-5, Table 5-3, JA1041.

In violation of RCRA, EPA has allowed Environmental Organizations' members to be exposed to dangerous levels of toxins from coal ash and to be threatened by dangerous coal ash disposal practices for years. Environmental Organizations had to sue EPA to force the agency to comply with its statutory obligation to issue a final rule regulating coal ash. *See Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30 (D.D.C. 2013). Now, more than two years after EPA issued an unlawfully weak rule, and more than a year after completion of briefing, Environmental Organizations have still not had their day in court, and

their members continue to be exposed to coal ash in ways that are impermissible under the statute.

EPA is asking the court to delay resolution of this case indefinitely, likely for multiple years. EPA promises only to report back to the Court after 120 days, EPA Mot. at 10, not to seek a new argument date or further proceedings before the Court after 120 days, and EPA's motion is premised on the notion that a merits decision should be delayed until EPA completes reconsideration, *id.* at 9. EPA has provided no timetable for initiating a new rulemaking, much less a deadline for completing it. Given how long it took EPA to finalize the Coal Ash Rule, a new rulemaking would likely take many years. Five years elapsed between issuance of the proposed rule in 2010, 75 Fed. Reg. 35,128, and promulgation of the final rule in 2015, 80 Fed. Reg. 21,302, and EPA would have taken even longer had environmental groups not secured a court order requiring EPA to fulfill its statutory obligations, *see Appalachian Voices*, 989 F. Supp. 2d 30. Forcing Environmental Organizations to wait several more years for a merits decision would severely prejudice Environmental Organizations' members, who, as a result of the Final Rule, are unlawfully exposed to toxic amounts of coal ash. *See Am. Petroleum Institute v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) ("[A]n agency can[not] stave off judicial review of a challenged rule simply by initiating a new

proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review.").

To overcome the harms to Environmental Organizations' members and obtain an abeyance, EPA would have to substantiate "a pressing need," which the agency has not demonstrated. *Belize Social Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 731-32 (D.C. Cir. 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). EPA argues that "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." EPA Mot. at 7. But this is a record review case, in which the Court evaluates whether the rationale that EPA provided in April 2015 comports with the statute and the record. How the current EPA would decide various issues in the rule is legally irrelevant to disposition of this case.

There is nothing extraordinary about one administration having to defend a rule issued by the prior administration. To the contrary, it is routine. *See, e.g.*, *Coal. of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613 (D.C. Cir. 2010) (upholding, during the Obama Administration, standards set under the Bush Administration); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (resolving, under the Bush Administration, the legality of rules issued by the Clinton Administration). EPA is not harmed by having to defend a rule that is on

the books and currently in effect. This is simply how the rule of law works. And, if EPA chooses not to defend portions of the Rule challenged by industry, the Environmental Organizations stand ready to defend the Rule against Industry Petitioners' claims, as indicated by their intervenor-respondent brief. *See* Brief for Environmental Intervenor-Respondents, ECF Doc. No. 1634040.

Nor would proceeding with this case hamper EPA's ability to reconsider the Rule. A merits decision from this Court does not foreclose EPA from reconsidering the Rule and reaching a different policy decision, provided that a new rule does not conflict with the statute and that EPA acknowledges and adequately supports any departures from its prior decision. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). In fact, as discussed below, a merits decision would provide timely resolution of disputed legal issues that will need to be addressed even after any reconsideration of the Rule that EPA may undertake.

II. JUDICIAL ECONOMY REQUIRES TIMELY RESOLUTION OF ISSUES THAT HAVE BEEN FULLY BRIEFED AND WILL RECUR IN ANY FUTURE RULEMAKING.

Judicial economy would be served best by holding argument on October 17 and reaching a merits decision. EPA's argument to the contrary rests on the mistaken assertion that reconsideration of the rule would "obviat[e] the need for

judicial resolution of some or all of the issues addressed in the parties' briefs." EPA Mot. at 9.

EPA has not yet decided to initiate rulemaking proceedings to rescind or revise any portion of the Rule. Instead, EPA has simply indicated that it "plans to undertake a careful review of the Rule" in response to petitions filed by Industry Petitioners. *Id.* at 6. But even assuming that EPA will eventually alter provisions of the Rule at issue in this proceeding, that does not obviate the need for this Court to reach a decision now. If the mere possibility that an agency could change a rule meant that judicial review should grind to a halt, no court would ever issue a merits decision on the legality of any rule.

Here, the Coal Ash Rule remains in effect. No party has moved this Court for a stay of the Rule. Thus, every day that EPA "undertake[s] a careful review of the Rule," *id.* at 6, the provisions of the Rule challenged in this proceeding continue to affect the disposal of tens of millions of tons of toxic coal ash around the country.

Moreover, the issues raised in this proceeding, and in particular those issues raised in Environmental Petitioners' briefs, will continue to be relevant to any rule EPA may issue after reconsideration. This Court has recognized in prior cases that judicial economy requires adjudication of pending issues that are likely to be raised in future cases if not resolved. *See AT&T Corp. v. FCC*, 841 F.3d 1047, 1054

(D.C. Cir. 2016) ("[J]udicial economy suggests that we address some of AT&T's other arguments to avoid re-litigation of identical issues in a subsequent petition."); *Kaufman v. Mukasey*, 524 F.3d 1334, 1339 (D.C. Cir. 2008) (similar).

For example, in the first claim of their opening brief, Environmental Petitioners contend that the Rule violates the RCRA Subtitle D "no reasonable probability of adverse effects on health or the environment" standard, 42 U.S.C. § 6944(a), by allowing unlined impoundments to continue to operate despite EPA's recognition that unlined dumps pose unacceptable risks of harm to human health and the environment. *See* Envtl. Pet. Opening Br. at 19-27. What those statutory health and environmental requirements dictate with regard to unlined impoundments is a critical question that will necessarily remain at issue under any revised rule regulating coal ash impoundments, since the majority of the nation's coal ash impoundments are unlined.

Similarly, the second claim that Environmental Petitioners raise in their opening brief concerns what type of liner suffices to meet the RCRA Subtitle D standard. *See* Envtl. Pet. Opening Br. at 27-31. The Court's adjudication of Environmental Petitioners' claim that EPA classified certain existing impoundments as "lined," even though they lack liners that are effective at preventing groundwater contamination, would resolve the issue of what RCRA requires on that point, which is likely to be an issue in EPA's future rulemaking

because liner sufficiency is an issue raised in Industry Petitioners' petition for reconsideration. *See* EPA Mot., Att. A at 44.

Further, in its motion, EPA argues that Environmental Petitioners' third claim that EPA has a statutory obligation to regulate all impoundments where coal ash is stored and disposed is "so intertwined" with industry's claim that EPA lacks authority to regulate any inactive impoundments that the Court should hold both claims in abeyance. EPA Mot. at 7-8. But, contrary to EPA's assertions, the fact that Environmental Petitioners and industry take polar opposite positions on the same legal questions, with EPA's 2015 Coal Ash Rule in the middle, weighs in favor of this Court holding argument and resolving the legal question at issue now. Given the opposing positions taken by Environmental and Industry Petitioners on this question, any future EPA rulemaking to revise the Rule will necessarily require EPA to address this issue. There is therefore no benefit to this Court refraining to resolve the legal question in this case now, given that it is certain to recur in the future if not resolved in this case.[6]

[6] The same is true for Industry Petitioners' claims pending before the Court, which overlap heavily with the issues raised in the petitions for reconsideration on which EPA intends to conduct future rulemaking. *See generally* EPA Mot. Atts. A & B. This Court's adjudication of legal disputes that are ripe for resolution now would clarify the applicable law in any future EPA rulemaking.

In sum, the parties have completed briefing on critical legal issues that bear on the lawfulness of the Coal Ash Rule, which is in effect currently. Judicial resolution of these issues would assist the agency in reconsideration, particularly because those issues will remain relevant to any changes EPA wishes to make to the Rule. Given the late stage of this litigation, and the continuing relevance of the issues to the current Rule and any future rule, judicial economy favors proceeding with oral argument and a decision.

III. RECENT LEGISLATION DOES NOT SUPPORT AN ABEYANCE OF THIS LITIGATION.

EPA argues that an abeyance is warranted because EPA may, at some unknown future date, revise its position on some unknown number of issues in this litigation and conduct further rulemaking of unknown scope or duration. EPA Mot. at 6-8. EPA asserts that "[r]econsideration is particularly appropriate where there has been a fundamental change in the statute pursuant to which the regulation was promulgated," *id.* at 9, and states that how EPA treats issues on reconsideration may be affected by intervening legislation, *id.* at 6. EPA is referring to section 2301 of the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628 ("WIIN Act"), passed by Congress on December 16, 2016. The WIIN Act contains amendments to provisions of the Solid Waste Disposal Act governing disposal of coal ash. However, EPA

dramatically overstates the significance of the WIIN Act to the claims at issue in these proceedings.

Contrary to EPA's claim that the WIIN Act made "fundamental changes" in the statute governing the Coal Ash Rule, the WIIN Act made no changes whatsoever to the basic legal standard by which EPA chose to regulate coal ash. In particular, the WIIN Act made no changes to the RCRA Subtitle D provision central to this case that requires EPA to ensure that "there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste." 42 U.S.C. § 6944(a).

Indeed, despite the fact that Congress passed the WIIN Act nearly two years after EPA issued the Rule, Congress did not mandate any substantive changes in the Rule. The WIIN Act does not alter any of the requirements in the Rule concerning how coal ash must be stored, managed, monitored, or remediated. In fact, by passage of the WIIN Act, Congress indicated its support of the Coal Ash Rule, because it established the current rule as the basis of both federal and federally-approved state permit programs. The WIIN Act provides EPA with authority to approve state coal ash permit programs to operate in lieu of the self-implementing Coal Ash Rule, but only if such state programs adopt the standards in the Coal Ash Rule or alternative standards "at least as protective" as the current Rule. Pub. L. No. 114-322, 130 Stat. 1736 at § 2301(d)(1)(B)(i)-(ii). Given that

the Coal Ash Rule is the baseline against which a proposed state permitting program must be measured, the legality of the Rule remains of central relevance to any state programs as well as in those states where the federal requirements apply.

Although the WIIN Act made no changes to the Rule's requirements for how coal ash must be disposed of, the WIIN Act did change the enforcement and permitting scheme for the Rule, as EPA notes. *See* EPA Mot. at 4. However, EPA overstates the significance of these changes. Regarding enforcement, the WIIN Act provides EPA with authority to enforce the Coal Ash Rule under certain circumstances. Pub. L. No. 114-322, 130 Stat. 1736 at § 2301(d)(1)(B)(i)-(ii). Prior to the WIIN Act, the Coal Ash Rule could only be enforced by citizen suits. 42 U.S.C.A. § 6972(a)(1)(A). Second, the WIIN Act provides EPA with authority to approve state coal ash permit programs, but it does not require states to apply for such approval or mandate states to administer such programs. *See* Pub. L. No. 114-322, 130 Stat. 1736 at § 2301(d)(1)(A) (providing that a state "may" submit evidence of a permit program).

The WIIN Act's provision for voluntary state permit programs is a modest amendment. Only two states have thus far applied to EPA to administer a permitting program. EPA Mot. at 5-6. Even for those two states, EPA has yet to act on the applications, and it is far from certain that EPA can or will authorize those states to administer permit programs. It is also far from certain that the

majority of states in the U.S., or even any additional states, will submit applications for authorization, particularly because the WIIN Act provides no funding for states to set up their own coal ash permit programs.

Furthermore, if a state does not apply to administer a program, as is true of 48 states so far, the WIIN Act does not require EPA to administer a permitting program in those states. Instead, the Act authorizes EPA to issue permits only if Congress appropriates funds for that specific purpose, *see Pub*. L. No. 114-322, 130 Stat. 1738 at § 2301(d)(2)(B), which Congress has not done.

In short, at present, there are no approved state permitting programs, nor has EPA established a federal permitting program for any state. Thus, much like EPA's speculation that it may conduct further rulemaking to modify the Coal Ash Rule in unknown ways at some unspecified future time, EPA can point only to the possibility that at some indeterminate time, there may be permitting programs for an unknown number of states. Such speculative changes hardly amount to "fundamental" changes to RCRA Subtitle D or the Coal Ash Rule. Given that the WIIN Act has not changed the on-the-ground facts the Rule's applicability, the WIIN Act does not justify holding these proceedings in abeyance.

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Respectfully submitted,

/s/ Thomas Cmar
Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301
(312) 257-9338
tcmar@earthjustice.org

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

Matthew Gerhart
3639 N. Clayton St.
Denver, CO 80205
(510) 847-7721
megerhart@gmail.com

Jennifer Cassel
Earthjustice
1101 Lake St., Suite 308
Oak Park, IL 60301
(215) 717-4525
jcassel@earthjustice.org

Counsel for Environmental Petitioners and Environmental Intervenor-Respondents

CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this response complies with FED. R. APP. P. 27(d)(2)(A) because it contains 4,286 words, excluding the parts exempted by FED. R. APP. P. 32(f), as counted by a word processing system and, therefore, is within the word limit. This response also complies with the typeface requirements of FED. R. APP. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: September 21, 2017

/s/ Thomas Cmar
Thomas Cmar

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2017, I have served the foregoing response on all registered counsel through the Court's electronic filing system (ECF).

/s/ Thomas Cmar
Thomas Cmar