

**ORAL ARGUMENT SCHEDULED: NOVEMBER 20, 2017****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.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,

Respondents.

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No. 15-1219

**STATUS REPORT**

Pursuant to the Court’s Order of September 27, 2017 (Doc. 1695151), Respondent Environmental Protection Agency (“EPA”) sets forth below the provisions of the Final Rule, “Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities,” 80 Fed. Reg. 21,302 (April 17, 2015) (“Rule”), that are or are likely to be reconsidered by the Agency and the timeline for reconsideration.<sup>1</sup>

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<sup>1</sup> The information provided in this Status Report reflects information provided to the undersigned Department of Justice counsel by EPA staff. Should it be helpful to the Court, EPA would be willing to provide a supporting declaration from an appropriate agency official regarding the representations reported herein.

## **Provisions for Reconsideration**

The provisions set forth below are those that are or are likely to be reconsidered by EPA. To assist the Court and the parties, EPA explains the following about the information provided:

A. To the extent the provisions for reconsideration are subject to challenge in this litigation, they are noted below by reference to the section of Industry Petitioners' brief or Environmental Petitioners' brief where they are challenged.

B. EPA understood the Court's Order to require identification of *all* provisions of the Rule that EPA is, or is likely to, reconsider. Consequently, the list below includes provisions for reconsideration that are not the subject of a challenge before this Court, listing them under the heading "Not Before the Court." The list also includes provisions of the Rule that already have been remanded pursuant to the Court's Order.

C. Provisions that are included in EPA's pending Motion to Remand filed on November 7, 2017 (Doc. 1703468) are noted with an \*.

D. Provisions that were included in EPA's Motion to Remand filed on April 18, 2016 (Doc. 1609250), which was granted by the Court on June 14, 2016 (Doc. 1619358), are noted with an \*\*.

<b>Provisions to be Reconsidered</b>	<b>Industry Petitioners' Brief Section</b>	<b>Description</b>
*40 C.F.R. §257.50(c) *40 C.F.R. §257.100	II	EPA Regulation of Inactive Surface Impoundments
*40 C.F.R. §257.53, definition of Beneficial Use	IV.A  III.B	The Criteria for Determining Whether Activities Constitute Beneficial Use or Disposal
*40 C.F.R. §257.95(h)(2)	IV.F	Use of Risk-Based Alternative Standards for Remediating Constituents Without an MCL
*40 C.F.R. §257.53, definition of CCR Pile	IV.B  III.A	The Criteria for Determining Whether a Pile will be Regulated as a Landfill or as Beneficial Use
**40 C.F.R. §§257.96-98	III.D	Regulatory Procedures Used to Remediate Certain Non-Groundwater Releases
**40 C.F.R. §§257.73(a)(4), 257.73(d)(1)(iv), 257.74(a)(4), 257.74(d)(1)(iv)	III.E	Requirements for Slope Protection on Surface Impoundments, Including the Use of Vegetation.
**40 C.F.R. §§257.103(a) and (b)	IV.C.ii	Whether to Allow Continued Use of Surface Impoundments Subject to Mandated Closure If No Capacity for Non-CCR Wastestreams

<b>Provisions to be Reconsidered</b>	<b>Envtl. Petitioners' Brief Section</b>	<b>Description</b>
*40 C.F.R. §257.50(e)	III	Regulation of Inactive Surface Impoundments, including Legacy Ponds
**40 C.F.R. §257.100 <sup>2</sup>	IV	Exemption from Certain Remediation and Post-Closure Requirements for Inactive Surface Impoundment that Close by April 17, 2018.
**Appendix IV to 40 C.F.R. Part 257 40 C.F.R. §§257.93(b), 257.94(b), 257.95(b), 257.95(d)(1)	V	Addition of Boron to the List of Constituents that Trigger Corrective Action
<b>Provisions to be Reconsidered</b>	<b>Not Before the Court</b>	<b>Description</b>
40 C.F.R. §257.97		Whether to Allow Modification of the Corrective Action Remedy
40 C.F.R. §257.90		Whether to Suspend Groundwater Monitoring Requirements Where "No Migration" Demonstration is Made
40 C.F.R. §257.98(c)		Whether to Allow Alternate Period of Time to Determine Remediation is Complete
40 C.F.R. §257.104		Whether to Allow Modification of the Post-Closure Care Period

<sup>2</sup> EPA has completed its reconsideration of the issues associated with this claim. See 81 Fed. Reg. 51,802 (August 5, 2016).

40 C.F.R. §§257.101 257.102		Whether to Allow CCR to be Used to Close Surface Impoundments Subject to Mandated Closure
40 C.F.R. §257.53, definition of Quarry		Clarify Placement of CCR in Clay Mines

### **Timeline for Reconsideration**

EPA anticipates that it will complete its reconsideration of all of the provisions identified above in two phases. In setting forth below estimated dates for various rulemaking actions, EPA factored in two separate 90-day periods for the Office of Management and Budget (“OMB”) to review the drafts of proposed and final rules, in accordance with Executive Order 12,866. The estimated dates also assume a 90-day comment period on any contemplated proposed rule. EPA anticipates that 90 days is the minimum amount of time needed to provide the public with an adequate opportunity to comment, given the complexity of the technical matters at issue. In addition, this 90-day period will allow sufficient time for EPA to hold the public hearings that are statutorily mandated as part of the process to revise the 40 C.F.R. part 257 regulations. *See*, 42 U.S.C. §§ 6907(a), 6944(a).

#### **Phase One**

In the first phase, EPA will continue its process with respect to the provisions that were included in EPA’s Motion to Remand filed on April 18, 2016

(Doc. 1609250), which was granted by the Court on June 14, 2016 (Doc. 1619358). As set forth in the settlement agreement that was the basis for EPA's motion ("Settlement Agreement"), EPA committed to publish a proposed rule or rules ("Remand Rule") to address three of the issues remanded back to the Agency. The provisions covered in the contemplated Remand Rule are:

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

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

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

In the Settlement Agreement, EPA stated that the Agency intended to take final action on the three above-described matters within three years of an Order from the Court granting the Motion for Remand. Based on the date of that Order,

final action on the above-described proposals is currently contemplated by June 14, 2019. EPA has been diligently working on these proposals and a draft of the proposed Remand Rule is nearing completion.

As part of Phase One, EPA now also intends to review the twelve additional provisions identified in the chart above (those noted with one \* or no \*) in an effort to determine whether revisions of those provisions are warranted and, if so, whether proposals to revise or amend some of those provisions can be developed quickly enough so that they can be included in the current draft of the Remand Rule, consistent with the schedule set out in the Settlement Agreement. EPA currently expects to complete this initial step and sign a proposal that includes the three matters in the Remand Rule, along with additional matters (provisions) if any are identified for inclusion, no later than March 2018. EPA intends to take final action on all the proposals in the March 2018 proposal no later than June 14, 2019, the date for final action provided for in the Settlement Agreement.

### **Phase Two**

During the second phase, EPA plans to complete its review of all of the remaining matters identified in the chart above but not included in the Phase One Remand Rule and determine whether to propose revisions to those provisions. EPA currently expects that if further revisions are determined to be warranted, it will sign a proposed rule no later than September 2018. EPA intends to complete

its reconsideration of all issues and take final action on any September 2018

proposals no later than December 2019.

Respectfully submitted,

Date: November 15, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Status Report 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 15, 2017

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