In the United States Environmental Protection Agency

AES Puerto Rico LP's Petition for Rulemaking to Reconsider Provisions of the Coal Combustion Residuals Rule, 80 Fed. Reg. 21,302 (Apr. 17, 2015), and Request to Hold in Abeyance Challenge to the Coal Combustion Residuals Rule, No. 15-1219, et al. (D.C. Cir.)

INTRODUCTION

AES Puerto Rico LP ("AES-PR") hereby petitions the United States Environmental Protection Agency ("EPA" or "Agency") pursuant to 5 U.S.C. § 553(e) and 42 U.S.C. § 6974 for a rulemaking to reconsider one aspect of EPA's rule regulating coal combustion residuals ("CCR") produced at electricity generation stations. *See* 40 C.F.R. Part 257 and Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals, 80 Fed. Reg. 21,302 (Apr. 17, 2015), (the "CCR Rule" or "Rule"). Specifically:

First, AES-PR seeks a rulemaking to reconsider a single aspect of the CCR Rule: to reconsider how the Rule regulates the storage of CCR at a facility (on-site) as a "CCR pile" before the CCR is delivered to a third party for beneficial use or disposal (off-site). Currently, the Rule imposes costly, unnecessary and arbitrary burdens on on-site storage because it defines a "CCR pile" to be a "CCR landfill" and therefore subject to onerous regulatory requirements. Those burdens should be eliminated, consistent with the President's recent Executive Orders directing agencies to reduce the burden of federal regulations.[1]

Second, to allow EPA time to consider this and other petitions and to complete the transition to permit programs, EPA should also take immediate action to extend the CCR Rule's upcoming compliance deadlines. An extension would ensure the regulated community does not expend limited resources on elements of the CCR Rule that EPA may modify during the regulatory reform process mandated by the President and in the course of developing the new permit program required by Congress in the December 2016 changes to the Resource Conservation and Recovery Act ("RCRA").[2]

Third, AES-PR has challenged EPA's "CCR pile" in a petition for review of the CCR Rule now consolidated with other petitions for review pending before the U.S. Court of Appeals for the D.C. Circuit.[3] AES-PR requests that EPA ask the D.C. Circuit to hold the consolidated challenges to the Rule in abeyance, so that the Agency can consider whether it

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[1] *See* Letter from M. Mata, AES-PR to S. Dravis, EPA (May 15, 2017) (discussing Executive Orders and commenting to EPA's Regulatory Reform Task Force on need to repeal or revise "CCR pile" requirement)

[2] RCRA was amended in the Water Infrastructure Improvement for the Nation Act ("WIIN Act").

[3] *AES Puerto Rico LP v. EPA,* No. 15-1229, consolidated with *Utility Solid Waste Activities Group v. EPA*, No. 15-1219 (D.C. Cir.) (and Nos. 15-1221, 15-1222, 15-1223, 15-1227, and 15-1228) ("CCR Litigation").

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will choose to revise its positions in the CCR Litigation in light of the recent Executive Orders, as well as the changes to RCRA.[4]

BACKGROUND

CCR Rule. EPA's CCR Rule regulates coal combustion residuals ("CCR") produced by the electric utility sector. *See* 40 C.F.R. Part 257. The CCR Rule causes significant economic and operational impacts on coal-fired power generation, including AES-PR.

Among other requirements, the CCR Rule regulates the disposal of CCR. For land disposal, the Rule establishes minimum federal criteria for determining which new and existing disposal sites would qualify as "CCR landfills" and may receive CCR. *See e.g.,* 40 C.F.R. §§ 257.60-.64 (location restrictions), 257.70 (design criteria). These criteria are based on EPA's standards for municipal solid waste landfills under RCRA Subtitle D, such as an impervious liner, leachate collection, and groundwater monitoring. Permitted Subtitle D landfills are also authorized by the Rule to receive CCR. *E.g.,* 80 Fed. Reg. at 21341-42.

In addition, the Rule includes various operating requirements for CCR landfills, such as mandated inspections and fugitive dust control; groundwater monitoring and corrective action requirements; closure requirements, including (i) closure with CCR in place in conformance with specified standards, followed by post-closure care or (ii) closure by removing the CCR from the unit and certifying compliance with the mandated groundwater protection standards; and recordkeeping and reporting requirements demonstrating compliance with the criteria that must be posted to a publicly available website. *E.g.,* 40 C.F.R. §§ 257.80 (air criteria), 257.81 (run-on and run-off controls) 257.84 (inspections) 257.90-.98 (groundwater monitoring and corrective action) 257.103-.104 (closure and post-closure care) and 257.105-.107 (recordkeeping and internet requirements).

Certain of the Rule's operating criteria have already taken effect, including fugitive dust controls, regular inspections and the requirement to prepare closure and post-closure plans. However, the Rule's most burdensome requirements, including the groundwater monitoring requirements, which can trigger closure and corrective action rules, are scheduled to go into effect in less than five months, on October 17, 2017. 40 C.F.R. § 257.90(b)(1) (establishing deadline).

AES Puerto Rico. AES-PR is a leading provider of low-cost electricity for Puerto Rico. It owns and operates a state-of-the-art, coal-fired electricity generating facility located in Guayama, with a generating capacity of 454.3 megawatts (net). At a cost of $800 million, AES-PR is one of the largest public-private infrastructure investments in the history of Puerto Rico. The plant has over 110 employees and contributes upwards of $100 million to the

[4] *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 42 (1983); *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 cast 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)).

island's economy each year.[5] This contribution is critical, particularly given the dire economic situation imperiling the island.[6]

The AES-PR plant includes state-of-the-art emission controls, using circulating fluidized bed technology, which allows it to produce lower NOx emissions. In addition, the action of the fluidized bed when mixed with limestone or other sulfur-absorbing materials greatly reduces SO_2 emissions. EPA authorized these and other emission-controls as best available control technology under the Clean Air Act.[7] AES-PR is also a "zero liquid discharge" facility, as all process water from operations is recycled or reused.

The Commonwealth government, through the Puerto Rico Electric Power Authority ("PREPA"), distributes all electricity in Puerto Rico. Accordingly, AES-PR operates under a Power Purchase Agreement ("PPA") with PREPA. Under the PPA, PREPA purchases the power from AES-PR and then distributes it through the Puerto Rico grid. AES-PR represents approximately 17 % of the electricity consumed on the island and has been the lowest cost, most reliable source of baseload power for Puerto Rico since it started commercial operations in November 2002.

In the course of providing this essential electricity to the citizens of the island, like all coal-fired power plants, AES-PR produces CCR. AES-PR uses much of its CCR to produce a manufactured aggregate known as AGREMAX™ ("Agremax"). To produce Agremax, AES-PR mixes and hydrates the coal ash in an on-site mill, and the resulting mixture is then compacted and cured. This process of hydration, compaction and curing physically converts the coal ash into a hardened, manufactured aggregate, which can be further processed to reduce it to the appropriate size for beneficial use. In 2004, experts at the Texas A&M Transportation Institute performed tests on the aggregate and confirmed that it has the necessary physical, mechanical, and chemical properties for effective use in a range of applications, including road base and structural applications.[8] The effectiveness of these uses are well documented and have been specifically recognized by EPA, including in the CCR Rule. *See* 80 Fed. Reg. at 21,309 ("As of 2012, CCR beneficial uses (i.e., industrial

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[5] *See* INFORME DE AUDITORÍA CP-10-02 4 de agosto de 2009 AUTORIDAD DE ENERGÍA ELÉCTRICA DE PUERTO RICO (Unidad 3075 – Auditoría 12867) *available at* http://www.ocpr.gov/informes_en_PDF/pdf_2009_2010/cp/CP-10-02.pdf .

[6] https://www.nytimes.com/2017/05/03/business/dealbook/puerto-rico-debt.html?_r=0

[7] *See* W. Muszynski, EPA Region 2 to S. Slusser, AES Puerto Rico, Prevention of Significant Deterioration Permit for the Proposed AES Puerto Rico Cogeneration Plant (AES-PRCP) Administrative Permit Modification (Oct. 29, 2001), available at http://www.epa.gov/region2/air/permit/AES10292001.pdf. The Facility also has a Clean Air Act Title V Operating Permit issued by the Puerto Rico Environmental Quality Board. *See* Puerto Rico EQB, Title V Operating Permit No. PFE-TV-4911-30-0703-1130 (Nov. 15, 2011), *available at* http://www2.pr.gov/agencias/jca/Documents/Permisos%20y%20Formularios/Calidad%20de%20Aire/Permisos%20de%20Operaci%C3%B3n%20T%C3%ADtulo%20V%20Finales/AES%20FINAL%20Permit.pdf.

[8] *See* S. Kochyil and D. N. Little, Physical, Mechanical and Chemical Evaluation of Manufactured Aggregate (2004) (the AES Puerto Rico "manufactured aggregate has excellent properties for use as a fill or structural fill" and "may serve successfully as a subbase or base layer in pavements") *available at* http://www.agremax.com/Downloads/Final%20Report%20-%20TTI.pdf.

applications) involved about 52 million tons annually").[9] Agremax can also be used as daily cover or to stabilize liquids at a landfill.

"CCR Pile" Provision Challenged by AES-PR. Like all power plants that produce electricity using coal, the company faces significant burdens from the EPA's CCR Rule. As noted, in particular, the Rule has defined a stockpile of CCR temporarily stored on-site before the CCR is delivered off-site to be a "CCR pile" that must satisfy the requirements of a "CCR landfill." 40 C.F.R. § 257.53. This imposes costly – and unnecessary – regulatory burdens on electricity providers, like AES-PR, because requiring the CCR producer to handle its on-site CCR inventory as if it were operating a landfill greatly increase the cost to produce baseload electricity using coal. EPA should remove or reduce these substantial regulatory costs.

As such, AES-PR urges EPA to reconsider and reopen the CCR Rule in order to repeal or narrow the burdens imposed on power providers that store CCR temporarily on-site. Repealing or limiting the "CCR pile" requirements will reduce the costs and burdens imposed on U.S. energy production. Moreover, during reconsideration, AES-PR urges the Agency to extend the next compliance deadlines for "CCR piles" and hold AES-PR's D.C. Circuit petition in abeyance. With AES-PR (and many other coal-fired power plants) poised to make major investments to comply with CCR rule requirements, these requirements should be on hold while EPA conducts its review.

I. EPA SHOULD RECONSIDER AND REPEAL OR REDUCE THE BURDENSOME CCR RULE REQUIREMENTS GOVERNING THE ON-SITE STORAGE OF CCR

There are multiple aspects of the Rule that warrant repeal or revision, as industry-wide stakeholders have explained in a recently filed petition for rulemaking.[10] AES-PR's petition is focused on the following critical issues:

A. EPA should reconsider the way it regulates on-site storage of CCR

1. EPA should revise the Rule to allow temporary on-site storage on the ground of CCR without triggering Rule requirements

Foremost, EPA should revise the way in which it regulates the on-site storage of CCR under the CCR Rule. According to the Rule:

> CCR pile or pile means any noncontainerized accumulation of solid, non-flowing CCR that is placed on the land. CCR that is beneficially used offsite is not a CCR pile.

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[9] *See also* Proposed Rule, *Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities*, 75 Fed. Reg. 35,128, 35,254 (June 21, 2010); *Notice of Regulatory Determination on Wastes from the Combustion of Fossil Fuels*, 65 Fed. Reg. 32,214, 32,229 (May 22, 2000); *Final Regulatory Determination on Four Large-Volume Wastes from the Combustion of Coal by Electric Utility Power Plants*, 58 Fed. Reg. 42,466 (Aug. 9, 1993).

[10] *See* Utility Solid Waste Activities Group Petition for Rulemaking to Reconsider Provisions of the Coal Combustion Residuals Rule, 80 Fed. Reg. 21, 301 (Apr. 17, 2015) and Request to Hold in Abeyance Challenge to Coal Combustion Residuals Rule, No. 15-1219, et al. (D.C. Cir.) (filed May 12, 2017) ("USWAG Petition").

40 C.F.R. § 257.53. The Rule further defines a "CCR landfill" to include a "CCR pile." *Id.* ("CCR landfill" includes CCR piles). Consequently, any inventory of any CCR of any volume or quality that is produced and stored on the ground for any length of time before delivery off-site for disposal or beneficial use, is regulated under the Rule as if the utility itself were operating a disposal site. *Id*

EPA should reconsider this regulatory approach due to the unnecessary burdens it imposes and the negligible benefits it provides. By treating an on-site inventory of CCR as if it were a landfill, EPA is placing significant additional burdens on operating facilities that only temporarily store CCR prior to off-site delivery for final use or disposal. As noted above, these additional burdens include groundwater monitoring, closure and potentially corrective action requirements, as well as others. 40 C.F.R. §§ 257.90 (groundwater monitoring), 257.96, .98 (corrective action), and 257.102, .104 (closure). These entail significant investments by facilities, requiring hiring of consulting engineers to develop plans and potentially substantial implementation costs to effect closure.

The Rule purports to exempt from its CCR landfill requirements, those CCR piles that are "containerized." However, this exemption does not provide sufficient relief, as it also imposes substantial and unnecessary burdens on temporary storage of CCR. According to EPA's preamble to the CCR Rule, in order for a CCR inventory to be considered "containerized" the measures "could include placement of the CCR on an impervious base such as asphalt, concrete, or a geomembrane; leachate and run-off collection; and walls or wind barriers." 80 Fed. Reg. at 21,356. If an impervious base and leachate collection are required, these mechanisms are significant additional burdens that are similar to the requirements for a landfill and often cost millions of dollars to install and maintain. Walls and wind barriers could also impose significant additional burdens. Further, each measure of "containerization" is undefined, and is thus susceptible to different interpretations and, worse, regulatory fiat.

In addition to reducing burdens on energy production, excluding CCR that is destined for off-site use or disposal from the CCR Rule is sound environmentally. CCR is not a hazardous waste and its constituents are naturally occurring and commonly found in our environment.[11] Moreover, CCR stored on-site is typically further processed at a facility before it is placed in on-site storage. Like AES-PR, many utilities convert CCR to a manufactured product for a range of beneficial uses, such as a manufactured aggregate. Inventories of natively quarried aggregate are commonly stored on the ground without the extraordinary regulatory burdens imposed by the CCR Rule.[12] CCR that is processed into

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[11] Indeed, the concentrations of constituents in CCR are similar to concentrations in background soils in the U.S., including Puerto Rico. *See* Coal Ash Material Safety: A Health Risk-Based Evaluation of USGS Coal Ash Data from Five US Power Plants. American Coal Ash Association (ACAA, 2012) available at https://www.acaa-usa.org/Portals/9/Files/PDFs/ACAA_CoalAshMaterialSafety_June2012.pdf; Comparison of Coal Combustion Products to Other Common Materials. Electric Power Research Institute, Report No. 1020556 (Sept. 2010), available for download at http://www.epri.com/; Agency for Toxic Substances and Disease Registry, Centers for Disease Control, Petitioned Public Health Assessment Soil Pathway Evaluation, Isla de Vieques Bombing Range, Vieques, Puerto Rico (2003), *available at* http://www.atsdr.cdc.gov/HAC/PHA/reports/isladevieques_02072003pr/printview.html; US Geological Survey, Geochemical and Mineralogical Maps for Soils of the Conterminous United States (2014), *available at* http://pubs.usgs.gov/of/2014/1082/.

[12] Gravel pits, quarries and aggregate plants comply with air quality and stormwater management rules (as does AES-PR), but are not subject to the extensive additional requirements of the CCR Rule.

aggregate should not be treated differently and should therefore be excluded from the requirements of the CCR Rule. Further, like any aggregate material stored at a plant site, long-established Clean Water Act and Clean Air Act regulations would regulate the storage pile and be more than adequate to address the potential for runoff to surface water or fugitive air emissions, if any. Hence, excluding from the CCR Rule those CCR that are destined for off-site use or disposal, would also serve to eliminate duplicate regulatory requirements imposed by the CCR Rule.

2. At a minimum, EPA should confirm that CCR stored on the ground on-site prior to delivery for beneficial use off-site is not a CCR pile

At a minimum, EPA should reconsider its interpretation of a "CCR pile" and affirm that CCR that are stored on the ground *on-site* at a generating facility prior to delivery of the CCR *for beneficial use off-site* is not a CCR pile and therefore not subject to the Rule. Wherever they are stored, CCR that are to be beneficially used should not be regulated as if they had been disposed of in a landfill. This is a sensible and straightforward way for the Agency to reduce unnecessary regulatory burdens and promote the beneficial use of CCR.

This should be clear, because as written, the Rule provides that storage before beneficial use should not be regulated. As detailed above, in the definition of "CCR pile" the Rule states "CCR that is beneficially used off-site is not a CCR pile." *Id.* It therefore should be the case that any CCR that are temporarily stored before beneficial use off-site are not subject to the burdens of being regulated as a landfill.

However, in the preamble to the CCR Rule, EPA issued a contrary interpretation that rewrote its own plain language. Specifically, EPA stated that only CCR that are stored on the ground as inventory *after* it is transferred off-site would be considered "CCR that is beneficially used off-site." 80 Fed. Reg. at 21,356.[13] By contrast, the *exact same inventory* of the *exact same CCR* placed on the ground *on-site* at the CCR generating facility *before it is delivered would be* regulated as a "CCR pile" subject to all of the burdensome regulatory requirements of a landfill. 80 Fed. Reg. at 21,356. In fact, the on-site inventory would be considered a CCR pile *even if* the CCR has already "been designated by the CCR facility to be transferred to another location for subsequent beneficial use … in the near future." 80 Fed. Reg. at 21,356. Therefore, even if the generating facility has determined that it is not going to discard the CCR, EPA has said the facility must treat the CCR inventory as if it had been disposed of in a landfill.

That interpretation should be reversed. Given that EPA has already found that storage *off-site* prior to beneficial use did *not* warrant regulation, there is no legitimate justification for treating *on-site* storage *of the exact same material* differently. At a minimum, EPA should revise the CCR Rule to confirm that CCR that is stored on the ground on-site prior to beneficial use is not a CCR pile.

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[13] EPA also limited the volume that could meet the exclusion to 12,400 tons. The 12,400 ton limit, which is found in the CCR Rule's definition of "beneficial use," 40 C.F.R. § 257.3, is not justified, as it is based on a mathematical error, which EPA has acknowledged. *E.g.*, Brief of Respondent, Environmental Protection Agency, *Utility Solid Waste Activities Group, et al., v. EPA*, No. 15-1219 (consolidated) at 54-55 (filed Apr. 18, 2016).

B. Reconsidering how EPA regulates CCR stored on-site squares with the Administration's policies to reduce regulatory burdens on energy producers like AES-PR

Reconsidering how EPA regulates CCR stored on-site would be fully consistent with the President's recent Executive Orders directing federal agencies to reduce the costs of unnecessary and burdensome regulations. In Executive Order 13777, *Enforcing the Regulatory Agenda* (Feb. 24, 2017) ("EO 13777"),[14] President Trump directed federal agencies to reduce unnecessary regulatory burdens on the American people. EO 13777 directed each federal agency to create a Regulatory Reform Task Force ("RRTF") to "evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law." *Id.* § 4. In undertaking this task, the RRTF is charged with identifying regulations that are unnecessary or ineffective, impose costs that exceed benefits, and/or create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies. Measures identified for reform should reflect the Administration's core priorities, such as to reduce the scope and cost of regulations, *see* Executive Order 13771, Reducing Regulations and Controlling Regulatory Costs (Jan. 30, 2017), and to reduce the burdens on the production of energy in the United States. *See* Executive Order 13783, Promoting Energy Independence and Economic Growth (Mar. 28, 2017).[15]

Every year, millions of tons of CCR are produced, stored temporarily, delivered to customers, and then used beneficially (or disposed of in landfills).[16] Requiring CCR producers across the U.S. to handle that CCR inventory as if it were already in a landfill – or "containerize" it with costly additional measures – imposes unnecessary regulatory burdens that needlessly increase the costs to the utilities that produce baseload energy using coal.

C. EPA should extend the compliance deadlines while the Agency considers revisions to the CCR Rule

To allow time to consider these and other proposed reforms to the CCR Rule, it is critical that EPA promptly take action to extend compliance dates established in the Rule. In particular, EPA should immediately extend the time schedules in 40 C.F.R. §§ 257.90(b) and 257.90(e) for initiating groundwater monitoring – which is due to commence in October 2017. By acting immediately to extend these compliance deadlines, EPA will minimize a utility's investment of their limited capital resources on requirements that EPA may change during EPA's regulatory review.

Moreover, an extension will allow time for EPA and states (which includes Puerto Rico) to develop a permit program to implement the CCR Rule in accordance with the recent amendments to RCRA Subtitle D.[17] States may now seek EPA's approval to administer the

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[14] *See* 82 Fed. Reg. 12285 (Mar. 1, 2017).

[15] *See* 82 Fed. Reg. 16093 (Mar. 31, 2017).

[16] American Coal Ash Association, Beneficial Use of Coal Combustion Products: An American Recycling Success Story 7, https://www.acaa-usa.org/Publications/Production-Use-Reports.

[17] *See* RCRA § 4005(d) ("State Programs for Control of Coal Combustion Residuals."). The changes were made in the WIIN Act.

CCR Rule directly through a state permit program. If a state does not apply or EPA denies a state's application, EPA can implement the Rule through a federal permit program.[18] This statutory change transforms the CCR Rule from a self-implementing program, into a rule that will be implemented through either a state or EPA permit program, much like traditional federal environmental laws. EPA originally included, but then removed site-specific, risk-based provisions from the Final Rule because there was no permit program.[19] EPA should reconsider its regulation of temporary on-site storage in this more flexible context, as it considers state permit program applications.

II. EPA SHOULD ASK THE COURT TO HOLD IN ABEYANCE THE CCR PETITIONS FOR REVIEW PENDING IN THE DC CIRCUIT

As explained above, AES-PR has petitioned for review of the "CCR pile" provision in consolidated litigation pending before the U.S. Court of Appeals for the D.C. Circuit.[20] AES-PR and other industry petitioners have argued that elements of the rule exceed EPA's statutory authority, were promulgated without notice and comment, and/or are arbitrary and capricious. A group of environmental NGOs has also filed a petition for review. All the petitions have been consolidated and briefing is complete, but the Court has not yet set a date for oral argument.

For the reasons outlined in this Petition, AES-PR requests that EPA ask the Court to hold in abeyance AES-PR's petition, as well as the remainder of the CCR Litigation, while the Agency reconsiders its position. This would allow EPA to reconsider and modify its position, to the extent permitted by law. Indeed, the Agency has taken similar action to ask the courts to hold in abeyance pending litigation while EPA reconsiders the Obama Administration's positions on regulations, including rules affecting the power sector.[21] In

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[18] *See* RCRA § 4005(d)(2)(B).

[19] *See* 80 Fed. Reg. at 21,371 (setting criteria that must operate "in the absence of any guaranteed regulatory oversight (i.e., a permitting program)").

[20] *See* CCR Litigation, *supra* at n.2.

[21] *See e.g.*, Respondent EPA's Motion to Continue Oral Argument, *Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir.) (filed Apr. 18, 2017) ("In light of the recent change in administration, EPA requests continuance of the oral argument to give the appropriate officials adequate time to fully review the SSM Action. EPA intends to closely review the SSM Action, and the prior positions taken by the Agency with respect to the SSM Action may not necessarily reflect its ultimate conclusions after that review is complete."); Notice of Executive Order and Motion to Hold Case in Abeyance, *American Petroleum Institute v. EPA*, No. 13-1108 (and consolidated cases) (D.C. Cir.) (requesting abeyance and that "once EPA has determined whether it will initiate a rulemaking … the parties can consider what course is appropriate for whatever remains of Petitioners' challenges") (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("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."); Respondent EPA's Motion to Continue Oral Argument, *Murray Energy Corp. v. EPA*, No. 16-1127 (and consolidated cases) (D.C. Cir.) (filed Apr. 18, 2017) (asking the court to "allow the new Administration adequate time to review the Supplemental Finding to determine whether it will be reconsidered"); Respondents' Motion to Hold Proceedings in Abeyance While the Agency Undertakes Reconsideration, *Southwestern Electric Power Co., v EPA,* No. 15-60821 (5th Cir.) (filed Apr. 14, 2017) (seeking abeyance because "EPA's reconsideration of the rule might result in further rulemaking that would revise or rescind the rule at issue in these proceedings and thereby obviate the need for judicial resolution of some or all of the issues raised in the parties' briefs.")

several instances, the courts have already granted EPA's request.[22]

If EPA modifies the CCR pile requirements as outlined, AES-PR would then join EPA in supporting a remand of AES-PR's petition for review. AES-PR has also joined the USWAG Petition, which makes a similar request for all industry petitioners.[23]

CONCLUSION

The CCR Rule is causing significant adverse impacts on coal-fired generation in this country by imposing excessive costs of compliance. Among many burdensome provisions, the burdens imposed on a "CCR pile" are particularly acute, especially in Puerto Rico – which is facing severe economic challenges. Reconsideration will enable the Agency to consider these and other impacts as contemplated by recent Executive Orders and in view of the new permitting structure required by the Congress.

For all the foregoing reasons, EPA should grant this Petition, take action to suspend and/or extend the Rule's upcoming compliance deadlines, promptly initiate a new rulemaking to reflect the required changes, and ask the Court to hold the CCR Litigation in abeyance to allow the new Administration to reassess its position in the litigation.

Dated: May 31, 2017

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[22] *E.g.*, Order, *Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir. Apr. 24, 2017) (granting EPA motion to continue oral argument and hold case in abeyance); Order, *Southwestern Electric Power Co., v EPA,* No. 15-60821 (5th Cir. Apr. 24, 2017) (granting EPA motion to continue oral argument and hold case in abeyance); Order, *Murray Energy Corp. v. EPA* , No. 16-1127 (D.C. Cir. Apr. 27, 2017) (granting EPA motion to continue oral argument and hold case in abeyance); *Murray Energy Corp. v. EPA,* No. 15-1385 (D.C. Cir. Apr. 11, 2017) (removing case from oral argument calendar eight days before scheduled argument date); Order, *North Dakota v. EPA,* No. 15-1381 (D.C. Cir. Mar. 30, 2017) (removing case from oral argument calendar in light of EPA review of underlying rule and motion to hold cases in abeyance).

[23] *See* USWAG Petition, *supra* at 45-52.

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