ORAL ARGUMENT NOT YET SCHEDULED

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

WATERKEEPER ALLIANCE, INC., et al.,	)	
Petitioners,	)	
v.	)	No. 18-1289
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	

EPA'S RESPONSE TO PETITIONERS' MOTION FOR PARTIAL STAY AND EXPEDITED CONSIDERATION, OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY VACATUR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*Authorities chiefly relied upon are marked with an asterisk.

Rules

Statutes

Code of Federal Regulations

Federal Register

Other

INTRODUCTION

Petitioners seek extraordinary relief—a stay or summary vacatur of a regulation that the U.S. Environmental Protection Agency (EPA) has already agreed it will reexamine in the wake of a later-arising decision of this Court. Petitioners' request is all the more extraordinary because it would mandate that coal-fired power plants across the country alter complex waste disposal operations overnight. In simple terms, it would require the impossible. This would radically disrupt the operations, as well as the investment-backed reliance interests, of many regulated parties. And, it may compromise the reliability of the power grid on which the public depends. Petitioners' motion should be denied.

In 2015, the EPA promulgated a rule under the Resource Conservation and Recovery Act governing the disposal of coal combustion residuals (CCR). 80 Fed. Reg. 21,302 (Apr. 17, 2015). CCR is a by-product of the operation of coal-fired power plants. Among other things, the CCR Rule required certain wastewater surface impoundments to take steps toward closure within six months of specified triggering events. In July of 2018, EPA promulgated a rule which extended the closure deadlines for certain surface

impoundments. 83 Fed. Reg. 36,435 (July 30, 2018). Regulated entities could reasonably "presume[] the validity of [these] agency action[s]." *See Nat'l Assoc. of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). Then, the month after the July 2018 Rule was published, this Court issued its decision addressing challenges to the original CCR Rule. *See Utility Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018) (*USWAG*). *USWAG* vacated in part a provision underlying the July 2018 Rule—40 C.F.R. § 257.101(a)(1)—and remanded that provision to the agency.

EPA recognizes that further consideration of the July 2018 Rule is necessary in light of *USWAG*. EPA also recognizes that orderly closure of unlined surface impoundments is appropriate. The Agency accordingly moved for a voluntary remand to allow it to reexamine the rule and promulgate feasible closure regulations.

Petitioners oppose EPA's motion for remand without vacatur. They instead seek a stay or summary vacatur of the July 2018 Rule's extension of the closure deadlines for surface impoundments. But critically, because *USWAG* vacated the CCR Rule's original closure timeframe for unlined impoundments, either a stay or summary

vacatur of the July 2018 Rule's new deadlines would require power plants to initiate closure of operating impoundments immediately. This would be profoundly disruptive. Some power plants generate many millions of gallons of wastewater daily. Intervenors' brief provides that power plants across the United States may have to shutter operations while they arrange for alternative disposal of their non-CCR waste. This may impact the reliability of the power grid. The hardship faced by clay-lined impoundments would be particularly severe. These units reasonably relied on EPA's original CCR rule, and had no notice that closure may be required until this Court decided *USWAG*.

Petitioners do not grapple with the real-world consequences of the relief they seek. Instead, Petitioners focus on the merits of the July 2018 Rule. But, even assuming that Petitioners can successfully challenge the July 2018 Rule in light of *USWAG*, any deficiencies with the July 2018 Rule standing alone are insufficient to allow for a stay or summary vacatur. Petitioners must also prove entitlement to the equitable relief sought. *Cuomo*, 772 F.2d at 978. They cannot do so given the serious harm that could result. Further, Petitioners' concerns regarding the continued operation of unlined impoundments, and

impoundments located too close to an aquifer, will be addressed on remand when EPA undertakes a rulemaking setting closure deadlines. Contrary to Petitioners' contentions, nothing in *USWAG* forecloses EPA from promulgating feasible, supported closure deadlines for these impoundments.

STATUTORY BACKGROUND

The Resource Conservation and Recovery Act (RCRA) establishes a regime for the regulation of all solid waste. 42 U.S.C. § 6903(5); *Am. Mining Congress v. EPA,* 824 F.2d 1177, 1179 (D.C. Cir. 1987).[1] Subtitle D of RCRA, 42 U.S.C. §§ 6941-6949a, covers all solid waste that is not deemed to be "hazardous," as that term is defined by the Act. Under Subtitle D, EPA is directed to promulgate regulations defining the requirements for "sanitary landfill[s]." 42 U.S.C. § 6944(a). To be classified as a sanitary landfill, there must be "no reasonable probability of adverse effects on health or the environment from disposal of solid waste . . . ." *Id.*

[1] EPA's motion for a voluntary remand without vacatur sets forth the statutory background and procedural history for this matter. For ease of reference, the statutory background and procedural history are repeated below.

Congress further directed EPA to establish criteria applicable to all "solid waste management" activities. These are defined as the "storage, transportation, transfer, processing, treatment, and disposal of solid waste." *Id.* at §§ 6907(a)(3), 6903(28). If a waste unit fails to comply with regulations setting the criteria to be classified as a sanitary landfill, the unit is deemed an unlawful "open dump." *Id.* at §§ 6944, 6945, 6903(14). A facility operating an open dump must either come into compliance with the regulatory requirements, or close the unit pursuant to closure procedures promulgated by EPA. *Id.*

The procedures for revising these regulations require both notice and comment rulemaking under the Administrative Procedure Act, as well as "consultation with the States," and "public hearings." *Id.* at § 6944(a). *See also id.* at § 6907(a) (requiring development of solid waste management guidelines "in cooperation with appropriate Federal, State, municipal, and intermunicipal agencies, and in consultation with other interested persons, and after public hearings . . . .").

PROCEDURAL HISTORY

A. The CCR Rule.

In April of 2015, EPA promulgated the CCR Rule under Subtitle D of RCRA, which governs the disposal of solid waste presently classified as non-hazardous. 80 Fed. Reg. 21,302. The CCR Rule sets forth comprehensive requirements for the disposal of CCR in properly constructed and maintained landfills and impoundments. 80 Fed. Reg. at 21,302-03. Failure to comply with these requirements results in a covered CCR facility being deemed an "open dump"—"open dumps" are prohibited under the statute. 42 U.S.C. §§ 6944, 6945, 6903(14). A facility operating an open dump must either come into compliance with the regulatory requirements or close the unit pursuant to closure procedures promulgated by EPA. *Id.*

The CCR rule required existing CCR surface impoundments and landfills to cease receiving waste and initiate closure under certain circumstances. For impoundments that do not comply with location criteria set by the rule (i.e., because they are located too close to certain aquifers), and for unlined impoundments contaminating groundwater above the groundwater protection standard, the owner or operator of

such impoundment must cease placing any waste into the unit. 80 Fed. Reg. at 21,490-91. The owner or operator must also initiate closure activities within six months of making the relevant determination that the CCR impoundment must close. *Id.*[2]

Specifically, regarding the timeframe for closure, § 257.101(a)(1) & (b)(1) of the CCR Rule provided in full:

> (a) The owner or operator of an existing unlined CCR surface impoundment, as determined under § 257.71(a), is subject to the requirements of paragraph (a)(1) of this section.
>
> (1) Except as provided by paragraph (a)(3) of this section, if at any time after October 19, 2015 an owner or operator of an existing unlined CCR surface impoundment determines in any sampling event that the concentrations of one or more constituents listed in appendix IV to this part are detected at statistically significant levels above the groundwater protection standard established under § 257.95(h) for such CCR unit, within six months of making such determination, the owner or operator of the existing unlined CCR surface impoundment must cease placing CCR and non-CCR wastestreams into such CCR surface impoundment and either retrofit or close the CCR unit in accordance with the requirements of § 257.102.
>
> . . .

[2] At the time the CCR Rule was promulgated, the closure requirement at section 257.101(a)(1) applied only to unlined CCR surface impoundments. Units with either a composite liner (a specialized liner to limit migration), or with a clay liner that met certain requirements, were allowed to operate indefinitely. *See* 40 C.F.R. § 257.71(a).

> (b) The owner or operator of an existing CCR surface impoundment is subject to the requirements of paragraph (b)(1) of this section.
>
> (1) Except as provided by paragraph (b)(4) of this section, within six months of determining that an existing CCR surface impoundment has not demonstrated compliance with any location standard specified in §§ 257.60(a), 257.61(a), 257.62(a), 257.63(a), and 257.64(a), the owner or operator of the CCR surface impoundment must cease placing CCR and non-CCR wastestreams into such CCR unit and close the CCR unit in accordance with the requirements of § 257.102.

80 Fed. Reg. at 21,490-91.

B. The July 2018 Rule.

In July of 2018, EPA promulgated a new rule after notice and comment. Among other things, this modified the closure-related deadlines provided by sections 257.101(a)(1) & (b)(1). 83 Fed. Reg. 36,435. The revised provisions read as follows, with the changes identified in **bold**:

> (a) The owner or operator of an existing unlined CCR surface impoundment, as determined under § 257.71(a), is subject to the requirements of paragraph (a)(1) of this section.
>
> (1) Except as provided by paragraph (a)(3) of this section, if at any time after October 19, 2015, an owner or operator of an existing unlined CCR surface impoundment determines in any sampling event that the concentrations of one or more constituents listed in appendix IV of this part are detected at statistically significant levels above the groundwater protection standard established under § 257.95(h) for such CCR unit, within six months of making such determination **or no later than**

> **October 31, 2020**, whichever date is later, the owner or operator of the existing unlined CCR surface impoundment must cease placing CCR and non–CCR wastestreams into such CCR surface impoundment and either retrofit or close the CCR unit in accordance with the requirements of § 257.102.
>
> . . .
>
> (b) The owner or operator of an existing CCR surface impoundment is subject to the requirements of paragraph (b)(1) of this section.
>
> (1)(i) Location standard under § 257.60. Except as provided by paragraph (b)(4) of this section, the owner or operator of an existing CCR surface impoundment that has not demonstrated compliance with the location standard specified in § 257.60(a) must cease placing CCR and non–CCR wastestreams into such CCR unit **no later than October 31, 2020**, and close the CCR unit in accordance with the requirements of § 257.102.

83 Fed. Reg. at 36,454-55.

In relevant part, the new rule extends the deadline for an owner or operator to cease placing waste in certain CCR surface impoundments. For unlined impoundments, instead of requiring an owner or operator to cease contributing waste to a unit within six months of detecting a leak, that owner or operator may continue to place waste in the unit until October 31, 2020. *Id.*

EPA supported its decision with "concerns [that were] raised about the feasibility of complying with the current closure timeframes." 83 Fed. Reg. at 36,441. Specifically, EPA heard that the six-month

regime provided for by the CCR Rule provides "at best, [a] barely adequate" amount of time. *Id.* As a commenter explained, it can take many months to obtain new wastewater permits, as well as "several months to properly tune and commission a large water treatment plant . . . accounting for quantity and quality variations in the non-CCR water streams." *Id.* (Non-CCR waste streams are relevant because existing surface impoundments are commonly used for both CCR and non-CCR waste, and section 257.101 requires impoundments to cease accepting *all* types of waste.) In sum, the utility "provided concrete examples to support their contention that it may take 18-36 months to find alternate capacity for their non-CCR wastes streams." *Id.*

C. The D.C. Circuit's Decision in *Utility Solid Waste Activities Grp. v. EPA.*

Prior to the promulgation of the July 2018 Rule, a number of environmental and industry groups had challenged the original CCR Rule. *See USWAG*, 901 F.3d 414. A few weeks after the July 2018 Rule was published, the D.C. Circuit issued its decision on the validity of the original CCR Rule. The Court upheld certain provisions of the CCR Rule, and vacated other provisions. 901 F.3d at 427-30. Specifically, *USWAG* held that the requirement in section 257.101(a)(1), that an

owner or operator cease placing waste in an unlined CCR impoundment only after determining that it has leaked, was arbitrary and capricious. 901 F.3d at 427-28.

The Court reasoned that "the vast majority of existing impoundments are unlined," and that EPA's record showed that "leakages pose substantial risks to humans and the environment." *Id.* The Court held that EPA's "approach of relying on leak detection followed by closure was arbitrary and capricious" because the rule "addresses neither the risks to public health and to the environment before leakage is detected, nor the harms from continued leakage during the years before leakage is ultimately halted by retrofit or closure." 901 F.3d at 429. As a result, the Court "vacate[d] 40 C.F.R. § 257.101, which allows for the continued operation of unlined impoundments." *Id.* at 430.

The Court also held that the provision that classified impoundments lined with clay as "lined" and imposed different, more lenient requirements on these units, 40 C.F.R. § 257.71(a)(1)(i), was arbitrary and capricious, 901 F.3d at 449. The Court vacated this

provision as well. *Id*. The mandate for the case issued on October 15, 2018.

D. EPA's Motion for a Voluntary Remand of the July 2018 Rule Without Vacatur.

In December of 2018, EPA moved for a voluntary remand without vacatur of the July 2018 Rule. *See* Remand Mot., Doc. Id. No. 1764500. EPA explained that it wished to reexamine the July 2018 Rule in light of this Court's decision in *USWAG*. *Id*. at 3, 13. The motion stated that the Agency plans to promulgate a new rule to allow for an orderly transition away from disposal of CCR and non-CCR wastestreams in unlined impoundments, as well as clay lined impoundments that cannot operate consistent with the statute. *Id*., App'x A, EPA Decl. at ¶ 17. EPA further explained that on remand the Agency will also consider whether other aspects of the July 2018 Rule challenged by the Petitioners should be re-examined. Remand Mot. at 13.

Intervenor Utility Solid Waste Activities Group and Intervenors Luminant Generation, et al.,[3] consented to remand without vacatur,

[3] Joining Luminant are Oak Grove Management Company, LLC, Big Brown Power Company, LLC, Coleto Creek Power, LLC, Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois

and separately filed a response in support of EPA's motion. Intvs. Br., Doc. Id. No. 1769550.

STANDARD OF REVIEW

"On a motion for [a judicial] stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The movant must "demonstrate that the balance of equities or the public interest *strongly favors* the granting of a stay." *Id.* (emphasis added). *See also* Circuit Rule 18. This standard is applied stringently. *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985).

A similarly stringent test applies to motions for summary vacatur. "Summary reversal is rarely granted and is appropriate only where the merits are 'so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision.'" D.C. Cir. Handbook of Practice and Internal Proc. at 36 (quoting *Sills v. Fed. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir.

Power Resources Generating, LLC, Electric Energy, Inc., Dynegy Miami Fort, LLC, Dynegy Zimmer, LLC, and Kincaid Generation, LLC.

1985); "Parties should avoid requesting summary disposition of issues of first impression for the Court.").

ARGUMENT

I. SETTING ASIDE THE JULY 2018 RULE NOW WOULD BE PROFOUNDLY DISRUPTIVE FOR POWER PLANTS AND COULD UNDERMINE THE RELIABILITY OF THE GRID.

Petitioners' motion should be denied because a stay or summary vacatur of the July 2018 Rule may seriously harm regulated entities and the public as a whole.

To determine whether a rule should be stayed pending judicial review, the court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). *Accord Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also* Circuit Rule 18. The Supreme Court has repeatedly made clear that "[a] stay is not a matter of right, even if irreparable injury might otherwise

result." *Nken*, 556 U.S. at 433-34 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, the propriety of a stay is "dependent upon the circumstances of the particular case." *Id.* "[I]t is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978.

Summary vacatur is likewise extraordinary relief and is even more rarely granted. The movant "bears a heavy burden of showing that summary disposition is appropriate." *Sills*, 761 F.2d at 793. The movant must establish that the right to relief is "so clear, [that] plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Id.* at 793-94. Furthermore, summary disposition is inappropriate for "issues of first impression for the Court." D.C. Cir. Handbook at 36.

Where the challenged action is an agency rule, the Court determines whether vacatur is proper by considering "the seriousness of the . . . deficiencies" and "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks and citation omitted). Even where an agency acts

arbitrarily and capriciously in promulgating a rule, vacatur is not "necessarily indicated." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002), *modified on other grounds*, 293 F.3d 537 (D.C. Cir. 2002). Both the test for a stay and the test for summary vacatur require the petitioner to establish that setting aside the challenged rule is equitable—namely, that any harm and disruption do not outweigh the benefit of granting such extraordinary relief. *See Nken*, 556 U.S. at 434; *Allied-Signal*, 988 F.2d at 150-51.

Here, Petitioners cannot satisfy their heavy burden and show that a stay or summary vacatur of the July 2018 Rule is warranted. There will be serious impacts to regulated entities and potentially for the public. If the closure deadlines in the July 2018 Rule are set aside—either temporarily as a result of a stay, or permanently as a result of vacatur—power plants across the country would be required to cease disposing of waste in operating unlined surface impoundments overnight. This would mandate the impossible. Thus, even assuming that Petitioners have established a likelihood of success on the merits and irreparable injury, the balance of equities weigh heavily in favor of leaving the July 2018 Rule in place for now. EPA should first be given

the opportunity to complete a notice and comment rulemaking to reconsider the rule and set feasible closure deadlines for these impoundments.

A. Surface Impoundments Would Be Required To Initiate Closure Immediately If the July 2018 Rule Were Set Aside.

Absent the July 2018 Rule, the CCR Rule—as modified by the D.C. Circuit's decision in *USWAG*—requires entities to cease disposing of waste in unlined impoundments immediately. As described above, at the time the CCR Rule was promulgated, 40 C.F.R. 257.101(a)(1) provided as follows: "if at any time after October 19, 2015 an owner or operator of an existing unlined CCR surface impoundment" determines that the unit does not satisfy the groundwater protection standard, then "within six months of making such determination, the owner or operator of the existing unlined CCR surface impoundment must cease placing CCR and non-CCR wastestreams into such CCR surface impoundment" and initiate closure. 80 Fed. Reg. at 21,490-91.

USWAG vacated the part of section 257.101(a)(1) that provides the timing requirement to initiate closure. But, it left the closure requirement intact. Specifically, the Court vacated "the provisions of the Final Rule that permit unlined impoundments to continue receiving

coal ash *unless* they leak." 901 F.3d at 449 (emphasis added). *See also* Aug. 21, 2018 Judgment, Case No. 15-1219, Doc. No. 1746576 (the "Final Rule [is] vacated and remanded with respect to the provision that permit unlined impoundments to continue receiving coal ash unless they leak. . .."). The original version of the CCR Rule, as modified by the partial vacatur, now provides that "the owner or operator of the existing unlined CCR surface impoundment must cease placing CCR and non-CCR wastestreams into such CCR surface impoundment" and initiate closure. The rule reads as a blanket prohibition—no future timeframe is specified to take such action. And, unlined units must close regardless of whether they are leaking.

As described above, the July 2018 Rule extended the deadline by which entities must cease contributing all waste to unlined impoundments. 83 Fed. Reg. at 36,454. Instead of allowing for operation until six months after detecting a violation of the groundwater protection standard, the rule provides that an entity has either six months from detecting a violation, or until "October 31, 2020, whichever date is later," to cease contributing additional waste to an unlined impoundment. *Id.* at 36,454-55.

EPA readily acknowledges that the July 2018 Rule must be reexamined in light of *USWAG*. *See* Remand Mot. at 11-15. But, granting a stay or summary vacatur would require an owner or operator cease contributing waste to unlined impoundments immediately.

B. Mandating Immediate Compliance Would Seriously Harm Intervenors and the Public Interest.

EPA explained in detail in its motion for voluntary remand that setting aside the July 2018 Rule now, before EPA has completed a rulemaking setting feasible closure deadlines, could be profoundly disruptive for power plants and the public interest. Remand Mot. at 19-22. In sum, a stay or vacatur of the deadlines provided by the July 2018 Rule would require entities with operating unlined impoundments, and impoundments located too close to an aquifer—including entities those that made plans based on the ordinary presumption of validity attending to EPA's rules, *see Clean Air Agencies*, 489 F.3d at 1228—to make alternative disposal arrangements for many millions of gallons of non-CCR wastewater overnight, Remand Mot. at 19-22. But, arranging for alternative disposal of these wastestreams cannot be achieved immediately. *Id.* At a complex site, it can take years to fabricate a new wastewater treatment system and obtain the discharge permits

required for operation. *Id.* at 21.

To be sure, some power plants with operating unlined impoundments began the planning process months or years ago. These entities may be able to develop alterative disposal capacity for non-CCR wastestreams relatively quickly. *See* Intvs. Br. at 11, A71, A104. But, quickly is not immediately. And just become certain plants *may* be in a position to alter their conduct in the very near term, that does not satisfy Petitioners' burden to prove entitlement to these extraordinary remedies as to all. Even under a best-case scenario, a stay or summary vacatur of the July 2018 Rule would require many power plants to cease operations for some period of time. *See id.* Intervenors have described the disruptive effects in a series of sworn declarations from electricity providers. Providers in Arizona, Arkansas, Illinois, Indiana, Kentucky, Michigan, New Mexico, North Carolina, Ohio, Oklahoma, Texas, and West Virginia have all attested that setting aside the July 2018 Rule now would require simultaneous, immediate closure of their coal-fired power plants, destabilizing the electrical grid in these areas. *Id.* at A13-14, A23-28, A75-77, A83-84, A96-97, A105-06.

C. Petitioners Ignore the Disruptive Consequences of Requiring Compliance Overnight.

Petitioners do not grapple with the dramatic real-world consequences of requiring power plants to alter overnight their current waste disposal operations. Instead, Petitioners argue at length that the July 2018 Rule is arbitrary and capricious. Pets. Mot. at 8-17. They also contend that the Intervenors would not be harmed by a stay because power plants should have been able to comply with the CCR's original closure deadlines—that is, the deadlines that were vacated by *USWAG*. *See id.* at 20-23. Neither of these arguments provides a sufficient basis for setting aside the July 2018 Rule now before EPA has promulgated a new rule setting feasible closure deadlines.

1. As an initial matter, EPA concedes that *USWAG* impacts the July 2018 Rule. *USWAG* vacates in part 42 C.F.R. § 257.101(a)(1), the same provision underlying the July 2018 Rule. *See supra* at 17-19. For this reason, EPA sought a voluntary remand of the July 2018 Rule. Remand Mot. at 3, 11-15. That said, Petitioners overstate *USWAG*'s impact on this litigation. *USWAG* did not address, because it was not before the Court, the validity of the July 2018 Rule. Thus, Petitioners are wrong that *USWAG* "invalidate[d]" the July 2018 Rule. *See* Pets.

Mot. at 10-12. The only rule reviewed by *USWAG* was the original CCR Rule—nothing else. *See* 901 F.3d at 419-20.

In addition, *USWAG* did not conclude that unlined impoundments must close immediately. *See* Pets. Mot. at 10-11. Nor did the Court hold continued operation of unlined impoundments for any period of time was a *per se* violation of RCRA as Petitioners argue. *Id*. Rather, *USWAG* determined that the closure deadline for unlined impoundments provided by the original CCR Rule (i.e., six months from detecting a leak) was arbitrary and capricious on that record. 901 F.3d at 430. The Court then remanded the provision for "additional consideration consistent with this opinion." *Id*. Nothing in *USWAG* forecloses EPA from undertaking a rulemaking to develop a record that supports feasible closure deadlines for unlined impoundments. *See id*.

Even assuming that Petitioners are likely to succeed on the merits of their challenge in light of *USWAG*, any deficiencies with the challenged rule do not alone warrant a stay or summary vacatur. Rather, to grant a stay or summary vacatur, the Petitioners must prove it is equitable and in the public interest to set aside the rule now, taking into account the interests of the parties and the public. *See*

Wash. Metro. Area, 559 F.2d at 843 (holding a stay is proper only where the equities militate strongly in favor of the relief); *Fox Television Stations, Inc.*, 280 F.3d at 1048 (holding vacatur is proper only where it would not result in serious disruption).

Here, given the potential for serious harm to Intervenors and the public interest described above, the most equitable course is to grant EPA's motion for voluntary remand. Granting voluntary remand is also consistent with the principle that agencies should, where possible, first be given the opportunity to correct their errors. *See Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). This will allow EPA to promulgate feasible closure deadlines on an expedited timeframe. EPA recognizes that unlined impoundments cannot continue to operate indefinitely. *See* Remand Mot., App'x A, EPA Decl. at ¶ 17. The Agency explained in its motion that it intends to promulgate a new regulation that allows for orderly transition away from disposal of CCR and non-CCR wastestreams in unlined impoundments, as well as clay lined impoundments that cannot operate consistent with the statute. *Id.* In these circumstances, where EPA plans to address expeditiously the

deficiencies identified by Petitioners, and serious harm may result from a stay or vacatur, setting aside the rule is not warranted.

Lastly, Petitioners are wrong that a stay is the only avenue for them to obtain meaningful relief. *See* Pets. Mot. at 20. EPA concedes that reexamination of the rule is appropriate and so no merits briefing is necessary here. Remand Mot. at 3, 13. There is thus little risk that the "18-month extension will elapse during this litigation." Pets. Mot. at 20. To the extent that Petitioners believe that power plants are inaccurately describing the difficulty of initiating closure, and that a 2019 deadline is feasible, that concern can be addressed during the rulemaking.

2. Petitioners next point out that some power plants were on notice in 2015 when the original CCR rule was promulgated that their impoundments may have to close. *Id.* at 21-22. In Petitioners' view, these entities would face no serious disruption from a stay or summary vacatur of the July 2018 Rule because these power plants—if they had been "prudent"—should have been able to initiate closure by the April of 2019 deadline provided by the CCR Rule. *Id.* This argument misses the mark in two respects.

First, as Intervenors' sworn declarations make clear, arranging for alternative disposal of hundreds of millions of gallons of wastewater can take years. *E.g.*, Intvs. Br., A4-5, A21-22, A82-83. Intervenors describe in detail each of the steps necessary to construct alternative disposal capacity. *Id*. This includes, among other things, designing a new impoundment or water treatment facility, procuring construction materials, and obtaining discharge permits. *E.g.*, A4-5; A18-19, A39-65, A73-75, A82-83, A89-92, A105-06. Indeed, EPA's concern that the original April of 2019 deadline was unachievable for some regulated entities was the reason the Agency promulgated the July 2018 Rule in the first place. 83 Fed. Reg. at 36,441.

Second, some power plants are not all power plants. Petitioners ignore that an entire category of impoundments—impoundments lined with clay—had no notice at all that they would be required to close until this Court issued its decision in *USWAG* in August of 2018. *USWAG* held that EPA's decision to classify impoundments "clay-lined" as "lined," and impose more lenient requirements on these units, was arbitrary and capricious. 901 F.3d at 449. It then vacated 40 C.F.R. § 257.71(a)(1)(i). This put all "clay-lined" units in the same bucket as

unlined units and subject to the same regulatory requirements. 901 F.3d at 449.

Critically, if the Court were to set aside the July 2018 Rule effective immediately, no waste could be placed in the dozens of clay-lined surface impoundments that are presently operating. Intvs. Br. at A9. Yet these entities had no reason to consider closure until *USWAG* was decided. *Id.* at A87-88. They are thus years away from developing the necessary alternative disposal capacity. *Id.*, *see also id.* at A9-11. An order setting aside the July 2018 Rule would cause serious disruption for these power plants.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion for a partial stay or for partial summary vacatur.

Respectfully submitted,

Date: January 29, 2019

JEFFREY BOSSERT CLARK
Assistant Attorney General
JONATHAN D. BRIGHTBILL
Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ *Meghan E. Greenfield*
MEGHAN E. GREENFIELD
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
P.O. Box 7611
Washington D.C. 20044
Tel: (202) 514-2795
meghan.greenfield@gmail.com
Counsel for EPA

OF COUNSEL:

LAUREL CELESTE
U.S. Environmental Protection Agency
Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Mail Code 2344A
Washington, D.C. 20460
Tel: (202) 564-1272

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 Century Schoolbook type, and that this Motion complies with the length requirements of Fed. R. App. P. 27(d)(2), as this Motion contains 5,106 words.

Date: January 29, 2019

/s/ *Meghan E. Greenfield*
Meghan E. Greenfield
Counsel for EPA

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief 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 all parties, who have registered with the Court's CM/ECF system.

Date: January 29, 2019

/s/ *Meghan E. Greenfield*
Meghan E. Greenfield
Counsel for EPA