ORAL ARGUMENT NOT YET SCHEDULED

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

City Utilities of Springfield, Missouri by and through the Board of Public Utilities,	)	**Case No. 24-1200 (consolidated with Case Nos. 24-1267, 24-1269, 24-1274, 24-1275, and 24-1276)**
Petitioner,	)	
v.	)	
United States Environmental Protection Agency, et al.,	)	
Respondents.	)	

PETITIONERS' JOINT PROPOSED BRIEFING FORMAT AND SCHEDULE

Pursuant to this Court's Order dated November 1, 2024, Petitioners in this action jointly submit the following proposed briefing schedule and format for these consolidated cases. Petitioners conferred with counsel for Respondents and Respondent-Intervenors on a proposed briefing schedule and format. All parties have agreed to a proposed briefing schedule; however, the parties were unable to reach an agreement on a proposed briefing format with respect to the number of words allotted to each party. Accordingly, Petitioners file this separate proposed briefing format:

Filing	Agreed Due Dates	Petitioners' Requested Word Limit
Petitioners' Opening Briefs	January 31, 2025	32,000 words total, divided into up to two briefs at Petitioners' discretion
Respondent's Answering Brief	April 18, 2025	32,000 words
Respondent-Intervenors' Answering Briefs	May 2, 2025	9,100 words
Petitioners' Reply Briefs	June 2, 2025	16,000 words total, divided into up to two briefs at Petitioners' discretion
Deferred Appendix	June 9, 2025	N/A
Final Briefs	June 23, 2025	See above

These consolidated cases challenge the United States Environmental Protection Agency's (EPA) final action entitled Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024) (the Rule). The agency proceedings in this case spanned multiple years and involved an Advanced Notice of Proposed Rulemaking, 85 Fed. Reg. 65,015 (October 14, 2020), a Proposed Rule, 88 Fed. Reg. 31,982 (May 18, 2023), and a Notice of Data Availability, 88 Fed. Reg. 77,941 (Nov. 14, 2023), each with its own notice and comment period.

The Rule is, in effect, two rules in one. In one part of the Rule, EPA responds to this Court's remand in *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018), regarding "legacy impoundments." 89 Fed. Reg. at 38,956. In the second part of the Rule, "[i]n addition to the revisions [] to address the *USWAG* decision," the Rule "add[s] a new category" of regulated activity, which EPA calls a "CCR management unit." *Id*. at 38,956, 39,035. EPA's rationale and record for the two parts of the Rule are different, and each presents distinct legal and record-based issues.

All parties agree that this case requires a word allotment greater than a single standard-length brief to fully and fairly litigate the complex issues. Six separate petitions for review of the Rule were filed and consolidated by the Court. The consolidated cases involve 17 State Petitioners, 24 owner-operator Petitioners (including a municipally owned utility, a State conservation and reclamation district, and local cooperatives), and 4 industry-group Petitioners.

Petitioners filed their separate Statements of Issues on September 20, 2024. *See, e.g.*, Docs. 2076053, 2076057, 2076073, 2076105, 2076115, 2076120. As set out in their respective Statements, Petitioners intend to raise a wide variety of statutory and record-based issues with respect to both parts of the Rule, which necessarily reflect the respective positions and responsibilities of the diverse range of Petitioners. For example, State Petitioners occupy a unique role under the statute

at issue here—the Resource Conservation and Recovery Act (RCRA)—which provides that States are primarily responsible for the types of solid waste management activities addressed by the Rule. Petitioners that are owner-operators of regulated facilities subject to the Rule will raise issues that relate to the diverse business models and physical properties of various Petitioners and their facilities.

As directed by the Court, Petitioners have endeavored to "specify the word allotment necessary for each issue." Doc. 2083243 at 2. The proposed number of words reflects Petitioners' efforts to avoid duplication in their briefing, while still addressing both the "legacy impoundment" and "CCR management unit" parts of the Rule. While the ultimate allotment and organization may differ—and some issues may be presented by only some groups of Petitioners—Petitioners would anticipate allocating the following words to the following broad categories of issues in their opening briefs, including the words necessary to provide a statement of the case, summary of argument, and other supporting sections on these issues:

1. EPA's regulation of CCR management units is outside of EPA's statutory authority under RCRA (8,000 words).
    a. The CCR management unit provisions of the Rule exceed EPA's statutory authority because, under the best reading of the statute, RCRA does not grant EPA the authority to issue national regulations for management of nonhazardous solid waste like CCR.

b. The CCR management unit provisions of the Rule infringe on Congress' direction that States, not EPA, define the solid waste management practices that constitute open dumping.

c. RCRA does not authorize EPA to regulate a facility without conducting an adequate assessment to conclude that such sites present a reasonable probability of adverse effects on health or the environment.

2. The Rule's regulation of CCR management units is impermissibly retroactive (5,000 words).

a. RCRA does not grant EPA the authority to impose new pre-closure and closure requirements on CCR units that completed closure under then-existing RCRA requirements.

b. EPA failed to consider and reasonably account for Petitioners' reliance interests and substantial investments in completing closures under existing RCRA requirements.

3. The Rule's regulation of the beneficial use of CCR is unlawful (8,000 words).

a. The Rule's regulation of the on-site beneficial use of CCR as a CCR management unit exceeds EPA's statutory authority under RCRA.

b. The Rule's regulation of the on-site beneficial use of CCR as a CCR management unit is arbitrary and capricious because EPA failed to consider all statutory factors when deciding to regulate beneficial use.

c. EPA's risk assessment for CCR fills, a form of beneficial use, was neither reasonable nor reasonably explained.

d. EPA unreasonably failed to acknowledge the conflict between the Rule and the beneficial use exemption in the existing regulations.

e. The Rule has unreasonable secondary retroactivity as to beneficial use and fails to account for Petitioners' reliance interests in the existing beneficial use exemption.

4. The legacy impoundment provisions of the Rule are unlawful (6,000 words).

a. The legacy impoundment provisions of the Rule exceed EPA's statutory authority because RCRA does not grant EPA the authority to regulate areas where waste was, but no longer is, disposed of.

b. EPA failed to demonstrate that sites where CCR has been removed present a reasonable probability of adverse effects on health or the environment.

c. EPA's regulation of sites where CCR has been removed is an unlawfully retroactive.

d. The legacy provisions of the Rule are inconsistent with the WIIN Act.

e. The Rule's regulation of legacy impoundments violates the Commerce Clause.

f. The Rule's regulation of legacy impoundments is arbitrary and capricious.

5. The Rule is arbitrary and capricious (3,000 words).

a. The record does not demonstrate a reasonable probability of adverse effects on health or the environment from CCR management units as a category.

b. EPA failed to consider contrary data provided to the agency.

6. The definitions in the Rule are unlawful (2,000 words).

a. The definitions in the Rule were promulgated without observance of statutory procedures in RCRA and the Administrative Procedure Act (APA).

b. EPA failed to explain the post-proposal and post-signature changes to the definitions in the Rule.

The total allotment of 32,000 words for Petitioners' opening briefs will help ensure that the Parties can adequately brief the numerous issues involved in both parts of the Rule, including their distinct issues, while avoiding duplication. Allowing up to two briefs for Petitioners is necessary in light of the respective roles and interests of the State and non-State Petitioners, as discussed above. Despite the number of parties, complexity of the issues, and the size and technical nature of the administrative record, the Petitioners' proposed word count is analogous to, and in

many cases less than, the word counts the Court has permitted for other complex litigation of nationally applicable environmental rules issued by EPA. For example, to litigate petitions for review of the "Affordable Clean Energy Rule," this Court authorized 52,800 words across four Petitioners' briefs, 52,800 words for Respondents, and 26,400 across four reply briefs. *See Am. Lung Ass'n v. EPA*, No. 19-1140 (Order dated Jan. 31, 2020) (Doc. No. 1826621). In the "Clean Power Plan" litigation, the Court permitted 42,000 words for principal briefs and 21,000 words for reply. *See West Virginia v. EPA*, No. 15-1363 (Order dated Jan. 28, 2016) (Doc. No. 1595922). In the ongoing challenges to EPA's National Emission Standards for Hazardous Air Pollutants, the Court permitted 24,000 words for up to two Petitioners' briefs, 24,000 words for Respondents, and 12,000 words for reply briefs. *See North Dakota v. EPA*, No. 24-1119 (Order dated August 29, 2024) (Doc. 2072376). And in litigation over EPA's power plant greenhouse gas rule, the Court recently permitted principal briefs up to 32,000 words in the aggregate, with 16,000 words in the aggregate for reply. *See West Virginia v. EPA*, No. 24-1120 (Order dated Aug. 9, 2024) (Doc. No. 2069206).

The Court's authorization of the proposed word count is warranted here for the same reasons that it was warranted in the aforementioned cases: litigation over EPA's nationally applicable rules is highly complex, and when many petitions for review are consolidated, as they are here, the parties require additional briefing space

in order to adequately raise and respond to all relevant arguments. That is particularly true here given the two-part nature of the Rule and the multiple issues that Petitioners plan to raise for each part of the Rule.

As for the Respondent-Intervenors' word limit, Petitioners propose allotting Intervenors a standard-length Intervenor brief of 9,100 words. *See* D.C. Circuit Rule 32(e)(2)(B)(i). Respondent-Intervenors moved to intervene in this case in a single motion and their interests are generally aligned, *see* Doc. 2064787; therefore, a single, standard-length brief is appropriate and will ensure efficiency in the briefing.

Petitioners respectfully request that the Court enter the Parties' agreed-to schedule and Petitioners' requested format for briefing these consolidated cases.

Dated: November 15, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing document complies with the typeface and type-volume requirements of the Federal Rules of Appellate Procedure and the rules of this Court. The document is set in 14-point Times New Roman font and contains 1,626 words.

Dated: November 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2024, I electronically filed the foregoing through the CM/ECF system, which will send a notice of filing to all registered CM/ECF users.

Dated: November 15, 2024

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