IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

PETITION OF NRG MD ASH MANAGEMENT, LLC c/o GenOn Mid-Atlantic, LLC 8301 Professional Place West Landover, MD 20785	)	
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, SITTING AS THE DISTRICT COUNCIL	)	CIVIL ACTION No. CAL18-11495
IN THE CASE OF S.E. 4675 (Brandywine Fly Ash Storage Site)	)	

PATUXENT RIVERKEEPER'S OPPOSITION TO PETITIONER'S MOTION FOR STAY PENDING APPEAL

INTRODUCTION

Patuxent Riverkeeper requests this Court DENY NRG MD Ash Management, LLC (hereinafter "NRG") Motion to Stay the Prince George's County District Council's (hereinafter "District Council") decision to deny NRG's coal ash dump special exception. First, the coal ash dump does not come to the court with clean hands and therefore should not benefit from the Court's equitable assistance. Second, a balance of the equities does not weigh in favor of NRG, and NRG fails to meet the four factor test for preliminary injunctions. Third, NRG fails to carry its burden to show that it will prevail on the merits, that it will be irreparably or even substantially harmed, or that it can operate the coal ash dump without violating federal, state and/or local law or that it can operate without harming the local community air and water resources, including nearby drinking water wells.

Put simply, NRG alleges that this Court should protect it from a "substantial" harm of $100,000 per month added cost of trucking coal ash to Virginia. NRG claims the neighboring community is "served" from 200 dump trucks a day rolling through the Brandywine neighborhood that now includes ball fields, a playground, walking trails and picnic areas and

then expanding the mound of coal ash from 260 feet (the capacity agreed upon since 1991) to 290 feet all while the coal ash dump is under a federal consent decree for its substandard construction, polluting local waters and threatening local well water. They are wrong.

Since July 11, 2015, NRG has illegally operated the coal ash dump without a special exception in violation of local law and now comes before this Court making unsubstantiated claims and outright misrepresentations to enlist this court's equitable powers to obtain a Stay. The coal ash dump is at approved capacity, Prince George's County notified NRG, a bona fide purchaser, that July 2015 was the end of the special exception and acted accordingly in denying NRG's late special exception application for very good reasons including NRG's illegal conduct and the harms and risks the substandard, at-capacity coal ash dump poses to local residents and neighbors. *See, Exhibit 1,* District Council Final Decision at 17-27 (hereinafter "Council Final Decision").

I. Petitioner's Motion to Stay

NRG decided to flout local zoning laws and operate its site without a valid special exception. Granting the Petitioner a stay under these conditions will allow it to continue to impose environmental and health impacts on the surrounding community for years to come while NRG slowly pushes its meritless challenges through the appellate process. By NRG's admission, every month it can delay the well-reasoned denial, it makes an extra $100,000 a month at the expense of the surrounding community. In addition, NRG also makes unsupported claims, misrepresentations and numerous misleading statements in support of its motion.

NRG MD Ash Mangement, LLC ("NRG") is a subsidiary of NRG Energy, Inc., a publicly traded company with a market value exceeding $10 billion. In the first quarter of 2018,

it declared revenues of $2.4 billion and earnings of $549 million..[1] NRG asks this court to stay the well-considered judgment of the Prince George's County Council to end the special exception so the coal ash dump can continue to perform its "important function" not described. Stay Motion @ 1. In addition, nowhere in its Motion for Stay does NRG tell the Court about the federal consent decree with the Maryland Department of Environment (MDE) that governs mandated upgrades, monitoring and studying of the extent of contamination to local waters. *See, Exhibit 2,* May 1, 2013 Consent Decree, Maryland Department of Environment v. Genon Ash Management, LLC, U.S. District Court for the District of Maryland, case no. 10-0826 (hereinafter "Consent Decree") at ¶29 (complaint filed due to excessive cadmium discharges).[2] Because NRG's Motion to Stay is riddled with inaccuracies, Riverkeeper must address them.

- **NRG had a special exception to operate and "(b)efore the end of that approved special exception, petitioner began the process for applying for a succeeding special exception." Stay Motion @ ¶2.**

Actually, Petitioner's special exception expired on July 10, 2015 and it did not apply for a new special exception until December 14, 2015 thereby operating an illegal coal ash dump while under a federal consent decree for excessive discharges of toxic heavy metals into surface and groundwater. County Opposition at 2; Consent Decree @ ¶29.

- **NRG was allowed to violate the terms of their special exception, local law and state law because "(i)t is standard operating procedure in (Prince George's County) to allow the *applicant* to continue to operate under the prior special exception until the new application is ruled upon." (emphasis supplied).**

[1] *See, https://finance.yahoo.com/news/why-nrg-energy-nrg-5-092009452.html.*

[2] "Cadmium is a heavy metal of considerable toxicity with destructive impact on most organ systems." Bernhoft, Robin A. , "Cadmium Toxicity and Treatment," *The Scientific World Journal* (2013).

The Consent Decree was entered into with NRG's corporate predecessor GenOn and by its terms applies to corporate successor NRG. *Exhibit 2* at ¶41. When NRG bought the property it bought with knowledge of this consent decree and its requirements to, *inter alia,* install liners, monitor drinking water wells, conduct ground and surface water testing, mediate excessive/illegal discharges, pay a $1.9 million penalty for those illegal discharges, cap closed portions of the dump and conduct a Nature and Extent of Contamination study which is due in June 2018. This expense undoubtedly was reflected in the price paid for the coal ash dump.

Besides being wrong (Council Opposition @ 2), it is irrelevant. By NRG's own, phony "standard operating procedure," only an *applicant* can have its special exception tolled. Since NRG was not an *applicant* for more than 5 months it was violating its special exception and operating its coal ash dump illegally. PRINCE GEORGE'S COUNTY, MD., CODE OF ORDINANCES §27-406 (2018) (hereinafter "*PG County Code*"); Md. Ann. Code Land Use §11-102.

- **NRG argues that the District Council was not "authorized" to review the examiner's decision. Stay Motion @ ¶6-7.**

The Hearing Examiner is an employee of the District Council. Council Opposition at 3. The District Council acted within its authority and complied with state law when it elected to issue a final decision in this matter on November 6, 2017. The alleged delay of 9 days that NRG bases its appeal was due to NRG's own failure to comply with ethics requirements until, at the earliest, September 27, 2017. *Id.* at 2. Under Maryland law, the ethics affidavit attesting to applicant not making payments to County officials must be filed "at least 30 calendar days before *consideration* of the application by the District Council." (emphasis supplied). Md. Ann. Code Gen. Prov. §5-835(c)(2). Therefore the earliest the Hearing Examiner could file its opinion for District Council approval was October 27, 2018. Under the Prince George's County Code, the Council has 30 days after the Examiner's opinion is "filed" (not "issued" as NRG erroneously claims) to take up the matter.

- **NRG asks the Court to stay the special exception denial because doing so would allow NRG to operate "the site consistent with the requirements of the previous special exception and within the framework of the relevant laws and regulations." Stay Motion @ ¶13.**

As noted above and below, the coal ash dump has operated in violation of federal, state and local laws for the better part of the last decade and it is unclear whether the coal ash dump continues to operate in violation of federal and state water pollution laws. In addition, it violated local law by

operating its coal ash dump without a special exception. While illegally operating, it was polluting the air of the neighborhood with diesel trucks and through wind blown coal ash. *Exhibit 1,* District Council Final Decision at 3, 26-27.

- **"Neither the county nor any other parties who argued below against the special exception will be harmed by the continuation of operations pending appeal." Stay Motion @ ¶14.**

Not true. Concerned citizen groups provided expert testimony, accepted by the District Council, of the myriad of harms to local residents from coal ash dump operations. *See, Exhibit 2,* Notice of Final Decision of the District Council at 17-27. Finally, evidence presented to the District Council which it accepted shows that the "investments" made in the substandard coal ash dump are not working, liners are leaking and ground water contamination continues in an area reliant on well water. *Id.* at 27.

- **NRG "invested" over $40 million into the site. Stay Motion @ ¶15.**

NRG did not "invest" their money in their coal ash dump, they were *legally obligated* under the consent decree to study the damage the substandard coal ash dump caused and start to repair it so it would no longer violate federal and state laws as it had for years. *Exhibit 2,* Consent Decree at ¶¶ 29-30, 42. That work remains ongoing.

- **"(T)he public is served by continuing to use a needed site that has been fully engineered for safe operations." Stay Motion at ¶18.**

No one in Brandywine is served by the continued operation of a coal ash dump with 200 trucks a day rolling through their peaceful neighborhood and park, spewing diesel exhaust they must breathe, mixed with air laced with coal dust blown from the dump. In fact, the coal ash dump has unduly burdened the residents of Brandywine for years to benefit NRG $100,000 per month. In addition, NRG's own evidence that it has found an alternative site for its coal ash shows that the

site is not "needed" as NRG asserts. Rather, NRG wants this filled-to-capacity coal ash dump to remain operational so it can squeeze more profits from it at the expense of Brandywine residents.

- **"The (coal ash dump) impacts on the neighborhood from the operation of the site have been well-known and fully addressed for years." Stay Motion @ ¶23.**

Patently false. First, NRG's "Nature and Extent of Contamination" study is supposed to quantify the extent of damage to land and water and it is not even completed. Second, Riverkeeper submitted significant evidence of harm to the surrounding community from diesel exhaust from 200 trucks a day, as well as dust and coal ash blowing from the dump. Local news have covered the impacts of this dump on local residents.[3] We will likely never know the full impact of decades of toxic metals leaching from the substandard dump or the harm it has done and is doing to local resident's lungs playing on nearby ball fields and playgrounds. Finally, NRG recklessly makes this assertion without ANY qualified expert providing such opinions. The Court should disregard all such unsupported, self-serving assertions in this appeal.

- **"The District Council's basis for denying the special exception was that the site had had an approved special exception for temporary use for long enough." Stay Motion at ¶24.**

Patently false. The District Council wrote a 27 page opinion detailing the reasons, including: (1) illegally operating the coal ash dump (*Exhibit 1* at 2); (2) NRG failed to carry its burden of proof to show it could operate "without real detriment to the neighborhood" (*Id.* at 11); (3) operated the site in violation of special exception for over two years by continuing to fill the coal ash dump (*Id.* at 13); (4) failing to protect and promote the health and safety of residents (*Id.*); (5) failing to protect against undue water and air pollution; (6) exceeding the agreed upon capacity special exception limits beyond 260 feet in height (*Id.* at 14); (7) a community park with multiple

[3] *See,* https://archive.org/details/Brandywine_Fly_Ash_Site.

ball fields, playground, and walking trail was added since the last special exception would be adversely impacted (*Id. at 27*); and it just keeps going.

The story that NRG tells as it requests this court to use its equitable powers to stay the District Council's well-reasoned opinion denying the special exception is pure fiction: The coal ash dump complies with all laws, NRG has "invested" millions into the site, there is no evidence of harm, in fact neighbors are served by the coal ash pit, but NRG will be "substantially" harmed by having to pay an additional $100,000 a month to properly dispose of its coal ash. The simple truth is that "status quo" for this coal ash dump is violating federal, state, or local law for the better part of a decade. Below is a more accurate summation of this case and why the court should DENY NRG's Motion to Stay.

II. Zoning History of the Property

On July 10, 2015, the ***final*** special exception to operate the Brandywine coal ash dump expired. During the pendency of the final special exception, the community built ball fields and playground in this Open Space Zone. *Exhibit 1*, District Council Notice of Final Decision at 1, 27. The purpose of Open Space is to provide low density development consistent with the General and Master Plans and "to provide for area which are to be devoted to uses which preserve the County's ecological balance and heritage, while providing for the appropriate use and enjoyment of natural resources." *PG County Code* §27-415(a) (1) (2018). Open Space Zones "promote the economic use and conservation of agriculture, natural resources, residential estates, nonintensive recreational uses, and similar uses." *Id.* at §27-425(a) (2) (2018). The community and County have done that by developing the Brandywine-North Keys Park. *Exhibit 1* at 17, n.13.

The coal ash dump is only permitted by temporary special exception in Open Space Zones. *PG County Code* §27-406(a) (2018). The most recent special exception, S.E. 4520, approved on July 10, 2007, stipulated:

> "This special exception shall expire eight years after final District Council approval action, or upon reaching site capacity to accept fly ash rubble, whichever date occurs first. Applicant shall notify DER and the District Council, in writing, upon cessation of the use." S.E. 4520, Condition 2. . *Id.* at 2

S.E. 4520 expired on July 10, 2015 – eight years after its approval. *Id.* Over 5 months after the expiration of S.E. 4520, NRG filed an application for a new special exception on December 14, 2015. *Id.* n. 5. After receiving the application, the Planning Staff "recommended disapproval of S.E. 4675" as the site plan did not comply with the condition included in the previous special exception that the height of the coal ash mounds not go above 260 feet above grade, the agreed upon capacity of this coal ash dump since 1991. *Id.* at 3.On September 28, 2017, the Zoning Hearing Examiner recommended approval of the application, S.E. 4765, including expansion of the coal ash dump to 290 feet high. *Id.*

On November 6, 2017, the District Council voted to consider S.E. 4675 and determine final approval. *Id.* Following oral argument, the District Council denied S.E. 4675 for numerous reasons, including NRG illegally operating the coal ash dump without a special exception, that the allegedly engineered "safe operations" is still leaking contaminants, posing a continuing risk of ground and well water contamination and that noise, dust and air pollution from continued operation beyond capacity would adversely affect the neighborhood. *Id.* at *27.* The Council considered the opinions of experts on air pollution from 200 diesel trucks a day dumping coal ash in an ever expanding and higher mountain that becomes airborne when the wind blows. The

District Council considered MDE findings that the site causes toxic pollutant discharges, and NRG admissions that there is ground and surface water pollution that is adversely affecting adjoining property owners. *Id.* at 22. The District Council's Final Decision was well within their authority to end the Brandywine coal ash dump and they did so in a timely, thoughtful and reasoned manner. NRG's challenges to it are meritless.

ARGUMENTS

I. The Court Should Deny Petitioner's Motion Because Petitioner's Inequitable Conduct Precludes Equitable Relief.

NRG requests this court to issue a stay, an equitable power within the court's sound discretion, to allow continued dumping of coal ash while this case winds its way through the many layers of appeal. But to be entitled to the court's equitable power, NRG must come to this court with "clean hands." *Mona v. Mona Electric Group, Inc.* 176 Md.App. 672 (2007). As shown above, NRG does not have clean hands before this court. The unclean hands doctrine "prevents a party guilty of inequitable conduct, relating to the matter in which relief is sought, from receiving equitable relief." *The Fischer Organization, Inc. v. Landry's Seafood Restaurants, Inc.,* 792 A.2d 349, 357 (Md. Ct. Spec. App. 2002) (citing *Hlista v. Altevogt,* 210 A.2d 153, 156 (Md. 1965). A party's hands become unclean when their conduct is "fraudulent, illegal, or inequitable." *Hlista v. Altevogt,* 210 A.2d 153, 156 (Md. 1965).

Petitioner has acted inequitably in the myriad of misstatements and unsupported self-serving statements in their Motion to Stay. *See, infra* pp. 1-6. Further NRG illegally operated their coal ash dump in violation of their special exception and with no legal justification whatsoever. Even accepting NRG's own "standard operating procedure" of allowing *applicants* to continue operations (despite its direct conflict with written ordinances and terms of their special exception), they were still illegally operating their coal ash dump from July – December 2015 because they

were not an applicant. *Exhibit 1,* District Council Final Decision at 2 n. 5. This violation comes on the heels of the May 2013 Consent Decree for state and federal violations, the nature and extent of damages for those violations are still under study. More accurately, Petitioner improperly operated the coal ash dump for the two years following the expiration of S.E. 4520 without authorization, i.e., illegally in violation of local law. *Id.* at 3; Md. Ann. Code Land Use §11-102 ("A violation of this division or of a local law enacted or regulation adopted under this division is a misdemeanor."). As NRG's conduct is both inequitable and illegal in relation to the matter in which relief is sought (the continued operation of the coal ash dump beyond its approved special exception) and the coal ash dump has operated in violation of federal, state and local laws, regulations and ordinances for the better part of the past decade, this behavior precludes engaging this court's equitable power to reward such behavior at the expense of the Brandywine community. *Winmark Ltd. V. Miles and Stockbridge,* 345 Md. 614 (1997) (Unclean hands doctrine protects courts from endorsing or rewarding inequitable conduct).

II. NRG's Motion for Stay fails because it failed to carry its burden and show it will be irreparably or substantially harmed, or that it will likely succeed on the merits. Neighboring and local residents will suffer if a stay is granted.

To the extent the Court decides that illegally operating its coal ash dump while under a federal consent decree does not make NRG's hand unclean and seeks to address the merits, Riverkeeper agrees with NRG that the best framework for determining whether to grant a stay is the preliminary injunction inquiry (likelihood to prevail, balance of harms, irreparable nature of NRG injury, public interest). *See,* Stay Motion at 5-10; Rochvarg, Arnold, Principles and Practice of Maryland Administrative Law, (2011) at §13.12 (Most important factors in considering a stay of an administrative order are irreparable harm, public interest and likelihood of success on the

merits).[4] *Dep't of Transp., Motor Vehicle Admin. V. Armacost*, 474 A.2d 191, 197(1984) (citing State Dep't v. Baltimore County. 383 A.2d 51, 55 (1997)).[5]

A. Petitioner will not suffer irreparable or substantial harm if the Court denies their Motion for Stay.

Petitioner contends that they will suffer "substantial" harm due to "the cessation of operations at the site" if the stay is denied because they will have to "transport[] the ash to alternative locations." Stay Motion at ¶ 17. First, the denial of the special exception was foreseeable given the terms of the previous special exception. Put simply, NRG was on notice that the old, substandard coal ash dump was at the end of its useful life and therefore was reflected in the price NRG paid to GenOn to acquire the asset. Second, the additional $100,000 in costs is negligible compared to the $549 million earnings NRG made in just the first quarter of this year. Finally, NRG can petition the Public Service Commission to increase rates for necessary infrastructure expenditures. *BGE v. Public Service Commission of Md.*, 75 Md.App. 87 (1988). The U.S. Supreme Court explained that monetary damages likely do not constitute irreparable harm: "(m)ere injuries, however substantial, in terms of money …necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

[4] As Petitioner noted, the Court of Special Appeals in *North Court Assocs., LLC v. City of Frederick Preservation Comm'n* included in a footnote that the standard for a stay and an injunction have different standards. Pet'r Motion for Stay at 5, ¶ 12; 2016 WL 3961384, no. 1 (Md. Ct. Spec. App. 2016). The Court does not explain what the different standard is. *See* 2016 WL 3961384, no. 1.

[5] Federal Courts employ a similar standard when determining whether to deny a Motion for Stay of an agency action. *See* Hamlin Testing Laboratories, Inc. v. U.S. Atomic Energy Commission, 337 F.2d 221, 221 (6th Cir. 1964); Unglesby v. Zimmy , 250 F.Supp. 714, 716 (N.D. Cal. 1965).

While Petitioner does assert they have a low probability of recovering this increased expense, their only support is the affidavit which does not explain why they believe they have a low probability of recovery. *See* Stay Motion at 7, ¶ 17; *Sampson v. Murray,* 415 U.S. at 90 (only a *possibility* of recovery is needed to negate irreparable harm). Therefore, the Court should find that Petitioner has not and will not suffer irreparable or even substantial harm. Indeed, NRG has suffered no harm at all as their "final" special exception, by its terms, was to end July 2015 yet they continued to use the coal ash dump beyond their legal entitlement for more than two years.

B. Denying the Motion for Stay is in the public interest and will protect the residents of Prince George's County from further harm.

The Court when balancing equities should consider "whether greater injury would be done to the defendant by granting the injunction that would result to the plaintiff from its refusal" as well as the injury to the public. *State Dep't of Health and Mental Hygiene v. Baltimore County,* 383 A.2d 51, 56 (1977). The coal ash dump has caused harm to the community. From heavy metal contamination of local waters to decreased air quality to the fear that such pollution will enter their well water and lungs unbeknownst to them. *See, e.g., Exhibit 1* at 19-21; *Exhibit 2,* Consent Decree at ¶ 30. The risk of water contamination, the air pollution from 200 trucks a day rumbling through their neighborhood, the air pollution from ever higher piles of coal ash blowing onto local residents playgrounds, ball fields and recreation areas all are exacerbated if the coal ash dump remains operational through the years of appeals that are likely to ensue from a Stay. As the District Council's Final Decision shows, the operation of the Brandywine coal ash dump has both environmental and health impacts on the community. These heightened risks, worsened air and water quality and threat to drinking water supplies should be mitigated by work done under the federal consent decree, not exacerbated by granting the stay.

C. Petitioner is Unlikely to Succeed on the Merits.

The Petitioner did not have a vested right to operate the coal ash landfill as the Hearing Examiner's recommendation of conditional approval was not final. Petitioner contends that they have a final special exception under which to operate the Brandywine Site because the District Council voted to consider it 39 days after the "issuance" of the Zoning Hearing Examiner's recommended conditional approval. Stay Motion at ¶20-21. First, the time limit for District Council consideration is 30 days after the examiner's decision is "filed" not issued. PG County Code §27-312(a)(2). NRG misstates the law because their argument fails otherwise. *See,* Council Opposition at 3, 10. Second, the District Council could not consider the Examiner's recommendation to conditionally approve the special exception until October 27, 2018 as NRG filed state mandated ethics affidavits late, September 27, 2017. *Id., see also Exhibit 1* at 5-6. Under state law, NRG must submit their ethics affidavits 30 days before the Council <u>*considers*</u> the matter. Md. Ann. Code Gen. Prov. §5-835(c)(2). As the District Council notes, " [p]ersons proceeding under [Board approval] prior to finality are not 'vesting' rights." Council Opposition at 11; *City of Bowie v. Prince George's County*, 863 A.2d. 976, 985 (2004) (altering language from *Powell v. Calvert County*, 795 A.2d. 96, 101 (2002)). Once the District Council could review the filed Examiner decision and accompanying ethics affidavits (on or after October 27, 2018), it quickly decided to issue a final decision on November 9th, held hearings and then issued the final decision April 12, 2018. Put simply, NRG cannot cause a delay by failing to file affidavits, then take advantage of this delay by interpreting a local ordinance to directly conflict with a state law. It makes no sense. But even assuming arguendo that the Zoning Hearing Examiner's decision was final on October 28, 2017, NRG can claim no right that vests because the limit of their right was

crystal clear: NRG's "right" to operate the coal ash dump ended on July 10, 2015. Thereafter, NRG was operating an unlicensed dump that was and is polluting the local community.

The record provides substantial evidence to support the District Council's decision to deny S.E. 4675. Judicial review of an administrative agency decision[6] "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 650 A.2d 226, 230 (1994).

The Code of Ordinances for Prince George's County describes seven required findings to be made before a special exception can be approved. PG COUNTY CODE §27-317 (2018). One of the required findings requires the special exception to be consistent with the twelve purposes of the zoning ordinance which includes "to protect and promote the health, safety … and welfare of the present and future inhabitants of the County", "to protect against … air and water pollution", and "to protect and conserve … natural resources." *Id.* at §27-102 (2018).

Air and Water Pollution

Petitioner is currently under a consent decree to address water pollution from the Brandywine coal ash dump. MDE regarding the Brandywine Site, which state determined that wastewater discharges into surface and ground water exceeded water quality standards for cadmium and/or selenium. *Exhibit 1,* District Council Final Decision at 20-21; *Exhibit 2,* Consent Decree, at ¶ 29. As for air pollution, Dr. Henry Cole testified that fly ash particles blown from the coal ash dump contain metals like arsenic, lead, chromium, cranium, barium and can go deep into the respiratory system. *Exhibit 1* at 19-20. The coal ash dump has a history of water and air

[6] The District Council acts as an administrative body when deciding zoning matters. Resp't. Opp. To Motion for Stay at 3; *County Council v. Brandywine Enterprise*, 711 A.2d 1346, 1347 (1996).

pollution, the District Council had evidence in the record to support a finding that "water pollution pose[s]a risk to the rural community". *Id.* at 27. In fact, NRG is obligated to provide studies pursuant to the consent decree that assess the risk their coal ash dump poses to the community – not *if* they have contaminated the neighboring properties, but *how much* contamination (and therefore risk) is present. *Exhibit 2,* Consent Decree at ¶¶58-60.

In order for the Petitioner to receive a special exception, the use cannot impact the health safety and welfare of the community. Dr. Sacoby Wilson testified that diesel exhaust and fly ash blowing from Brandywine can lead to asthma, asthma attacks, hospitalizations and that toxic heavy metals can be inhaled and can have developmental impacts or cause cancer. *Exhibit 1* at 20-21; Zoning Hearing Examiner Tr. 11/16/16, p. 170-71. The record includes abundant evidence regarding the detrimental health impacts this coal ash dump has and will continue to have on the community, the District Council has sufficient evidence to deny the special exception and did so.

CONCLUSION

The Court should deny the Petitioner's Motion for Stay because their illegal conduct in operating the Site following the expiration of the previous special exception precludes the Court from providing them relief under the Unclean Hands Doctrine. Further, the Court should also deny their motion because a balance of the equities favors the respondents as the petitioner will not be irreparably or substantially harmed, is unlikely to succeed on the merits, and the public will suffer from environmental and health impacts if a stay is granted.

Put simply, NRG's Motion to Stay exhibits a callous disregard for facts, the voice of the community, local law and Prince George's County District Council authority. It ignores or misrepresents these parties and the law which reflects its unwillingness to act equitably. *See, CityCo Realty Co. v. Slaysman,* 160 Md. 357, 366 (1930) (maxim: "He who seeks equity must do

equity"). For the foregoing reasons, Patuxent Riverkeeper urges this Court to deny NRG's Motion for a Stay.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Petition for Judicial Review and Petitioner's Motion for Stay, was served via first class mail on June 8, 2018 upon: Paul J Kiernan, Holland & Knight LLP, 800 17th Street, N.W., Suite 1100, Washington, DC 20006; Arthur J. Horne, Jr., Esquire, Shipley & Horne, P.A., 1101 Mercantile Lane, Suite 240, Largo, MD 20774; and Rajesh A. Kumar, 14741 Governor Oden Bowie Dr., Room 2055, Upper Marlboro, Maryland 20772.

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