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Before the Environmental Appeals Board
United States Environmental Protection Agency
Washington, D.C.

In the Matter Of Florence Copper, Inc.
Florence Copper Project
Underground Injection Control Program
Permit No. R9UIC-AZ3-FY11-1

UIC Appeal No. 17-03

Petitioners' Consolidated Reply to the Responses of EPA Region 9 and Florence Copper, Inc.

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Petitioners have submitted no new attachments with this consolidated reply.

I. Introduction

Region 9's UIC permit exempts 400 acres of a regional drinking water aquifer from protection against pollution from FCI's 2.2-acre production test facility (PTF). The Region argues that it has no regulatory obligation to revoke its 20-year old aquifer exemption; leaving the exemption in place supposedly causes no harm; and therefore the agency cannot be forced into the common sense decision of fitting the exemption to the project. Absent from this argument are direct answers addressing any of the following:

- Why, given that the project before Region 9 today is profoundly different than the project approved 20 years ago, the exemption remained the same.
- Why the agency is exempting such a large area for such a small project, especially given that the applicant initially requested a smaller exemption.
- Why, given the major changes in circumstances, Region 9 found it appropriate to revoke the 20-year old UIC permit but not the aquifer exemption.
- Why the agency's assessment of harm, which was limited to the small area actually impacted by this project, doesn't argue for revisiting the exemption.
- What defenses Region 9 has for pretending that an arbitrary portion of the regional water supply aquifer is copper-bearing and therefore eligible for exemption when the only resource in the aquifer is drinking water.
- Why Region 9 ignores that fact that much of the area exempted for mining is subject to municipal zoning which renders mining illegal.
- Why Region 9's practice in this matter is so at odds with how EPA has handled changes circumstance in many other UIC permits.

Respondents' continued silence on these issues is telling. Region 9 lacks a reasonable basis for its decision, which is clearly erroneous and must be overturned.

II. The Same Changed Circumstances Justifying Revocation of the 1997 UIC Permit Justify Revocation of the 1997 Aquifer Exemption.

Region 9's main argument supporting its decision to retain the 20-year old aquifer exemption is that there is no statutory mandate to do otherwise. But Region 9 revoked the UIC permit and required a new application without any statutory requirement to do so. It did so because of significant changes in circumstances, changes that similarly require revocation and reconsideration of the 1997 Aquifer Exemption, with corresponding changes to the UIC permit.

Conditions have changed substantially since the 1997 Aquifer Exemption was issued:

- The proposed mine site ("Site") is now in the geographic center of the Town of Florence's municipal limits.
- The closest downgradient residential development in 1997 was 10 miles away; today the Site is surrounded by existing and proposed residential development as part of a master-planned community.
- In 1997, the mine company controlled 10,000 downgradient acres, with no non-mining private owners within the proposed aquifer exemption boundary. Today, FCI controls approximately 1,300 acres directly surrounding the Site, which is surrounded by existing and proposed residential development.
- In 1997, there were no drinking water wells in the 10,000 downgradient acres and no risk that the area would serve as a future drinking water source. Today, the aquifer is relied upon for current and future drinking water uses by the growing Town of Florence and its residents.[1]

Region 9 determined that the 1997 UIC Permit should be revoked, based on these changed conditions,[2] but has never explained why it did not revoke the 1997

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[1] Petition for Review, at 14-15.

[2] Petition for Review, at 6 (citing Attachment 7: Region 9, *Letter re Response to Request for*

Aquifer Exemption for the same reason.[3]

Revocation is clearly within EPA's authority.[4] The lack of a statutory mandate doesn't justify Region 9's decision to retain the 1997 Aquifer Exemption. But a pressing policy consideration—protection of the Town's drinking water aquifer—absolutely mandates revocation and further review.

As Petitioners explained, EPA has reopened other aquifer exemptions to address changed circumstances and new issues.[5] Region 9 completely failed to discuss these precedents, much less explain why this case is any different.[6] And Region 9 can hardly deny that agencies have ample authority to revisit prior decisions based on new evidence.[7]

Modification and Transfer of UIC Permit (August 5, 2010)).

[3] Region 9 appears to have accepted FCI's self-serving conclusion that there are no changed conditions requiring re-evaluation of the aquifer exemption, with no reasonable basis for doing so. *In re Indeck-Elwood, L.L.C.*, 13 E.A.D. 126, 160 (2006) ("[The agency's] provision of only conclusory responses to the comments in its Responsiveness Summary and its failure to connect such responses to supporting documents in the record leave the impression that [the agency] was relying entirely on [the applicant's] analysis ... in the face of comments putting the adequacy of that analysis fairly at issue. Thus, we find that the record does not reflect a sufficient response by [the agency] to the comments or a reasoned basis for its conclusions ..."); *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 589 (2006) (conclusory reasons for decision are insufficient); *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357, 385-87 (2007) (response to comments that is unsupported by facts or analysis in the record is inadequate).

[4] Respondents did not address Petitioners' citation to the rule promulgating the UIC program, in which EPA expressly stated that aquifer exemptions may be changed or amended at any time. Petition for Review, at 36.

[5] Petition for Review, at 36.

[6] FCI's response to Petitioners' recent examples of exemption re-openings was to make technical arguments about the procedural stance of those cases. FCI Response at 21, note 8. The procedural status of those examples is not the point. The point is that EPA was either compelled by court order to reevaluate an existing exemption or was considering the continued viability of an existing exemption of its own accord. This supports Petitioners' contention that Region 9 has ample authority to review the exemption in this case.

[7] *New Castle County Airport Comm'n v. C.A.B.*, 371 F.2d 733, 734-35 (D.C. Cir. 1966) ("When not controlled by a regulation even an established approach or precedent may be modified or

Similarly, Respondents studiously ignored Petitioners' argument that public policy, as evidenced by EPA's recent rulemaking activities related to uranium in-situ leach mining sites, argues for the smallest exemption area possible.[8] EPA has repeatedly indicated that the aquifer exemption for in-situ leach mines like FCI's should be minimized to "protect as much of the aquifer surrounding the mining project as is practically possible."[9] Region 9 failed to address this policy concern, much less explain why it doesn't apply at this site. Rather, Region 9 attempted to distinguish uranium mine sites based on irrelevant factors, despite citing a uranium mine case in support of its own arguments here.[10] The fact is, EPA's own guidance advocates for the smallest exemption possible, thereby protecting the most underground drinking water possible, a logical and worthy goal that is fully consistent with the SDWA. Respondents never explained why that same goal doesn't apply here.

III. Petitioners Specifically Challenged Permit Conditions that Are Based on the 1997 Aquifer Exemption.

Petitioners pointed to specific terms and conditions in the UIC permit that rely upon and arise out of the 1997 Aquifer Exemption.[11] Petitioners' objections to these permit terms provides the Board has jurisdiction to review the 1997 Aquifer Exemption, despite Respondents' arguments.[12] In fact, Petitioners

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overruled. An administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent."); *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292, 1300 (D.C. Cir. 1975); *High Country Resources v. FERC*, 255 F.3d 741, 748 (9th Cir. 2001) ("existence of new information gave the Forest Service good reason to reevaluate the 1986 determination").

[8] Petition for Review, at 32-33.

[9] EPA Region VIII, Draft Discussion of Zone of Influence, Area of Review and Aquifer Exemption Boundary for Class III Injection Wells Used for In-Situ Leaching of Uranium, at 1-2 (June 20, 2008) (cited in SWVP Comments on FCI UIC Permit, at F-5); *see also* Petition for Review at 31-32 and attachments cited.

[10] Region 9 Response to Comments, at 16 and 38; Region 9 Response, at 18 (citing *Western Nebraska* in support of maintaining the 1997 aquifer exemption).

[11] Petition for Review, at 12-13.

[12] FCI Response, at 11-12 ("the Petition fails to "identify the contested permit condition or other

explained, with citations to the final UIC permit and FCI's application, that although the UIC permit imposes a "buffer zone" where no injection is allowed at the top of the oxide bedrock to be mined, it nevertheless allows mining contaminants to flow into the LBFU without penalty. Petitioners also explained that the UIC permit can only allow mining contaminants into the LBFU drinking water aquifer through Region 9's continued reliance on the 1997 Aquifer Exemption, which exempted the lower 200 feet of the LBFU from SDWA protection.[13] And the risk to the LBFU has been Petitioners' central concern since FCI's application was submitted, as clearly evidenced in the Petition for Review.

Respondents cannot dispute that the terms and conditions in the UIC permit allowing mining contaminants to pollute the LBFU without penalty or consequence are premised upon the areal and vertical extent of the 1997 Aquifer Exemption. Indeed, Region 9 agreed in its Notice of Stay that Petitioners have challenged permit sections II.B.1 (Exempted Zone) and II.B.2 (No Migration).[14] Petitioners, in turn, have every right to challenge the 1997 Aquifer Exemption that underpins those permit terms.[15] The continued validity of the 1997 Aquifer Exemption is within the Board's scope of review because it is a key component of, and necessary precedent to, Region 9's UIC permit decision. Respondents' argument lacks support, defies logic, and unreasonably seeks to preclude any challenge to an outdated and unsupportable exemption, regardless of the threat to drinking water sources.

FCI, especially, tries to downplay the relationship between the aquifer

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specific challenge to the permit decision," as required by 40 C.F.R. § 124.19(a)(4)(i)"); Region 9 Response, at 7 (approval of the existing aquifer exemption is not part of the permit decision before the Board).

[13] Petition for Review, at 12-13.

[14] FCI Response, Attachment 3, Region 9 Notice of Stay, at 2 (January 30, 2017).

[15] *In re J&L Specialty Products Corp.*, 5 E.A.D. 333, 339-340 (1994) (where a permit condition is based upon a NPDES listing decision, a petitioner can challenge specific permit conditions attributable to the listing decision because of legal or factual errors in the listing decision, since the listing decision forms the basis for the Region's action); *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 671 (7th Cir. 1991) (error in NPDES listing decision can be asserted as basis for reviewing permit amendment based on the listing decision).

exemption and its UIC permit.[16] But the 1997 Aquifer Exemption was a key component of FCI's application package, without which no permit could be issued.[17] And the Board's decision on this single permit, in these unique circumstances, will not establish precedent that would disrupt the UIC program, as FCI contends.[18] FCI has not here applied for a "replacement permit or permit modification" similar to the normal permit modifications often sought by permittees under any permit program. Rather, FCI sought a transfer of an existing UIC permit, which Region 9 rejected in favor of revoking the existing permit and requiring an entirely new permit application because of significant changed circumstances in the 20 years since the original permit was issued. A decision under those unique circumstances, with the unusual facts at issue here, where a Town has annexed and rezoned the Site for residential development before any mining has occurred, is not precedent-setting for the vast majority of existing or potential UIC applicants.[19]

IV. If only a "portion" of the 1997 Aquifer Exemption is impacted by FCI's PTF, then there is no basis for leaving in place the remainder of an outdated exemption for a 20-year old, now abandoned commercial mining proposal.

Region 9's argument that the "portion" of the 1997 Aquifer Exemption impacted by FCI's PTF meets applicable standards actually supports Petitioner's argument. If the only portion of the exemption relevant to FCI's PTF is the area immediately surrounding the 2.2-acre PTF well field,[20] then there can be no justification for leaving the rest of the 400-acre exemption in place. The commercial mining proposal for which the 1997 Aquifer Exemption was

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[16] FCI Response, at 9 ("the Permit implicates the 1997 aquifer exemption only in a most basic manner.").

[17] *See* Petition for Review, at 12-13.

[18] FCI Response, at 9.

[19] For this same reason, a rulemaking is not required before this issue can be decided, despite FCI's unsupported arguments. FCI Response, at 9, at 15-16.

[20] The "portion" subject to informal review by Region 9 was the Area of Review, containing the area within an approximately 500-foot radius of the PTF well field. Region 9 Response, at 9.

originally issued was abandoned. The only proposal currently before Region 9 is FCI's 2.2-acre PTF, which doesn't require exemption of the hundreds of acres covered by the 1997 Aquifer Exemption.[21] Indeed, even FCI's initial application for the PTF requested only a 500-foot aquifer exemption boundary based on the Area of Review.[22] The "portion" reviewed by Region 9 is the only part of the aquifer that arguably should be exempted for this project, requiring revocation of the existing, decades-old exemption.[23]

The 1991 Eighth Circuit case cited by Region 9 doesn't support its position. Rather, it demonstrates what Region 9 should have done in this case.[24] In *Western Nebraska,* the state exempted 3,000 acres of an aquifer for uranium in situ leach mining. EPA initially refused to approve all but 6.7 acres of the exemption that were relevant to the permittee's pilot project. Only after the pilot project proved successful did EPA approve the remaining exemption.[25] This is exactly what Region 9 should be doing in this case—limiting the approved exemption to the area needed for the PTF. Moreover, Region 9 ignored the key point in EPA's approval of the 3,000-acre exemption. Despite the plaintiff's opposition to the size of the exemption, EPA determined that the 3,000 acres exemption "correlated directly to [the permittee's] proposed mining activities."[26] The same

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[21] Respondents admit that this permit has nothing to do with commercial operations, which will require a separate application and review process if such operations are ever pursued. FCI Response, at 25 ("full-scale commercial mineral extraction on private property is not accommodated by the Permit"); Region 9 Response, at 5.

[22] Petition for Review, at 30 and Attachment 23: FCI Revised UIC Application, Attachment S (December 2013). Nothing in the record indicates why Region 9 did not accept FCI's request for the smaller exemption area and Respondents failed to address the issue.

[23] Petitioners have not argued that the relative size of the two areas is a factor Region 9 is required to consider under applicable statutes. *See* Region 9 Response, at 17 (mischaracterizing Petitioners' position). But the lack of a mandate to do so does not mean that the relative size of the two area is irrelevant to the Board's review.

[24] EPA Response, at 17-18 (citing *Western Nebraska Resources Council v. U.S.E.P.A.*, 943 F.2d 867 (8th Cir. 1991). Note that *Western Nebraska* is an Eighth Circuit decision, not Ninth Circuit as indicated by Region 9.

[25] *Western Nebraska,* 943 F.2d at 869.

[26] *Id.* at 871.

cannot be said by Region 9 here because most of the 1997 Aquifer Exemption covers vertical and horizontal areas that are wholly irrelevant to FCI's PTF operations or otherwise don't qualify for an exemption.

Finally, Respondents focus on risks to particular wells, instead of protection of the drinking water aquifer itself. The issue isn't how long it will take a given contaminant to reach an existing drinking water well. The issue is the size of the exemption being granted for a small pilot project when the surrounding aquifer serves as current and future source of drinking water for a growing city. Common sense and the policy considerations of the SDWA mandate that any exemption be as small as possible so that the largest possible portion of the aquifer is protected.[27]

V. The 1997 Aquifer Exemption Lacks Justification in the Record and is Legally Indefensible.

Region 9 hasn't demonstrated that the 1997 Aquifer Exemption is still legally defensible. The only basis for an aquifer exemption in this case is 40 C.F.R. § 146.4(b)(1)—a demonstration that, "considering their . . . location," the aquifer contains commercially producible minerals. But the exempted area includes the LBFU, an aquifer unit that contains no producible copper, but is the primary drinking water supply for the Town of Florence. Nothing in the record or Respondents' briefs justifies exemption of the LBFU. Moreover, much of the ore body in the exempted area is subject to local zoning that renders mining illegal, thereby eliminating any consideration of that area as mineral producing.

In 1997, Region 9 concluded that the LBFU does "not contain commercially-producible quantities of copper,"[28] but went on to include the bottom 200 feet of the LBFU within the 1997 Aquifer Exemption. As Petitioners have explained, nothing in the administrative record for the 1997 Aquifer Exemption explains why the exemption includes the bottom 200 feet of the

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[27] *See also* Petition for Review, at 13-21.

[28] Petition for Review, at 23; Attachment 29: Region 9, *Statement of Basis for a Draft Permit and Proposed Aquifer Exemption*, at 7 (February 1997).

LBFU.[29] Neither Region 9 nor FCI responded to this issue with anything new to justify this boundary.

If, as Region 9 claims, the entire aquifer beneath FCI's property should be considered "mineral-producing,"[30] then why did it only include the bottom 200 feet of the LBFU within the 1997 Aquifer Exemption? Region 9 has studiously avoided any explanation of the exemption's vertical boundary because there is no basis in the record for it. That alone is enough to require revocation and reconsideration of the exemption.

Region 9 also misses the point regarding Petitioners' argument that the oxide ore body outside of the State Land parcel is subject to local zoning that makes mining illegal. Region 9 wrongly focuses on the fact that it is legal for FCI to mine on the State Land parcel because that parcel is exempt from local zoning.[31] Petitioners' contention is that it is illegal to mine within the area of the 1997 Aquifer Exemption subject to the Town of Florence's zoning laws. These changes became effective after the 1997 Aquifer Exemption was issued, another changed circumstance requiring reevaluation of the exemption. And proper evaluation of that exemption would find no legal or factual basis for the exemption outside of the State Land Parcel, because the aquifer cannot be considered "mineral-producing" if it is illegal to mine the aquifer.[32]

Region 9's other response on this issue similarly misses the point. Petitioners have never asked Region 9 to enforce local zoning and land use ordinances as part of the UIC program.[33] The point is that changes in those laws undermine Region 9's 1997 conclusion that the aquifer is mineral producing. Mining was legal in 1997 on all of the land subject to the exemption. That is not

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[29] Petition for Review, at 23-24.

[30] Region 9 Response, at 12.

[31] Region 9 Response, at 16.

[32] Laws that make mining illegal are also a clear example of circumstances where FCI's argument—that once an aquifer is found to be mineral producing it "remains so until it is mined"—fails. FCI Response at 19-20.

[33] Region 9 Response, at 16 and Response to Comments at 20.

the case now. Petitioners' argument goes to what it means for an aquifer to be "mineral-producing" in the face of laws making mining illegal, an issue Region 9 has expended great effort to avoid.

Moreover, Region 9 appears to be improperly deferring to FCI's arguments regarding its right to mine. Contrary to the explanation provided in FCI's response,[34] the Pre-Annexation Development Agreement doesn't contain any language whatsoever about mining, except by reference to a 2003 zoning ordinance that limits mineral exploration to its historic scope, location and extent within an industrially zoned district, and doesn't allow any new nonconforming structures of any kind.[35] FCI's predecessor petitioned for, expressly consented to, and received rezoning in 2007 that rezoned the property as residential, eliminated all references to mining and expressly superseded the 2003 zoning. Except for the State Land parcel where the PTF is located (which is exempt from local zoning), FCI lost its right to mine when the property was rezoned in 2007. FCI has repeatedly admitted that it has no legal right to mine on the property without rezoning, as it twice sought rezoning and twice lost over a two-year period. In any case, unless and until the state court rules that FCI has a legal right to mine the property, and that the right to mine includes commercial operations, this body is required to defer to the legislative and administrative determinations of the agency having jurisdiction to enforce zoning laws: The Town of Florence. The Town of Florence has determined that FCI has no right to mine on the property subject to the Town's zoning jurisdiction and that determination is presumptively valid and binding on this body until a court of last resort says otherwise.[36] Region 9 should either defer to the Town's

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[34] FCI Response, at 24-25.

[35] FCI Response, Attachment 10.

[36] Great weight is to be accorded to the construction of a zoning ordinance by the officials charged with enforcing it. *Desert Outdoor Advertising v. City of Oakland*, 506 F. 3d 796 (9th Cir. 2007); *Kubby v. Hammond*, 68 Ariz. 17 (1948); *Circle K Corp. v. City of Mesa*, 166 Ariz. 464 (App. 1990). Public policy favors elimination of nonconforming uses. *Gannett Outdoor Co. v. City of Mesa*, 166 Ariz. 459 (App. 1989); *City of Glendale v. Aldabbagh*, 189 Ariz. 140 (1997); *Jones v. Coconino County*, 201 Ariz. 368 (App. 2001) (nonconforming uses are disfavored in the law and cannot be enlarged, expanded or moved from the site where they existed at the time of the passage of the zoning ordinance). Only uses in actual existence when the zoning ordinance is

reasonable zoning determination or place its review of the aquifer exemption and the permit on hold until the issue is decided by the courts.

VI. Respondents' Red Herrings Deserve no Weight in the EAB's Decision Process.

Respondents make several arguments that have nothing to do with this case. The Board should ignore these arguments as misrepresentations of Petitioners' positions or irrelevant attempts to muddy the waters:

- Region 9 argues about "short-circuits" in the bedrock, an issue Petitioners have not raised as having any relevance here.[37]

- Region 9 argues that UIC considerations do not "implicate private property rights."[38] Petitioners never said they did. The argument is that local zoning that makes mining illegal on FCI's privately-held land requires reconsideration of the decision that the aquifer can be "mineral producing."

- FCI spends the latter part of its response arguing about the relative priority of residential uses of groundwater over mining uses.[39] Petitioners have not raised groundwater rights as an issue, the Board has no jurisdiction over water rights, and FCI's arguments in this regard are irrelevant to the issues before the Board.

VII. Conclusion

Despite Respondents' complaints to the contrary, Petitioners have demonstrated that Region 9's response to their comments on the draft permit was inadequate and that Region 9's decision to issue the permit in reliance on an

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passed are legal nonconforming uses; intended uses are irrelevant. *Rotter v. Coconino County*, 169 Ariz. 269 (1991); *Phoenix City Council v. Canyon Ford, Inc.*, 12 Ariz. App. 595 (1970).

[37] Region 9 Response, at 9-10.

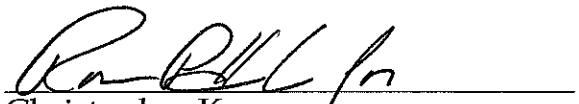
[38] Region 9 Response, at 16.

[39] FCI Response, at 21 to 26.

outdated and unsupportable aquifer exemption was clearly erroneous. For their part, Respondents' silence on numerous key issues demonstrates that Region 9 lacks a reasoned basis for its decision.

Respondents have done nothing to justify Region 9's decision to retain a 20-year old aquifer exemption for a commercial mining proposal that was abandoned years ago. Petitioners' arguments are based on facts, legal requirements, and policy considerations that justify remand to the agency with direction to:

- revoke the 1997 Aquifer Exemption;
- require FCI to submit an application in support of an exemption designed specifically for the proposed PTF; and
- revise the UIC permit as necessary to reflect the smaller exemption area.



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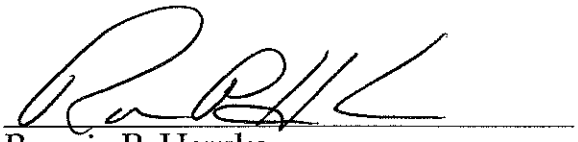

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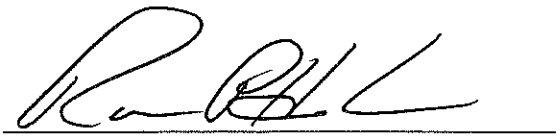
VIII. Statement of Compliance with Word Limitation

This petition complies with 40 C.F.R. §§ 124.19(d)(3). The petition contains 4,063 words, using the word count function in Microsoft Word and excluding the table of contents, table of authorities, table of attachments, this statement of compliance, and the certificate of service.



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IX. Certificate of Service

I certify that a copy of this Consolidated Reply was served upon the following parties by electronic mail on April 24, 2017:

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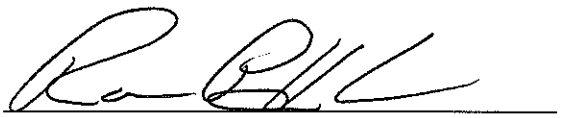

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