Team #20

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

September Term, 2017
Docket Nos. 17-000123 and 17-000124

ENERPROG, L.L.C.,

Petitioner,

and

FOSSIL CREEK WATCHERS, INC.,

Petitioner

- v. -

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Consolidated Petitions for Review of a
Final Permit Issued Under Section 402 of the Clean Water Act

BRIEF OF PETITIONER FOSSIL CREEK WATCHERS, INC.

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JURISDICTIONAL STATEMENT

The following issues deal with both state and federal questions. Both petitioners, EnerProg L.L.C. and Fossil Creek Watchers, Inc. appeal the decision of the Environmental Appeals Board denial of their petitions. The Environmental Protection Agency and the State of Progress have both issued permits to EnerProg for its coal-fired power plant, under sections 401 and 402 of the Clean Water Act. Petitioners each appeal separate parts of the permits as they exist, and the denial of the Board to hear the petitions. The EPA Region XII issued a federal National Pollutant Discharge Elimination System permit on January 18, 2017. On April 1, 2017, EnerProg and Fossil Creek Watchers both filed petitions for review of this permit pursuant to 40 C.F.R. part 124. The Appeals Board extended the filing deadline for both parties, and both petitions were filed in a timely manner in accordance with the extension.

STATEMENT OF THE ISSUES

I. Whether the Final Permit properly included conditions requiring closure and remediation of the coal ash pond required by the State of Progress in the Clean Water Act section 401 certifications.

   a. Whether the Environmental Protection Agency was required to include all of Progress's certification conditions in the Clean Water Act section 401(d) permit.

   b. Whether "appropriate requirements of State law" independently violate the requirements for a Clean Water Act section 404 permit.

II. Whether the April 25, 2017 Environmental Protection Agency Notice suspending certain future compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water.

III. Whether the Environmental Protection Agency Region XII may rely on Best Professional Judgment as an alternative to require zero discharge of coal ash transport wastes, independent of the applicability of effectiveness of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines

IV. Whether National Pollutant Discharge Elimination System permitting requirements apply to EnerProg's pollutant discharges into the Moutard Electric Generating Station ash pond, in light of the EPA's July 1980 suspension of the provision of 40 C.F.R. section 122.2 that originally included waste treatment systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States.

V. Whether the ash pond closure and capping plan requires a permit for the discharge of fill material pursuant to section 404 of the Clean Water Act.

STATEMENT OF THE CASE

All parties take exception to some part of the denial for petition of the Environmental Appeals Board. EnerProg L.L.C. is the original petitioner, and the Environmental Protection Agency (EPA) the respondent. Fossil Creek Watchers, Inc. filed for review of the permit, adding itself as a petitioner in the case. Although the issues have been broken down into several parts, the crux of the arguments can be simplified that EnerProg, Fossil Creek Watchers, and the EPA take issue with the permitting, which the Appeals Board then refused to hear. EnerProg believes that the EPA must review the state of Progress's separate requirements under the Clean Water Act (CWA) separate from its CWA section 401 and 402 permits. They also believe that the EPA cannot rely on any Best Professional Judgement standard. EnerProg and the EPA also agree on several issues, each in direct opposition to what Fossil Creek Watchers contends. EnerProg and the EPA attempt to explain that effective notice was given for suspension of compliance deadlines, that discharge into ash ponds are not subject to effluent limits, and that no section 404

permit under the CWA is required in this case. Fossil Creek Watchers agree with the original permit, concerning the acceptance of Progress's independent requirements for the section 401 permit, the decision of suspending the change of permit compliance deadlines, and that the Best Professional Judgement standard is appropriate. Fossil Creek Watchers argue the Board's finding on the final two issues. The Board found that the National Pollutant Discharge Elimination System (NPDES) permit was not required for the Moutard Electric Generating Station (MEGS) ash pond, and that EnerProg is not required to apply for a CWA section 404 permit.

STATEMENT OF THE FACTS

EnerProg operates a coal-fired steam electric power plant located in the town of Fossil, within the state of Progress. (R. at 6). Fossil Creek Watchers, Inc. is an environmental group in Progress, concerning itself with the town of Fossil and the Fossil Creek in Progress. (*Id.*). EnerProg has filed for a renewal of its Moutard Electric Generating Station (MEGS) permitting with the Environmental Protection Agency (EPA), because the facility is subject to the EPA effluent limitation guidelines as a "Steam Electric Power Generating Point Source Category." (R. at 7). The MEGS has an intake flow of less than 125 million gallons per day, a closed-cycle cooling system, and a wet fly ash handling system with a wet bottom ash handling system. (*Id.*). The ash handling system uses water to push ash solids to an ash pond, where they are treated, and subsequently discharged into the Moutard Reservoir. (*Id.*). The ash pond was created by purposefully damming the Fossil Creek, a perennial tributary of the Progress River, which is a navigable-in-fact interstate body of water. (*Id.*). Prior to this action, Progress had set in place its own legislation, the Progress Coal Ash Cleanup Act (CACA). (R. at 8). Progress has issued

certification for EnerProg under section 401 of the CWA for its renewal of the MEGS NPDES permit, while including the requirements under the CACA. (*Id*.).

SUMMARY OF THE ARGUMENT

Fossil Creek Watchers support some parts and challenge several other parts of the permit as it was left by the Appeals Board. Progress's CACA requirements should be left as part of the CWA section 401 permit, and the original dates set by Progress should be left in place. The Effluent Limitation Guidelines (ELGs) should be affirmed by this court, as should be the decision to allow the EPA's standard of Best Professional Judgement as an alternative ground to require MEGS to implement dry handling of the wastes. However, the permit as it exists is illegal, because it authorizes the coal plant's discharges of ash pollutants without being subject to the CWA effluent limitations. Finally, the provisions of the permit that authorize coal ash solids to remain in the ash pond after its required closure should not be allowed in the permit without requiring EnerProg to attain a CWA section 404 dredge and fill permit.

STANDARD OF REVIEW

This court reviews mixed questions of law and fact under an abuse of discretion standard. The standard of review is abuse of discretion, because EnerProg claims that the Environmental Appeals Board failed to correctly apply the law. *Koon v. United States*, 518 U.S. 81, 100 (1996). This court must take into consideration whether the Appeals Board overstepped on a matter of discretion. *De novo* may only be considered if the organization in question is not congressionally authorized to administer the CWA. *American Rivers v. FERC*, 129 F.3d 99 (2nd Circ. 1997). Because the EPA is a congressionally authorized administrator, then the standard of review

becomes abuse of discretion. *Chevron USA, Inc. v. Natural Resources Defense Council,* 478 U.S. 837 (1984).

ARGUMENTS

I. The Final Permit properly included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the Clean Water Act.

The Environmental Appeals Board was correct when it rejected EnerProg's arguments regarding the first issue. The inclusion of the ash pond closure and capping conditions are "appropriate requirements of State law" as considered by the Clean Water Act (CWA) section 303. The State of Progress's Coal Ash Cleanup Act (CACA) meets the requirements of CWA section 303, and is related to achieving effluent limitations. This issue has been split into two sub-issues.

a. The EPA has no jurisdiction to determine the consistency of Progress's certification conditions with the Clean Water Act.

EnerProg has the burden in this case to prove that the ash pond closure and capping provisions required by the permit under the CACA are unreasonable and not at all related to water quality under section 401(d) of the CWA. Then, EnerProg and the EPA would both need to show that the EPA has discretion to reject the conditions set by a state in any case, regardless of that outcome.

One purpose discussed within the CWA is to allow states to impose more stringent water quality controls than what is at a base minimum required by the CWA. *See* 33 U.S.C. §§ 1311 (b)(1)(C), 1370. The CWA § 303, 33 U.S.C. § 1313 explains that the Act allows revision of effluent limitations or water quality standards, "only if such revision is subject to and consistent with the antidegredation policy established under this section." *PUD No. 1 v. Washington Dep't*

of Ecology, 511 U.S. 700 (1994) citing CWA § 1313 (d)(b)(4). A section 401 permit under the CWA additionally explains that the Environmental Protection Agency (EPA) will certify that any NPDES permit will also comply with the state's quality standards. 33 U.S.C. § 1314.

The CACA has, before this action, been in place in the state of Progress, and is not something the EPA can reject as a part of their licensing authority now. When considering section 401(d) of the CWA, it explains in relevant part, "[a]ny certification provided under this section … *shall* become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. §1341(d) (emphasis added). The *American Rivers* case discusses what this means: "[t]his language is unequivocal, leaving little room to argue that it has authority to reject state conditions … absent a clearly expressed legislative intention to the contrary…" *American Rivers v. FERC*, 129 F.3d 99 at 107 (2d Cir. 1997). The court in *American Rivers* found that the express language of the CWA required that any conditions imposed on a certification by the state becomes a condition on the subsequent federal license issued by respondent, and that NO authority to reject such conditions was granted. The EPA may claim that this case is distinguishable because the party involved was the Federal Energy Regulatory Commission (FERC) and is afforded less power than the EPA is. However, the Second Circuit Court did not distinguish the difference between the language of the CWA when applied to any administrative body. The Second Circuit was clear when it explained that the conditions of the state's water quality certification must be included without modification, and the district court was correct to apply this finding to the EPA in this case.

This outcome has been found by courts more recently, and in direct application to the EPA. In *Lake Carriers Association*, the DC Circuit Court of Appeals explained the concept in

several ways. "[petitioners] infer that 'section 401's certification process is designed to *preserve* state authority, not expand it' Pet'rs Br. 48. Whatever the validity of that inference, it still does not explain how the text of section 401 might be read to permit EPA to alter state certifications." *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1 at 9-10 (D.C. Cir. Ct. of App. 2011). Summarizing its findings, the court later states "[i]n sum, given the case law and arguments that EPA had before it, the agency correctly concluded that it did 'not have the ability to amend or reject conditions in a [state's] CWA 401 certification.'" *Id*. at 10. There are other cases with identical findings that this court can look to for guidance. *See generally: Ala. Rivers Alliance v. FERC*, 325 F.3d 290 (DC Circ. Ct. of App. 2003) (explaining that the CWA expressly requires the incorporation of state-imposed water quality conditions into its licenses.); *S.D. Warren Co. v. Main Dep't of Envtl. Prot.*, 2005 ME 2007 (ME Sup. Ct. 2005) (explaining that state-imposed water quality certification conditions must be included); *Mattaponi Indian Tribe v. Commonwealth*, 261 Va. 366 (VA Sup. Ct. 2001) (finding that no federal court or agency can review the state permit); *U.S. v. Marathon Dev. Corp*, 867 F.2d 96 (U.S. Ct. of App. for the 1st Cir. 1989) (explaining that a federal court or agency cannot review a state permit in relation to CWA licenses).

b. The "appropriate requirements of State law" still independently violate the requirements for a CWA section 404 permit.

Although the EPA has no say regarding whether or not to apply the CACA requirements to the EnerProg licenses, that does not mean that the requirements are enough. EnerProg was issued a permit under section 401 of the CWA, the National Pollutant Discharge Elimination System (NPDES) permit. (R. at 6). But, the company will still be in violation of the CWA if they do not file for a section 404 permit as well. The record establishes that the effects of Enerprog's

sluice ash could affect Fossil Creek and Progress River, a navigable-in-fact interstate body of water. (R. at 7). A CWA section 404 permit must be applied for and awarded by an administrator if there will be a "discharge into navigable waters at specified disposal sites." 33 U.S.C. §1344(a). The section further specifies to explain that:

> any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. §1344 (f)(2).

The Supreme Court of the United States has addressed this issue. In *Coeur Alaska*, the majority recognized what a section 404 permit is, and when one must be sought. The U.S. Army Corps of Engineers and the EPA have defined discharge of fill material to include the placement of slurry, tailings, or similar mining related materials. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 at 14 (2009). Although the section 404 permit was not the permit in issue in the *Alaska* case, the Court explained that the Corps and the EPA both agreed that the mining's slurry met their regulatory definition of fill material, and that it required a section 404 permit. EnerProg has admitted that sluice ash and solids will be discharged into the Fossil Creek. (R. at 7). The conclusion writes itself, EnerProg should be required to apply for a section 404 permit based solely on the definitions in section 404, as well as under binding decisions on this court. For further analysis on this argument, please see issue V.

II. EPA Region XII may rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash transport wastes, independent of the applicability or effectiveness of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines.

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act declared a national goal of eliminating discharge of pollutants into navigable waters by 1985 through a system of effluent limitations guidelines (ELGs) and NPDES permits that set technology-based discharge limits for all categories and subcategories of pollution point sources. 33 U.S.C. § 1251(a); 33 U.S.C. § 1251(a)(1). The limitations are intended to "reflect the capabilities of available pollution control technologies to prevent or limit different discharges rather than the impact that those discharges have on waters." *Texas Oil & Gas Ass'n v. United States EPA*, 161 F. 3d 923, 928 (5th Cir. 1998). ELGs are not enforceable against individual dischargers; rather, ELGs are transformed into the obligations (including a timetable for compliance) of the individual discharger through incorporation into an NPDES permit. *Texas Oil & Gas Ass'n v. United States EPA*, 161 F.3d 923, 928 (5th Cir. 1998) (citing *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025, 48 L. Ed. 2d 578 (1976)). In the event that the EPA has not yet promulgated ELGs for the point source category or subcategory, the EPA "must determine on a case-by-case basis what effluent limitations represent the BAT level, using its "best professional judgment." 40 C.F.R. § 125.3(c)-(d); *Texas Oil & Gas Ass'n*, 161 F.3d at 928-29. The EPA "does not have unlimited discretion in establishing permit effluent limitations"; rather, the EPA must consider the statutory factors enumerated in 33 U.S.C. § 1314(b). *See* 40 C.F.R. § 125.3(c). (d); *Citizens Coal Council v. United States EPA*, 447 F.3d 879 (6th Cir. 2006). Courts reviewing permits issued on a best professional judgment basis must review the same factors in establishing the national effluent limitations. *Natural Resources*

Defense Council, Inc. v. United States EPA, 966 F.2d 1292, 1425 (9th Circ. 1992). These factors include:

> [C]onsideration of the total cost of application of technology currently available…, consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and… the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.
>
> 33 USC § 1314(b)(1)(B).

The effluent from the MEGS coal ash pond contains toxic pollutants including mercury, arsenic, and selenium, which are not regulated by the 1982 ELGs. *See* 40 C.F.R. 125, 423. In the event that the 2015 ELGs were eliminated or vacated, the effluent limitations are determined using the best professional judgment. The factors contained in 33 USC § 1314(b)(1)(B) weigh in favor of the effluent limitations set by the permit writer. MEGS is profitable to adopt dry handling of these wastes with zero liquid discharges with no more than a twelve cents per month increase in the average consumer's electric bill. The benefits to be achieved from the application of the zero-discharge requirement are consistent with the goal of CACA, which is to prevent public hazards associated with the failures of ash treatment pond containment systems. EnerProg has not demonstrated that compliance with the November 1, 2018 deadline is infeasible and the factors weigh in favor of reliance on the permit writer's best professional judgment. (R. at 11). The permit writer required MEGS to implement dry handling of bottom and fly ash wastes in order to achieve zero discharge of toxic pollutants associated with the wastes by November 1, 2018.

III. The April 25, 2017 EPA Notice suspending certain future compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water.

The CWA prohibits discharge of pollutants unless one of the several enumerated statutory exceptions applies. *See* 33 U.S.C. § 1311(a). An exception to the ban on discharge of pollutants exists where a polluter is issued a permit pursuant to the National Pollution Discharge Elimination System (NPDES), authorizing it to discharge pollutants at levels subject to conditions within the permit. *See* 33 U.S.C. § 1342. The CWA provides that the Environmental Protection Agency (EPA) may delegate authority to administer the NPDES permitting system to a state or regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the local agency operates satisfies certain criteria. *See* 33 U.S.C. § 1342(b).

The State of Progress issued a certification pursuant to section 401 of the CWA for the renewal of the MEGS NPDES permit. (R. at 8). A condition of the Progress Section 401 certification is that EnerProg must cease operation of its ash pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020. (*Id*.). This condition is required to comply with the Progress Coal Ash Cleanup Act (CACA), a state-enacted law requiring assessment, closure and remediation of substandard coal ash disposal facilities in the State of Progress. (*Id*.). The 2015 revised Effluent Limitation Guidelines for the Steam Electric Power Generating Point Source Category, 40 C.F.R. part 423 established a zero-discharge requirement for toxic discharges associated with bottom ash and fly ash with an initial compliance deadline of November 1, 2018. (R. at 6). On April 12, 2017, EPA Administrator Scott Pruitt issued a Notice

purporting to postpone the compliance deadlines for the 2015 Steam Electric Power Generating Point Source Categories ELGs. 82 Fed. Reg. 19005 (Apr. 25, 2017), (R. at 6-7).

EnerProg's issued NPDES permit requires it to cease operation of its ash pond by November 1, 2018. EPA Administrator Pruitt's April 12, 2017 Notice is insufficient to modify the compliance deadlines for three reasons: (1) the EPA lacks legal authority to alter the compliance deadline; (2) EnerProg's NPDES permit cannot be modified in this manner; and (3) states can impose more stringent limitations than federal regulations require.

a. The EPA lacks legal authority to alter compliance deadlines.

The EPA lacks legal authority under the Act and the Administrative Procedure Act (APA) to alter compliance deadlines for standards lawfully promulgated under 33 U.S.C. § 1311(b)(2). The EPA is a federal agency and is a creature of statute. *Michigan v. Environmental Protection Agency*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). "[The EPA] has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Id.* In a recent decision, the D.C. Circuit concluded that the EPA lacks authority to stay a rule suspending compliance deadlines under the Clean Air Act. *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017). The D.C. Circuit Court held that an agency's decision to reconsider a regulation is subject to the APA, including its requirements for notice and comment. 5 U.S.C. § 553; (*Id.* at 5).

The legal authority cited by the EPA in the notice purporting to postpone compliance dates, section 705 of the APA, authorizes an agency only to "postpone the effective date of an action taken by it, pending judicial review." 5 U.S.C. § 705. The plain meaning of the text of the APA does not allow an agency to stay the effective date of a rule after it has become effective.

See id. Further, the EPA has previously interpreted Section 705 of the APA not to authorize the Agency to postpone the effective date of a rule when the effective date had already passed. *See* 76 Fed. Reg. at 28,326.

The effective date of the ELG Rule has long since passed; the final ELGs became effective on January 4, 2016. 80 Fed. Reg. at 67, 838. The ELG rule was effective for over sixteen months before the EPA issued its notice purporting to suspend compliance deadlines. Further, the APA requires agencies engaged in rulemaking to abide by the APA's notice and comment requirements. 5 U.S.C. § 553(b)-(c). The EPA cannot indefinitely postpone compliance dates without complying with the APA's notice and comment requirements. Consistent with the D.C. Circuit court's holding, the EPA lacks authority to postpone the compliance deadlines under the APA as the ELG Rule had already gone into effect and the agency did not comply with the APA's notice and comment requirements.

b. EnerProg's NPDES permit has not been modified to extend compliance deadlines.

Any putative modification of EnerProg's NPDES permit by the April 25, 2017 Postponement of Compliance Deadlines for 2015 ELGs would have been invalid. A modification to a NPDES permit must be implemented in accordance with standards and procedures outlined by federal regulations. 40 C.F.R. §§ 122.41(f), 122. 62, 122.63, 124.6, 124.8(a), 124.10, 124.11, 124.12, 124.56. The procedural mechanisms for modifying NPDES permits are mandatory. *Ackels v. US EPA*, 7 F.3d 862, 864 n. 1 (9th Cir. 1993); *United States v. Metropolitan District Commission*, 16 Envtl. L. Rep. 20621, 20624, 1985 WL 9071 (D. Mass. 1985). The enforcement agency modifying the permit must make a finding of cause appropriate for modifying the permit. 40 C.F.R. §§ 122.41(f), 122.62, 122.63. The enforcement agency must also draft a permit and

issue a fact sheet with the significant factual, legal, mythological, and policy questions considered in preparing the permit, or take other mandatory steps to ensure careful assessment of alternatives. 40 C.F.R. §§ 124.6, 124.8(a), 124.10, 124.11, 124.12, 124.56. These essential procedural mechanisms did not occur in this case. EPA Region XII issued the NPDES permit to EnerProg with a deadline for compliance with zero discharge requirements for coal ash transport waters as mandated by the State of Progress. (R. at 6). EPA Region XII has made no steps to modify EnerProg's NPDES permit, and in fact refused to extend the deadline for compliance. Any putative modification of EnerProg's NPDES permit does not comply with the federal procedural regulations for modification of permits and is invalid.

Further, any purported modification to EnerProg's permit would have violated the "anti-backsliding" provision of the Act. 33 U.S.C. § 1342(o)(1); *Citizens for a Better Environment-California v. Union Oil Co. of California,* 861 F. Supp. 889 (N.D. Cal. 1996). Subject to certain exceptions, "a permit may not be renewed, reissued or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. § 1342(o)(1). Modifying EnerProg's NPDES permit to extend the compliance deadline for zero discharge would violate the Act's prohibition on backsliding.

c. States can impose more stringent limitations than federal regulations require.

The CWA allows states to impose more stringent limitations, including schedules of compliance, than those contained under the Act. 11 U.S.C. § 1342; *see also EPA v. California ex rel. State Water Resources Control Board,* 96 S. Ct. 2022 (1976). "Congress thus has chosen not

to preempt state regulation when the state has decided to force its industry to create new and more effective pollution-control technology." *United States Steel Corporation v. Train, et al*, 556 F.2d 822 (7th Cir. 1983) (abandoned on other grounds by *City of Chicago v. US Nuclear Regulatory Com'n*, 701 F. 2d 632 (7th Cir. 1983)). Section 401(a) of the Act empowers the state to certify that a proposed discharge will comply with the Act and "with any other appropriate requirement of State law." 33 U.S.C. §1314; *Roosevelt Campobello Inter. Park Com'n v. U.S. E.P.A.*, 684 F. 2d 1041, 1056 (1st Cir. 2005). "Section 510 of the Act, 33 U.S.C. § 1370, specifically preserves the right of a state to adopt or enforce… any requirement respecting control or abatement of pollution, even if it is more stringent than those adopted by the federal government." *Id.* at 1056.

Notwithstanding EPA Administrator Pruitt's purported postponement of compliance deadlines for the 2015 Steam Electric Power Generating Point Source Categories ELGS, the State of Progress has the authority to impose more stringent schedules of compliance than those contained under the Act. 33 U.S.C. § 1311; *see also EPA v. California ex rel. State Water Resources Control Board*, 96 S. Ct. 2022 (1976). Progress retains the right to enforce its compliance deadlines even if this court were to find that EPA Administrator Pruitt's Notice was sufficient to suspend compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry. The State of Progress certification requires EnerProg to achieve zero discharge of coal ash related effluents by November 1, 2018. This compliance deadline established by the State of Progress is sufficient independent of the 2015 ELGs and EPA Administrator Pruitt's purported postponement of compliance deadlines.

IV. The NPDES permitting requirements do apply to EnerProg's pollutant discharges into the MEGS ash pond.

The Environmental Appeals Board erred in finding that the NPDES permitting requirements do not apply to EnerProg's pollutant discharges into the MEGS ash pond, and the EPA's July 21, 1980 suspension of the provision of 40 C.F.R. section 122.2 that originally included waste treatment systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States is valid. Issue four originates from a statement in the record, "the final permit authorized the continued use of internal outfall 008 to transport bottom and fly ash to the coal ash pond without any effluent limits on an interim basis until closure of the coal ash treatment pond on November 1, 2018." (R. at 10)

This statement blatantly flies in the face of section 301(a) of the Clean Water Act which states that the, "*discharge* of *any pollutant*, by *any person*, into the *waters of the United States* shall be unlawful without a permit." 33 USC §1311(a). In the present case, all components of a section 301(a) violation are present in the record. This includes the description of *Internal Outfall 008* in the Record on page 8 which speaks to the discharge of material from a point source, the description of the discharge as toxic pollutants on page 9, and the discharge of these pollutants into a water of the United States as evidenced on page 7 by the impoundment of Fossil Creek to create the ash pond in 1978.

In fact, the only argument that can be made as to why EnerProg's discharge of pollutants into the MEG's ash pond is not a section 301(a) violation is based on a narrow and antiquated exception that this court should not adhere to for two reasons. First, the EPA lacked the statutory authority to issue the suspension of the provision in the first place. Second, in promulgating this

agency rule, the EPA failed to comply with section 553 of the Administrative Procedure Act, invalidating the suspension of the provision. In order to effectively explain the deficiencies in the Environmental Protection Agency's actions, a brief factual background on the issue is necessary.

40 CFR section 122.2 provides the definition of waters of the United States for purposes of the Clean Water Act. Section 2 of this provision contains exceptions for situations where a water would normally qualify as a water of the United States, but is exempted from such a designation. Included within section 2 of this definition is the provision which EnerProg seeks to rely on, subsection 2(i). Subsection 2(i) states that exempt from the designation of waters of the United States are, "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." A qualification immediately follows this exception, stating that the exception does not apply to situations in which the previously mentioned waste treatment systems, "resulted from the impoundment of waters of the United States."

However, on July 21, 1980, the Environmental Protection Agency published notice in the Federal Register suspending the qualification to the exception pending further rulemaking proceedings. 45 Fed. Reg. 48620. Specifically, the EPA stated that it had received comments from "industry petitioners" that were concerned with some of the practical effects of the definition. EPA then stated an intention to promptly, "develop a revised definition and to publish it as a proposed rule for public comment." The Federal Register notice concluded with a broad citation to the entirety of the Clean Water Act as EPA's authority to issue the suspension. This court cannot allow this suspension to be applied in the case before it for three reasons, beginning first with the EPA's lack of statutory authority to issue the suspension in the first place.

a. The EPA lacks statutory authority.

The authority of the EPA to administer the Clean Water Act is found in 33 U.S.C. section 1251(d), which states that, except where otherwise expressly provided in the act, the Administrator of the EPA shall administer the Act. However, the EPA has exceeded this statutory authority afforded to them in issuing the suspension found in 45 Fed. Reg. 48620. Congress has clearly spoken to the intended purpose of the Clean Water Act, and because the EPA has contravened that intent by issuing the suspension in question, this court cannot find the suspension valid. As a result, the EPA's decision should not be afforded Chevron deference. The actions of the EPA are beyond the scope of the statutory authority afforded them in the Clean Water Act, and as a result, this court should hold as unlawful and set aside their actions under section 706(2)(A) of the APA, or 5 U.S.C. 706(2)(A).

To demonstrate that the actions of the EPA exceed the statutory authority granted to them, one must look to Congress's intent in passing the Clean Water Act. Specifically, in section (a), "(t)he objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Additionally, the Clean Water Act provides in section (e) that, "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act [33 U.S.C.S §§ 1251 et seq.] shall be provided for, encouraged, and assisted by the Administrator and the States." The suspension promulgated by the EPA found in 45 Fed. Reg. 48620 violates both of the above-specified provisions of the Clean Water Act and therefore exceeds their statutory authority.

By suspending a portion of the definition of waters of the United States, the EPA has allowed individuals who pollute our nations waters to do so without suffering the consequences. This suspension and the subsequent pollution that it allows does not assist in restoring or maintaining the "chemical, physical, and biological integrity" of our nations waters, in contravention to section (a) of the Clean Water Act. Additionally, in suspending a portion of the definition of the waters of the United States without providing a scintilla of opportunity for public comment, at least from anyone outside of industry, the EPA has acted in a way that does not comport with section (e) of the Clean Water Act. The actions of the EPA are arbitrary and capricious under section 706(2)(A) of the Administrative Procedure Act because they exceed the statutory authority granted to them in the Clean Water Act, and this court should set aside the suspension as a result, including a finding that the discharges into the MEGS ash pond are subject to NPDES limitations.

In addition to operating beyond the extent of their statutory authority, the Environmental Protection Agency also violated the Administrative Procedures Act when issuing their July 21st, 1980, suspension of 40 CFR section 122.2.

b. The suspension violates the Administrative Procedure Act.

The unilateral suspension of 40 CFR section 122.2 by the EPA is a rule-making action that violates the notice, comment, and appeal provisions of the Administrative Procedure Act. Their actions are therefore arbitrary and capricious under §706(2)(A) and should be disregarded by this court. The Administrative Procedure Act (APA) is codified as 5 U.S.C. section 553, and it governs all rule making procedures undertaken by administrative agencies, including the EPA. There are three actions required by the APA that apply to the case before this court. In addition,

because the EPA's actions are more than mere housekeeping and alter the rights of the parties, namely the right of Fossil Creek Watchers to expect a clean environment, under the case of *Jem Broad. Co. v. FCC*, 22 F.3d 320 (1994), this court should presume that notice and comment rulemaking is required.

First, subsection (b) of the APA requires that, "General notice of proposed rule-making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." Second, following the publication of the proposed rulemaking, subsection (c) requires that, "the agency shall give interested persons an opportunity to participate in the rule making." Third, subsection (e) of the APA requires that, "(e)ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." The July 21st, 1980, suspension by the EPA violated all of the before-mentioned provisions.

To begin, the record accurately reflects that the EPA never put forth any notice of their intent to promulgate a rule, specifically, of their intent to suspend the provision of 40 CFR section 122.2. Without appropriate notice, published in the Federal Register, the EPA has violated subsection (b) of the APA, and this court should not allow their actions to stand. This case is a particularly egregious example of why publication is necessary. Without equal awareness of potential rulemakings taking place, only those with insider knowledge will be able to influence rulemakings. In the case at hand, active lobbying by the only parties aware of the potential rulemaking ruled the day, as the suspension itself found at 45 Fed. Reg. 48620, indicates that EPA's actions were taken at the behest of "industry petitioners."

A similar problem to those resulting from a violation of subsection (b) of the APA can also be found when subsection (c) regarding the opportunity to comment is violated. In the case at hand, the unilateral Federal Register notice again indicates that the opinions of only "industry petitioners" were taken into account when the decision to suspend the "waste treatment system" subsection of 122.2 was made. Again, Congress recognized the value that the opportunity for all interested parties to comment on a provision provides, and as such, the idea was incorporated into the APA. Yet, the EPA has thought better of providing the opportunity to comment to all parties, and because of this failure, there decision to suspend the provisions of section 122.2 cannot be given weight by this court.

Perhaps even more egregious than the EPA's failure to publish their rulemaking intention under subsection (b), and their failure to provide an opportunity to comment under subsection (c), is their failure to allow for the review of their actions under subsection (e). The Federal Register notice regarding the EPA's unilateral rulemaking decision concludes with a promise to promptly revise the definition and publish the revised product as a proposed rule with the opportunity to comment. Not only do we know this statement to be patently false as we appear before this court 38 years later, but it also is written in a coercive manner that prevents anyone from being able to appeal their decision. By expressing the intent to reevaluate the suspension in the future, EPA has taken away the opportunity for individuals to appeal their decision to suspend the rule because they can always rest on the guise of future action when questioned. This is a violation of the APA, making the EPA's decision arbitrary and capricious, and their decision to suspend section 122.2 cannot be adhered to any longer.

The EPA's unilateral rulemaking had the practical effect of allowing individuals to impound waters of the United States for uses that would have otherwise been blatant violations of the Clean Water Act, and escape liability by simply defining their usage as a "waste treatment system." This wrong can go uncorrected no longer, and to that end, we ask this court to find that the EAB erred in finding for EnerProg regarding this issue.

V. The ash pond closure and capping plan does require CWA section 404 permit for the discharge of fill material.

If this court were to find that the ash pond is not subject to the NPDES restrictions under the CWA, the Environmental Appeals Board still erred in deciding that the ash pond closure and capping plan does not require a permit for the discharge of fill material pursuant to section 404 of the CWA once it ceases to fall under the "waste treatment system" exception. 33 U.S.C. §1344. To be clear, FCW in no way concedes the designation of the MEGS ash pond as a "waste treatment system," but rather operates on that assumption arguendo for the duration of this issue. This issue can be analyzed in two parts. First, is the proposed pond closure and capping action a dredge and fill under the CWA requiring a permit? Two, assuming that the capping action is a dredge and fill, is a permit still required since the former water body was once classified as a "waste treatment system?" Turning first to the traditional definition of dredge and fill, there is little question that the proposed capping action requires a dredge and fill permit under the CWA.

A dredge and fill permit under §404 of the Clean Water Act is required when dredge or fill material is placed in a water of the United States. The question of what qualifies as fill material can be answered by looking to 33 C.F.R. 323.2, which defines the term as a material, when placed in the water of the United States, that has the effect of, "(i) Replacing any portion of

a water of the United States with dry land; or ii) Changing the bottom elevation of any portion of a water of the United States." In the case at hand, both provisions of this definition are met.

To determine first whether fossil creek is a water of the United States, we look to the case of *Rapanos* in which the United States Supreme Court provided two different tests for determining what may be considered a water of the United States. *Rapanos v. United States*, 547 U.S. 715 (2006). The first test announced by Justice Kennedy in the concurrence states that a water can be considered a water of the United States if it is connected to a known water of the United States by a *significant nexus.* The second test was announced in the majority by Justice Scalia, and it asks whether there is an unbroken surface connection between the water in question and a known water of the United States. In the case at hand, the record states that Fossil Creek, which was damned to create the ash pond in question, is a, "perennial tributary to the Progress River, a navigable-in-fact interstate body of water." (R. at 7). Since the Progress River is navigable in fact, it is a water of the United States, and because of the perennial tributary relationship between it and Fossil Creek, both of the tests announced in *Rapanos* are satisfied. This means that the MEGS ash pond is a water of the United States that will be filled in when the action of capping the pond takes place, which not only replaces a portion of the waters of the United States, but most certainly changes the bottom elevation as well. As a result, the proposed capping of the ash pond is definitively a dredge and fill action requiring a section 404 permit.

The second question is whether a permit is still required for the capping action even though the former water body was once classified as a "waste treatment system." It is untenable for the designation of the ash pond as a "waste treatment system" to be maintained for the purposes of section 404 permitting for three reasons. First, the permitting system only improves

the ultimate outcome by consideration of alternative options and the public interest. Second, without proper review through the permitting process, capped coal ash ponds have the potential for long term consequences to human health and the environment. Third, allowing a clean water act exception designation to be maintained beyond the usage of the water for the excepted reason would open up the program to potential abuses. For these reasons, we ask the court to employ 33 U.S.C. section 1344(f)(2), and find that the MEGS ash pond, formerly a "waste treatment system," is recaptured as a water of the United States, and therefore subject to section 404 dredge and fill permitting requirements.

First, by requiring EnerProg to receive a permit before filling their ash pond, the situation only improves for all parties involved. Dredge and fill permits under section 404 are administered by the Army Corps of Engineers who are required to consider, among other things, the public interest and reasonable alternatives when issuing permits. It obviously benefits the public to have their interests considered when a permit is filed, but having this type of review also provides EnerProg with a form of insulation in the event that a citizen ever decides to challenge their decision to cap and cover the ash pond. Additionally, putting in place an impermeable cap and covering the pond is potentially expensive. As such, there is a potential benefit to reviewing alternative options to the cap and cover action that may be less expensive. The process of permitting the cap and cover action stands to benefit the party who would be required to request the permit, and it only makes sense for the court to require them to do so.

Potentially harmful impacts can result from the cap and cover actions contemplated by EnerProg, and the process of permitting the action may expose some of those risks while it is still possible to mitigate their negative impacts. For example, consider the case of *Tenn. Clean Water*

Network v. TVA. In the case of *Tenn. Clean Water Network*, the covering of an abandoned coal ash pond resulted in harmful effects on nearby rivers through the transfer of toxic pollutants contained in remnants of the ash pond that were transferred through groundwater. *Tenn. Clean Water Network v. TVA*, 206 F. Supp. 3d 1280. Though the focus of the *Tenn. Clean Water Network* case concerned whether the covered ash ponds are subject to NPDES requirements, it stands as a siren song of the negative consequences that can result from the improper treatment of coal ash ponds. (*Id*.). In the case at hand, requiring a dredge and fill permit simply ensures that another set of expert eyes, those of the Army Corps of Engineers, have an opportunity to examine the potential cap and cover action. This in turn could help to prevent the exact same situation found with the Gallatin Plant in *Tenn. Clean Water Network.*

This court should also consider the dangerous precedent that it would set by allowing former "waste treatment system" to maintain that designation into perpetuity. Without a logical end to the protections afforded to "waste treatment systems" under the Clean Water Act, there would undoubtedly be a misuse of their initial exemption by those attempting to use them as a shield. For example, if the court never recognized a loss of protected "waste treatment system" status for water bodies that would otherwise be classified as waters of the United States and subject to pollution control, they could become dumping grounds for toxic substances. Operators would sell former power plant sites to those with a need to dump toxic substances. The new owners could then bury the toxic substances in former ash ponds, thereby perpetrating a dredge and fill that would otherwise require a permit, without any negative consequences. This logical outgrowth is a real possibility if this court refuses to allow a recapture designation for former

"waste treatment systems," and the line of precedent that could prevent it begins with requiring that EnerProg apply for a section 404 permit in the case before the court presently.

For the numerous beneficial reasons mentioned above, this court should find that the MEGS ash pond is subject to section 404 dredge and fill permitting requirements, and the avenue through which the court can do so is the deployment of section 1344(f)(2) of the Clean Water Act. This section of the Clean Water Act contemplates exactly what FCW is asking this court to find when it states in part,

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

The MEGS ash pond was formerly designated as a "waste treatment system," but will be used for an entirely different purpose when it is capped and covered by EnerProg as part of their efforts to conform with the CACA. As a result of this change in usage from that which was originally contemplated in the section 404 "waste treatment system" designation of the MEGS ash pond, this court should find that the waters of the United States are recaptured and subject to section 404 dredge and fill permitting requirements.

CONCLUSION

For the foregoing reasons, Fossil Creek Watchers, Inc. requests that this court amend the permitting requirements in two primary ways. First, the NPDES permit that has already been issued should be subject to effluent limitations. Second, that EnerProg be required to apply for a Clean Water Act section 404 dredge and fill permit for any ash left behind. The other requirements

of the original permit should be left in place, in order to protect the environment and waters of the United States as is the purpose of the Clean Water Act.