Team No. 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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.

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Environmental Appeals Board Decisions

Other Authorities

STATEMENT OF JURISDICTION

This is a petition for review of a final decision made by the Environmental Appeals Board ("EAB") of the Environmental Protection Agency ("EPA") affirming the grant of a National Pollutant Discharge Elimination System ("NPDES") permit to EnerProg, L.L.C. ("EnerProg") to operate the Moutard Electric Generating Station ("MEGS") and denying review of various permit conditions requested by petitioners. Petitioners, EnerProg and Fossil Creek Watchers ("FCW"), filed petitions for EAB review of the permit pursuant to 40 C.F.R. § 124 (2017). The EAB issued its final decision in spring 2017 denying review. Petitioners then filed timely petitions for review with this Court pursuant to 33 U.S.C. § 1369(b) (2012).

This Court has jurisdiction under 33 U.S.C. § 1369(b), which provides that petitions for review of EAB determinations shall be filed in the appropriate circuit court within 120 days of the issuance of such a determination. Since petitions were timely filed, this Court has jurisdiction to review the EAB's decision to deny review.

STATEMENT OF THE ISSUES

I. Whether EPA appropriately included § 401 state certification conditions related to closure of the MEGS ash pond in EnerProg's NPDES permit, including:

   a. Whether EPA had any discretion to review state certification conditions, and

   b. Whether conditions originating in Progress's Coal Ash Cleanup Act were "appropriate requirements of state law" under § 401.

II. Whether the EAB properly held EPA's suspension of the 2015 final effluent limitations guidelines ("ELGs") is impermissible when the suspension defers compliance dates, not effective dates.

III. Whether the EAB properly held EPA can rely on best professional judgment ("BPJ") as an alternative ground to require zero discharge of coal ash transport wastes when the 1982 ELGs failed to regulate toxic pollutants mercury, arsenic, and selenium.

IV. Whether the EAB was arbitrary and capricious in allowing EPA to suspend part of its validly promulgated rule defining waters of the United States ("WOTUS") when the

agency refused to conduct notice and comment rule making to effect this change for more than 30 years.

V. Whether the EAB erred in determining a § 404 permit is not required to close and cap EnerProg's coal ash pond when draining and capping the pond will dry up the existing pond and turn the area into dry land.

STATEMENT OF THE CASE

To attain Congress's mission to restore the "integrity of the nation's waters[,]" the Clean Water Act ("CWA") was enacted in 1972, requiring the implementation of "water quality standards . . . sufficient to protect the public health or welfare [and] enhance the quality of water . . . ." 33 U.S.C. § 1313(c)(2)(A) (2012); *Minn. Ctr. for Envtl. Advocacy v. EPA*, No. CIV03-5450(DWF/SRN), 2005 WL 1490331, at *1 (D. Minn. June 23, 2005). FCW has brought this lawsuit to ensure that EPA, the administrator of the CWA, acts in accordance with this mission by requiring EnerProg to comply with the CWA in its continued operation of the MEGS, a coal-fired power plant that discharges toxic pollution into the state of Progress's waters.

A. Statement of Facts

This appeal stems from petitioners FCW and EnerProg challenging an NPDES permit renewal for EnerProg's continued operation of MEGS and its associated discharges of pollution into surrounding waters in Fossil, Progress. R. at 6.

Discharges of Pollution from the Moutard Electric Generating Station. MEGS is a coal-fired steam electric generating plant with a maximum dependable capacity of 745 megawatts. R. at 7. MEGS discharges ash transport water, coal pile runoff, stormwater runoff, cooling tower blowdown, flue gas desulfurization wastewater, and other waste streams into a man-made ash pond near the plant. R. at 7–8. The ash pond, in turn, discharges toxic pollutants into the Moutard Reservoir. R. at 7. The ash pond—which treats the ash transport water through sedimentation before it is discharged to the reservoir—was created in 1978 by damming the upper

reach of Fossil Creek, a perennial tributary of the Progress River, a navigable-in-fact interstate body of water. R. at 7. Discharges from the ash pond into the reservoir contain elevated levels of mercury, arsenic, and selenium—toxic pollutants that are dangerous to human health. R. at 9.

The NPDES Permit. Pursuant to the requirement that MEGS comply with EPA ELGs for the Steam Electric Power Generating Point Source Category, EPA Region XII issued EnerProg's renewed NPDES permit on January 18, 2017. R. at 6, 7. This permit authorized EnerProg to continue its discharges from the ash pond into the reservoir without any effluent limits until the pond's closure. R. at 10. EPA determined that no permit was necessary for discharges from the plant into the ash pond. *See* R. at 12.

Progress's Conditions on the Permit. Pursuant to § 401 of the CWA, Progress issued EnerProg a certification for the renewal of the permit, in which it included conditions requiring the decommissioning of the ash pond. R. at 8. These requirements were developed in accordance with the State of Progress's Coal Ash Cleanup Act ("CACA"), a state law that was designed to prevent public hazards associated with ash pond leaks and failures—including toxic contamination of surface and ground waters—by requiring closure and remediation of inferior coal ash disposal facilities such as the MEGS ash pond. R. at 8–9. According to the conditions imposed by Progress under CACA, EnerProg must stop using its ash pond by September 1, 2018, dewater the pond by September 1, 2019, and cover the decommissioned pond with an impermeable cap by September 1, 2020. R. at 6, 8. Progress does not provide procedures for judicial review of conditions in its § 401 certifications. R. at 11.

EPA's Effluent Limitations Guidelines. In 2015, EPA promulgated a rule establishing ELGs for the Steam Electric Power Generating Point Source Category, with an effective date of January 4, 2016. Effluent Limitations Guidelines and Standards for the Steam

Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838, 67,838 (Nov. 3, 2015). In these ELGs, EPA established that Best Available Technology ("BAT") for coal ash wastes—which members of the steam electric power generating category must implement—requires zero liquid discharge of these wastes because of the availability of dry ash handling. R. at 9. Dry handling of bottom and fly ash has been used in the coal-power industry for many years. R. at 9.

The 2015 ELGs are currently subject to a challenge by members of the industry in the Fifth Circuit. R. at 9. On April 12, 2017, claiming to invoke § 705 of the APA, EPA Administrator Scott Pruitt ("the Administrator") issued a notice "suspending the compliance date for [the 2015] ELGs" without engaging in a notice and comment period. R. at 6. Thus, the effective date for the ELGs had passed more than a year before his notice postponing compliance. R. at 12.

Dry handling of coal ash wastes at MEGS. EPA has determined that, in accordance with BAT, MEGS is able to adopt dry handling, and this would result in a mere twelve-cent-per-month increase in consumers' average electric bills. R. at 9. Based on these findings, EPA's permit writer, relying on BPJ, included requirements for the MEGS facility to convert from wet to dry ash handling, thereby reducing its discharges of ash handling wastes to zero, by November 1, 2018. R. at 9. This will end the discharge of the toxic pollutants that occur in EnerProg's waste streams: mercury, arsenic, and selenium. R. at 9. These three pollutants were not regulated by the 1982 ELGs governing this category of polluters, which preceded the implementation of the 2015 ELGs. Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52,290, 52,303 (Nov. 19, 1982).

B. Procedural History

On April 1, 2017, both EnerProg and FCW filed petitions for review of EnerProg's NPDES permit with EPA's EAB, requesting remand to EPA Region XII on a number of issues. R. at 6. The EAB denied these petitions, R. at 6, determining that (1) EPA properly included Progress' state certification conditions requiring closure and capping of the ash pond in EnerProg's NPDES permit, R. at 10., (2) the Administrator cannot suspend the compliance date of a regulation under § 705 of the APA, R. at 12, (3) BPJ was an appropriate ground for EPA to require zero discharge of ash transport and treatment wastes, R. at 11, (4) EnerProg is not required to obtain a CWA § 402 permit for its continued discharges to the ash pond, R. at 12, and (5) EnerProg is not required to obtain a CWA § 404 permit to close, drain, and cap its ash pond, R. at 13.

FCW and EnerProg have filed timely petitions seeking judicial review of EAB's final decision. R. at 2. FCW challenges the EAB's decision on the fourth and fifth issues, while EnerProg challenges the EAB's decision on the first, second, and third issues. The petitions have been consolidated for review before this Court. R. at 2.

STANDARD OF REVIEW

This Court's standard for reviewing the EAB's decision is arbitrary and capricious. The Court of Appeals "must set aside the [EAB's decision regarding] EPA's final determination if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .'" 5 U.S.C. § 706(2)(A) (2012); *Howmet Corp. v. EPA*, 614 F.3d 544, 549 (D.C. Cir. 2010).

SUMMARY OF THE ARGUMENT

EPA properly included Progress's certification conditions in EnerProg's NPDES permit. Because the plain language of § 401 requires EPA to include states' conditions and because EPA takes the regulatory position that it lacks reviewing authority, EPA may not review or reject §

401 certification conditions. Furthermore, EnerProg's due process rights do not compel an EPA hearing to review conditions imposed pursuant to state law. Even if EPA did have such reviewing authority, certification conditions derived from CACA are appropriate requirements of state law. First, they are intended to prevent discharges; therefore, they are sufficiently related to water quality standards to be appropriate. Also, since ash pond leakage and failure are well-known threats to water quality, conditions intended to prevent them are appropriate.

Second, EPA Administrator Scott Pruitt's April 25 memo does not effectively suspend the 2015 ELG compliance dates because it violates the APA. Section 705 of the APA permits the postponement of effective dates—not compliance dates. In reading the statute on its face, the Administrator illegally amended the 2015 ELGs in an attempt to circumvent § 705.

Third, even in the absence of the 2015 ELGs, BPJ is a sufficient alternative basis for the NPDES Permit's zero discharge requirement for two reasons. First, because the EAB is owed *Auer* deference, the EAB's interpretation of 40 C.F.R. § 125.3 that BPJ is a permissible means of regulation, controls. Second, Congressional intent recommends against strict limitations on the use of BPJ.

Fourth, EnerProg must obtain a § 402 permit for its continued discharges to the MEGS ash pond. EPA's 1980 amendment to EPA's definition of WOTUS—which suspended a sentence of the waste treatment exclusion, thereby removing impoundments of WOTUS such as the MEGS ash pond from WOTUS's reach—was made without providing the public an opportunity for comment. This change is legally invalid because the APA prohibits EPA from amending a properly promulgated rule without engaging in notice and comment rule making. In addition, EPA's effort to exclude impounded waters from WOTUS is without statutory authorization because it conflicts with the CWA and congressional intent in enacting the CWA.

Therefore, the MEGS ash pond falls within the definition of WOTUS according to the only validly promulgated version of the rule, so EnerProg must obtain an NPDES permit to continue its discharges into the pond.

Finally, regardless of this Court's determination regarding the requirement of a § 402 permit while the ash pond is operational, EnerProg must obtain a § 404 permit for the pond's closure and capping. Once the ash pond is closed, it no longer qualifies as a "waste treatment system," and it is not otherwise excluded from the definition of WOTUS. Therefore, the waters of the ash pond must be regarded as WOTUS, and a fill permit is required because the acts of draining the ash pond and placing layers of earthen material over the ash as a cap both change the bottom elevation of the waters and replace part of the waters with dry land.

ARGUMENT

I. EPA PROPERLY INCLUDED § 401 STATE CERTIFICATION CONDITIONS RELATED TO THE CLOSURE OF THE MEGS ASH POND IN ENERPROG'S NPDES PERMIT.

EPA was required to, and properly did, include § 401 certification conditions requiring EnerProg to remediate the MEGS ash pond. R. at 2. First, EPA lacks authority to review certification conditions. Second, even if EPA possessed such authority, Progress's certification conditions were appropriate requirements of state law.

A. The EAB Correctly Held That EPA Lacked Authority to Reject Certification Conditions Derived from Progress's Coal Ash Cleanup Act Because Such Review Is Contrary to the Plain Language of the Act and Is Precluded by Judicial and Administrative Precedent.

A wealth of administrative and judicial precedent precludes federal review of state certification conditions issued under § 401(d) of the CWA. The EAB accordingly and correctly applied this principle to determine that EPA lacked authority to reject Progress's requirement that EnerProg remediate its ash pond to comply with state law. R. at 11. First, based on a plain

reading of statutory language, courts have repeatedly held that federal agencies lack jurisdiction to reject certification conditions issued by state regulators. 33 U.S.C. § 1341(d) (2012); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041 (1st Cir. 1982); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230 (S.D. Ala. 1976). Second**,** EPA itself has codified this position through rulemaking and precedential decisions by the EAB. 40 C.F.R. § 124.55(e); *In re City of Moscow*, 10 E.A.D. 135, 151 (EAB 2000). Finally, this Court may deny review without violating EnerProg's Fifth Amendment rights to due process, since other avenues of constitutional challenge remain available. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 836 (7th Cir. 1977), *overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983).

1. EPA Review Is Precluded by the Plain Language of § 401(d).

Prior decisions have pointed to § 401(d)'s provision that "[a]ny certification provided under [§ 1341] . . . *shall* become a condition on any Federal license or permit subject to the conditions of [§ 1341(a)]" to preclude federal agency review of certification conditions. 33 U.S.C. § 1341(d) (emphasis added); *Am. Rivers*, 129 F.3d at 107. Since "Congress expresses its purposes through the ordinary meanings of the words it uses," the term *shall* in § 1341(d) requires federal agencies to incorporate certification conditions in permits and licenses and denies them any discretion to evaluate or reject such conditions. *Id.* Indeed, "certification under § 401 is set up as an *exclusive prerogative of the state* and is not to be reviewed by EPA or any agency of the federal government." *Mobil Oil Corp.*, 426 F. Supp. at 234 (emphasis added). This principle is grounded in the CWA's emphasis of states' primacy in combating water pollution and in Congress's intent to prevent federal agencies from inappropriately relaxing state requirements. *Id.*; *In re City of Moscow*, 10 E.A.D. at 151.

The *American Rivers* court held just this when it expressly rejected the Federal Energy Regulatory Commission's ("FERC") refusal to include § 401 certification conditions in a federal energy license, noting that "FERC is required in clear statutory language to incorporate [certification conditions]." *Am. Rivers*, 129 F.3d at 110. The *Roosevelt Campobello* court extended the same principle to vacate an EPA Administrative Law Judge's determination that various certification conditions exceeded a state's authority under § 401, noting that EPA itself interprets § 401(d) to preclude agency review of certification conditions. 684 F.2d at 1056; 40 C.F.R. § 124(e).

States' certification power is not "unbounded": EPA may reject conditions that are less stringent than EPA deems necessary to comply with the CWA. *In re City of Moscow,* 10 E.A.D. at 151 ("[EPA's] duty under § 401 of the CWA to defer to considerations of state law is intended to prevent EPA from *relaxing* any requirements . . . imposed by state law"); 40 C.F.R. § 124.55(c). And a federal agency may apply § 401(a)(3) to determine whether a state has properly revoked a certification already given. *Keating v. FERC*, 927 F.2d at 623–24. None of these contingencies exist in the present case, however.

Rather, the canonical principle of statutory construction noted in *American Rivers* applies here: the plain language of 401(d), construed repeatedly by courts and agencies, mandates that Progress's remediation conditions be incorporated into EnerProg's NPDES permit, and EPA lacks authority to review or reject them.

2. EPA Review Is Precluded by EPA's Codified Interpretation of § 401.

EPA regulations, consistent with § 401(d)'s plain language, clearly preclude agency review of state certification conditions. 40 C.F.R. § 124.55(e) ("Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part."). Since "it is

well settled that regulations validly prescribed by a government administrator are binding upon him as well as the citizen," this agency interpretation of the language of § 401 controls. *Cardoza v. CFTC*, 768 F.2d 1542, 1550 (7th Cir. 1985) (internal quotation marks omitted).

EPA maintains the novel position in this litigation that it possesses authority to review Progress's certification conditions, despite the wealth of contrary precedent enumerated above. R. at 3. This Court owes no deference to that position. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (courts afford no deference to agency litigating positions that are "wholly unsupported by regulations, rulings, or administrative practice."). EPA may not so easily reverse its course and adopt a position on reviewability that contradicts directly both the statute's plain language and EPA's own regulations.

3. This Court May Deny EPA Review Without Violating Due Process.

Denying EnerProg EPA review of state certification conditions will not deprive EnerProg of procedural due process, since other avenues of constitutional challenge to state law remain available. EPA may not review state certification conditions, even when no state avenue for review is available to the permittee. *U.S. Steel Corp.,* 556 F.2d at 836. In *U.S. Steel,* the Seventh Circuit declined to follow *Consolidation Coal*, an anomalous case in which the Fourth Circuit held that due process required EPA to hold a hearing to conduct such review when state redress was unavailable. *Consolidation Coal Co. v. EPA*, 537 F.2d 1236, 1238 (4th Cir. 1976). The *U.S. Steel* court noted that a permittee alleging that state certification procedures violated due process could bring a constitutional challenge against those procedures in a federal action against state officers. 556 F.2d at 836–37. This Court may, and should, hold the same. Though the permittee may not seek redress in an agency proceeding, other avenues of challenge provide adequate due process protections.

B. Even If EPA Did Possess Authority to Reject Progress Certification Conditions, Special Condition A Is Appropriate Because It Relates Directly to Water Quality Standards.

Because the State of Progress's Special Condition A is intended to prevent discharges of coal combustion residuals ("CCRs") from ash pond failure or pond leakage into surface and ground waters, Progress's conditions are sufficiently related to water quality to make them "appropriate requirements of state law" under § 401(d). 33 U.S.C. § 1341(d). First, **t**he Supreme Court has endorsed an expansive view of what types of conditions are appropriate. *PUD #1 v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). Also, recent research has highlighted the threat posed by ash pond seepage into adjacent surface water and shallow groundwater, demonstrating convincingly the connection between the threat of ash pond seepage and water quality. Jennifer S. Harkness et al., *Evidence for Coal Ash Ponds Leaking in the Southeastern United States*, 50 Envtl. Sci. & Tech. 6583 (2016). Therefore, the EAB held correctly that the permit writers properly included Progress's remediation conditions in EnerProg's NPDES permit. R. at 11.

1. Special Condition A Is Sufficiently Related to Water Quality to Be Appropriate Under the *PUD #1* Standard Because Its Purpose Is to Prevent Discharges.

Because Progress's certification condition requires ash pond remediation to "prevent . . . leaks from [treatment ponds] into ground and surface waters," it is sufficiently related to state water quality standards to be an "appropriate requirement of state law" under § 401(d). R. at 8; 33 U.S.C. § 1341(d).

In *PUD #1*, the Supreme Court interpreted § 401(d) to allow conditions related broadly to regulating permittees' "activities" and not just "discharges": "§ 401(d) is most reasonably read as authorizing additional conditions and limitations on [the permittee's activity] as a whole once the threshold condition, the existence of a discharge, is satisfied." 511 U.S. at 712. While state certification authority is "not unbounded," courts favor an expansive interpretation of what

requirements are appropriate and will countenance conditions that are "imposed pursuant to state water quality standards." *Id.* at 713. In *PUD #1*, the permittee challenged conditions requiring it to maintain minimum stream flows in the Dosewallips River to protect fisheries. *Id.* at 709–10. The permittee argued for a strict approach to certification conditions, arguing that appropriate requirements could regulate only water quality, not water quantity; that appropriate requirements must originate in numeric water quality criteria (and not in water quality standards more generally); and that appropriate requirements must relate to specific discharges. *Id* at 711. The Court rejected these arguments, holding that since the minimum stream flow requirements protected another component of water quality standards—designated use, which included fisheries—the requirements were designed to protect water quality and were appropriate certification conditions. *Id.* at 714–15. This establishes a wide-ranging, permissive approach to 401 certifications; since the conditions at issue were designed to protect some aspect of water quality, they were permissible under § 401. *Id.*

Progress's Special Condition A, which requires EnerProg to abandon and remediate its ash pond, is directly related to mitigating discharges of CCRs from the ash pond into the surrounding surface and ground waters. R. at 8. Since the MEGS ash pond admittedly creates discharges, R. at 9, Special Condition A clears *PUD #1*'s discharge threshold and regulates an activity—EnerProg's use and remediation of the ash pond—that is directly related to discharges from the pond.

2. Special Condition A Is Related to Water Quality Standards Because Ash Pond Seepage Is Known to Threaten Water Quality.

Progress's Special Condition A is designed to prevent well-established environmental threats associated with ash pond seepage. R. at 8–9. Leakage of CCRs from coal ash ponds threatens the quality of surrounding surface and ground waters. Harkness, *supra* at A. A recent

study by a team of environmental scientists discovered that systematic leakage from coal ash ponds led to elevated levels of contaminants associated with CCRs in adjacent waters. *Id.* The study found that levels of boron and strontium exceeded background levels at *all* monitored sites. *Id.* The resulting paper characterized the findings as "strong evidence for the leaking of coal ash ponds to adjacent surface water and shallow ground water." *Id.*

These findings support Progress's Special Condition A, which is designed to mitigate such discharges for the express purpose of protecting water quality, bringing it within the purview of *PUD #1*'s requirement that certification conditions be "imposed pursuant to state water quality standards." 511 U.S. at 713.

II. THE APRIL 2017 PRUITT NOTICE DOES NOT EFFECTIVELY SUSPEND THE 2015 ELGS BECAUSE § 705 ONLY PERMITS THE POSTPONEMENT OF EFFECTIVE DATES—NOT COMPLIANCE DATES.

The EAB correctly held that EPA Administrator Scott Pruitt's April 25, 2017, memo violates the APA and is not sufficient to suspend the compliance dates required by the 2015 Effluent Limitation Guidelines. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017). Under the APA, the EPA Administrator may not unilaterally amend duly promulgated final rules without following the procedures provided for in the Act. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *Becerra v. U.S. Dep't of Interior*, No. 17-cv-02376-EDL, slip op. at 8 (N.D. Cal. Aug. 30, 2017). The Administrator's action is not permitted by § 705 of the APA, which permits the postponement only of effective dates of promulgated rules pending judicial review—not the suspension of compliance dates. *Becerra*, slip op. at 8.

The Administrator may not employ § 705 of the APA to suspend compliance dates enacted by a prior legislative rule, since the plain language of § 705 applies only to effective

dates. 5 U.S.C. § 705 (2012) ("When an agency finds that justice so requires, it may postpone the *effective* date of action taken by it, pending judicial review") (emphasis added). Section 705 may only be applied to effective dates, since courts typically "resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

In *Becerra*, the court noted that, on its face, § 705 of the APA allows the "effective date" of a rule to be postponed—not the compliance date. *Becerra*, slip op. at 9. The court held that "[e]ffective and compliance dates have distinct meanings" and should not be conflated. *Id.* Accordingly, the statute permits agency postponement only of "the effective date of a not yet effective rule, pending judicial review." *Id.* The court further noted that the APA's notice and comment requirement—which must be invoked to change a compliance date—beneficially "ensure[s] that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Id.* at 11; *see also Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (stating that notice and comment allows agencies to benefit from commenters' suggestions).

In this case, the Administrator issued a notice on April 12, 2017 "suspending the compliance date for . . . ELGs" without engaging in a notice and comment period. R. at 6; Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. at 19,005. The effective date of the 2015 ELGs was January 4, 2016. Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. at 67,838. Thus, the effective date had passed over a year before the Administrator's notice postponing compliance. R. at 12. Under *Becerra*, this is not a permissible use of § 705. Allowing the Administrator to use § 705 to postpone compliance dates would be to read language "into

[the] statute that [does] not appear on its face." *Bates*, 522 U.S. at 29. Accordingly, this Court should affirm the EAB's determination that the Administrator's notice is an invalid use of § 705, as § 705 permits the suspension only of effective dates, while the notice seeks to suspend compliance dates.

III. EVEN ABSENT THE 2015 ELGS, BPJ IS A SUFFICIENT ALTERNATIVE BASIS FOR THE NPDES PERMIT'S ZERO DISCHARGE REQUIREMENT BECAUSE EPA'S INTERPRETATION OF ITS OWN REGULATIONS CONTROLS AND BECAUSE THE CWA INTENDED BAT TO BE A TECHNOLOGY-FORCING PROVISION.

The EAB held correctly that it was permissible for the writer of EnerProg's permit to utilize BPJ to establish a zero discharge requirement for coal ash transport wastes independent of the 2015 ELGs. R. at 11. First, EAB's interpretation of 40 C.F.R. § 125.3(c)(3) is owed *Auer* deference by this Court since such a reading is not plainly erroneous. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Also, Congress's intent that the CWA and its BAT requirements be technology-forcing provisions recommends against placing strict limits on the use of BPJ. *NRDC v. EPA*, 863 F.2d 1420, 1431 (9th Cir. 1988) (Congress intended BAT to force industries to adopt technologies furthering the CWA's goal of eliminating discharge of all pollutants).

The CWA provides that EPA may impose technology-based limits on NPDES permits either (1) pursuant to codified ELGs or (2) on a case-by-case basis, using BPJ, "prior to the taking of necessary implementing actions" under various provisions of the Act. 33 U.S.C. § 1342(a)(1) (2012). EPA regulations interpret this provision to mean that "[where ELGs] only apply to certain aspects of a discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis." 40 C.F.R. § 125.3(c)(3) (2017). As a result, when some aspect of a permittee's activity is not regulated by existing ELGs, "EPA may establish effluent limitations on a case-by-case basis according to its [BPJ]." *NRDC v. EPA*, 863

F.2d 1420, 1424 (9th Cir. 1988); *see also Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 969 (5th Cir. 1986); *NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987).

A. This Court Owes *Auer* Deference to EAB's Holding That BPJ Is a Permissible Means of Regulating Pollutants That Are Not Regulated by Existing ELGs.

Auer deference, also known as *Seminole Rock* deference, is the principle that courts must defer to agencies' interpretations of their own regulations as long as those regulations are not plainly erroneous. *Auer*, 519 U.S. at 461; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (agency's interpretation of its own regulations given controlling weight unless plainly erroneous). EAB decisions are afforded *Auer* deference. *REDOIL v. EPA*, 716 F.3d 1155, 1164 (9th Cir. 2013).

In the decision below, EAB affirmed the use of BPJ by interpreting 40 C.F.R. § 125.3(c)(3)'s provision that case-by-case regulation is permissible when existing ELGs do not "apply" to certain pollutants to mean that BPJ is appropriate when existing ELGs do not "[regulate]" those pollutants. R. at 11. EAB's holding that to "apply" means to "regulate" is not clearly erroneous, and this Court owes deference to that decision. The existing 1982 ELGs governing the steam electric power generating point source category do not regulate the toxic pollutants mercury, arsenic, and selenium. Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. at 52,303 (mercury, arsenic, and selenium are "excluded from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator."). Therefore, the 1982 ELGs do not "apply" to these pollutants, and the use of BPJ to regulate them is consistent with EPA regulations and with the CWA. The EAB's holding below that, in this situation, the ELGs do not "apply" to these elements (which are thus subject to BPJ regulation) is consistent with the definition of "apply":

"to put to use with a particular subject matter." *Apply*, *Black's Law Dictionary* (9th ed. 2009). It is not clearly erroneous for the EAB to conclude that the 1982 ELG's "exclusion" of mercury, arsenic, and selenium from regulation represents a failure to "apply" regulations to these elements, since no provision of the ELGs is "put to use" to regulate them. R. at 11. Thus, this Court should defer to the EAB's interpretation.

B. Congress's Intent That the CWA Be Technology-Forcing Recommends Against Strict Limitations on the Use of BPJ.

Congress's intent that BAT provisions of the CWA force industries to adopt reasonable technologies recommends against strict limits on the use of BPJ. *NRDC v. EPA*, 822 F.2d at 124 (noting that the NPDES permitting system is designed "not only to stimulate but to press development of new, more efficient and effective technologies"). The EAB's decision to allow the use of BPJ in this case was consistent with the intent behind the CWA that BAT requirements encourage "reasonable further progress" toward elimination of the discharge of all pollutants. *NRDC v. EPA*, 863 F.2d at 1433. Dry ash handling represents such reasonable progress, given its low cost and broad industry implementation. *Id.*; R. at 9.

Allowing EPA permit writers to implement technological requirements via BPJ determinations serves the purpose of the CWA by pressing the adoption of newer, cleaner technologies than those available at the time ELGs were passed. This is unchanged by the fact that some state courts have utilized a provision of EPA's *Permit Writers' Manual* to hold that BPJ is precluded if applicable ELGs "addressed" or "considered" the regulated pollutants. *See, e.g.*, *Louisville Gas & Elec. Co. v. Ky. Waterways Alliance*, 517 S.W.3d 479, 489 (S. Ct. Ky. 2017); *U.S. Environmental Protection Agency NPDES Permit Writers' Manual*, 5-45–46 (Sept. 2010). This Court should refuse to follow state court decisions restricting the use of BPJ in cases where the regulated pollutant was "addressed" or "considered" in—but not regulated by—

existing ELGs. The policy considerations behind the CWA support the EAB's more liberal reading of when BPJ is permissible.

Moreover, EPA's requirement that EnerProg implement dry ash handling is reasonable, given dry handling's low cost and widespread industry adoption. R. at 9. In 2015, two thirds of plants using ash ponds utilize dry handling. *A Primer on Coal Ash Handling Systems*, ProcessBarron (Nov. 23, 2015), https://processbarron.com/news/a-primer-on-coal-ash-handling-systems. Furthermore, the expense to EnerProg of implementing dry handling would require only a modest twelve-cent-per-month increase in consumers' average electric bills. R. at 9. The 1982 ELGs declined to regulate mercury, arsenic, and selenium because no technology was available at the time to sufficiently control them. Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. at 52,303. Now, such a technology—dry handling—exists and is in widespread use. EPA permit writers should be permitted to utilize BPJ to press the adoption of this technology.

IV. THE MEGS ASH POND MUST COMPLY WITH NPDES PERMITTING REQUIREMENTS BECAUSE THE ONLY PROPERLY ENACTED VERSION OF EPA'S REGULATION INCLUDES ALL IMPOUNDMENTS OF PRE-EXISTING WOTUS.

EnerProg is required to obtain a § 402 permit to continue discharging coal ash into the MEGS ash pond, an impoundment of Fossil Creek. 33 U.S.C § 1342 (2012); R. at 7. As a threshold matter, Fossil Creek is indisputably a part of WOTUS because it "is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water." R. at 7. Under both EPA regulations and Supreme Court precedent, a perennial tributary to a traditionally navigable water clearly falls within the scope of WOTUS. 40 C.F.R. § 122.2(1)(ii)–(v) (2017) (defining WOTUS to include "[a]ll tributaries . . . of waters identified in paragraphs (1)(i) through (iii) of

this section," where section (ii) is defined as "[a]ll interstate waters . . . ."); *Rapanos v. United States*, 547 U.S. 715, 732 (2006) (recognizing that, despite three differing interpretations of the term WOTUS by a divided court, "relatively permanent" bodies of water would be deemed as WOTUS under any of the justices' interpretations). Thus, because Fossil Creek is a perennial tributary to Progress River, which is an interstate water, the creek itself and any impoundment of it qualify as WOTUS. *See* 40 C.F.R. § 122.2(1)(iv) (including within the definition of WOTUS "[a]ll impoundments of waters otherwise identified as [WOTUS] under this section").

Since the MEGS ash pond is an impoundment of Fossil Creek, a WOTUS, the ash pond does not qualify for the exclusion from WOTUS that applies to waste treatment systems in general. As defined by EPA's regulation, the following waters are excluded from the definition of WOTUS:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in [WOTUS] (such as disposal area in wetlands) nor resulted from the impoundment of [WOTUS].

40 C.F.R. § 122.2(2)(i). Following the procedurally valid promulgation of this regulation, in response to complaints from members of the coal-energy industry, EPA amended its regulation—without engaging in notice and comment procedures—to suspend the last sentence of the paragraph above. Consolidated Permit Regulations, 45 Fed. Reg. 48,620, 48,620 (July 21, 1980); 40 C.F.R. § 122.2.

Because the EPA's suspension of part of its regulation was made without observance of the procedures required by the APA and without statutory authority, the suspension is invalid. *See United States v. TGR Corp.*, 171 F.3d 762, 765 (2d Cir. 1999) (applying the 1979 definition of WOTUS, without mention of the EPA's attempt to suspend part of the regulation, and holding that the brook at issue in the case "clearly cannot be considered a waste treatment system,"

despite its use for stormwater transport, because it was a tributary of a navigable water). Therefore, like the Second Circuit, this Court should give the suspension no effect and require EnerProg to obtain a § 402 permit for its continued—and currently unauthorized—discharges into the MEGS ash pond.

A. EPA's Suspension of the Part of Its Rule Concerning Impoundments of WOTUS Is Invalid Because EPA Failed to Comply with the APA's Notice and Comment Rule Making Procedures.

Under the APA, EPA cannot lawfully suspend a portion of a validly enacted regulation without engaging in notice and comment rule making and providing the public an opportunity to critique the regulation. According to the APA, "'rule making' means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (2012). The statute requires agencies to provide public notice of rule making via the Federal Register, 5 U.S.C. § 553(b) (2012), and provides, "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c). If a rule is made without following the requirements of the APA, it has been made without observance of procedures required by law, and it must be held unlawful and set aside. 5 U.S.C. § 706(2)(D).

In this case, EPA cannot unilaterally amend its valid definition of WOTUS—which would include the MEGS ash pond within its scope—because the agency is required to conduct notice and comment rule making to change the definition. This conclusion is supported by the facts that the rule defining WOTUS was legislative, not interpretive, and that no "good cause" existed to amend the rule outside of the APA's usual procedures. Therefore, EPA's attempt to suspend a sentence from the waste treatment exclusion to WOTUS must be set aside because it was made without observance of the procedures required by law.

1. EPA Has Acknowledged It Must Conduct an Additional Round of Notice and Comment Rule Making to Suspend Any Part of Its Validly Promulgated Regulation.

Throughout the long history of the APA, courts have recognized that one of its most valuable features is its requirement to incorporate public participation in the rule making process to avoid "the dangers of arbitrariness and irrationality in the formulation of rules." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027–28 (D.C. Cir. 1978); *see also Am. Bus. Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) ("Congress thus selected public participation in rule-making as its means of assuring that an agency's decisions are both informed and responsive."). Because of this emphasis on public involvement, once an agency has promulgated a rule through notice and comment rule making, it cannot then amend the rule or repeal part of the rule without again conducting notice and comment procedures. As explained by the D.C. Circuit, "Once a rule is final, an agency can amend it only through a new rulemaking." *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 919 (D.C. Cir. 1998); *see also Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987) ("[O]nce a regulation is adopted by notice-and-comment rulemaking . . . , its text may be changed only in that fashion.").

Here, EPA has attempted to make a substantive change to its 1979 regulation without ever engaging in the APA's required procedures of notice and comment rule making. The 1979 rule clearly stated that waste treatment systems created by impounding part of a WOTUS were not excluded (in other words, were included) within the definition of WOTUS. 40 C.F.R. § 122.2(2)(i). This rule, properly promulgated by EPA, could not then be lawfully amended by EPA without engaging in another period of notice and comment by the public. Indeed, the history of EPA's attempted suspension of part of the rule reveals EPA's own awareness that notice and comment procedures were in fact necessary to implement this type of change. When EPA first suspended the sentence concerning impoundments of WOTUS, it promised "promptly

to develop a revised definition and to publish it as a proposed rule for public comment." Consolidated Permit Regulations, 45 Fed. Reg. at 48,620. Further, EPA added, "At the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension." *Id.* Again, when it considered the sentence's applicability in 1983, EPA stated, "Final Agency action on each of these suspensions [one of which was the sentence in the waste treatment exclusion] will be taken in subsequent Agency rulemakings." Environmental Permit Regulations, 48 Fed. Reg. 14,146, 14,153 (Apr. 1, 1983).

More recently, EPA's knowledge of its procedural failures is further evidenced by the fact that, in 2015, EPA finally did formally incorporate its preferred definition of "waste treatment system" into its revised WOTUS rule. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,114 (June 29, 2015).[1] However, that rule has been indefinitely stayed by the Sixth Circuit, so it is has not taken effect and cannot protect EPA in this litigation. *In re EPA*, 803 F.3d 804 (6th Cir. 2015). Furthermore, the EPA has announced its intention, under the Trump administration, to rescind and re-codify the WOTUS rule. Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017). Under these circumstances, EPA cannot sincerely claim to rely on the contents of the WOTUS rule to attempt to justify its avoidance of the APA's procedural requirements.

Based on this procedural history, the 1979 version of the rule is the only version that has gone through notice and comment rule making procedures. Accordingly, this is the only version

---

[1] The 2015 WOTUS Rule still references the note, originally added in 1980, that suspended the second sentence of the waste treatment exclusion. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,114 ("[See Note 1 of this section.]"). However, Note 1 is omitted from the text of the final rule. *Id.* This appears to be an oversight on the part of EPA and the Corps since the rule purports to "make[] no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA." *Id.* at 37,073.

of the rule that has the force of law, since the later suspensions were not promulgated in accordance with the requirements of the APA. Because the 1979 version of the rule is the only valid iteration of the rule, its terms stand, and the exclusion does *not* apply to treatment systems that were created as impoundments of WOTUS. In the case of the MEGS ash pond, therefore, the exclusion does not apply because the ash pond was created as an impoundment of Fossil Creek, indisputably a WOTUS. Consequently, since the ash pond itself is part of WOTUS under the currently valid version of the regulation, NPDES permitting requirements apply to the ash pond, and EnerProg is actively violating the CWA by continuing to discharge to the ash pond without an applicable NPDES permit.

2. The Rule Defining WOTUS Is a Legislative Rule—Not a Mere Policy Judgment Or Interpretive Rule—So EPA Cannot Relax the APA's Procedural Requirements.

Despite the EAB's characterization of the EPA's suspension of the sentence as a "longstanding policy judgment," R. at 12, in reality, EPA's actions amount to rule making since they result in "amending . . . a rule," 5 U.S.C. § 551(5), as described above. The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). More specifically, a legislative rule—as opposed to an interpretive rule, which does not have to go through notice and comment procedures—is one which, among other possibilities, amends or repudiates a previous legislative rule. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (noting that if a later rule repudiates an earlier legislative rule, "the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative."); *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) ("an agency decision which effectively suspends the implementation of important and duly promulgated standards . . . constitutes rulemaking subject to notice and comment requirements").

Similarly, an agency cannot subvert notice and comment procedures by simply deeming its action a policy decision rather than a rule making. *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 211 (5th Cir. 1979) (setting aside EPA's designation of certain areas in Alabama as nonattainment areas under the Clean Air Act for EPA's failure to provide a notice and comment period where the designation was "not a mere statement of policy" and "ha[d] the force of law"). And in spite of pre-*Chevron* decisions that afforded great weight to an agency's longstanding, consistent interpretation of its regulation, *e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974), the Supreme Court's current process for reviewing agency actions no longer relies on consistency as a determinative factor in deciding an agency interpretation's validity. *See Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842–43 (1984) (establishing two-part statutory interpretation test that determines, first, whether Congress's intent was clear, and if not, whether the agency's interpretation of the statute is permissible); *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004) (unanimous agreement that EPA's interpretation of part of the Clean Air Act lacked the "force of law," despite its consistent interpretation over twenty-one years, because it had only been issued in a guidance document and not a regulation).

In this case, the definition of WOTUS meets the general requirements of a rule, since it is EPA's statement of future effect that implements the policy of the CWA. Specifically, the modification of the 1978 rule is itself a legislative rule—which requires a notice and comment period—because it amended the 1978 legislative rule defining WOTUS. Neither can EPA's unlawful amendment be characterized as a mere policy statement, since it purports to change part of a validly promulgated regulation. And in contrast to the BPJ issue, EPA's position on this matter is not owed *Auer* deference because, here, EPA's interpretation is in fact "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. EPA is attempting to cast aside

part of its validly promulgated regulation, an act that is clearly "inconsistent with the regulation" under *Auer* review. *Id.* Therefore, since EPA's amendment of its rule was made without proper procedure, this Court should set aside the improper amendment.

3. None Of the "Good Cause" Exceptions Apply Here to Allow EPA to Amend Its Rule Without Proper Procedures.

In rare circumstances, the APA provides agencies with the ability to dispense with notice when it finds that the usual notice procedures would be "impracticable, unnecessary, or contrary to the public interest"; in such situations, the agency must include within its rule its finding of "good cause." 5 U.S.C. § 553(b)(3)(B); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) ("We have repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'" (citations omitted)). Courts do not allow agencies to invoke the good cause provision to evade the usual requirements of the APA. *U.S. Steel Corp.*, 595 F.2d at 214 (The good cause exception "is an important safety valve to be used where delay would do real harm. It should not be used, however, to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." (footnote omitted)); *AFL-CIO v. Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981) ("As the legislative history of the APA makes clear . . . the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations. . . .").

Further, even when courts do find that good cause exists to justify an emergency change to a rule, the agency is required to conduct proper rule making afterward to maintain the regulation's lawfulness for the long term. *Block*, 655 F.2d at 1158 ("[O]nce an emergency situation has been eased by the promulgation of interim rules, it is crucial that the comprehensive

permanent regulations which follow emerge as a result of the congressionally-mandated policy of affording public participation . . . .").

In this case, EPA's amendment to its regulation cannot be held to fall within any of the "good cause" exceptions that would allow it to bypass full notice and comment rule making procedures. Although the suspension of the sentence in the waste treatment exclusion may have initially been valuable to certain members of the public (specifically, the regulated coal power industry), it certainly no longer meets the "emergency" condition required by the case law, now that EPA has been employing it for more than 30 years. Instead, as noted in *Block*, EPA was required to make good on its own promise to conduct an actual notice and comment period to allow public involvement in its rule making. 655 F.2d at 1158. Accordingly, this Court should refuse to allow EPA "to circumvent the notice and comment requirements" because EPA "finds it inconvenient to follow them." *U.S. Steel Corp.*, 595 F.2d at 214.

B. EPA's Exclusion of Coal Ash Ponds from the Reach of WOTUS Is Without Statutory Authority Because It Conflicts with the CWA and Congressional Intent.

In addition to EPA's procedural error, its action in limiting the scope of WOTUS must also be set aside because it clashes with the language and intent of the CWA. In general, where Congress has "directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43 (footnote omitted).

The purpose of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). In pursuit of this laudable goal, the CWA prohibits discharges of pollutants that are not authorized through an NPDES permit. 33 U.S.C. § 1311(a) (2012) ("Except as in compliance with this section and [other CWA sections], the discharge of any pollutant by any person shall be unlawful."); §

1311(e) ("Effluent limitations established pursuant to this section . . . shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter."). Although certain activities are properly exempted by the statute, such as discharges associated with certain silviculture activities and storm water runoff from oil and gas exploration, 33 U.S.C. § 1342(l), these are limited in scope and do not include coal ash ponds among them.

Over the decades since the CWA's enactment, multiple circuit courts have rejected attempts by the EPA to carve out exceptions for particular industries or categories of activities, reasoning that these efforts conflicted with the CWA's plain meaning and intent. For instance, in rejecting EPA's attempt to exempt certain categories of point sources from the CWA's permitting requirements, the D.C. Circuit explained,

> Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of [§] 301(a).
>
> . . .
>
> The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of [§] 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.

NRDC v. Costle, 568 F.2d 1369, 1375, 1377 (D.C. Cir. 1977); *see also Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 307 (3d Cir. 1977) ("[U]nder [§] 301(e), an exemption by regulation from effluent limitations is not a permissible means of accommodating diversity." (footnote omitted)). Similarly, relying on the D.C. Circuit's reasoning in *Costle*, the Ninth Circuit rejected an attempt to once again skirt the CWA's requirements—this time, rather than by *exempting* certain categories of point sources, by *defining* certain categories of sources as non-point sources. *League of Wilderness Defs. v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002). The court stated, "Allowing the EPA to contravene the intent of Congress, by simply substituting the word 'define' for the word 'exempt,' would turn *Costle* on its head" and, accordingly, held that the

point source at issue in the case was required to obtain an NPDES permit to continue its operation. *Id.*

In this case, similar to *Costle* and *Forsgren*, EPA is again attempting to use its rule making authority under the CWA to subvert the Act's requirements and the intent of Congress. In yet another unique turn, EPA is attempting to exclude another category of point sources—here, coal ash ponds—from NPDES permitting requirements by defining them out of the regulation, using the definition of WOTUS rather than the definition of "point source." Just like in the previous cases, EPA is acting without statutory authority in its interpretation of the CWA. Therefore, like the other circuits before, this Court should decline to allow EPA to contravene the clear wording of the statute and Congress's intent by permitting EnerProg's discharges of pollutants into WOTUS without a permit.

V. ENERPROG MUST OBTAIN A § 404 PERMIT TO CLOSE AND CAP THE MEGS ASH POND BECAUSE THE COAL ASH AND THE CAP ITSELF WILL REPLACE THE POND WITH DRY LAND AND CHANGE THE BOTTOM ELEVATION OF THE POND.

Regardless of this Court's determination regarding whether a § 402 permit is required while the ash pond is operational, EnerProg will be required to obtain a § 404 permit to close and cap the MEGS pond once it ceases operations. 33 U.S.C. § 1344 (2012). The § 404 permit is necessary because, upon closure, the ash pond can no longer be viewed as a "waste treatment system" under any reasonable reading of that phrase. Thus, even if this Court finds that discharges to the pond do not currently require a § 402 permit, the waters of the pond would once again become part of WOTUS upon closure since the waste treatment exclusion would no longer apply. Then, EnerProg's subsequent actions to drain the pond and place an impermeable cap over the former pond would have the effect of replacing part of WOTUS with dry land and

changing the bottom elevation of the waters, so a § 404 permit must be obtained prior to these actions.

A. Once the Ash Pond Is Closed, It No Longer Qualifies for the Waste Treatment Exclusion, and Therefore Regains Its Status as WOTUS.

Once the coal ash pond has been closed, it no longer serves as a waste treatment system, and therefore, § 404 permitting requirements apply. Based on EPA's own use of defined terms in its regulations and a plain-language reading of the definition of WOTUS, a non-operational ash pond would not meet the definition of a "waste treatment system," and its waters would therefore revert into WOTUS once it closes.

1. EPA Definitions Indicate That a Closed, Covered Ash Pond Would Not Qualify for the Waste Treatment Exclusion.

When determining the meaning of undefined words in a statute or regulation, courts commonly refer to basic canons of construction, one of which is *in pari materia*, meaning that when a particular term is ambiguous, its meaning may be determined based on its use in other statutes or regulations concerning the same subject matter. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006) ("[U]nder the *in pari materia* canon, statutes addressing the same subject matter generally should be read 'as if they were one law' . . . ." (quoting *Erlenbaugh v. United States,* 409 U.S. 239, 243 (1972)).

The exclusion EnerProg is attempting to invoke applies to "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." 40 C.F.R. § 122.2(2)(i). EPA did not define "waste treatment systems" nor "ponds" in § 122.2. *See id.* However, in another section of EPA's CWA regulations, applicable to the Centralized Waste Treatment Point Source Category, EPA defines "treatment" as "any method, technique, or process designed to change the physical, chemical or biological character or composition of any metal-bearing . . . wastes to neutralize such wastes; to render such wastes

amenable to discharge; or to recover energy or . . . metal . . . from the wastes." 40 C.F.R. § 437.2 (2017). Similarly, in its implementation of the Resource Conservation and Recovery Act ("RCRA"), EPA defines "treatment" as "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste"[2] for a variety of purposes. 40 C.F.R. § 260.10 (2017). In its RCRA regulations, EPA defines "disposal facility" as "a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure." *Id.*; *see also* 40 C.F.R. § 257.2 (EPA's CCR Rule, which notes that a surface impoundment may be used for "treat[ing], stor[ing], or dispos[ing] of CCR"; the use of the disjunctive "or" indicates that treatment, storage, and disposal are three separate functions).

Although this case involves violations of the CWA rather than RCRA, EPA's own definitions are useful in determining whether such a closed pond meets the definition of a treatment system. After closure, the pond is no longer serving the purpose of treatment—since the pond is no longer "chang[ing] the physical, chemical, or biological character" of the coal ash, 40 C.F.R. § 437.2; 40 C.F.R. § 260.10—but instead is serving a purpose more akin to that of a disposal facility—a location to place the ash for it to remain long-term, after closure. Because RCRA and EPA's CCR Rule handle treatment and disposal as two distinct parts of the process for management of waste, the same concepts should be applied in a CWA case involving treatment and disposal of coal ash under the principle of *in pari materia*: an ash pond that has

---

[2] When EPA issued its CCR Rule, 40 C.F.R. § 257.2 (2017), a topic of contention was whether CCRs should be regulated under Subtitle C of RCRA, which concerns hazardous waste, or under Subtitle D, which addresses non-hazardous industrial wastes. Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302, 21,302 (Apr. 17, 2015). Ultimately, CCRs continue to be regulated under Subtitle D. Since this subtitle does not contain a definition of "treatment" or "disposal facility," 40 C.F.R. § 257.2, the definitions from Subtitle C are provided here.

been drained and no longer serves any treatment functions is not a waste treatment system, but instead, a disposal facility. Accordingly, even if this Court determines that the coal ash pond does not qualify as WOTUS while it is operational, the ash pond regains its status as WOTUS once the ash pond ceases operations since it no longer falls within the exclusion that applies to waste treatment systems.

2. A Plain-Language Interpretation of the Term "Pond" Leads to the Inevitable Conclusion That a Closed and Dried Ash Facility Does Not Constitute a Pond and That the Waters Are Recaptured into WOTUS Once the Pond Is Drained.

The plain-meaning rule states that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470 (1917); *see also District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (extensively consulting dictionaries, both legal and common, to interpret terms used in the Second Amendment by their plain meaning). In addition, the Supreme Court has stated that courts should "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29.

Regarding the ash pond, because the WOTUS rule does not define "pond," this Court may resort to a plain language definition for reviewing this portion of the waste treatment exclusion. *Random House Webster's Unabridged Dictionary* defines "pond" as "a body of water usually smaller than a lake." (Deluxe ed. 2001). When a coal ash pond is closed and capped in place, the typical procedure employed is to drain the pond and then cover it with an impermeable cap. *Closing Coal Combustion Residual Ponds*, Power Engineering (Feb. 20, 2017), http://www.power-eng.com/articles/print/volume-121/issue-2/features/closing-coal-combustion-residual-ponds.html. Indeed, EPA's CCR Rule requires that "[f]ree liquids . . . be eliminated by removing liquid wastes or solidifying the remaining wastes" and, for capping, orders the placement of "an infiltration layer that contains a minimum of 18 inches of earthen material" and

"an erosion layer that contains a minimum of six inches of earthen material that is capable of sustaining native plant growth." 40 C.F.R. § 257.100(b). Once this process occurs, what was formerly a treatment pond clearly no longer meets the everyday definition of "pond," since it is no longer a waterbody and is covered in earthen material.

Although the EAB noted that the WOTUS regulation does not contain a recapture provision, R. at 13, the reverse is also true: the regulation does not explicitly state that former waste treatment systems are not to be recaptured once operations cease. *See* 40 C.F.R. § 122.2(2)(i). On the contrary, analogous sections of the CWA suggest that Congress *would* intend for these waters to be recaptured, since the statute provides that other waters excluded from the permitting requirements of § 404 are recaptured once the waters are brought "into a use to which [they were] not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2). Here, the impounded waters of Fossil Creek would be brought into a new use—disposal rather than treatment of coal ash—while their flow, circulation, and reach would be completely eliminated by the drainage of the pond. Because the EPA and Corps regulations do not directly address the topic of recapture, this Court should not read in a provision that prevents recapture. Rather than stretch the interpretation of "waste treatment system" to apply to a closed ash-disposal facility that no longer treats anything or resembles a pond, this Court should reverse the EAB's decision and hold that a closed and capped ash pond does not fall within the limits of the WOTUS exclusion.

B. The Closure and Capping of the Ash Pond Requires a § 404 Permit Because These Actions Replace WOTUS with Dry Land and Change the Bottom Elevation of Part of Fossil Creek.

Because the MEGS ash pond regains its status as WOTUS once it is closed, the definition of "fill material," as promulgated by EPA and the U.S. Army Corps of Engineers ("the Corps"), undoubtedly requires a § 404 permit for EnerProg's closure and capping activities. In 2002, EPA

and the Corps promulgated a joint definition of "fill material" for determining under what circumstances a § 404 permit would be required. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002). The regulation provides as follows:

> [T]he term fill material means material placed in waters of the United States where the material 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.

33 C.F.R. § 323.2(e)(i) (2017). As examples of fill material, the regulation provides the following: "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." *Id.* § 323.2(e)(ii). "Discharge of fill material," which means "the addition of fill material into [WOTUS]," is defined to include "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills." *Id.* § 323.2(f).

Tellingly, in discussing the locating of CCR impoundments in wetlands, EPA's CCR Rule acknowledges that a § 404 permit from the Corps may be required for siting certain CCR impoundments. Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. at 21,364 ("[O]ther federal laws may be applicable in siting a CCR unit . . . [T]he use of a wetlands location for a CCR unit may require a permit from the [Corps]."). And although the preamble of the rule defining fill indicates that discharges of "suspended or settleable solids" are generally not regulated as fill material, even though they may raise the bottom elevation of waters over time due to settlement, this exclusion is based on the fact that these discharges have already been subject to regulation under § 402.

Final Revisions to the Clean Water Act, Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. at 31,135. That is not the case here since EPA has not been regulating discharges into the ash pond at the MEGS facility under § 402.

Finally, while abandoned coal ash and the placement of a cap may not have qualified as "fill material" under the Corps' previous definition of the term, this is of no relevance in light of the current, harmonized definition described above. *See* 33 C.F.R. § 323.2(e) (repealed) (defining "fill" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody" and excluding "any pollutant discharged into the water primarily to dispose of wastes . . . ."). Under the current definition of "fill," the agencies no longer look to the purpose of the discharge of the fill material, but rather focus on its effects, in terms of replacing WOTUS with dry land and changing the bottom elevation of WOTUS. *Id.* § 323.2(e); Claudia Copeland, Cong. Research Serv., RL31411, *Controversies Over Redefining "Fill Material" Under the Clean Water Act* 7 (2005). In addition, waste disposal is no longer excluded from the definition of "fill." *Id.* The agencies explained,

> Simply because a material is disposed of for purposes of waste disposal does not . . . justify excluding it categorically from the definition of fill. Some waste . . . consists of material such as soil, rock and earth, that is similar to 'traditional' fill material used for purposes of creating fast land for development.

Final Revisions to the Clean Water Act, Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. at 31,133.

This broader definition requires coal ash pond closure activities to fall within the scope of discharging fill material. Regardless of the purpose of draining and capping the pond, the effect of these activities clearly meets the new, effects-based definition by replacing water with dry land and changing the bottom elevation of the pond. Moreover, the materials EPA requires for closure and capping of an ash pond—"earthen material that is capable of sustaining native plant

growth," 40 C.F.R. § 257.100(b)—is precisely the type of material the redefinition of "fill" was meant to regulate: "material such as soil, rock and earth, that is similar to 'traditional' fill material used for purposes of creating fast land for development." Final Revisions to the Clean Water Act, Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. at 31,133. Because of this, this Court should hold that EnerProg must obtain a § 404 permit to close and cap its ash pond since it will be placing earthen material in a way that replaces WOTUS with dry land and changes the bottom elevation of WOTUS.

CONCLUSION

For the foregoing reasons, Petitioner FCW respectfully requests that this Court affirm the EAB's holdings regarding Progress's certification conditions, the effectiveness of the suspension of the compliance date for the 2015 ELGs, and the EPA's use of BPJ, and reverse the EAB's holdings regarding EnerProg's requirements to have a § 402 permit for continued discharges to its ash pond and a § 404 permit to close and cap its ash pond.

Respectfully Submitted,

_____

Counsel for Fossil Creek Watchers, Inc.