Team 37

Docket Nos. 17-000123 and 17-000124

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ENERPROG, L.L.C.,

Appellant,

and

FOSSIL CREEK WATCHERS, INC.,

Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee.

An Appeal from the Environmental Appeals Board
United States Environmental Protection Agency Washington, D.C.
No. 17-0123

BRIEF FOR PETITIONER ENERPROG, L.L.C.

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STATEMENT OF JURISDICTION

In the Spring Term of 2017, the Environmental Appeals Board (EAB) of the United States Environmental Protection Agency (EPA) filed an "Order Denying Review" against both EnerProg and Fossil Creek Watchers, Inc. (FCW). (R—5-6.) The EAB had jurisdiction to review EnerProg and FCW's petitions for review of EnerProg's National Pollutant Discharge Elimination System (NPDES) Permit pursuant to the Code of Federal Regulation. 40 CFR § 124.19 (2017). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear the appeal pursuant to Section 509(b) of the Clean Water Act (CWA). 33 U.S.C. § 1369(b) (2012).

ISSUES PRESENTED

I. Under Section 401 of the CWA, any NPDES Permit must state all effluent and other limitations required, as well as any other "appropriate requirement of state law." The state of Progress' NPDES Permit only stated dates for closure and capping but did not set forth any effluent limitations that must be met before closure. Was the State of Progress' certification requirement proper?

   A. Under Section 401 of the CWA, any state requirements that comply with the CWA must be included in the NPDES Permit. The NPDES Permit given to EnerProg did not contain limitations that complied with the CWA. Did the EPA have the authority to review the permit requirements for compliance before granting the permit?

   B. Under Section 401 of the CWA any "appropriate requirement of state law" must be included in an NPDES permit. The State of Progress required the closure and capping of the ash pond which was not an effluent limitation or limitation to protect water quality. Was the closure and capping requirement an "appropriate requirement of state law"?

II. Under Section 705 of the APA, an administrative agency may postpone any effective date of an action, when justice so requires. On April 27, 2017, the Administrator of the EPA suspended the requirement that the revised effluent limitations be met starting November 1, 2018. Did the suspension of the November 1 date count as a suspension of EnerProg's compliance deadlines?

III. Under Section 125.3 of the Code of Federal Regulations, when the Effluent Limitation Guidelines fail to list an effluent limitation for a pollutant, the agency may use Best Professional Judgement to determine an appropriate effluent limitation. The 1982 Effluent Limitation Guidelines specifically list all pollutants present in the MEGS coal ash pond. Was

Region XII justified in relying on Best Professional Judgement to require closure of the ash pond?

IV. Under Section 122.2 of the Code of Federal Regulations, and the EPA's suspension of part of the provision, waste treatment systems formed by impounding waters of the United States are no longer considered "waters of the United States." The MEGS pond is a waste treatment system that was created by damming Fossil Creek. Is the MEGS pond still subject to NPDES permitting requirements as a "water of the United States"?

V. Under Section 404 of the CWA, inactive ash ponds are not considered "waters of the United States" and are not subject to any additional permitting requirements. Once the MEGS pond is closed and capped it is considered an inactive ash pond. Is the MEGS pond subject to any additional permitting requirements?

STATEMENT OF THE CASE

A. Procedural History

Both EnerProg and FCW filled petitions on April 1, 2017, with the EAB seeking review of the NPDES Permit that was issued to EnerProg on January 18, 2017. (R—1-2, 6.) EnerProg's complaint alleged that the EAB erred in refusing to extend the compliance deadline contained in the permit; that the EPA erred in including all conditions imposed by the State of Progress in the permit; and that the EPA should not have relied on Best Professional Judgement in determining compliance requirements for the permit. (R—2.) FCW, on the other hand, alleged that abandonment and capping of the ash pond are illegal without an additional permit under the CWA, and that impounding part of Fossil Creek to create the ash pond was a violation of the CWA because the ash pond is considered "a water of the United States." (R—2.)

During the Spring Term of 2017, the EAB, sitting on a three-judge panel, denied review of EnerProg and FCW's petitions. (R—5.) Both EnerProg and FCW filed appeals with the United States Court of Appeals for the Twelfth Circuit, which were consolidated and granted a writ certiorari during the September Term of 2017. (R—1.)

B. Statement of the Facts

On January 18, 2017, Region XII of the EPA issued an NPDES renewal Permit to Enerprog for the continuation of water pollution discharges under Section 402 of the CWA. (R—6.) The Permit authorizes EnerProg to continue water pollution discharges associated with the operation of the Moutard Electric Generating Station (MEGS), which is a coal fired steam electric power plant located in Fossil, Progress. (R—6.)

The MEGS is a coal fired electric generating plant with one unit rated at a maximum dependable capacity of 745 megawatts. (R—7.) Water for plant use is withdrawn from the

Moutard Reservoir—as required to make up for evaporative losses from the cooling tower, boiler water, ash transport water, and drinking water needs. (R—7.) The facility includes a closed-cycle cooling system (cooling tower), with an actual intake flow and a design intake flow of less than 125 million gallons per day; a wet fly ash and a wet bottom ash handling system, which uses water to sluice ash solids through pipes to one ash pond, where transport water undergoes treatment by sedimentation before it is discharged to the Moutard Reservoir. (R—7.)

The ash pond was first created in June 1978 by damming the then free-flowing upper reach of Fossil Creek. Fossil Creek is a perennial tributary to the Progress River, which is a navigable interstate body of water; however, it does not discharge directly into the Moutard Reservoir. (R—7.)

There are currently four outfalls in use at the MEGS; two are internal outfalls. (R—7-8.) Outfall 001 is the cooling tower system that drains less than once a year directly into the Moutard Reservoir. (R—7.) Outfall 002 contains the ash pond treatment system. (R—7.) The ash pond receives and then discharges into the Moutard Reservoir: bottom ash and fly ash, coal pile runoff, storrmwater runoff, cooling tower blowdown, flue gas desulfurization wastewater, and various low volume wastes. (R—7-8.) Internal Outfall 008 currently consists of the fly ash and bottom ash transport system and the cooling tower which discharges the waste into the ash pond. (R—8.) Internal Outfall 009 discharges the waste from the Flue Gas Desulfurization (FGD) blowdown system into the ash pond. (R—8.)

Progress has recently passed a law known as the Clean Air Implementation Plan which required the reduction of sulphur from air admissions, and required EnerProg to build a vapor compression evaporator. (R—9.) This compression evaporator opened up in February 2015, and is used to eliminate the flue gas desulfurization blowdown stream. (R—9.) Now, with the

passing of the State of Progress's Coal Ash Clean Up Act, EnerProg is forced to build an additional retention basin to take the pollutants away from the coal ash pond, and into the retention basin. (R—9-10.)

The State of Progress's Coal Ash Cleanup Act was passed with the intention of preventing public hazards that are attributed to failures of the ash treatment containment systems, as well as leaks from the ponds into ground surface waters. (R—8.) The CACA requires the closure and capping of all ash ponds within the state of Progress by November 1, 2018, the dewatering of the ash ponds by September 1, 2019, and the capping of the pond by September 1, 2020. (R—8.) All of these dates were included in the NPDES permit that was granted to EnerProg. (R—8.)

EnerProg and FCW both filed petitions with the Environmental Appeals Board questioning the validity of the NPDES permit. (R—2.)

SUMMARY OF THE ARGUMENT

EPA authority to review state requirements. Section 401 of the CWA states that the NPDES Permit must include all effluent limitations, other limitations, and any "appropriate requirements of state law," however, courts have held that the EPA does not have jurisdiction to make sure that the state permit requirements comply with the CWA. Without oversight by the EPA or the federal courts, states will have the authority to add in any requirement that they deem proper into an NPDES Permit. Since the CWA is a federal law that is enacted and overseen by the EPA, the EPA has the jurisdiction to verify that the state permit requirements comply with state authority under the CWA before the permit is granted.

"Appropriate Requirements of State Law" The State of Progress' requirement that EnerProg close and cap the ash pond is not an "appropriate requirement of state law" under Section 401(d) of the CWA. Section 401 requires that the state set forth effluent limitations, or any other limitations that affect water quality. In setting an effluent limitation the state is authorized to use a narrative so long as a numerical limitation can be determined from the language. The Court will look at the intent of the legislature to determine what the effluent limitation is. Based on the State of Progress' intent to prevent harms that may occur due to ash ponds, it is not possible to determine what effluent limitation is to be met. For these reasons, the State of Progress' requirements are not an "appropriate requirement of state law."

Since the Supreme Court of the United States has refused to determine exactly what falls under the category of "appropriate requirements of state law," one must look to the Act's history. When the Act was first enacted, the Federal Water Pollution Control Agency listed twelve specific guidelines that the state water quality standards were required to meet. The State of Progress' certification requirements do not meet any of these standards because the closure and

capping requirements only list a timetable for compliance and do not include any other limitations. Therefore, the state of Progress' requirements do not affect state water quality standards and are not an "appropriate requirement of state law."

Notice of suspension. On April 27, 2017, the Administrator of the EPA, acting in his authority under Section 705 of the APA, announced that the EPA was postponing the effective date for the 2015 revised Effluent Limitation Guidelines (ELGs). The revised guidelines stated that companies were required to comply with the new effluent limitations as soon as possible beginning on November 1, 2018. Although the guidelines had amended the CWA back in 2015, the effluent limitations do not take effect until 2018, making the suspension of the compliance dates an effective suspension on EnerProg's requirement to close their ash pond by that date.

However, even if the Court finds that the guidelines had already gone into effect and, therefore, the EPA did not have the authority to suspend EnerProg's deadline, the Court still has the authority and must postpone EnerProg's compliance date. If the Court fails to suspend EnerProg's required closure and capping of the ash pond, the company may be forced to pay out money to alter their system when the EPA may end up changing the ELGs, or the Fifth Circuit may end up striking down the requirements. To preserve EnerProg's rights, the Court should suspend the required closure of the ash pond on November 1, 2018.

Use of Best Professional Judgement. When the ELGs fail to address limitations for a pollutant, the permitting agency may use Best Professional Judgment to set a limitation. When the EPA used its authority to suspend the 2015 revised Guidelines, they in turn, reenacted the 1982 Guidelines. Under the 1982 Guidelines, the EPA specifically chose to enact effluent limitations for all pollutants found in the MEGS ash pond except for flue gas desulfurization water and stormwater runoff. However, the agency specifically listed both flue gas

desulfurization wastewater and stormwater runoff as pollutants that the agency was choosing not to address at that time. Since the EPA recognized all the pollutants contained in the MEGS ash pond and chose to either set limitations, or purposefully omit limitations this meant that Region XII and the State of Progress were not justified in relying on Best Professional Judgement in requiring the closure of the MEGS ash pond.

However, if the Court does find that Region XII and the State of Progress were justified in relying on Best Professional Judgement in requiring the closure of the MEGS ash pond, the requirement still does not meet Best Professional Judgement. When a permitting agency is implementing Best Available Technology under Best Professional Judgement they must meet six factors. Under these six factors, the required closure of the ash pond is not an appropriate use of Best Professional Judgement because the State of Progress required the building of the VCE only two years ago making the equipment new, and the closure of the ash pond would require EnerProg to reroute Outfalls 008 and 009 away from the ash pond and to the retention basin.

Waters of the United States. In 1980, the EPA suspended a part of the definition of "waters of the United States" making it so that bodies of water that are created by impounding a water of the United States no longer falls within the definition. The EPA suspended this rule without a notice and comment period, however, the agency did not need to have a notice and comment period because the suspension was not arbitrary or capricious. The EPA agreed with companies that the original definition may have been overly broad and needed to be reexamined closely.

In 1983, the EPA stated that the suspension of impoundment of waters as being considered part of the definition of "waters of the United States," was continuing and the law was to remain in its current form. The suspension is valid because it is subject to "Chevron

deference," which means that when Congress has not directly addressed the question at issue, the agency has the implicit authority to fill in the gaps. The only question for the court is whether the agency's interpretation is based on a permissible construction of the statute. There is no indication that the EPA has impermissibly used its power and thus, the discretion remains with the EPA.

Additional Requirements. The MEGS pond is not subject to any additional requirements under the CWA because it is not considered a "water of the United States." The MEGS pond is also not subject to a fill permit upon its closure and capping because leaving the remaining ash and adding a cap are considered a non-prohibited discharge of fill material. The EPA has specified that once coal ash ponds are closed, they are not subject to any additional requirements, making the MEGS ash pond no longer subject to CWA jurisdiction once the ash pond is closed.

ARGUMENT

I. THE FINAL PERMIT ISSUED TO ENERPROG IMPROPERLY INCLUDED CONDITIONS REQUIRING CLOSURE AND REMEDIATION OF THE COAL ASH POND BECAUSE THE REQUIRED CLOSURE WAS A VIOLATION OF THE CWA, AND WAS NOT AN APPROPRIATE REQUIREMENT OF STATE LAW.

Companies seeking to obtain or renew an NPDES Permit are required to meet all conditions under Section 401 of the CWA. Section 401 states that:

> Any certification provided under this section shall set forth any effluent limitation and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act. . . . and with any other appropriate requirement of state law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d) (2012). The EPA must include all requirements set forth by the state as long as the requirements comply with the CWA, and as long as the requirements are "appropriate requirements of state law." 33 U.S.C. § 1342(d) (2012). (stating that the permit requirements must be within the guidelines of the CWA); *Pud No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 715 (1994) (discussing "appropriate requirements of state law").

Since the Court is reviewing whether the State of Progress's requirements complied with the CWA, and whether or not the EPA was required to include the State requirements into EnerProg's NPDES permit, the Court must review this issue *de novo*. When an issue involves a question of law, the court must review the case independently and must not give deference to the lower court's decision. *Trayco, Inc., v. United States*, 994 F.2d 832, 835 (Fed. Cir. 1993). Since determining whether the State of Progress's actions were proper under the CWA is a question of law, the Court must apply *de novo* review.

A. The EPA improperly included the conditions set out by the State of Progress in EnerProg's certification requirements because the required closure and capping of the ash pond was inconsistent with the CWA Section 401(d).

Section 401 of the CWA requires that any NPDES Permit state the effluent limitations required to make sure that the permit complies with state law. 33 U.S.C. § 1341(d). However, the requirements set forth by the State must also comply with the requirements in the CWA. 33 U.S.C. § 1342(d).

It has been the presumption among the courts that the EPA must include any and all state requirements in the NPDES permit, without their own evaluation, because the state has the ultimate authority to determine the requirements for an NPDES permit. *Am. Rivers v. FERC*, 129 F.3d 99, 108 (2d Cir. 1997); *Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). Section 401(a) even gives the licensing agency the authority to enforce the terms of the license, but fails to mention any authority to review the certification requirements. *Id.* However, this presumption clashes with the specific language in the CWA itself. The Supreme Court found in a similar case, that the federal agency has two options when it finds that the requirements set forth by the state do not meet the standards imposed under the CWA: the agency can deny the permit all together, or incorporate all of the requirements set forth by the issuing state. *Am. Rivers*, 129 F.3d at 110. Since the CWA is a federal statute, and the EPA, a federal agency, is given the authority to verify that all actors are complying with the CWA, the EPA and the federal courts should have jurisdiction to review state permit requirements.

Federal Courts lack jurisdiction to hear a case regarding a permit requirement issue before the permit is administered, but they gain jurisdiction after the permit has been administered. The Federal Court of Appeals for the D.C. Circuit has held that a federal agency or a federal court

may review a revocation or amendment to a state permit after the permit has been issued. *See generally Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991) (holding that the state can only revoke an issued permit when the revocation falls under a reason listed in CWA Section 401(a)(3)). The court stated that the reason the federal court could hear the issue after the revocation was because there was now a federal question as to whether the revocation was appropriate under a federal statute. *Id.* at 624. However, a state permit condition is also a federal question because it falls under Section 401(d)'s language that the required condition be an "appropriate requirement of state law."

Without the authority of the EPA and the federal courts to be able to step in and clarify if state permit requirements are "appropriate requirements of state law," the states will be able add requirements that not only apply to maintaining water quality, but they will be able to add in any condition that they deem appropriate relating to the project. *See generally,* Lisa M. Bogardus, *State Certification of Hydroelectric Facilities under Section 401 of the CWA*, 12 Va. Envtl. L.J. 43, 43. The Third Circuit Court of Appeals has stated that:

> requiring Commission review and approval of project modifications intended to maintain the state water quality standard [is not] an impermissible intrusion on state certification authority under Section 401. . . . That provision gives states exclusive authority only to issue a certification, prior to licensing. . . .

Id. at 98 (*quoting Pennsylvania Dep't of Envtl. Resources v. FERC*, 868 F.2d 592 (3d Cir. 1989). Due to the fact that state requirements are added into a federal permit, the requirements become federal law and, therefore, should be subject to review by a federal agency or the federal courts before being implemented into the NPDES permit.

The permit issued by the state of Progress required the closure and capping of the MEGS ash pond. (R—10.) The permit set the required deadline of November 1, 2018 for the closure of the ash pond; September 1, 2019 for the dewatering of the ash pond; and September 1, 2020 for

the capping of the ash pond. (R—10.) If EnerProg failed to meet any of these deadlines, not only would they be subject to penalties by the state of Progress, but also by the EPA. By including these requirements in an NPDES permit the state of Progress's requirements became federal law and therefore should have been independently evaluated by the EPA before the permit was administered.

If the EPA and federal courts did not have the authority to review state permit requirements before the issuance of an NPDES permit, states would be able to include any and all requirements whether or not it effects state water quality, without any limitations.

B. The ash pond closure and capping conditions are not an "appropriate requirement of state law" because the requirements surpass the conditions allowed to be imposed by States under Section 401(d) of the CWA.

Any NPDES Permit approved under Sections 401 or 402 of the CWA shall include any limitations set forth under the CWA and any other "appropriate requirements of state law." 33 U.S.C. § 1341(d). The Supreme Court, however, has refused to speculate on what state laws fall into this category. *Pud*, 511 U.S. at 713-14. EnerProg contends that the requirement that EnerProg close the ash pond by November 1, 2017, and cap the ash pond by September 1, 2020 (R—10,) is beyond the authority given to the states under the "appropriate requirements" standard because the requirements are not effluent limitations and are not based on achieving State water quality standards.

1. The State of Progress' required closure and capping of the ash pond is not an "appropriate requirement of state law" because neither the State of Progress's intent, nor the certification requirements are an effluent limitation.

There are two types of effluent limitations that are recognized by the EPA. *In re Decision on the Approval for Submittal*, 822 N.W.2d 676 (Minn. Ct. App. 2012). The first is water-quality based effluent limits, and the second is technology-based effluent limitations (TBELs). *Id.*

TEBLs require companies to alter the technology being used in their discharge facilities to be able to reduce the levels of pollution. *Id.* The TEBLs make no reference to the water they are trying to improve and protect. *Id.* Whether a requirement is numeric or narrative, it must be clear enough for a Permit holder to be able to discern what effluent limitations must be met. *See NRDC v. United States EPA,* 804 F.3d 149, 170 (2d Cir. 2015) (Discussing an NPDES Permit stating "Your discharge must be controlled as necessary to meet applicable water quality standards in the receiving water body . . impacted by your discharges." The EPA believed that a numeric limitation was "infeasible" to calculate in this situation). *See generally, In re Alexandria Lake Area Sanitary Dist*, 763 N.W.2d 303 (Minn. 2009). (Discussing an ambiguous Minnesota statute requiring that the state's water control agency establish a numeric effluent limitation based on the intention of the legislature to preserve the water quality.)

Based on the intentions of the state legislature, and the words in the NPDES permit issued by the State of Progress, it is not clear what numeric limitations are being set by the State. The legislation for the CACA shows that the intent is "to prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters." (R—8-9.) No agency, person, or company would be able to generate a numerical effluent limitation from the intent of the State of Progress' legislature. Merely stating that the State wishes to prevent any public harms does not determine at what level of discharge or waste buildup that harm occurs. Therefore, the legislative intent does not lead itself to a numeric effluent limitation. If the requirement does not lead itself to an effluent limitation, the court must then look to see if the requirement is based on a state water quality standard.

2. The State of Progress' required closure and capping of the ash pond is not an "appropriate requirement of state law" because the closure and capping requirements are not based on achieving State water quality standards.

The Supreme Court of the United States has held that "limitations imposed pursuant to Section 303 of the CWA are 'appropriate requirements of state law.'" *Pud*, 511 U.S. at 715. The state requirements must list the designated uses of the waters and the water quality criteria. *Id.* The Court stated that the state must set forth any limitations that are necessary to assure compliance with the Section 303 limitations and any other "appropriate requirement of state law." *Id.* The CWA specifically recognizes the state's ability to impose stricter standards than the standards set forth in the CWA. *Id.* at 723. (Stevens, J. concurring.) However, without a specific limitation on what is considered an "appropriate requirement of state law," the Supreme Court is giving states too much authority to be able to include any requirement they choose within an NPDES Permit as long as the requirement is stricter than the CWA, and as long as they claim that the requirement touches water quality within the state.

When the Act was initially passed it was called the Federal Water Pollution Control Act, which required states to set water quality standards within their borders as long as the regulations complied with federal requirements. 2-3 Treatise on Environmental Law § 3.03 (2017). The problem was that the statute failed to give guidance to the states as to how they were to set water quality standards, accordingly, the Federal Water Pollution Control Agency created twelve "guidelines on water quality standards." *Id.*

First, the "nondegradation requirement stated that if the quality of a body of water was already better than the standards laid out in the statute, then the state was not permitted to allow the quality of the water to drop to the federally mandated level. *Id*. Second, a state could not allow any part of a stream be used for transporting waste. *Id*. Third, states were required to

establish numeric effluent standards. *Id*. Fourth, states were required to specify the time in which the effluent limitation was to be measured in. *Id*. Fifth, states were required to describe current water quality and uses in the future. *Id*. Sixth, states were required to lay out a schedule for compliance with the requirements. *Id*. Seventh, states were required to consider all sources of pollution that were relevant. *Id*. Eighth, states had to require that all waste be "treated" before being discharged into the water. *Id*. Ninth, states must conduct public hearings before imposing the new requirements. *Id*. Tenth, states were required to review the quality of their standards with the quality of the standards of adjacent states. *Id*. Eleventh, state plans must be in compliance with any federal plans. *Id*. And finally, the standards must anticipate any effect that population growth and technological changes would have on the water quality. *Id*.

The State of Progress' NPDES Permit requirements do not meet any of the guidelines set forth by the Federal Water Pollution Control Agency. The Permit granted to EnerProg merely states that "by November 1, 2018 there shall be no discharge of pollutants in fly ash [and bottom ash] transport water," and that EnerProg must "cease operation of the coal ash pond by November 1, 2018." (R—10.) No part of this permit meets any of the guidelines set forth. There is no limitation on the amount of pollutants that are allowed to be discharged into the water, there is no measurement of time in which the chemicals can be measured against, there is no description of the water quality currently, and no description of the water quality in the future. The only guideline that the permit issued by the State of Progress may meet is the guideline that a time table be set out for compliance.

When the State of Progress merely sets out a requirement that the ash pond be closed by November 1, 2018, be dewatered by September 1, 2019, and covered by September 1, 2020, the State of Progress fails to regulate any effluent limitation or other limitation on EnerProg. The

certification requirements merely force EnerProg to alter its existing outfall structures even though they have failed to provide any evidence that the requirement is based on an achieving better state water quality standards under the CWA.

II. THE EPA NOTICE THAT SUSPENDED FUTURE COMPLIANCE DEADLINES ALSO SUSPENDED ENERPROG'S PERMIT COMPLIANCE DEADLINES BECAUSE NOVEMBER 1, 2018 WAS THE DATE THE EFFLUENT LIMITATION BECAME EFFECTIVE.

An agency has the authority to postpone the effective date of an action taken by it when the agency believes that justice so requires, pending judicial review. 5 U.S.C. § 705 (2012). The court that is reviewing the case may issue all process to postpone the effective date, or to preserve the status or rights of the affected, pending conclusion of review. *Id.* On April 12, 2017, Scott Pruitt, the Administrator of the EPA, announced that the EPA was reconsidering the earliest compliance dates set out under 40 C.F.R. Section 423.12. 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, 19,005 (Apr. 25, 2017). He announced that this suspension applied to all Best Available Technology (BAT) effluent limitations for fly ash transport water, bottom ash transport water, flue gas desulfurization wastewater, flue gas mercury control wastewater, and gasification wastewater. *Id.* The EPA believed that because the rule was so far reaching, it warranted a second look pending judicial review. *Id.*

The Court must review whether the EPA suspension under Section 705 of the EPA was effective to suspend the compliance dates for the 2015 Effluent Limitation Guidelines *de novo*, because the issue is a question of law.

A. The April 27, 2017 notice of suspension included EnerProg's deadline because November 1, 2018 was the effective date of the new requirement that coal facilities turn to zero discharge waste sites.

When reading Section 705 of the APA for its plain meaning, it would seem that Congress intended for administrative agencies to be able to postpone only the effective dates of regulations, not the compliance deadlines. *Beccerra v. U.S. Dept. of Interior*, No. 17-cv-02376-EDL, 2017 U.S. Dist. LEXIS 150458 (N.D. Cal. Aug. 30, 2017). The D.C. Circuit has held that the statute only permits an administrative agency to postpone the effective date of a statute that has not already gone into effect, but does not permit the agency to suspend a promulgated rule without a notice and comment period. *Safety-Kleen Corp. v. EPA*, No. 92-1629, and consolidated case No. 92-1639, 1996 US. App. LEXIS 2324 1, 1 (D.C. Cir. Jan. 19, 1996). Therefore, the question in every Section 705 case is to determine what the true effective date is of the statute.

The 2015 revised ELGs for the Steam Electric Power Generating Point Source Category states that the new effluent limitations for fly ash transport water, flue gas mercury control wastewater, and gasification wastewater must be met by a date specified by the state permitting agency "that is as soon as possible beginning November 1, 2018, and no later than December 31, 2023." 40 C.F.R. § 423.13. The plain language of this part of the code states that the new effluent limitation for fly ash transport water, mercury control wastewater, and gasification wastewater do not go into effect until November 1, 2018, which is nineteen months after Scott Pruitt announced that the EPA was suspending the compliance dates for the 2015 ELGs. Although the amendment originally went into "effect" on November 3, 2015, the effective dates for the individual effluent limitations had not occurred yet.

The State of Progress' certification requirement created the November 1, 2018, deadline for closure of the ash pond to comply with the 2015 revised ELGs. (R—9.) The State of Progress

determined that EnerProg could meet the earliest requirement and required that in their NPDES Permit conditions. (R—9-10.) There is no indication in the record that the State of Progress would have required closure and capping of the ash pond without the requirement in the 2015 revised ELGs, and the compliance date corresponds exactly with the earliest possible date set out in the guidelines. This leads to the conclusion that the State of Progress was merely complying with the CWA compliance dates when it issued the NPDES permit requirement.

Since the effluent limitations laid out in the Limitation Guidelines do not go into effect until November 1, 2018, and Scott Pruitt suspended the effective dates nineteen months before the limitations were to go into effect, the suspension of the effective dates on April 27, 2017 was an effective suspension of EnerProg's compliance deadline under the State of Progress' certification.

B. Even if the Court finds that the effective date had already passed and that the EPA did not have the authority to suspend the November 1, 2018 deadline, the Court should still suspend the deadline pending judicial review to avoid burdensome costs on EnerProg.

Section 705 of the APA states that a court has the authority to "preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. Due to the language in the statute, even if the EPA did not have the authority to suspend the November 1, 2018, required closure of the EnerProg ash pond, the Court has the authority to suspend the deadline while the case is pending. *Salt Pond Assocs. v. U.S. Army Corps. Of Eng'rs*, 815 F.Supp. 766, 774 (D. Del. 1993). The court has the authority to postpone the action required by the agency, and they may preserve the rights of the parties. *Id.* at 776. The relief is only concerned with preliminary relief. *Id.* at 777.

In the case at hand, if the Court were not to suspend the November 1, 2018, deadline for closure of the ash pond EnerProg may be forced to build a new retention basin and shut down

their ash pond, which would needlessly disrupt their current business practices. This change could prove to be in vain because the court or the EPA could strike down the deadline set forth by the EPA after the damage is already done. The State of Progress determined that the cost of implementing the new basin would be a twelve cent increase to the average consumer's monthly electric bill. (R—9.) EnerProg would also have front the expense of building and implementing this new technology all while the technology they currently have in place is sufficient under the existing limitations of the CWA. The only action necessary to protect EnerProg's rights is to postpone the November 1st deadline set forth by the State of Progress pending judicial and agency review of the 2015 revised ELGs for the Steam Electric Power Generating Point Source Category.

III. IF THE SUSPENSION OF THE EFFECTIVE DATES FOR THE 2015 STEAM ELECTRIC POWER GENERATING INDUSTRY EFFLUENT LIMITATIONS WERE APPLICABLE TO ENERPROG, REGION XII OF THE EPA COULD NOT ALTERNATIVELY RELY ON BEST PROFESSIONAL JUDGMENT.

If it is determined that the 2015 revised ELG effective dates also led to a suspension of the effective dates in the State of Progress certification requirement, the Court must then look at whether Region XII of the EPA could have relied on Best Professional Judgment when requiring zero discharge of coal ash transport wastes.

When the ELGs only apply to some part of the operation of a company's business, the EPA may use Best Professional Judgement to regulate the other aspects of the company's business. 40 CFR § 125.3. TEBLs may be imposed through a combination of methods including BAT options. *Id.* Permits can be issued on a case-by-case basis and will look at multiple BAT factors including: (1) the age of the equipment and facilities involved; (2) the process employed; (3) the engineering aspects of the application of various types of control; (4) process changes; (5) the cost of achieving such effluent reduction; and (6) non-water quality environmental impacts. *Id.*

The EPA has the discretion to weigh the factors as they deem appropriate. U.S. EPA, EPA-821-R-15-004, Regulatory Impact Analysis for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (2015) [*hereinafter Regulatory Impact Analysis*] (*citing Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978)) When the CWA fails to list a national BAT requirement for a particular pollutant source, the permitting agency is given the authority to determine its own site-specific requirement by applying Best Professional Judgment. *Regulatory Impact Analysis*. The permitting agency, however, must use the same factors that the EPA would have used to determine the effluent limitation. *Id.*

The Court must review whether Region XII could rely on Best Professional Judgment under an abuse of discretion standard. The Court must review whether Region XII's decision was "based on a consideration of relevant factors and was not a product of a clear error of judgement." *Weyerhaeuser Co.*, 590 F.2d at 1025. Since the use of Best Professional Judgement for Best Available Technology requires the application of multiple factors, the Court must determine whether the EPA applied those factors in such a way that was not an abuse of discretion.

A. Region XII of the EPA was not justified in resorting to Best Professional Judgement in requiring closure and capping of the EnerProg ash pond because all of the pollutants that exist in the ash pond are covered under the 1982 ELGs.

With the suspension of the 2015 revised ELGs, the Court must look back to the 1982 ELGs to determine if all of the pollutants created by the MEGS ash pond are covered, or if the EPA and the State are authorized to resort to Best Professional Judgement in determining the effluent limitation for the pollutant. *See generally*, 40 CFR § 125.3.

The 1982 ELGs contained limitations for: (1) once through cooling water; (2) cooling tower blowdown; (3) fly ash transport water; (4) bottom ash transport water; (5) chemical metal cleaning wastes; (6) low volume wastes; and (7) coal pile runoff. 40 CFR part 125 (1982). Additionally, the EPA specifically stated that they were reserving their right to create effluent limitations in the future for: (1) non-chemical metal cleaning wastes; (2) flue gas desulfurization waters; (3) runoff from materials storage and construction areas; and (4) thermal discharges. *Id.*

The MEGS ash pond that must be closed and capped under the State of Progress certification requirements is listed as Outfall 002. (R—7.) This outfall system receives ash transport water from the surrounding Outfalls and contains: (1) bottom ash and fly ash; (2) coal pile runoff; (3) stormwater runoff; (4) cooling tower blowdown; (5) flue gas desulfurization wastewater; (6) and various low volume wastes. (R—8.) Out of all of the pollutants that accumulate in the MEGS coal ash pond, there are only two pollutants that do not have a specific effluent limitation listed in the 1982 ELGs: stormwater runoff, and flue gas desulfurization wastewater. However, both of these pollutant sources are listed as limitations that the EPA was specifically choosing not to set limitations for. 40 CFR part 125. Although the EAB found that the wastewater from these sources included mercury, arsenic, and selenium (which are all toxic pollutants) (R—9,) the EPA specifically listed all three pollutants as being excluded from regulation due to the fact that they were "present in amounts too small to be effectively reduced by technologies known to the Administrator." 40 CFR part 125.

Since the EPA specifically chose to refrain from setting effluent limitations for flue gas desulfurization wastewater and stormwater runoff, Region XII and the State of Progress could not rely on Best Professional Judgement to set limitations in their place. Since the entirety of the pollutants included in the coal ash pond are covered in some form or another in the 1982 ELGs,

there is no room for Region XII or the State of Progress to assert their Best Professional Judgement requiring closure and capping of the MEGS ash pond.

B. However, if the Court finds that Region XII could rely on Best Professional Judgement, the factors for BAT weigh heavily in EnerProg's favor because EnerProg just built the VCE system to comply with Progress's Clean Air Act State Implementation Plan.

When the ELGs do not set out a specific effluent limitation for a pollutant, the permitting agency is given the authority to exercise their Best Professional Judgement to determine the BAT that should be implemented for that pollutant. 40 CFR § 125.3. The permitting agency must look to six factors in making their determination, they are: (1) the age of the equipment and facilities involved; (2) the process employed; (3) the engineering aspects of the application of various types of control; (4) processes changed; (5) the cost of achieving such effluent reduction; and (6) non-water quality environmental impact. *Id.*

In the 1990s the Pennsylvania Department of Environmental Resources conducted a Best Professional Judgement test to find the BAT for coal mining operation ground water seeps. Conference, *Best Professional Judgement Analysis for Constructed Wetlands as a Best Available Technology for the Treatment of Post-Mining Groundwater Seeps*, Int'l Land Reclamation and Mine Drainage Conference, 60, 60 (1994). The agency reviewed the same factors that the EPA would review in determining Best Professional Judgement. *Id.* The agency looked at the fact that the acidity that results from the groundwater seeps damages drinking water treatment and distribution facilities, makes streams unsuitable as fisheries, and can generate higher costs to treat drinking water supplies. *Id.* at 66. Additionally, the Agency found that the cost of the change in technology would average to only $0.20 per kilogram. *Id.* at 67. For these reasons, the Agency decided that the State of Pennsylvania would benefit from the implementation of the BAT guidelines for groundwater seeps. *Id.* at 68.

The NPDES permit issued to EnerProg differs in many respects. The State of Progress implemented a Clean Air Act State Implementation Plan which required EnerProg to install a FGD system to remove sulphur oxide (S0x) from air emissions. (R—9.) The system is set up so that the FGD blowdown is treated through a vapor compression evaporator (VCE), which evaporates the majority of the wastewater from the FGD system. (R—9.) This system only became operational in February 2015, yet the State of Progress's certification requirement would require EnerProg to build an additional retention basin to take the waste stream that the VCE is already treating from the ash pond and redirect it into the retention basin. (R—9.) Similarly, EnerProg is also currently in the process of constructing an FGD settling basin to take the stormwater runoff which will also be transported through the VCE on all occasions other than severe storms. (R—10.)

Considering the age of the equipment, as the factors dictate, the fact that the retention basin would require construction of a new outfall system just two years after the State of Progress forced EnerProg into building the VCE, weighs heavily in EnerProg's favor. Although the State of Progress found that the change in technology would cost the average customer only $0.12 per month, and that the technology has been used in the industry for years, the permit would still require the rerouting of Internal Outfalls 008 and 009 to the new retention basin. At this time, all outfalls except for Internal Outfall 001, which discharges directly into the Moutard Resovor, would need to be rerouted away from the ash pond currently in use, and would be redirected to the new retention basin. This would unnecessarily force EnerProg to establish an entirely new system.

Based on how young the VCE is, coupled with the hardship of rerouting outfalls 008 and 009, compared with the cost of implementing the new retention basin, Region XII of the EPA

and the State of Progress were not justified in relying on Best Professional Judgement to require the closure of the MEGS ash pond by November 1, 2018.

VI. THE DISCHARGES FROM OUTFALL 008 TO THE COAL ASH POND ARE INTERNAL DISCHARGES AND THUS NOT SUBJECT TO CWA JURISDICTION BECAUSE THE COAL ASH POND IS NOT A "WATER OF THE UNITED STATES" AS THE TERM IS DEFINED BY THE EPA.

The MEGS coal ash pond is a waste treatment system that does not fall under the definition of "waters of the United States" as stated in Section 122.2 of the Code of Federal Regulations. 40 C.F.R. § 122.2. However, the Code also lists exclusions to this definition. *Id.* Waste treatment systems are not considered "waters of the United States" unless the waste treatment system consists of a manmade body of water. *Id.* This includes waters that were originally created from waters of the United States (such as disposal area in wetlands) or resulted from the impoundment of waters of the United States. *Id.* This exception was suspended by the EPA on July 21, 1980, taking all waste treatment centers that fall into those two categories out of the definition of "waters of the United Sates." Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980). This suspension has been upheld for over 30 years. *Id.* The suspension was effective because it met the requirements for a notice and comment period that are required by Section 553 of the APA.

B. The EPA had the authority to suspend part of the definition of "waters of the United States" under Section 553 of the APA because the suspension was not arbitrary or capricious since the current definition of "waters of the United States" needed careful reexamination.

A federal agency that proposes a new rule, or amends an existing rule, shall give notice of the proposed rule in the Federal Register, and shall include the time and place for public rulemaking proceedings, the legal authority for the proposed rule, and the substance of the proposed rule. 5 U.S.C. § 553 (2012). However, this rule does not apply to general rules of policy, interpretive rules, or when the agency finds that public notice and comment is

"impracticable, unnecessary, or contrary to the public interest. *Id.* Although the Supreme Court has never decided a case involving agency suspension, the holding in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, has set the standard of review for courts hearing suspension cases. 463 U.S. 29, 48 (1983).

In *State Farm*, the Supreme Court of the United States held that an agency could not suspend a rule if the suspension is arbitrary and capricious. *Id.* at 41. An agency rule is arbitrary and capricious if the agency has relied on factors which Congress has not intended to consider, failed to consider an important aspect of the problem, offered an explanation that is counterintuitive, or is implausible. *Id.*

In *Council of S. Mountains, Inc. v. Donovan*, the court found the Secretary of Labor's order deferring implementation of a regulation to be non-arbitrary and non-capricious. 653 F.2d 573, 583 (D.C. Cir. 1981). Upon near completion of a 2-year phase-in period, the secretary added an additional six months before the implementation of final regulations for coal mining rescue equipment. *Id.* The Secretary had decided to postpone implementing the regulations because numerous parties had questioned the safety of the equipment. *Id.* This led the secretary to reasonably determine that field testing should be finished before the regulations were implemented. *Id.* Storage guidelines and training had not also been completed. *Id.* Thus, the court found this deferment to be reasonable. *Id.*

Similarly, in *Nat'l Fed'n of Fed. Emp. V. Devine*, the Office of Personnel Management postponed a regulation allowing federally employees open season to transfer freely from one health benefit plan to another. 671 F.2d 607, 608 (D.C. Cir. 1982). The Office enacted the postponement because the changes in package benefits and pricing would be so substantial that it

would threaten the financial integrity of many of the plans. *Id.* at 609. The court found that this postponement was neither arbitrary, nor capricious because of the financial threat. *Id.*

On the other hand, in *Pub. Citizen v. Dep't of Health & Human Servs.*, there was an FDA regulation that provided that certain estrogen drugs must be dispensed with inserts 180 days after a notice for that drug was published to the federal register. 671 F.2d 518, 518-19 (D.C. Cir. 1981). Sometime later, the FDA postponed implementation of the insert program. *Id.* at 519. The Secretary of the Department of Health and Human Services released a notice in the Federal Register formally stating that the program was postponed. *Id.* The notice stated the reasons for the postponement regarded questions of cost, necessity, and the utility of the program. *Id.* The notice gave no mention of a notice and comment period and did not mention when the postponement would end. The district court ruled in favor of the Department. *Id.* The appellate court held that the Department had one month to determine its course of action. *Id.*

In the case at hand, the EPA suspended the inclusion of waters that were originally created from an impoundment waters of the United States, as "waters of the United States." The EPA's suspension came about after a series of petitions filed in several courts of appeal that were brought by numerous industries and an environmental group. The EPA agreed that the regulation was overly broad and acknowledged that it needed careful reexamination. For these reasons, the suspension was put into effect. The EPA also intends to develop a revision that will be subject to public comment. This is similar to Donovan, in which, the Secretary heeded the promptings of the members in the field and responded in a way that would help.

Additionally, in the case at hand, the EPA suspended the sentence in the regulation as a response to negative feedback from several entities who argued that the regulation would require them to obtain permits for discharges into their existing waste treatment systems, which had been

in existence for many years. This is equivalent to a financial threat that is sufficient to pass the arbitrary or capricious test. Hence, this suspension should be upheld in the same way that the postponement was upheld in National Federation.

On the other hand, the case at hand differs from Public Citizen in that it had an end result in mind. The EPA did not intend for the suspension to remain in effect indefinitely, it was a temporary measure meant to facilitate a solution, which is exactly what it did. The EPA suspension has been discussed and upheld subsequent times. This suspension was most recently affirmed in the Federal Register. EPA Administered Permit Programs: The NPDES, 80 Fed. Reg. 37, 114 (June 29, 2015). The agencies were able to hear directly from the representatives, throughout the rule development, and the results of this outreach led to the development of this rule. *Id.* The EPA's suspension was not merely an indefinite stay, it was a means to achieve a goal.

C. The coal ash pond is not subject to clean water act jurisdiction because it falls under the July 21, 1980 suspension.

The suspension of the portion of the definition of "waters of the United States" which includes waste treatment centers, has been upheld for over 30 years. Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980). The suspension was originally put into place because the EPA, after looking at the string of cases arising from disputes involving the definition, believed that the regulation may be overly broad and needed careful re-examination. *Id.* The EPA has yet to reexamine the regulation, thus the suspension is still in effect. *Id.* It would be wholly irrational to suddenly require EnerProg to obtain a permit for discharging into its own waste treatment system without any change in the regulation.

On April 1, 1983, the EPA specifically addressed the suspension of the exclusion of waste management treatment centers from the definition of "waters of the United States." Envt'l

Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA NPDES; CWA Section 404 Dredge or Fill Programs; and CAA Prevenion of Significant Deterioration, 48 Fed. Reg. 14,146 (Apr. 1, 1983). The Federal Register stated that as of this date, the EPA was continuing with the suspension that began on July 21, 1980. *Id.* When the EPA specifically addressed the suspension, but chose not to alter the definition, or lift the suspension, it meant that the EPA chose to keep the law in its current form.

This suspension is also subject to "administrative deference" or "Chevron deference." If Congress has directly spoken to the question at issue, and Congress's intent is clear, then the court as well as the agency, must give effect to the expressed intent of Congress. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, if Congress has not directly addressed the question at issue, the agency's authority to fill in the gaps is implied. *Id.* The court does not impose its own construction, rather the question for the court is whether the agency's interpretation is based on a permissible construction of the statute. *Id.*

The EPA has used its implicitly granted authority to define and limit the parameters of what constitutes a "water of the United States." The discretion resides with the EPA alone and the court is only able to step in if there is some indication that the EPA has overstepped the bounds of its authority. There is no indication that the EPA has impermissibly used its power and therefore the discretion remains in the hands of the EPA. Moreover, if the EPA were to decide to lift the suspension, the court would have to respect that decision as well.

In order for EnerProg to comply with the laws it must first know what the laws are. If the court had the authority to lift the suspension without remedying the initial problem, it would impose an undue burden upon many entities, including EnerProg. The ability to trust that the law will remain consistent is crucial. It would be unreasonable to subject the coal ash pond to CWA

act jurisdiction before the EPA makes a final decision regarding the regulation. For these reasons, the court must give deference to the EPA's decision to uphold the suspension, meaning that the MEGS ash pond is not considered a "water of the United States," and therefore is not subject to CWA jurisdiction.

VII. THE ASH POND CLOSURE AND CAPPING PLAN DOES NOT REQUIRE A PERMIT FOR THE DISCHARGE OF FILL MATERIAL BECAUSE ONCE IT IS CLOSED, IT IS NOT SUBJECT TO ANY ADDITIONAL REQUIREMENTS.

The MEGS pond is not subject to any additional requirements under Section 402 or 404 of the CWA because it is not considered a "water of the United States." Regarding the requirement of a fill permit, the closure and capping of the MEGS pond is considered a non-prohibited discharge of fill material because the remaining ash and cap do not impair the flow or reduce the reach of the navigable water. Whether the MEGS pond requires any additional permits is a matter of law and therefore this court must analyze this issue de novo.

Under Section 404 of the CWA, an NPDES permit is only required if there is a discharge of pollutants into navigable waters of the United States. 33 U.S.C. § 1342. Waste treatment systems that were created from the impoundment of waters of the United States are not considered "waters of the United States." 40 C.F.R. § 122.2. The final authority regarding Clean Water Act jurisdiction remains with the EPA. *Id*. The EPA fact sheet addresses the requirements of inactive ash ponds and states that once coal ash ponds are closed they are not subject to any additional requirements. U.S. Envt'l Protection Agency, Fact Sheet: Final Rule on Coal Combustion Residuals Generated by Electric Utilities, (December 2014) https://www.epa.gov/sites/production/files/2014 12/documents.factsheet_cerfinal_2.pdf

The MEGS pond is not considered a "water of the United States" because it was created from the impoundment of Fossil Creek and, therefore, is not considered a "water of the United States."

(R –7) After the MEGS pond is closed and capped, it is not subject to any additional permitting requirements because the ash pond is officially inactive. Similarly, the lower court found that the jurisdictional definition of "waters of the United States" is the same for both Section 402 and 404 permitting. (R–13)

Because the EPA has stated that the MEGS ash pond is not subject to any additional requirements once the ash pond is inactive under Section 402 of the CWA, and because EAB determined that the jurisdiction of 402 and 404 are the same, the MEGS ash pond is not subject to a Section 404 permit requirement.

The lower court found that the EPA exemption for waste treatment systems does not contain a recapture provision that would convert these features back into "waters of the United States" upon their retirement. Therefore, once the MEGS pond is no longer active, it does not convert into a "water of the United States."

The MEGS pond does not require a permit for the closure and capping. Section 404 of the CWA states two situations where a permit is required: (1) when the discharge of fill material into the navigable waters impairs the circulation or flow of the navigable waters or (2) when the reach of such waters is reduced. 33 U.S.C. § 1344(f)(2). For the closure and capping of the MEGS pond to be considered fill material, the closure and capping activities would have to impair the flow or reduce the reach of the navigable waters. The cap does neither of these, rather, the cap will allow the site of the MEGS pond to be reused. While the MEGS pond discharge is isolated, the cap allows any water to flow over it without impairing the water quality of the navigable water.

CONCLUSION

EPA authority to review state requirements. The EPA must have the authority to be able to review state permit requirements for NPDES permits to determine if the permits comply with the CWA under "appropriate requirements of state law." The CWA is a federal statute that the EPA has been given oversight of, and without their oversight of state permitting requirements a state would be able to include almost any requirement they deem proper with no oversight from a federal agency. The EPA must have the jurisdiction to review the state permits before they are issued.

"Appropriate Requirements of State Law" The State of Progress' requirement that EnerProg close and cap the ash pond is not an "appropriate requirement of state law." Section 401 requires that the state set forth effluent limitations, or any other limitations that affect water quality. Based on the State of Progress' intent to prevent harms that may occur due to ash ponds, it is not possible to determine what effluent limitation is to be met. For these reasons, the State of Progress' requirements are not an "appropriate requirement of state law." Similarily, because the Supreme Court has failed to determine what falls under the category of "appropriate requirements of state law," the Court must look to the history of the CWA. Under the twelve guidelines that were originally set out under the Act, the State of Progress' requirements do not affect state water standards and therefore, are not an "appropriate requirement of state law."

Notice of suspension. On April 27, 2017 the Administrator of the EPA suspended the effective dates for the 2015 Revised Effluent Limitation Guidelines, which required that companies comply with the guidelines as soon as possible beginning on November 1, 2018. Since the dates were stated that they must be met beginning on November 1, 2018, these dates were effective dates and could be suspended by the Administrator when exercising his powers

under Section 705 of the APA, and in it was an effective suspension of EnerProg's deadlines. However, even if the Court finds that the dates were compliance dates, and could not be suspended, the Court still has the authority and the responsibility to postpone EnerProg's deadlines because the 2015 Effluent Limitation Guildelines are currently under review in the Fifth Circuit and it would be unjust for EnerProg to be forced to meet the deadlines, that the court may end up striking down.

Use of Best Professional Judgement. A state or permitting agency may use Best Professional Judgement when the EPA fails to set an effluent limitation for a pollutant. When the EPA suspended the 2015 Effluent Limitation Guidelines, they made the 1882 Guidelines effective again, and the 1982 guidelines specifically addressed each of the pollutants found in the MEGS ash pond. Since the EPA recognized all of the pollutants and chose to set limitations, or purposefully omit limitations, Region XII could not justifiably rely on Best Professional Judgement to require the closure and capping of the MEGS ash pond. However, if the Court does find that Region XII could rely on Best Professional Judgement, the Court must still apply the six factors that the EPA would look at. Under these six factors, the scale tips in favor of EnerProg in that the required closure and capping of the ash pond are not the Best Available Technology under Best Professional Judgement.

"Waters of the United States" The MEGS pond should not be considered a "water of the United States" because it is a waste treatments system created by impounding waters of the United States. This type of waste treatment system was included in the EPA suspension and is no longer considered a "water of the United States." The EPA suspension is subject to Chevron deference and the discretion of defining the term "waters of the United States" resides with the EPA. Additionally, the fact that the EPA suspended this rule without a notice and comment

period is moot. The notice and comment period was not necessary because the suspension was not arbitrary or capricious. For the foregoing reasons, this court should uphold the lower court's decision to not subject the MEGS pond to effluent limitations because the MEGS pond is not a "water of the United States."

Additional Requirements. The MEGS pond should not be subject to any additional requirements because it is not considered a "water of the United States" under Sections 402 and 404 of the CWA. Furthermore, the closure and capping of the MEGS pond is considered a non-prohibited discharge of fill material because the remaining ash and cap do not impair the flow or circulation of the navigable water, nor does it reduce the reach of the navigable water. For the foregoing reasons, this court should uphold the lower court's decision to not subject the MEGS pond to permitting requirements once it is closed and capped.

For the foregoing reasons, EnerProg respectfully requests that the holding of the Environmental Appeals Board be reversed and the State of Progress' certification requirements be suspended pending judicial review in the Fifth Circuit.