Team 40

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 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 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent

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Oral Argument Requested

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STATEMENT OF JURISDICTION

These two consolidated petitions for review, brought by EnerProg, L.L.C., and Fossil Creek Watchers, Inc. (FCW) (collectively, "petitioners") against Respondent United States Environmental Protection Agency ("EPA" or the "Agency") concern the final decision of the Environmental Appeals Board (EAB) of the United States Environmental Protection Agency (EPA), affirming the issuance of a final National Pollutant Discharge Elimination System (NPDES) Permit to EnerProg pursuant to section 509(b) of the Clean Water Act (CWA), 33 U.S.C. § 1369(b). The petitions are preceded by an order of the EAB denying petitions for review filed by EnerProg and FCW pursuant to 40 C.F.R. Part 124 (2017). EPA's action on the permit was final for purposes of judicial review in this matter on spring term, 2017 when the EAB denied both EnerProg and FCW appeals and affirmed NPDES Permit PG000123. EPA agrees the petitions were timely and this Court has jurisdiction over these consolidated petitions for review of EPA's issuance of the NPDES permit pursuant to section 509(b)(1)(F) of the Act, 33 U.S.C. § 1369(b)(1)(F).

STATEMENT OF THE ISSUES

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

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

III. Whether the Final Permit properly included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the CWA Section 401 certification, including the questions:

- Whether EPA was required to include all such Progress certification conditions without regard to their consistency with CWA Section 401(d); and
- Assuming the question of the consistency of the conditions with CWA Section 401(d) is open to EPA and to this reviewing court, whether the ash pond closure and remediation conditions constitute "appropriate requirements of State law" as required by CWA Section 401(d).

IV. Whether NPDES permitting requirements apply to EnerProg's pollutant discharges into the MEGS ash pond, in light of EPA's July 21, 1980 suspension of the provision of 40 C.F.R. § 122.2 that originally included waste treatment systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States.

V. Whether the ash pond closure and capping plan requires a permit for the discharge of fill material pursuant to Section 404 of the CWA.

STATEMENT OF THE CASE

This case involves two consolidated petitions for review by EnerProg and FCW of an NPDES permit renewal issued in on January 18, 2017, by EPA to EnerProg for discharges associated with the continuing operation of the Moutard Electric Generating Station (MEGS), an operational coal-fired steam electric power plant located in Fossil, Progress. The 2017 NPDES permit imposes detailed effluent limitations, monitoring requirements, and operating conditions which EnerProg must comply to operate MEGS.

Both EnerProg and FCW appealed the re-issuance of the NPDES permit for MEGS. The EAB denied both appeals and affirmed NPDES Permit PG000123.

Petitioner EnerProg, objects to provisions contained within the NPDES permit, including the deadline for compliance with zero discharge requirements for coal ash transport waters, the permit's inclusion of certain requirements for the closure of its coal ash treatment pond, and with Region XII's reliance on Best Professional Judgment (BPJ) as an alternative ground for requiring zero discharge of ash transport pollutants, 40 C.F.R. § 125.3(c)(3).

Petitioner FCW, objects to provisions contained within the NPDES permit, including the interim discharge of untreated coal ash wastes into the ash pond and provisions of the closure plan, requiring the capping of the remaining coal ash pond.

CLEAN WATER ACT REGULATORY BACKGROUND

Passed by Congress in 1972, the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, is a comprehensive statute administered by the EPA with the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" principally through the reduction and eventual elimination of pollutant discharges from both point and nonpoint pollution sources. 33 U.S.C. § 1251(a). To achieve this goal, the CWA provides "the discharge of any pollutant by any person shall be unlawful," unless such discharge complies with specific requirements under the Act, including securing a permit before discharging any pollutant from any point source into the navigable waters of the United States. 33 U.S.C. § 1311(a). *See EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976); *see also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013). "NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). Under

the guidance of the Administrator, the EPA is responsible for implementing CWA requirements, including administering the NPDES permit program. Section 402(a)(1), 33 U.S.C. § 1342(a)(1). An NPDES permit "defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act]." *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976).

The EPA "initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials. If authority is transferred, then state officials . . . have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2525 (citations omitted).

Because the State of Progress is not authorized to administer the NPDES program pursuant to § 402(b) of the CWA, EPA Region XII has retained jurisdiction to issue final NPDES permits. 33 U.S.C. § 1342(b), 40 C.F.R. §§ 123 *et seq.*

However, applicants such as EnerProg "shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate" and "[n]o license or permit shall be granted if certification has been denied by the State." Clean Water Act, § 401 *et seq.*, 33 U.S.C.A. § 1341(a)(1).

STATEMENT OF FACTS

Moutard Electric Generating Station (MEGS) is a coal-fired electric generating plant with one unit rated at maximum dependable capacity of 745 megawatts (MW). The water drawn from the plant is withdrawn to the Moutard Reservoir to make up for evaporative losses from the cooling tower, boiler water, ash transport water and drinking water needs. MEGS is subject to Environmental Protection Agency (EPA) effluent limitation guidelines per 40 C.F.R. § 423 – Steam Electric Power Generating Point Source Category. The facility has a closed-cycle cooling

system (cooling tower). This cooling tower has a design intake flow of less than 125 million gallons per day (MGD). The facility has a wet fly ash handling system and a wet bottom ash handling system, which uses water sluice ash solids through pipes to one ash pond, where the transport water undergoes treatment by sedimentation before it is discharged to the Moutard Reservoir. In June 1978 an ash pond was created by damming the then free-flowing upper reach of Fossil Creek. Fossil Creek does not discharge to the Moutard Reservoir but is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water.

The facility operates five outfalls. The State of Progress has issued a certificate pursuant to Section 401 of the Clean Water Act for the renewal of the MEGS NPDES permit. One of the conditions of the Progress Section 401 certification is that, in order to comply with the Progress Coal Ash Cleanup Act (CACA), EnerProg must cease operation of its ash pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and covered the dewatered ash pond with an impermeable cap by 2020. The intent of CACA legislation is to prevent public hazards associated with ash treatment pond containment systems and leaks from treatment ponds into ground and surface water. Pursuant to the Clean Water Act Section 401(d) Progress requirements are incorporated as additional conditions to the permit.

Based on the requirements of the Progress 401 certification, it is determined that MEGS is capable of meeting this zero discharge standard by the initial compliance deadline of November 1, 2018. EPA staff have determined that dry handling of bottom ash and fly ash has been in use at existing plants in the industry for many years. MEGS is sufficiently profitable to adopt dry handling of these wastes with zero liquid discharges, with no more than a twelve cents per month increase in the average consumer’s electric bill. Accordingly, the permit writer has

determined, in the exercise of his best professional judgment, that zero discharge of ash handling wastes by November 1, 2018, constitutes BAT for discharges associated with coal ash wastes.

In response to Progress's Clean Air Act State Implementation Plan, the company installed a Flue Gas Desulfurization (FGD) system. The MEGS facility will be required to build a new Retention Basin to reroute all waste streams currently discharged to the ash pond. This change is required to meet the CACA requirements. The facility is also constructing a new FGD settling basin, the waste from the basin will be treated by VCE. In case of the severe storms, overflow from the basin may be routed to Outfall 002.

STANDARD OF REVIEW

The EAB denied the appeals of both EnerProg and FCW and affirmed Permit PG000123. This Court reviews the EPA's decision to issue a final permit according the Administrative Procedures Act (APA), 5 U.S.C. §§ 701–06. *See American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Under the APA, the court generally reviews such a decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999).

SUMMARY OF THE ARGUMENT

The Environmental Appeals Board (EAB) correctly denied the appeals of both EnerProg and Fossil Creek Watchers (FCW). The EPA issuance of Permit PG000123 was correct and in compliance with Section 402 of the Clean Waster Act (CWA).

First, the final permit included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the CWA Section 401 certification. Because the water is not-navigable this condition is not required.

Second, the notice for suspending compliance deadlines is effective because of court precedent and the elements of substantial harm to the EPA, irreparable damage and the undermining public interest.

Third, the standard of Best Professional Judgement is the best alternative to rely on zero-discharge of coal and ash transport wastes. The EPA issuance of Permit PG000123 is justified via 40 C.F.R. Part 423. 40. C.F.R. § 125.3(c)(3).

Fourth, discharges into the MEGS ash pond are internal outfalls and therefore do not require effluent limitations under NPDES permitting requirements because that feature falls into the waste treatment exclusion to the definition of waters of the United States.

Fifth, MEGS ash pond closure and capping do not require a permit for the discharge of fill under Section 404 of the CWA. There is no recapture provision under Section 402 which would convert the feature back to a water of the United States upon retirement and Section 404 has an explicit exclusion for waste treatment systems.

ARGUMENT

I. THE APRIL 25TH 2017 NOTICE IS EFFECTIVE TO REQUIRE SUSPENSION OF THE COMPLIANCE DEADLINES

The effective notice date issued by the EPA for April 25th, 2017 is effective to require the suspension of compliance deadlines. The Administrative Procedure Act (APA) establishes the standard to postpone the effective date of an action requiring compliance 5 U.S.C. § 705.

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Section 705 solely does not establish the extension of a compliance date. However, it does establish that the purpose of the act is to take action to avoid irreparable injury therefore providing relief from compliance by postponing the effective date. In the event upon which a compliance date has passed, or an action has not fallen within compliance a stay of said action can be maintained under the Administrative Procedure Act if it upholds the standards established in *Berard v. Office of Personnel Management*, 24 M.S.P.R. 347 (1984). In *Berard* it was held that the likelihood of success on appeal for claims of irreparable harm, substantial harm to other interested parties, and public interest. In cases where the three factors strongly favor issuance of stay, stay will be issued if serious legal question exists on the merits. *Berard v. Office of Personnel Management,* 24 M.S.P.R. 347 (1984).

Therefore, a determination of if the Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water requires examining the presence of at least three elements including: irreparable harm, substantial harm to other interested parties and public interest. The standard for satisfying these elements in Berard must be slight but strong on success for appeal. In this case while EnerProg has not proven that compliance is infeasible the record indicates that compliance with the current compliance deadlines would not be in the public interest, and would cause substantial harm to the EPA by limiting its ability to aid companies in finding environmentally and economically friendly ways to comply with the Final Effluent Limitation Guidelines. Therefore, the EPA does have the authority to issue a stay of the postponement date. The relationship and the elements provide the through the notice of the effective compliance deadline make notice effective to require the suspension of the compliance deadlines.

Additionally, the court has ruled in *Salt Pond Associates v. U.S. Army Corps of Engineers*, 815 F. Supp. 766 (D. Del. 1993) that compliance deadlines can be suspended if developers or companies can show that the relief from a compliance deadline can avoid irreparable harm. The court should rule in favor of effective notice requiring the suspension of compliance deadlines. EnerProg was granted the postponement of the effective date because of the difficulties in adhering to the effective date and compliance deadlines. Therefore, applying the standard for irreparable harm established in *Berard v. Office of Personnel Management*, M.S.P.B. 1984, 24 M.S.P.R. 347 mean that EnerProg only provide a slight chance of irreparable harm. Consequently, effective notices requires suspension of the compliance deadlines.

II. EPA REGION XII CAN RELY ON BEST PROFESSIONAL JUDGMENT INDEPENDENT OF THE APPLICABILITY OR EFFECTIVENESS OF THE 2015 STEAM ELECTRIC POWER GENERATING INDUSTRY EFFLUENT LIMITATION GUIDELINES

The Environmental Appeals Judges correctly asserted that EPA Region XII can rely on Best Professional Judgement (BPJ) as an alternative ground to require zero discharge of coal ash transport waste. BPJ is justified independent regardless of the nature of 2015 ELGs for the Steam Electric Power Generating Industry Category, 40 C.F.R. Part 423, 40 C.F.R. § 125.3(c)(3) reads: "[w]here promulgated effluent limitation guidelines 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." Therefore, activities that include toxins not covered by the ELG are also subject to regulation. The court has echoed this logic in *Louisville Gas and Electric Company v. Kentucky Waterways Alliance*, 517 S.W.3d 479 (2017). "The Cabinet's determination that the LG&E permit should proceed under 40 C.F.R. § 125.3(c)(1), as opposed to (c)(3), was a reasonable interpretation of the regulation and merits our deference." In Louisville Gas the court ruled that a permit issued to discharge certain pollutants in the Ohio

river was correctly issued after being vacated. Additionally, the permit writer did not abuse discretion in deferring Best Professional Judgment assessment in reasonable anticipation of EPA guidelines. The Environmental Appeals Judges correctly applied the logic to this case. It is not disputed that the MEGS contains toxic pollutants such as mercury, arsenic, and selenium that are not regulated by the 1982 ELGs. Therefore, these pollutants are subject to the standard limits of Best Professional Judgment.

III. THE EPA DOES HAVE JURISDICTION TO CONSIDER PERMISSIBILITY CONDITIONS AND THE CONDITIONS IN THIS CASE ARE APPROPRIATE

The conditions outlined related to closure and remediation constitute "appropriate requirements of state law." Appropriate requirements of state law as stated under CWA section 401(d) is defined as requirements or actions within the standards established by conditions enforced by the state *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 128 L. Ed. 2d 716 (1994). When appropriate requirements of state law or the implementation of environmental standards are in question, courts have typically deferred to the appropriate agency for deference. The EPA is the relevant agency related to the regulation and protection of the environment and clean water/air standards. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). The state of Progress does not have a standard for review of certifications in state courts. Consequently, the EPA not only has jurisdiction over the issue of appropriate requirements of state law but is legally given deference according to *Chevron*.

Additionally, EnerProg asserts that the closing and capping requirements are not appropriate requirements of state law. This assertion is incorrect. The burden of proof lies within EnerProg to establish that pond remediation, and capping is not related to water quality. The court in situations of deference has been unlikely and unwilling to do *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). Additionally, deference

granted to the EPA does not grant the EPA discretion that is a condition of State 401 certification see *American Rivers, Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99 (2d Cir. 1997).

EnerProg additionally asserts that the EPA is in violation of the CWA Section 404 permit. The Ash pond in question is not a navigable water and therefore falls within the exceptions to the permit requirement.

IV. NPDES PERMITTING REQUIREMENTS DO NOT APPLY TO ENERPROG'S DISCHARGES INTO THE MEGS ASH POND BECAUSE THE ASH POND FALLS WITHIN AN EXCEPTION TO WATERS OF THE UNITED STATES

The MEGS ash pond falls under CWA's waste treatment system exception from "waters of the United States," therefore NPDES permitting requirements do not apply to effluent discharges into the feature. Clean Water Act, § 301(a), 33 U.S.C.A. § 1311(a); 33 C.F.R. § 328.3(a)(8). The threshold question to determine whether a discharge into a water body requires permitting under the CWA, is whether a particular water body falls under the jurisdiction of a water of the United States. Clean Water Act, § 502(7), 33 U.S.C. § 1362. The EPA and the United States Army Corps of Engineers, regulations provide that waters of the United States include:

> [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, . . . [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), . . . the use, degradation, or destruction of which could affect interstate or foreign commerce, [and] [a]ll impoundments of waters otherwise defined as waters of the United States. . . . [*W]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA* (other than cooling ponds . . .) *are not waters of the United States*.

40 C.F.R. § 122.2 (emphasis added), 33 C.F.R. § 328.3(a). From the plain language of the regulation, it is clear that the EPA and the United States Army Corps of Engineers exclude waste

treatment systems from the waters of the United States, when those waters have been designed to meet the requirements of the CWA.

FCW argues that the because the ash pond was the result of damming the upper reach of Fossil Creek, a perennial tributary it falls within the definition of waters of the United States contained in 40 C.F.R. § 122.2 which includes "all impoundments of waters otherwise identified as waters of the United States." However, subsection (2) of the definition clearly modifies and restricts the definition, stating "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA . . . are not waters of the United States." 40 C.F.R. § 122.2. From this language, it is clear that the EPA has specifically exempted waste treatment systems, from the definition of a waters of the United States.

FCW also improperly maintains that the exclusion of waste treatment systems is limited by the second sentence in 40 C.F.R. § 122.2(2)(i), which states, "[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States . . . nor resulted from the impoundment of waters of the United States." 40 C.F.R. § 122.2. The EPA agrees that if implemented, this modifying sentence would place a limitation on the waste treatment exclusion under Section 122.2. 40 C.F.R. § 122.2. However, "[o]n July 21, 1980, EPA suspended the (modifying sentence) after concerns were voiced by industries that the last sentence suggested that they might be required to obtain permits for discharges into existing waste treatment systems, such as power plant ash ponds." *West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 694, 1991 WL 75217 (4th Cir. Jan. 10, 1991), *see also* Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980) (to be codified 40 C.F.R. pt. 122). The concern that permitting may be required for existing waste treatment systems like MEGS ash pond, is exactly what prompted the EPA to suspend

enforcement of the exclusion to waste treatment systems. Showing that the EPA never intended to bar such discharges and did not intend for current ash ponds to fall within the exclusion to waste treatment facilities. In addition to the July 21, 1980 suspension, the EPA has repeatedly continued to reaffirm the indefinite stay, most recently addressing the definition of waters of the United States in 2015. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054-01 (June 29, 2015) (codified at 33 C.F.R. pt. 328). *See also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 213 (4th Cir. 2009). By continuing to stay enforcement, the EPA and United States Army Corps of Engineers have made it clear that the exception to the definition of waters of the United States, still includes waste treatment systems even if those systems "resulted from the impoundment of waters of the United States." 40 C.F.R. § 122.2.

In light of EPA's July 21, 1980 suspension of the provision of 40 C.F.R. § 122.2 that originally included waste treatment systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States, NPDES permitting requirements do not apply to EnerProg's pollutant discharges into the MEGS ash pond. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 213 (4th Cir. 2009). The Environmental Appeals Board was correct in asserting that "no effluent limitations are required for internal outfall 008, as it does not discharge into a "Water of the United States" as that term is defined in the regulations." (EAB Order at 12.)

As defined effluent limitations are "any restriction imposed by the Director on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States.'" 40 C.F.R. § 122.2. In other words, effluent limitations "restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046, 117 L. Ed. 2d

239 (1992) (citing 33 U.S.C. §§ 1311, 1314). Effluent limitations are applied by the EPA "at the point of discharge into navigable waters, known as end-of-the-pipe, unless monitoring at the discharge point would be impractical or infeasible." *Iowa League of Cities v. EPA*, 711 F.3d 844, 856 (8th Cir. 2013) (internal citation omitted) citing 40 C.F.R. § 122.45(a), (h). In the current case, Outfall 008 does not discharge into a water of the United States, instead it is an internal outfall of water into a NPDES permitted waste treatment system and therefore no effluent limitations are required.

Additionally, FCW's argues that the stay for the exclusion to waste treatment systems was not valid under Section 553 of the Administrative Procedure Act (APA). 5 U.S.C. §§ 553 *et seq.* However, under the Act, "when an Agency for good cause finds that notice and public procedures are impracticable, unnecessary or contrary to the public interest, the Agency may issue a final rule without providing notice and an opportunity for public comment." Technical Amendments to the Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities-Correction of the Effective Date, 80 Fed. Reg. 37,988-01 (July 2, 2015) (codified at 40 C.F.R. pt. 257). As noted in by the EAB, the July 21, 1980 suspension has been in effect for over 35 years. Throughout this time courts have continually enforced and granted deference to the suspension. Recently, in *Tennessee Clean Water Network*, the court found that a

> Coal-fired power plant operator's use of coal ash containment ponds in area that had allegedly been covered by stream that connected to navigable river before ponds were created did not violate Clean Water Act (CWA), where flow of contaminants from plant to ash ponds was disclosed under and reasonably contemplated by plant's National Pollutant Discharge Elimination System (NPDES) permit.

Tennessee Clean Water Network v. Tennessee Valley Authority, 206 F. Supp. 3d 1280 (M.D. Tenn. 2016). Similarly, the MEGS ash pond is a waste treatment system designed to meet the requirements of the CWA and is therefore not subject to effluent limitations.

V. ASH POND CLOSURE AND CAPPING PLAN DOES NOT REQUIRE A PERMIT FOR THE DISCHARGE OF FILL MATERIAL PURSUANT TO SECTION 404 OF THE CWA BECAUSE SECTION 404 IS NOT APPLICABLE

The EAB is correct holding that "no section 404 permit is required for the ash pond closure and capping activities." (Order at 13.) Like Section 402, Section 404 of the Clean Water Act recognizes the exclusion for waste treatment systems. 33 C.F.R. § 328.3. Moreover, as noted by the EAB, the MEGS waste treatment system does not revert to a water of the United States after closure because the exemption for waste treatment systems under 40 C.F.R. § 122.2 "does not contain any recapture provision that would convert these features back into waters of the United States upon their retirement." (Order at 12.) Rather, closure and capping requirements are controlled under the CWA at 40 C.F.R. §§ 257.50 *et seq.*

Section 404 of the Clean Water Act, authorizes the Secretary of the Army, acting through the United States Army Corps of Engineers to issue permits for discharges that constitute dredged or fill material. 33 U.S.C. § 1344. Alternatively, Section 402 authorizes the EPA to establish the NPDES permit program, through which all other types of pollutant discharges are regulated. 33 U.S.C. § 1342. As discussed above NPDES permits are not required for discharges into waste treatment systems, because waste treatment systems are categorically excluded from the definition of waters of the United States. 40 C.F.R. § 122.2. Correspondingly, the Army Corps of Engineers recognizes the exclusion for waste treatment systems under Section 404 at 33 C.F.R. § 328.3. As § 328.3 states, "The following are not 'waters of the United States' . . . (1) Waste treatment systems, including treatment ponds or lagoons designed to meet the

requirements of the Clean Water Act." 33 C.F.R. § 328.3. Therefore, the jurisdictional definition of waters of the United States is the same for Section 402 and 404 permitting.

It is the longstanding policy of both the EPA and the Army Corps of Engineers that waste treatment systems are categorically excluded from waters of the United States and that these systems may be created in jurisdictional waters. *See Ohio Valley Envt'l Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). As established earlier in this brief, the MEGS ash pond falls clearly within the waste treatment system exception to waters of the United States and is therefore not subject to Section 402 or 404 permitting requirements.

Further, there is no recapture provision under 40 C.F.R. § 122.2. After careful consideration, the EPA issued the Coal Ash Disposal Rule under the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6901, authorizing utilities to retire waste treatment systems containing Coal combustion residuals such as those present in the MEGS ash pond by dewatering systems and capping remaining materials. 40 C.F.R. §§ 257.5 *et seq.*, Disposal of Coal Combustion Residuals from Electric Utilities final rule ("Coal Ash Disposal Rule"), 80 Fed. Reg. 21,302 (Apr. 17, 2015). Through the Coal Ash Disposal Rule, the EPA established "nationally applicable minimum criteria for the safe disposal of coal combustion residuals in landfills and surface impoundments." *Id.* at 21,303. The Coal Ash Disposal Rule applies to the MEGS ash pond as an existing surface impoundment. *Id.* The criteria of this program have been properly applied to EnerProg's MEGS facility including, operating criteria, groundwater monitoring, and integrity requirements. *Id.* at 21,304. The closure plan that has been approved by the EPA ensures compliance with the Coal Ash Disposal Rule's requirement that ash is removed or capped in place. 40 C.F.R. § 257.102(d). Additionally, closure and capping are not only

permissible under the laws of Progress, but necessary to meet the requirements of the Progress Coal Ash Cleanup Act.

Additionally, 33 U.S.C. § 1344(f)(2) recapture provisions are not applicable in this case. The recapture provision under § 1344(f)(2) "requires a permit even for an exempt activity under § 1344(f)(1) if the discharge of dredged or fill material is incidental to any activity that has as its purpose creating a 'new use' of the navigable waters." *Jones v. Thorn*, 1999 WL 1140863 (D. Or. 1999). The recapture provision under 33 U.S.C. § 1344, is not applicable in this case because the primary purpose of the closure and capping of the coal ash pond is to bring the facility into compliance with the Section 402 permitting requirements. The recapture provision provides that:

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

33 U.S.C. § 1344(f)(2) (emphasis added). In this case, the primary purpose of the closure and capping of the coal ash pond is not to bring an area of navigable water into a use which it was not previously subject. Currently, the MEGS ash pond serves to prevent contamination of nearby waterways and prevent the outflow of pollution into waters of the United States. The closure and capping of the feature has the same primary purpose as its original operation and therefore, is not subject to the "recapture provision." Further, the flow or circulation of navigable waters will not be impaired, or the reach of such waters be reduced by the closure and capping; in fact, the closure and capping requirement is intended to alleviate pollution concerns in accordance with the section 402 permitting requirements. EnerProg is not requesting to bring an area of navigable waters into a new use but is rather being required to take steps to alleviate pollution concerns at the MEGS site.

CONCLUSION

For the reasons set forth above, Respondent United States Environmental Protection Agency respectfully requests that this Court affirm the decision of the Environmental Appeals Board.

Dated: Nov. 27, 2017

Respectfully submitted,

Counsel for United States Environmental Protection Agency