Team 44

Docket Nos. 17-000123 and 17-000124

In the United States Court of Appeals for the Twelfth Circuit

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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

PETITIONER-FOSSIL CREEK WATCHER, INC.

Counsel for the Petitioner

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JURISDICTIONAL STATEMENT

This case concerns the application of the Federal Water Pollution Control Act (CWA), 33 33 U.S.C. § 1251 *et seq*. The Environmental Appeals Board United States Environmental Protection Agency (EAB) had proper jurisdiction pursuant to 40 C.F.R. § 124. This Court has personal jurisdiction over this appeal pursuant to 33 U.S.C. § 1369(b), which allows for petition for review. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 as to questions of federal law.

STATEMENT OF ISSUES

1. The EPA retains only limited authority over submitted water quality standards or any conditions applicable to limitation requirements. Progress' did not submit its cap and close conditions – derived from state law – as a submitted standard, nor do they relate to federal limitations. Does the EPA have any authority to review Progress' cap and close conditions when not submitted as a standard and has no effect on federal limitations?

2. Agencies must comply with APA § 553 when they create substantive rules. Otherwise, a reviewing court must vacate the substantive rule. An agency creates a substantive rule when it effectively suspends or delays a final rule. EPA's April 25, 2017 Notice purports to suspend compliance deadlines for the 2015 ELGs, which is a final rule. EPA did not comply with § 553 when it issued the Notice. Is the Notice effective to require suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water?

3. Agencies have discretion to implement permit conditions on a case-by-case basis, using their Best Professional Judgment, when the effluent limitations guidelines are inapplicable to a point source's activities. If the 2015 ELGs do not apply to the MEGS, the 1982 ELGs apply. The 1982 ELGs do not set BAT limits for discharges of fly ash and bottom ash transport water. The MEGS uses both types of wastestreams in its plant operations. The 1982 ELGs also do not set BAT limits for arsenic, mercury, and selenium, all toxic pollutants found in the MEGS's coal ash pond and traceable to its coal ash transport water. Could EPA Region XII rely on Best Professional Judgment (BPJ) as an independent ground to require zero discharge of pollutants in its coal ash transport waster, regardless of the applicability or effectiveness of the 2015 ELGs?

4. The CWA requires an NPDES permit for the discharge of pollutants into waters of the United States. EPA's definition of waters of the United States includes waste treatment systems created by impounding wasters of the U.S. The MEGS coal ash pond was created by impounding the waters of Fossil Creek, which is a water of the U.S. because it is a perennial tributary to an interstate river. The MEGS discharges toxic pollutants into its coal ash pond. Do National Pollutant Discharge Elimination System permitting requirements apply to the MEGS's

discharges of toxic pollutants into a coal ash pond created by impounding the waters of a perennial tributary to an interstate river?

5. An activity requires a § 404 permit when a discharged material would dry any portion of, or elevate the bottom of a navigable water when that water was never previously subjected to that purpose. The MEGS ash pond closure would dry the impoundment on Fossil Creek – a perennial tributary to a navigable-in-fact water – which was never used to dispose of coal ash. Does the ash pond closure require a 404 permit?

STATEMENT OF THE CASE

This case involves challenges to a federal National Pollutant Discharge Elimination System ("NPDES") permit that Region XII of the United States Environmental Protection Agency ("EPA") reissued to EnerProg, L.L.C. ("EnerProg") under § 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. R. at 6. The permit, reissued on January 18, 2917, authorizes EnerProg to continue water pollution resulting from its operation of the Moutard Electric Generating Station ("MEGS"). R. at 6. The MEGS is a coal-fired steam electric power plant in Fossil, Progress. R. at 6.

On April 1, 2017 EnerProg and Fossil Creek Watchers, Inc. ("FCW") filed petitions for EPA review of the permit under 40 C.F.R. § 124.19. R. at 6. Both petitioners sought the remand of the permit to Region XII, citing several grounds for reconsideration. R. at 6

The Environmental Appeals Board ("EAB") denied both petitions for review and affirmed the issuance of the MEGS's NPDES permit. R. at 13. First, the EAB held that EPA had no jurisdiction to determine the appropriateness of State-imposed permit conditions, and that even if it did those conditions were appropriate. R. at 7. Second, the EAB upheld the November 1, 2018 compliance deadline for the permit's zero discharge requirement for coal ash transport water on the grounds that 1) the Notice purporting to suspend the compliance deadlines in the 2015 ELGs exceeded the Administrator's authority under § 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, 2) the Notice could not be issued without notice-and-comment

rulemaking procedures under APA § 553, and 3) that the deadlines were independently required by the Progress certification and the permit writer's BPJ.R. at 11–12. Third, the EAB found that EPA's reliance on BPJ as an alternate ground for the November 1, 2018 permit compliance deadline was proper, notwithstanding the Administrator's notice purporting to suspend compliance deadlines in the 2015 ELGs. R. at 11. Fourth, the EAB concluded that discharges into the MEGS's coal ash pond were not subject to CWA § 402 effluent limits due to a 1980 notice suspending an exception from the waste treatment system exemption from the regulatory definition of "waters of the U.S." R. at 12. Finally, the EAB held that a dredge and fill permit under CWA § 404, 33 U.S.C. 1344, was not required for the coal ash pond closure and capping. R. at 12–13. EnerProg and FCW filed timely appeals to this Court pursuant to CWA § 509(b), 33 U.S.C. 1369(b). R. at 2, seeking judicial review of the EAB's decision denying them review and affirming the MEGS's permit R. at 2. This Court has consolidated these petitions for review. R. at 2.

STATEMENT OF FACTS

The Coal Ash Pond. The MEGS is a coal-fired electric power plant. R. at. 7. The MEGS currently has a wet ash handling system by which fly and bottom ash from burning coal is mixed with water and sluiced through pipes to a single coal ash pond. R. at 7. These fly ash and bottom ash transport waters (collectively, "coal ash transport waters") flow directly from the facility through Internal Outfall 008 ("IO 8") into the coal ash pond, which contains elevated levels of the toxic pollutants arsenic, mercury, and selenium. R. at 8, 11. The coal ash pond was created in 1978 by impounding the waters of Fossil Creek, a perennial tributary to the navigable-in-fact Progress River, and is itself the former bed of Fossil Creek. R. at 7, 13.

Indefinite Suspension of the Exception to the Exemption. While the CWA itself does not define "water of the United States," EPA promulgated 40 C.F.R. § 122.2 to provide that definition. There is an exception to this definition that applies to "[w]aste treatment systems, including treatment ponds or lagoons designed to meet" the requirements of the C.W.A. 40 C.F.R. § 122.2(2)(i). But the last sentence of this exception states "This 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." § 122.2(2)(i). In other words, waste treatment ponds created by impoundment of waters of the United States do not fall within the waste treatment exception, and are thus waters of the United States. Further complicating the issue, in 1980 EPA suspended this last sentence of the waste treatment exception ("the 1980 Suspension"). 45 Fed. Reg. 48,620 (July 21, 1980).

EnerProg's NPDES Permit. The NPDES permit reissued to EnerProg contains three conditions relevant to this appeal. R. at 10. First, there must be no discharge of toxic pollutants in the MEGS's fly ash transport water by November 1, 2018. R. at 10. Second, there must be no discharge of toxic pollutants in bottom ash transport water by November 1, 2018. R. at 10. These two conditions and their compliance dates are required by the relevant effluent limitations guidelines ("ELGs"), which state that the effluent limits for toxic pollutants in coal ash transport water through use of the best available technology economically achievable ("BAT") is zero. R. at 9. This zero discharge BAT limit is also independently based on Progress's state-imposed conditions and the permit writer's best professional judgment ("BPJ"). Third, pursuant to the Progress Coal Ash Cleanup Act ("CACA") and CWA § 401, the coal ash pond must be closed by November 1, 2018, dewatered by September 1, 2019, and covered by an impermeable cap by September 1, 2020. R. at 10. Fourth, the permit allowed EnerProg to continue using IO 8 to

discharge fly ash and bottom ash transport waters into the coal ash pond until the pond is closed with no effluent limits on such discharges. R at8, 10.

Best Professional Judgment. As stated above, the permit writer imposed a BPJ-based BAT limitation of zero discharge of toxic pollutants in coal ash transport waters. R. at 9. This determination follows from EPA's findings that 1) dry handling of coal ash transport waters has been in use at other plants in the industry for many years, 2) the MEGS is sufficiently profitable to adopt this technology with at maximum a twelve cents per month increase to consumers, and 3) that zero discharge of toxic pollutants by November 1, 2018 constitutes BAT for coal ash transport waters. R. at 9.

Late Notice. On November 3, 2015, EPA issued a final rule titled the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category ("2015 ELGs"), codified at 40 C.F.R. § 423. These 2015 ELGs became effective about two months later, on January 4, 2016. Over a year and three months after the 2015 ELGs had become effective, on April 25, 2017, EPA Administrator Scott Pruitt issued an administrative notice titled Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source category ("the Notice") at 18 Fed. Reg. 19,005 (Apr. 25, 2017). R. at 11. The Notice purports to suspend the compliance deadlines for the new, more stringent effluent limits for fly ash and bottom ash transport water. R. at 11. EPA relied on APA § 705, which allows agencies to "postpone the effective date" of its actions "pending judicial review," for authority to issue the Notice. R. at 11. Over one month later, on June 6, 2017, EPA also issued a proposed rulemaking to suspend these same compliance dates. 82 Fed. Reg. 26,017 (June 6, 2017).

The Coal Ash Cleanup Act. To protect ground and surface waters, Progress enacted the Coal Ash Cleanup Act (CACA), requires assessment, closure, and remediation of substandard ash pond treatment systems. R. at 8-9. Progress implemented conditions on the MEGS 401 permit application to comply with CACA including: (1) the facility must build a new Retention Basin that accepts monofill leachate and decants vacuumed sediments and solids prior to disposal and (2) EnerProg must cap the dewatered ash pond with an impermeable cap. R. at 8. The EPA included these conditions on the final permit. R. at 10.

SUMMARY OF THE ARGUMENT

A state retains exclusive authority to review whether state certification conditions are "appropriate requirements of State law". The EPA may only review conditions when authorized such as approving water quality standards, complying with CWA requirements, or when certification fails to follow procedural guidelines. Therefore, a condition developed from state-enacted law, which abided by certification requirements, and does not qualify as a WQS, then it is an appropriate standard the EPA must include in certification.

The Notice purporting to suspend the compliance dates of the 2015 ELGs does not in turn require suspension of the compliance deadlines in the MEGS's permit for achieving zero discharge of coal ash transport water. First, the Notice is arbitrary, capricious, and exceeds EPA's authority under APA § 705. APA § 705 allows suspension of effective dates, not compliance deadlines for already-effective agency action. Also, EPA never justified, or sought to justify, the Notice under the four-part preliminary injunction test. Moreover, EPA's stated justifications for the Notice have only a superficial connection to pending litigation. Second, the Notice is a substantive rule promulgated without the notice-and-comment procedures required under APA § 553. The Notice indefinitely delays implementation of the 2015 ELGs for EPA's

reconsideration, and EPA never invoked any of the exceptions to § 553. Third, even if the Notice is upheld, it applies only to the 2015 ELGs, not to any state-imposed conditions or BPJ-based limits in the permit.

EPA is authorized to use its BPJ as an alternative ground for requiring zero discharge of toxic pollutants in coal ash transport waters by November 1, 2018. Whether the 2015 ELGS apply or not, EPA must consider the 1982 ELGs in setting BAT limitations for coal ash transport water, arsenic, mercury, and selenium. The next most recently promulgated ELGs are those from 1982. The 1982 ELGs are inapplicable to the MEGS to the extent that they set no national BAT limits for coal ash transport waters, arsenic, mercury, or selenium. EPA properly exercised its BPJ when it set the zero discharge limit for coal as transport waters because it considered all necessary factors.

Until the coal ash pond is closed on November 1, 2018, NPDES permitting requirements apply to discharges of coal ash transport waters into the coal ash pond. The coal ash pond meets the regulatory definition of "waters of the United States" because it is an impoundment of waters of the United States. Moreover, EPA's 1980 notice purporting to suspend the impoundments exception of the waste treatment system exemption from the definition of waters of the United States is unlawful and should be set aside. The 1980 Suspension is a substantive rule promulgated without observance of § 553 notice-and-comment rulemaking. The public was never given an opportunity to comment on the 1980 Suspension, and EPA never provided a concise general statement of the suspension's basis and purpose when EPA incorporated the suspension into subsequent rulemakings.

Although Progress appropriately requires dewatering and capping of the ash pond, the activity would effectively dry the pond – a part of Fossil Creek and significant waterway to

Progress River, a navigable-in-fact water. As such, fulfilling the condition requires a § 404 fill permit. Although currently exempt as a waste treatment system, CWA never originally intended for any treatment system to permanently impound any WOTUS. The EPA has concurred that excessive exemptions disregard the original intention of the provision and the purpose of the CWA as a whole. As a misinterpreted provision, which materially conflicts with the CWA, the original purpose limiting exemptions to man-made treatment systems should control.

STANDARD OF REVIEW

When reviewing an agency's interpretation of a statute it administers, reviewing courts follow the two-step test from *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under "step one" a court determines whether Congress "has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the inquiry ends because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, on the other hand, "the statute is silent or ambiguous" on the issue, the court moves to "step two" and decides whether the agency's interpretation is "based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. If the agency's interpretation is reasonable, reviewing courts must uphold it. *Chevron*, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). In other words, reviewing courts defer to an agency's reasonable interpretations of a statute that agency administers when the statutory provision at issue is ambiguous. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). But *Chevron* deference does not extend to an agency's interpretations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–559, 701–706. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997). Even stronger deference is given to an agency's

interpretations of its own promulgated regulations, which interpretations have controlling weight unless they are "plainly erroneous or inconsistent with the regulation" being interpreted. *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965).

The APA sets forth the standard that courts must use to review agency action and the scope of that review. 5 U.S.C. § 706. Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency action" that the court finds to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; in excess of [statutory authority]"; or "without observance of procedure required by law." § 706(2)(A), (C)–(D). Generally, agency action is arbitrary and capricious if 1) "the agency relied on factors which Congress has not intended it to consider"; 2) "entirely failed to consider an important aspect of the problem"; 3) "offered an explanation for its decision that runs counter to the evidence before the agency"; or 4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Reviewing courts may not uphold agency action on grounds that the agency itself has not asserted. *State Farm*, 463 U.S. at 43 (quoting *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (Reviewing courts "may not supply a reasoned basis for the agency's action that the agency itself has not given.").

ARGUMENT

I. THE EPA DOES NOT HAVE AUTHORITY TO REVIEW PERMISSIBILITY OF PROGRESS' CAP AND CLOSE CONDITIONS ARISING FROM STATE LAW.

Applicants for a permit to conduct activities that may result in discharges into navigable bodies of waters of the U.S. must obtain state certification. 33 U.S.C. § 1341. Any certification

shall include conditions – including other limitations and other appropriate state laws – necessary to comply with all applicable laws. 33 U.S.C. § 1341(d) (citing §§ 301-303, 306, and 307).

EnerProg contends the EPA must review state certification conditions while EPA contends it has discretion to review. R. at 3. However, EPA's capacity for review is contingent on whether (1) the State's condition derives from a submitted WQS or (2) would conflict with the applicable limitations of the CWA.

A. The EPA cannot review the appropriateness of Progress' close and cap conditions because the conditions do not relate to any area under EPA

An agency has no authority to alter or review conditions certified by the state; such authority lies exclusive with state procedures. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 734 (1994). The EPA may only review within the purview of its authority such as water quality standards. 40 C.F.R. § 131.5.

i. Conditions subject to EPA review must show a reasonable chance the conditions materially alter pre-existing water quality standards.

The CWA promotes a state's responsibility by requiring submission of standards in compliance with the CWA, and ensures a state's authority to establish standards based on state laws. 33 U.S.C. § 1313. Approved submissions constitute as a state's Water Quality Standards (WQS). *Id*. But, the statute specifically separates "other limitations" from "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Therefore, the EPA's authority to review condition whether the CWA authorizes the Agency to review specific type of criteria.

In *PUD*, the Court determined that state conditions limiting flow rates were appropriately constituted as "other limitations" because they were submitted as the state's WQS. *PUD*, 511 U.S. at 735. Specifically, the court found the state properly included flow rates in its submitted WQS by (1) designating the uses of waters and (2) establishing water quality criteria of such

uses. *Id*. at 714. Although the Court confirmed that water quality standards constitute as "other limitations" a state may impose, it failed to answer what would constitute as other appropriate requirements of state law. Separation of these terms infers state certification conditions are not limited to WQS and that not all "other appropriate requirements of state" classify as a WQS.

Though Water Quality Standards inherently constitute appropriate limitations, it does not restrict including other laws when certifying for permits. In *Arnold Irr. Dist. v. Department of Environmental Quality*, the court determined Congress did not intend water quality standards as the only criteria, because it would only mention them in § 401(d). 717 P.2d 1274, 1279 (1986). The court determined that by including the phrase, "any other appropriate requirement of state law", Congress authorized states to include "all state action related to water quality… in imposing limitations on CWA certificates." *Id*. Simply, so long as a condition relates to a law effecting water quality, then the state may include an according condition notwithstanding its absence as a WQS.

ii. A state may include conditions relevant to water quality, but conditions may not require EPA review when they do not alter standards.

Although state law may require conditions for certification, such law may not constitute as a WQS and accordingly require EPA review. In *Pine Creek Valley Watershed Ass'n v. EPA*, the court held a citizen-suit could not compel EPA to review state legislation altering antidegredation requirements because it did not constitute as proposed WQS. 97 F.Supp.3d 590, 593 (E.D. Pa. 2015). First, the court considered the EPA's interpretation of a WQS, which included (1) designating use or uses made of the water and (2) setting criteria to protect the uses, just as in *PUD*. *Id*. at 600 (citing 40 C.F.R. § 131.2). WQS submission further had minimum requirements more specific to analyses, procedures and antidegredation policy. 40 C.F.R. § 131.5

Second, the court compared the enacted legislation to the EPA's requirements for WQS. The legislation at issue – sewage system disposal regulation – added provisions that state compliance with the act also fulfilled permit requirements, regulations promulgated under the act, and its antidegredation policy. *Id*. at 602. The court held that the legislation was not a WQS because it neither consisted of designated uses, accorded criteria, nor "approximately anything like the federally-promulgated [WQS]." *Id*. at 603. Antidegredation is only an element of WQS present, and does not establish a WQS in of itself. *Id*. Lacking the requisite factors of a WQS, the challengers cannot compel the EPA for review.

Comparatively, a state law may trigger review as a new or revised WQS if in direct conflict with the state's pre-existing standard. In *Florida Pub. Interest Research Grp. Citizen Lobby, Inc. v. E.P.A.*, the court found a state's newly enacted laws altered its pre-existing water quality standards, therefore constitutes a revision WQS subject to EPA review. 386 F.3d 1070, 1075 (11th Cir. 2004). The new "Impaired Waters Rule", though unintended to establish water quality criteria, the Rule effectively changed the state's WQS. *Id*.

First, the new rule allowed one to exceed criteria without triggering a body of water as impaired while the original standard did not allow any criteria to exceed at any time. *Id*. Second, the new rule added narrative criteria absent from the pre-existing standard, such as specific numeric criteria. *Id*. at 1076. The state used these new criteria to update its Impaired Waters List, which removed one hundred water bodies from the List and subsequently submitted the new List to the EPA for approval. *Id*. at 1078. The court found that the district court did not fully examine the practical impacts on the state's water quality standards; the court reversed its grant of summary judgment and remanded it for consideration. *Id*.

iii. EnerProg cannot force the EPA to review conditions required only to meet state law, absent from the State's WQS, and does not alter other requirements.

Although a necessary condition, Progress neither intended the cap and close conditions as a WQS for EPA review nor do the conditions trigger WQS review. CACA requires the closure of substandard coal ash treatment ponds to eliminate the risk of harm to ground or surface water if a containment system fails. R. at 9. Like the sewage legislation in *Pine Creek*, Progress did not submit CACA as Progress' WQS. R. 10. Further, CACA does not establish uses nor criteria to water quality, but rather focuses entirely on preventing harms to water through safeguards on coal ash system procedures. R. at 8-9.

Unlike the 11th Circuit case, CACA neither diminishes any existing standards nor alters criteria used to determine water quality of water bodies. R. 8-9. Rather, CACA requires facilities in the industry to abide by restriction to reduce the risk of harm; it does not alter narrative criteria for the threatened water, categorically remove threatened waters from impairment lists, nor exempts existing waters from numeric criteria. Simply, the conditions adjust industry standards, rather than altering standards of water criteria. Because the cap and close conditions promulgate from state law rather than from Progress' WQS and have no practical effect on pre-existing water quality standards the EnerProg cannot compel EPA review.

B. The EPA may modify a state's certification conditions only if the state failed to meet certification procedures and cannot violate state law in doing so.

i. The cap and close condition is attributable to Progress, and therefore under the State's exclusive jurisdiction; regardless, the EPA cannot violate requirements of state law.

Unless a state waived its right to certify intentionally or by failure to follow procedure, the EPA may not review state certification conditions. A State waives its right to certify only if done explicitly, if it failed to certify on time, or if certification did not cite the applicable law and

explain why the conditions cannot be relaxed. 40 C.F.R. § 124.53(e)(1)-(3). If such requirements are met, the condition is attributable to the state and exclusive to review within state courts. 40 C.F.R. § 124.55(e).

Even if subject to EPA review, a state retains authority for any standard or limitation respecting the discharge of pollutants. 33 U.S.C. § 1370(1)(A). Even waiver would not necessarily grant the EPA authority to modify a condition if it would violate requirements of state law. 40 C.F.R. § 124.55(b). Accordingly, even when an applicant attempted to stay conditions because of inadequate notice, the 9th Circuit found the EPA's notice sufficient and the EPA lacked authority to stay conditions imposed by the state. *Ackels v. EPA*, 7 F.3d 862, 868 (9th Cir. 1993).

The provision at issue is neither substantively nor procedurally insufficient to allow EPA review. The close and cap condition derives from Progress' CACA, an act that requires the closure of ash ponds. R. at 8. The conditions regulate criteria independent of the required federal minimums nor do they weaken pre-existing state standards considering. Progress filed its certification on time, had cited CACA's intent to "prevent public hazards… of ground and surface water", and Progress explained the conditions are "necessary to meet CACA's requirements." R. at 8-9. EnerProg would contest that the facts do not inform whether Progress provided notice directly to EnerProg as required by 40 C.F.R. § 124.53(d). The EPA's notice to EnerProg satisfies Progress' duty of notice. Q&A, at 5, para. 23.

ii. Even if Progress' lacks procedures for EnerProg to challenge conditions in state court, alternatives methods exist.

Alternative options are available to challenge state conditions aside from state procedures. A federal court may review constitutional claims against state certification. *Am. Trucking Associations, Inc. v. E.P.A.*, 600 F.3d 624, 628 (D.C. Cir. 2010). Further, challengers

may obtain recourse by contacting Congress to amend the CWA and circumvent state law. *Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 10 (D.C. Cir. 2011).

EnerProg noted in the EAB review that Progress lacks procedures to review certifications. R. at 10-11. But EnerProg could have sought other means of relief such as through this Court, which may review Progress' conditions on a constitutional challenge. Though, EnerProg makes no such argument. R. at 10.

EnerProg failed to show the EPA must review the permissibility of the cap and close conditions. Neither has the EPA demonstrated any discretion to review the conditions because they meet applicable laws and do not weaken any standards of § 401(d). Rather, because the condition targets water quality without altering any pre-existing federal or state limitations, the condition is appropriate state law. Therefore, this Court should find no authority – either mandatory or voluntary – for the EPA to review the appropriateness of Progress' cap and closure condition.

II. THE NOTICE DOES NOT REQUIRE SUSPENSION OF THE PERMIT COMPLIANCE DEADLINES FOR ACHIEVING ZERO DISCHARGE OF COAL ASH TRANSPORT WATER.

The Notice has no effect on the compliance deadlines in the MEGS's permit. First, the Notice should be vacated because it exceeds EPA's statutory authority under § 705. Second, EPA's issuance of the Notice is arbitrary and capricious because the Notice is a substantive rule promulgated without § 553 notice-and-comment rulemaking procedures. Third, even if the Notice is upheld, it has no effect on the permit compliance deadlines because it pertains to nothing beyond the 2015 ELGs.

A. The Notice does not require suspension of the permit compliance deadlines because the Notice is arbitrary, capricious, and exceeds EPA's statutory authority under APA § 705.

When "justice so requires," an agency may "postpone the effective date" of its final rule "pending judicial review." 5 U.S.C. § 705. The Administrator cited § 705 as the sole basis of his authority the Notice purporting to postpone compliance dates in the already-effective 2015 ELGs. But § 705 does not grant the Administrator such authority. The Notice is arbitrary and capricious and beyond the scope of § 705 because 1) the Notice purports to suspend compliance deadlines of an already effective final rule, and 2) EPA's stated rationale for the Notice reveals that it has little to do with judicial review and much to do with EPA's reconsideration of the 2015 ELGs. The Notice therefore exceeds EPA's statutory authority under § 705 and should be vacated.

i. APA § 705 does not authorize EPA to postpone the compliance deadlines of a final rule that has already gone into effect, and to do so is arbitrary and capricious.

Agencies may not invoke APA § 705 to postpone compliance deadlines of an already-effective final rule. By its plain language, § 705 gives an agency the authority to delay only the "effective date" of a final rule before that rule becomes effective. Compliance deadlines of an already effective final rule are not within the meaning of "effective date" as stated in § 705. *Becerra v. U.S. Dep't of Interior*, No. 17-CV-02376-EDL, 2017 WL 3891678, at *9 (N.D. Cal. Aug. 30, 2017) ("The plain language of [APA § 705] authorizes postponement of the 'effective date,' not 'compliance dates.'"). This follows from the fact that compliance deadlines and effective dates are distinct, and thus § 705 applies to the latter, not to the former. *See Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995) ("The mandatory compliance date should not be misconstrued as the effective date of the revisions.").

Moreover, agencies, like courts, generally must comply with their precedents. *I.N.S. v. Yang*, 519 U.S. 26, 32 (1996). If an agency departs from prior precedent without giving a

reasoned explanation, that departure "could constitute action that must be overturned as 'arbitrary, capricious [or] an abuse of discretion" under the APA. *Yang*, 519 U.S. at 32. EPA precedent holds that a stay under § 705 "is not appropriate" when the effective date of the rule at issue has already passed. Portland Cement Manufacturing Industry, 76 Fed. Reg. 28,326 (May 17, 2011) ("[P]postponing an effective date implies action before the effective date arrives.") (internal citations and quotations omitted).

The Administrator's interpretation is contrary to the plain language of APA § 705 and not entitled to deference from this Court under *Chevron*. The plain language of § 705 shows that it provides no basis for the Notice and that the Administrator acted beyond his authority when he issued it. The Administrator stated in the Notice that the compliance deadlines "have not yet passed, and they are within the meaning of the term 'effective date' as that term is used in Section § 705 of the APA." 82. Fed. Reg. 19,005. But the plain language of § 705 leaves no room for the Administrator's overly broad interpretation of "effective date." Even if the Administrator's interpretation of the APA was entitled to *Chevron* deference (it is not), the statutory term "effective date" is unambiguous. It means the date written in the final rule on which the entire rule goes into effect. Here, the Administrator expressly suspended compliance deadlines, not the effective dates. In fact, the Administrator could not have postponed the effective date of the 2015 ELGs: that date had long since passed by the time the Notice was issued. Thus, it was beyond the Administrator's authority under APA § 705 to issue the Notice.

ii. The Notice exceeds EPA's authority under APA §705 and is arbitrary and capricious because EPA's justifications for the Notice have no rational connection with the underlying litigation in the court of appeals and much do to with EPA's reconsideration of the 2015 ELGs.

The Notice also flouts § 705 because EPA's stated reasons for issuing the Notice have very little to do with judicial review. When an agency invokes § 705 to delay implementation of

its rules, the agency must articulate "at a minimum, a rational connection between its stay and the underlying litigation in the court of appeals." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33–34 (D.D.C. 2012) (EPA's "Delay Notice" purporting to stay effectiveness of two duly promulgated regulations implementing the Clean Air Act was arbitrary and capricious because its "purpose and effect" was "plainly . . . to stay the rules pending reconsideration, not litigation"). Paying lip service to judicial review does not constitute a "rational connection" between a delay and pending litigation. *Sierra Club*, 833 F. Supp. 2d at 33–34 ("Although EPA paid lip service to the pending litigation in the court of appeals, its stated purpose in promulgating the Delay Notice was to delay" the relevant rules "pending reconsideration."). An agency cannot rely on § 705 to delay the effectiveness of its rules "simply because litigation in the court of appeals *happens to be pending*." *Sierra Club*, 833 F. Supp. 2d 11, 33–34 (D.D.C. 2012) (emphasis in original).

Here, EPA's purported grounds for issuing the Notice have very little to do with the Fifth Circuit litigation. To the contrary, EPA's own written justifications in the Notice have much to do with its stated desire to reconsider the 2015 ELGs. EPA bases the Notice in large part on letters from the Utility Water Act Group ("UWAG") and the Small Business Administration Office of Advocacy petitioning the EPA for reconsideration of the 2015 ELGs and raising "wide-ranging and sweeping objections" to those ELGs. 82 Fed. Reg. 19,005. EPA then draws a causal connection between these petitions for reconsideration and the Notice: "[A]fter considering the objections raised in the reconsideration petitions, the Administrator determined that it is appropriate and in the public interest to reconsider the Rule." In particular, EPA states that the letters petitioning for reconsideration point to "new data" regarding technology needed to achieve the 2015 ELGs and that "EPA wishes to review these data." 82 Fed. Reg. 19,005. EPA

cannot invoke § 705 to delay compliance deadlines for one of its rules in the name of pending judicial review only to turn around and move that reviewing court to hold the litigation in abeyance while EPA reconsiders its rule. To do so defeats the purpose of § 705.

While the Notice does contain a few express references to the litigation pending in the Fifth Circuit, this mention is mere lip service. It does not provide a rational connection between the Notice and the litigation. EPA's only references to the litigation in the Notice are 1) that some of the objections raised in the petitions for reconsideration "overlap with the claims in the ongoing litigation," 2) once using the phrase "while the litigation is pending," and 3) after discussing its reasons for reconsidering the 2015 ELGs, concluding that it "hereby issues a postponement of the compliance dates [for the relevant sections of the 2015 ELGs] . . . pending judicial review." 82 Fed. Reg. 19,005.

EPA is attempting to utilize § 705 because litigation happens to be pending. But EPA cannot do this under the APA. Merely incanting the language "judicial review" or "pending litigation," as EPA has done here, does not suffice to create the required rational connection. Thus, the Notice is arbitrary and capricious and should be vacated.

B. The Notice is unlawful because it constitutes a substantive rule within the meaning of the APA and it was promulgated without the notice-and-comment rulemaking procedures required under APA § 553.

The APA broadly defines "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). APA § 553 provides the procedural requirements all agencies must follow to promulgate rules when "the governing statute does not require" such rulemaking to be "on the record." *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir 1987) (citing

United States v. Florida East Cost Ry., 410, U.S. 224, 234–41 (1973)). This process is commonly referred to as "notice-and-comment" rulemaking. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir 1987) (citing *United States v. Florida East Cost Ry.*, 410, U.S. 224, 234–41 (1973)).

All substantive rules are subject to § 553 notice-and-comment procedures. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 855 (8th Cir. 2013). Those procedures do not apply to "interpretive rules" or "general statements of policy" or when "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued)" that notice-and-comment rulemaking procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 551(b)(A)–(B). A reviewing court must set aside a substantive rule that has failed to observe "procedure[s] required by law," including those required under § 553. *Iowa League of Cities*, 711 F.3d at 855. Here, the Notice violates the procedural requirements of § 553 because 1) it is a substantive rule subject to § 553's requirements, and 2) EPA did not use the procedures required under § 553 when it issued the Notice, and 3) the Notice does not fit any of the § 553 exceptions.

i. The Notice is a substantive rule under the APA because it indefinitely delays implementation of the relevant 2015 ELGs so that EPA may reconsider them.

When an agency action effectively suspends or delays "implementation of" a final rule, that agency action "normally constitutes substantive rulemaking" subject to the notice-and-comment rulemaking requirements APA § 553. *Envtl. Def. Fund, Inc. v. E.P.A.*, 716 F.2d 915, 920 (D.C. Cir. 1983) (citing *Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752 (3d Cir. 1982) (indefinite postponement of effective date for regulatory amendments that had "undergone notice and comment procedures, had been published in final form (including a 'final' effective date), and had become

final for purposes of judicial review" constituted substantive rule subject to § 553 notice-and-comment rulemaking procedures). The duration of a stay or "its temporary nature" does not guide the analysis. *Sierra Club v. Jackson*, 833 F. Supp. 2d 9, 10 (D.D.C. 2011) ("The question . . . [is] rather whether a suspension or delayed implementation of a final regulation constitutes substantive rulemaking. The case law suggests that normally it does."). Even a delay "for a relatively short time" may constitute a substantive rule. *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (per curiam) ("[T]he limited nature of the rule cannot in itself justify a failure to follow notice and comment procedures.").

While an agency may temporarily preserve the status quo pending judicial review under § 705, an indefinite suspension of duly promulgated regulations "in order to allow a wholesale reevaluation of a major regulatory program" is not a "temporary measure for preserving the status quo." *Pub. Citizen v. Dep't of Health & Human Servs.*, 671 F.2d 518, 520 (D.C. Cir. 1981) (Edwards, J., dissenting). Moreover, the "imminence of" a compliance deadline cannot alone provide a basis for an agency's circumventing notice-and-comment rulemaking. *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 580–81 (1981). Otherwise, an agency could always avoid a compliance deadline by waiting until the deadline becomes "imminent" and then issuing a delay on good cause grounds. *Southern Mountains*, 653 F.2d at 581.

Here, the Notice is a final rule because it indefinitely delays implementation of the 2015 ELGs. The 2015 ELGs constitute a final rule. The Notice, if upheld as valid, would effectively suspend or delay implementation of the 2015 ELGs. The EPA itself acknowledged that suspending compliance dates constitutes a substantive rule under the APA when it stated in the Notice that "[s]eparately, EPA intends to conduct notice and comment rulemaking to stay the

compliance deadlines for the new, more stringent limitations and standards in the rule." 82 Fed. Reg. at 19,005.

Moreover, the Notice is not "a temporary measure for preserving the status quo" because EPA intends the Notice to apply throughout a new rulemaking process that could take years. The Notice states EPA's intention to conduct notice-and-comment rulemaking in implementing the compliance delay so that it can reconsider certain compliance deadlines for the 2015 ELGs. But if the Notice itself were sufficient to suspend the compliance dates under §705, EPA would have no reason to begin another lengthy rulemaking process to reach the same result. Because the Notice is a substantive rule, § 553 rulemaking requirements apply.

ii. EPA did not follow § 553 notice- and-comment rulemaking when it issued the Notice and did not assert that any of the § 553 exceptions applied to the Notice.

The APA includes limited exceptions from the notice-and-comment requirements of § 553. The Notice meets none of these exceptions. Even if it did, a reviewing court may not uphold agency action on a basis the agency itself did not provide. *Chenery*. And EPA did not provide any indication in the Notice that it was invoking any of the § 553 exceptions. To do so would have been absurd anyway: the Notice itself states EPA's intent to commence notice-and-comment rulemaking process for a delay of the 2015 ELGs compliance dates. 82 F.R. 19,005. EPA has in fact done so, but that process is nowhere near complete. 82 F.R. 26,017.

III. EPA has authority to use its Best Professional Judgment as an alternative ground for requiring zero discharge of toxic pollutants in coal ash transport waters as of November 1, 2018.

The CWA allows "the Administrator" to "issue a permit for the discharge of any pollutant, or combination of pollutants" on the condition that the discharge will comply with CWA requirements or "such conditions as the Administrator determines are necessary." 33

U.S.C. § 1342(a)(1). Permits issued under the CWA impose technology-based limitations on the discharge of pollutants into waters of the United States. 40 C.F.R. § 125.3. Typically, these limitations are determined by the applicable Effluent Limitations Guidelines ("ELGs"). 40 C.F.R. § 125.3(c)(1). But the CWA also allows EPA to determine technology-based requirements in a permit on a case-by-case basis, "to the extent that EPA-promulgated effluent limitations are inapplicable" or "[w]here promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants." 40 C.F.R. § 125.3(c)(2)–(3). For toxic pollutants, such as arsenic, mercury, and selenium, the Administrator must establish effluent limitations according to BAT. 33 U.S.C. § 1311(b)(2)(A), (b)(2)(C). The CWA requires EPA to base its case-by-case BAT limitations on its "Best Professional Judgment" ("BPJ") by considering several enumerated factors. 40 C.F.R. § 125.3(a)(1)(B).

Here, even if the 2015 ELGs are inapplicable to the MEGS's permit, EPA properly exercised its BPJ to determine that zero discharge of pollutants constituted BAT for fly ash and bottom ash transport water. First, EPA has the authority to set case-by-case BAT limitations on toxic pollutants discharged via the MEGS's coal ash transport waters. Second, EPA considered all relevant factors when it exercised its BPJ to determine the zero discharge BAT limitation for coal ash transport waters.

A. Under the CWA and its implementing regulations, EPA has authority to set BPJ-based BAT limits on the discharge of arsenic, mercury, and selenium in the MEGS's coal ash transport waters.

Whether or not the 2015 ELGs are effective, EPA is justified in setting BPJ-based limits on the discharge of toxic pollutants in the MEGS's fly ash and bottom ash transport waters. Based on the timing of the MEGS permit, he terms of the 2015 ELGs require EPA to look to the 1982 ELGs. Were the 2015 ELGs to be suspended or vacated, EPA would consult the 1982

ELGs by default. And the 1982 ELGs are inapplicable to the extent that they set no BAT limits on fly ash transport water, bottom ash transport water, arsenic, mercury, or selenium. To comply with the CWA in light of its requirements and stated purposes, EPA properly relied upon BPJ to require zero discharge of toxic pollutants in the MEGS's coal ash transport waters.

i. Under the terms of the 2015 ELGs themselves, EPA is justified in setting BPJ-based BAT limits for arsenic, mercury, and selenium in the MEGS's coal ash transport waters because EPA issued the MEGS permit after the 2015 ELGs became effective but before November 1, 2018.

The 2015 ELGs state that when "a plant's final NPDES permit will be issued after the effective date of the final ELGs, but before November 1, 2018, the permitting authority should apply limitations based on the previously promulgated BPT limitations or the plant's other applicable permit limitations until at least November 1, 2018." 80 Fed. Reg. 67,883. The 2015 ELGs became effective on January 4, 2016. EPA issued the MEGS's permit one year later on January 18, 2017. (R. at 6.) Because the MEGS's permit was issued after the 2015 ELGs became effective but before November 1, 2018, EPA was justified in considering the previously promulgated ELGs and MEGS's other applicable permit limitations when it set its zero discharge limitation on MEGS's coal ash transport water. Because the 1982 ELGs are inapplicable to some extent, EPA was authorized to use its Best Professional Judgements to the extent that set coal ash water conditions for the interim time between the date the permit was issued and the November 1, 2018 compliance date.

ii. Even if the 2015 ELGs were rendered inapplicable, EPA would be justified in Setting BPJ-based BAT limits for arsenic, mercury, and selenium in the MEGS's coal ash transport waters under 40 C.F.R. § 122.2(c)(3).

Were the 2015 ELGs to be effectively stayed, eliminated, or vacated, the most recent applicable ELGs would be those promulgated in 1982 at 47 Fed. Reg. 52,290 (the "1982

ELGs"). The 1982 ELGs set no national BAT limits for pollutant discharges in fly ash transport water or bottom ash transport water. Moreover, the 1982 ELGs set no BAT limits for the toxic pollutants arsenic, mercury, and selenium. 47 Fed. Reg. at 52,290 ("The following 34 toxic pollutants are excluded form national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator: . . . Arsenic . . . Mercury . . . Selenium."). The coal ash pond contains "elevated levels of mercury, arsenic, and selenium." (R. at 9.) Thus, EPA could properly use its Best Professional judgment to provide BAT limitations for these wastestreams and pollutants in the MEGS NPDES permit.

iii. BPJ-based limits under 40 C.F.R. 125.3(c)(3) were appropriate because the 1982 ELGs are inapplicable to the extent that they set no national BAT limits for the for fly ash transport water, bottom ash transport water, or the toxic pollutants arsenic, mercury, and selenium.

EPA properly exercised BPJ because the 1982 ELGs, which EPA must consider when setting BPJ-based BAT limits in the MEGS's permit, are inapplicable to the toxic pollutants in the MEGS's coal ash transport waters. Under the 1982 ELGs, there are no national BAT standards for several toxic pollutants, including arsenic, mercury, and selenium because "they are present in amounts too small to be effectively reduced by technologies known to the Administrator." 47 Fed. Reg. 52,290. There are also no national BAT limitations for pollutants in fly ash or bottom ash transport water in the 1982 ELGs. 47 Fed. Reg. 52,290. Because there is no applicable BAT standard for these toxic pollutants or wastestreams in the 1982 ELGs, those ELGs are "inapplicable" under 40 C.F.R. § 125.3.

In two recent cases, state appellate courts considered whether BPJ-based BAT limits on arsenic, mercury, and selenium could be written into NPDES permits for steam electric power plants. In both cases, this question hinged upon whether the 1982 ELGs were "applicable" within the meaning of 40 C.F.R. § 125.3. *Louisville Gas & Elec. Co. v. Ky. Waterways Alliance*, 517,

S.W.3d 479 (Ky. 2017); *Nat. Res. Def. Council v. Pollution Control Bd.*, 37 N.E.3d 407 (Ill. App. Ct. 2015). If the 1982 ELGs were applicable, the permit writer could not set BPJ-based limitations on these toxic pollutants. If they did not apply, the permit writer could set such BPJ-based limitations. Both courts concluded that the 1982 ELGs applied and thus BPJ-based limits on arsenic, mercury, and selenium could not be written into the permit. But those cases are distinguishable from this case.

In both cases, the courts were reviewing prior agency decisions excluding BPJ-based limitations from the permits at issue. In the Kentucky case, the court granted deference to the state agency's determination that the permit in that case "should proceed under 40 C.F.R. § 125.3(c)(1) as opposed to (c)(3)." *Louisville Gas & Elec. Co. v. Ken. Waterways Alliance*, 517, S.W.3d 479, 490 (Ky. 2017). In other words, the court granted deference to the agency's conclusion that the permit at issue was not subject to BPJ-based limitations. Here, in contrast, the agency decision entitled to difference is that the permit *was* subject to some BPJ-based limitations. This distinction is critical, considering the deference reviewing courts give to agencies' interpretations of their own promulgated regulations.

Another important difference between those cases and this case, is that in those cases, the permit in dispute was issued before the 2015 ELGs were promulgated. Both courts relied on the argument that permit writers did not want to prematurely set a BPJ limitation that might be inconsistent with a national standard set in the next series of ELGs EPA would promulgate. But here, as discussed above, the MEGS permit was issued more than a year after the 2015 ELGs were promulgated and had become effective.

What the 1982 ELGs do is explicitly *exclude* these toxic pollutants from a national BAT limitation. The 1982 ELGs state that no BAT limits apply, and thus establish a regulatory "gap."

It is the very purpose of BPJ-based limitations to fill these gaps in the name of implementing the CWA. Thus, it is left to the EPA to set such BAT limits on a case-by-case basis so that EPA may "carry out the provisions of the [CWA]." The point of ELGs is to guide EPA in setting technology-based limitations, not to help polluters circumvent such limitations.

B. EPA's Best Professional Judgment that zero discharge of toxic pollutants by November 1, 2018, constitutes BAT for coal ash transport water is not "plainly erroneous or inconsistent with the regulation" governing BPJ-based BAT limits.

i. The factors for setting BPJ-based BAT limitations pursuant to 40 C.F.R. § 125.3(c)(3) are those listed under paragraph (d)(3), not those under paragraphs (d)(1) or (2).

An NPDES permit writer may use one of three regulatory methods of imposing technology-based requirements in permits: 1) the permit writer can apply EPA-promulgated ELGs, 2) the permit writer can impose requirements on a case-by-case basis "to the extent that EPA-promulgated effluent limitations are inapplicable," or 3) "through a combination of the *methods* in paragraphs *(d)(1)* and *(2)* of this section" when promulgated ELGs apply only to "certain aspects of the dischargers operations, or to certain pollutants." 40 C.F.R. §125.3(c)(1)–(3) (emphasis added). Paragraph (c)(3)'s reference to the "methods in paragraphs (d)(1) and (2)" is odd because those latter two paragraphs contain "factors," not methods, and those factors are specifically categorized as relevant to BPT and BCT limits, not BAT limitations. This reference to paragraphs (d)(1) and (2) is probably a typographical error. *See Louisville Gas and Elec. Co. v. Kentucky Waterways Alliance*, 517 S.W.3d 479, 492 n.6 (Ky. 2017) (stating that paragraph (c)(3)'s reference to paragraphs (d)(1) and (2) "strongly suggests a misprint" and noting that the parties "have all tacitly agreed to read § 125.3(c)(3)" as referring to the methods stated in paragraphs (c)(1) and (2) instead); *see also Nat. Res. Def. Council v. Pollution Control Bd.*, 37 N.E.3d 407, 412–13 (Ill. App. Ct. 2015) (under 40 C.F.R. § 125.3(c)(3) permit writers may use a

combination of promulgated ELGs and BPJ-based limitations when "promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants").

ii. EPA's BPJ-based BAT limit of zero discharge of toxic pollutants is not plainly erroneous or inconsistent with the required factors under 40 C.F.R. 125.3(d)(3).

In determining limitations reflecting the best available technology economically achievable ("BAT") on a case-by-case basis, EPA must consider the following factors enumerated in the regulations that implement the CWA: 1) "the age of equipment and facilities involved," 2) "the process employed," 3) "the engineering aspects of the application of various types of control techniques," 4) "process changes," 5) the cost of achieving such effluent reduction, and 6) "non-water quality environmental impact (including energy requirements)." 40 C.F.R. § 125.3(d)(3). In making BPJ determinations, EPA must also consider relevant factors enumerated in the CWA itself. *Nat. Res. Def. Council v. U.S. E.P.A.*, 863 F.2d 1420, 1425 (9th Cir. 1988). Under the CWA, the Administrator must consider certain factors when adopting and revising effluent limitations that reflect BAT. 33 U.S.C. § 1314(b)(2)(B). The CWA factors are the same as those regulatory factors listed above, with the addition of "such other factors as the Administrator deems appropriate." § 1314(b)(2)(B).

When considering the "cost of achieving such effluent reduction" factor, EPA is not required to compare the cost of BAT to its "effluent reduction benefits." *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 71 (1980). In other words, EPA is not required to consider "the reasonableness of the relationship between costs and benefits" when determining BAT limitations. *Tex. Oil & Gas*, 161 F.3d at 936. In fact, as long as the BAT determination is

economically achievable across "the industry as a whole," that determination is proper even if the costs are "significantly disproportionate to their benefits." *Tex. Oil & Gas*, 161 F.3d at 936.

Reviewing courts give agencies broad deference in interpreting their own duly promulgated regulations, even broader deference than courts give agencies' interpretations of the statutes they administer. *Udall v. Tallman*. Under this standard of deference, a reviewing court must uphold an agency's interpretation of its regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Udall*, 380 U.S. at 16–17.

After exercising its Best Professional Judgment, EPA has properly determined that BAT for fly ash and bottom ash transport water is zero discharge of toxic pollutants.

IV. UNTIL THE COAL ASH POND IS CLOSED ON NOVEMBER 1, 2018, THE MEGS'S DISCHARGES OF COAL ASH TRANSPORT WATER INTO THE COAL ASH POND ARE SUBJECT TO NPDES PERMITTING REQUIREMENTS BECAUSE THOSE DISCHARGES CONSTITUTE THE ADDITION OF "POLLUTANTS" TO "WATERS OF THE UNITED STATES" FROM A "POINT SOURCE."

Discharges from Internal Outfall 008 ("IO 8") into the coal ash pond should be subject to § 402 permitting requirements during the interim between the reissuance of the MEGS's permit and the coal ash pond's closure on November 1, 2018. Discharges from IO 8 into the coal ash pond are direct discharges of pollutants to waters of the United States in violation of the CWA because 1) The coal ash pond itself is a "water of the United States" within the meaning of 40 C.F.R. § 122.2, 2) discharges into the coal ash pond contain the toxic pollutants arsenic, mercury, and selenium, and 3) the 1980 suspension of the last sentence of the waste treatment system exception is arbitrary and capricious and should be vacated.

A. The coal ash pond is a "water of the United States" within the meaning of the CWA because the 1980 Suspension exceeds EPA's statutory authority.

Despite the broad discretion courts give to agencies, a reviewing court "shall hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Accordingly, the 1980 Suspension must be set aside because 1) it exceeded EPA's authority under the CWA, 2) like the Notice, the 1980 Suspension is a substantive rule subject to notice-and-comment rulemaking requirements under § 553, and 2) EPA failed to comply with § 553 when it issued the 1980 Suspension and when EPA purported to incorporate it into the regulatory definition of "water of the U.S."

On July 21, 1980, EPA published its suspension at 45 Fed. Reg. 48,620. EPA concluded by stating its intent to develop a revised definition of "waters of the United States," to process that definition through notice-and-comment rulemaking, and ,"[a]t the conclusion of that rulemaking," to "amend the rule, or terminate the suspension." 45 Fed. Reg. 48,620. Almost forty years later, EPA has neither amended the rule through notice-and-comment rulemaking nor terminated the suspension. In fact, EPA has managed to effectively amend the rule by simply leaving the suspension in place. EPA used this tactic to avoid § 553 notice-and-comment rulemaking, and for this reason the 1980 Suspension is arbitrary, capricious, and fails to observe procedure required by law.

B. Even if found to be within EPA's statutory authority, the 1980 Suspension is unlawful because it is a substantive rule promulgated without the notice-and-comment rulemaking procedures required under APA § 553.

Like the Notice discussed above, the 1980 Suspension constitutes a substantive rule subject to notice-and-comment rulemaking under APA § 553. In its decision, the Environmental Appeals Board ("EAB") upheld the 1980 Suspension on the grounds that 1) the 1980 Suspension "has been in effect for over 35 years," and 2) it has "been reincorporated in two subsequent

reconsiderations of the definitions section of section 122.2." (R. at 12.) Neither of these grounds justify the 1980 Suspension.

First, the fact that the 1980 suspension has been in effect for thirty-five years shows its indefinite nature and binding effect, further supporting the conclusion that it is a substantive rule subject to § 553 notice-and comment rulemaking. Were this Court to hold otherwise, it would offer agencies a template for avoiding notice-and-comment rulemaking requirements when their goal is to amend or repeal a rule. APA § 706, which requires courts to vacate arbitrary and capricious agency actions, precludes such a holding.

Second, the fact that the 1980 suspension was "continued" in "two subsequent reconsiderations" of 40 C.F.R. § 122.2 does not cure the suspension's arbitrary and capricious nature, nor does that fact bring the suspension within compliance of procedures required by law.

Like the Notice, the 1980 Suspension is a substantive rule because it effectively rescinds the duly promulgated last sentence of the waste treatment exclusion, which otherwise recognizes that impoundments of waters of the U.S. remain waters of the U.S. even if used as a waste treatment system. The 1980 Suspension has prevented the last sentence of the waste treatment exclusion from being implemented for almost forty years.

The first of these "subsequent reconsiderations" was a 1983 final rule that never went through notice-and-comment rulemaking because EPA invoked the "good cause" exception to § 553. 48 Fed. Reg. 14,148. EPA justified circumventing the § 553 requirements on the ground that the final rule "does not change the substance of the regulations at all; it merely changes their location in the Code of Federal Regulations." 48 Fed. Reg. 14,148 ("Accordingly, we are proceeding directly to promulgation without previously having proposed the regulation."). Because this rule was never proposed in the first place, the public never had the opportunity to

comment on any of its provisions, including the 1980 Suspension. Thus, the 1983 final rule did not cure the § 553 defect.

The second "subsequent reconsideration," the proposed version of the 2015 Clean Water Rule, did nothing to cure the defect either. As the proposed rule states, there was no public comment on the waste treatment system exclusion from the definition of "waters of the United States." 79 Fed. Reg. 22,188. In fact, the proposed version of the Clean Water Rule, published at 79 Fed. Reg. 22,188, explicitly states that EPA and the Corps did not "address the exclusions from the definition of 'waters of the United States.'" 79 Fed. Reg. 22,190. Because the waste treatment systems exclusion was not a part of the proposed rule, the proposed rule states, "the agencies do not seek comment on these existing regulatory provisions. 79 Fed. Reg. at 22,190. In other words, EPA and the Corps expressly excluded the waste treatment system exception, and therefore the suspended last sentence of that exception, from the notice-and-comment rulemaking process. The public never had an opportunity to comment on the suspension because the agencies stated that the suspension was not part of the proposed rule. Yet the suspension remained after the Clean Water Rule was made final.

V. THE CLOSURE AND CAPPING PLAN REQUIRES A 404 PERMIT BECAUSE IT CAUSES A DISCHARGE OF FILL MATERIAL FROM A POINT SOURCE INTO A WOTUS.

An activity requiring a § 404 permit supersedes the requirements for a § 402 permit. 33 U.S.C. § 1342. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009). The Army Corp of Engineers considers § 404 permits for any discharge of a fill material in a WOTUS. 33 U.S.C. § 1344. A WOTUS typically includes any water body with a significant nexus to a navigable water, with consideration of whether the body continually flows and has a semi-permanent surface area. *Rapanos v. United States*, 547 U.S. 715 (2006). Materials that

effectively replace any portion of a WOTUS with dry land or change the water body's bottom elevation constitute as a fill material. 40 C.F.R. § 232.2.

A. The "waste treatment system" exemption applies only to man-made impoundments, originally designed and functioning as a treatment system.

Regulations exempt waste treatment systems designed to meet the requirements of the CWA from classification as a WOTUS. 33 C.F.R. § 328.3. A claimant carries the burden of prove a water body qualifies for exemption. *United States v. First City Nat. Bank of Houston*, 386 U.S. 361, 366 (1967). This Court should find the MEGS ash pond as a WOTUS because (1) neither Congress nor the EPA intended for impoundments of WOTUS to become exempt as waste treatment systems; and (2) exempting the ash pond as waste treatment when the pond is effectively for disposal defeats any purpose of the exemption.

i. The sentence excluding exemptions of waste treatment systems originally created in WOTUS survives despite suspension.

The exclusion of waste treatment systems as a WOTUS does not, and was never intended to apply to impoundments originally created in a WOTUS. 40 C.F.R. § 122.3 (1980). The EPA included the last sentence of the exclusion to clarify its application only to entirely man-made bodies of water. 45 Fed. Reg. 33,298 (May 19, 1980). The EPA reasoned that the sentence "ensure[s] that dischargers did not escape treatment requirements by impounding [a WOTUS] and claim the impoundment was a waste treatment system." *Id*. Suspension of the sentence derived solely on potential confusion, not to eliminate the sentence's meaning to clarify the exclusion to the exemption.

The exemption further conflicts with Congress' intention to limit exemption to entirely man-made bodies of water. "The use of any [water of the U.S.] as a waste treatment system is unacceptable," stated Congress upon enacting the CWA. S. Rep. No. 414, 92nd Cong., 2nd Sess.

7 (1971). Indeed, regulations still define "tributary" as a water that retains its status, including when impounded by a dam or other constructed breaks. 33 C.F.R. § 328.3(c)(3).

Some courts have rallied behind the provision's original intent as interpreted by the EPA. *W. Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1286 (S.D.W. Va. 1989), aff'd, 932 F.2d 964 (4th Cir. 1991). In *Reilly*, the court supported the EPA stated the suspension has no effect on the "clear definitional mandate that impoundments of [WOTUS] remain [as such]." *Id*. at 1289-90. The court held the EPA's interpretation, finding it was neither plainly erroneous nor inconsistent with the regulation. *Id*. at 1291. Looking to courts' deference to EPA interpretation of the regulation at issue, as well as Congress' original purpose, the exemption should inherently revert back to a water of the United States.

ii. Current interpretations of waste treatment systems material conflict with the CWA without sufficient justification.

EnerProg or the EPA may contest that current interpretation by the EPA strays from this view. For instance, in *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.* the court found that the ACOE and EPA's interpretation of waste treatment system exemptions for discharges of fill runoff into streams did not conflict with the CWA aim to restore and maintain the integrity of waters of the United States. 556 F.3d 177, 216 (4th Cir. 2009). But, the court reached this conclusion when considering SMCRA's goal to balance environmental protection and productivity. *Id*. Further, in that methodology represented the "best available technology" and topographical challenges for alternatives.

Unlike in *OVEC*, deference to current EPA interpretation would unreasonably conflict with the CWA. First, it would disregard precedence that § 404 permits supersede § 402. Second, a § 404 permit would focus more heavily on the direct environmental impact of the coal ash. Considering effluent limitations would end after closure, proper maintenance of the ash pond and

dam should remain regulated under § 404 permit. Although recent EPA interpretation has strayed from this view, this Court should consider both Congress' intent and the previous Agency's interpretation as controlling rather than recent derisions threatening the integrity of the nation's water and core goal of the CWA.

iii. Absent exemption as a treatment system, the MEGS ash pond is a WOTUS subject to § 404 permitting requirements.

Eliminating the exemption as a waste treatment system, the ash pond is properly a WOTUS. Waters of the United States encompass a variety of water bodies, including: all impoundments of waters identified as WOTUS; all tributaries, including impoundments, to waters identified as WOTUS; and waters determined to have a significant nexus. 33 C.F.R. § 328.3. The MEGS ash pond is an impoundment of Fossil Creek, which is itself a tributary to a navigable-in-fact water, the Progress River. R. at 7. Further, Fossil Creek is a perennial tributary, meaning it has a near permanent surface connection to the Progress River. R. at 7. The ash pond does not "lose its status" notwithstanding a damn breaking connection for any length of time. 33 C.F.R. § 328.3(3). As a WOTUS without exemption, the ash pond is subject to CWA permitting for the discharge of pollutants, in this case a § 404 fill permit.

B. Dewatering coal ash and covering it with an impermeable cap would constitute a discharge of fill material based on the act's effect.

A "discharge of a pollutant" is any addition of any pollutant into a navigable water from any point source. 33 U.S.C.A. § 1362. Any material that would in effect raise the bottom level of water or replace a portion of water with dry land constitutes as a "fill material". 40 C.F.R. § 232.2. Dewatering the coal ash pond and prospective cap would have the effect of both raising the bottom level of the water and create dry land, requiring a § 404 permit.

A pollutant that constitutes as fill material under § 404 excludes the EPA's permitting authority under § 402 of the CWA. *Coeur*, 557 U.S. at 274. In *Coeur*, the Supreme Court held the discharge of slurry would change the bottom elevation of a body of water. *Id*. at 275-76. Though the material included pollutants prompting 402 permit requirements, because the materials effectively raise the bottom elevation of water, the activity requires a 404 permit.

The cap and close plans would effectively dry the waters and raise the bottom level. Dewatering the MEGS ash pond impoundment, as a WOTUS, would have the effect of creating dry land. Further, the remaining dry coal ash and impermeable cap would raise the bottom level of any water that could accumulate. The EPA already considers discharges of the coal ash into treatment ponds as a discharge, considering the agency had issued a § 402 permit. Because a § 404 supersedes § 402 jurisdiction, the cap and closure of the pond properly falls within the ACOE's jurisdiction.

CONCLUSION

For the foregoing reasons, Petitioner Fossil Creek Watchers respectfully requests that this Court vacate the Notice and the 1980 suspension, uphold current permit conditions, and compel EPA to impose the requested additional permit conditions.