Brief Copy Team No. 7

Docket Nos. 17-000123 and 17-000124

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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ENERPROG, L.L.C.,
*Petitioner-Appellee,*

*and*

FOSSIL CREEK WATERS, INC.,
*Petitioner-Appellee,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
*Respondent-Appellant.*

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On Consolidated Petitions for Review of a Final Permit Issued
Under Section 402 of the Clean Water Act
NPDES Appeal No. 17-0123, Environmental Appeals Judges Wink, Blinc, and Knod

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# BRIEF OF ENERPROG, L.L.C., Petitioner-Appellee

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Oral Argument Requested

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## STATEMENT OF JURISDICTION

The Environmental Protection Agency (EPA) has delegated subject-matter jurisdiction over Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit appeals to the Environmental Appeals Board (EAB). 40 C.F.R. § 124.19 (2017). The CWA provides this Court with authority to review the Administrator's issuance of the final permit after administrative remedies have been exhausted. 33 U.S.C. § 1369(b) (2012); 40 C.F.R. § 124.19(l). Both petitioners, EnerProg, L.L.C. ("EnerProg") and Fossil Creek Watchers (FCW), timely filed for judicial review of the EAB's order. R. at 7. A state's CWA § 401 certification conditions are more appropriately challenged in the applicable state's courts because the EPA generally does not have authority to exclude state certification conditions. 40 C.F.R. § 124.55(e) (2017); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006). However, the EPA has jurisdiction to review the State of Progress's ("Progress") § 401 certification conditions in this case to preserve EnerProg's right to due process in the absence of a proper state forum. U.S. Const. amends. V, XIV. The EPA's decision not review Progress's certification conditions allows this Court to review the permit conditions as a final agency action. 5 U.S.C. § 704 (2012).

## STATEMENT OF THE ISSUES

I. Were the State of Progress's section 401 certification conditions properly included in Enerprog's Final NPDES Permit?

II. Did the EPA's suspension of compliance deadlines relieve EnerProg from state certification deadlines for achieving zero discharge of coal transport water?

III. May the EPA Region XII rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash transport wastes?

IV. Do NPDES permitting requirements apply to EnerProg's internal pollutant discharges into the MEGS coal ash pond?

V. Is EnerProg required to obtain a section 404 dredge and fill permit for the closure and capping of the coal ash pond?

## STATEMENT OF THE CASE

This case involves the proper scope and application of the CWA NPDES permit program when the EPA is the permitting authority. This case focuses upon the inclusion of state conditions in their § 401 state water quality certification for EnerProg's continued operation of the Moutard Electric Generating Station (MEGS), located in Fossil, Progress. R. at 2.

### I. Statement of the Facts

The permit renewal being challenged is for EnerProg's MEGS facility, which is a coal-fired electric generating plant that is subject to EPA effluent limitations for Steam Electric Power Generating Point Source Category. *Id*. at 7. The facility withdraws water from the Moutard Reservoir ("the Reservoir") as necessary for plant operations. *Id.* Water withdrawn from the Reservoir is mostly returned either through the direct discharge of water from the closed-cycle cooling system (less than once per year), or through Outfall 002 after the water has gone through the facility's ash pond treatment system. *Id.* The ash pond was created in June 1978, by damming the upper reach of Fossil Creek. *Id*. Fossil Creek does not discharge into the Reservoir, but it is a perennial tributary to a navigable-in-fact interstate water called the Progress River. *Id*.

The facility operates a number of outfalls relevant to this appeal. The ash pond receives water via Internal Outfall 008, which collects wastewater from the fly ash and bottom ash transportation systems and the cooling tower blowdown. *Id*. at 8. All of the water that has been treated through the ash pond is discharged directly into the Reservoir through Outfall 002 via a riser structure, triggering NPDES permit requirements. *Id*. at 7-8. No NPDES permit is required for discharges from the plant into the ash pond itself pursuant to 40 C.F.R. § 122.2, which exempts such ponds from being considered "waters of the United States." *Id*. at 12.

The pond also receives flue gas desulfurization (FGD) blowdown as overflow in severe rain events. *Id.* at 8. Otherwise, FGD blowdown goes through a vapor compression evaporator (VCE) waste treatment system and is either used internally for plant processes or is returned to the Reservoir via Outfall 002. *Id*. EnerProg is currently constructing a new FGD settling basin that will treat waste water by VCE. *Id*. at 10. Overflow from the new basin may result from severe storms and will be routed to Outfall 002, which can accommodate such overflows within appropriate TBEL limits. *Id.*

EnerProg appropriately sought a § 401 certification from Progress for the renewal of its MEGS NPDES permit because MEGS is a point source, requiring a NPDES permit to discharge any pollutants into "waters of the United States." *Id*. at 8. Progress signed the § 401 certification with the condition that EnerProg stop using its coal ash pond, completely dewater the pond, and cover the dewatered pond with an impermeable cap, all by September 1, 2020. *Id*. Progress claims that these measures were included "in order to comply with the Progress Coal Ash Cleanup Act (CACA)." *Id*. According to Progress, CACA is a state law requiring the "assessment, closure, and remediation of substandard coal ash disposal facilities" to "prevent public hazards associated with the failures of ash treatment pond containment systems" and leaks from treatment ponds into ground and surface water. *Id*. at 8-9.

The EPA included Progress's § 401 certification conditions in EnerProg's Final NPDES Permit without reviewing the conditions for consistency with state law and the CWA, thereby forcing EnerProg to build a new Retention comply with CACA. R. at 10. Progress authorized EnerProg to continue using Internal Outfall 008 to transport bottom and fly ash to the coal ash pond free of any effluent limitations on an interim basis until the coal ash pond is closed on

November 1, 2018. *Id*. The discharge necessary to dewater the ash pond was not accounted for in the Final Permit. *Id*.

Progress's § 401 certification also requires EnerProg to completely change its current waste treatment system from a wet system to a dry handling system by November 1, 2018. *Id*. at 9. The November 8, 2018, compliance deadline was originally included in the EPA's 2015 revised Effluent Limitation Guidelines (ELGs) for the Steam Electric Power Generating Point Source Category, 40 C.F.R. pt. 123. *Id*. Under the 2015 ELGs, Best Available Technology (BAT) for toxic discharges associated with wet bottom ash and fly ash is zero discharge, capable through dry handling technology. *Id*. However, the EPA has since issued Notice suspending the compliance deadlines for the 2015 ELGs pending judicial review from the Fifth Circuit court case challenging the rule. *Id*. at 11.

The EPA permit writer ignored the pending court case and the deadline suspension when writing the EnerProg's Final Permit, instead he unilaterally decided to require zero discharge as BAT for the MEGS facility. *Id.* He further determined that he could use his Best Professional Judgement (BPJ) as an alternative ground for requiring zero discharge because the dry handling technology is already available and MEGS is profitable enough to implement the new system with a twelve-cent increase in consumers' electric bill. *Id*. Because of this, MEGS must convert to a dry handling system to reach zero discharge to satisfy the BAT requirement. *Id*. at 7, 9.

## II. Procedural History

EnerProg received a renewed Final NPDES Permit from EPA Region XII on January 18, 2017, that included the § 401 certification conditions imposed by Progress. *Id*. at 6. EnerProg and Fossil Creek Watchers, Inc. (FCW) filed petitions for review of the re-issued NPDES permit to the EAB on April 1, 2017, requesting that the permit be remanded to Region XII for further

consideration. *Id*. Both petitioners timely appealed EAB's decision to deny their petitions and affirm the final permit. *Id.*

EnerProg challenged Progress's § 401 certification conditions that were included in the final permit, requiring EnerProg to stop using its coal ash pond at the MEGS facility by November 1, 2018, dewater the ash pond by September 1, 2019, and place an impermeable cap over the remaining coal combustion residuals (CCRs) by September 1, 2020. *Id*. EnerProg also challenged the final permit's inclusion of the zero-discharge standard and the November 1, 2018 compliance deadline imposed by Progress to meet this standard. *Id*. Finally, EnerProg challenged the EPA permit writer's reliance on BPJ as an alternative ground for requiring zero discharge. *Id*. at 7. FCW challenged the permit provisions that authorized coal ash solids to remain in the pond after it was closed without obtaining a § 404 dredge and fill permit. FCW also claims that the permit must include an NPDES effluent limitation for the discharges into the ash pond because they claim the ash pond itself is a "water of the United States." *Id*.

## STANDARD OF REVIEW

Circuit Courts review questions of law *de novo*, while conclusions of fact are reviewed for clear error. *Bass Enter. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998). The Administrative Procedure Act's (APA) arbitrary and capricious standard is applied by Courts of Appeals when reviewing the issuance of an EPA administered NPDES permit. *City of Pittsfield v. EPA*, 614 F.3d 7, 14 (1st Cir. 2010). The APA's standard of review, requires this Court to decide "all relevant questions of law," including interpreting constitutional and statutory provisions to ensure that agency actions, findings, and conclusions are not "arbitrary, capricious, an abuse of discretion, [] otherwise not in accordance with law," "contrary to constitutional right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(a) (2012).

## SUMMARY OF THE ARGUMENT

EPA's inclusion of Progress's § 401 certification conditions was arbitrary and capricious because the EPA is obligated to deny conditions that are not "appropriate requirement[s] of State law" where there is no state forum to challenge the conditions. Progress exceeded its authority under the CWA by imposing certification conditions that cannot be challenged in state court, are not part of the state's EPA approved water quality standards, and are not otherwise "appropriate requirement[s] of State law." Most critically, certification conditions that allow the discharge of pollutants without regard to effluent limitations cannot be an "appropriate requirement of State law" because it violates the CWA.

Federal courts and agencies generally do not have authority to review the validity of requirements imposed under state law or in the state's § 401 water quality certification. However, the EPA should have reviewed Progress's certification conditions in this exceptional circumstance because such review is necessary to preserve EnerProg's constitutional right to due process. The constitutional right to due process is an indispensable right that federal agencies and courts are to uphold. If possible, federal courts and agencies are charged with interpreting statutory provisions to fit within the bounds of the Constitution.

Regardless of the procedural inappropriateness, the conditions should have been excluded because the conditions cannot be "appropriate requirement[s] of State law" if they violate the CWA and exceed state authority. Section 510 of the CWA expressly provides that a state "may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent" than federal requirements. Progress's permit conditions authorize EnerProg to discharge pollutants with impunity until state objectives are met, a clear violation of the CWA.

Under the APA, the EPA has authority to postpone the effective date of an agency action pending judicial review in the interest of justice. This Court should reverse the ruling of the EAB because the Administrator properly considered all aspects of the revised effluent limitations and standards when postponing the deadlines and the EPA's provided a reasoned definition of the "effective date" of its rule deadlines. The EPA was not even required to provide notice and comment of the stay because the postponement was not substantive rulemaking. Even if it was substantive rulemaking, the EPA properly postponed the compliance deadlines.

APA § 705 permits an agency to "postpone the effective date of action taken by it, pending judicial review." When the EPA submitted notice to postpone the deadlines, the deadlines in question had not yet passed and the substance of the rule was pending litigation in the Fifth Circuit. Under other circumstances, the EPA or a court could postpone compliance deadlines upon request by parties involved in the litigation. It would be counter to the purpose of § 705 (i.e., to maintain the status quo) to not allow the EPA to postpone compliance deadlines on its own initiative, when it can do so upon request by a regulated party. Additionally, the EPA's interpretation of "effective date" is reviewable under the "arbitrary and capricious" standard, which gives substantial deference to agency interpretation. The EPA's interpretation is not arbitrary or capricious because the agency gave a reasonable basis for suspending the compliance deadlines and complied with appropriate procedural requirements in issuing the stay. Thus, the EAB's holding should be reversed.

While a NPDES permit writer may develop an individual limit for a discharger based on BPJ in the absence of a technology-based limit, the permit writer is precluded from doing so when the EPA has already established a technology-based limit. In this case, the EPA has already established the BAT standard in the ELGs that govern toxic bottom ash and fly ash

discharges. As this standard applies to the discharges from the MEGS plant, the permit writer was precluded from promulgating a different, individual limit. As such, this Court must reverse the decision of the EAB and the EPA to set a zero discharge standard as BPJ in the final permit.

However, this Court should affirm the EAB's decision that Internal Outfall 008 is an internal discharge that does not require a § 402 permit. The ash pond into which Internal Outfall 008 discharges is not a water of the United States. The EPA properly revised its definition of "waters of the United States" in 1980 to stay the language which considered manmade waterbodies originally created in waters of the United States or resulting from the impoundment of such waters, to be "waters of the United States." The EPA's application of this stay is consistent with its regulations and is not clearly erroneous. Accordingly, the EPA's interpretation of its own regulations in determining that the ash pond is not a water of the United States should be given deference.

Similarly, the EPA properly interpreted and applied its own regulations in determining that EnerProg does not need a § 404 fill permit to cap the ash pond. As stated above, the ash pond is not a water of the United States and § 404 fill permits only apply to the filling of a water of the United States. This Court should therefore affirm the EAB's decision that EnerProg does not need a § 404 fill permit to cap the ash pond.

## ARGUMENT

### I. STATE OF PROGRESS'S SECTION 401 CERTIFICATION CONDITIONS SHOULD NOT BE INCLUDED IN ENERPROG'S FINAL NPDES PERMIT.

The EPA's inclusion of Progress's § 401 certification conditions was arbitrary and capricious because EPA is obligated to deny conditions that are not "appropriate requirements of State law." Independent of review granted by 33 U.S.C. § 1369(b), this Court may review the appropriateness of Progress's certification conditions for arbitrary and capriciousness because

the issuance of a NPDES permit is a "final agency action for which there is no other adequate remedy in a court," given the lack of a proper state forum. 5 U.S.C. § 704. In determining whether the EPA's actions were arbitrary and capricious, this Court must determine whether the EPA failed to consider "all relevant factors" when making its decision. 5 U.S.C. § 706(2)(a). One factor that must be considered is whether denying review of the state's conditions was "contrary to a constitutional right." *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

Adding to the lack of respect for constitutional guarantees, EPA's inclusion of Progress's § 401 certification conditions was "arbitrary and capricious" because such conditions exceeded Progress's authority under the CWA. *See* 33 U.S.C. § 1341(d) (2012). Progress exceeded its authority by imposing certification conditions that cannot be challenged in state court, are not part of the state's EPA approved water quality standards, and are not otherwise "appropriate requirement[s] of State law." Most critically, Progress's certification conditions cannot be an "appropriate requirement of State law" because the conditions violate the CWA's mandate that states shall not impose less stringent standards than federal requirements. *See* 33 U.S.C. § 1370 (2012) (providing that states may adopt more stringent standards but "may not adopt or enforce an effluent limitation, or other limitation, effluent standard, . . . which is less stringent that the [standards set forth] under this chapter."); 40 C.F.R. § 124.55(c) (2017) (requiring Administrator to consider less stringent certification standards as a denial or waiver of state certification).

As such, this Court should reverse the ruling of the EAB and hold that the EPA has the authority to review states' § 401 certification conditions where there is no appropriate state forum for review and doing so is necessary to preserve a constitutional guarantee. This Court should also interpret § 401(d) as limiting "appropriate requirement[s] of State law" to state laws that are consistent with the provisions of the CWA.

### A. The EPA has jurisdiction to review state § 401 certification requirements to preserve constitutional procedural safeguards.

Review of agency action under the "arbitrary and capricious" standard is deferential, within reason. *Nat'l Ass'n of Home Builders v. Def. of Wildlife,* 551 U.S. 644 (2007). A Court will not vacate an agency's decision "unless it has relied on factors which Congress did not intend it to consider [or has] entirely failed to consider an important aspect of the problem . . . ." *Nat'l Ass'n of Home Builders,* 551 U.S. at 646. The constitutional implications of an agency's actions are an important aspect of this problem. *See* Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1058 (1984). In this instance, the EPA's inclusion of Progress's certification conditions was arbitrary and capricious because the agency failed to consider the procedural due process implications arising from the state's initial, and the EPA's subsequent failure to provide an appropriate avenue for review of the state's conditions.

#### 1. Progress failed to provide a proper state forum to challenge its § 401 certification conditions.

Federal courts and agencies generally do not have authority to review the validity of requirements imposed under state law or in the state's § 401 water quality certification. 40 C.F.R. § 124.55(e) ("Review of Appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in [Part 124]."); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982), *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976); *In re D.C. Dep't of Pub. Works*, 6 E.A.D. 470, 3 (EAB 1996). Further, EPA does not generally have authority to reject conditions included in a State § 401 certification because the CWA mandates that such conditions "shall become a condition of any Federal license or permit." 33 U.S.C. § 1341(d); *see e.g., S.D. Warren Co.,* 547 U.S. at 386*; PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*,

511 U.S. 700, 705 (1994); *Del Ackels v. EPA,* 7 F.3d 862, 867 (9th Cir. 1993); *Am. Rivers Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997); *United States v. Marathon Dev. Corp.,* 867 F.2d 96, 102 (1st Cir. 1989)*; Roosevelt Campobello Int'l Park Comm'n*, 684 F.2d at 1056; *In re D.C. Dep't of Pub. Works,* 6 E.A.D. at 3. *But see* U.S. ARMY CORPS OF ENG'RS, RGL 92-04, SECTION 401 WATER QUALITY CERTIFICATION & COASTAL ZONE MANAGEMENT ACT CONDITIONS FOR NATIONWIDE PERMITS (2010) (allowing the Corps to consider a 401 certification administratively denied where the certification contains conditions that require the Corps to take action outside its statutory authority or are otherwise unacceptable). The EPA does have some authority to consider certification conditions. *See* 40 C.F.R. § 124.55(c) (concerning conditions that are less stringent than federal limitations). Where the EPA is implementing the NPDES permit program, the EPA has authority to review § 401 certification conditions to preserve EnerProg's right to due process. U.S. Const. amends. V, XIV.

2. The EPA must review state certification conditions if the state fails to provide a proper state forum for judicial review in order to preserve Enerprog's constitutional right to due process.

Due process of law is an indispensable right of individual freedom under the United States Constitution that "requires [] action[s] by state through any of its agencies [] be consistent" with constitutional protections. *Application of Gault*, 387 U.S. 1 (1967); *Buchalter v. New York*, 319 U.S. 427 (1943). Procedural due process implications arise when there is a deprivation of an individual's "liberty" or "property" interest provided under some source of law, other than the Constitution, or the denial of statutory entitlements. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972). Courts must consider the nature of the interest and recognize that due process is a flexible requirement that extends property interest protections "well beyond actual ownership of real estate, chattels or money." *Roth*, 408 U.S. at 570.

Once a court determines that there has been a deprivation of a protected property interest, it must analyze what process is due. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). *Matthews v. Eldridge* requires courts to consider three distinct factors when considering due process claims: (1) the "private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews*, 424 U.S. at 335.

In this case, the *Matthews v. Eldridge* factors weigh heavily in favor of finding a denial of procedural due process. First, EnerProg has a substantial property interest in its business operations and its continued beneficial use of its property (i.e., the ash pond), especially when the electrical utilities from such operations are depended upon by the surrounding community. Second, the risk of industrial industry members in Progress being erroneously deprived of their right to challenge conditions placed upon their operations in the future simply cannot be sustained under the Constitutional right to "due process of law." U.S. Const. amends. V, XIV. Due process is grounded in fairness and imposing conditions without the opportunity to legally challenge such conditions is inherently unfair. *Matthews*, 424 U.S. at 335.

Finally, the government interest involved in substantial, considering that thus far, every federal court that has considered the appropriateness of a State's certification conditions has done so after state administrative and judicial processes have been exhausted. *See generally S.D. Warren Co.,* 547 U.S. at 374 (describing Warren's appeals process through the state courts); *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 705 (1994) (describing state appeals process). This simple procedural safeguard will not entail substantial fiscal or administrative burdens since the

EPA is already well-versed in Progress's permitting standards and laws, and the EPA is already knowledgeable of the State's regulated community and water quality needs. In contrast, the burden placed on EnerProg to comply with these conditions is substantial.

Turning to the process that is due, it is undisputed that Progress and the EPA appropriately provided notice and an opportunity to comment on the permit. However, EnerProg should have access to federal administrative or judicial review. This is especially important for determining the legality of administrative action and the interpretation of state and federal law. Plus, it is counterintuitive to mandate that states administering the NPDES program provide applicants with procedures to challenge permit conditions, 40 C.F.R. § 123.30 (2017), yet deny applicants the same opportunity under a federally administered NPDES permit program. It is also counterintuitive that the EPA can rejected state water quality standards if they inconsistent with the CWA, 33 U.S.C. § 1313(3)-(4) (2012), but cannot review state certification conditions.

The EPA should have considered the lack of meaningful opportunity for EnerProg to challenge state certification conditions, and provided review of such conditions. As such, the EPA acted arbitrarily and capriciously in failing to consider an important factor (i.e., the constitutional implications) relevant to its decision.

### B. Progress's certification conditions should not be included in the final permit because they are not state water quality standards or "other appropriate requirement[s] of State law."

Regardless of the procedural inappropriateness, Progress's certification conditions exceed the state's authority under the CWA. The Supreme Court has interpreted § 401(d) broadly, allowing states to impose various pollution control methods to protect state water quality. *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 705. However, such pollution control methods have never extended so far to force an active electric facility to abandon its treatment methods that meet

federal requirements without showing that such methods violate state water quality standards. *See* 33 U.S.C. § 1312 (2012) (allowing the Administrator to impose "alternative effluent control strategies" to attain or maintain water quality standards only after assuring the protection of existing industrial water uses). Nor can the conditions be considered some "other appropriate requirement of State law" because the conditions allow for the discharge of pollutants with impunity until the closure of the ash pond, in clear violation of the CWA. 33 U.S.C. § 1370. Since the conditions contained in the final permit are not part of the state's water quality standards and are not some "other appropriate requirement under State law," such conditions exceed the state's authority and should not have been included in the final permit.

1. Closure and remediation of the MEGS coal ash pond is not required by Progress's state water quality standards.

State water quality standards are developed by states to preserve and protect state waters that must be submitted to and approved by the EPA before being enforced. 33 U.S.C. § 1311 (2012). State water quality standards under § 303 of the CWA are among the "other limitations" and "other appropriate requirement[s] of State law" that states may impose through its certification authority. *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 711-12. The Supreme Court has established that state water quality standards are, at least, "other appropriate requirement[s] of State law." *Id.* at 701 (stating that state water quality standards are not specifically listed in § 401(d), but are incorporated by reference). However, this authority is not limitless. *Id*. at 712.

The Court suggested that certification conditions must give due consideration to state water quality standards. Under § 303, state water quality standards must "consist of the uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (2012). Water quality effluent limitations under State water quality standards "shall be established taking into consideration their use and value for . . .

industrial, and other purposes." *Id.* To be state water quality standards, such standards must be "expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 715.

Progress's condition to close the coal ash pond is completely unrelated to Progress's EPA approved state water quality standards, evident from Progress not citing state water quality standards in the permit. CACA was proposed to protect the public from hazards associated with coal ash ponds, consistent with the purpose of state water quality standards. R. at 8-9. Although the purpose of the law aligns with that of state water quality standards, it is not a state water quality standard and should not have been included in EnerProg's NPDES permit. Further, the law does not contain the elements for state water quality standards. Nor does it assure compliance with state water criteria or consider the existing use of the coal ash pond. Progress's certification conditions are not even set forth in terms used to denote state water quality standards. Instead, Progress is relying upon the EPA to enforce conditions unrelated to, and inconsistent with the CWA. A law that supposedly applies to "substandard coal ash disposal facilities," but Progress failed to show that EnerProg's ash pond is substandard. *Id*. at 8.

2. Certification conditions that are not consistent with the CWA do not constitute "any other appropriate requirement of State law."

The Supreme Court has specifically refused to speculate on what additional state laws may be included as "any other appropriate requirement of State law." *Id*. at 713. However, the consideration of the Court is still instructive. In both *PUD No. 1* and *S.D. Warren*, the conditions being considered were specifically tied to maintaining state water quality standards. *Id.* at 716. In *PUD No. 1*, the Court considered water quantity limitations contained in the state certification as appropriate state water quality requirements. In *S.D. Warren*, the Court considered thermal conditions placed in state certification conditions. *S.D. Warren Co.*, 547 U.S. at 378. Neither

case purported to completely end a designated beneficial use of water without citing to specific water quality criteria that was sought to be achieved, or alternative methods to reach state water quality objectives. Further, neither were inconsistent with the CWA.

Section 510 of the CWA provides that a state "may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent" than federal requirements. 33 U.S.C. § 1370. It is well established that the CWA imposes minimum water quality requirements that states are free to exceed. *See PUD No. 1 of Jefferson Cty.*, 511 U.S. at 705. The EPA is authorized by rule to consider state certification as administratively waived if the certification includes requirements that are less stringent than federal mandate. 40 C.F.R. § 124.55(c) (stating that "[a] State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition. The Regional Administrator shall disregard any such certification conditions, and shall consider those conditions or denials as waivers of certification.").

Here, the certification conditions adopted into the final NPDES permit provides that EnerProg must close, dewater, and cap its coal ash pond. R. at 10. However, nothing in the permit establishes an effluent limitation for the discharge associated with dewatering the ash pond. Since the water from the ash pond must be discharged to dewater the ash pond, it is logical that this discharge must comply with effluent limitations. *See Frequent Questions about the Coal Ash Disposal Rule,* EPA, https://www.epa.gov/coalash/frequent-questions-about-coal-ash-disposal-rule (last visited Nov. 19, 2017). This authorization promotes exceedance of effluent limitations being discharged into the Reservoir and is a clear violation of the CWA as a far less stringent limitation than that allowed under federal requirements. R. at 10.

Additionally, inclusion of the ash pond closure and remediation requirements was inappropriate under the NPDES permit program because such measures are governed by Subtitle D of the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. § 6901 *et seq*. (1976); 80 Fed. Reg. 21,301, 21,303 (Apr. 17, 2015) (codified at 40 C.F.R. pts. 257 & 261 (2017)). The only connection between the NPDES program and the closure and remediation of the coal ash pond is the discharge associated with dewatering the pond, and that discharge is not even included in the final permit. R. at 10. The final permit only covers the continued use of the outfall until the pond is closed, not additional discharges related to dewatering the pond. *Id*. Progress, and thereby the EPA, have set up a situation in which EnerProg cannot legally comply with a condition, but must do so or risk civil or criminal penalties, or citizen suit actions.

3. The EPA can exclude certification conditions that are not consistent with the CWA as a permissible exercise of agency discretion.

Allowing the EPA to exclude state certification conditions that are not consistent with the CWA is permissible by the legislative history of § 401(d). Section 401(d) of the CWA was enacted in 1970 to prevent federal licenses and permits from being issued "for an activity that through adequate planning or otherwise could in fact become a source of pollution." 115 Cong. Rec. H9,030 (Apr. 15, 1969) (House debate); 115 Cong. Rec. S28,958-59 (Oct. 7, 1969) (Senate debate). It essentially codified pre-existing law to prevent polluters from hiding behind a federal permit as an excuse for violating water quality standards and from making "major investments in facilities under a Federal license [] without providing assurance that the facility will comply with water quality standards." 116 Cong. Rec. 8,984 (1970) (statement by Senator Muskie when what is now § 401 was first proposed). To this end, § 401 allows states to enforce their water quality standards as "any other appropriate requirement of State law" by imposing conditions on federal licenses that may result in a discharge. U.S. EPA, CLEAN WATER ACT SECTION 401 WATER

QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES (2010). The object of § 401 "comprehends maintaining state water quality standards." *S.D. Warren Co.*, 547 U.S. at 380. As such, the provision was meant as a check on federal power to authorize activities that may affect state water quality standards. *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 713 (stating that the "State's authority under § 401 includes limitations designed to ensure compliance with state water quality standards."). Nowhere in § 401 did Congress authorize states to go outside the bounds of the CWA when imposing certification conditions that require the federal agency to enforce conditions beyond its authority.

Plus, the CWA contemplated that states would be principally responsible for administering the NPDES permit program, with some federal assistance. 33 U.S.C. § 1251(b) (2012) (stating the congressional policy that "the States . . . implement the permit programs under sections 1342 and 1344 of this title."). Although this objective has been largely realized, it is counterproductive to allow states to force federal agencies to bear the burden of administering state laws that are beyond the agency's authority. 33 U.S.C. § 1342(a) (stating that the administrator shall prescribe conditions for permits to assure compliance with of sections 1311, 1312, 1316, 1317, 1318, and 1343, specifically excluding section 1341.). Allowing states to sit by while forcing the federal agency to administer its program violates the delicate cooperative federalism envisioned by the CWA. As such, the certification conditions imposed by Progress should have been reviewed and rejected by the EPA when issuing EnerProg's final permit.

This Court should determine as a matter of law that the EPA has the authority to review and reject state § 401 certification conditions that are not consistent with the CWA where there is no appropriate state forum for judicial review.

## II. THE EPA'S NOTICE SUSPENDING FUTURE COMPLIANCE DEADLINES RELIEVES ENERPROG FROM COMPLYING WITH STATE COMPLIANCE DEADLINES FOR ACHIEVING ZERO DISCHARGE.

Under the APA, the EPA has the authority to postpone the effective date of an action pending judicial review in the interest of justice. 5 U.S.C. § 705 (2012). The EPA Administrator properly considered all aspects of the revised effluent limitations and standards in deciding to postpone the compliance deadlines for discharges of coal ash transport water. The EPA's definition of "effective date" to include the compliance dates is also reasonable. Additionally, because the postponement was not substantive rulemaking, the notice and comment requirements of the APA do not apply. This Court should therefore reverse the ruling of the EAB.

### A. The EPA's interpretation of "effective date" to include compliance deadlines is reasonable and therefore entitled to judicial deference.

The APA permits an agency to "postpone the effective date of action taken by it, pending judicial review." *Id.* On April 25, 2017, the EPA postponed the compliance deadlines for more stringent discharge standards under the 2015 revised Effluent Limitation Guidelines for the Steam Electric Power Generating Point Source Category (2015 ELGs). 82 Fed. Reg. 19,005 (Apr. 25, 2017) (codified at 40 C.F.R. § 423 (2017)). These compliance dates had not yet passed and the EPA determined that they were within the meaning of the term "effective date" as it is used in § 705 of the APA. *Id.* The agency decided that justice required postponing the deadlines in light of ongoing litigation in the Fifth Circuit challenging the 2015 ELGs and the significant capital expenditures that affected facilities would incur in meeting standards under the Rule. *Id.*

When reviewing an agency's interpretation of a statute, the Court must first determine if Congress has "directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Where Congress remains silent or when congressional intent is unclear, the court then determines "whether the agency's answer is based on a

permissible construction of the statute." *Id.* at 843. If it is, then the Court cannot "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

Although Congress does not provide a definition for the term "effective date," § 706 of the APA provides the standard for judicial review for interpretation of APA provisions. 5 U.S.C. § 706. The reviewing court must hold agency action unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* However, this standard of review is narrow, highly deferential, and agency action is presumed to be valid. *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Agency action is only arbitrary and capricious if it goes beyond statutory boundaries set by Congress, ignores an important aspect of the issue, is implausible when applied to the facts, or lacks a satisfactory explanation for the decision. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

The EPA's decision was not arbitrary and capricious because the agency properly considered all aspects linked to the postponement of limitations and standards within the 2015 ELGs and provided a reasonable explanation for its action. Before issuing its notice, the EPA received petitions from regulated entities objecting to the ELGs and asking for EPA to reconsider the rule. 82 Fed. Reg. at 19,005. Importantly, the petitions contained new data from a pilot study showing that the technology needed to achieve the revised effluent limits went beyond the EPA's model technology in impacting performance at coal-fired power plants. *Id.* The EPA needed time

to review this data. In addition, litigation challenging the 2015 ELGs was before the Fifth Circuit. *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (5th Cir. Nov. 20, 2015). After considering the capital expense required to meet the new standards, the EPA decided to preserve the existing regulatory standards pending litigation and re-evaluation of the Rule. 82 Fed. Reg. at 19,005.

The EAB held that "section 705 of the APA does not authorize the extension of compliance dates, only of the effective date." R. at 11-12. In its decision, the EAB defined the effective date of the 2015 ELGs as January 4, 2016, the date stated in the Federal Register. R. at 12. Yet *Chevron* clearly states that a court cannot replace an agency's reasonable interpretation of a statute with its own. *Chevron U.S.A., Inc.*, 467 U.S. at 842. The EPA's inclusion of compliance dates as the effective date is reasonable since the compliance dates are when the new effluent limitations and standards from the 2015 ELGs actually go into effect. It is these deadlines that threaten harm on affected coal-fired power plants, not the date that the Rule goes into regulatory effect. The EPA's definition aligns with Congress's intent that § 705 be a mechanism to delay actions necessary to prevent irreparable injury.

### B. The EPA's Notice postponing compliance dates is not subject to the APA's notice and comment requirements because it is not substantive rulemaking.

The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (2012). An agency that undertakes rulemaking must follow a set procedure that includes publishing notice in the Federal Register and allowing interested parties an opportunity to comment on the proposed rule. 5 U.S.C. § 551; *see also Select Specialty Hosp.-Akron, L.L.C. v. Sebelius*, 820 F. Supp. 2d 13, 22 (D.D.C. 2011).

The suspension or delayed implementation of final regulations usually constitutes substantive rulemaking. *Envtl. Def. Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983). However,

delaying a rule is not considered rulemaking itself if two factors are met. First, the delay notice must not operate as an amendment or rescission of the original rule. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 17 (D.D.C. 2012). Second, the notice is not rulemaking if it is a temporary device that serves only to maintain the status quo until litigation is resolved or ongoing reconsideration of the original rule concludes. *Id.* These factors create a temporary stay to preserve the status quo, and therefore do not constitute substantive rulemaking because the stay is not designed to "implement, interpret, or prescribe law or policy." *Pub. Citizen v. Dep't of Health & Human Servs.*, 671 F.2d 518, 520 (D.C. Cir. 1981).

The EAB incorrectly interpreted the APA to require the EPA Administrator to undergo notice and comment rulemaking before postponing a rule's effective dates. The notice explicitly states that it is designed to delay the effective date of the 2015 ELGs because of ongoing litigation that could affect its implementation, allowing the EPA to consider new data which could hinder implementation of effluent standards. 82 Fed. Reg. at 19,005. The EPA refrains from making "any concession of error with respect to the rulemaking," and makes no changes to the substantive body of the 2015 ELGs. *Id.* Furthermore, the Notice provides a timeframe for the conclusion of the reconsideration process, declaring that the agency intends to conduct a notice and comment period separate from the postponement of compliance deadlines. *Id.*

## III. THE EPA CANNOT RELY ON BPJ AS AN ALTERNATIVE GROUND TO REQUIRE ZERO DISCHARGE

Under the CWA, the Administrator has authority to approve pollutant discharges based on nationally promulgated limits for that pollutant. 33 U.S.C. § 1342. In the absence of a technology-based limit, a NPDES permit writer may develop an individual case-by-case limit based on his or her BPJ. *Id.* The MEGS permit writer cannot rely on the BPJ standard because the EPA had already promulgated the BAT standard in its ELGs governing toxic bottom ash and

fly ash discharges at the time the permit was granted. This Court should therefore reverse EAB's affirmance of the EPA's use of BPJ as an alternative ground for requiring zero discharge.

The CWA outlines the procedure for the NPDES permit program. The Administrator has the power to promulgate technology-based limits for pollutants based on BAT that apply nationally to all facilities within a specific industry. 33 U.S.C. § 1342(a). This authority to establish national effluent limitations was first sanctioned by the Supreme Court in *E.I. Du Pont de Nemours & Co. v. Train,* and has remained unchallenged since. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). In that case, inorganic chemical manufacturers argued that the EPA could only establish general guidelines for setting pollutant standards and those guidelines would then be used in setting limits on a case-by-case basis for each NPDES permit. *E.I. du Pont de Nemours & Co.*, 430 U.S. at 115. The Supreme Court rejected that argument, holding that the EPA has authority under § 301 to limit discharges at existing plants through industry-wide regulations that set forth uniform effluent limitations, provided that some allowance is made for variation of individual plants. *Id*.

In the absence of national effluent guidelines, the CWA allows the EPA to approve NPDES permits based on a BPJ. 33 U.S.C. § 1342(a)(1). Permit writers are allowed to issue a permit for pollutant discharge based on conditions that the "Administrator determines are necessary to carry out the provisions of this chapter." *Id.* However, BPJ is reserved for instances where the EPA has not already acted to implement national guidelines for a certain pollutant. *Id.* Section 1302(a)(1) acts to "preclude the establishment of BPJ permit limits once applicable effluent guidelines are in place." *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 200 (D.C. Cir. 1988). A plain reading of the text shows that the NPDES program operates under a two step-process: first BPJ permit issuance, then national effluent guidelines. *Nat. Res. Def. Council, Inc.*,

859 F.2d at 200. Therefore, it is clear that BPJ permits are "no longer to be created once national guidelines are in place." *Id.*

This view of the BPJ standard is further bolstered by the section's legislative history. Congress intended for BPJ permits to be a temporary stop-gap measure that would carry out the provisions of the CWA in the time that all necessary steps for national guidelines were to be completed. H.R. REP. No. 911 (1972), *reprinted in* 93D CONG., LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 128 (1972) ("[T]he Administrator may issue permits during this interim period with such conditions as he determines are necessary to carry out the provisions of this Act. Thus, the new permit program may be initiated without undue delay.").

In 2015, the EPA released a set of revised ELGs for the Steam Power Generating Point Source Category. 40 C.F.R. § 423 (2015). Within these guidelines, the BAT standard for toxic discharges associated with bottom ash and fly ash was determined to be zero discharge, based on the available technology to handle these wastes. *Id.* As applied to the MEGS facility, MEGS was determined to be capable of meeting this zero discharge standard. R. at 9. Therefore, these standards were already in effect when the MEGS permit writer applied BPJ to require zero discharge of coal ash wastes by 2018. The EPA's position that the permit writer could rely on BPJ as an alternative to the 2015 ELGs is not supported by either a plain reading of the statute or congressional intent within the legislative record. This Court should require the EPA to apply the BAT standard for coal ash wastes already set by the agency.

## IV. INTERNAL OUTFALL 008 IS AN "INTERNAL" DISCHARGE THAT DOES NOT REQUIRE A SECTION 402 PERMIT.

As required, the EPA promulgated rules for implementing the CWA, and in doing so, determined that the purpose of the CWA would be upheld by staying the previous rule's

language that included manmade bodies of water in the definition of "waters of the United States." 45 Fed. Reg. 48,620, 48,620 (July 21, 1980). The EPA had the statutory authority to stay this language and complied with APA procedural requirements in enacting the stay. Furthermore, the EPA and the courts' application of the suspension supports the purpose of the CWA. Therefore, the Court should affirm the decision of the EAB.

### A. EPA has authority to define, clarify, and revise its definition of "waters of the United States."

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and adopted a national goal of eliminating the discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a)(1). In doing so, Congress granted the EPA Administrator the authority to promulgate rules to implement the CWA. 33 U.S.C. § 1251(d). "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). When there is a gap in the legislation, there is an express delegation of authority for the agency to implement provisions of the statute by regulation. Legislative regulations have controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc.,* 467 U.S. at 844.

The Court's authority to review an agency's statutory authority is limited. *Leedom v. Kyne*, 358 U.S. 184, 187 (1958). If the subject matter of a case is entrusted to an agency, Federal courts must "ascertain whether an administrative agency is acting within its authority and if the decision of the agency is within its authority, the court [must] dismiss the case for want of subject matter jurisdiction." *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 185-86 (4th Cir. 1988).

In enacting the CWA, Congress did not define "waters of the United States." 33 U.S.C. § 1251. EPA is charged with implementing and enforcing the CWA, requiring the EPA to promulgate a regulatory definition for "waters of the United States," and other terms necessary for the implementation of the CWA. 40 C.F.R. § 122.2. Without defining terms like "waters of the United States," the EPA would be hard-pressed to implement any of the CWA's provisions. Furthermore, compliance with the CWA would be impossible if the EPA and the regulated community could not identify which waterbodies fell under CWA regulation.

In its argument, FCW claims that EPA had authority to define some terms, mostly terms favorable to FCW, but lacked the authority to define the rest of the terms not defined in the CWA. FCW cannot have it both ways. It is undisputed that the EPA has the authority to define "waters of the United States." R. at 7. It follows that EPA is also authorized to revise definitions to enforce the CWA in line with Congress's intent. 33 U.S.C. § 1251(d). Accordingly, this Court should dismiss this claim for want of subject matter jurisdiction.

### B. The EPA properly complied with the APA's § 553 procedural requirements in issuing the stay.

The APA requires each agency to publish notice of a proposed rule in the Federal Register and allow for public comments before it may adopt a proposed rule. 5 U.S.C. § 553(b). Except when notice is required by statute, notice and comment procedures requirement are not applicable to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b). An agency's rule is interpretive if the agency intends it to be "no more than an expression of its [own] construction of a statute or rule." *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980).

The EPA was not required to publish the suspension in the first place as the suspension is an interpretation or expression of its own rule. In publishing this interpretation, the EPA was not

promulgating any new regulations. It was merely clarifying the existing definition of "waters of the United States" that the EPA had already promulgated. The stay is interpretive, and therefore exempt from the publication requirements of § 553. *See Chamber of Commerce of the United States*, 636 F.2d at 468.

Even if this Court finds the suspension was not simply an interpretation of its own rule, the EPA complied with APA § 553 when issuing the stay. The EPA first published notice of the stay on July 21, 1980. 45 Fed. Reg. at 48,620. As part of the publication, the EPA explained the reasoning behind the suspension—to "ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system." *Id.* After hearing objections and concerns from industry petitioners, the EPA realized that the language would require many of the petitioners to obtain additional permits for discharges within a waste treatment system, despite already having a permit for discharges *from* the system. *Id.* The EPA published this suspension not once, but three times. *Id.*; 48 Fed. Reg. 14,146, 14,153 (Apr. 1, 1983); 80 Fed. Reg. 37,054, 37,114 (June 29, 2015). The multiple instances of publication provided multiple opportunities for public comments.

FCW alleges that the EPA failed to comply with the requirements set forth in APA § 553. R. at 12. However, FCW fails to establish how the EPA supposedly violated this section, or even which portion of this section the EPA supposedly failed to comply with. The EPA adhered to the requirements of § 553 of the APA in publishing notice of the stay, receiving comments on the stay, responding to comments on the stay, and publishing the final rule establishing the stay, not once, but three times, despite being exempt from following these requirements for an interpretation of its rules.

### C. The EPA correctly applied the stay, and its application should be given judicial deference.

The EPA's issuance of the stay was an interpretation of its own regulation. The EPA has reincorporated and stood by the application of the stay for more than thirty-five years. 48 Fed. Reg. at 14,153; 80 Fed. Reg. at 37,114. Accordingly, it should be afforded deference. The application of the stay was not clearly erroneous or an abuse of discretion. The EPA has furthered the purpose of the CWA in applying the stay by ensuring dischargers do not escape regulation by impounding waters of the United States and claiming the impoundment is a waste treatment system, while avoiding doubly regulating dischargers already in compliance with NPDES permit requirements encompassing any impoundments. The discharge from Internal Outfall 008 into the ash pond is part of the closed cycle cooling system, which is regulated in its entirety by a NPDES permit. This Court should therefore affirm the EAB's decision.

1. EAB properly deferred to the EPA's long-standing interpretation of its own regulation.

"Judicial review of an agency's interpretation of its own regulations is sharply circumscribed." *W. Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1290 (S.D.W. Va. 1989). "When the construction of an administrative regulation rather than a statute is at issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). These legislative regulations are given controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc.*, 467 U.S. at 844. "[T]he consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

The stay at issue here involves the EPA's interpretation of its own regulations, rather than a statute. Since Congress did not define "waters of the United States" in the statute, this responsibility fell to the EPA Administrator to promulgate in the regulations. 33 U.S.C. § 1251.

The EPA relied on its professional judgment and experience in deciding to stay a portion of the definition. This decision followed from the EPA's realization that the suspended language was overly broad in accomplishing its goal of preventing dischargers from escaping regulation, to the point of duly regulating compliant waste treatment systems. 45 Fed. Reg. at 48,620.

The EPA has stood by its suspension for more than thirty-five years and has reincorporated two reconsiderations of this definition since the initial notice of suspension. 48 Fed. Reg. at 14,153; 80 Fed. Reg. at 37,114. The EPA's consistency on the suspension of language from its own regulation should weigh strongly in favor of judicial deference. *See Shalala*, 508 U.S. at 417. The EAB properly reached this conclusion in its ruling, indicating EPA's long-standing policy judgment on the suspension and its application should not be disturbed. R. at 7. Since the stay involves EPA's interpretation of its own regulations and the Courts' firmly established position that agencies should be given deference in interpreting their own regulations, this Court should affirm the EAB's ruling on this claim.

2. The stay is not clearly erroneous, an abuse of discretion, or beyond the EPA's statutory authority.

Administrative interpretation of an agency's own regulations "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The EPA's purpose in originally including the later-suspended language was to "ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands." 45 Fed. Reg. at 48,621. "The waste treatment system exemption was intended to exempt either waste systems that do not discharge into waters of the United States or waters that are incorporated in an NPDES permit as part of a treatment system." *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007) (citing

44 Fed. Reg. 32,854, 32,858 (June 1, 1979); *In re Colonial Sugars*, 1984 1 E.A.D. 895 (EAB 1984)). "The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds." *Id.* at 1002 (citing 45 Fed. Reg. at 48,621).

The EPA's mission to prevent dischargers from escaping treatment requirements by impounding waters of the United States has been reaffirmed numerous times in applying the waste treatment system exemption. In *Northern California River Watch*, the Court properly found that the City's discharge into a pond that was part of a waste treatment system did not fall under the exemption "because it was neither a self-contained pond nor [was] it incorporated in an NPDES permit as part of a treatment system." *N. Cal. River Watch*, 496 F.3d at 1001. There is no indication that the pond at issue is resulting in seepage or underground water contamination. Even if there was data supporting this claim, seepage from the pond into underground water is nonpoint source pollution that is exempt from NPDES permit requirements. *See id.* at 997, 1001.

The Court in *Reilly* reached a similar conclusion where a coal mining operation was using an in-stream treatment pond to filter out sediment in a portion of the stream, and then discharging that sediment from the in-stream pond directly into the stream below. *Reilly*, 728 F. Supp. at 1281. Similarly, in *In re Colonial Sugars*, the EAB held that discharges by a sugar company into the surrounding wetlands to "naturally treat" wastes through biodegradation and mineralization processes did not qualify for exemption. *In re Colonial Sugars*, 1 E.A.D. at 1.

These decisions follow the EPA's interpretation of its own regulations clarifying "waters of the United States," and its intent to prevent dischargers from circumventing permit requirements. In each of the above cases, the dischargers were discharging directly into waters of the United States and the pond or waterbody from which they were discharging was neither

isolated nor incorporated as part of a NPDES permit. *N. Cal. River Watch*, 496 F.3d at 1001; *Reilly*, 728 F. Supp. at 1281-82; *In re Colonial Sugars*, 1 E.A.D. at 1-2. Essentially, the dischargers attempted to circumvent the CWA regulations in the exact manner the EPA was concerned with when it enacted the exemption. 48 Fed. Reg. at 14,153.

In contrast, Internal Outfall 008 is an internal discharge, and does not directly discharge into a "water of the United States." R. at 8. FCW attempts to argue that the ash pond into which Internal Outfall 008 discharges is itself a water of the United States. Unlike the in-stream treatment pond in *Reilly*, 728 F. Supp. at 1281, which essentially treated waste within an undisputed water of the United States, or *Northern California River Watch*, 496 F.3d at 996, where the treatment pond was not incorporated in an NPDES permit and discharged into wetlands, Internal Outfall 008 and the ash pond are incorporated into the system's NPDES permit. R. at 2-4. The waste water is discharged into the ash pond via Internal Outfall 008, and then undergoes treatment within the pond before being discharged into the Reservoir. *Id*. at 2-3. The MEGS facility subsequently withdraws the water from the Reservoir to use in the plant. *Id*. at 2. The waste water discharged into the ash pond, and from the ash pond into the Reservoir, is therefore part of the facility's closed-cycle cooling system and the discharge in Internal Outfall 008, as a result, is incorporated into the NPDES permit.

While EnerProg agrees that the ash pond might be subject to a NPDES permit if the waste was discharging from Internal Outfall 008 into a water of the United States, the ash pond itself is not a water of the United States, and the water from the ash pond is not directly discharged into a water of the United States. The EPA's decision not to require a separate permit for Internal Outfall 008 is an interpretation of its own regulation—the definition of "waters of the United States." The EPA's decision also upholds the purpose of the CWA because the EPA is

still regulating potential pollution discharges related to this pond via the NPDES permit for the entire waste water treatment system.

In *Reilly*, *Northern California River Watch*, and *In re Colonial Sugars*, the courts were concerned with dischargers escaping regulation of the final discharge of waste waters. EnerProg is not shirking any responsibilities. Its system is regulated by a NPDES permit to ensure that the integrity of nearby waters is protected. EnerProg agrees that "[r]egulations under the CWA . . . still extend to discharges *from* treatment ponds." *N. Cal. River Watch*, 496 F.3d at 1002. However, the discharges from the ash pond into the Reservoir are regulated under the treatment system's NPDES permit as the ash pond is an integral part of that system. Discharges *into* the treatment system are regulated to ensure the facility does not exceed its effluent limitations. The waste treatment system, as a whole, is designed to meet the requirements of the CWA, which was the intent behind the original exemption. 33 C.F.R. 328.3(a)(8) (2008); 40 C.F.R. § 232.2 (2008). By regulating the entire closed cycle cooling system, the EPA is also regulating the internal discharges, including Internal Outfall 008. EnerProg's system is precisely the type that the EPA meant to avoid unduly and doubly regulating when it suspended the language at issue. The EPA's determination that Internal Outfall 008 did not require effluent limitations was neither clearly erroneous nor inconsistent with its regulations and, accordingly, should be given judicial deference.

## V. THE EAB CORRECTLY HELD THAT CLOSING THE COAL ASH POND DID NOT REQUIRE A § 404 PERMIT BECAUSE THE POND IS NOT A WATER OF THE UNITED STATES.

The CWA requires a § 404 permit to discharge dredge or fill materials into a water of the United States. 33 U.S.C. § 1344 (2012). In enacting the CWA, Congress did not define "waters of the United States." *See* 33 U.S.C. § 1251 *et seq*. Accordingly, the EPA has promulgated a

regulatory definition for "waters of the United States." 40 C.F.R. § 122.2 (2017); 33 C.F.R. § 328.3 (2008); 40 C.F.R. § 230.3 (2008). As stated above, agencies should be given great deference when interpreting their own regulations. *See Udall*, 380 U.S. at 16-17. Furthermore, "the consistency of an agency's position is a factor in assessing the weight that position is due." *Shalala*, 508 U.S. at 417.

Though defined in multiple sections of the CWA, each definition of "waters of the United States" has explicitly excluded "[w]aste treatment systems, including ponds or lagoons designed to meet the requirements of the [Act]" from "waters of the United States." *Id.* The exclusion's preceding language includes "[f]or the purposes of the Clean Water Act, 33 U.S.C. § 1251 *et seq*. implementing regulations, subject to the exclusion in paragraph (2) of this definition, the term "waters of the United States means . . . ." 40 C.F.R. § 230.3 (2017). The preceding language's application to all definitions of waters of the United States under the CWA, in conjunction with the consistent interpretation and implementation of the definition, reflects the EPA's intent that the language defining "waters of the United States" be the same throughout the entire CWA.

The fact that the definition of "waters of the United States" is consistent throughout the Code of Federal Regulations should weigh in favor of greater deference to the EPA's determination that a § 404 permit is not required. *See Shalala.*, 508 U.S. at 417 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987)). Due to the consistency in the definitions, it follows logically that the suspension of part of this definition in 40 C.F.R. § 122.2, would also apply to the definition of "waters of the United States" for the purposes of § 404 permitting, as the EPA and EAB properly concluded. R. at 8.

In arguing that a § 404 permit is required to fill the ash pond, FCW cites the definition of "fill" set forth in 33 C.F.R. § 323.2. *Id*. However, the regulatory definition specifically states that

"the term fill material means material placed *in waters of the United States*." 40 C.F.R. § 323.2 (2017) (emphasis added). Because the ash pond is not a water of the United States, neither the remaining coal ash nor the impermeable cap can qualify as "fill." *Id.* Nor can the coal ash or impermeable cap be considered prohibited dredge material, as the discharge of dredge material refers to dredge material discharged into a water of the United States. *Id.*

Unlike *Reilly, In re Colonial Sugar*, and *Northern California River Watch*, the ash pond here does not discharge into a water of the United States. Treated waste from the ash pond discharges into the Reservoir and is part of a waste treatment system that is already being regulated by a NPDES permit. R. at 2-3. The ash pond is not a water of the United States, and potential overflow of fill or dredge material would not discharge into a water of the United States. *See id.* If a water of the United States is not being filled, a § 404 permit is not required.

Furthermore, there is no language within the regulations that states an impoundment reverts to a water of the United States. 40 C.F.R. pt. 323. If the ash pond is not currently considered a water of the United States, and there is no provision allowing for a reversion, a § 404 permit is not required. Consequently, the EAB, in deferring to the EPA's interpretation of its own regulatory definitions, correctly concluded that the ash pond is not a water of the United States. R. at 8. This Court should uphold the EAB's decision.

## CONCLUSION

For these reasons, EnerProg respectfully asks this Court to set aside and remand the findings of the EPA concerning the inclusion of the permit requirements pertaining to the closure and remediation of the coal ash pond, and the permit requirements for zero discharge by November 1, 2018. Additionally, EnerProg requests that this Court affirm the EPA's judgment, based on the decision to exclude manmade ponds that are part of the waste treatment system

from the definition of "waters of the United States," that EnerProg does not need a § 404 dredge and fill permit for discharges into the coal ash pond.

Dated: November 27, 2017

Respectfully Submitted,

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