THIS CASE HAS BEEN SCHEDULED FOR ORAL ARGUMENT
FEBRUARY 22 - 24, 2018

NOS. 17-000123 and 17-000124

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ENERPROG, L.L.C.,
Petitioner,

and

FOSSIL CREEK WATCHERS, INC.
Petitioner
- v. -

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

APPEAL FROM THE ENVIRONMENTAL APPEALS BOARD OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR RESPONDENT

Counsel for Respondent

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MISCELLANEOUS

GLOSSARY

BAT	Best Available Technology
BPJ	Best Professional Judgment
CWA	Clean Water Act
EAB	Environmental Appeals Board
ELGs	Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category
EPA	U.S. Environmental Protection Agency
FCC	Federal Communications Commission
FCW	Fossil Creek Watchers, Inc.
FERC	Federal Energy Regulatory Commission
FGD	Flue Gas Desulfurization
NPDES	National Pollutant Discharge Elimination System
VCE	Vapor Compression Evaporator
WOTUS	Waters of the United States

STATEMENT OF JURISDICTION

This case asserts a claim pursuant to 33 U.S.C. § 1369 (2012). The Environmental Appeals Board of the U.S. Environmental Protection Agency had subject matter jurisdiction over this matter pursuant to 40 C.F.R. part 24 (2017). The U.S. Court of Appeals for the Twelfth Circuit has jurisdiction of this appeal pursuant to 33 U.S.C. § 1369(b)(1)(D) because this is a review of the Environmental Protection Agency's action in issuing a permit under 33 U.S.C. § 1342. The order denying review and affirming the issuance of the permit was granted during the Spring Term, 2017. The order granting appeal was issued on September 1, 2017. This appeal is from a final order that disposes of all parties' claims by the EAB pursuant to 40 C.F.R. part 124.

STATEMENT OF THE ISSUES

Should this Court affirm the final decision of the EAB, affirming the issuance of a final National Pollutant Discharge Elimination System Permit to EnerProg, L.L.C., for pollutant discharges associated with the continued operation of the Moutard Electric Generating Station ("MEGS"), when the EPA reasonably interpreted the applicable provisions of the Clean Water Act ("CWA") in light of all conflicting guidance, appropriately reviewed the permissibility of the state-imposed conditions, used sound reasoning to determine the Best Available Technology associated with ash pond discharges based on the permit writer's Best Professional Judgment, followed the proper procedure to suspend the 2015 Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category ("ELGs"), reasonably excluded waste treatment system from the definition of the waters of the United States, and stayed within its statutory boundary by not issuing EnerProg a § 404 permit under the CWA?

STATEMENT OF THE CASE

Statement of Facts

Coal Ash Adverse Impacts

Coal ash is one of the largest types of industrial waste created in the United States, with over 117 million tons of coal ash generated in 2015 alone.[1] The coal ash created by the MEGS plant contains dangerous pollutants, including arsenic, mercury, and selenium. R. at 9. The EPA has classified all three pollutants as toxic pollutants. 40 C.F.R. § 401.15. The major concern with coal ash is its safe storage and removal, as contaminants can migrate into the environment, posing a risk to public health and the environment.[2] The contaminants can migrate through everyday seepage into ground and surface water or through large-scale disasters. One such disaster occurred in 2014 when approximately 39,000 tons of coal ash spilled into the Dan River in North Carolina costing over $300 million to clean up.[3] The Dan River spill site extended 70 miles downstream, affecting two endangered species, livestock, crop irrigation, recreational use, and the drinking water for citizens of two different states.[4]

When coal ash comes in contact with water, the toxic chemicals can "leach out of the ash."[5] If human beings drink this contaminated water or eat fish swimming in the contaminated

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[1] THE AMERICAN COAL ASH ASS'N, 2015 COAL COMBUSTION PRODUCT PRODUCTION & USE SURVEY REPORT (2015).

[2] GIRISH KUMAR ET AL., FAILURE OF COAL ASH CONTAINMENT FACILITIES: CAUSES, IMPACTS, REMEDIATION, AND LESSONS LEARNED 145 (2016).

[3] Craig Jarvis, *Dan River Coal Ash Spill Damage Could Top $300 Million*, News & Observer (Nov. 26, 2014, 6:43 AM), http://www.newsobserver.com/news/politics-government/state-politics/article10148612.html.

[4] *Case Summary: Duke Energy Agrees to $3 Million Cleanup for Coal Ash Release in the Dan River*, https://www.epa.gov/enforcement/case-summary-duke-energy-agrees-3-million-cleanup-coal-ash-release-dan-river (last visited Nov. 19, 2017).

[5] LISA EVANS ET AL., STATE OF FAILURE: HOW STATES FAIL TO PROTECT OUR HEALTH AND DRINKING WATER FROM TOXIC COAL ASH (2011).

water, the toxic chemicals can be absorbed, which can cause cancer and organ damage.[6] In 2010, the EPA released a report that found exposure to coal ash causes 900 cancer cases per 100,000 exposed individuals, as compared to 100 cancer cases per 100,000 individuals who smoked a pack of cigarettes a day.[7] Exposure can occur from large-scale disasters, like the Dan River spill, or from gradual, yet equally dangerous, contamination as coal ash toxins potentially seep into drinking water sources.[8]

Description of the Moutard Electric Generating Station

EnergProg, L.L.C. owns and operates the MEGS, located in the City of Fossil, Progress. R. at 7. MEGS is a coal-fired steam electric power plant, with one unit rated at a maximum dependable capacity of 745 megawatts (MW). R. at 7.

The MEGS plant uses combustion of coal to create electricity. R. at 7. This process generates waste by-products commonly referred to as coal ash.[9] Some of the coal ash, called the fly ash, is captured by emissions control equipment before it can "fly" up the chimney or stack.[10] Another type of coal ash, called the bottom ash, is heavier and more granular than the fly ash.[11] The bottom ash is collected from the "bottom" of coal-fueled boilers.[12]

The MEGS facility utilizes a wet fly ash handling system and a wet bottom ash handling system to remove the toxic coal ash from the plant. R. at 7. The wet handling systems use water to sluice ash solids through pipes into one ash pond, where the transport water undergoes

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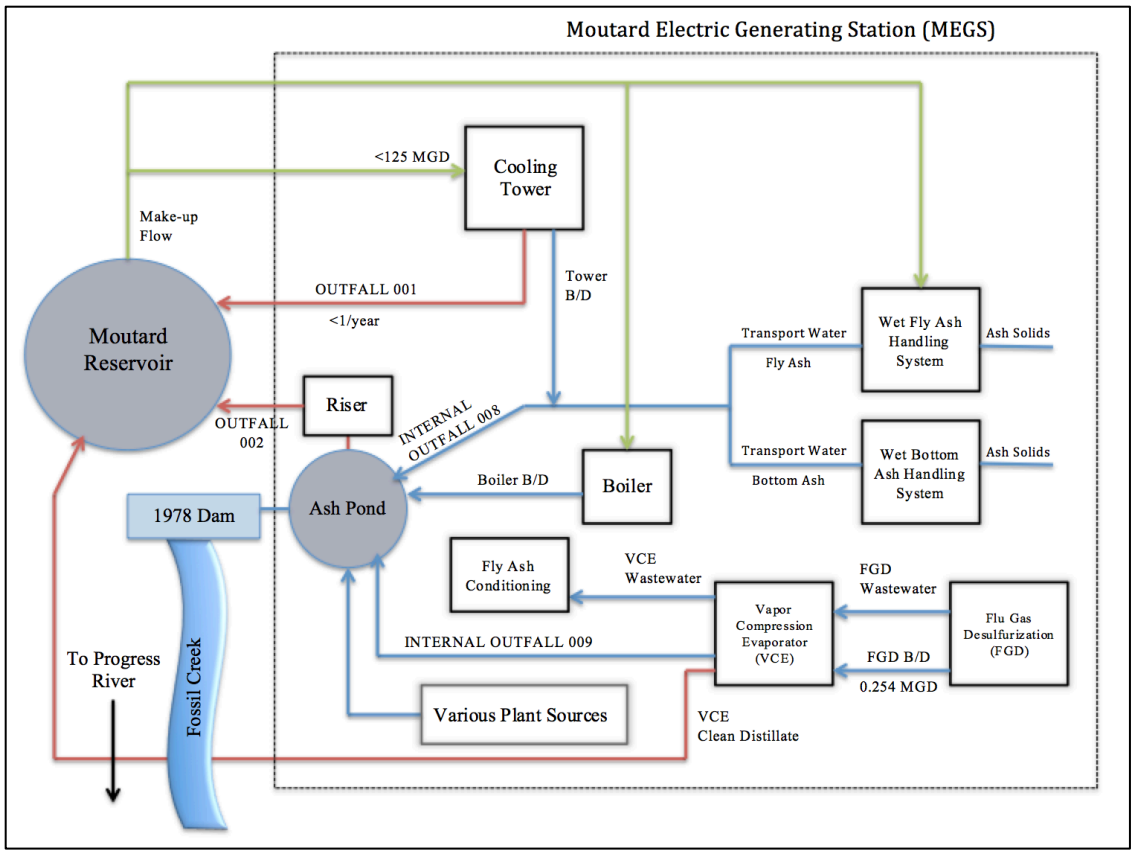
[6] Id.
[7] Ethan Goemann, Note, *Surveying the Threat of Groundwater Contamination from Coal Ash Ponds*, 25 Duke Envtl.L & Pol'y F. 427, 429 (2015).
[8] Id.
[9] THE AMERICAN COAL ASH ASS'N, BENEFICIAL USE OF COAL COMBUSTION PRODUCTS: AN AMERICAN RECYCLING STORY 3 (2015).
[10] Id. at 4.
[11] Id.
[12] Id.

treatment by sedimentation. R. at 7. After treatment, the transport water discharges to the Moutard Reservoir. R. at 7. The ash pond was created in June 1978, by damming the then free-flowing Fossil Creek. R. at 7. Fossil Creek is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water. R. at 7.

In addition to the coal ash transport water, the MEGS plant operates many internal and external flow paths. R. at 7-8. The diagram below shows the flow paths described in the record for reference, but only those flow paths integral to the discussion of the issues will be described in detail. R. at 7-8.



Water is withdrawn from the Moutard Reservoir to make up for evaporative losses from the cooling tower, boiler water, coal ash transport water, and drinking water needs. R. at 7. OUTFALL 002 discharges from the Ash Pond Treatment System via a riser structure. R. at 7.

The ash pond receives many internal plant flow paths, which will be discussed in detail in the following paragraphs. R. at 8.

INTERNAL OUTFALL 008 combines two major internal flow paths. R. at 8. The first flow path is the discharge from the fly ash and the bottom ash transport water system. R. at 8. As discussed early, this water contains toxic pollutants, including mercury, arsenic, and selenium. R. at 9. The ash transport flow paths will be eliminated from INTERNAL OUTFALL 008 upon completion of the conversion to dry ash transport handling, which will be discussed in further detail below. R. at 8. The second internal flow path in INTERNAL OUTFALL 008 is the cooling tower blowdown, which mixes with the ash transport water prior to discharging into the ash pond. R. at 8. The record is silent as to whether the cooling tower blowdown flow path will be affected by the conversion to a dry ash handling system.

INTERNAL OUTFALL 009 consists of flue gas desulfurization (FGD) blowdown water. R. at 8. FGD is a scrubber system used to remove SOx by mixing flue gas with a limestone slurry. R. at 9. EnerProg installed an FGD system in response to Progress' Clean Air Act State Implementation Plan, which requires reduction of SOx and NOx from air emissions. R. at 9. While the FGD system removes harmful gases, the FGD blowdown itself generates elevated concentrations of harmful metals and chloride. R. at 9. A portion of the harmful blowdown water can be removed by a vapor compression evaporator ("VCE"). R. at 9. However, during heavy rainfalls, the VCE is not capable of eliminating the harmful FGD blowdown stream from OUTFALL 002. R. at 9. Under normal weather conditions, the VCE removes the FGD blowdown water, producing concentrated wastewater that is used for moisture conditioning of the fly ash prior to sending the ash to the landfill. R. at 9.

In addition to INTERNAL OUTFALLS 008 and 009, the ash pond receives various other

flow paths from the facility, which are not described in detail, but nevertheless, add to the harmful pollutants collected in the ash pond. R. at 8. The ash pond receives coal pile runoff, stormwater runoff, various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis wastewater, plant area wash down water, landfill leachate, monofill leachate, equipment heat exchanger water, groundwater, yard sump overflows, occasional piping leakage from limestone slurry and the FGD system, and treated domestic wastewater. R. at 9.

National Pollutant Discharge Elimination System (NPDES) Permit

The State of Progress issued a certification pursuant to § 401 of the CWA for the renewal of the MEGS NPDES permit. R. at 8. In order to comply with the Progress Coal Ash Cleanup Act ("CACA"), the state permit requires EnerProg to cease operation of the coal ash pond by November 1, 2018, complete dewatering of ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020. R. at 8.

Progress enacted CACA to provide for assessment, closure, and remediation of substandard coal ash disposal facilities within the state. R. at 8. The CACA legislation states that the Act's purpose is to prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters. R. at 8-9. Pursuant to CWA § 401(d), these state requirements are incorporated as additional conditions in the NPDES permit. R. at 9.

The EPA promulgated the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category in 2015 pursuant to its authority under the CWA, effective on January 4, 2016. 80 Fed. Reg. 67838 (Nov. 3, 2015). As a coal-fired electric power plant, MEGS is subject to the 2015 ELGs. R. at 7. According to the 2015 ELGs, the Best

Available Technology ("BAT") for toxic discharges associated the with the bottom and the fly ash is zero discharge, and the MEGS plant is fully capable of meeting the zero discharge standard by the initial compliance date of November 1, 2018. R. at 9. Nearly two years after the 2015 ELGs went into effect, the industry and environmental groups decided to challenge the validity of the rule in court in late 2016. Without conceding any error with respect to the 2015 ELGs rulemaking, on April 25, 2017, the EPA postponed the 2015 ELGs compliance dates by a publication on the Federal Register while the challenge to the 2015 ELGs is under review in the Fifth Circuit. 82 Fed. Reg. 19005 (Apr. 25, 2017); R. at 11.

Independent of the 2015 ELGs, the MEGS permit must specify limits for toxic pollutants present in the discharge based on the BAT. R. at 9. The dry handling of the bottom and the fly ash has been used in the industry for many years. R. at 9. The MEGS facility is sufficiently profitable to adopt the safer dry handling of these toxic wastes with zero discharges. R. at 9. The MEGS facility modifications would cost an average consumer no more than twelve cents per month on their electric bill. R. at 9. Based on these factors, the EPA permit writer determined, under the theory of Best Professional Judgment ("BPJ"), that zero discharge of ash handling wastes by November 1, 2018, constitutes the BAT. R. at 9.

Facility Modification Requirements

In order to comply with the NPDES permit, EnerProg must build a new retention basin to reroute all waste streams currently discharged to the ash pond, including the particularly dangerous toxic ash transport water and FGD wastewater. R. at 9. The retention basin will have a cell used to decant vacuumed sediments and solids prior to disposal. R. at 9. The basin will also accept monofill leachate, which contains coal ash. R. at 9.

Upon completion of construction, discharge from the new lined retention basin will be

designated as OUTFALL 002A. R. at 8. The wastewater from this outfall will discharge to the Moutard Reservoir via OUTFALL 002. R. at 8. Once this outfall is established, the ash pond will no longer accept any wastewater. R. at 8.

The ash transport flow paths will be eliminated from INTERNAL OUTFALL 008 upon completion of the conversion to dry ash transport handling. R. at 8. The dry ash transport handling system will remove the fly and the bottom ash and dispose of it in a dry landfill. R. at 8

Since the FGD wastewater overflow risks harmful metal and chloride discharges during severe storms, the MEGS facility will construct a new FGD settling basin which will allow overflow to be routed to OUTFALL 002 to accommodate overflows. R. at 10. The waste from the new FGD basin will be treated by the VCE. R. at 10.

Procedural History

On January 18, 2017, EPA Region XII issued a federal NPDES permit to EnerProg pursuant to CWA § 402, authorizing EnerProg to continue water pollution discharges associated with the MEGS facility under the following conditions. R. at 6, 10.

1. By November 1, 2018, there shall be no discharge of pollutants in the fly ash transport water generated after November 1, 2018. R. at 10.
2. By November 1, 2018, there shall be no discharge of pollutants in the bottom ash transport water generated after November 1, 2018. R. at 10.
3. EnerProg must cease operation of its ash pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020. R. at 10.
4. INTERNAL OUTFALL 008 is authorized for continued use to transport the bottom and the fly ash to the coal ash pond without any effluent limits on an interim basis until the

closure of the ash pond on November 1, 2018. R. at 10.

On April 1, 2017, both EnerProg and Fossil Creek Watchers, Inc. ("FCW"), filed timely petitions for review of the NPDES permit by the EAB, pursuant to 40 C.F.R. part 124, requesting for the permit to be remanded to EPA Region XII for further consideration. R. at 6. The EAB denied both petitions for review. R. at 6.

Subsequent to the filing of this appeal, on April 12, 2017, EPA Administrator Scott Pruitt issued a Notice that postpones the compliance deadlines for the 2015 ELGs pursuant to § 705 of the Administrative Procedure Act ("APA"), which authorizes an agency to "postpone the effective date of an action taken by it, pending judicial review." 5 U.S.C. § 705; 82 Fed. Reg. 19005 (Apr. 25, 2017); R. at 11.

EnerProg and FCW appealed to this Court, seeking judicial review of the final decision of the EAB affirming the issuance of the NPDES permit for the MEGS facility. R. at 2.

EnerProg attacks the issuance of the NPDES permit on three grounds. First, EnerProg challenges the EPA requirement that EnerProg shall terminate the use of, dewater, and cap the ash pond, despite the grave dangers associated with failure of ash pond treatment systems and the toxic pollutants discharged from the ash pond. R. at 6. Second, EnerProg questions the inclusion of the zero discharge requirements based on the 2015 ELGs, in light of the notice issued by EPA Administrator Scott Pruitt on April 12, 2017, suspending the compliance date for the 2015 ELGs. R. at 6. Third, EnerProg doubts the permit writer's reliance on BPJ as an alternative ground for requiring the dry handling of the bottom and the fly ash wastes in spite of the clear congressional language authorizing the use of BPJ in setting the BAT in the absence of categorical effluent limits. R. at 7.

FCW challenges the issuance of the NPDES permit on two grounds. R. at 7. First, FCW

challenges the permit provisions authorizing ash solids to remain in the ash pond after it is closed. As grounds for this challenge, FCW attempts to assert that it is unlawful to leave the coal ash solids in place where a stream once flowed without first obtaining a fill permit under CWA § 404. R. at 7. Second, FCW claims that the conditions allowing interim discharge of untreated coal ash wastes into the ash pond, an impoundment historically part of Fossil Creek, on the grounds that this is a violation of CWA § 301. R. at 2. To support its position, FCW attempts to define the coal ash pond itself as "waters of the United States" ("WOTUS") by relying on an exemption promulgated by the EPA that was indefinitely stayed on July 21, 1980, and has not been reinstated ever since. 45 Fed. Reg. 48620 (July 21, 1980); R. at 12.

SUMMARY OF THE ARGUMENT

The most infamous by-products of coal-fired steam electric power plants are arsenic, lead, mercury, selenium, chromium, and cadmium. Once released, the nature of these metals will keep haunting human health for years to come. The EPA is entrusted with the mission to guard both humans and the environment against the threats imposed by elevated metal concentrations in the creeks, brooks, perennials, tributaries, and rivers that flow across the vast soil of the United States.

The EPA carries out its duty by imposing coal-fired power plant wastewater effluent standards and coordinating with states and other federal agencies to administer discharge permits. This case is about how the EPA fulfilled its obligations, where it confronted a coal-fired power plant industry's distorted profit-driven attack on the agency's long-sighted determination to tighten wastewater discharge standards, and rejected an overly ambitious environmental group's invitation for the EPA to overstep its statutory authority.

The EPA is in the middle of a tug-of-war between the industry and a watchdog environmental group who are fighting to tip the balance maintained by the separation of powers in their favor. On one side, the industry, unhappy with the laws promulgated by the state and federal legislative branches and the reasonable interpretation of those laws by the EPA, is asking this court to indulge in lawmaking and law enforcement by forcing the EPA to adopt the industry's interpretation of the CWA and disregard appropriate state-enacted laws.

On the other side, the watchdog environmental group, equally dissatisfied with the legislative and executive branches, asks the court to disregard 37 years of proper statutory interpretation by the agency, and adopt a new category of "waters of the United States." The watchdog organization will stop at nothing to cripple the coal industry, and it is looking for a federal court mandate of an overreaching interpretation of Congress' words and intent regardless of any actual harm prevented by the unprecedented interpretation. Justice will not be served by allowing the watchdog organization to use the federal courts as a sword to pierce the heart of the coal industry. This is not the purpose of the Clean Water Act.

The EAB's decision to deny review of the NPDES permit issued to EnerProg should be affirmed because the EPA has adhered to the statutory authority vested in it by Congress and the agency's decisions are neither arbitrary nor capricious.

ARGUMENT AND CITATION OF AUTHORITIES

I. This Court Should Affirm the Final Decision to Issue a NPDES Permit Because the Final Permit Properly Included Conditions Requiring Closure and Remediation of the Coal Ash Pond and Zero Discharge Limits.

Statutory Background

Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress set a national goal of eliminating all pollutant discharges from point sources into the navigable waters. Id. As such, the discharge of any pollutant into navigable waters by any person is unlawful without a NPDES permit. 33 U.S.C. § 1311(a).

Each of the essential terms used by Congress has been broadly defined by the CWA and case law. Rapanos v. United States, 547 U.S. 715, 723-26 (2006). "The discharge of any pollutant" includes "any addition of any pollutant to navigable waters from any point source," and "pollutant" includes not only traditional contaminants but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt." 33 U.S.C. § 1362(12); id. at 723. Here, the MEGS plant easily satisfies the "discharge of any pollutant" threshold issue because MEGS is a steam and electric generating point source, which discharges toxic pollutants such as arsenic, mercury, and selenium. R. at 7, 9.

Another essential term used by Congress is "navigable waters," which are defined as "waters of the United States." 33 U.S.C. § 1362(7). The legislative history of the term indicates congressional intent to provide comprehensive jurisdiction. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985). Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the commerce clause to regulate at least some waters that would not be deemed

'navigable' under the classical understanding of that term." Id. at 133. Thus, courts have held that the CWA applies to wetland areas that "form the border of or are in reasonable proximity to other waters of the United States," even though there is no apparent surface connection to non-navigable tributaries seasonally connected to traditionally navigable waters; to intermittent streams; and to ditches and irrigation canals. Here, the WOTUS threshold issue is satisfied because the discharge of toxic pollutants from the MEGS plant reaches the Moutard Reservoir, which is a body of water in reasonably proximity to waters of the United States. R. at 7. From the Moutard Reservoir, toxic pollutants can flow to Fossil Creek, a perennial tributary to the Progress River, through ground or surface water, eventually reaching the Progress River, a navigable-in-fact interstate body of water. R. at 7. In addition, the ash pond may be susceptible to flooding back into Fossil Creek during severe storms because the MEGS plant experiences other overflow issues during severe storms. R. at 7, 9. Moreover, as the record is absent as to whether EnerProg has implemented any stormwater retention measures, stormwater runoff from the MEGS plant can discharge into Fossil Creek due to the plant's proximity to the creek. R. at 7, 8.

In the guidelines for NPDES permits, the CWA anticipates a partnership between the federal government and the states to achieve the objectives set forth by Congress. 33 U.S.C. § 1251(a); Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992). The CWA assigns roles to the federal and state governments in the form of two sets of water quality measures, "effluent limitations" and "water quality standards." Arkansas, 503 U.S. at 101. The federal government, through the EPA, promulgates "effluent limitations," technology-based standards designed to restrict the quantities, rates, and concentrations of pollutants discharged from point sources. Id.; 33 U.S.C. §§ 1311, 1314. The states promulgate "water quality standards" subject to EPA standards and recommendations. 33 U.S.C. § 1313(c); See Arkansas., 503 U.S. at 101.

The federal agency imposes "effluent limitations" according to the best available or practical technology. Our Children's Earth Found. v. Env't Prot. Agency, 527 F.3d 842, 848 (9th Cir. 2008). Every five years, the EPA is required to review effluent limitations established under CWA § 301(b)(2). Id. The CWA promulgates varying degrees of technology-based analysis for the EPA to follow when setting effluent limitations. 33 U.S.C. § 1311. Effluent limitations for toxic pollutant discharges require the application of the best available technology economically achievable for such category or class, which will reasonable further progress toward the national goal of eliminating the discharge of all pollutants. 33 U.S.C. § 1311(b)(2)(A).

The state-imposed "water quality standards" consist of designated uses for the protected body of water and state water quality criteria based on such uses. 33 U.S.C. § 1313(c)(2)(A). The CWA establishes very broad requirements to ensure states remain within the bounds of the Act. PUD No. 1 of Jefferson City. v. Washington Dept. of Ecology, 511 U.S. 700, 704 (1994). The State water-quality standards shall protect the public health or welfare, enhance the quality of water and serve the purposes of the CWA while taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational and other purposes. Id. at 704-5.

Standard of Review

The United States Supreme Court has long recognized an agency's expertise in promulgating the statute that it administers. Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944). Pursuant to its duties to administer the CWA, the EPA accumulates "considerable experiences" in staying informed of the industry conditions and customary practices, and is expanding on resolving and bringing "injunction actions to restrain violations." Id. at 137-8. When a court reviews an agency action pursuant to the power granted to it by a statute that the agency

administers, the agency action is given "controlling weight" unless the agency's statutory interpretation is "arbitrary… or capricious." Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984).

A court may reverse the decision of the EPA only if the agency's action is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 30 (1983); see also Exxon Mobil Corp. v. Env't Prot. Agency, 217 F.3d 1246, 1248 (9th Cir. 2000). The "arbitrary or capricious" standard is narrow, and the reviewing court may not substitute its judgment for that of the agency. State Farm, 463 U.S. at 30. An agency decision is "arbitrary and capricious" when the agency relies on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 555 U.S. 644, 658 (2007).

The Agency's Interpretation of the Statute

The EPA reasonably interpreted the applicable provisions of the CWA and APA in light of all conflicting guidance when it issued a final NPDES permit to the MEGS facility.

First, the EPA appropriately reviewed the permissibility of the Progress NPDES permit conditions pursuant to § 401. The EPA is charged with administering the CWA, and therefore, possessed broad authority to impose not only federal permit conditions pursuant to § 402 on the MEGS permit but to also review the permissibility of the Progress conditions pursuant to § 401. Additionally, the EPA appropriately determined that the Progress permit conditions pursuant to § 401 were well within the bounds of "state water quality standards" because the closure and

remediation of the coal ash pond are designed to comply with the provisions of the Progress CACA, which constitutes appropriate requirements of State law. R. at 8-9.

Second, the EPA appropriately set zero discharge effluent limitations for coal ash transport wastes for the MEGS facility. In light of the April 25, 2017, notice, which suspended compliance with the 2015 ELGs, the EPA permit writer could not rely on the 2015 ELGs in setting effluent limits. R. at 11. As an alternative, the writer properly utilized his or her BPJ in setting effluent limitation standards based on the BAT for coal ash transport water.

Finally, the EPA appropriately excluded the MEGS ash pond from the scope of the "waters of the United States" definition. The EPA's indefinite stay of its regulations, which has been lawfully followed for 37 years, indicating Congress's' implied approval, is within the statutory authority of the EPA because the decision was not arbitrary and capricious. R. at 12. Based on the exclusion of the ash pond from "waters of the United States," the EPA did not have the authority to issue a § 404 permit.

This Court should apply an "arbitrary or capricious" standard and affirm the EAB's decision pursuant to 40 C.F.R. part 124, denying petition for review filed by EnerProg and FCW.

A. The EPA Appropriately Reviewed the Permissibility of the Progress NPDES Permit Conditions.

1. The EPA has Authority to Review State § 401 NPDES Permit Conditions Because the CWA Contains Unambiguous Language Designating the EPA Administrator as the Final Reviewing Authority, and, in the Absence of Unambiguous Language, the Court Should Defer to the Agency's Reasonable Interpretation of the Statute.

The EPA is the only federal agency possessing authority to review state court restrictions on federal NPDES permits under the CWA § 401 for three reasons. First, the CWA's broad language grants the EPA Administrator broad authority to review final conditions of all NPDES

permits. Second, the narrow language of § 401(d) restricts state-court conditions to comply with all other provisions of § 401, which the EPA is responsible for enforcing. Third, the EPA's interpretation of the statute is a reasonable exercise of the Agency's statutory discretion.

The broad language of the CWA is unambiguous, allowing final review of NPDES permit conditions by the EPA Administrator. 33 U.S.C. § 1342(a)(2), (5), and (d)(2); see also Arkansas, 503 U.S. at 105. In Arkansas, a sewage plant in Arkansas received an EPA-issued permit pursuant to CWA § 402, authorizing it to discharge pollutants into a stream that ultimately reached the Oklahoma border. Id. at 95. The Supreme Court held that the EPA possessed broad statutory authority to ensure state permit conditions comply with all applicable water quality standards when an EPA-issued permit implicates multiple states through a navigable-in-fact body of water. Id. at 105. The Supreme Court stated that "Congress preserved for the Administrator broad authority to oversea state permit programs" citing CWA § 402(d)(2), which states that "no permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter." Id.; 33 U.S.C. § 1342(d)(2). The allowance for EPA oversight under § 402(d)(2) refers to all permits within Chapter 26 to the CWA, which includes § 401 state permit requirements. 33 U.S.C. § 1342(d)(2). In a lower court decision, the Second Circuit indicated that the EPA would be the only agency with the authority to review § 401 state permit conditions. Am. Rivers, Inc. v. Fed. Energy Regulatory Comm'n, 129 F.3d 99, 107 (2nd Cir. 1997).

Here, the EPA Administrator possesses the final authority to review the MEGS facility NPDES permit conditions, including the water quality standards promulgated by the State of Progress. The EPA Administrator has the authority to reject in writing to any issuance of any permit under CWA Chapter 26. § 401 state permit requirements, like the ones promulgated by

the State of Progress, are established within Chapter 26. While the Arkansas court, and any other Supreme Court decision, has not directly addressed the EPA's authority to review the permissibility of state-imposed permit conditions pursuant to § 401, the Arkansas language and broad statutory language is persuasive. Arkansas, 503 U.S. at 105. This interpretation of the CWA text resolves the issue at hand by taking the words used by Congress in their ordinary sense. If Congress intended § 402(d)(2) to only refer to § 402 permit requirements when granting the EPA Administrator broad reviewing authority, Congress would not have used the words "no permit" or "outside the guidelines . . . of this chapter." Instead, Congress would have said "no permit under this section" or "outside the guidelines of this section." When statutory words or phrases are subject to disagreement, the words should first be read plainly. Here, the words are plain, and the meaning is clear. The EPA Administrator has the authority. Therefore, EPA Region XII did not overstep in reviewing the permissibility of the Progress § 401 conditions based on its broad authority to review NPDES permit conditions under the CWA. R. at 3.

The narrow language of § 401(d) is equally unambiguous. 33 U.S.C. § 1341(d). Under § 401(d), state § 401 certification conditions "shall become a condition on any Federal license or permit subject to the provisions of this section." Id. § 401(b) states that "Nothing in [§ 401] shall be construed to limit the authority of any [agency] pursuant to any other provisions of law to require compliance with any applicable water quality requirements." 33 U.S.C. § 1341(b). When reading § 401(d) in light of § 401(b), the language of § 401(d) should not be read to limit the authority of the EPA to ensure overall compliance with Chapter 26 of the CWA, as Congress has granted the Administrator broad oversight authority, as discussed in reference to the broad language of the CWA discussed in the preceding paragraphs. 33 U.S.C. §§ 1341(b), 1341(d), 1342(d)(2).

Here, EPA Region XII had the authority to review the state-imposed § 401 permit conditions because the permit conditions are subject to the provisions of § 401, and § 401(b) explicitly states that no portion of § 401 shall be construed to limit the authority of any agency. The EAB incorrectly interpreted § 401(d), "shall become a condition on any Federal license or permit subject to the provisions of this section," by failing to focus on the words "subject to the provisions of this section." R. at 11. In keeping with the textual canon rule against superfluous language, the words "subject to the provisions of this section" cannot be ignored because every word and clause must be given effect. Otherwise, Congress would not have included these words in the statute.

Even if § 401(d) is found to be ambiguous, the EPA's interpretation of CWA § 401(d), as granting the EPA authority to review the permissibility of state conditions, is a reasonable exercise of the agency's statutory discretion. Chevron, 467 U.S. at 842-45. In Chevron, the Supreme Court established the well-known rule that when Congress has left a gap in the statute for the agency to fill, there is an express delegation of authority to the agency to fill in the gap. Id. at 843-44. The agency's interpretation is given controlling weight unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." Id.; see also Auer v. Robbins, 519 U.S. 452, 461 (1997) (The Supreme Court held that an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation); see also Skidmore, 323 U.S. at 140 (The Supreme Court held that even informal agency determinations could be persuasive authority for courts); see also Am. Rivers, 129 F.3d at 107 (The court did not show the Federal Energy Regulatory Commission (FERC) deference when interpreting § 401 because the FERC was not congressionally authorized to administer the CWA).

If the statute is read ambiguously, the EPA's reasonable interpretation of the statute

should be given Chevron deference because the EPA's interpretation is not arbitrary, capricious, or manifestly contrary to the statute. The EPA is the certifying agency designated by Congress to implement the CWA. Therefore, the EPA's interpretation of the statute is given controlling weight to the exclusion of any other agency. The EAB inappropriately relied on the holding in American Rivers for two reasons. R. at 11. First, the court in American Rivers distinguished the deference given to the FERC, in interpreting the CWA, with the deference given to the EPA. Id. at 107. The court held that the FERC "receives no judicial deference under the doctrine of Chevron because [the FERC] is not congressionally authorized to administer the CWA," the Administrator of the EPA is. Id. Second, the holding of a Second Circuit decision is not binding on this court. While sister circuit holdings can be used as persuasive authority, the lack of decisions from other circuits or the Supreme Court on this issue supports the strong incentive to give deference to the EPA's interpretation of § 401.

Based on the plain meaning of the statute in both the broad and narrow context and the deference shown to EPA's interpretation, the EPA has the authority to review the permissibility of state-imposed conditions on the MEGS facility permit.

2. The EPA Appropriately Determined that the Progress Certification Conditions were within the Bounds of CWA § 401 Because the Ash Pond Closure and Remediation Constitute 'Appropriate Requirements of State Law.'

The ash pond closure and remediation conditions are permissible because they are designed to prevent toxic pollution through compliance with the Progress CACA for substandard coal ash disposal facilities like the MEGS facility, and ash pond remediation is sufficiently related to water quality to fall within the scope of § 401(d) based on both numerical and narrative criteria. R. at 8-9.

Section 401(d) grants states broad authority to impose "other limitations" on facilities to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirements of state law." PUD, 511 U.S. at 713 (1994); 33 U.S.C. §§ 1251(b), 1341(d). In PUD, a local utility district appealed the state's imposition of minimum stream flow rates as part of certification requirements for building a hydroelectric power plant. 511 U.S. at 703. The Supreme Court in PUD held that minimum stream flow rates were lawful § 401 limitations for several reasons. Id. at 723. The Court showed substantial deference to the conclusion of the EPA that "activities" as well as "discharges" shall be conducted in a manner not to violate water quality standards. Id. at 712. Second, the Court reasoned that minimum stream flow rates ensured compliance with state water quality standards. Id. at 713. The Court determined that state water quality standards were "appropriate requirements of State law" and therefore, the minimum stream flow rates were lawful § 401 permit limitations. See id. While the Supreme Court in PUD did not directly address what additional state laws might be incorporated by this language, the Court indicated that a law based on protecting water quality was well within the bounds of § 401(d). Id. at 723.

Here, the Progress conditions are designed to comply with CACA, an appropriate, water-quality based state law. R. at 8. CACA was enacted to prevent well-documented public hazards caused by immediate and gradual failures of substandard coal ash disposal facilities like the MEGS coal ash pond. R. at 8. If the MEGS ash pond fails to contain ash transport water, the release of toxic pollutants such as arsenic, mercury, and selenium, will have a direct impact on the water quality of the Fossil Creek, which leads directly into the Progress River, a navigable-in-fact interstate body of water. R. at 7. Like the Dan River spill, which affected endangered species, livestock, crop irrigation, recreation, and drinking water needs for two states, a failure of

the MEGS ash pond could have similarly disastrous consequences. The State of Progress has the cardinal duty of protecting its citizens from failures like the Dan River spill. Preventing these types of disasters, or merely gradual seepage of ash pond pollutants falls squarely within the intent of Congress in promulgating the CWA and the bounds of § 401 as a water-quality based state-law requirement. EnerProg can hardly argue that a failure of the MEGS pond would not have an immediate impact on state water quality standards in Progress and downstream states, and therefore, the capping and remediation of the MEGS ash pond constitutes "appropriate requirements of State law."

Under § 401(d), water quality standards based on "appropriate requirements of State law" do not require enforcement exclusively through numerical criteria, so long as the standards generally protect the designated use of the body of water impacted. Id. at 701. The Supreme Court in PUD analyzed the EPA's definition of criteria as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." Id. at 715; 40 C.F.R. § 131.3(b). The regulations further provide that "[w]hen criteria are met, water quality will *generally* protect the designated use," implicitly recognizing that in some circumstances, criteria alone are insufficient to protect a designated use. PUD, 511 U.S. at 715. Under the CWA, only one class of criteria, those governing toxic pollutants listed pursuant to CWA § 1317(a)(1), need to be rendered in numerical form. 33 U.S.C. § 1317(a)(1). This gives states the option to use numerical or narrative criteria where appropriate. See Islander East Pipeline Co., LLC, v. McCarthy, 525 F.3d 141, 144-45 (2nd Cir. 2008) (The court held that the state lawfully denied a pipeline company's certification to build a natural gas pipeline, reasoning that states may employ both quantitative and open-ended standards to prevent under-inclusiveness in circumstances where it may be

impossible to formulate quantitative standards to apply to all cases).

Here, the closure and remediation of the coal ash pond can be interpreted to impose both numerical and narrative criteria in order to protect the water quality of the Moutard Reservoir, Fossil Creek, and the Progress River. The closure and capping of the ash pond serve two purposes in protecting the water quality. First, closure of the ash pond prevents the release of dangerous toxic pollutants, such as arsenic, mercury, and selenium. R. at 9. These pollutants are governed by CWA § 1317(a)(1), which requires numerical criteria as a basis for § 401 state permit limitations. By requiring the closure of the ash pond to comply with both CACA and the EPA's zero discharge limits based on the BAT, the state water quality requirements appropriately consider a numerical component to the criteria, zero discharge. R. at 10. Second, closure of the ash pond prevents the release of numerous other wastes not defined as toxic pollutants and not governed by CWA § 1317(a)(1). R. at 8. These other wastes, which include harmful FGD wastewater, do not require numerical criteria to be considered when setting § 401 permit limits. R. at 8. For these wastes, narrative criteria is an acceptable consideration when setting § 401 limits and closure of the ash pond is alternatively appropriate under this reasoning.

In conclusion, the closure and remediation of the MEGS ash pond is an "appropriate requirement of State law" under § 401(d) because the permit restrictions are designed to prevent toxic pollution and other harmful wastewater from disastrously affecting the water quality of Fossil Creek and the Progress River.

B. The EPA Appropriately Set Zero Discharge Effluent Limitations for Coal Ash Transport Wastes for the MEGS Facility.

1. The April 25, 2017, Postponement of Compliance Notice is Effective Because Administrative Stays Do Not Require Informal Rulemaking, Justice Requires the Administrative Stay, and the EPA Presented A Reasoned Explanation for the Stay.

The EPA's suspension of compliance dates is effective on two independent grounds. First, the postponement of compliance dates does not constitute substantive rulemaking under APA § 553. Second, under the first sentence of the APA § 705, justice requires the EPA to postpone the compliance dates when the compliance dates are pending judicial review in the Fifth Circuit, and the EPA is not mandated to go through a four-factor analysis to halt an action take by it, as would be required for a judicial review.

An agency action is effective without a notice-and-comment period when the agency action does not constitute substantive rulemaking. 5 U.S.C. §§ 553(b), 553(c), and 551(4); see also Sierra Club v. Jackson, 833 F.Supp.2d 11, 15 (D.D.C. 2012). Under APA § 553, a rule includes "an agency statement of general or particular applicability . . . designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (2012). "Rule making" means an agency process for formulating, amending, or repealing a rule. 5 U.S.C. § 551(5). Informal rulemaking is subject to notice-and-comment requirements but only if the informal rulemaking is substantive. 5 U.S.C. § 553(b) and (c); Env't Def. Fund v. Env't Prot. Agency, 716 F.2d 915, 920 (D.C. Cir. 1983). Otherwise, a notice-and-comment period is not required. Sierra Club, 833 F.Supp.2d at 26. In Sierra Club, a notice issued by a federal agency suspending the effective dates of two rules was effective without § 553 rulemaking because the delayed notice was not a rule within the meaning of the APA. Id. at 15. The court in Sierra Club held that the notice did not constitute

substantive rulemaking when the delayed notice served to "preserve status quo" and was not "designed to implement, interpret, or prescribe law or policy." Id. at 15, 27.

Here, the EPA's suspension notice on April 25, 2017, is effective because the suspension notice does not constitute substantive rulemaking. The EPA administrative stay explicitly provides that the agency purports to "preserve the regulatory status." 82 Fed. Reg. 19005 (Apr. 27, 2017). This suspension only affects the compliance dates that have not passed. R. at 11. Following this suspension, the industry does not need to take immediate action to meet the November 1, 2018, deadline set by the 2015 ELGs. R. at 11. As a result, the notice does not constitute substantive rulemaking because the notice serves to maintain the status quo of industry customary practice and the notice does not fall within the meaning of a rule that "implement[s], interpret[s], or prescribe[s]" any law or policy. 5 U.S.C. § 551(4).

Under the first sentence of APA § 705, an agency can postpone an action taken by it, pending judicial review, if justice requires. 5 U.S.C. § 705. Agency action encompasses more functions than mere rulemaking, including orders, licenses, sanctions, relief, or failure to act. 5 U.S.C. § 551(13). The EPA has satisfied the "agency action" threshold issue because postponement of compliance dates is an agency action. An "effective date" can mean more than just the date a proposed rule goes into effect, and the "effective date" deserves a broad construction in the context of § 705 that includes any "compliance date" mandated by an agency. See 5 U.S.C. § 553(d).

The EPA has met the second threshold burden that the challenged agency action has a "rational connection" with the pending litigation in the Fifth Circuit. Sierra Club, 833 F.Supp.2d at 34. In Sierra Club, the court held that a federal agency did not establish a "rational connection" when the court determined that the agency paid "lip service" to the pending

litigation while the stay really served to buy time for the agency to reconsider the two rules. Id. Here, the EPA properly established a "rational connection" when the EPA pointed out in the notice that the validity of the 2015 ELGs are being challenged in the Fifth Circuit and the purpose of the notice is to wait for a judicial review of the 2015 ELGs. 82 Fed. Reg. 19005 (Apr. 27, 2017).

Having met the threshold issues that the postponement of 2015 ELGs compliance dates is an agency action and that the pending litigation in the Fifth Circuit is rationally related to the action, the EPA turns to show that its decision that justice requires it to postpone the compliance date is neither arbitrary nor capricious. State Farm, 463 U.S. at 43; Chevron, 467 U.S. 844. Even though an agency action can be deemed arbitrary and capricious if the agency fails to consider "an important aspect of [a] problem," an agency can change positions if it gives a "reasoned explanation" for the change. State Farm, 463 U.S. at 43; Fed. Communications Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515-516 (2009).

An agency's change of position is neither arbitrary nor capricious if the agency gives a "reasoned explanation" for the change. Id. In Fox Television Stations, the Federal Communications Commission (FCC) initially does not ban a one-time use of a nonliteral expletive on air but then shifted to include nonliteral expletive within the ban even if the word is used only once. Id. at 508. The Supreme Court ruled that this change in policy is neither arbitrary nor capricious because the FCC was aware that it was changing positions and as the FCC was not required to offer a detailed justification that the new policy is "better" than the prior one, the explanation the FCC offered was entirely rational. Id. at 517.

Here, the EPA is entitled to change its position by postponing the compliance dates because the agency offered a reasoned explanation. 82 Fed. Reg. 19005 (Apr. 27, 2017). The

EPA is changing position because the former compliance dates of the 2015 ELGs were no longer in effect when the agency stated in the April 25th notice that the Administrator of the EPA "announce[d]" his decision to "reconsider" the 2015 ELGs. 82 Fed. Reg. 19005 (Apr. 27, 2017). As justification for the change in policy, the EPA explained that the "new data" and results from "new experiments," which were not present during the 2015 ELGs rulemaking, warrant further efforts to assess the 2015 rule as an industry-wide standard. 82 Fed. Reg. 19005 (Apr. 27, 2017). The EPA also incorporated concerns about both the costs to implement the "economically achievable" BAT and the benefits to the public health by setting "pretreatment standards" set by the 2015 ELGs to the industry as a whole. 82 Fed. Reg. 19005 (Apr. 27, 2017). The EPA does not need to acknowledge any errors in the 2015 ELGs or offer a more detailed reason that the postponement is better than the enforcement of the 2015 ELGs by November 1, 2018, than when the EPA promulgated the 2015 ELGs in the first place.

Under the second sentence of the APA § 705, Congress requires a "reviewing court" to apply a four-factor test before it issues an injunction on an agency's action. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Standard Havens Products, Inc. v. Gencor Indus., Inc., 897 F.2d 511, 512 (Fed. Cir. 1990). Congress repeats three times that a reviewing "court" needs to apply this test. 5 U.S.C. § 705. What is prominently absent from this sentence is the requirement that an agency reviewing petitions for a stay of one its actions applies the same four-factor test. 5 U.S.C. § 705. According to the canon of interpretation of *expressio unius est exclusio alterius*, Congress explicitly excludes any agencies from applying the same four-part analysis. 5 U.S.C. § 705; Church of The Holy Trinity v. United States, 143 U.S. 457, 463 (1892).

To conclude, the EAB's decision that EPA's postponement of the 2015 ELGS was effective should be affirmed because justice requires the EPA to postpone the compliance dates

of the 2015 ELGs, and the EPA has given a reasoned explanation of a change in the agency's policy.

2. The EPA Properly Relied on Best Professional Judgment as an Alternative Ground to Zero Discharge of Coal Ash Transport Wastes.

To the extent that EPA-promulgated effluent limitations are inapplicable, the permit writer shall use his or her best professional judgment (BPJ) to set effluent limitations based on the BAT. 40 C.F.R. § 125.3 (c)-(d); see also Nat'l Wildlife Fed'n v. Env't Prot. Agency, 286 F.3d 554, 566 (D.C. Cir. 2002). In determining the BAT, the EPA first considers the technological availability and the economic achievability in determining what level of control is appropriate. 33 U.S.C. 1311(b)(2)(A). Other factors the EPA considers are the cost of achieving such effluent reduction, the age of equipment and facilities involved, the process employed, potential process changes, any unique factors relating to the applicant, the engineering aspects of the application of various types of control techniques, and non-water quality environmental impacts (including energy requirements). 33 U.S.C. § 1314(b)(2)(B); 40 C.F.R. § 125.3(c)(2) and (d)(3). In applying the BAT standard, the EPA has significant discretion in deciding how much weight to accord each statutory factor. See Nat. Res. Def. Council v. Env't Prot. Agency, 863 F.2d 1420, 1426 (9th Cir. 1988). The EPA is not obligated to evaluate the reasonableness of the relationships between the costs and benefits as long as the BAT determination remains economically feasible to the industry as a whole. See Am. Petrol. Inst. v. Env't Prot. Agency, 858 F.2d 261, 265 (5th Cir. 1988). The BAT is intended to reflect the highest performance in the industry. Am. Paper Inst. v. Train, 543 F.2d 328, 353 (D.C. Cir. 1976); Am. Frozen Food Inst. v. Train, 539 F.2d 107, 132 (D.C. Cir. 1976).

Here, the EPA permit writer properly relied on BPJ as an alternative ground in setting zero discharge limits for the bottom and the fly ash transport wastes based on the BAT. In light

of the EPA 2015 ELG suspension, the EPA permit writer was required to set discharge limits. The dry handling of the bottom and the fly ash is technologically achievable for the Steam Electric Power Generating Point Source Category because the dry handling of these wastes has been used in the industry for many years. R. at 9. EPA determined that the dry handling is economically achievable, with no more than twelve cents per month increase in the average consumer's electric bill. R. at 9. EnerProg does not dispute these findings, nor does it present any evidence in the record indicating the MEGS facility is so unique it cannot meet the same standards as many other plants in the industry. R. at 2. In order to comply with the lawful state-imposed permit limitations to close and cap the ash pond, the MEGS facility will already be making the appropriate process changes to comply with the zero discharge requirements. R. at 9-10. There is no evidence to suggest that the dry handling of coal ash will have any non-water quality environmental impact. As such, the EPA writer properly balanced the cost and benefits of implementing dry ash handling in setting zero discharge limits based on the BAT.

C. The EPA Appropriately Excluded the MEGS Ash Pond from the Scope of the "Waters of the United States" Definition, Thereby Permitting the Interim Discharge of Ash Transport Wastes in Absence of a § 402 Permit and Excluding the Ash Pond from the Scope of § 404 Permits.

1. The Internal Outfall 008 into the Coal Ash Pond does not Require a § 402 Permit Because the EPA's Construction of the Meaning of "Waters of the United States" Warrants Chevron Deference.

Congress explicitly delegates the power to "administer" the Clean Water Act to the Administrator of the EPA. 33 U.S.C. § 1251(d). When an agency is in charge of administering a statute, the agency's construction of the statute is accorded strong deference unless Congress has directly spoken on the precise question at issue or that the agency's construction is arbitrary and capricious. Chevron, 467 U.S. at 842-3; State Farm, 463 U.S. at 30.

An agency that administers a statute is shown Chevron deference when the agency has the general power to make "rules carrying the force of law," and that the rule claiming the Chevron deference was promulgated "in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-7 (2001).

Here, the EPA has the authority to "develop[], revis[e], [and] enforce[]" regulations, standards, effluent limitations, plans, or programs under the Clean Water Act. 33 U.S.C. § 1251(d) and (e). The EPA derived its authority to promulgate the definition section in its Clean Water Act regulations from the statute and followed the formality required by the APA when it exercised that authority to promulgate the definitions. 33 U.S.C. § 1251; 45 Fed. Reg. 33290, as amended by 48 Fed. Reg. 14153 (April 1, 1983).

When an agency administers a congressionally created and funded statute or program, the agency carries with it the power to "fill any gap left, implicitly" by Congress. Morton v. Ruiz, 415 U.S. 199, 231 (1974).

Here, The EPA's construction of the meaning of the "waters of the United States" warrants Chevron deference because Congress has not directly spoken on the issue when it restricts the EPA's jurisdiction to "navigable waters," and has explicitly given the EPA the power to define the term. Chevron, 467 U.S. at 842; 33 U.S.C. § 1251(a)(1). The Clean Water Act regulates the discharge of pollutants into "navigable waters." 33 U.S.C. § 1251(a)(1). Congress then defines "navigable waters" as the "waters of the United States." 33 U.S.C. § 1362(7). However, Congress stops short of articulating what WOTUS means in the statute, but at the same time explicitly grants authority to EPA's Administrator to administer "this chapter." 33 U.S.C. § 1251(d). Congress has explicitly left a gap in the definition of WOTUS for the EPA to fill in regards to waste treatment systems. Since July 1980, when the EPA suspended a sentence

that formally included waste treatment systems as WOTUS, Congress never took the opportunity to legislate and further articulate the meaning of WOTUS. Chevron, 843; 40 C.F.R. 122.2; R. at 12.

An agency rule is arbitrary or capricious if the agency "entirely fail[s] to consider an important aspect of the problem." State Farm, 463 U.S. at 43. To be deemed a permissible construction, the agency must establish "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

Here, the EPA's interpretation of WOTUS warrants Chevron deference because excluding "waste treatment system" from WOTUS is neither arbitrary nor capricious. Chevron, 467 U.S. at 843; 40 C.F.R. part 122.2. The EPA includes in the WOTUS definition "impoundment of waters otherwise identified as waters of the United States" but excludes any wastewater treatment systems, and later suspended the language that makes wastewater treatment system "originally created" in WOTUS. 40 C.F.R. part 122.2; 45 Fed. Reg. 48620 (July 21, 1980). To explain the suspension, the EPA pointed to the objections filed by both industries and environmental groups in federal courts and further admitted that the non-suspended version may be "overly broad." 45 Fed. Reg. 48620 (July 21, 1980). The EPA's explanation demonstrates a rational connection between the facts found and the EPA's choice to suspend the language.

To conclude, the EAB's decision that the 1980 suspension of the inclusion of waste treatment system originally created in the WOTUS should be affirmed because the EPA's construction of the meaning of the WOTUS warrants Chevron deference.

2. The Closure and Capping of the MEGS Ash Pond does not Require a § 404 Permit Because the Ash Pond is not WOTUS; FCW Failed to Join the Army Corps of Engineers and the State of Progress as Indispensable Parties in this Appeal; and the Closure and Capping Activities Fall Under the § 404(f)(1)(D) Exemption.

EPA cannot require EnerProg to apply for a § 404 permit for the closure and capping of the ash pond because the EPA does not have the jurisdiction over the discharges into the ash pond. Under the current regulation, an ash pond as a waste treatment system does not fall within the meaning of WOTUS. 40 C.F.R. part 122.2. When EnerProg closes the ash pond by November 1, 2018, and thereafter begins filling the ash pond, EnerProg will be filling an industrial structure on private land. Therefore, the EPA does not have the jurisdiction to regulate this activity. R. 6.

Even if this court determines that the ash pond falls within the meaning of WOTUS, the EPA cannot require EnerProg to apply for a § 404 permit for the closure and capping of the ash pond because the petitioners failed to join either the U.S. Army Corps of Engineers (Corps) or the State of Progress as an indispensable party under Federal Rules of Civil Procedure 19. Fed R. Civ. P. 19(a)(1)(B)(ii). Under CWA § 404, either the Corps or the Governor of the State has the authority to issue dredge or fill permits after notice and opportunity for public hearings. 33 U.S.C. § 1344 (a), (d) and (g). The EPA only has the power to "prohibit, deny, or restrict" any designation of disposal area by the Corps. 33 U.S.C. § 1344(c). The EPA does not have jurisdiction over EnerProg's responsibility under § 404 because EnerProg was not issued a § 404 permit by the Corps or the State of Progress.

Under the Federal Rules of Civil Procedure, a party is required if the party claims an interest relating to the subject of the action and in that party's absence, an existing party will be exposed to a substantial risk of incurring inconsistent obligations because of that interest. Fed R.

Civ. P. 19(a)(1)(B)(ii). If FCW wishes to require EnerProg to apply for a § 404 permit, it should have joined the Corps under Rule 12(b)(7) that requires the plaintiff to join an indispensable party under Rule 19. Id.; Fed R. Civ. P. 12(b)(7). The Corps or the State of Progress is an indispensable party under Rule 19(a)(1)(B)(ii) for two reasons. First, since either the Corps or the State administers the § 404 permit, both parties have an interest to assert or contest requirements in a § 404 permit. Second, disposing of the instant case without either the Corps or the State of Progress will expose EnerProg to future litigation brought by the Corps, private parties through citizen suits under the CWA, and downstream property owners through trespass or nuisance claims. See 33 USC § 1365(a). Even though this Court conducts a review of the EAB's decision, the issue was never tried in the district, court and thus, the EPA should be allowed to assert this 12(b)(7) defense.

Even if the court does not recognize either the Corps or the State of Progress as an indispensable party, closure and capping of the ash pond is exempt from a § 404 permit because the closure and capping of the ash pond are a part of the whole process to construct a new lined ash basin that will receive all the wastewater streams that currently end up in the ash pond. 33 U.S.C. § 1344(f)(1)(D). CWA § 404(f)(1)(D) exempts the discharge of dredged or fill material for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters. Id. The ash basin falls within the meaning of a sedimentation basin under § 404(f)(1)(D) because the wastewaters carry the pollutants contained in the bottom and the fly ash transport water and dispose of the fluid and solid pollutants in the ash basin. R. at 7, 8. Since EnerProg has never expressed that this ash basin will indefinitely serve the facility, the ash basin is also temporary within the meaning of the statute. R. at 8.

Even though CWA § 404(f)(2) requires a permit for any activities incidental to bring an area of navigable waters into a use that will impair the flow or reduce the reach of the waters, that provision does not apply here because the ash pond is not WOTUS under the current regulation. 40 C.F.R. part 122.2.

In short, the EAB's decision that EnerProg is not required to apply for a § 404 permit should be affirmed because the Corps and the State of Progress are indispensable parties to this action and the closure and capping activities under the CWA falls within the § 404(f)(1)(D) exemption.

CONCLUSION

For all of the foregoing reasons, the EPA requests that this Court affirm the EAB's Order Denying Review.

Dated: November 27, 2017

Respectfully submitted,

Counsel for Respondent