Team No. 32

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

September Term, 2017

Docket Nos. 17-000123 and 17-000124

ENERPROG, L.L.C.,
Petitioner,

and

FOSSIL CREEK WATCHERS, INC.,
Petitioner

– v.–

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Consolidated Petitions for Review of a
Final Permit Issued Under Section 402 of the Clean Water Act

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342, the Environmental Protection Agency has jurisdiction to issue federal National Pollutant Discharge Eliminating Systems permits authorizing the discharge of pollutants into the waters of the United States. On January 18, 2017, EPA Region XII issued a federal National Pollutant Discharge Elimination System permit to EnerProg, L.L.C. ("EnerProg"), pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342. On April 1, 2017, EnerProg, L.L.C. and Fossil Creek Watchers, Inc. ("FCW"), petitioned the Environmental Appeals Board "EAB" for review of the Final Permit. The EAB issued an order denying review of the EnerProg and FCW's Petitions pursuant to 40 C.F.R. § 124.19(c). This final permit decision constitutes final agency action for purposes of judicial review. 40 C.F.R. §§ 124.19(c), (f).

Jurisdiction is proper for both Petitioners' Petitions for Review in the United States Court of Appeals for the Twelfth Circuit pursuant to Section 509(b)(1)(F) of the Clean Water Act, 33 U.S.C. § 1369(b)(1)(F), which provides jurisdiction for this Court to hear petitions for review of the Administrator's action "in issuing or denying any permit under section 1342 of [the CWA] . . . within 120 days from the date . . . of such issuance or denial." Both EnerProg, L.L.C. and Fossil Creek Watchers, Inc. filed timely Petitions for Review.

STATEMENT OF THE ISSUES

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

   a. Whether EPA was required to include all such Progress certification conditions without regard to their consistency with CWA section 401(d); and

   b. Assuming the question of the consistency of the conditions with CWA section 401(d) is open to EPA and to this reviewing court, whether the ash pond closure and remediation conditions constitute "appropriate requirements of State law" as required by CWA section 401(d).

II. Whether the April 12, 2017 EPA Notice suspending certain future compliance deadlines for the Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water.

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

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

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

STATEMENT OF THE CASE

The mission of the United States Environmental Protection Agency ("EPA") is to ensure that: all Americans are protected from significant risks to human health in the environment where they live, learn and work; federal laws protecting human health and the environment are enforced fairly and effectively; and environmental protection is an integral consideration in U.S. policies concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and international trade. To accomplish that mission, the EPA issued a final federal National Pollutant Discharge Elimination Systems ("NPDES") permit to EnerProg, L.L.C. to continue its operation of the Moutard Electric Generating Station ("MEGS Facility") pursuant to federal and state conditions.

While the EPA recognizes the Nation's need for coal-fired electric generating installations such as the MEGS Facility, it also recognizes the need to limit pollutant discharge from such installations and each individual state's right to set limitations on their own intrastate bodies of water. EnerProg and Fossil Creek Watchers, Inc.'s desire the EPA to act beyond its authority and circumvent the law. In granting the final NPDES permit to EnerProg, the EPA has followed the letter of the law and balanced the respective interests.

A. STATEMENT OF THE FACTS

i. EnerProg's Effects on the Progress River Through Its Continued Operation of the MEGS Facility.

EnerProg operates the MEGS Facility, a coal-fired electric generating plant located in Fossil, Progress. R. at 6. Water used by the MEGS Facility is drawn from the Moutard Reservoir as needed to make up for the losses from the cooling tower, boiler water, ash transport water (including both the wet fly ash system and bottom ash handling system), and the MEGS Facility's

drinking water. R. at 7. The MEGS Facility operates the following outfalls relevant to this action:

- Outfall 002. MEGS Ash Pond Treatment System: Contains Discharge to the MEGS Ash Pond containing virtually all MEGS Facility's wastewater. Outfall 002 discharges directly to the Moutard Reservoir
- Outfall 002A. Contains redirected Outfall 002 ("MEGS Ash Pond") to the MEGS Retention Basin when completed. The wastewater from this outfall discharges into the Moutard Reservoir via Outfall 002.
- Outfall 008. Contains fly and bottom ash transport water system along with cooling tower blowdown waste. These waste streams and ash transport water are discharged into the Moutard Reservoir via Outfall 002.

R. at 8. The wet fly ash system and bottom ash handling system use water to sluice ash solids through pipes to a single ash pond MEGS Ash Pond. R. at 7. The MEGS Ash Pond was created in June 1978 by damming the then free-flowing upper reach of Fossil Creek. R. at 7. Though Fossil Creek does not discharge into the Moutard Reservoir, it is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water. R. at 7.

Water from the MEGS Ash Pond undergoes treatment by sedimentation to remove elevated levels of the toxic substances mercury, arsenic, and selenium before being returned to the Moutard Reservoir. R. at 7, 9.

ii. Reasonable Federal and State Licensing Requirements for the Continued Operation of the Moutard Electric Generating Station.

On January 18, 2017, EPA Region XII issued a federal NPDES permit to EnerProg pursuant to Section 402 of the Clean Water Act ("CWA"). R. at 6. Compliance with the NPDES permit requires that the MEGS Facility operate pursuant to the 2015 Revised Effluent Limitation Guidelines ("2015 ELGs") for the Steam Electric Power Generating Point Source Category. R. at 9. Under these 2015 ELGs, Best Available Technology ("BAT") for toxic discharge associated with bottom ash and fly ash is zero discharge based upon the presently available technology for

dry handling wastes. R. at 9.

In addition to the federal NPDES permit conditions, EnerProg is authorized to continue the pollution discharge associated with the continued operation of the MEGS Facility only if it complies with certain conditions under Progress's state certification issued pursuant to Section 401 of the CWA. R. at 9. The conditions included in Progress's CWA Section 401 certification obliges the MEGS Facility to comply with both the State of Progress's Coal Ash Cleanup Act ("CACA") and the State of Progress's Clean Air Act State Implementation Plan. R. at 8–9. The purpose of these state conditions is to prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into surface and ground surface waters. R. at 8–9.

To comply with CACA, EnerProg must (1) terminate its use of the MEGS Ash Pond by November 1, 2018; (2) dewater the MEGS Ash Pond by September 1, 2019; (3) cap the remaining coal combustion residuals by September, 1, 2020; and, (4) independent of the 2015 ELGs, comply with ceiling limits based upon BAT for toxic pollutants present in the MEGS Ash Pond. R. at 8.

To comply with these conditions and the State of Progress's Clean Air Act State Implementation Plan, EnerProg must reduce the amount of S0x and N0x from air emissions. As a result of the State of Progress's Clean Air Act State Implementation Plan, EnerProg previously installed a flue gas desulfurization ("FDG") system and a vapor compression evaporator ("VCE") to evaporate the wastewater from the FDG system. R. at 9. The VCE eliminates the FDG blowdown stream, except in situations of severe rain. R. at 9.

In addition to the systems mentioned above, the MEGS Facility will be required to construct a new retention basin to reroute all wastestreams that are currently discharged to the MEGS Ash Pond. R. at 9–10. This is necessary before the MEGS Ash Pond can be

decommissioned. R. at 9–10. In cases of severe rain, overflow from this new Retention Basin may still be rerouted to the MEGS Ash Pond. R. at 10.

Lastly, in addition to complying with CACA and the State of Progress's Clean Air Act State Implementation Plan, the State of Progress's Section 401 certification contained ceiling limits for toxic pollutants present in the ash pond discharge based upon a Best Available Technology Standard. R. at 9. Under a BAT standard, the level of pollutants MEGS is allowed to discharge is zero. R. at 9.

B. PROCEDURAL HISTORY

This is case arose from the Environmental Appeals Board's ("EAB") January 18, 2017, decision to affirm the issuance of a final NPDES permit to EnerProg for the continued pollutant discharges associated with the operation of the MEGS Facility. R. at 1. On April 1, 2017, EnerProg and FCW petitioned the EAB for review of the final permit. R. at 1.

EnerProg sought review of the NPDES permit issued by EPA Region XII, and approved by the EAB for three reasons. First, EnerProg took issue with the EAB's refusal to extend compliance dates with zero discharge requirements for coal ash transportation waters as contemplated by an April 25, 2017 Notice issued by EPA Administrator Scott Pruit. R. at 1. Second, EnerProg sought review to challenge the NPDES permit's inclusion of certain requirements related to the closure of the MEGS Ash Pond as conditions under Progress's state certification issued pursuant to section 401 of the CWA. R. at 1. EnerProg also sought to challenge EPA Region XII's reliance on BAT as an alternate ground for requiring zero discharge of ash transport water pollutants. R. at 1.

FCW also sought review of the NPDES permit issued by EPA Region XII, and approved by the EAB for two reasons. First, FCW sought review of the permit on the grounds that

abandoning and capping of the MEGS Ash Pond as contemplated by the closure plan was illegal. R. at 1. Second, FCW wished the EAB to review the interim discharge of untreated coal ash into the ash pond. R. at 1.

The EAB denied EnerProg and FCW's Petitions for Review. R. at 1. EnerProg and FCW have now filed timely Petitions of Review pursuant to Section 509(b) of the CWA seeking this Court's judicial review of the EAB's final decision. R. at 1, 5.

STANDARD OF REVIEW

"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." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) *(quoting Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are *arbitrary, capricious, or manifestly contrary to the statute. Chevron,* 467 U.S., 843–44 (1984). However, when as in Section IV and V of this argument, an agency is interpreting its own regulation, the agency interpretation is given deference unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

These are highly deferential standards that presume the validity of agency action and uphold that action if it satisfies minimum standards of rationality. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 412, 415 (1971). This Court's standard of review is also informed by the standard of review applied by the EAB. The EPA's regulations and the EAB's precedent place the burden on the petitioner to demonstrate that review of a permit is warranted to correct "clearly erroneous" findings of fact or conclusions of law, or to resolve an important matter of policy or exercise of discretion. *See* 40 C.F.R. § 124.19(a)(1); *In re American Soda, LLP*, 9 E.A.D. 280, 286 (EAB 2000). Thus, the standard of review in this case can be viewed more specifically as asking whether the Board acted arbitrarily or capriciously in determining that the EPA had failed to meet this "clearly erroneous" standard.

SUMMARY OF THE ARGUMENT

The final NPDES permit granted to EnerProg for its continued operation of the MEGS Facility properly included the State of Progress's special conditions because the plain language of the CWA mandates that the EPA incorporate any "appropriate requirement of State law" into the final NPDES permit at issue. Closure and remediation of the MEGS Facility ash pond are "appropriate requirements under State law" because the Supreme Court has held that state requirements related to assuring compliance with state water quality standards and state antidegradation policies are "appropriate." The special conditions Progress has included in the Section 402 permit are related to the Progress Coal Ash Cleanup Act and Progress antidegradation policy because they serve the purpose of protecting the Progress River from being contaminated by coal ash runoff containing the priority pollutants of mercury, arsenic, and selenium.

The EPA's April 25, 2017 notice announcing a stay and reconsideration of the November 1, 2018 compliance dates set out in its 2015 ELGs are effective because the EPA Administrator was performing his nondiscretionary duty to annually review effluent guidelines. This stay was proper because Section 705 of the Administrative Procedure Act ("APA"), allows an agency to postpone the effective date of regulations when justice so requires. The April 25, 2017 stay of compliance dates was not subject to notice and comment requirements under the APA because temporary stays of effective dates are not considered to be rulemaking. Moreover, the EPA's stay of these future compliance dates is a reasonable exercise of agency discretion while reconsideration of the 2015 ELGs is underway. Therefore, this Court should overturn the EAB's finding that the April 25, 2017 notice by the EPA was not effective to stay compliance dates set out in its 2015 ELGs.

The MEGS Facility permit writer's inclusion of zero discharge requirements for coal ash

transport and treatment wastes relying upon best professional judgment ("BPJ") was justified because the permit writer's reliance on BPJ had not practical effect upon the requirements contained in the MEGS Facility's NPDES permit. Under either the 2015 or 1982 ELGs, BAT for ash transport and treatment wastes would zero discharge. If the 2015 ELGs are maintained, then the MEGS Facility's NPDES permit will be subject to zero discharge requirements under EPA's current national effluent guidelines. Even if the 2015 ELGs are eliminated or vacated, a NPDES permit issued under the EPA's older, 1982 ELGs would still allow a permit writer to set BAT for ash transport and treatment wastestreams at zero discharge using BPJ. Therefore, the MEGS Facility permit writer's reliance on BPJ had no practical effect on the contents of its NPDES permit. The permit writer also considered all necessary factors for BPJ required under federal regulations. Therefore, this Court should affirm the EAB's finding that MEGS Facility permit writer's reliance on BPJ was justified.

In it initial decision, the EPA exempted the discharge into the MEGS Ash Pond from requiring a Section 402 permit. This decision was subsequently upheld by the EAB, and should be affirmed by this reviewing court. The EPA has not reopened the issue of whether the July 21, 1980 suspension met the required procedural requirements, and any claim against the exemption under the theory that the July 21, 1980 suspension was invalid is barred by the applicable six-year statute of limitations.

Even if the claim is not time barred the EPA still has the authority to exclude certain waters from being considered waters of the United States. The EPA properly used that authority and created the waste treatment system exemption. The MEGS Ash Pond is an impoundment that was "designed to meet the requirements of the CWA" and was created before the "exclusion from the exclusion" became a rule. Therefore, this Court should follow the EPA's valid interpretation of its

own regulations and affirm the EAB's decision that the MEGS Ash Pond does not require a Section 402 permit.

Likewise, the EAB was correct when it determined that the MEGS Ash Pond does not require a Section 404 permit when it is eventually closed and capped. The MEGS Ash Pond was taken out of the waters of the United States when it was created and will not return to the waters of the United States upon its closure and capping. There is no recapture provision in Section 404(b) that would return an ash impoundment back to the waters of the United States, and the recapture provision located within Section 404 relates to other types of incidental fills. Therefore, this Court should affirm the decision of the EAB and not require a Section 404 permit to fill and cap the MEGS Ash Pond.

LEGAL ARGUMENT

I. THE STATE OF PROGRESS'S ASH POND CLOSURE AND REMEDIATION CONDITIONS CONSTITUTE "APPROPRIATE REQUIREMENTS OF STATE LAW" AS REQUIRED BY CWA SECTION 401(d) BECAUSE LIMITING PRIORITY POLLUTANTS THAT MAY ENTER PROGRESS RIVER ASSURES COMPLIANCE WITH STATE WATER QUALITY STANDARDS AND PREVENTS THE DEGRADATION OF INTRASTATE WATER.

The Clean Water Act ("CWA") is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §§ 1251 *et seq.* (2012). This complex statutory and regulatory scheme that governs our Nation's waters implicates both federal and state administrative responsibilities.

States are required by Section 401 of the CWA to provide a water quality certification before any federal license or permit can be issued for any activity that may result in a discharge into interstate navigable waters. This state certification sets forth "[a]ny effluent limitations and other limitations… necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and …with *any other appropriate requirement of State law set forth in such certification*, and shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d) (2012) (emphasis added).

A. The EPA Does Not Have Discretion to Refuse Appropriate State Certification Conditions Pursuant with CWA Section 401(d).

The plain language of Section 401(d) of the CWA specifically states that any "appropriate requirement of State law set forth in such certification . . . *shall* become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d) (emphasis added). The mandatory language of this statute is unequivocal. It grants no discretion to the Environmental Protection Agency ("EPA") to refuse an "appropriate requirement of State law" as a condition of the federal permit. *See American Rivers, Inc. v. FERC*, 129 F.3d 99, 110–11 (2d Cir. 1997) (stating

that an agency "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401"); *see also Airport Communities Coalition v. Graves*, 280 F. Supp.2d 1207, 1214 (W.D. Wash. 2003).

In an analogous case involving state conditions on a hydroelectric project, the U.S. Court of Appeals for the Second Circuit held that the express language of the CWA required that any conditions imposed upon a certification by the state became conditions on the subsequent federal license, and further held that the Federal Energy Regulatory Commission had no authority to reject such conditions. *See American Rivers*, 129 F.3d at 109.

When making its decision, the *American Rivers* court relied on precedent set by the Supreme Court in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians* to make this decision. 466 U.S. 765 (1984). In *Escondido,* the Supreme Court interpreted Section 4(e) of the Federal Power Act, a separate, but similar statute to the CWA, with analogous mandatory language found in Section 401(d) of the CWA. 466 U.S. at 772. In construing Section 4(e), the *Escondido* Court focused closely on the provision's plain language, remarking "the mandatory nature of the language chosen by Congress appears to require that the Commission include the Secretary's conditions in the license even if it disagrees with them." *Escondido*, 466 U.S. at 772. Consistent with this view, the Court gave effect to the plain language of section 4(e), finding no "clear expressions of legislative intent to the contrary." *Id.*

Though the EPA does not have discretion to reject "appropriate requirements of State law," it does retain discretion to determine whether certain requirements are indeed "appropriate requirements. 33. U.S.C. § 1341(d). "Although the United States Supreme Court has since extended the authority of state agencies under Clean Water Act § 401 to reviewing the 'activities' of hydroelectric power facilities, such activities must still relate to water quality." *Matter of E.*

Niagara Project Power All. v. New York State Department of Environmental Conservation, 840 N.Y.S.2d 225, 227 (N.Y. App. Div. 2007). Allowing states to regulate any activity that has a vague or indirect effect on water integrity would in essence allow states to hold captive the issuance of federal NPDES permits. *Id.* Allowing states to have final authority over the issuance of federal NPDES permits for any reason whatsoever would result "constitute an intrusion into an area preempted by the federal statue." *Id.* (citing *Erie Boulevard Hydropower, L.P. v. Stuyvesant Falls Hydro Corp.*, 816 N.Y.S.2d 224, 227 (App. Div. 2006)). Thus the EPA has the discretion to determine what is "an appropriate requirement under State law," but once a condition is determined to be "appropriate" the EPA lacks the discretion to incorporate it into the final NPDES permit.

"The CWA does not merely authorize state certifications; it incorporates those certifications into federal law." *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 9 (D.C. Cir. 2011). Once the EPA chooses to issue a federal NPDES permit, appropriate state imposed conditions are incorporated therein. Thus, if a state imposes an appropriate condition upon a federal license, the only discretion the EPA has is whether or not to issue the license. If the EPA does not approve of the conditions mandated to be included in the federal license, it has the authority to not issue the license. However, if the EPA chooses to issue the federal license, any "appropriate requirement[] of State law" must then be incorporated into the final federal license. 33 U.S.C. § 1341(d).

B. The State of Progress's Ash Pond Closure and Remediation Conditions Constitute "Appropriate Requirements of State Law" as Required by CWA Section 401(d).

The conditional closure and remediation of the Moutard Electric Generating Station ash pond ("MEGS Ash Pond") required under the State of Progress's Section 401(d) state certification are "appropriate requirements of State law" as envisioned by the CWA because they serve the purpose of assuring compliance with Progress's water quality standards and antidegradation policy. The introduction of the "priority pollutants" of mercury, arsenic, and selenium into

Progress River not only violates the water quality standards of Progress by endangering the general welfare, but also the introduction of these chemicals degrades virtually all existing uses of the Progress River.

i. The Closure of the Ash Pond and Remediation Conditions Constitute an "Appropriate Requirement of State Law" Under 401(d) Because They Are Limitations to Assure Compliance with State Water Quality Standards.

The United States Supreme Court has held that "limitations to assure compliance with state water quality standards are . . . permitted by § 401(d)'s reference to 'any other appropriate requirement of State law.'" *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 713 (1994**)** (quoting 33 U.S.C. § 1341(d)). This raises the issue of what qualifies as a "water quality standard." Section 303 of the CWA expressly states that water quality standards consist of both a "use" and criteria necessary to protect that use. 33 U.S.C. § 1313(c)(2) (2012). A water quality standard cannot exist without both components. However, "[w]hen criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b).

The EPA has interpreted the phrase "water quality criteria to include 'constituent concentrations, levels, or *narrative statements*, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b) (emphasis added). Because often condensing water quality criteria down to specific numeric limits is "an exercise in futility", narrative statements representing the [state's] water quality standards are acceptable. *In re Decision on the Approval for Submittal*, 822 N.W.2d 676, 688 (Minn. Ct. App. 2012); *see also Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995); *Natural Resources Defense Council v. City of Los Angeles*, 2010 WL 761287, at *33 (C.D. Cal. Mar. 2, 2010).

Furthermore, Congress's broad purpose in enacting the CWA was "to restore and maintain the physical, chemical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)

(2012). "This broad purpose suggests that what state laws qualify as 'appropriate' for the purposes of section 401(d) should also be interpreted broadly." *Niagara Mohawk Power Corp. v. State Department of Environmental Conservation*, 624 N.E.2d 146, 150 (N.Y. 1993). The *Niagara Mohawk* court further held that, "[i]f Congress intended to refer only to state water quality standards [in Section 401(d)], it could have specifically referred to them. That Congress did not do so is evidence that it intended the phrase 'any other appropriate requirement of State law' to refer broadly to all state water quality-related laws, not just to state water quality standards adopted pursuant to section 303 of the Clean Water Act." *Id*.

While the EPA recognizes the need for coal ash treatment ponds, the State of Progress enacted the Coal Ash Cleanup Act ("CACA") to protect its pristine waters from "hazards associated with coal ash treatment containment systems, as well as leaks from these treatment ponds." R. at 8–9. CACA empowers Progress to assess, close, and remedy substandard coal ash depositories to maintain its standard of water quality. R. at 8–9.

This state-enacted law protects the water quality of the Progress River by preventing the introduction of mercury, arsenic, and selenium associated with water runoff from the MEGS Ash Pond. R. at 7, 9. The EPA lists these toxic chemicals as "priority pollutants." 40 C.F.R. Pt. 423, App. A. Stopping the introduction of these harmful by-products of coal combustion serves the general public welfare by protecting virtually all uses of the Progress River. This purpose directly reflects the CWA's goal of protecting the "chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), by preventing drinking water from being contaminated, as well as preventing the contamination from reaching anyone, or any wildlife, who makes use of downstream waters.

CACA, which requires the closure and capping of the MEGS Ash Pond to prevent the

leaking of hazardous pollutants into the Progress River to protect its water quality standards and to prevent irreparable harm to all humans and wildlife in contact with the Progress River, to assure compliance with its water quality standards. R. at 8–9. Because CACA assures compliance with the water quality standards of the State of Progress, Supreme Court precedent dictates that it is to be considered an "appropriate" state law requirement under 401(d).

ii. The Closure of the Ash Pond and Remediation Conditions Constitute an "Appropriate Requirement of State Law" Under 401(d) Because Failure to Do So Would Violate the State of Progress' Antidegradation Policy.

The Supreme Court has held that "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to section 303 [of the CWA] are 'appropriate' requirements of state law." *PUD No. 1*, 511 U.S. at 713; *see also Public Util. Dist. No. 1 v. Department of Ecology*, 51 P.3d 744, 760 (Wash. 2002). Section 303 of the CWA requires each State to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. 33 U.S.C. § 1311(b)(1)(C) (2012). Furthermore, the CWA's 1987 amendments "make[] clear that § 303 also contains an 'antidegradation policy'" *PUD No. 1*, 511 U.S. at 705. An antidegradation policy "requir[es] that state standards be sufficient" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *PUD No. 1*, 511 U.S. at 705; 40 C.F.R. § 131.12 (1993). The EPA has explained that under its antidegradation policy, "no activity is allowable which could partially or completely eliminate any existing use." EPA, Questions and Answers on Antidegradation 3 (Aug. 1985).

Continued use of the MEGS Ash Pond could potentially result in the breach of the impoundment, introducing "priority pollutants" such as mercury, arsenic, and selenium into the Progress River. The introduction of such hazardous materials would create a public hazard and

destroy virtually all existing uses for this interstate body of water. Even the partial destruction of current uses for the Progress River would constitute an impermissible degradation. Therefore, this Court should affirm the eventual closure and capping of the MEGS Ash Pond as "an appropriate requirement under State law." 33 U.S.C. § 1341(d).

II. THE ADMINISTRATOR'S APRIL 25, 2017 NOTICE DELAYING COMPLIANCE DEADLINES FOR THE 2015 ELGS IS EFFECTIVE BECAUSE THE DECISION TO DELAY COMPLIANCE DATES FOR THE ELGS IS COMMITTED TO AGENCY DISCRETION AND EPA'S DECISION TO DELAY COMPLIANCE DATES WAS REASONABLE.

In a letter dated April 12, 2017, EPA Administrator Pruitt announced the EPA's decision to reconsider its 2015 final rule amending the effluent limitations guidelines and standards for the steam electric power generating point source category ("2015 ELGs"). *See* 80 Fed. Reg. 67,838 (Nov. 3, 2015). On April 25, 2017, the EPA published a notice in the Federal Register announcing a stay of the November 1, 2018 compliance dates for best available technology economically achievable ("BAT")[1] effluent limitations and pretreatment standards for: fly ash transport water, bottom ash transport water, flue gas desulfurization ("FGD") wastewater, flue gas mercury control wastewater, and gasification wastewater ("April 25, 2017 Delay Notice"). 82 Fed. Reg. 19,005 (Apr. 25, 2017). The compliance dates contained in the 2015 ELGs were stayed pursuant to Section 705 of the Administrative Procedures Act ("APA") which allows an agency to "postpone the effective date of an action taken by it, pending judicial review." 5 U.S.C. § 705 (2012).

The April 25, 2017 Delay Notice suspending the future compliance dates set out in the 2015 ELGs was effective and proper for three reasons. First, the CWA imposes a nondiscretionary

[1] BAT is the most demanding standard applied by EPA and "requires the 'application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.'" *Natural Resource Defense Council v. EPA*, 808 F.3d 556, 564 (2d Cir. 2015) (citing 33 U.S.C. § 1311(b)(2)(A)).

duty upon the Administrator to review effluent guidelines annually and to review effluent limitations every five years. *See* 33 U.S.C. §§ 1314(b), 1311(d). Second, the April 25, 2017 Delay Notice is not subject to the notice and comment requirements set out in Section 553 of the APA because a temporary administrative stay of a rule's effective date does not constitute "rulemaking" as defined in the APA. *See* 5 U.S.C. §§ 551(5), 553. Third, the EPA's final action in staying the future effective dates of a final rule under reconsideration, such as the 2015 ELGs, is a reasonable exercise of its lawful discretion and should be afforded deference.

First, the EPA's decision to stay compliance dates for the 2015 ELGs was effective and proper because the Administrator has an obligation under the CWA to review effluent guidelines once every year and effluent limitations once every five years. *See* 33 U.S.C. §§ 1314(b), 1311(d). While the Administrator's obligation to review effluent guidelines under Section 304(b)(2) of the CWA is not discretionary, the "ultimate decision whether to revise the guidelines and limitations is discretionary[.]" *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D. D.C. 2012) (citing *Our Children's Earth Foundation v. EPA*, 527 F.3d 842, 849 (9th Cir. 2008)); 33 U.S.C. §1314(b).

Section 705 of the APA states that "when an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. The EAB incorrectly held that Section 705 of the APA does not authorize delaying of the compliance dates of an agency action, only effective dates. In its decision, the EAB needlessly draws a distinction between the terms effective date and compliance date. R. at 11–12. The future compliance dates set forth in the 2015 ELGs fall within the meaning of the term "effective date" as it is used in Section 705 of the APA. Neither the APA nor the CWA specifically define the term effective date. When determining the meaning of a statutory provision, courts "look first to its language, giving the words their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108

(1990). Black's Law Dictionary defines "effective date" as "[t]he date on which a statute, contract, insurance policy, or other such instrument becomes enforceable or otherwise takes effect. *This date sometimes differs from the date on which the instrument was enacted or signed*." Black's Law Dictionary (10th ed. 2014) (emphasis added). Therefore, because these new, more stringent BAT limitations and standards announced under the 2015 ELGs do not take effect until November 1, 2018, the EPA to may stay their effective date pending judicial review pursuant to Section 705 of the APA.

Second, the EAB erred when it found that the EPA's temporary stay of the 2015 ELGs was invalid because such an agency action constituted informal rulemaking under the APA and thus was subject to notice and comment requirements. *See* 5 U.S.C. §§ 553(b)–(c) (2012). The APA defines "rulemaking" as "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). This definition does not fit the actions taken by the EPA in its April 25, 2017 Delay Notice. An agency's decision to temporarily stay the effective date of its regulations does not trigger informal rulemaking requirements under the APA. *See* 5 Op. O.L.C. 55 (Jan. 28, 1981) (stating that the APA "does not require an agency to follow notice and comment procedures in connection with a temporary postponement of the effective date of a regulation even where such regulation has been published in final form, since such postponement is not generally regarded as rulemaking").

The EPA readily admits that when an agency attempts to indefinitely postpone the effective date of its regulation, the agency is likely engaging in indirect rulemaking and should be subject to the notice and comment requirements set forth in the APA. *See Natural Resources Defense Council v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982). However, the April 25, 2017 Delay Notice clearly indicates that the administrative stay of the 2015 ELGs is only temporary in nature because

it states that the stay will last "pending judicial review" under Section 705 of the APA. 82 Fed. Reg. 19,005.

Decisions such as the April 25, 2017 Delay Notice are squarely within an agency's lawful discretion. The EPA, like most agencies, has inherent authority to revisit and revise its past decisions so long as the change is supported by a "reasoned explanation." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automotive Ins. Co.*, 463 U.S. 29, 57 (1983) (holding that "an agency changing its course must supply a reasoned analysis"). The EPA's prior interpretations of its own rules and guidelines, such at the 2015 ELGs, are not "carved in stone. On the contrary, the agency… must consider varying interpretations and the wisdom of its policy on a continuing basis." *National Cable & Telecommunications Ass'n v. Brand X Internet Services.*, 545 U.S. 967, 981 (2005) (citations omitted).

Lastly, the CWA affords the EPA considerable discretion when considering whether to revise its effluent guidelines by directing the Administrator to consider several factors, including "the costs of achieving such effluent reduction…and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(2)(B) (2012). Moreover, Congress left it to the EPA's discretion in deciding how much weight to give each factor laid out in 33 U.S.C. § 1314(b)(2)(B). *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978). In the EPA's decision to stay the future compliance dates in the 2015 ELGs, the Administrator has deemed it appropriate to consider the capital expenditures being made by steam electric power plants to comply with an EPA rule that is pending reconsideration. 82 Fed. Reg. 19,005. Additionally, the Administrator has deemed it appropriate to consider the ongoing litigation regarding the validity of the 2015 ELGs that is currently before the U.S. Court of Appeals for the Fifth Circuit. *Id.*; *see also*

Southwestern Elec. Power Co. v. EPA, Docket No. EPA-HQ-OW-2009-0819 (currently pending in 5th Cir.).

In both of these instances, the EPA's decision to stay future compliance dates will preserve the regulatory status quo with respect to the wastestreams now subject to BAT limitations under the 2015 ELGs, while also allowing those challenging or attempting to comply with the 2015 ELGs to conserve their resources while the rule is under reconsideration by the EPA. Congress has allowed the Administrator, in his discretion, to consider both the costs of achieving effluent reduction and any other factors the Administrator deems appropriate when considering whether to revise the EPA's effluent limitation guidelines. 33 U.S.C. § 1314(b)(2)(B). Therefore, this Court should review EPA's final decision to stay these future compliance dates in the 2015 ELGs under an arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A).

Under this standard of review, a final agency action may only be set aside where it is shown that the agency "has relied on factors which Congress has 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 before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43. This standard of review is narrow and "the reviewing court may not substitute its judgment for that of the agency. *O'Keeffe's, Inc. v. United States Consumer Product Safety Commission*, 92 F.3d 940, 942 (9th Cir. 1996) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989)).

In this case, the EPA has appropriately considered the factors set out by Congress in 33 U.S.C. § 1314(b)(2)(B) when considering whether to revise its effluent limitation guidelines. 82 Fed. Reg. 19,005. The EPA has also offered an explanation that conforms to the evidence before

the agency and is not so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.* (finding that new data brought to EPA's attention, which contains wide-ranging and sweeping objections to the 2015 ELGs, warrants careful and considerate review of the 2015 ELGs by EPA). Accordingly, this Court should reverse the finding of the EAB that EPA's stay of future compliance dates was ineffective.

III. THE MEGS FACILITY PERMIT WRITER'S RELIANCE ON BEST PROFESSIONAL JUDGMENT AS AN ALTERNATIVE GROUND FOR REQUIRING ZERO DISCHARGE FOR COAL ASH TRANSPORT AND TREATMENT WASTES IS JUSTIFIED BECAUSE SUCH RELIANCE HAD NO PRACTICAL EFFECT ON THE REQUIREMENTS IN MEGS FACILITY'S NPDES PERMIT AND THE PERMIT WRITER APPROPRIATELY CONSIDERED ALL FACTORS REQUIRED UNDER FEDERAL REGULATIONS.

Under the CWA, the EPA is authorized to establish technology-based effluent limits ("TBELs"), which set limits for certain pollutants and for various point sources "based on how effectively technology can reduce the pollutant being discharged." *Louisville Gas & Elec. Co. v. Kentucky Waterways Alliance*, 517 S.W.3d 479, 485 (Ky. 2015) (citation omitted); 33 U.S.C. § 1314(b)(1)(A) (2012). Once the EPA promulgates these limitations, it then enforces them through NPDES permits that are issued to dischargers. *See Louisville Gas & Elec. Co.*, 517 S.W.3d at 486 (citing 33 U.S.C. § 1342). Under CWA regulations, there are three possible methods used for the inclusion of TBELs in a NPDES permit: (1) through application of EPA's nationwide ELGs; (2) to the extent that nationwide ELGs do not exist or are inapplicable, on a case-by-case basis utilizing the permit writer's best professional judgment ("BPJ"); and (3) "where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act." 40 C.F.R. 125.3(c)(1)–(3).

In this matter, the EAB correctly determined that the MEGS Facility permit writer's reliance upon BPJ as an alternative ground for mandating zero discharge of ash transport and treatment streams was justified under 40 C.F.R. § 125.3(c) because the permit writer's reliance on BPJ has no practical effect on the actual permitting requirements contained in the MEGS Facility's NDPES permit. R. at 11. Under the 2015 ELGs, the ash transport and treatment waste discharges from the MEGS Facility are subject to a zero discharge requirement under BAT requirements. 40 C.F.R. 423.13. Furthermore, the 2015 ELGs include numeric limits on toxic pollutants, such as arsenic, mercury, and selenium, that were not regulated by the EPA's previous effluent limitations guidelines for the Steam Electric Power Generating Point Source Category promulgated in 1982 ("1982 ELGs"). 47 Fed. Reg. 52,290 (Nov. 19, 1982).

The 2015 ELGs are currently being reconsidered by the EPA and are also the subject of an industry challenge pending in the U.S. Court of Appeals for the Fifth Circuit. 82 Fed. Reg. 19,005; *see also Southwestern Elec. Power Co. v. EPA*, Docket No. EPA-HQ-OW-2009-0819 (currently pending in 5th Cir.). Regardless of the outcome of these rule reconsiderations and industry challenges, any NPDES permit issued to the MEGS Facility would properly require zero discharge for ash transport and treatment wastes. If the 2015 ELGs are maintained, then the EPA's promulgated effluent limitations would apply to the MEGS Facility's NDPES permit pursuant to 40 C.F.R. § 125.3(c)(1). Thus, under the EPA's current promulgated effluent guidelines, BAT for toxic discharges from bottom and fly ash would still be zero discharge, based on the availability of dry handling technology that has been used at many industry plants for years. 80 Fed. Reg. 67,838; *see also* R. at 9.

However, even if the 2015 ELGs were eliminated or vacated, inclusion of a zero discharge requirement for ash transport and treatment wastes in the MEGS Facility's NPDES permit would

still be appropriate under the permit writer's use of BPJ. If the 2015 ELGs were to be eliminated or vacated, the 1982 ELGs would then become the applicable effluent limitations guidelines for the MEGS Facility. The administrative record clearly states that "[t]here is no dispute that the effluent from the MEGS coal ash pond contains toxic pollutants such as mercury, arsenic, and selenium. . . ." R. at 11. The 1982 ELGs did not set any limits for these toxic pollutants because the EPA determined "they are present in amounts too small to be effectively reduced by technologies known to the Administrator". 47 Fed. Reg. 52,290, 52,303. While these toxic pollutants were not prevalent in 1982, their presence in effluent discharges has risen substantially in the last thirty years due to increased use of flue gas desulfurization ("FGD") scrubber systems. *See Steam Electric Power Generating Point Source Category: Final Detailed Study Report*, EPA, 821-R-09-008, xii (2009) (finding that use of FGD scrubber systems has increased substantially since 1982 in response to federal and state air pollution requirements).[2]

Due to the fact that the toxic discharges from the MEGS Facility's FGD scrubber system are not regulated under the 1982 ELGs, these pollutants may be regulated pursuant to the permit writer's use of BPJ. 40 C.F.R. § 125.3(c)(3). A NPDES permit writer may impose TBELs on a case-by-case basis, using BPJ, when "promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants." *Id.* Because the 1982 ELGs fail to set any limits on mercury, arsenic, selenium and other toxic pollutant discharges from the MEGS Facility's FGD scrubber system, these pollutant discharges are appropriately subject to limits based upon the permit writer's BPJ.

[2] EPA's 2009 Final Study of Steam Electric Power Generating Point Source Category is available at https://www.epa.gov/sites/production/files/2015-06/documents/steam-electric_detailed_study_report_2009.pdf.

When exercising their BPJ, the EPA permit writers are not given unfettered discretion. Permit writers must consider all appropriate factors for BAT requirements set out in 40 C.F.R. § 125.3(d)(3), including: "(i) the age of equipment and facilities involved; (ii) the process employed; (iii) the engineering aspects of the application of various types of control techniques; (iv) process changes; (v) the cost of achieving such effluent reduction; and (vi) non-water quality environmental impact (including energy requirements)." 40 C.F.R. § 125.3(d)(3). There is nothing in the administrative record to indicate that the MEGS Facility permit writer failed to consider any of the above-mentioned factors when determining that BAT for ash transport and treatment waste was zero discharge. In fact, evidence in the record indicates that the MEGS Facility permit writer took into account the prevalence of dry handling technology used at the coal-fired steam electric power and the limited increase in cost that MEGS would incur upon adopting dry handling. R. at 9.

Accordingly, this Court should affirm the EAB's determination that the MEGS Facility permit writer's reliance on BPJ to set zero discharge requirements had no practical effect on the permit requirements applicable to the MEGS Facility and that the permit writer properly considered all necessary factors in setting zero discharge requirement for ash transport and treatment waste based upon BPJ.

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IV. NPDES PERMITTING REGULATIONS DO NOT APPLY TO ENERPROG'S POLLUTANT DISCHARGES INTO THE MEGS ASH POND BECAUSE THE POND IS A WASTE TREATMENT SYSTEM DESIGNED TO MEET CLEAN WATER ACT REQUIREMENTS REMOVING IT FROM THE WATERS OF THE UNITED STATES AND ANY CHALLENGE TO THE PROCEDURAL HISTORY OF THE JULY 21, 1980 SUSPENSION IS BARRED BY THE STATUTE OF LIMITATIONS.

"In 1972, Congress enacted the CWA 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp.3d 428, 434–35 (M.D. N.C. 2015) (quoting 33 U.S.C. § 1251(a)). To help effectuate this grand policy goal, the EPA and the Army Corps of Engineers issue federal permits to place limits on what individuals and companies can do to influence waters of the United States. 33 U.S.C. §§ 1311, 1342, 1344. The EPA regulates the discharge of pollutants into waters of the United States through the NPDES permitting program. 33 U.S.C. § 1342. The NPDES program is "designed to regulate the discharge of polluting effluents." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). However, for a point source to require a NPDES permit it must be a discharge into a water of the United States. 33 U.S.C. § 1342; 40 C.F.R. § 122.2.

Although the reach of the CWA is extensive, not all waters *within* the United States are considered waters *of* the United States. What constitutes a water of the United States has been extensively litigated in the Supreme Court. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County ("SWANCC") v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Throughout the Supreme Court's jurisprudence, one thing is clear: waters can be excluded from the scope of the CWA, and therefore, not require NPDES Section 402 permits to operate. *Rapanos*, 547 U.S. at 744-45; *see also Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring) (Agencies may define "categories" of waters of the United States based on what is "significant enough").

A. The EPA has Never Reopened the Suspension of the Waste Treatment Exclusion Since its July 21, 1980 Revision and Therefore FCW's Claim is Barred by the APA's Six Year Statute of Limitations.

In the present case, FCW takes issue with the decision by the EPA to not require a permit for the discharge of pollutants into the MEGS Ash Pond. On June 7, 1979, the EPA first excluded "waste treatment systems," such as power plant ash ponds, from "waters of the United States." 44 Fed. Reg. 32,854, 32901 (June 7, 1979). Then, on May 19, 1980, the EPA revised this rule to exclude only "waste treatment system[s] . . . designed to meet the requirements of the CWA." 40 C.F.R. § 122.2; 45 Fed. Reg. 33,424 (May 19, 1980). This revision included a sentence which stated, "[t]his exclusion applies only to manmade bodies of water which neither were created in waters of the United States (such as disposal areas in wetlands) nor resulted in from the impoundment of waters of the United States." 45 Fed. Reg. 33,424. Multiple petitions for review were immediately filed because the new language would "require [companies] to obtain permits for discharges into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years." 45 Fed. Reg. 48,620 (July 21, 1980). Following these petitions, the EPA released a revision on July 21, 1980 suspending the sentence beginning at "[t]his exclusion" from 40 C.F.R. § 122.2. *Id.* This July 21, 1980, suspension has been continued twice since its initial suspension, but the EPA has never proposed substantive changes, solicited comments or responded presumptively to unsolicited comments regarding the suspension. *See* 48 Fed. Reg. 14,153 (Apr. 1, 1983); 80 Fed. Reg. 37,114 (June 29, 2015).

FCW argues that the suspension of the exclusion to the waste treatment exclusion (the "Suspension") does not apply to the MEGS Ash Pond because the process taken by the EPA in revising the May 19, 1980, rule lacked statutory authority and failed to comply with the requirements of the APA. 5 U.S.C. § 553. However, this claim is time barred. The Suspension occurred on July 21, 1980; over 37 years ago. 45 Fed. Reg. 48,620. Any civil action against the

United States is "barred unless the complaint is filed *within six years* after the right of action first accrues." 28 U.S.C. § 2401(a) (2012) (emphasis added). The only "right of action" the FCW had to challenge the procedural aspects of the Suspension ended over 31 years ago on July 21, 1986. *Id.*

Moreover, the 2015 continuance of the Suspension did not reopen the statute of limitations to allow this collateral attack on the procedural aspects of the July 21, 1980, Suspension. 80 Fed. Reg. 37,114. A prior regulation made by an agency cannot be reopened to challenge unless the agency "create[s] the opportunity for renewed comment and objection." *Ohio Public Interest Research Group, Inc. v. Whitman*, 386 F.3d 792, 800 (6th Cir. 2004) (quoting *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988) (internal citations omitted)). Furthermore, the issue is only reopened if the agency proposes substantive changes, solicits comments and responds substantively to those comments. *See American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989). Without this "serious, substantive reconsideration" of the regulation in existence, the issue is not reopened. *National Mining Ass'n v. DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995).

The 2015 continuance of the Suspension did not reopen the issue because EPA did not reexamine, reconsider, or invite comment on the 1980 Suspension. Furthermore, the EPA expressly stated that "the agencies do not propose to address the substance of the waste treatment system exclusion" when they released the 2015 continuance of the suspension. 79 Fed. Reg. 22,188 (Apr. 21, 2014). Clearly there was no "serious, substantive reconsideration" by the EPA when continuing the 1980 Suspension, and as such, the issue was not reopened. *See National Mining*, 70 F.3d at 1352. Without reopening the issue, FCW's collateral attack against the 1980 Suspension is time barred by the applicable statute of limitations.

B. Even if the FCW's Claim is Not Barred, the EPA has the Authority to Determine What Are Waters of the United States Subject to Section 402 Permits, and Its Designation of the MEGS Ash Pond Being Outside Section 402's Jurisdiction was Proper.

Congress has recognized that there is a need "to strike a balance between protection of the environment . . . [and] the Nation's need for coal as an essential source of energy." *Ohio Valley Environmental Coalition ("OVEC") v. Aracoma Coal Co.*, 556 F.3d 177, 189 (4th Cir. 2009) (quoting Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1202(f) (2012)). Coal ash impoundments balance that need by collecting the coal ash created by the scrubbing required by the Clean Air Act. Coal ash impoundments are treated as "waste treatment systems" and are excluded from CWA jurisdiction. 40 C.F.R. § 122.2. The 1980 Suspension was created to exclude those waste treatment systems that had been running for many years from the new regulations that made waste treatment systems built within "waters of the United States" still subject to the CWA. 45 Fed. Reg. 48,620.

The Suspension was promulgated to avoid requiring dischargers to meet effluent discharge standards for discharges into . . . not from treatment ponds." *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2007). Furthermore, the Suspension "was not intended to transform 'waters of the United States' into waste treatment systems without at least the protection afforded by a physical barrier separating the discharge from navigable waters." *In the Matter of: Borden, Inc./Colonial Sugars*, 1 E.A.D. 895 (E.A.B. 1984), 1984 WL 60946, at *9. However, the MEGS Ash Pond was built prior to the May 19, 1980 rule and it provides the necessary physical barrier separating the impoundment from "waters of the United States." Furthermore, the MEGS Ash Pond receives discharges *into* it from Outfall 008. Thus, it meets the requirements for exemption from the Section 402 permitting process because it has been removed from being a "water of the United States."

Discharges from ash impoundments to waters of the United States are subject to Section 402 jurisdiction. Memorandum from Diane Regas, Dir., Office of Wetlands, Oceans and Watersheds, et al. to Randy Smith, Dir., Office of Water, Region X (May 17, 2004) ("Regas Memorandum") ("EPA and the Corps also agree that any discharge of pollutants from the impoundment to a downstream water . . . is subject to CWA Section 402 [NPDES permitting]." Because of the Suspension, there is ambiguity in the intention of the "waste treatment exception," and the EPA is allowed to interpret its own regulation. *See OVEC*, 556 F.3d at 213. Whether EPA's decision that discharges from Outfall 008 *into* the MEGS Ash Pond are not subject to Section 402's jurisdiction is reviewed to see if the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *Auer* deference is highly deferential to the agency. *OVEC*, 556 F.3d at 213. In fact, when reviewing an agency's interpretation of its own regulation "[t]he reviewing court does not have much leeway." *Kentuckians for the Commonwealth v. Rivenburg*, 317 F.3d 425, 439 (4th Cir. 2003). The EPA is entitled to *Auer* deference because it has always treated ash ponds as being outside CWA jurisdiction and has released guidance for how the agency treats ash ponds that were created before the May 19, 1980 exclusion and were "designed to meet the requirements of the CWA." 40 C.F.R. § 122.2; *see* Memorandum from Marcia Williams, Dir., Office of Solid Waste to James H. Scarbrough, Chief, Residuals Mgmt. Branch, Region IV, at 5 (Apr. 2, 1986) ("Williams Memorandum").

The Williams Memoranda is entitled to the same *Auer* deference and it clearly shows the intention of the agencies when promulgating the May 19, 1980 rule and the July 21, 1980 revision:

> The 'exclusion from the exclusion' was included in the May 19, 1980 rule as a clarification to the existing regulations. The clarification, however, was overbroad in that it would have required NPDES permits for discharges into existing waste treatment systems which had been in existing waste treatment systems which had

> been in existence for many years. EPA [issued the 1980 Suspension], thereby restoring the ambiguity of the earlier regulations, so that each case must be decided on its own facts.

Williams Memorandum. This memorandum clearly shows that the EPA meant to exclude waste treatment systems that impounded waters of the United States, but were created before the "exclusion from the exclusion," from CWA jurisdiction.

Courts that have addressed this issue have looked at whether the impoundment was "designed" to meet the requirements of the CWA. *California Sportfishing Protection Alliance v. California Ammonia Co.*, 2007 WL 273847, *8 (E.D. Cal. Jan. 29, 2007) (Water loses its status as a water of the United States if impounded and designed to be a waste treatment system); *Northern California River Watch v. City of Healdsburg*, 2004 WL 201502, at *11 (N.D. Cal. Jan. 23, 2004) (natural waste treatment system not designed to meet the requirements of the CWA because "[t]he pond preexisted the plant [and] preexisted the Clean Water Act."). These cases show that ash impoundments that were designed after the enactment of the CWA, were most likely "designed to meet the requirements of the CWA." 40 C.F.R. § 122.2. The MEGS Ash Pond was created in June 1978, six years after the enactment of the CWA, but two years prior to promulgation of the "exclusion to the exclusion." Therefore, the MEGS Ash Pond clearly fits into the group of ash impoundments built from waters of the United States that were meant to be excluded from waters of the United States by the 1980 Suspension. The EPA's decision to exclude the MEGS Ash Pond from Section 402 was well within its discretion and the intention of the CWA and EPA regulations, and therefore was not "plainly erroneous or inconsistent with the regulation."

V. THE CLOSURE OF THE MEGS ASH POND AND CAPPING PLAN DO NOT REQUIRE A SECTION 404 PERMIT BECAUSE THE MEGS ASH POND IS NOT A WATER OF THE UNITED STATES, AND THERE IS NO RECAPTURE PROVISION WITHIN THE CWA THAT WOULD CHANGE THE ASH POND BACK TO A WATER OF THE UNITED STATES AFTER CLOSURE AND CAPPING.

Section 404 permits are administered by the Army Corps of Engineers ("Corps"). 33 U.S.C. § 1344(b) (2012). Section 404 permits are required whenever "fill material" is added to a water of the United States. *Id.* However, the MEGS Ash Pond is not a water of the United States, and is therefore not subject to the Section 404 permitting process.

A. The MEGS Ash Pond is Not a Water of the United States.

The MEGS Ash Pond was created in June 1978. R. at 7. When it was created it would have been subject to a Section 404 permit in its creation because it required the damming of Fossil Creek. 33 U.S.C. § 1344(b) (2012). "Fill material" is used to dam creeks. 40 C.F.R. § 232.2. A 1992 EPA guidance excluded all impoundments made with 404 permitted "fill material" from being considered "waters of the United States." The memorandum stated that impoundments "created by the discharge of fill material . . . if permitted by the Corps under Section 404 for purposes of creating a waste treatment system, would *no longer* be waters of the United States." Memorandum from LaJuana S. Wilcher, Assistant Adm'r, U.S. Envtl. Prot. Agency to Charles E. Findley, Dir., Water Division, Region X (Oct. 2, 1992) ("Wilcher Memorandum").

The Wilcher Memorandum is entitled to *Auer* deference as an agency interpretation of its own regulation and should be given deference unless it is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Consistent with the discussion above, the MEGS Ash Pond is not a "water of the United States" and the Wilcher

Memorandum only adds that this exemption applies to the Corps' jurisdiction regarding Section 404 permits. *See supra* Section IV.B.

B. There is No Recapture Provision in the CWA that Would Convert the Capped MEGS Ash Pond Back into a Water of the United States.

Section 404(f)(2) includes a recapture provision that brings activities which state that discharges incidental to exempted activities will still require permits if the discharge "is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject and the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced." 33 U.S.C. § 1344(f)(2); *see* 33 C.F.R. § 323.4(c). However, this recapture provision does not extend to ash impoundments as they receive their permits from Section 404(b) upon creation. 33 U.S.C. § 1344(b). Section 404(f) regulates other Section 404 issues, such as the incidental filling of wetlands. 33 U.S.C. § 1344(f); *see Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001); *United States v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994).

Without a recapture provision, the MEGS Ash Pond will not return to be a "water of the United States" once it is filled and capped. It will instead remain an impoundment; something that is only subject to Section 404 permitting upon creation, and subject to Section 402 permitting when it discharges pollutants *from* the impoundment, not when it *receives* discharges of pollutants. Therefore, this Court should affirm the appeals board decision that the MEGS Ash Pond is not subject to any more CWA permits for discharges *into* the pond or for the filling and capping of the pond upon closure.

CONCLUSION

For the foregoing reasons, Respondent, the Environmental Protection Agency, respectfully requests that this Court affirm the Environmental Appeals Board decision regarding issues I, III, IV, and V and reverse the decision of Environmental Appeals Board in regard to issue II.

Respectfully Submitted,

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