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 AGECNY,

Respondent.

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

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BRIEF FOR PETITIONER, FOSSIL CREEK WATCHERS, INC.

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JURISDICTIONAL STATEMENT

This court has jurisdiction for review of the final decision of the Environmental Appeals Board pursuant to section 509(b) of the Clean Water Act. 33 U.S.C. § 1369. This court has subject matter jurisdiction to hear an appeal regarding the Administrator "making any determination as to a State permit program submitted under section 402(b)," "in approving or promulgating any effluent limitation," or "in issuing or denying any permit under section 402." *Id.* This appeal has been timely filed on November 27, 2017.

ISSUES PRESENTED

1) 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).

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

3) 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.

4) 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.

5) 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

On January 18, 2017, Environmental Protection Agency ("EPA") Region XII issued a renewal of a federal National Pollutant Discharge Elimination System ("NPDES") permit to EnerProg, L.L.C., pursuant to section 402 of the Clean Water Act ("CWA"). R. at 6. The permit authorizes EnerProg to continue water pollution discharges from the Moutard Electric Generating Station ("MEGS"), a coal-fired steam electric power plant located in Fossil, Progress. *Id.*

The MEGS facility is subject to EPA effluent limitation guidelines per 40 C.F.R. § 423, Steam Electric Power Generating Point Source Category. R. at 7. The facility utilizes a wet fly ash handling system and a wet bottom ash handling system, using water to sluice ash solids through pipes to one ash pond. *Id.* There, the water is treated by sedimentation before it is discharged to the Moutard Reservoir. *Id.*

The ash pond was created in 1978 by damming the then free-flowing upper reach of Fossil Creek, a perennial tributary, to the Progress River. *Id.* Progress River is a navigable-in-fact interstate body of water. *Id.*

The State of Progress issued a certification pursuant to CWA section 401 for the renewal of the NPDES permit. R. at 8. This certification, pursuant to CWA section 401(d), imposed conditions upon EnerProg in order to comply with the Progress Coal Ash Cleanup Act ("CACA"). R. at 8. CACA is a state-enacted law that requires assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress. *Id.* The purpose of CACA, according to the legislation, 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.

In accordance with CACA, the State of Progress imposed the following conditions upon the MEGS facility: (1) the termination of operation of the ash pond by November1, 2018; (2) complete dewatering of the ash pond by September 1, 2019; and (3) covering the dewatered ash pond with an impermeable cap by September 1, 2020. R. at 8.

Pursuant to applicable Effluent Limitation Guidelines ("ELGs") for the MEGS facility, Best Available Technology ("BAT") for toxic discharges associated with bottom ash and fly ash is zero discharge, based on the available technology of dry handling these wastes. R. at 9. MEGS is capable of achieving this zero discharge standard by the initial compliance deadline of November 1, 2018, per the requirements of the CWA section 401 certification. *Id.* However, in a letter dated April 12, 2017 and in a subsequent Notice published on April 25, 2017, EPA Administrator, Scott Pruitt suspended the compliance deadlines laid out in the ELGs.

The MEGS coal ash pond currently contains elevated levels of toxic pollutants, including mercury, arsenic, and selenium. *Id.* Independent of the ELGs, the permit must contain limits for toxic pollutants actually present in the discharge based on the BAT. *Id.* MEGS is sufficiently profitable to adopt dry handling of these wastes with zero liquid discharges, with no more of an increase than twelve cents per month in the average consumer's electric bill. *Id.* As such, in the exercise of his best professional judgment ("BPJ"), the permit writer determined that zero discharge of ash handling wastes by November 1, 2018 constitutes BAT for discharges associated with coal ash wastes. *Id.*

Accordingly, in addition to the above-mentioned conditions regarding the coal ash pond, the final permit included conditions that by November 1, 2018, there shall be no discharge of pollutants in fly ash transport water, and there shall be no discharge of pollutants in bottom ash

transport water. R. at 10. These conditions apply to fly ash transport water and bottom ash transport water generated after November 1, 2018. *Id.*

Fossil Creek Watchers, Inc. and EnerProg filed petitions for review to the Environmental Appeals Board ("EAB") of the EPA regarding the re-issuance of a NPDES permit to EnerProg for the Moutard Electric Generating Station in Fossil, Progress. R. at 6. EnerProg objected to the closure and capping provision included in the NPDES permit. *Id*. Further, EnerProg objected to the inclusion of the zero discharge effluent requirements due to the EPA Administrators stay of the 2015 ELGs and reliance on BPJ is inappropriate for MEGS. *Id.* FCW asserted internal outfall 008 is inappropriately classified and should be classified as a direct discharge into waters of the United States, requiring a CWA Section 402 permit. R. at 7. Also, FCW argued the closure and capping of the MEGS coal ash pond requires a CWA Section 404 permit, issued by the Army Corps of Engineers. *Id*. The EAB denied both petitions and affirmed NPDES Permit PG000123 as it was written. R. at 13. Both parties have timely filed petitions for review of those issues to the United States Court of Appeals for the Twelfth Circuit. R. at 2-3.

SUMMARY OF ARGUMENTS

I. Issue 1

The National Pollutant Discharge Elimination System permit issued to EnerProg necessarily included State of Progress conditions regarding closure and remediation of the MEGS coal ash pond. Section 401(d) of the CWA requires state conditions that are appropriately related to water quality to be incorporated into federal permits as conditions upon the federal permit. The Supreme Court of the United States has interpreted the phrase "appropriate conditions" broadly. This broad interpretation by the Court permits the State of

Progress to set conditions for its own waters, such as the conditions related to the State of Progress' Coal Ash Cleanup Act, by incorporating those conditions in NPDES permitting.

Further, the EPA has no jurisdiction to determine the appropriateness of State of Progress' conditions to Clean Water Act Section 401 certifications. Section 401(d) makes clear that any appropriate state conditions "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d). Because the State of Progress conditions are "appropriate conditions" they must be incorporated in NPDES permitting.

However, even though the current conditions implemented in the final permit are appropriate, they independently violate the CWA by omitting the requirement for a CWA Section 404 permit. When the State of Progress requires the capping of the MEGS ash pond, it is requiring EnerProg to fill the bed of Fossil Creek. Because Fossil Creek is a navigable water, or water of the United States ("WOTUS"), raising the bottom level of Fossil Creek requires CWA Section 404 permitting by the Army Corps of Engineers. Absent a provision requiring the appropriate fill permit, the NPDES permitting in this instance violates the CWA.

II. Issue 2

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 not effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water. This attempt to suspend the compliance deadlines is unlawful in three ways. First, the EPA failed to apply the proper four-part test when determining if a suspension of the compliance deadlines was appropriate. In the EPA's Notice of suspension there is no mention of this four-part test and there is no reasoning in the Notice that could be interpreted to meet the test.

Second, Section 705 of the APA provides only for postponing the effective date of an action, not a compliance date. The EPA conflates "effective date," which is the terminology used in Section 705 of the APA, with compliance date. Courts have held there is a distinction between an effective date and a compliance date. Most importantly, Section 705 allows an agency to postpone an effective date prior to its effectiveness. The statute does not afford the same procedure to a compliance date. Thus, the EPA's reliance on Section 705 is misplaced.

Third, the EPA failed to provide prior notice and an opportunity to comment, as required by 5 U.S.C. § 553. The APA requires notice and comment before an agency formulates, amends, or repeals a rule. The Effluent Limitation Guidelines are actually rules promulgated by the EPA through the notice and comment requirements of the APA. Therefore, when the EPA attempts to suspend, or repeal, these rules it must do so through the required notice and comment procedure outlined in the APA.

III. Issue 3

An agency could rely on Best Professional Judgment as an alternative ground for requiring zero discharge of coal ash transport wastes in the absence of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines. If the 2015 ELGs are not effective, the NPDES permits must incorporate conditions the Administrator deems necessary to carryout the provisions of the CWA. 33 U.S.C. § 1342(a)(1). The EPA has already determined in its best professional judgment that zero discharge of coal ash effluents is achievable for MEGS. Therefore, due to statutory authority, independent of the 2015 ELGs, MEGS must meet the zero discharge requirement.

IV. Issue 4

NPDES permitting is required when EnerProg discharges pollutants into the MEGS ash pond because the EPA's July 21, 1980 suspension of a portion of 40 C.F.R. §122.2 did not comply with the APA, making the waste treatment system exclusion inapplicable to the MEGS ash pond, which is a water of the United States. Pursuant to applicable case law the EPA's WOTUS rule is a legislative rule because it satisfies the factor test set out in *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir 1993). Because the EPA's WOTUS rule is a legislative rule, the EPA must comply with notice and comment when amending the rule. Any amendment or revocation of a legislative rule, or part of the legislative rule, must be done in accordance with how the rule was promulgated in the first instance. Thus, when the EPA failed to comply with APA procedures in suspending a portion of the WOTUS rule it violated the law. To remedy this violation, the July 21, 1980 suspension must be vacated, which leaves the May 19, 1980 promulgation of WOTUS controlling law. Under the proper promulgation of the EPA's WOTUS rule, the MEGS ash pond is clearly a WOTUS.

V. Issue 5

Once the MEGS ash pond is closed, meaning when it is no longer being used as a waste treatment system, it is classified under the CWA as a tributary. Fossil Creek is a perennial tributary to the Progress River. The Progress River is a WOTUS because it is an interstate body of water that is navigable-in-fact. Under either the Corps or EPA's WOTUS rule, a tributary of a WOTUS is also a WOTUS. Tributaries under the WOTUS rule never lose the status of tributary even if it has been dammed. Fossil Creek was dammed to create the MEGS ash pond. While the pond was used as a waste treatment system the WOTUS rule excepted the pond from the rule. However, once the pond is no longer in use as a waste treatment system, it regains its status as a

tributary and a WOTUS. Section 404 of the CWA requires a permit issued by the Corps to fill, or change the bottom level of a WOTUS. Placing an impermeable cap on the pond changes the bottom level of the Fossil Creek bed. Therefore, EnerProg must acquire a Section 404 permit because the pond regains its tributary status when it is no longer a waste treatment system and EnerProg is required to fill the creek bed with an impermeable cap.

ARGUMENT

I. The National Pollutant Discharge Elimination System permit issued to EnerProg necessarily included State of Progress conditions regarding closure and remediation of the coal ash pond, but these conditions independently violate the Clean Water Act without requiring EnerProg to obtain a Section 404 permit.

Pursuant to section 402 of the CWA, any facility discharging pollutants into navigable waters is required to obtain a National Pollutant Discharge Elimination System permit from the United States EPA. *See* 33 U.S.C. § 1342. Section 401 of the CWA provides the states with the authority to ensure that no federal agency issues a permit or license that violates state water quality standards through water quality certification. *See Id.* § 1341. The same section prohibits federal agencies from issuing a permit for an activity that may result in a pollutant discharge to the navigable waters until the state in which the discharge originates has granted or waived this water quality certification. *Id.* § 1341(a)(1).

A. Clean Water Act Section 401(d) requires state conditions that are appropriately related to water quality to be incorporated into federal permits as conditions upon the federal permit.

Pursuant to section 401(d), a state may impose conditions upon water quality certification, provided that any such condition is an "appropriate requirement of State law." *Id.* § 1341(d). Such conditions are incorporated into and become conditions upon any federal license or permit, including federal NPDES permits. *Id.*

The phrase "appropriate requirement of State law," as referred to in CWA section 401(d), has been interpreted broadly. In *Public Utility District No. 1 of Jefferson County v. Washington Dept. of Ecology*, the United States Supreme Court affirmed a holding by the Washington Supreme Court interpreting "appropriate requirement[s] of State law," as referred to in CWA section 401. *Public Utility District No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 710 (1994). The Washington Supreme Court, relying on the language of CWA section 401(d) and the broad purposes of the Clean Water Act, "concluded that § 401(d) confers on States power to 'consider all state action related to water quality in imposing conditions on section 401 certificates.'" *Id*.

Here, EnerProg, L.L.C., pursuant to section 402 of the CWA, applied for, and was granted, a renewal of a federal NPDES permit, authorizing the company to continue water pollution discharges associated with the continued operation of the Moutard Electric Generating Station, a coal-fired steam electric power plant located in Fossil, Progress.

In order to comply with the CACA, the State of Progress imposed the following three conditions, among others, to EnerProg's CWA section 401 certification: First, EnerProg must terminate its use of the coal ash settling pond at MEGS by November 1, 2018. Second, the company must dewater the ash pond by September 1, 2019. Third, EnerProg must cover the dewatered ash pond with an impermeable cap by September 1, 2020. Pursuant to CWA section 401(d), these requirements became incorporated as additional conditions to the federal NPDES permit.

CACA is a state-enacted law requiring assessment, closure, and remediation of substandard coal ash disposal facilities within the State of Progress. The purpose of the legislation is to prevent public hazards associated with the failures of ash treatment pond

containment systems, as well as leaks from treatment ponds into ground and surface waters. The discharge from the MEGS coal ash pond contains elevated levels of toxic pollutants, including mercury, arsenic, and selenium.

In the above-mentioned *Public Utility District* case, the Supreme Court explained that, "States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law.'" *Public Utility District,* 511 U.S. 700, 713-714 (1994) (quoting 33 U.S.C. § 401(d)).

Further, in a concurring opinion to the case, Justice Stevens explains, "Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require." *Id.* at 723. The Justice continues, "In fact, the Act explicitly recognizes States' ability to impose stricter standards." *Id.*

The purpose of the CACA demonstrates intent on behalf of the State of Progress to protect the jurisdiction's water quality standards. Because the conditions imposed upon EnerProg to comply with the CACA are "appropriate[ly]" related to water quality pursuant to CWA section 401(d), the conditions are "appropriate requirement[s] of State law." Therefore, the conditions pertaining to the coal ash pond were properly and necessarily included conditions upon the federal NPDES permit.

B. EPA has no jurisdiction to determine the appropriateness of State of Progress conditions to Clean Water Act Section 401 certifications.

State water quality certification conditions, as discussed above and pursuant to CWA section 401(d), "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d).

According to the United States Court of Appeals for the Second Circuit, the above language in CWA section 401(d), "is unequivocal, leaving little room for [a federal agency] to argue that it has authority to reject state conditions . . . ." *American Rivers, Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99, 107 (2d Cir. 1997).

As discussed by the United States Supreme Court in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, a "familiar canon of statutory construction" is that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (holding that plain language in 15 U.S.C. § 2055(b)(1) did not limit restrictions to disclosures in response to FOIA requests made by the Product Safety Commission). The opinion continues, explaining that "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*

Since the conditions imposed by the State of Progress were incorporated as conditions upon the federal NPDES permit, EPA has no discretion to reject the conditions. The jurisdiction for determination of appropriateness belongs to the State imposing the additional conditions that become incorporated as conditions upon federal permits pursuant to CWA section 401(d). The United States Supreme Court has held that "that authority is not unbounded," limiting such authority to the plain language in CWA section 401(d). *Public Utility District,* 511 U.S. 700, 712 (1994). That language incorporates state conditions as conditions upon "*any* Federal license or permit," provided that such conditions are "appropriate requirement[s] of State law." 33 U.S.C. § 1341(d) (emphasis added). There is no expression of legislative intent, clear or otherwise, demonstrating an allocation of power to determine the appropriateness of state

conditions to EPA once such conditions become incorporated as conditions upon a federal permit.

As such, EPA has no jurisdiction in determining the appropriateness of the conditions regarding the coal ash pond remediation.

C. The current conditions implemented in the final permit, while appropriate, independently violate the Clean Water Act by omitting the requirement for a Clean Water Act Section 404 permit.

Section 404 of the CWA requires that any entity wishing to discharge "fill material" into "navigable waters" must obtain a permit from the Army Corps of Engineers. *See Id.* § 1344. The Code of Federal Regulations defines "fill material" as "material placed in waters of the United States where the material has the effect of… [r]eplacing any portion of a water of the United States with dry land; or… [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1).

The term "navigable waters," as referred to in CWA sections 401, 402, and 404, has been interpreted broadly. The CWA defines the term as "waters of the United States, including its territorial seas." 33 U.S.C. § 1362(7). The CWA does not further define the term, but subsequent case law and regulations have helped to expound upon the definition.

In *Riverside Bayview Homes v. United States*, the United States Supreme Court explained that, by its use of the term in the CWA, "Congress evidently 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." *Riverside Bayview Homes v. United States*, 474 U.S. 121, 132-133 (1985).

The definition of "waters of the United States," as used in the CWA, that is currently in use is that which was promulgated in Title 40 of the Code of Federal Regulations. *See* 40 C.F.R. § 230.3. In pertinent part, the Code includes as "waters of the United States," "[a]ll waters which are currently used, [or] were used in the past… including all waters which are subject to the ebb and flow of the tide;" "all tributaries" thereto; and "all waters adjacent to" the above-mentioned waters. § 230.3(o)(1)(i), (v), and (vi). This definition excludes waste treatment systems from "waters of the United States." § 230.3(o)(2)(i).

The coal ash pond at issue was created by damming the upper reach of Fossil Creek, a perennial tributary to the Progress River. The Progress River is a navigable-in-fact interstate body of water.

Once the first condition of ceasing the use of the coal ash pond is satisfied, the pond will lose its waste treatment exclusion from the aforementioned definition of "waters of the United States." Because Fossil Creek is a tributary to the Progress River, it is included within the definition, as is the adjacent pond.

The appropriate conditions of terminating use of, dewatering, and eventually capping the MEGS coal ash pond constitute the discharging of fill material into navigable water. The conditions will not only replace a portion of a water of the United States with dry land, but will also change the bottom elevation of a portion of a water of the United States.

The dewatering and capping of the pond is unlawful without a CWA section 404 permit. Although the conditions are "appropriate," the conditions independently violate the CWA by failing to require EnerProg to obtain a CWA section 404 permit.

II. EPA's Notice of suspension is not effective, because the suspension did not comply with the APA and EPA did not apply the proper four part test when determining if a suspension was appropriate, thus the compliance deadlines in the NPDES permit are still in effect.

Under the Clean Water Act, the EPA is required to issue technology-based standards, known as "effluent limitation guidelines" that regulate discharges of pollutants. *see* 33 U.S.C §1311. The ELGs also require power plants to come into compliance "as soon as possible" on or after November 2018, but no later than December 31, 2023. 40 C.F.R. §423.13(h)(1)(i). States and the EPA then incorporate these guidelines and compliance dates into NPDES permits. *see* 80 Fed. Reg. 67,842. However, on April 12, 2017, Scott Pruitt, the EPA Administrator, issued a Notice suspending certain compliance dates set out in the ELGs, citing section 705 of the Administrative Procedure Act ("APA") as authority. 82 Fed. Reg. 19005.

The EPA's attempt to suspend the compliance deadlines in the ELGs was unlawful in three ways. First, the EPA failed to apply the proper test to determine whether a suspension of the deadlines was appropriate. Second, section 705 of the APA provides only for postponing the effective date of a rule, not a compliance date within the rule. Third, the EPA failed to provide prior notice and an opportunity to comment, as required by law, before amending the ELGs. For these three reasons, the suspension of the compliance deadlines in the ELGs was invalid. Thus, the compliance deadlines in the NPDES permit are still in effect.

A. The EPA failed to apply the proper four-part test when determining if a suspension of the compliance deadlines was appropriate.

Section 705 of the APA provides that "when an agency finds that justice so requires, it may postpone the effective date" of its own agency rule, pending judicial review. 5 U.S.C. § 705. A postponement of an agency rule is considered an administrative stay, which is equivalent to a preliminary injunction. *See Sierra Club v. Jackson* , 833 F. Supp. 2d 11, 30

(D.D.C. 2012). Courts and agencies alike must apply a four-part test when determining whether a preliminary injunction is appropriate. *Id* at 30.

The United States District Court for the District of Columbia addressed this issue in *Sierra Club v. Jackson*. In that case, the EPA attempted to issue an order delaying the implementation of emission standards under the Clean Air Act. The court held that "the standard for a stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test applied in this Circuit." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30-31 (D.D.C. 2012); *See also Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). EPA neither employed nor mentioned the four-part test in its Delay Notice and the failure to do so was found to be arbitrary and capricious. 833 F. Supp. 2d 11 at 30-31.

Here, the EPA issued a Notice to suspend compliance deadlines in the ELGs. However, nowhere in the Notice does it mention the four-part test that must be used when considering a stay of an agency rule. In the April 25th Notice, the EPA based its decision to suspend the compliance deadlines on "the capital expenditures that facilities incurring costs under the Rule will need to undertake in order to meet the compliance deadlines for the new, more stringent limitations..." The EPA then concluded that "justice requires it to postpone the compliance dates" in the ELGs. These reasons are simply not in accord with the requirements of the law. Just as in *Sierra Club v. Jackson*, the EPA's failure to apply the appropriate test in this case should be found arbitrary and capricious.

B. Section 705 of the APA provides only for postponing the effective date of an action, not a compliance date.

After demonstrating that the EPA did not apply the appropriate test in deciding to issue a Notice of suspension, the EPA's actions are further inappropriate because an agency can only postpone "effective dates," not "compliance dates." The EPA, by invoking 5 U.S.C. § 705 to suspend certain compliance deadlines for the ELGs acted in a manner that was arbitrary and capricious, an abuse of discretion, and not in accordance with law.

Section 705 permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. 5 U.S.C. § 705. Importantly, "effective and compliance dates have distinct meanings." *California v. United States BLM*, No. 17-cv-03804-EDL, 2017 U.S. Dist. LEXIS 176620, at *34 (N.D. Cal. Oct. 4, 2017); *see Silverman v. Eastrich Multiple Inv'r Fund*, L.P., 51 F.3d 28, 31 (3d Cir. 1995) ("The mandatory compliance date should not be misconstrued as the effective date of the revisions."). To interpret "effective date" and "compliance date" to mean the same thing would undercut regulatory predictability and consistency, which courts have held are an important aspect of agency rulemaking. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (explaining that agency deference creates a risk of inconsistent rule interpretation, thereby frustrating the notice and predictability purposes of rulemaking.); *see also Price v. Stevedoring Servs. of Am.*, 697 F.3d 820 (9th Cir. 2012) (formal rulemaking exists in order to provide "notice and predictability to regulated parties").

The Northern District of California addressed this issue in *California v. United States BLM* where the Bureau of Land Management ("BLM") attempted to suspend certain compliance dates within the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Rule"). *California v. United States BLM*, No. 17-cv-03804-EDL, (N.D. Cal. Oct. 4, 2017) at *17. BLM argued that an agency should be "able to use Section 705 after the official

effective date but before the compliance date comes due because the compliance date is functionally equivalent to a second effective date." *Id.* at *37. The court disagreed, holding that "not only is this argument contrary to the plain language of the statute, but it collapses the clear statutory distinction between the two periods, before and after, a rule takes effect." *Id.* Therefore, the court vacated the illegal postponement of the compliance dates in the Rule.

In this case, the EPA is attempting to make the same argument. It states in it's April 25th Notice that "[t]he earliest compliance date...is November 1, 2018" and that date has not yet passed, so it is "within the meaning of the term 'effective date' as that term is used in Section 705 of the APA." 82 Fed. Reg. 19005. This is inconsistent with what courts have held regarding the difference between "effective date" and "compliance date." Just as in the persuasive argument of *California v. United States BLM*, this court should also find that the two terms have different meanings and that the EPA cannot suspend compliance dates using section 705.

C. EPA failed to provide prior notice and an opportunity to comment, as required by 5 U.S.C. § 553.

Any agency rule that is promulgated through formal rulemaking must be amended through formal rulemaking procedures. 5 U.S.C. § 551(5). The EPA blatantly disregarded that rule of law by suspending the compliance deadlines in the ELGs without any notice or comment period.

The APA requires agencies to engage in a notice and comment process prior to formulating, amending, or repealing a rule. 5 U.S.C. §§ 551(5), 553. This process is designed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id*. § 553(c). It is also well settled that the retraction of a promulgated rule requires compliance with the APA's notice-and-comment procedures. *See Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 817 (D.C. Cir. 1983); *Clean Air Council v.*

Pruitt, 862 F.3d 1, 2017 WL 2838112, at *11 (D.C. Cir. 2017); *Perez v. Mortg. Bankers Ass'n, U.S.* 135 S. Ct. 1199, 1206 (2015); *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009); *Nat. Res. Def. Council v. Envtl. Prot. Agency*, 683 F.2d 752, 761 (3d Cir. 1982). "The APA does not permit an agency to guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Nat. Res. Def. Council*, 683 F.2d at 762. The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures. *Id.*

California v. United States BLM provides persuasive guidance on this specific issue. BLM argued that its suspension of compliance dates did not require a notice and comment period, because section 705 does not refer to such requirements. BLM further argued, without any supporting authority, that "notice and comment would impede its ability to act swiftly to maintain the status quo, as Congress envisioned when it crafted section 705." *California v. United States BLM* at *40, *41. However, the court disagreed, holding "statutory requirement of notice and comment is equally applicable to the repeal of regulations as to their adoption." *Id.* (citing *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982) ("The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.")) Thus holding that BLM's postponement of compliance deadlines without notice and comment was invalid.

In this case, EPA failed to provide prior notice of the suspension, and failed to provide an opportunity to comment prior to issuance of the April 25th Notice of suspension. The only prior "notice" was a letter dated April 12, 2017 to the parties who submitted petitions for reconsideration of the ELGs. Further, the Notice states that "after considering the objections

raised in the reconsideration petitions, the Administrator determined that it is appropriate and in the public interest to reconsider the Rule." 82 Fed. Reg. 19005. The law requires a notice and comment period, not a determination of public interest. The EPA is in clear violation of well-established principles of agency rulemaking procedures under the APA.

III. The EPA is required by law to use Best Professional Judgment when ELGs for point source categories have not been promulgated or are not available.

Federal effluent limitations guidelines play a critical role in the overall structure of the CWA. However, in situations where there are no national effluent standards on which to base its determinations of appropriate pollution levels, states and the EPA must establish on their own technology-based effluent limitations using "Best Professional Judgment." *Natural Resources Defense Council, Inc. v. Reilly*, 1991 U.S. Dist. LEXIS 5334 at *24, *25. "In situations where the EPA has not yet promulgated any ELGs for the point source category or subcategory, NPDES permits must incorporate 'such conditions as the Administrator determines are necessary to carry out the provisions of the [Clean Water] Act.'" 33 U.S.C. § 1342(a)(1). Individual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same." *Texas Oil & Gas Ass'n v. United States Environmental Protection Agency*, 161 F.3d 923, 928-29 (5th Cir. 1998).

Eighteen Texas petitioners challenged EPA's use of best professional judgment in *Tex. Oil & Gas Ass'n v. United States EPA*. EPA Region 6 determined in its best professional judgment that a zero discharge requirement on ceratin produced water and produced sand best represented the BAT standard, and included such a limit in its proposed General Permit. 161 F.3d 923 at 929. The court found this to be valid, because if no national standards have been promulgated for a particular category of point sources, "the permit writer is authorized to use, on a case-by-case basis, 'best professional judgment' to impose such conditions as the permit writer

determines are necessary to carry out the provisions of [the Clean Water Act.]" *Id.* at 928, 929. Thus, the court held that "EPA did not act arbitrarily or capriciously or abuse its discretion when it set zero discharge limits based on best professional judgment." *Id*. at 940.

This establishes that if the facts of this case so required, the EPA could rely on best professional judgment to set 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. NPDES permitting is required when EnerProg discharges pollutants into the MEGS ash pond because the EPA's July 21, 1980 suspension of a portion of 40 C.F.R. §122.2 did not comply with the APA, making the waste treatment system exclusion inapplicable to the MEGS ash pond, which is a water of the United States.

"[T]he discharge of any pollutant [into navigable waters] by any person shall be unlawful" except for compliance within section 301, 402, and other sections of the Clean Water Act. 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System allows for the EPA to issue permits for discharge into navigable waters. *Nat'l Pork Producers Council v. United States EPA*, 635 F.3d 738, 743 (5th Cir. 2011) (citing 33 U.S.C. § 1342). Navigable waters as defined as "waters of the United States" includes the territorial seas. 33 U.S.C. § 1362. WOTUS has been further defined through EPA rulemaking, published in 40 C.F.R. § 122.2. As shown below a) the WOTUS rule is a legislative rule, b) legislative rules must comply with APA notice and comment, and c) the correct reading of 40 C.F.R. § 122.2 requires the MEGS ash pond be considered a WOTUS.

A. The EPA's WOTUS rule is a legislative rule

The EPA's WOTUS rule is clearly a legislative rule. There is a distinction in the APA between rules that are interpretive by nature and rules that have the force and effect of law, or legislative rules. *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106,

1109 (D.C. Cir 1993). The manner to determine whether a rule is legislative or interpretive depends upon if the rule has a legal effect. *Id.* at 1112. This legal effect will be found even if only one of the following four factors is met: "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." *Id.*

Under the Clean Water Act every enforcement action, permitting requirement, or other action taken by the EPA or Army Corps begins with an analysis of whether the body of water is a navigable water. *See generally Rapanos v. United States*, 547 U.S. 715 (2006); *see also Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121 (1985). The legislative definition of navigable waters is simply "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362. Without the EPA or Army Corps regulations defining WOTUS, individuals and industry alike would have no guidance to the jurisdictional reach of the CWA. Without clarification navigable waters could be narrowly construed to only include navigable-in-fact waters, or broadly construed to include every mud puddle. Therefore, without the WOTUS rule an agency would not be able to take action for enforcement of the CWA or ensure the performance of permitting duties under the NPDES. Thus, the WOTUS rule fits squarely in factor one from *Am. Mining Cong.*

Further, the WOTUS rule has been codified multiple times, but currently under 40 C.F.R. § 122.2, which fulfills factor two.

And finally, the June 21, 1980 stay of a portion of the May 19, 1980 WOTUS rule did in fact amend a prior legislative rule.[1] The June 21 stay amended the May 19, 1980 publication of the WOTUS rule removing the sentence "[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." 45 Fed. Reg. 48620. This indefinite suspension, or stay, amended the WOTUS rule, which was part of the final rule consolidating five permitting processes under EPA jurisdiction. *See* 45 Fed. Reg. 33424. That version of the WOTUS rule was codified under 40 C.F.R. §122.3 and also amended a prior legislative rule promulgated under the same code section. *See* 44 Fed. Reg. 32901. Thus the June 21, 1980 stay of a portion of the WOTUS rule fits factor four by amending a prior legislative rule.

Due to the foregoing, the EPA's WOTUS rule satisfies at least three of the four factors set out in *Am. Mining Cong.* That court opined that only one factor is necessary to find that a promulgated rule by an agency is a legislative rule. Thus, the WOTUS rule, whether it is the 1979, 1980, or 1983 promulgation, is a legislative rule.

B. Because the EPA's WOTUS rule is a legislative rule, the EPA must comply with notice and comment when amending the rule.

Section 1 of the APA mandates "that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1206 (2015), *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017). Section 4 of the APA describes this process as follows: 1) general notice of proposed rule making is published, 2) an agency must give interested parties a chance to

[1] The current codification of the WOTUS rule is from April 1, 1983, where the EPA recodified several rules, but made no substantive changes to the rule.

participate in the rule making through "submission of written data, views, or arguments," then the agency must respond to those comments, and 3) when promulgating the final rule the agency must include a concise statement of the rule's basis and purpose. *Id.* at 1205. *See also* 5 U.S.C. § 553.

On August 21, 1978, he EPA provided notice for the first WOTUS rule. *See* 43 Fed. Reg. 37078. On June 7, 1979, the EPA promulgated the final rule from that notice and comment period. *See* 44 Fed. Reg. 32901. In the final rule the EPA provided responses to comments and provided the required statement of the rule's basis and purpose. *Id.* on June 14, 1979, the EPA issued a proposed consolidation of several rules, and amendments to those rules. 44 Fed. Reg. 38854. Then on May 19, 1980, following the notice and comment period, the EPA promulgated its final rule. 45 Fed. Reg. 33424. The WOTUS rule was amended at least twice, and each time the APA notice and comment procedures were followed. On July 21, 1980 the EPA suspended a portion of the WOTUS rule without notice and comment.

Under *Perez*, an agency rule that is being amended must follow the same procedures as its promulgation under the APA. *Perez* at 1206. As shown above, the WOTUS rule was promulgated through notice and comment two times before the EPA indefinitely suspended a portion of the rule without notice and comment. This suspension was then renewed again without notice and comment on April 1, 1983, which is the current law. 48 Fed. Reg. 14153. The Court in *Perez* made clear this is impermissible. *Perez* at 1206. Rules promulgated by agencies through notice and comment can only be amended or revoked by the same procedure. *Id.*

Therefore, this court must vacate the impermissible suspension by the EPA on June 21, 1980 and restore the last permissible WOTUS rule from its May 19, 1980 promulgation.

C. Once the unlawful suspension is lifted, the MEGS ash pond is clearly a WOTUS under the May 19, 1980 rule.

When the impermissible suspension of a portion of the WOTUS rule is lifted, the MEGS coal ash pond will be a navigable water requiring EnerProg apply for a permit to discharge pollutants into the pond. Section 402 of the Clean Water Act describes permitting requirements to comply with Section 301 Effluent Limitations. 33 U.S.C. §§ 1342, 1311. The permitting is required for the discharge of pollutants into navigable waters. *Id.* Navigable waters, or WOTUS, are defined in relevant part as "[a]ll interstate waters, including interstate wetlands... [a]ll tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section." 40 C.F.R. 122.2. Waste treatment systems are excluded from the definition of waters of the United States except when the system is created from impounding a water of the U.S. or the system was originally created in a water of the U.S. *Id.*

The MEGS ash pond was created by damming the free flowing Fossil Creek in 1978. Fossil Creek is a tributary of Progress River, which is a navigable-in-fact interstate body of water. Progress River is a WOTUS because it is an interstate body of water. 40 C.F.R. 122.2. Fossil Creek is a WOTUS because it is a tributary of a WOTUS. *Id.* Because impounding a WOTUS created the ash pond, the ash pond does not, under the correct promulgation of the WOTUS rule, meet the exception for waste treatment systems. Thus, because the ash pond is itself a WOTUS, EnerProg must acquire a Section 402 permit to discharge into the pond.

Due to the foregoing, this court must vacate the EAB's ruling and the July 21, 1980 partial stay of the WOTUS rule because the stay did not meet APA requirements for notice and comment. This court should then declare that the MEGS ash pond is a WOTUS and order EnerProg to acquire a Section 402 permit to discharge into the MEGS ash pond.

V. Closure and capping of the MEGS ash pond requires a CWA §404 permit because when EnerProg ceases use of the ash pond as a waste treatment system, it reverts to its original status as a tributary, and to fill a tributary requires §404 permitting.

"[A]ny discharge of dredged or fill materials into navigable waters... is forbidden unless authorized by a permit issued by the Corps of Engineers" *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121, 123 (1985) (internal quotations omitted). Fill material is defined as "any material that has the effect of . . . changing the bottom elevation of water [of the United States]." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 268 (2009) (citing 33 C.F.R. § 323.2) (internal quotations omitted). "All tributaries" of waters of the United States, including "[a]ll interstate waters" are waters of the United States. 33 C.F.R. § 328.3. However, waste treatment systems, "including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act" are excluded from the definition of waters of the United States. *Id.* But, "[a] water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams) ... so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id.*

The Progress River is a "navigable-in-fact interstate body of water." Therefore, because it is an interstate body of water it is a WOTUS. *See* 33 C.F.R. § 328.3. Fossil Creek is a perennial tributary to the Progress River. Therefore, because Fossil Creek is a tributary to the Progress River it is also a WOTUS. *See* 33 C.F.R. § 328.3. Damming Fossil Creek created the MEGS ash pond. No facts indicate that Fossil Creek is no longer flowing into the Progress River. Further, the EAB does not dispel the notion that the MEGS ash pond is the former creek bed of Fossil Creek. Absent the use of the pond as a waste treatment facility, the pond is in fact

part of Fossil Creek, which is a WOTUS. The only reason the pond is not currently considered a WOTUS is the exception for waste treatment facilities in 33 C.F.R. § 328.3.

The EAB erred when it decided there must be a recapture provision within the exclusion for waste treatment facilities for the ash pond to be considered a WOTUS. There is no recapture provision necessary when the regulation makes clear a tributary "does not lose its status as a tributary" even after it has been dammed for any length of time. 33 C.F.R. § 328.3. As the record makes clear the ash pond is part of Fossil Creek, which is a WOTUS. And the regulations make clear raising the bottom level of a WOTUS with fill material requires a Section 404 permit issued by the Army Corps of Engineers. EnerProg by leaving coal ash in the creek bed, then subsequently filing the remaining creek bed with an impermeable cap will raise the bottom level of the creek bed. Therefore, this action by EnerProg requires a Section 404 permit because it raises the bottom level of a WOTUS.

Due to the foregoing, this court must vacate the EAB opinion and issue a declaratory judgment that once the MEGS ash pond is no longer in use as a waste treatment system it is in fact part of Fossil Creek, making it a WOTUS. This court should then order EnerProg to acquire a Section 404 permit to fill the Fossil Creek bed with an impermeable cap.

CONCLUSION

For the reasons set forth above, FCW respectfully asks this court to 1) DECLARE the Progress CACA requirements are appropriate considerations for MEGS NPDES permitting, 2) DECLARE the EPA has no jurisdiction to determine appropriate requirements of State Law in NPDES permitting, 3) DECLARE the April 25, 2017 Notice suspending the final 2015 ELGs was unlawful and the 2015 ELGs are still effective, 4) DECLARE the EPA can rely on BPJ to require zero discharge of coal ash wastes, 5) VACATE the July 21, 1980 suspension in the

EPA's WOTUS rule and DECLARE the May 19, 1980 rule effective immediately, and 6) VACATE the EAB's ruling that closing and capping the MEGS ash pond does not require a CWA Section 404 permit, and DECLARE capping the ash pond requires a CWA Section 404 permit.

Respectfully submitted,

Team #34