17-000123 and 17-000124

United States Court of Appeals

FOR THE TWELFTH CIRCUIT

Case Nos. 17-000123 and 17-000124

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

ENERPROG, L.L.C.,
Petitioner,
and

FOSSIL CREEK WATCHERS, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

BRIEF FOR ENERPROG, L.L.C.

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JURISDICTIONAL STATEMENT

The Environmental Appeals Board ("EAB") of the United States Environmental Protection Agency ("EPA") acquired subject-matter jurisdiction of the underlying controversy through 40 C.F.R. § 124.19 (2017). This section states, in relevant part, "[a]ppeal for a RCRA, UIC, NPEDES, or PSD final permit decision issued under § 124.15 of this part . . . is commenced by filing a petition for review with the Clerk of the Environmental Appeals Board . . ." 40 C.F.R. § 124.19(a)(1) (2017). This controversy arose after EPA issued a National Pollutant Discharge Elimination System ("NPDES") permit to EnerProg, L.L.C. EnerProg and Fossil Creek Watchers ("FCW") filed petitions for review of the permit under 40 C.F.R. § 124.19, thereby giving the EAB subject-matter jurisdiction over the controversy. Rec. at 6. EnerProg and FCW each sought judicial review of the subsequent EAB decision and thus filed petitions with this Court seeking review. *Id.* Section 509(b) of the Clean Water Act ("CWA") states that

> [r]eview of the Administrator's action . . . in issuing or denying any permit under section 1342 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

33 U.S.C. § 1369(b)(1) (2012). Section 1342 governs the issuance of NPDES permits; because EnerProg and FCW both seek review of the NPDES permit and either reside or transact business within this Court's judicial district, this Court maintains appellate jurisdiction. The EAB decision was a final order that disposed of all parties' claims. Rec. at 2.

STATEMENT OF THE ISSUES

I. Were the State of Progress conditions that required EnerProg to close and remediate the ash pond appropriately included in the final NPDES permit? Specifically,

a. Was EPA compelled to include all conditions present in the State of Progress certification, regardless of those conditions' consistency with CWA section 401(d)?

b. Assuming the above question is open to EPA and this Court, are conditions requiring EnerProg to close and remediate the ash pond "appropriate requirements of State law" as required by CWA section 401(d)?

II. Did the April 12, 2017, EPA Notice have the stated effect of suspending future compliance deadlines for the Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry?

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

IV. May the NPDES permit cover EnerProg's discharges into the MEGS ash pond when a 1980 EPA stay eliminating manmade wastewater treatment systems from the regulatory definition of waters of the United States exists?

V. Under section 404 of the Clean Water Act, does the ash pond closure require a permit when fill material is discharged into a body of water that may not fall under the definition of waters of the United States?

STATEMENT OF THE CASE

Petitioner EnerProg, L.L.C., is an energy production company dedicated to providing customers with reliable and affordable energy while maintaining environmental standards. As a part of these environmental standards, EnerProg must comply with a permit program to ensure its compliance with environmental standards. Rec. at 6. On January 18, 2017, EPA issued a renewed National Pollutant Discharge Elimination System ("NPDES") permit for EnerProg's Moutard Electric Generating Station (MEGS), a 745-megawatt plant. *Id.* MEGS is subject to the

2015 Steam Electric Power Generating Effluent Limitation Guidelines and the EPA Steam Electric Power Generating Point Source Category regulations. *Id.* at 7. MEGS has installed a scrubber system to decrease the amount of NOx and SOx. *Id.* Fossil Creek was dammed in 1978 to create the Moutard Reservoir, a main discharge point for wastes that adheres to current environmental regulations. *Id.* Fossil Creek does not discharge to the Moutard Reservoir, but is a perennial tributary for Progress River. *Id.* The reservoir is used for cooling systems, boiling water, transporting ash, and drinking water. *Id.* at 7-8.

There are five outfalls operated by the facility: outfall 001, outfall 002, internal outfall 008, internal outfall 009, and outfall 002A. Rec. at 7-8. Outfall 001 is a cooling tower that discharges into the reservoir less than once a year. *Id* at 7. Outfall 002 is an ash pond treatment system that discharges into the reservoir and contains bottom ash, fly ash, flue gas desulfurization wastewater, coal pile and storm water runoff, cooling tower blowdown, and other low volume wastes. *Id* at 7-8. Internal outfall 008 is a fly ash and bottom ash transport water system that discharges into the ash pond and the cooling tower blowdown cycles through outfall 002 into the reservoir. *Id* at 8. Internal outfall 009 handles the discharge from the flue gas treatment that discharges into the reservoir after cycling through outfall 002. *Id* at 8. Finally, outfall 002A is a new retention basin that will only accept solids upon completed construction, before the wastewater is discharged into the reservoir via outfall 002. *Id* at 8.

The permit at issue here was a renewal for MEGS in compliance with section 402 of the Clean Water Act and allowed EnerProg to continue discharging coal ash transport wastes into the Moutard Reservoir. Rec. at 6. The permit included new conditions for MEGS under the Progress Coal Ash Cleanup Act, including building a new retention pond and ceasing operation of, dewatering, covering, and capping the ash pond all within the next three years. Rec. at 10. The

first step, ceasing operation of the ash pond, must be completed by November 1, 2018. *Id.* Currently, the Best Available Technology ("BAT") for bottom and fly ash is zero discharge and the toxic pollutants are zero liquid discharge. *Id.* at 9. The Board found, yet did not explain, that MEGS is capable of meeting these requirements by November 1, 2018. *Id.*

EnerProg and FCW each took issue with the permit as granted and filed petitions for review with the EAB, each of which were denied. Rec. at 6. First, the EAB found that including the Progress conditions requiring the capping and closing of the ash pond is permissible because the condition is related to surface water quality and state conditions may be included in federal permits. *Id.* at 10-11. Second, the EAB found that EPA could rely on Best Professional Judgemnt because there is no "practical effect on the permit requirement" and some pollutants are not directly covered in older effluent guideline limitations. *Id* at 11. Third, the EAB noted that the postponement of the compliance deadline was ineffective because the effective date of the 2015 ELG's has already passed. *Id* at 11-12. Fourth, the EAB found that outfall 008 does not require a permit because it is an exception under the Clean Water Act and a stay from 1980 exists allowing the manmade body of water to be used as a wastewater pond without a permit. *Id.* at 12. Finally, the EAB said closing and capping the ash pond does not require a 404 permit because discharges to the pond do not require 402 permit. *Id* at 13.

SUMMARY OF THE ARGUMENT

EPA possesses authority to review state certification conditions and is thus not required to include all such conditions without regard for their consistency with the CWA. While section 401 of the CWA states that EPA "shall" include requirements of state law, the statutory text importantly notes that EPA is required to include only "appropriate" requirements of state law, not merely any condition the state offers for inclusion. 33 U.S.C. § 1341(d) (2012). An

appropriate requirement of state law would be one that furthers the objectives of the CWA and upholds appropriate water quality standards. Therefore, an inappropriate water quality standard would be one that either does not serve these purposes or one that is diametrically opposed to the CWA. Because inappropriate requirements of state law are possible, an entity needs to possess the authority to deny inappropriate conditions so that these inappropriate conditions do not become included in final permits and thus take on the force of federal law. Because only the state and EPA have authority over the permit before it is finalized, and because the state cannot be responsible for determining when its own conditions are inappropriate, EPA must then retain some authority regarding review and modification of state certification conditions. At any rate, EPA reads section 401 of the CWA to mean that it possesses this authority. As this is a permissible construction of a statute that EPA is empowered to administer, this interpretation deserves *Chevron* deference from reviewing courts.

Moreover, these particular conditions are not appropriate requirements of state law because they do not adhere to Supreme Court case law regarding what an appropriate requirement of state law is. In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, the Court held that a requirement of state law is appropriate under the CWA as a water quality standard if it both sets out the designated uses of the water at issue and ensures compliance with water quality criteria necessary to maintain that designated use. 511 U.S. 700, 712 (1994). The State of Progress conditions do neither and thus fail as water quality standards and thereby as appropriate requirements of state law. Additionally, the certification conditions here do not simply set out a standard for EnerProg to follow or establish criteria to abide by. Instead, Progress required the complete shutdown of EnerProg's activity. This amounts to an overreaching condition enacted by Progress as no water quality standard was enacted, only a

directive requiring complete cessation of the activity. The fact that closure of the ash pond may indeed lead to state law and the CWA being followed is not dispositive on its own, as the Court has been clear in stating what an appropriate requirement of state law must contain to be valid.

Furthermore, the April 12, 2017, EPA Notice suspending future compliance deadlines for the Final Effluence Limitation Guidelines for the Steam Electric Power Generating Industry was effective because the earliest compliance date under the new limitations had not yet passed. In the decision below, the EAB took for granted the fact that EPA could not postpone the effective dates with the Notice. This was improper, as at least one circuit court of appeals has held that EPA can postpone compliance dates after the stated effective date has passed. *See Nat'l Res. Def. Council v. E.P.A.*, 749 F.3d 1055, 1061 (D.C. Cir. 2014). Also, the EAB failed to consider the possibility that Congress intended the term "effective date" to mean compliance dates in the Administrative Procedure Act, which EPA relied upon in postponing the compliance dates. Again, this was improper because the ordinary meaning of "effective date" typically means when a rule goes into effect and actually becomes applicable and must be adhered to, which describes a compliance date more so than an effective date. At least one circuit court of appeals has held in a similar case that Congress intended "effective date" to mean the first date of required compliance. *See Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004).

The plain language of section 1342(a)(1) of the Clean Water Act provides that a section 402 permit must be based on either relevant effluent limitation guidelines or best professional judgment ("BPJ"), with the guidelines taking precedent. EPA is attempting to use both rules on the same permit. However, the relevant guidelines are applicable to all aspects of the permit and there is applicable best available technology ("BAT") which intensifies the fact that EPA should not be using BPJ. The assessments with the effluent limitation guidelines and the BAT are a fully

functional assessment for this permit. The relevant toxic discharges into the reservoir was also never stated to be enough to cause harm where EPA has authority to step in and use BPJ. Thus, EPA may not use BPJ for this permit.

The term "waters of the United States" has a long, detailed definition that is very specific for the intention of the act. In this definition, there are a few explicit exceptions, including for wastewater treatment ponds made from impounded waters. There is an exception to this exception, but that was stayed in 1980 by EPA. Attempting to claim the ash pond as a body of water of the United States is in direct contradiction of the definition and the 1980 EPA stay. Also, there is no valid reason to disrupt the 37-year-old stay.

When the ash pond is found not be a body of water of the United States, the capping of the ash pond does not require a section 404 permit under the Clean Water Act. In order to require a section 404 permit, there must be a section 402 permit and those only apply to waters of the United States. Even if the ash pond is a body of water of the United States, the intention was never to discharge wastes into Fossil Creek before it was dammed as the ash pond. Thus, there should be no applicable permit to the ash pond.

STANDARD OF REVIEW

This Court should review the legal conclusions made by the EAB *de novo*. Questions of law decided by a lower court should be reviewed *de novo* with no deference given to the lower court's conclusions of law. *See Highmark Inc., v. Allcare Health Mgmt. System, Inc.*, 134 S. Ct. 1744, 1748 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable *de novo'* . . . ."); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Each of the issues certified for review by this Court are predicated on issues of federal law regarding EPA and the NPDES permit. Therefore, all issues are questions of law and should be reviewed *de novo*. However, when

appropriate, this Court should grant EPA deference in interpreting statutory language that EPA is empowered to interpret and act upon. This deference was established in the landmark *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* Supreme Court case. 467 U.S. 837, 842-44 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.") Specifically, this deference is relevant to and discussed in greater detail in section (I)(a) of this brief.

ARGUMENT

I. The Final NPDES permit improperly included conditions that required EnerProg to close and remediate the coal ash pond.

The State of Progress conditions that mandated closure and remediation of the EnerProg coal ash pond should not have been included in the final NPDES permit granted by EPA. Section 401 of the Clean Water Act prohibits the discharge of any pollutants into navigable waters of the United States without first obtaining a permit from EPA. 33 U.S.C. 1341 (2012). Before applying for a permit, the applicant must first seek certification from either the state in which the discharge originates or, when appropriate, the "interstate water pollution control agency" that maintains jurisdiction over the waters at the origin point of the discharge. 33 U.S.C. 1341(a)(1) (2012). By granting this certification (the state or agency may deny certification) the state or agency is certifying that the discharge will comply with sections 1311, 1312, 1313, 1316, and 1317 of Title 33 of the U.S. Code, all of which govern effluent limitations and water quality standards. *Id.* The final permit must include effluent limitations, monitoring requirements, and "any other appropriate requirement of State law" that aim to guarantee the applicant will comply with the limitations mandated by the Clean Water Act. *Id.*

Here, the State of Progress issued a certification to EnerProg that included commands to (a) completely terminate operation of EnerProg's coal ash pond by November 1, 2018, (b) completely dewater the ash pond by September 1, 2019, and (c) cover the dewatered ash pond with an impermeable cap by September 1, 2020. Rec. at 10. The State of Progress claimed these directives were included in order to comply with the state Coal Ash Cleanup Act ("CACA"), a state-enacted law that requires assessment, closure, and remediation of substandard coal ash disposal facilities within the state. Rec. at 8-9. For reasons set forth below, the inclusion of these conditions in the EPA permit granted to EnerProg was improper.

a. EPA is not required to include every condition proffered by the state in its permits and is thus empowered to review the permissibility of state conditions.

When an EPA permit applicant seeks the necessary state certification from the appropriate governing state, the state may include additional conditions for the applicant to adhere to so that the applicant remains in compliance with the relevant state law as well as the CWA. 33 U.S.C. § 1341 (2012). However, EPA was not required to include every condition offered by the State of Progress in the final NPDES permit without consideration of whether the condition was consistent with the CWA and its purposes. The certification section of the CWA labeled "Limitations and monitoring requirements of certification" states

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, 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.

(emphasis added). 33 U.S.C. 1341(d) (2012). The Supreme Court has long held that each and every word in a statutory provision should be given effect so that no word or phrase is deemed

"mere surplusage" in Congress's statutory scheme. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). The Court refers to this "cardinal principle" as the canon against surplusage and holds that courts should, when appropriate, presume that Congress did not extraneously or carelessly include a word or phrase in the statute but instead purposefully and knowingly included it so that it may have an individualized purpose and affect the surrounding statutory language. *See Williams v. Taylor*, 529 U.S. 362, 364 (2000).

Here, this Court should take note of Congress's inclusion of the word "appropriate" as a modifier for what type of requirements of state law may be included in EPA permits. 33 U.S.C. § 1341(d) (2012). Congress did not enact a blanket commandment that forces EPA to include each and every state certification condition in all EPA permits when state conditions are offered. Instead, Congress instructed EPA that only "appropriate" requirements of state law should be included in permits. *Id.* Due attention must be given to state conditions to ensure they point toward achieving the CWA's purpose of satisfying water quality standards.

The presence of "appropriate" before "requirement of State law" should not be assumed to be superfluous or mere surplusage on the part of Congress, but instead should be given its normal, common-sense meaning that fits with its place in the statutory language. Merriam-Webster defines appropriate as "especially suitable or compatible." MERRIAM-WEBSTER (2017), https://www.merriam-webster.com/dictionary/appropriate. Among the statutory text of section 1341, "appropriate" would indicate that only requirements of state law that are compatible with the CWA's requirements or suitable to achieve the act's goals should be included.

Importantly, this means that someone must act as an arbitrator in determining which requirements of state law are appropriate and may be included and which are inappropriate and must be excluded. In other words, if a condition included by a state in its certification is wholly

inappropriate, someone must take the specific action to deny that condition and remove it from the final EPA permit. For example, if a state included a condition that was entirely irrelevant to the CWA, such as a collective bargaining requirement for the applicant's employees, or even a condition that operated in direct opposition to the CWA, such as a requirement to dispose of all waste products in a specific river, surely these requirements would be inappropriate and would not belong in a CWA permit. However, even if everyone agreed the state should not have included those conditions and they should not be present in the permit, someone with the authority to do so must take the decisive action of removing it from the state certification or withholding it from the final EPA permit. Because only two parties have direct authority over permits before they are issued, those parties being the certifying state and EPA, and one of those parties is the entity including the potentially inappropriate condition, EPA must retain the authority to review and modify or even deny certain state conditions as needed. Any other interpretation ignores Congress's inclusion of the term "appropriate" in the CWA and forces EPA to include potentially hazardous or inconsistent conditions in its permits.

Additionally, EPA is permitted to decline to grant a permit to an applicant even after the applicant has received an appropriate state certification. Section 402 of the CWA states that "No permit shall issue (A) if the Administrator . . . objects in writing to the issuance of such permit . . ." 33 U.S.C. § 1342(d)(2) (2012). Under this section, EPA may unilaterally deny an applicant whether they have already obtained state certification or not. Therefore, it seems odd to say that the CWA both grants EPA authoritative discretion to deny permits in whole but simulatenously does not permit EPA to review, modify, or deny individual state conditions before placing them in a permit. Reading the two sections together, it makes far more sense to presume that Congress intended to give EPA the authority to review state conditions for appropriateness before

including them in permits than it does to say that Congress thought EPA could be trusted to deny entire permits outright but not to make determinations regarding whether a state condition was appropriate in light of the CWA and its purposes. Instead, the term "appropriate requirement of state law" from section 1341 should be read together with section 1342 to say that Congress entrusted the lesser included authority to review individual state conditions against the backdrop of the CWA in its grant of wide authority to EPA to deny whole permits on its own accord.

Moreover, EPA's construction of section 1341 should be given deference as an appropriate construction of a statute it is responsible for executing. In the landmark Supreme Court case *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court established a two-part test for determining when an executive agency's interpretation of a statute it is empowered to administer should be given greater weight than the standard *de novo* review of legal questions. 467 U.S 837, 842 (1984). First, a court should look to whether Congress has spoken directly on the issue, such as in the statute's legislative history or even in other statutes. *Id.* If congressional intent is clear from any legislative source, the court's analysis ends there and Congress's intent controls. *Id.* However, when congressional intent is unclear, the court then asks whether the agency's interpretation of the statute is predicated upon a "permissible construction of the statute." *Id.* at 843.

Here, nothing in the CWA's legislative history nor any other provision of the CWA speaks to what Congress meant when it said only "appropriate" requirements of state law should be included in EPA permits. 33 U.S.C § 1341(d) (2012). Therefore, the focus moves onto whether EPA's interpretation of the statute is based upon a permissible construction. As established in both the record and EPA's arguments before the EAB, EPA holds that it has jurisdiction to consider the permissibility of state conditions. Rec. at 3. Even if this Court does

not believe the above arguments regarding why the statutory text allows and even requires EPA to review state conditions for appropriateness, this Court should nonetheless hold that EPA's construction of section 1341 rests upon a "permissible construction of the statute." *Chevron*, 467 at 843. Again, nothing in the legislative history nor the remainder of the CWA prohibits the reading of section 1341 that EPA advocates for. Therefore, based on the "appropriate" language in section 1341, EPA relied upon a permissible construction when it found that it has the responsibility of reviewing state conditions before including them in permits.

Respondent FCW may argue that this interpretation is inconsistent with some circuit courts of appeals who have adjudicated this issue. However, not only are these courts' decisions not binding upon this Court, they also rely upon the same misinterpretation. In *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, the Court reviewed a permit issued by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act ("FPA"). 466 U.S. 765, 770 (1984). The relevant portion of the FPA stated that "licenses issued under that section 'shall be subject to and contain such conditions as the Secretary of the department . . . shall deem necessary for the adequate protection and utilization of such reservations." *Id.* at 772. FERC argued that this language did not compel it to "accept without modification" any conditions the secretary proffered. *Id.* at 770. However, the Court held that "[t]he 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." *Id.* at 772.

In a CWA case very similar to the one before this Court, the Second Circuit relied upon *Escondido* to hold "the Commission [FERC] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401 [§ 1341]." *American Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 110-111 (2d Cir. 1997). In a subsequent

case before the D.C. Circuit, EPA then relied upon *American Rivers* to hold that "it 'did not have the ability to amend or reject conditions in a [state's] CWA 401 certification'" which the court accepted without analysis. *Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 10 (D.C. Cir. 2011). Lastly, the Ninth Circuit has held that "once the state added the additional conditions, EPA was required to incorporate those conditions into the final permit and lacked authority to reject them." *Ackels v. U.S. E.P.A.*, 7 F.3d 862, 867 (9th Cir. 1993). However, the *Ackels* court seemed to simply assume this conclusion and only cited section 1341 and the corresponding Code of Federal Regulations section as support.

Both courts of appeals who have considered the issue and relied upon *Escondido* to resolve it relied upon mistaken interpretations of *Escondido* when they did so. The relevant statute in *Escondido* only gave discretionary authority to the party adding the additional conditions, the Secretary of Interior in that case. In other words, the agency responsible for reviewing and granting permits, FERC in that case, had no statutory support for its proposition that it could review and modify the additional conditions. The FPA simply stated that FERC "shall be subject to" the secretary's additional conditions and gave no discretion to FERC in reviewing these conditions. *Escondido*, 466 U.S. at 772. On the other hand, in the present case before this Court, both the party adding conditions and the party reviewing the conditions and granting permits are given discretion by the statute. Section 1341 allows the state to include additional conditions in its certification to ensure compliance with state law, but also requires EPA to include only "appropriate requirements of state law" rather than simply saying "all requirements" or more stringent language like the FPA used in *Escondido*. 33 U.S.C. § 1341(d) (2012). Therefore, unlike *Escondido* and the courts of appeals that have relied thereupon, this

Court should find that EPA is able to review state conditions for appropriateness because of the more permissive language used in the CWA.

b. The State of Progress certification conditions are not appropriate requirements of state law because they require overreaching, unnecessary action rather than compliance with state water quality standards as the CWA calls for.

EnerProg concedes that it was required to obtain a certification from the State of Progress before continuing to operate the Moutard Electric Generating System ("MEGS"). However, the State of Progress exceeded its authority under the CWA when it included certification conditions that required EnerProg to close and remediate the coal ash pond because these conditions are not reasonably based on complying with state water quality standards or effluent limitations. Importantly, a state does not possess unbridled authority to enact restrictions upon the applicant's activity. The state may only regulate under section 1341 of the CWA in order to "ensure that the project complies with 'any applicable effluent limitations and other limitations under [33 U.S.C §§ 1311, 1312]' or certain other provisions of the Act, 'and with any other appropriate requirement of State law.'" *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994). In *PUD No. 1 of Jefferson County*, the State of Washington included the challenged certification condition which required the applicant to maintain a minimum stream flow requirement (100 – 200 cubic feet per second) in order to comply with state water quality standards. *Id.* at 709. Petitioners, a city and local utility district trying to build a hydroelectric project on a state river, challenged the condition, arguing it was not an "appropriate requirement of state law" as required by section 1341 because the condition did not relate to the project's potential discharges but instead placed more broad limitations on the entire general project. *Id.* at 711. The court read section 1341(d) to grant states authority to regulate not only the discharge but the entire activity and its compliance with the CWA and state law requirements as long as the

implemented conditions relate to water quality standards. *PUD No. 1 of Jefferson County*, 511 U.S. at 711-12. The Court held that once the threshold condition of the possibility of a discharge is satisfied, the state may include conditions to ensure the activity, not only the discharge, will comply with state and federal water quality standards. *Id.* The Court held that "[s]tates may condition certification upon any limitations necessary to ensure compliance with state water quality standards or 'any other appropriate requirement of State law . . . .'" *Id.* at 713-714.

Having found that states may regulate beyond just the discharge in certain scenarios, the Court then turned its analysis to the question of whether the minimum flow requirement was appropriate. In determining what constituted an "appropriate requirement of State law" as used in section 1341(d), the Court looked to another section of the CWA for guidance. The Court read CWA section 303 to say that a state water quality standard is appropriate if it pertains to both the designated uses of the navigable waters at issue and the water quality criteria for those waters according to the stated uses. *Id.* at 714 (citing 33 U.S.C. § 1313(c)(2)(A)). The Court held that both the "designated use" prong and the "water quality criteria" prong must be met by the applicant in order for the project to comply with the applicable water quality standards. *PUD No. 1 of Jefferson County*, 511 U.S. at 715. Similarly, a valid water quality standard, and thereby an appropriate requirement of state law, must also focus on both the navigable waters' designated use and water quality criteria. *Id.*

Here, not only has the State of Progress not stated what the designated purposes of the navigable waters it seeks to protect are, it has not specifically stated which "navigable waters" it is trying to protect and regulate based upon. The State included the closure and remediation conditions in order to force EnerProg into compliance with the state-enacted Coal Ash Cleanup Act ("CACA") that requires the "assessment, closure, and remediation" of coal ash ponds like

the one at issue here. Rec. at 8. The purpose of CACA 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." *Id.* at 8-9. While closing and remediating the ash pond may accomplish the goals of CACA, these are not appropriate requirements of state law nor valid water quality standards because the test for appropriateness does not turn on whether the condition furthers state goals. The Supreme Court has laid out exactly what a certification condition must pertain to in order to be a valid water quality standard and thus an appropriate requirement of state law under the CWA. *PUD No. 1 of Jefferson County*, 511 U.S. at 714-15. This controversy is unlike *PUD No. 1 of Jefferson County* because there, the State of Washington had designated the river as a fish habitat and the minimum flow requirement was established in order to maintain the fish's ability to migrate and reproduce there. *Id.* at 713-14. The State of Progress has offered neither a designated use of the waters it claims to be protecting nor the water quality criteria necessary to maintain such designated use, meaning it cannot satisfy the Court's framework for appropriate water quality standards.

Furthermore, it is important to emphasize that a requirement of state law is not automatically appropriate simply because the condition ensures compliance with the CWA and state law. Effluent limitations are determined according to the best available technology economically achievable ("BAT"). The BAT for bottom ash transport water like the type here is "zero discharge of pollutants." 40 C.F.R. § 423.13(k)(1)(i) (2017). In all likelihood, closing and remediating the ash pond would likely result in this zero discharge requirement being satisfied.

However, potential compliance with the stated goal is not the test by which to judge the appropriateness of a certification condition. That test is laid out in extensive detail *supra* and is guided by considerations beyond a simple determination of whether the applicant could become

compliant with the goal. These particular conditions are inappropriate because they are overreaching and do not enact water quality standards as required by both the CWA and Supreme Court precedent. Instead, the certification requires EnerProg to totally cease operation of the coal ash pond by November 1, 2018, less than two years after the permit was issued. Rec. at 6. This amounts to a de facto injunction of EnerProg's activity by the State of Progress that is essentially immune from review, as "Progress law does not provide for review of such certifications in the state's courts." Rec. at 11. Rather than setting a standard for EnerProg to follow, Progress put an end to the activity altogether. Again, ceasing the activity will likely achieve the stated goal of zero discharge, but that alone is not dispositive of the condition's appropriateness. In *PUD No. 1 of Jefferson County* the state condition required the city and utility district to maintain a minimum flow requirement of 100 – 200 cubic feet per second, depending on the time of year. 511 U.S. at 709. Had the State of Washington simply included a condition saying that the dam must be closed within two years, it would have certainly had the end result of maintaining the minimum flow requirement, yet would likely have been too broad and overreaching. Here, Progress could have relied upon the 2015 revised Effluent Limitation Guidelines for the Steam Electric Power Generating Source Category to include a condition requiring EnerProg to limit its activities to "no discharge of pollutants," the BAT regarding bottom ash transport water. 40 C.F.R. 423.13(k)(1)(i). Such a condition would be appropriate, as it protects the water quality standard, ensures that the least amount of effluent will discharge into public waters, and still permits EnerProg to operate as stated in the permit. In short, including a zero discharge condition would have given EnerProg at least a chance to comply with the BAT determination itself. By including a condition requiring closure, Progress met that goal, yet in a dangerously and unnecessarily overreaching manner.

II. The Environmental Appeals Board erred in not analyzing the text of the Administrative Procedure Act to determine its practical meaning and effect.

The EAB held below that EPA could not postpone the compliance deadlines for the 2015 Steam Electric Power Generating Point Source Categories Effluent Limitation Guidelines because the Administrative Procedure Act ("APA"), which EPA relied upon in delaying the compliance deadlines, only allows agencies to extend effective dates, not compliance dates. Rec. at 11. However, the EAB performed no analysis of the term "effective date" as used in the APA and simply concluded that EPA lacked authority to make the stated extension of compliance dates. *Id.* at 11-12. This issue is not as clear as the EAB thought it to be, as at least once circuit court of appeals has held that "effective date," as used in the Code of Federal Regulations, actually indicates the required date of compliance. *See Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004).

On November 3, 2015, EPA issued a final rule that included more stringent effluent limitation guidelines and standards for the steam electric power generation point source category. 80 Fed. Reg. 67,838 (Nov. 3, 2015). The earliest compliance deadline under these new limitations is November 1, 2018, for fly ash transport water, bottom ash transport water, flue gas desulfurization wastewater, flue gas mercury control wastewater, and gasification wastewater. *Id.* However, on April 12, 2017, EPA issued a Notice that postpones the compliance dates of these limitations in order to consider the costs of the new limitations upon facilities, as EPA received seven individual petitions from interested parties for review of the new limitations. 82 Fed. Reg. 19,005 (Apr. 25, 2017). EPA based its authority to extend the compliance dates on the APA, which allows an agency to alter its action before the "effective date." 5 U.S.C.A. § 705 (2012)

The APA states, in relevant part, "[w]hen 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.A. § 705

(2012). This portion of the APA plainly only includes the term "effective date" and does not mention the postponement of compliance dates in any manner. However, it is largely unclear what Congress intended by "effective date," as the term is not defined in this section nor in the APA's definitions section. 5 U.S.C.A. §701. The Supreme Court has long held that courts should rely upon the ordinary definition of a word or phrase that conforms with common sense when interpreting vague statutory terms. *See Muscarello v. United States*, 524 U.S. 125, 128 (1998); *Nix v. Hedden*, 149 U.S. 304, 305 (1893). In *Muscarello*, the Court relied upon the Oxford English Dictionary, the King James Bible, and *Robinson Crusoe* in defining "carry" so that an individual operating a vehicle "carries" a weapon while the weapon is inside the vehicle he is driving. *Muscarello*, 524 U.S. at 128-30. In *Nix*, the Court was faced with the question of whether a tomato should be classified as a fruit or vegetable for the purposes of the Tariff Act of 1883. *Nix*, 149 U.S. at 306. The witnesses called at trial established that no special definition had developed for either fruit or vegetable in trade or commerce that solved the issue at hand. *Id.* Because no legal or commercial definition was apparent, the Court found that the terms "must receive their ordinary meaning." *Id.* at 306-07. Ultimately, the Court held that "in the common language of the people," tomatoes are vegetables because they are more generally served "at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert." *Id.* at 307.

Here, the EAB should have performed at least as cursory a review as this to determine whether "effective date" encompassed compliance dates or only stated effective dates. Merriam-Webster defines effective date as "the day when a law, rule, contract, etc., starts to be used." MERRIAM-WEBSTER (2017), https://www.merriam-webster.com/dictionary/effective%20date. Similarly, Black's Law Dictionary states that that the effective date is the "[d]ocumented date

when something is due, like a report or results, *or when something is applicable in effect*, like a law, or a restriction, or a sale price." (emphasis added) BLACK'S LAW DICTIONARY (2017), https://thelawdictionary.org/effective-date.

Importantly, the Second Circuit Court of Appeals has interpreted "effective date" in the Code of Federal Regulations to actually mean the compliance date. *Abraham*, 355 F.3d at 196. In *Abraham*, the court was tasked with determining when section 325 of the Energy Policy Conservation Act ("EPCA") as amended by the National Appliance Energy Conservation Act ("NAECA") took effect. *Id.* at 184. After analyzing the original EPCA in light of the NAECA and its stated purposes, the court held that "[t]he term 'effective date' for the purposes of modifying the Code of Federal Regulations . . . is used only to indicate the date by which manufacturers must come into compliance with the prescribed standards." *Id.* at 196. The Second Circuit thus found that although the statute at issue used the term "effective date," Congress actually intended the term to indicate only the date by which manufacturers must become compliant with the new standards. *Id.*

Moreover, the D.C. Circuit Court of Appeals has held that EPA is empowered to extend compliance dates of emissions standards even after the stated effective date has passed. *See Natural Resources Defense Council v. E.P.A*, 749 F.3D 1055, 1061 (D.C. Cir. 2014). The court held that EPA must offer both a new effective date and new emissions standards in order to effectively extend compliance dates. *Id.* Here, EPA has not yet introduced new emissions standards regarding the Steam Electric Power Generating Point Source Categories Effluent Limitation Guidelines, but *Natural Resources Defense Council* nonetheless stands for the principle that the question of whether EPA may extend compliance dates after the stated effective date has passed is not nearly as well-settled as the EAB made it appear.

In light of the common-sense meaning of "effective date" and the courts of appeals decisions that have addressed this issue, this Court should similarly find that "effective date" was included in the APA to ensure that agencies cannot alter or extend dates once the limitation has substantively gone into effect, or once the compliance date has passed. However, at the very least, this Court should hold that the EAB did not perform an adequate review of the APA and its terms, notably "effective date," before holding that EPA could not extend the effective date. The question is clearly not the well-settled principle of law that the EAB took it to be and performed no analysis upon. The EAB's analysis and holding should thus be reversed under any standard of review, as it plainly did not rely upon any construction of law, let alone a proper one.

III. The Environmental Protection Agency may not rely on BPJ because it can only be used in the absence of effluent limitation guidelines and there are relevant guidelines present.

The Court should not allow EPA's reliance on the best professional judgment ("BPJ") rule because the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines are in place and applicable. According to section 1342(a)(1) of the CWA, EPA must first rely on effluent limitation guidelines before it can use bPJ. *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 859 F.2d 156 (D.C. Circ. 1988); 33 U.S.C.S. § 1342(a)(1) (LexisNexis 1972). On top of this, the CWA requires that a 402 permit be either effluent limitations guidelines or a case-by-case analysis under BPJ. 33 U.S.C.S. § 1342(a)(1) (LexisNexis 1972). Under the BPJ rule, the Supreme Court has also found that toxicity can only be addressed as a concern if the toxicity is enough to kill marine life. *Nat. Res. Def. Council*, 859 F.2d at 156. But when writing a permit based on BPJ and not effluent limitation guidelines, the Court has found that EPA must base the permit on the available technologies, costs versus benefits, engineering feasibility, best management practices, and other environmental effects. *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006). When there is no fully

functional assessment or a "textual bar", BPJ may be used. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 204 (4th Cir. 2009); *Riverkeeper, Inc v. U.S. EPA*, 358 F.3d 174, 203 (2d Cir. 2004).

In *Natural Resource Defense Council*, the court looked at eight main issues. *Nat. Res. Def. Council*, 859 F.2d at 165. These issues included challenges to EPA's regulations under National Environmental Policy Act ("NEPA"); regulations that regarded transfer under the National Pollutant Discharge Elimination System ("NPDES") permits, toxicity permits, allowing the use of non-adversary panel procedures, issues regarding newly relaxed regulations, defining permit limits, a defense for noncompliance, and continuance of old permits. *Id*. The court found that the CWA did not authorize EPA's imposition of non-water quality permit conditions. *Id* at 169. The court also upheld challenged regulations where EPA's interpretation was reasonable and Congress' intent was unclear under a *Chevron* analysis. *Id*. When addressing the challenged regulation regarding whether EPA has veto power, the court found that EPA must adhere to the technology-based standards even if the rule has not gone through notice-and-comment rulemaking but only in the absence of effluent limitation guidelines. *Id* at 182-83. The court also addressed the toxicity concerns when EPA stated that permit writers could write in limits based on toxicity. *Id* at 189. The court found that EPA could write in toxicity concerns but that it must follow the requirements of the CWA. *Id*. The court also found that toxicity is an attribute of the pollutants and therefore can be considered in the permits, but the permit will typically involve the percentage, type of toxic substance, and marine life that would be killed in a certain time period. *Id*. The court found most of the other issues irrelevant or not yet ripe for ruling. *Id* at 156.

In *Natural Resource*, EPA had promulgated regulations that were based on an ambiguous federal statute. That statute has not been changed, but has been clarified by case law. *Supra.* This

case law states multiple times that EPA can only use their BPJ in the absence of formally promulgated effluent limitations. In the present case, there is no ambiguous statute but instead formally promulgated effluent limitations – the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines. This program is a national program set out by EPA. *Natural Resource* also discussed the effects of toxicity and how that can be considered for BPJ but only when it is certain to kill marine life. In *Natural Resource*, the industry had marine life dying from the toxic chemicals released, but that is not alleged here. There is also no evidence in the record that drinking water levels are harmed even though the water is useable as drinking water. In the present case, there is a fully functional assessment measure set in place *and* a "textual bar." The Steam Guidelines are the assessment and provide adequate, functioning measures for the permit. BPJ is a secondary permit writing option, not the first.

Here, effluent limitation guidelines are in place, the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines. These guidelines have gone through the necessary process to become final as of November 3, 2015 and thus must be followed *first* before EPA can rely on BPJ. In this case, EPA decided to bypass these limitations and apply BPJ. But because these effluent limitations cover fly ash, partially for toxicity reasons, EPA must follow these first. These limitations cover types fly ash which is a type of coal ash waste transports and EnerProg's permit is covering their coal ash waste transports. Finally, the Clean Water Act says a permit can be issued under BPJ or effluent limitation guidelines, not both. When the statute states that either the guidelines *or* BPJ can be used, that is limiting language to imply only one can be used when writing the permit. Effluent limitation guidelines are in place so that eliminates the ability of EPA to use BPJ. Therefore, these limitations govern EPA's BPJ and must be overturned.

EPA may use the BPJ rule for toxicity concerns that may not be covered under the effluent limitations. For this to be implemented, there must be proof that the toxicity of the discharges is dangerous enough to kill marine life. But, there are two issues with using that logic in this case. First, the effluent limitation guidelines do not mention the level of toxicity of the chemicals in the discharge. The only mention is of "elevated levels of mercury, arsenic, and selenium. . ." Rec. at 9. While these chemicals are toxic, there is no proof that they are at levels to kill marine life. Second, there is no proof that there is marine life in the pond that EnerProg built to hold the coal ash discharge. Nor is there any evidence of marine life in the nearby ponds or waterways that may be affected. Without these aspects in play, EPA cannot rely on BPJ even for toxicity reasons.

Finally, this can lead to a public policy issue. If this permit were to be enforced as EPA is claiming, that would put an extra cost on EnerProg. While EnerProg is profitable enough to support this increased cost, other companies may not be that may be dealing with similarly situated discharges. Setting the standard that all companies must follow the judgment of the EPA administrator when there is already guidelines in place that the companies have likely prepared to follow would add extra costs, time, and unnecessary worry onto companies. Also, should the public utility commission approve EnerProg to recover these additional costs, that is passed onto customers. Customers should be protected and should not be forced to pay more for their electricity because EPA is bypassing their already-enacted laws to apply harsher standards on companies. Therefore, EPA should not be allowed to rely on BPJ to write a permit when there are relevant effluent limitation guidelines in place.

EPA and Fossil Creek Watchers may try to argue that the effluent limitations do not apply because the exact discharge is not defined in the limitations. But that does not matter here

because the rule states that EPA must follow the limitations if they are applicable. It is illogical and unfair to attempt to apply a secondary form of evaluation on a permit that is already controlled by another set of regulations. Also, if it is found that the guidelines do not explicitly apply, the Court has previously found that it is arbitrary and capricious to apply BPJ on a permit when there are effluent limitation guidelines handling the other, closely related aspects of the permit. *Riverkeeper*, 358 F.3d at 191. As noted above, the statute covers fly ash, a type of coal ash that Enerprog is receiving a permit to discharge into the designated coal ash pond. Because the statute covers the different forms of coal ash waste, the lack of an express statement that the general category with the narrower subcategories does not exclude the broader form from being covered. Therefore, EPA cannot rely upon BPJ.

IV. The ash pond discharges are not subject to NPDES permitting requirements because the waters of the United States rule has an exception for wastewater ponds.

This Court should find the effluent limitations under the NPDES permit do not apply here because there is an explicit exception for wastewater ponds. Section 122.2(b)(2) states "waste treatment systems, including treatment ponds . . . " are not waters of the United States. 40 C.F.R. § 122.2(b)(2)(i) (2012). There is an exception to this stating that this only applies to "manmade bodies of water which . . ." did not result from an impoundment of waters. 40 C.F.R. § 122.2(b)(2)(i) (2012). But a 1980 EPA order stayed this exception, allowing manmade bodies of water used as waste treatment ponds to be excluded from the definition of waters of the United States. 45 FR 48620 (July 21, 1980). This simply means that wastewater ponds are not subject to effluent limitations and permits because their purpose is solely for wastewater.

This exception should stand because the statute has explicit language for the issue here. Under *expressio unius*, when a statute states exactly what it wants, it can be read to exclude anything that is not listed. The exception is specific and simple: it states that ponds holding only

waste treatment water are not subject to effluent limitations. There was previously an exception to this, but the 1980 order excluded it and now the statute should be read specifically to exclude waste treatment ponds from effluent limitations. This is a 37 year stay that should not be modified now because there is no need to modify it, as the EAB noted. Rec. at 12. Finally, even if this stay was released, the later exception should not apply because the pond is not flowing back into the natural waters. It would also be wasteful to change the stay now because for the past 37 years many companies with waste treatment ponds have relied on this exception. It is evident from the statue, and purpose behind the statute, that the main point was to maintain the quality of water for local human and animal life. But the pond in question is not flowing into the other nearby waters constantly and is not a threat to human or animal life unless the humans or animals intentionally seek out the water. All waters may eventually flow back into each other, but it is far too expansive to make all waste treatment ponds with any potential of connecting to other bodies of water follow these stricter regulations when there are already functioning laws in place. Also, marine life is not stated to be present in this pond, eliminating that worry as well. The policy behind this is simple: these ponds do not directly impact the water ways that are defined as waters of the United States and are not harming humans or animals via consumption. Therefore, the limitations should not apply because the purpose of the statute and the express language both counteract with applying these strict regulations on this pond.

FCW may argue that the stay should be vacated because EPA did not follow the APA when enacting the stay. 5 U.S.C. § 553 (LexisNexis 1966). This section of the federal code lays out the guidelines for enacting an agency rule or regulation. Violation of this statue renders the rule invalid but EPA has not violated the rule. FCW is simply wrong when claiming that EPA did not follow these procedures because there is no concrete evidence in these accusations. One

of the issues FCW raises is the lack of the 30-day notice period, which is normally required under the APA when changing a rule. 5 U.S.C. § 553. But the APA also states that a rule relieving a restriction is not required to have the 30-day notice period. 5 U.S.C. § 553. This is likely because relieving a restriction does not burden individuals as much as increasing regulations would. The 1980 EPA stay is a relaxation on a regulation because the rule is relieving a restriction on an already-enacted exception to the rule.

Also, should it be found that the rule loses its validity, the pond is still not applicable as a tributary to waters of the United States. *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (Dist. of Ariz. 1975). Under the "sufficient nexus" test established in the case, if a tributary eventually flows into a larger body of water that is a water of the United States, then discharges into the tributaries must also have a permit. 33 U.S.C.S. § 1342 (LexisNexis 2008). There is no evidence to show that the pond flows directly into any tributary or other body of water. The statute also states that ditches are not a body of water of the United States, especially ditches that do not directly flow into water of the United States. 40 C.F.R. 122.2(b)(2)(iii). The rule later defines tributaries and does not include man-made waters and ditches under the exclusion noted above. 40 C.F.R. 122.2(b)(3)(iii). Because there is also an exception for the impoundment, that language should also apply to impoundments for wastewater ponds. Therefore, this Court should find that the effluent limitations are not applicable to this pond under the regulatory definition of waters of the United States.

V. The closure and capping plan does not require a permit because the CWA does not require permits for capping plans and the ash pond is not a water of the United States.

The Court should find that EnerProg's proposed ash pond closure and capping plan is not subject to a permit because the CWA does not state that a permit is required for capping plans. Section 404(f) of the CWA outlines the acceptable discharge of fill materials without a permit.

33 U.S.C.S. § 1344(f) (LexisNexis 1972). Section 404(f)(2) states that any discharge of fill material *into the waters of the United States* which it was not previously subject will require a permit. 33 U.S.C.S. § 1344(f)(2) (emphasis added).

Here, as stated above, the waste pond is not a body of water of the United States. Without this, there is no express language that requires a permit for the capping plan proposed by EnerProg. The permit program which EnerProg adheres to in order to close and cap the ash pond follows the necessary steps as noted in 33 USCS 1288(b)(4). These steps include following the necessary guidelines set, properly planning to mitigate the damage, cooperating with the surrounding regions if needed, and receiving the proper permits and grants. 33 USCS 1288(b)(4). Also, there are issues with the requirement of drying up the pond. This is simply a discharge pond, not a navigable body of water of the United States. Requiring a permit and changing the way the pond rests would not only financially hurt EnerProg, but that cost could be passed onto the customers. Covering and capping the pond is also a fairly reasonable environmental standard for how this issue should be handled, even if the deadline is too soon. Requiring stricter environmental standards on an existing practice (that is already environmentally friendly and reasonable for businesses), is not only a difficult move but unnecessary.

Also, even if the pond was found to be a water of the United States, this exception would still not apply because the pond was always intended to be a waste pond. The statute states that permits are required for discharging fill material *into* navigable waters that were not previously intended for dumping. But the pond was formed from tributaries, which EnerProg was not previously using to hold coal ash. It was only once the tributaries were dammed that it became used for coal ash discharge. Hence, under the rule in section 404(f)(2), EnerProg would only be discharging into navigable waters that was previously used for dumping before the capping plan

not before the waters were dammed. Therefore, no permit would be required even if the pond was considered water of the United States.

FCW may argue that a 404 permit should be required because this is a navigable water of the United States. But as noted above, this pond is not a part of the waters of the United States because it is a waste treatment pond and the EPA stay excludes such ponds. FCW may also argue that closing and capping counts as fill material, thus requiring a 404 permit. The EAB correctly pointed out that without the qualification as waters of the United States, there is no 402 permit and no 404 permit. Even if the closing and capping plan fit under the definition of changing the bottom elevation, waste treatment ponds are not subject to these regulations. Therefore, the Court should find that the 404 permit is not applicable to the closing and capping plan.

CONCLUSION

For the reasons stated above, EnerProg, L.L.C., respectfully asks this Court to reverse the findings made by the Environmental Board of Appeals of the Environmental Protection Agency.

SUBMITTED,
BY COUNSEL,

Team 38
Attorneys for EnerProg, L.L.C.

CERTIFICATE OF SERVICE

I, Team 38, counsel for the EnerProg, L.L.C, do hereby certify that I served the contents of this filing on counsel for both Fossil Creek Watchers and Environmental Protection Agency via e-mail, on November 27, 2017.

Team 38
Attorneys for EnerProg, L.L.C