Team No. 39

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket Nos. 17-000123 and 17-000124

ENERPROG, L.L.C.,

Petitioner,

AND

FOSSIL CREEK WATCHERS, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Consolidated Petitions for Review of a
Final Permit Issued by Region XII of the
United States Environmental Protection Agency

BRIEF OF ENERPROG, L.L.C., Petitioner

Oral Argument Requested

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STATEMENT OF JURISDICTION

Enerprog L.L.C., filed a timely petition, pursuant to section 509(b) of the Clean Water Act (CWA), 33 U.S.C. § 1369(b) (2012), seeking judicial review of the final decision made by the Environmental Appeals Board (EAB) of the United States Environmental Protection Agency (EPA), affirming the issuance of a final National Pollutant Discharge Elimination System (NPDES) Permit and claiming violations of the CWA. Fossil Creek Watchers, Inc. (FCW) joined this petition and asserted additional claims under the CWA and in the alternative under the Administrative Procedure Act (APA). On September 1, 2017, this Court consolidated the petitions for review and ordered the issues briefed by all parties.

STATEMENT OF THE ISSUES

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

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

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

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

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

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

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

STATEMENT OF THE CASE

On April 1, 2017, EnerProg, LLC. (EnerProg) petitioned the Environmental Appeals Board (EAB) of the Environmental Protection Agency (EPA) to review the National Pollution Discharge Elimination System (NPDES) permit that was issued to EnerProg on January 18, 2017. R. 7. EnerProg claims that the EPA wasn't following its established precedent or its own guidelines, set by Administrator Scott Pruitt, when it issued the permit and compliance requirements. R. 2. The EAB found that the permit should be affirmed, because the decisions made by the EPA when issuing the NPDES permit to EnerProg were within the EPA's powers and discretion. R. 13. After the EAB found the permit to be proper, EnerProg filed a petition, pursuant to section 509(b) of the CWA, seeking judicial review of the EAB's findings. R. 2.

STATEMENT OF THE FACTS

EnerProg, L.L.C. (EnerProg) owns and operates the Moutard Electric Generating Station (MEGS), a coal-fired electric generating plant located in the State of Progress and subject to Environmental Protection Agency (EPA) regulation under the Steam Electric Generating Point Source Category. R. 6. The plant draws water for its various uses from the adjacent Moutard Reservoir. R. 6. Coal ash from the plant is sluiced through pipes

into an ash pond, where the water undergoes treatment by sedimentation before being discharged to the Moutard Reservoir. R. 6.

On January 8, 2017, the EPA issued a certification pursuant to the section 401 of the Clean Water Act to renew the MEGS NPDES permit. R. 7. The final permit included conditions requiring MEGS to meet standards, as determined in the State of Progress's recently passed Coal Ash Cleanup Act (CACA). R. 7. CACA was passed to prevent public hazards associated with the failures of ash treatment pond containment systems, including leaks from these treatment ponds into ground and surface waters. R. 7-8. Compliance with CACA would require EnerProg to cease operating its ash pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020. R. 7. The ash pond will be replaced by a retention basin that EnerProg must build to serve as the new destination for all the MEGS waste streams currently discharging into the ash pond. R. 8.

EnerProg alleges that the provisions mandating the closure and capping of the ash pond do not correctly apply State law as contemplated by the Clean Water Act, and claims the EPA could not rely on Best Professional Judgment (BPJ) when setting the Effluent Limitation Guidelines (ELGs) for MEGS's coal ash transport waste at zero. R. 9-10. Also, EnerProg argues that the order issued by EPA Administrator Scott Pruitt postpones the deadline for MEGS to meet the new ELG requirements. R. 10. While EPA agrees with EnerProg that the notice is effective to require suspension of the compliance deadlines, the agency argues that not only are the additional permit conditions required by CACA appropriate, but that the agency can rely on BPJ to mandate zero discharge of coal ash transport waste. R. 10.

Fossil Creek Watchers, Inc. (FCW) alleges that the discharges from MEGS outfall 008 into the ash pond should be treated as direct discharges of fill material to waters of the United States (WOTUS), which would require a 404 CWA fill permit. FCW further claims that capping the ash pond would require an additional 404 CWA fill permit. R. 11. The EPA claims that since the ash pond is not a WOTUS, discharges from MEGS outfall 008 are not subject to ELGs, and that the pond need only be capped as a requirement of closure. R. 12.

SUMMARY OF THE ARGUMENT

The State of Progress cannot include, and the EPA cannot approve, conditions in an NPDES permit that are not based on achieving state water quality standards. This invalidates all permit conditions meant for compliance with the Progress Coal Ash Cleanup Act, since this law was passed to address system failures related to ash pond treatment facilities, not discharge limitations into navigable waterways, which are regulated by NPDES permits. Because EPA is the agency assigned to administer the CWA, it is obligated to deny permit conditions that do not comply with the CWA, including effluent limitations. Even if the Progress certification conditions are found to be tied to water quality standards, they are still unenforceable as part of an NPDES permit since they fall under RCRA jurisdiction, not the CWA. Additionally, the Coal Ash Cleanup Act blatantly violates federal law by not providing aggrieved parties procedures for review in Progress state courts.

The EPA's April 25, 2017 notice suspending certain future compliance deadlines is effective and applies to EPA Region XII's NPDES permit compliance deadlines. Because the Administrator correctly invoked the EPA's authority under the

Administrative Procedure Act (APA) to initiate a stay of a Rule, the compliance deadlines for the 2015 Steam Electric Generating Point Source Category are postponed indefinitely. Where the Administrator finds that justice requires the postponement of certain deadlines pending judicial review he may initiate a stay of the pertinent Rule under Section 705 of the APA. Here, the Administrator through his notice in the Federal Register established that several parts of the 2015 ELGs may cause irreparable injury to the Steam Electric Power Generating industry depending on the outcome of the pending judicial review in the 5th Circuit. Therefore, this Court should find that the EPA correctly invoked its authority under section 705 of the APA when it postponed certain compliance dates of the 2015 ELGs.

Further, the EPA is authorized to postpone future compliance dates without undergoing notice and comment rulemaking. Section 705 of the APA allows for the postponement of the effective date for a Rule pending judicial review without undergoing the notice and comment rulemaking. Although, lower courts have decided this section of the APA does not allow for the postponement of compliance with an entire rule already promulgated by the agency, the present case is different in that the Administrator did not postpone the entire 2015 ELG's. Specifically, the administrator only delayed portions of the rule which have not yet become effective. Moreover, the purpose of the administrative and judicial stay authorized by section 705 is to provide an equitable remedy for parties facing potential injury due to the judicial review. Therefore, this Court should find that the Administrator was authorized to initiate a stay through the April 25, 2017 notice in order to prevent potential injury to industry parties.

The Region XII EPA office was not authorized to use best professional judgement (BPJ) when promulgating the effluent guideline for the MEGS NPDES permit. The CWA only allows for the use of BPJ when establishing effluent limitations if the EPA has not yet promulgated ELGs for that Point Source Category or toxic pollutant. In that case, the permit writer may establish effluent limitations on a case by case basis. In the present case, the EPA promulgated ELGs for the Steam Electric Power Generating Point Source Category in 1982. The 1982 ELGs cover the MEGS coal ash transport systems this Court and the permit writers are concerned with today. Because the EPA has already created ELGs for the Steam Electric Generating Industry, this Court should find that the Region XII's use of BPJ to determine effluent limitations for MEGS was improper.

Further, the Environmental Appeals Board (EAB) mistakenly decided that the 1982 ELGs did not cover the toxic pollutants known to be present at MEGS. The EPA considered toxic pollutants including arsenic, mercury, and selenium when they promulgated the 1982 ELGs. The question is not whether the EPA set specific limits on the toxic pollutants, but whether the EPA considered the toxic pollutants when setting technology based effluent limitations (TBELs) for a specific Point Source Category. Here, the Administrator explicitly stated why in his view, limits for specific toxic pollutants were not set when developing the Steam Electric Generating Point Source Category ELGs in 1982. Notably, within the EPA's permit writers' manual it directs the permit writer to determine whether the EPA has already considered the point source and pollutants within the national ELGs prior to establishing TBELs on a case by case basis. Thus, this Court should find that the 1982 ELGs considered the toxic pollutants present at MEGS, and therefore, the permit writer incorrectly established TBELs based on BPJ.

Additionally, the coal ash pond does not qualify as WOTUS under EPA rules, or by definitions created by the judicial branch. Because of this, the ash pond cannot be regulated under the CWA so long as it is considered part of a waste treatment system. This waste treatment system exception to the WOTUS definition was created by the EPA, under the authority granted to it by the Federal Water Control Act. 33 U.S.C. § 1251 (d). This exception has been renewed multiple times since 1980, the most recent being June 29, 2015. These renewals to the rule modification were in accordance with the APA.

There is no caselaw showing that a waste treatment system is no longer considered a waste treatment system once waste has stopped being dumped into it. Congress has also not spoken on this issue. Because of this, the EPA has the ability to consider the ash pond as a waste treatment system until after it is capped. So long as the court finds that the EPA was reasonable in this finding, it is not regulable under the CWA. However, once EnerProg stops using the ash pond, it is still an isolated waterbody with no shown biological, chemical, or physical impact on any nearby WOTUS and fails the tests from *Rapanos*. Therefore, the ash pond should still be classified as not WOTUS, and EnerProg does not require a 404 fill permit to cap the ash pond.

ARGUMENT

I. THE ENVIRONMENTAL APPEALS BOARD ERRED IN AFFIRMING THE ASH POND CLOSURE AND CAPPING CONDITIONS BASED ON THE PROGRESS COAL ASH CLEANUP ACT, A STATE LAW NOT DESIGNED TO ACHIEVE STATE WATER QUALITY STANDARDS.

"A State may impose conditions on certifications insofar as necessary to enforce a *designated use contained in the State's water quality standard*." *PUD No.1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 701 (1994) (emphasis added). There are two steps used to determine whether a state imposed certification condition is authorized by section 401 of the Clean Water Act (CWA). 33 U.S.C. § 1341. First, the reviewing court must determine the scope of the state's authority under section 401, and second, it must be determined whether the specific condition imposed by the state falls within that scope of authority. *Id.* at 710.

The State of Progress has the authority to issue and enforce its own National Pollution Discharge Elimination System (NPDES) permit requirements, but those requirements must be within the scope of achieving state water quality standards established under CWA section 303, 33 USCS § 1311, and under CWA section 401(a) and (d), 33 U.S.C. § 1341(a)(1) and (d). Section 303 deals with effluent limitations from point sources of water pollution. *Id.* "Effluent limitations are *restricted to regulations governing discharges from point sources* into navigable waters." *Iowa League of Cities v. EPA*, 711 F.3d 844, 877 (8th Cir. 2012) (emphasis added). The purpose of the Progress Coal Ash Cleanup Act (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." R. 7-8. Neither preventing system failures nor leaks, are

objectives related to achieving effluent limitations, and thus cannot be considered "appropriate requirements of State law" under CWA section 303. 33 USCS § 1311(m)(2).

Furthermore, the CACA objectives are not "appropriate requirements of state law" as contemplated by CWA section 401(a) and (d), 33 U.S.C. § 1341(a)(1) and (d). To be appropriate requirements of state law in accordance with sections 401(a) and (d), NPDES requirements must regulate activities that result in a discharge into navigable waters, a standard that is also related to achieving and maintaining state water quality standards. 33 U.S.C. § 1341(d). CWA section 401(a)(1) states, in part, that "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates. . ." 33 U.S.C. § 1341(a)(1). This, again, grants State of Progress the authority to enforce its own NPDES permit requirements, so long as these requirements go toward achieving water quality standards.

It is true that CWA section 401(d) requires NPDES permits to meet "any other appropriate requirement of State law" to receive certification. 33 U.S.C. § 1341(d). However, the "requirements" referred to in section 401(d) directly relate to effluent limitations, other limitations, and monitoring requirements for certification. *Id.* Closing and capping an ash pond is not related to regulating effluent limitations, since such a procedure will stop discharges entirely. While the Supreme Court in *PUD No. 1* did hold 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'", the limitation the majority was referring to was minimum flow conditions for

hydropower facilities, which are effluent limitations for point source discharges. *PUD No. 1 at 714*. In the present case, adding ash pond closure and capping conditions as part of an NPDES permit governed by the CWA is inappropriate and impermissible. Therefore, this Court should find that the Environmental Appeals Board (EAB) erred in affirming the ash pond closure and capping conditions based on CACA.

A. The Environmental Appeals Board erred by not rejecting the State of Progress certification conditions that are inconsistent with the goals of the Clean Water Act.

The EAB, a unit of the Environmental Protection Agency (EPA), was required to reject all Progress certification conditions not based on achieving water quality standards in accordance with the CWA, as such conditions are not appropriate requirements of state law. Administrative agencies have great deference when interpreting a statute that the agency has explicitly been ordered by Congress to administer. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The EPA is the agency assigned to administer the CWA. See 33 U.S.C. § 1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency. . .shall administer this chapter."); *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (stating that EPA is Congressionally authorized to administer the CWA). This gives EPA discretion to decide which conditions a state adds to an NPDES are within the authority of section 401(d) and, and which are not.

While the EPA has wide latitude to interpret the CWA, and thus to reject NPDES permit conditions, it is required by section 401(d) to only reject certification conditions that do not affect state water quality standards. *PUD No. 1 of Jefferson County*, 511 U.S. at 711-713. In other words, state conditions must still "comply with any applicable

effluent limitations and other limitations, under section 1311 or 1312 of this title. . .” 33 USC § 1341(d). Since the CACA requirements are not based on achieving State water quality standards established under CWA section 401(d), the EAB was not obligated to accept and include them in the final permit, and was in fact obligated to reject them.

B. The ash pond closure and remediation conditions are invalid as they do not fall under Clean Water Act jurisdiction, nor do they provide procedure for review in state courts.

Even if the ash pond closure and capping conditions could be considered appropriate requirements of state law in general, they are still not appropriate requirements of state law specifically under CWA section 401(d) because they fall under the jurisdiction of the Resource Conservation and Recovery Act (RCRA), not the CWA. RCRA, 42 U.S.C. §6901 et seq. (1976) was originally written to regulate the disposal of solid and hazardous waste. Now, under the EPA’s rule for Disposal of Coal Combustion Residuals from Electric Utilities, RCRA is used to administer the safe disposal of coal ash- referred to as coal combustion residuals (CCRs) within the rule. 80 Fed. Reg. 21302 (Apr. 17, 2015).

To clear up any confusion about what activities are governed by the CWA as opposed to RCRA, EPA published an article explaining that discharges of coal ash from point sources are still administered by NPDES permit requirements, while the coal ash deposits (CCRs already in a disposal unit), are governed by EPA’s CCR Rule. See *Relationship Between the Resource Conservation and Recovery Act’s Coal Combustion Residuals Rule and the Clean Water Act's National Pollutant Discharge Elimination System Permit Requirements* (Revised Aug. 7, 2017),

https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule. The article clearly states:

> The Coal Combustion Residuals (CCR) rule, promulgated under the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act (CWA) each address environmental impacts of the various units at coal fired power plants. As a general matter, the ***Clean Water Act addresses instances in which there are discharges to the jurisdictional waters of the United States*** ("jurisdictional waters"), while ***the CCR rule deals with the disposal units themselves*** (where they are located, specific design and operating criteria, structural stability requirements, groundwater monitoring and corrective action, ***closure of the units***, etc.) and with their impacts or potential impacts to groundwater.

Id. (emphasis added).

Therefore, while an operational coal ash pond that is still receiving discharges is governed by CWA, once that ash pond has been designated for closure, it is placed under RCRA's jurisdiction in accordance with 80 Fed. Reg. 21302. In fact, the closure and capping requirements mandated in the Progress CACA fall under CCR Rule requirements for "closure with waste in place." *See* 40 C.F.R. 257.102(d)(1)-(3).

Furthermore, the CACA directly violates federal law by having no procedure for judicial review. Federal regulation 40 C.F.R. 124.55(e) clearly states that "Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part." The word "shall" indicates that the EPA mandates that all states which have their own 401 certification requirements must also have an appeals process for those requirements. Having no procedure for judicial review denies EnerProg, or other stakeholders, a means of challenging the conditions established in the Progress CWA section 401 certification within Progress state courts.

II. THE EPA'S APRIL 25, 2017 NOTICE SUSPENDING CERTAIN FUTURE COMPLIANCE DEADLINES IS EFFECTIVE AND APPLIES TO EPA REGION XII'S NPDES PERMIT COMPLIANCE DEADLINES.

A. The EPA correctly invoked its authority under section 705 of the APA because the EPA determined that justice required the postponement of certain dates, pending judicial review of the 2015 ELGs.

The EPA's April 25th, 2017 notice postponing certain compliance dates included determinations that justice requires the suspension considering the pending litigation in the U.S. Court of Appeals for the Fifth Circuit. 82 Fed. Reg. 19005 (Apr. 25, 2017). Under 5 U.S.C. § 705 "[w]hen an agency finds justice so requires, it may postpone the effective date of action taken by it, pending judicial review. *Id.* Furthermore, when an agency relies on § 705 for authorization to implement a stay the "reasons it articulates to justify that stay must be based on *the*…underlying litigation." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (2012). Also, in showing that "justice so requires" some courts have required the agency to consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. U.S Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). (outlining the requirements to the "Four-Part Preliminary Injunction Test") However, this rule is under dispute and it would be unreasonable to expect an agency to consider all the above factors prior to initiating a stay. Therefore, an agency appropriately initiating a stay must only show that justice requires the delay pending a judicial review.

In the present case, the EPA based its postponement off factors that show justice required its decision because of the pending judicial review, as evidenced in the 82 Fed.

Reg. 19005. When considering the "justice so requires" prerequisite this Court must look to section 705 which, allows the agency, if the proper showing is made, to allow regulated parties to maintain the status quo in an effort to prevent irreparable injury to the regulated parties. *Sierra Club*, 833 F. Supp. 2d at 30. The finding of the potential for irreparable injury, because of the unknown outcome of the judicial review, satisfies the "justice so requires" prerequisite. However, the decision to postpone a rule must be based on the judicial review and not some alternative agency agenda. See generally *Id.*

In *Sierra Club,* the United States District Court for the District of Colombia resolved an issue regarding the EPA's use of § 705 to implement a stay. In *Sierra Club,* the district court determined that the EPA did not give proper justification for the Delay Notice because of its failure to consider the factors under the four-part preliminary injunction test. *Id.* The court determined that the reasons for the stay were not adequately based on the pending judicial review of the rule, rather, the EPA simply paid "lip service to the pending litigation in the court of appeals" and its intended purpose was to delay the promulgated rule pending the EPA's reconsideration of that rule. *Id.* at 34. The court classified this tactic as "sleight of hand …not authorized by the Clean Air Act or the APA." *Id.*

Here, the EPA's justification for the delay notice is distinguishable from *Sierra Club* in that the Administrator appropriately exercised his § 705 authority to postpone specific compliance dates because of the pending judicial review in the Fifth Circuit. In fact, the notice explicitly refers to 7 petitions being consolidated for judicial review. See 82 Fed. Reg. 19005. Although the notice refers to several petitions for reconsideration like the notice in *Sierra Club,* in the present case, the compliance dates of the rule are the

primary concern of the judicial review. Whereas in *Sierra Club* "the reasons for the Delay Notice articulated by the EPA in the Notice relate entirely to the pending reconsideration proceedings." *Sierra Club*, 833 F. Supp. 2d at 33.

Interestingly, there is nothing in § 705 that prohibits the EPA from having two reasons for postponing a regulation. In the present case, the EPA did not merely pay "lip service" to the pending judicial review. In fact, the petitions for review and reconsideration are closely linked and in some cases submitted by the same party for the same reasons. See 82 Fed. Reg. 19005 (referring to petition for reconsideration by the Utility Water Act Group whom is currently a party to the pending judicial review). Therefore, this Court should find that the EPA appropriately based notice to delay on the pending judicial review of the 2015 ELGs.

Furthermore, the *Sierra Club* court incorrectly mandated that the four-part preliminary injunction test applies to agencies. In that case, the Sierra Club pointed to the legislative history of § 705, which provides, in part, the following:

> This Section permits either agencies or courts, if the proper showing be made, to maintain the status quo … The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy.

Sierra Club, 833 F. Supp. 2d at 30-31 (*quoting* Administrative Procedure Act, Pub. L. 1944-46, S. DOC. 248 at 277 (1946)) (describing the intent of 5. U.S.C. § 1009(d), the prior version of Section 705). Notably, neither the plain language of § 705 nor the legislative history sited by Sierra Club requires the court or the agency to employ the four-part test. Moreover, to require an agency to determine that a party challenging their rule would likely succeed on the merits is contrary to our adversarial judicial system.

Therefore, this court should find that the EPA need only show that justice so requires the postponement based on the pending judicial review.

Here, the EPA provided adequate evidence that the postponement of certain compliance dates is needed because justice requires it. In determining that the promulgated rule must be altered because of pending judicial review and agency reconsideration, the agency must adequately explain the reason for the change. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Furthermore, an agency's decision will be deemed arbitrary where it "entirely failed to consider an important aspect of the problem." See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In the present case, the Administrator's notice provided detailed explanations of the potential problems of the rule. The April 25, 2017 letter referenced "wide ranging and sweeping objections to the Rule, some of which overlap with the claims in the ongoing litigation" in the Fifth Circuit. *See* 82 Fed. Reg. 19005. In postponing the compliance dates, the EPA was concerned with "new data, claiming that plants burning subbituminous and bituminous coal cannot comply with the Rule's limitations and standards…" *Id.* The EPA also sites to new data that states new additional technologies may be needed beyond the technologies that EPA considered in its models to meet the new limits. *Id.* The new technologies will require high cost expenditures and inevitably may be thrown out by the court or reconsidered by the EPA.

Thus, to avoid irreparable harm to the regulated industry the EPA stayed the compliance dates. Markedly, the compliance dates the EPA is postponing are specifically tied to the issues raised in the petitions. In addition, the recently promulgated 2015 ELGs

are still in effect as they pertain to compliance dates that have already passed and legacy waste waters, which do not require new technologies. Therefore, the EPA adequately explained the reasons for its change in compliance and allowed for the industry to maintain the status quo pending the petitions. Therefore, this Court should determine that the EPA correctly invoked its authority under § 705 when it postponed certain compliance dates of the 2015 ELGs.

B. The EPA is authorized to postpone future compliance dates without undergoing notice and comment rulemaking.

The EPA is authorized under § 705 to postpone future compliance dates without undergoing the lengthy and burdensome notice and comment process. In *Pub. Citizen v. Dep't of Health & Human Serv.*, 671 F.2d 518, 520 (D.C. Cir. 1981), the dissent noted that "[a] temporary stay to preserve the status quo does not constitute a substantive rulemaking because, by definition, it is not "designed to implement, interpret, or prescribe law or policy." *Id.* citing 5 U.S.C § 551(4). The court in *Sierra Club v. Jackson* agreed with this rational, concluding that the Delay Notice in that case by the EPA did "not constitute substantive rulemaking, and therefore is not subject to notice and comment requirements." *Sierra Club*, 833 F. Supp. 2d at 28. Furthermore, the plain language of § 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. However, it does not permit the agency to suspend without notice and comment a promulgated rule…" *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324 (D.C. Cir. 1996). In the present case, the EPA postponed only certain parts of the entire rule, and of those parts the compliance dates have yet to

take effect. Therefore, this Court should find the decision to delay only part of the rules compliance dates is not subject to notice and comment requirements.

In a recent decision by the United States District Court for the Northern District of California the court determined that the Department of the Interior was not allowed to postpone the compliance dates for an entire rule after the rule already took effect. See generally *Becerra v. U.S. Dep. of Int.*, No. 17-cv-02376-EDL, 2017 U.S. Dist. LEXIS 150458 (N.D. Cal. 2017) (granting a motion for summary judgment for the plaintiffs). The present case is distinguishable in that the EPA has not postponed the entire 2015 ELG Rule. Significantly, the EPA's decision to leave in place specific parts of the rule including compliance dates that have already passed, preserves the status quo for those who are already in compliance.

Furthermore, to narrowly construe § 705 to disallow the postponement of compliance dates would limit the ability of the agency to protect regulated parties from irreparable injury. However, in *Becerra* the court found this argument unpersuasive stating that to allow for the suspension of compliance dates would undercut "regulatory predictability and consistency" *Id.* at 26. Nevertheless, the court's reasoning in *Becerra* is flawed because the purpose of a § 705 stay is to provide regulated parties equitable relief from unpredictable outcomes during judicial review or an agency reconsideration. See *Sierra Club,* 833 F. Supp. 2d at 30-31 (quoting Administrative Procedure Act, Pub. L. 1944-46, S. DOC. 248 at 277 (1946)) (describing the intent of 5. U.S.C. § 1009(d) and that "[t]he authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy"). For these reasons, this Court should not follow the flawed reasoning of the United States District

Court for the Northern District of California and decide that § 705 allows for the postponement of future compliance dates, and therefore EPA is not required to undergo notice and comment rulemaking.

The EPA appropriately articulated its reasons for the delay in its April 25, 2017 notice and effectively invoked its authority under § 705. Furthermore, the pending litigation places the regulated parties in a position to be economically injured if they were required to abide by the original compliance dates. Therefore, the EPA properly determined that justice so required the postponement of the compliance dates to prevent injury and maintain the status quo.

Region XII's NPDES permit lacked authority to set compliance dates outside the mandate of the postponement notice. The Progress State Certification pertaining to CACA is moot due to the argument put forth under issue I of this brief. *See Supra* at P. 9. Therefore, the permit provisions must be based on the EPA's promulgated ELGs for the Steam Electric Generating Point Source Category and not developed on a case by case basis. Here, this Court should find the EPA's April 25, 2017 notice delayed the compliance dates for zero discharge of coal ash transport waste indefinitely, and consequently, delayed the Region XII NPDES compliance dates concerning coal ash transport waste at MEGS.

III. INDEPENDENT OF THE 2015 ELGS, EPA REGION XII'S RELIANCE ON BPJ IS UNWARRANTED BECAUSE THE 1982 STEAM ELECTRIC POWER GENERATING ELGs ARE APPLICABLE TO THE MOUTARD ELECTRIC GENERATING STATION.

Where the EPA has promulgated effluent limitation guidelines for a specific industry category, the EPA or the permit writer is not authorized to set technology based

effluent limitations (TBELs) based on their BPJ. *Am. Mining Cong. v. EPA,* 965 F.2d 759, 762 n.3 (9th Cir. 1992). BPJ is reserved for those "situations where the EPA has not yet promulgated any ELGs for the Point Source Category or subcategory. 40 C.F.R. §§ 125.3(c)(d) (2017), see *also Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 929 (5th Cir. 1998). More particularly, 40 C.F.R. § 125.3(c)(3) only allows for the use of BPJ in imposing TBELs "[w]here promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, and other aspects or activities are subject to regulation on a case-by-case basis…" *Id.*

In the present case, the EPA established ELGs for the Steam Electric Power Generating Point Source Category in 1974, and amended the regulations in 1977, 1978, 1980, 1982 and 2015 under 40 C.F.R. part 423. Due to the 2015 ELGs being under judicial review, this Court must determine if EPA Region XII's reliance on BPJ to establish the technology based standard of zero discharge of coal ash transport waste was appropriate considering the presence of the 1982 ELGs.

The above determination, requires this Court to decide two questions: first, whether the 1982 ELGs apply to the coal ash transport waste streams at MEGS; and second, to decide whether the 1982 ELGs also apply to toxic pollutants including arsenic, mercury, and selenium known to be present at MEGS. *See generally NRDC v. Pollution Control Bd.*, 37 N.E. 3d 407, 413-14 (Ill. App. Ct. 2015). Because 40 C.F.R. § 423.11(b) (2014), and § 423.12(b) both contain specific guidance on imposing TBELs for *inter alia,* fly ash transport water, bottom ash transport water, and low volume waste sources including flue gas desulfurization blowdown, this Court should find that the EPA was precluded from using BPJ to set TBELs for MEGS.

Importantly, although the EPA Administrator decided not to provide TBELs for toxic pollutants including arsenic, mercury, and selenium in the 1982 ELGs, "…the 1982 Guideline expressly addresses those chemicals in explaining why, in the Administrator's view, TBELs with respect to *Steam Electric Power Plants* were not possible." *Louisville Gas & Elec. Co. v. Ky. Waterways All.*, 517 S.W.3d 479, 487 (KY. 2017) (emphasis added). The 1982 ELGs for the Steam Electric Point Source Category apply to all the activities this Court is concerned with today at the MEGS, and furthermore, the TBELs determined in 1982 were promulgated after considering for regulation all the toxic pollutants the EAB mistakenly believes were left out of the 1982 ELGs. R. 11. Therefore, this Court should find that EPA Region XII could not rely on BPJ as an alternative ground to require zero discharge of coal ash transport wastes because the 1982 ELGs provide the standards for regulating the Steam Electric Point Source Category.

A. The 1982 ELGs apply to the coal ash transport waste streams present at MEGS.

The EPA's promulgation of ELGs for a specific industry category acts to confine the authority of permit writers to set additional limits. The EPA has adopted national ELGs for steam electric plants in 40 C.F.R. part 423 (2014). For existing point sources, the EPA provides for the application of the best practicable control technology currently available (BPT). *See* § 423.12 (b). This section includes fly ash transport water, bottom ash transport water, metal cleaning wastes, cooling tower blow down, coal pile runoff, and low volume wastes. *Id.* at (b)(1)-(12). Importantly, flue gas desulfurization wastewater is included within the low volume waste streams definition. *See* § 423.11(b).

In the present case, the MEGS point sources are regulated by the 1982 ELGs. Section 402(a)(1) of the CWA only authorizes BPJ limits "prior to the taking of necessary implementing action relating to all such requirements…" 33 U.S.C. § 1242(a)(1). The MEGS is within the Steam Electric Power Generating Point Source Category regulated by the 1982 ELGs. Indeed, all the point sources the NPDES permit and this Court is concerned with today are regulated under the 1982 ELGs. This includes the bottom ash transport waste stream, the fly ash transport waste stream, the FGD blow down and the MEGS ash pond. Specifically, the ash pond is regulated under 40 C.F.R. § 423.12(b)(12) which explains the following:

> In the event that waste streams from various sources are combined for treatment or discharge, the quantity of each pollutant or pollutant property controlled in paragraphs (b)(1) through (11) of this section attributable to each controlled waste source shall not exceed the specified limitations for that waste source.

Id.

The EPA followed the requirements under section 402(a)(1) of the CWA when developing the 1982 ELGs and therefore preempted individual permit writers from developing effluent limitations on a case-by-case basis. *See NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (the permit writer may use best professional judgement if "no national standards" have been promulgated for a particular category of point sources). Thus, this Court should find that the EPA region XII was required to use the 1982 ELGs and not BPJ in determining TBELs for the coal ash transport waste streams at the MEGS.

B. <u>The EPA considered the toxic pollutants arsenic, mercury and selenium when developing the 1982 ELGs.</u>

The EAB incorrectly determined that EPA Region XII may apply BPJ limits to the pollutants arsenic, mercury and selenium. Notably, the issue of applying 40 C.F.R. §

125.3(c)(3) to fill a perceived gap in previously promulgated ELGs has received little guidance by the Federal Courts. However, the Kentucky Supreme Court resolved a similar question in *Louisville Gas & Elec. Co. v. Ky. Waterways All.*, 517 S.W.3d 479, 489 (KY. 2017) (agreeing with the Appellate Court of Illinois Fourth District in that, "…the relevant question was whether the EPA had *considered* the toxic pollutants at issue …") (emphasis added). Furthermore, in *NRDC v. Pollution Control Bd.*, 37 N.E. 3d 407, 413-14 (Ill. App. Ct. 2015), the court found additional guidance on this issue in the EPA's 2010 Permit Writers' Manual. The relevant Chapter 5.2.3.2 states, in part, the following:

> As noted above, case-by-case TBELs are established in situations where EPA promulgated effluent guidelines are inapplicable. That includes situations such as the following:
>
> When effluent guidelines are available for the industry category, but no effluent guide requirements are available for the pollutant of concern (e.g., a facility is regulated by the effluent guidelines for Pesticide Chemicals [Part 455] but discharges a pesticide that is not regulated by these effluent guidelines). The permit writer should make sure that the pollutant of concern is not already controlled by the effluent guidelines and was not considered by EPA when the Agency developed the effluent guidelines.

U.S. Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual, § 5.2.3.2, at 5-45-5-46 (Sept. 2010).

Significantly, both the Kentucky court and the Illinois court determined that the EPA did consider the toxic pollutants in question when promulgating the Steam Electric Power Generating industry ELGs. *See Louisville Gas & Elec. Co*., at 489-90. This Court should find the state court's analysis instructive in determining that the EPA considered

toxic pollutants in the 1982 ELGs, and therefore, EPA Region XII could not rely on BPJ setting site specific limitations.

BPJ was not the appropriate method of imposing technology-based treatment requirements for the MEGS. In *Louisville Gas & Elec. Co.,* the court decided a case involving the same issue, of whether a permit writer should apply the 1982 Steam Electric Generating Point Source Category ELGs, despite the guidelines' absence of toxic pollutant regulations. The Kentucky court found that although the 1982 guidelines do not contain TBELs for the thirty-four toxic pollutants it mentions, including arsenic, mercury and selenium "the 1982 Guideline expressly addresses those chemicals in explaining why, in the Administrator's view, TBELs with respect to them were not then possible." *Id.* at 487; see *also* 47 Fed. Reg. 52,290, 52,303 (Nov. 19, 1982).

Certainly, under 33 U.S.C. § 1314(b)(2)(A), the EPA has the duty to "identify…the degree of effluent reduction attainable through the application of the best control measures and practices." *Id.* Arsenic, mercury and selenium were identified and listed in the 1982 ELGs. *See* 47 Fed. Reg. 52,290, 52,303 (Nov. 19, 1982) (the EPA stating that "[t]he following 24 toxic pollutants are excluded from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator" and listing arsenic, mercury and selenium.) In promulgating the 1982 ELGs the EPA identified the toxic pollutants at issue and considered TBELs in deciding not to regulate them. Accordingly, because the EPA considered arsenic, mercury and selenium, the EPA's own 2010 Permit Manual "directs a permit writer to refrain from imposing best-professional-judgement limitations and instead use the applicable ELG." *NRDC, 37* N.E. 3d at 414.

In the present case, the EAB incorrectly determined that Region XII's reliance on BPJ was appropriate because the 1982 ELGs did not regulate toxic pollutants such as mercury, arsenic, and selenium. As explained in the EPA's permit manual, the permit writer need only to determine if the pollutants were considered and if so refrain from using BPJ. *Id.* Here, the Administrator considered the toxic pollutants at issue in the 1982 ELGs. Therefore, this Court should find that Region XII's reliance on BPJ was inappropriate.

IV. ENERPROG'S DISCHARGES FROM THE MOUTARD ELECTRIC GENERATING STATION INTO THE COAL ASH POND ARE NOT BOUND BY NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITTING REQUIREMENTS.

The MEGS discharges into the ash pond are not bound by NPDES permitting requirements because the ash pond does not qualify as waters of the United States (WOTUS) for regulations under the CWA. This is due to a wastewater exemption in the WOTUS definition. The EPA suspended a specific portion of the WOTUS definition that had previously limited the wastewater exemption. This suspension was valid as it followed all the requirements of the APA. Due to this suspension, the coal ash pond is not considered WOTUS and is exempt from the NPDES permitting requirements.

A. The ash pond that the Moutard Electric Generating Station discharged ash waste into was not considered waters of the United States under the current rule established in *Rapanos v. United States*.

The courts have yet to make a conclusive definition for what constitutes WOTUS. *Rapanos v. United States*, 547 U.S. 715, 729 (2006). In *Rapanos*, the Petitioner was trying to put fill material into several wetlands on his property. *Id*. The EPA claimed that the wetlands were WOTUS, and that fill permits would be required due to CWA

guidelines. *Id*. The basis for the EPA's claim that the wetlands were WOTUS was that the wetlands drained through a series of ditches and canals into a navigable river. *Id*. However, the court couldn't decide if this should be considered WOTUS, or even come to an agreement on what should be considered WOTUS in general. In *Rapanos*, it was remanded to the lower courts with instructions that WOTUS includes only "standing or continuously flowing bodies of water 'forming geographic features' described in ordinary parlance as streams, oceans, rivers, and lakes." *Id.* at 739. In a concurring opinion, Justice Kennedy advocated for a "significant nexus" view, which can also be persuasive in determining if a water body should be considered WOTUS. *Id.* at 786. Justice Kennedy stated that when wetlands are isolated, or adjacent only to a non-navigable tributary of a navigable waterway, those wetlands are regulable under the CWA only if there is a significant nexus between the wetlands at issue and the navigable waterway. *Id*. at 796. He described a significant nexus as a connection between the wetland and navigable waterway that significantly affects the chemical, physical, and biological integrity of the waters. *Id*. However, he does qualify this by stating that a mere hydrologic connection is not sufficient to prove a significant nexus in all cases. *Id*. at 784. Justice Kennedy finished his opinion by stating that absent more specific regulations, significant nexus must be established on a case-by-case basis. *Id.* at 782.

For a system to qualify under the waste treatment system exemption, the waterbody should be self-contained or incorporated in an NPDES permit. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2005). The wastewater treatment pond in this case was formed when a mining company dug a pit while excavating gravel. After it was abandoned, it filled with water and became known as

Basalt Pond. Basalt Pond was adjacent to Russian River, a navigable body of water, and surrounded by various wetlands. The city of Healdsburg eventually started dumping waste into Basalt Pond without obtaining an NPDES permit. The court ruled that Basalt Pond was not self-contained because of waterflow through a porous aquifer system between Basalt Pond and Russian River. *Id*. at 996. The court also put a lot of weight on the chloride concentrations in the waters upstream in the Russian River (5.9 parts per million), in Basalt Pond (36 parts per million), and around the area that Basalt Pond and the Russian River are closest (18 parts per million). *Id*. at 997. These numbers suggested that Basalt Pond was not self-contained and should not meet the waste treatment system exception. *Id*. at 1002.

Because the ash pond is not navigable, it needs to be determined if it has adequate hydrologic connections to a navigable waterbody. Using the plurality opinion in *Rapanos*, the coal ash pond must have a flowing body of water "forming geographic features" such as a stream, ocean, river, or lake. *Rapanos*, 547 U.S. at 739. The coal ash pond was a dammed-up tributary with several incoming outflows from the MEGS. The only way that water left the ash pond was via groundwater or risers that transported treated water into the Moutard Reservoir. Neither of these water transportation methods meet the description of streams, oceans, rivers, or lakes. Also, the waterflow out of the ash pond is not continuous, which is a requirement for flowing water to be WOTUS under the plurality opinion. *Id*. at 739.

The ash pond cannot be considered WOTUS under Justice Kennedy's significant nexus evaluation either. Because the ash pond is dammed off, and only leaves intermittently via drainage to the Moutard Reservoir, there is no significant nexus to

WOTUS. Even if the Moutard Reservoir is considered WOTUS, the ash pond is only connected through a series of manmade canals and ditches when EnerProg opens Outflow 002. If this Court finds that the Moutard Reservoir is WOTUS, then it is up to the discretion of the Court to determine if this intermittent connection via manmade structures should be considered "significant." This Court should find that a connection cannot be significant if it can be turned on and off at will, provides no significant wildlife habitat, is not navigable, and is virtually unaffected by tides or nature.

Comparing the significant nexus in *Healdsburg* with this case, the ash pond shares no similarities regarding water connection to Basalt Pond. Basalt Pond had a porous aquifer connecting it to Russian River and there were tests showing higher chlorine concentrations in the section of the river closest to the pond. There is no evidence suggesting a leaching of chemicals from this specific ash pond to any other navigable waters. In this case, the ash pond has only the outflow into the Moutard reservoir as a connection to any other waterbody, but that can be closed at any point, and, as Justice Kennedy stated in *Rapanos*, hydrologic connection alone is not always enough to satisfy the significant nexus test. *Rapanos*, 547 U.S. at 784. Since there is no evidence suggesting that the ash pond affects the physical, chemical, or biological integrity of navigable waters nearby, the ash pond passes the isolation portion of the significant nexus tests used in *Healdsburg*.

In the WOTUS definition drafted by the EPA, there are exemptions specifically outlining types of water that are not considered WOTUS for purposes of governance under the CWA. One of those exemptions is "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water." 40

C.F.R. 230.3 (2)(i). The ash pond used by EnerProg was a properly established waste treatment system for EnerProg's coal ash. Because of this, the ash pond should not be considered WOTUS due to the waste treatment system exclusion in the EPA WOTUS definition.

The ash pond fails the significant nexus test and lacks the geographic features required in *Rapanos*. Further, the ash pond meets the requirements for a wastewater exemption from WOTUS consideration laid out by the EPA. For these reasons, the ash pond cannot be considered WOTUS for purposes of regulations under the CWA.

B. The EPA suspensions do not lack statutory authority.

Unless Congress has spoken directly on the issue at hand, courts must defer to interpretations of statutes made by the governing agencies charged with enforcing them, so long as the court finds that the interpretation to be reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The dispute in *Chevron* was over an EPA interpretation of a provision in the Clean Air Act (CAA) Amendments of 1977. The Court held that if a rule or law is ambiguous, then the courts defer judgment to the agency in question, so long as the agency's interpretation is reasonable. *Id.* at 865. The court ruled in this way because of the various competing interests that are inherently involved in these types of decisions and legislatures and agencies are better equipped to properly address these arguments. *Id.*

The EPA derived its statutory authority for this change from the Federal Water Control Act, 33 U.S.C. § 1251 (d), which states that the EPA is responsible for advancing the goals of restoring and maintaining chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). The phrase "Nation's waters," or WOTUS, has yet

to have a fully established definition from the Legislative branch or the Judicial branch of government. Because of this lack of a proper definition, and based on the Court ruling in *Chevron*, it is up to the discretion of the EPA to determine what is considered a part of the Nation's waters.

After the CWA was passed by congress, there was some ambiguity regarding what was actually considered WOTUS. Even the Supreme Court couldn't come to a conclusive decision for what should be considered WOTUS. *Rapanos*, 547 U.S. at 715. In response, the EPA drafted a definition for WOTUS that they would follow based on the EPA interpretation of the CWA. 40 C.F.R. 122.2. After drafting the definition, the EPA received feedback stating that the permit requirement for discharging into impounded WOTUS was overly broad, so the EPA suspended that portion to allow for further examination. 80 Fed. Reg. 37,053.

Applying the two-step test from *Chevron*, it must first be determined if the law in question is vague or ambiguous. The Supreme Court couldn't come to a conclusion in *Rapanos* regarding what is to be considered WOTUS. Therefore, the usage in the CWA is ambiguous enough to meet the first step of the Chevron test. If the law is ambiguous, the interpretation of that ambiguity is left to the discretion of the agency in question. However, the second step in the Chevron test is that the agency interpretation must be deemed reasonable. But this requirement is only that the interpretation be reasonable, not the most reasonable, nor did the Court say in *Chevron* that the agency interpretation be the best possible option. The agency interpretation just has to be reasonable. This Court should find that it is reasonable to classify an isolated ash pond, with only intermittent connections to other waterbodies, as not WOTUS.

The EPA was using its discretionary power outlined in *Chevron* to make a reasonable interpretation of a statute passed by Congress. Further, in response to its responsibility to maintain the integrity of the Nation's waters and the confusion that arose from *Rapanos*, the EPA acted reasonably to establish and publish an official definition it would follow. Upon review of the created WOTUS definition, the EPA suspended a portion of it in response to feedback suggesting that a portion of the definition was overly broad and would not actually further the goals that were established in the Federal Water Pollution Control Act.

C. The EPA suspensions followed Administrative Procedure Act requirements for rulemaking.

The original exemption in the WOTUS Rule carved out an exemption for waste treatment systems to not be considered WOTUS. However, in the following sentence, it was specified that this "exclusion only applies to manmade bodies of water which neither were originally created in waters of the United States… nor resulted from the impoundment of waters of the United States." 40 C.F.R. § 122.2. This qualifier was first suspended by the EPA on July 21, 1980, and was renewed multiple times, the most recent being on August 28, 2015. There are four required stages that a suspension must meet to be valid under the APA. *Id*. First, there must be a notice of the proposed rule change. *Id*. Second, the agency making the rule change must give interested persons an opportunity to submit comments. *Id*. Third, the agency may finalize the rule, but only after receiving and fully considering these public comments from stage three. *Id*. Fourth, the agency must provide the public with notice of the rule being adopted and include a general,

concise statement of the rule's basis and purpose. *Id*. The suspension met all these requirements.

The administration giving notice of rule changes must publish the rule changes a minimum of thirty days before the effective date of the change. *United States v. Cain*, 583 F.3d 408, 413 (2009). In this case, the Sex Offender Registration and Notification Act (SORNA) was enacted which created a minimum federal standard for how sex offenders are registered, but the defendant was not affected because his previous crime had occurred before the law was passed. *Id*. at 410. Then, the US Attorney General made an amendment to the law that required all sex offenders, regardless of their conviction date, to comply with SORNA. *Id*. The defendant was arrested within a thirty-day period after the regulation was originally passed. *Id*. The court found that the regulation should not have gone into effect before that thirty-day point because the Attorney General failed to show good cause. *Id*. at 424.

The initial notice of proposed rulemaking was made in this case on June 29, 2015 and posted on the Federal Register site. This contained the nature of public rulemaking proceedings, a reference to legal authorities under which the rule is proposed, and terms or substance of the proposed rule or a description of the subjects and issues involved. In the initial notice, the EPA cited the Federal Water Pollution Control Act, as discussed above. The EPA also noted the specific section that would be removed from the WOTUS definition. After the initial notice, interested persons had until the rule went into effect on August 28, 2015, to submit comments. Considering this was a renewal of a suspension that had been in place and renewed several times since 1980, this time period should be found reasonable. While the EPA also received these comments and considered them, the

EPA is under no obligation to act on them, but instead make what they consider to be a reasonable action. Finally, the rule was renewed on August 28, 2015. This notice time period only needs to be reasonable, and considering again that it was renewing a thirty-five-year-old suspension, the two-month time period is considered a reasonable time period under *United States v. Cain*.

The EPA met all the requirements outlined in the APA. It provided reasonable notice for the renewal of a thirty-five-year-old suspension, considered comments, acted with proper statutory authority, and gave public notice of the finalized rule before the rule was enacted.

V. THE ASH POND CLOSURE AND CAPPING PLAN DOES NOT REQUIRE A PERMIT FOR DISCHARGE OR FILL MATERIAL PURSUANT TO CWA 404.

As stated above, the ash pond, while in use, is exempt from regulations in the CWA because it is not considered WOTUS. Because the ash pond was a waste treatment system, and not WOTUS, a permit was not required for EnerProg to legally dump the ash into the pond. There is no case history to suggest that the ash pond would no longer qualify under the wastewater exemption once EnerProg has stopped dumping ash into it. Since EnerProg intends to cap the pond, that action should be considered the final act of the waste treatment system. This is similar to sealing off a landfill after it is full. Since there is no caselaw regarding this issue, the Chevron test applies. Since Congress hasn't spoken directly on this issue, this Court should determine if the EPA is being reasonable for not requiring a fill permit to cap the ash pond. If this Court finds that the EPA is being reasonable, this Court should rule in favor of EnerProg, and a fill permit pursuant to CWA section 404, 33 U.S.C. § 1344 should not be required.

Even if the ash pond is no longer considered a waste treatment system once the coal ash stops flowing into it, the ash pond still lacks an appropriate requirements outlined in *Rapanos*. The ash pond itself is not navigable, and with outflow 002 closed, it will have no connection to any other waterbodies. As established above, there is no significant nexus or continuous or adequate hydrologic connection. Coupled with the lack of a biological, chemical, or physical effect on any nearby WOTUS, the ash pond should still be considered isolated and not WOTUS.

The ash pond should still qualify for the waste treatment system exception after EnerProg has stopped dumping ash into it. However, the ash pond is still an isolated waterbody and cannot be considered WOTUS under the current rule. Because of these reasons, EnerProg does not need a 404 fill permit in order to cap the ash pond.

CONCLUSION

For the reasons stated above, EnerProg respectfully requests that this Court reverse the Environmental Appeals Board's decision affirming the Region XII's NPDES permit. In the alternative, this Court should remand the NPDES permit to the EAB with instructions to alter the Progress State 401(d) certifications to comply with the requirements of the CWA, eliminate the NPDES permit compliance dates requiring closure of the ash pond and find that the ash pond is not considered WOTUS nor does it require a permit for discharge of fil material.