Team Number 46

Docket Nos. 17-000123 and 17-000124

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TWELFTH DISTRICT

ENERPROG, L.L.C.,
Petitioner

and

FOSSIL CREEK WATCHERS, INC.,
Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent

On Appeal from the Environmental Appeals Board
United States Environmental Protection Agency, Washington, D.C.
NPDES Appeal No. 17-0123

Brief of Respondent, the United States Environmental Protection Agency

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STATEMENT OF JURISDICTION

This case involves an appeal from a judgment of the Environmental Appeals Board ("EAB"). The EAB had proper subject matter jurisdiction because the EAB has jurisdiction over appeals from the Environmental Protection Agency ("EPA") administrative permit decisions as established in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, codified at 40 C.F.R. part 22. The United States Court of Appeals for the Twelfth Circuit has appellate jurisdiction because the parties have statutory rights to appeal National Pollutant Discharge Elimination System ("NPDES") permits under the Clean Water Act ("CWA" or "Act"). 33 U.S.C. § 509(b). Petitioners EnerProg and Fossil Creek Watchers ("FCW") filed timely petitions for judicial review of the EAB's final decision. Record at 2.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Final Permit properly included conditions provided by the State of Progress in the CWA section 401 certification, including the questions:
   A. Whether EPA was required to include all Progress certification conditions.
   B. Whether the conditions are “appropriate requirements of State law."

II. Whether the April 12, 2017 EPA Notice suspending certain future compliance deadlines for the Final ELGs for the Steam Electric Power Generating Industry effectively suspended compliance deadlines for achieving zero discharge of coal ash transport water.

III. Whether EPA could rely on BPJ as an alternative ground to require zero discharge of coal ash transport wastes.

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 relevant provision of 40 C.F.R. part 122.2.

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

A. Factual Background

On January 18, 2017 EPA issued a NPDES permit under CWA section 402 authorizing petitioner EnerProg to continue pollution discharges from the Moutard Electric Generating Station ("MEGS"), a coal fired steam electric power plant in the state of Progress. Record at 6. Petitioners FCW, an environmental group, and EnerProg filed petitions for review. EnerProg challenged the inclusion of a permit condition issued by Progress requiring dewatering, closure, and capping of the MEGS coal ash settling pond. *Id.* EnerProg also challenged the zero discharge requirements for coal ash transport waters required by the 2015 Effluent Limitation Guidelines ("ELGs") on the theory that an April 12 Notice from EPA Administrator Pruitt effectively suspended those requirements. *Id.* Finally, EnerProg challenged the permit writer's use of Best Professional Judgment ("BPJ") to require MEGS to dry handle bottom and fly ash waste towards zero discharge of toxic pollutants. R. at 7. Petitioner FCW also challenged, claiming it is unlawful to dewater the pond and leave coal ash solids in place without a CWA section 404 dredge and fill permit. *Id.* FCW also claims that discharges into the MEGS pond are unlawful, on the theory that the MEGS pond is a water of the United States ("WOTUS").

B. Procedural History

On appeal, the EAB held that EPA has no discretion to reject state permit conditions, and that the closure and capping conditions imposed by Progress were appropriate. Record at 11. EAB also held that the permit writer's reliance on BPJ was a justified alternative ground for requiring zero discharge. *Id.* As to ELG compliance deadlines, EAB found that Administrator Pruitt's Notice did not affect a suspension because the agency did not undergo notice and comment rulemaking. Record at 12. Finally, the EAB found that no permit was required for

either Outfall 008 under CWA's 402 permitting provisions or for closure and capping of the ash pond under CWA's 404 provisions, because the MEGS pond is not a WOTUS and does not convert to one upon closure.

STANDARD OF REVIEW

The standard of review for appellate review of matters of law is whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" per the Administrative Procedure Act ("APA"). 5 U.S.C. § 702.

SUMMARY OF ARGUMENT

The final NPDES permit properly included conditions required by Progress pursuant to CWA section 401(d), because EPA has jurisdiction to review conditions certified by states and has determined that Progress's conditions are appropriate requirements of state law. Administrator Pruitt's April 12, 2017 Notice effectively suspended compliance deadlines for achieving zero discharge of coal ash transport water because EPA has both inherent and statutory authority, upheld in the U.S. Supreme Court, to reconsider past decisions where legally permissible, as long as the agency provides a reasoned explanation. Notice and comment is not required because formal rulemaking is not required statements of general policy, nor where notice and comment would be impracticable, unnecessary, or contrary to the public interest, and those exceptions both apply to the Administrator's suspension. Additionally, the EPA performed the required four-part test to determine when a stay is appropriate and concluded the postponement of compliance dates was appropriate. Use of BPJ to impose zero discharge BAT was proper because it fulfills the Act's purposes and the Act's mandate that EPA impose BAT for toxic pollutants without an established ELG. The zero discharge requirement is reasonable under the APA because it is both technologically and economically feasible. NPDES permitting

requirements do not apply to EnerProg's discharges into the MEGS pond because the pond is not a WOTUS, nor do they apply to the closure and capping of the pond, because no provision of the CWA converts the pond into a WOTUS upon closure.

ARGUMENT

I. THE FINAL PERMIT PROPERLY INCLUDED CONDITIONS CERTIFIED BY PROGRESS UNDER CLEAN WATER ACT SECTION 401(D)

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish its goals, the Act established the NPDES permit system to enforce technological standards on individual discharges of pollutants into navigable waters from point sources. *Id*. at §§ 1311, 1314. The Act established a strong role for states and the federal government when administering NPDES permits. *Id*. While many states have assumed responsibility for implementing the Act, Progress has not. *See* Record. In the absence of state administration of NPDES permits, the EPA retains broad authority to administer the provisions of the Act, subject to limitations imposed by states under section 401(d) of the Act. In this case, EPA used its jurisdiction to consider the permissibility of Progress's section 401(d) certification conditions, and determined that the state's conditions are appropriate requirements of state law. Therefore, this court should find that EPA acted properly under the APA's deferential standards of review.

C. EPA Has Jurisdiction to Consider and Deny Conditions Certified by States

The Clean Water Act and its implementing regulations expressly reserve to EPA jurisdiction to review conditions certified by states. 33 U.S.C. § 1341(a)(1)-(d); 40 C.F.R. 124.53. Section 401(a) of the Act requires state certification for a NPDES permit for any activity that "may result in any discharge into the navigable waters" of a state. 33. U.S.C. § 1341(a). MEGS is a point source which may discharge into Fossil Creek, which is a "water of the United

States" tributary to a navigable water; therefore, state certification must be obtained under the NPDES permitting process. Record at 7. In the absence of state authority to issue NPDES permits, EPA retains broad authority over that process to ensure compliance with the Act.

The Act provides that state certification requirements "shall become a condition on any Federal license or permit *subject to the provisions of this section.*" 33 U.S.C. § 1342(d) (emphasis added). Another provision of that section states that "[n]o license or permit shall be granted if certification has been denied by the… Administrator," in which "Administrator" stands for the EPA Administrator and those to which authority is delegated. This provision should be read as vesting in the EPA the jurisdiction to review section 401 certifications and deny state certification if its provisions are not in accordance with the Act. Although some courts have read section 401 and focused on the "shall become a condition" language to suggest that state certifications are automatically binding, EPA should not be bound to blindly authorize state certifications that violate the Act. *See Department of Interior v. Fed. Energy Reg. Comm.*, 952 F.2d 538, 548 (D.C. Cir. 1992). EPA must have the jurisdiction to consider state certifications, otherwise the Act would affect a total delegation of authority to the states, which is its intent. Not only does this make logical sense, it is consistent with EPA's regulations and longstanding guidance materials.

The Clean Water Act's implementing regulations on the certification process direct that "State certification shall be granted or denied within the reasonable time specified under paragraph (c)(3) of this section." 40 C.F.R. 124.53. This regulation clearly contemplates that EPA has the jurisdiction to review state certifications, and that there are two results possible from such review – grant or denial. If a certification is granted, EPA can proceed with issuing the permit. If the EPA chooses not to accept all the conditions certified by the state, then it may deny

the certification and not issue the permit. EPA's guidance materials for states and tribes going through the certification process affirm this reading as well.

EPA's guide for states and tribes interprets both the Act and its own regulations. *See* U.S. E.P.A., CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES (2010). This guide envisions four possibilities for a state or tribe when presented with a permit to certify: grant, grant with conditions, deny, or waive. *Id*. at 9-10. The most difficult questions arise under the second section, grant with conditions, as has occurred in the present case. Echoing 40 C.F.R. part 124.53, this handbook states that if the federal agency "chooses not to accept all conditions placed on the certification, then the permit or license may not be issued." *Id*. at 10. In which case, agencies may "deny the permit without prejudice… if the conditions are viewed as beyond the agency's authority." *Id*. This handbook has been guiding states, tribes, and federal officials for nearly eight years. There is no need to upset the balance of how the certification process operates from a public policy perspective. All regulating parties rely on 40 C.F.R. part 124.53 and this guidance document during certification. To hold that in this case EPA does not have jurisdiction to deny conditions certified by Progress would frustrate and delay the NPDES permitting process until the legal limbo was cleared.

Further, this court should grant EPA deference based on a variety of doctrines. First, this court should grant *Chevron* deference to EPA's interpretation of section 401 of the CWA. Under this doctrine, a court must ask whether Congress has spoken directly to the question at hand. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Here, Congress has plainly spoken to the issue, because section 401(a) states that "[n]o license or permit shall be granted if certification has been denied by… the Administrator…" This clear

reservation of agency authority to review certifications and deny them ends the *Chevron* inquiry because the agency "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

Chevron is not the end of deference deserved by the EPA; considering that EPA also has its own regulations on the subject expressed in 40 C.F.R. part 124.53, this court should grant so-called *Seminole Rock Deference* to the agency's interpretation that it possesses jurisdiction to review state certifications. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) held that an agency interpretation of its own rules deserves substantial deference unless that interpretation is "plainly erroneous or inconsistent with the regulation." Here, 40 C.F.R. part 124.53 states that "state certification shall be granted or denied…" It is not plainly erroneous to interpret that sentence as providing EPA authority to review state certification, in fact, it could hardly be plainer.

EPA's position is not directly contrary to case law on the subject either. *American Rivers, Inc. v. F.E.R.C.,* 129 F.3d 99 (2d Cir. 1997), concerned relicensing permits for hydroelectric facilities. Pursuant to section 401 of the Act, states submitted certifications with a variety of conditions. *Id*. at 102-03. Many of the certification provisions at issue did not address water quality, but attempted to use the certification process for recreational amenities and other non-related issues. *Id*. Therefore, FERC struck those conditions from the certification and approved the NPDES permits without the questionable conditions from the state. *Id*. at 103-04. The Second Circuit held that FERC's picking and choosing of certification provisions was invalid. *Id*. However, this case is distinguishable from the present case in multiple ways.

First, EPA does not argue for the ability to pick and choose which state certification provisions will survive, it merely has interpreted its own Act and regulations as granting it the

authority to consider certifications *as a whole* and either grant or deny them. To pick and choose, as FERC did in *American Rivers*, circumvents important due process concerns of the states. If it simply would have denied certification, the states would have had to reconsider their certification and potentially choose certification provisions that affect only water quality. *American Rivers* actually supports this position, citing a Supreme Court case, *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians*, 466 U.S. 765 (1984), for the proposition that "conditions must either be incorporated in full into any license that [the agency] issues or the [agency] must deny the license altogether." *Escondido*, 466 U.S. at 778 n. 20.

Second, in *American Rivers*, it was FERC interpreting the Clean Water Act, not the EPA. This is significant because deference of any kind is not afforded to an agency interpretation of an act that it doesn't administer. FERC is not charged with administering the Clean Water Act, merely complying with its provisions. Therefore, FERC's interpretation that it could reject certain conditions did not deserve deference, whereas EPA's contention in the present case deserves both *Chevron* and *Seminole Rock Deference.*

This court should clearly hold that EPA possesses the jurisdiction to review state certifications made pursuant to section 401(d) of the CWA. The ability to review and deny certifications is essential to the proper functioning of the Act. Such a holding will not upset the existing balance of power because the clear majority of state certifications are made pursuant to applicable state water quality standards and other "appropriate requirements of state law." 33 U.S.C.§ 1341(d). EPA review of state certification is merely a mechanism to weed out outliers, which is not an issue in this case.

D. Progress's Conditions Are "Appropriate Requirements of State Law."

1. Progress's Certification Conditions Support the Purpose of the Clean Water Act.

Regardless of whether EPA has jurisdiction to review Progress's certification, this court should hold that Progress's section 401(d) certification pursuant to the "Coal Ash Cleanup Act" ("CACA") is an "appropriate requirement of state law." CACA's requirements are appropriate because they support the purpose of the CWA to restore and maintain the Nation's water, and are in keeping with the cooperative federalism structure embedded in the Act. EPA's conclusion that Progress's conditions are an "appropriate requirement" deserves deference, and this court should uphold the decision of the EAB.

Under section 401(d) of the Act, even states without permitting authority may condition a party's receipt of a federal permit on "any other appropriate requirement of state law" subject to EPA's approval. In the present case, CACA is indisputably a "state law" under the CWA's plain meaning. However, the Act does not define "appropriate requirement of state law," resulting in statutory ambiguity. When a statute is ambiguous, a reviewing court should grant deference to an agency's permissible construction of a statute the agency implements. *See Chevron*, 467 U.S. 837 (1984). EPA's position that Progress's certification is an "appropriate requirement of state law" is reasonable because CACA's substantive effects are compatible with the Clean Water Act.

The ultimate objective of the Act is to "restore and maintain the integrity of the Nation's waters," which is accomplished through the complimentary goals of eliminating the discharge of pollutants into navigable waters and achieving fishable and swimmable water quality levels. 33 U.S.C. § 1251(a). Use of ash ponds to settle waste from MEGS threatens these twin goals. For instance, dam failure can cause the coal slurry in ash ponds to spill, devastating navigable waters and the communities alongside them. *See* U.S. E.P.A., U.S. ENVIRONMENTAL

PROTECTION AGENCY AND TENNESSEE VALLEY AUTHORITY KINGSTON COAL ASH RELEASE SITE PROJECT COMPLETION FACT SHEET (2014). The catastrophic dam failure at the Kingston Tennessee Valley Authority ("TVA"), for example, caused 5.4 million cubic yards of coal ash to be discharged into the Clinch River and onto 300 acres of surrounding farmland. *Id*. CACA is designed to prevent such spills the state of Progress.

CACA's legislation recites that its goal is to "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." Record at 9. Progress's certification provisions that usher in closure of the MEGS ash pond and force EnerProg to adopt dry handling techniques ensure that there will be no failure of the ash pond dam. This goal is consistent with the CWA, and thus certification under section 401(d)'s "appropriate requirements of state law" prong is a permissible statutory construction deserving deference.

Supporting EPA's position that Progress's certification is valid, *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700 (1994), interpreted the phrase "appropriate requirement of state law" broadly. The Court held that a state water department properly certified a NPDES permit by requiring it to keep a minimum amount of water in the stream pursuant to a state anti-degradation policy. *Id*. at 712. The state certification did not regulate discharges, the primary concern of NPDES permits, but regulated the quantity of water that a hydropower facility had to leave in the river. *Id*. The Court held that such a certification was nonetheless an "appropriate requirement" because section "401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id*. Thus, the Court supported a broad interpretation of section 401(d)'s "appropriate requirements" prong.

2. "Appropriate Requirement of State Law" Includes State Laws like the Coal Ash Cleanup Act.

The "appropriate requirement of state law" at issue in *PUD No. 1* was a state antidegradation standard promulgated pursuant to section 303 of the CWA, not a state law independent of the CWA. *PUD No. 1*, 511 U.S. at 707. However, this does not mean that CACA, which was not passed pursuant to the water quality standards provisions of the CWA, should not be considered an "appropriate requirement" per section 401(d). In fact, *PUD No. 1* left open the question of whether a law such as CACA can be incorporated into section 401(d) certification, stating "[w]e do not speculate on what additional state laws, if any, might be incorporated by this language." *Id*. at 713. This court should take the next step and hold that state laws such as CACA may be incorporated under the section 401(d) certification process when they are "appropriate" and consistent with the structure of the Act.

As explained above, CACA's requirements are "appropriate," but further, they are consistent with the cooperative federalism structure of the Act. The Act envisions a general partnership between federal agencies and states. For example, the CWA provision at issue in *PUD No. 1*, directs states to set water quality standards for their waters. 33 U.S.C. § 1313. Nothing prohibits the states from setting water quality standards stricter than the federal floor, and courts have regularly upheld this proposition. *See PUD No. 1*, 511 U.S. at 723 ("Not a single sentence, phrase, or word in the [Act] purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require") (Stevens, J., concurring); *Ackels v. U.S. E.P.A.*, 7 F.3d 862, 867 (9th Cir. 1993) ("and the state has authority to impose any more stringent terms or conditions necessary to ensure that the permits will meet state law water quality standards…"). In our case, the conditions imposed by CACA

are more stringent than required by federal law, and thus upholding them would be consistent with the Act and the weight of case law.

Lastly, section 510 of the Act supports inclusion of non-CWA state laws in a 401(d) certification, stating that nothing in the Act shall "preclude or deny the right of any State… to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution…" 33 U.S.C. § 1370. To deny Progress's appropriate certification provisions would violate this section of the Act. This court should give deference to the EPA's reasonable construction of the Act it is charged with administering and uphold the certification as an "appropriate requirement of state law."

II. ADMINISTRATOR PRUITT'S APRIL 12, 2017 NOTICE EFFECTIVELY SUSPENDS COMPLIANCE DEADLINES FOR ACHIEVING ZERO DISCHARGE OF COAL ASH TRANSPORT WATER.

EPA Administrator Scott Pruitt's April 12, 2017 Notice ("Notice") suspending future compliance deadlines for the Final ELGs for the Steam Electric Power Generating Industry effectively requires suspension of compliance deadlines for zero discharge of coal ash transport water. EPA has both inherent and statutory authority upheld by case law to revise a previous decision when permitted by law and supported by reason; the EPA Administrator may postpone permit compliance deadlines without notice and comment; and the agency properly applied the required four part-test.

A. EPA Has Both Inherent and Statutory Authority to Reconsider Past Decisions Where Legally Permissible, if the Agency Provides a Reasoned Explanation.

EPA has both inherent and statutory authority, upheld in case law, to amend, repeal, or replace its prior decisions. As the EPA has expressed in other rulemakings, "agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation." Intention To Review and

Rescind or Revise the Clean Water Rule, 82 Fed Reg. 12532 (March 6, 2017) (to be codified at 33 C.F.R. pt. 328). The U.S. Supreme Court upheld this authority in *F.C.C. v. Fox Television Stations*, *Inc.,* 556 U.S. 502, 514 (2009), where the Court found "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review" than for an initial rule, because the Act "makes no distinction… between initial agency action and subsequent agency action undoing or revising that action." This holding is consistent with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense* Council, 435 U.S. 519, 523 (1978), which established that "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." An agency may require more procedure as it sees fit, but courts may not impose additional procedural requirements on an agency beyond the requirements of the APA and the relevant organic statute.

In the instant case, EPA is merely exercising its inherent authority to revise the previous compliance deadlines and is not required to support its decision beyond a reasoned explanation, just as if the agency were promulgating compliance deadlines for the first time. See *F.C.C. v. Fox*, 556 U.S. 502. This inherent authority makes good sense from a policy perspective. Agencies have the expertise, and must also have the flexibility, to adapt to new realities. The EPA's prompt stay of compliance deadlines for achieving zero discharge of coal ash transport water demonstrates that need. Hesitant to impose an undue burden on industry, the agency responded to petitions from the Utility Water Action Group ("UWAG") and the U.S. Small Business Association to suspend compliance dates that had yet to undergo judicial review. EPA Administrator Scott Pruitt, Petitions for Agency Reconsideration and Stay of Effluent Guidelines for the Steam Electric Point Source Category (April 12, 2017) (hereinafter "Pruitt Notice"). The

stay, promulgated in the public interest, is both legally permissible and based on a reasoned decision. The agency responded to a pressing concern in a timely fashion, and exercised its professional judgement to revise untenable compliance deadlines.

The EPA has additional authority to revise deadlines under both the CWA and the APA. Congress expressly delegated the power to revise effluent standards to the EPA Administrator in the Clean Water Act, and gave the Administrator wide latitude to affect the Act's purposes. 33 U.S.C. § 1314. The Clean Water Act provisions for ELGs dictate that the "*Administrator shall*… publish… regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations" (emphasis added). *Id.*

The Act puts the onus on the Administrator to "specify factors to be taken into account in determining the control measures and practices to be applicable to point sources" and mandates that those factors:

> shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and *such other factors as the Administrator deems appropriate*" (emphasis added) *Id.*

Administrator Pruitt, then, fulfilled his statutory duty in his Notice suspending compliance deadlines, revising them where appropriate after careful consideration of the factors Congress required him to evaluate, and exercising his discretion in considering other relevant factors as Congress permitted.

Agency authority from the APA augments authority from the Clean Water Act. Section 705 of the APA states that "[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. § 705. The Supreme Court has held that this APA authority is not preempted by other statutory authority, rather it augments

that statutory authority. See *Sierra Club v. Jackson*, 833 F.Supp. 2d. 11 (D.C. Cir. 2012). In an analogous case, *Sierra Club v. Jackson*, an environmental advocacy organization sued the Administrator on the theory that the EPA's notice staying the effective date of rules regulating emissions standards under the Clean Air Act ("CAA") was invalid. *Id.* The plaintiff contended that a provision in the CAA limiting EPA's authority to stay the effective dates of rules eliminated EPA's authority to stay rules under the APA. *Id.* at 21. The reviewing court found that, because Congress could have, but did not, expressly exclude APA section 705 in the CAA, the CAA did not preempt EPA's authority to stay effective dates under the APA. *Id.* at 22. Rather, the APA provided additional authority for the EPA to stay the dates in question. In the instant case, the CWA has no comparable provisions limiting the agency's authority to stay rules, and certainly does not expressly exclude APA section 705. Thus, the CWA does not preempt the EPA's authority under the APA to postpone effective dates when justice so requires.

Agencies have inherent power to revise their own rules. Congress has determined that the EPA Administrator is the appropriate arbiter of ELGs and has endowed the Administrator with wide discretion to revise them and to determine the factors considered in those revisions. 33 U.S.C. 1314. The APA further permits the EPA to postpone effective dates when justice so requires. 5 U.S.C. § 705. Case law makes clear that the authority granted to the Administrator in the APA is not preempted by the CWA, and that reviewing courts will not impose a higher level of scrutiny upon revisions of rules than for the initial rules. Thus, Administrator Pruitt has both inherent and statutory authority, upheld by the nation's highest Court, to revise the compliance dates in question.

B. The EPA Administrator May Postpone Permit Compliance Deadlines without Notice and Comment Because The Notice Is a Statement of General Policy.

Administrator Pruitt's Notice suspending compliance deadlines need not go through formal rulemaking because the Notice is a statement of general policy, not a substantive rule, and notice and comment is not required for statements of general policy. 5 U.S.C. § 553(b)(3)(A). When evaluating whether an administrative stay constitutes a rule, the "central question" is "whether the stay of the … rule constitutes substantive rulemaking. *Sierra Club*, 833 F.Supp. 2d.at 28.

In the instant case, Administrator Pruitt's April 12 Notice is not a substantive legislative rule, but a statement of general policy akin to the Delay Notice at issue in *Sierra Club v. Jackson. Id.* at 11. In that case, an environmental organization sued the EPA Administrator on the theory that an EPA Notice staying the effective date of rules regulating emissions standards under the CAA was invalid because the agency failed to adhere to the notice and comment requirements for substantive rulemaking required by APA section 553. *Id.* The District Court found that the stay was valid, because the administrative stay did not constitute substantive rulemaking and was thus exempt from the APA's notice and comment provisions. *Id.* at 28. The court explained 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.* Because the Delay Notice was not "tantamount to an amendment or recission" of the rule, it was merely a general statement of policy. *Id.* at 27.

Pruitt's Notice is analogous to Jackon's Delay Notice. See *Sierra Club,* 833 F.Supp. 2d. at 11. Like the Delay Notice, Pruitt's Notice suspending compliance deadlines is a temporary device to preserve the status quo. Like the Delay Notice, Pruitt's Notice is not "tantamount to an amendment or recission" of the rule. Rather, its function and purpose are well defined, and it serves only to provisionally relieve industry of the burdens of a contested rule while the Fifth

Circuit assesses consolidated petitions for review with wide ranging objections to the 2015 Rule, which establishes the ELGs the Notice seeks to suspend. The Fifth Circuit is currently holding its review of those petitions in abeyance at the EPAs request, which is an appropriate response to the Notice and an exercise in regulatory negotiation, discussed in detail below.

C. The EPA Administrator May Postpone Permit Compliance Deadlines without Notice and Comment because Notice And Comment Is Not Required Where It Is "Impracticable, Unnecessary, Or Contrary To The Public Interest."

Administrator Pruitt's Notice effectively suspended compliance deadlines because notice and comment is not required where an agency finds, for good cause, that the notice and comment process is "impracticable, unnecessary or contrary to the public interest." *Sierra Club*, 833 F.Supp. 2d. at 26. In the instant case, the agency has found that notice and comment rulemaking would meet all three criteria. Requiring the Administrator's stay to undergo notice and comment rulemaking would be impracticable because, rather than preserving the status quo, public comment would delay the suspension of deadlines to the point of inefficacy and create confusion as to the appropriate standard. Notice and comment would also be unnecessary, as the stay merely maintains the status quo while EPA considers a revision, and the promulgated revision will afford the public notice and an opportunity to comment. Finally, notice and comment would be contrary to the public interest because the resulting undue delay would impose costs on industry that would be passed onto rate payers, and foment confusion while the 2015 rule undergoes revision.

In *In Re: Enerprog*, the Environmental Appeals Board opined that because the "effective date" of the stayed 2015 rule had "long since passed," when the Notice was issued, the Notice could not stay the 2015 rule. Record at 12. This dictum makes little sense, as the suspended compliance deadlines themselves had yet to go into effect. Thus, the retroactivity and reliance

concerns associated with repealing a rule that is already in affect are absent here. The law does not favor absurd results. If the Notice had been issued between the 2015 Rule's publication in the federal register and its "effective date" of January 4, 2016, the rationale for suspension would remain the same.

From a public policy standpoint, the risks from postponing compliance deadlines without notice and comment are *de minimis.* Informal rules are often passed without notice and comment, with much greater consequences than the Notice, which simply preserves the status quo. In *Lincoln v. Vigil*, 508 U.S. 182, 184 (1993), for instance, the Director of the Indian Health Service discontinued an entire program without notice and comment. The U.S. Supreme Court reversed the Tenth Circuit to uphold the Director's decision because the decision was "committed to agency discretion by law". Similarly, in the instant case, Congress has explicitly delegated discretion to the EPA Administrator to provide and revise ELGs. Administrator Pruitt's exercise of that delegated power was both appropriate and pragmatic.

Pragmatism is encouraged by the national policy shift towards "delegalizing" rulemaking. Since President Reagan's time in office, administrations from both parties have worked towards streamlining the regulatory process and implementing regulatory negotiation. Keith Werhan, "Delegalizing Administrative Law," 1996 *U. Ill. L. Rev.* 423, 440 (1996). By "delegalizing" the regulatory process, agencies can encourage regulated parties to participate in the process and resolve disputes within a "minimalist legal framework." *Id.* In doing so, the government reduces conflict between regulated parties and agencies, reduces the burden on the judiciary to resolve disputes, and obtains the cooperation of regulated entities that are often in the best position to understand the issues. Administrator Pruitt's Notice is in line with this policy

shift. Through dialogue with industry, Pruitt pragmatically reduced regulatory uncertainty and resolved the dispute with a minimum of participation by legal institutions.

D. Administrator Pruitt's Notice Stayed The "2015 Rule" Because EPA Properly Applied *Sierra Club v. Jackson*'s Four-Part Test and Has Reasonably Concluded a Stay Is Appropriate.

The Notice was an effective stay, because the EPA has authority under the APA to stay rules where "justice so requires it," and the agency properly applied the required four-part test to determine a stay was appropriate. The APA permits an agency to postpone the effective date of the agency's own action when it finds that justice so requires. 5 U.S.C. § 705. To determine whether justice requires a stay, the agency must perform a four-part test. *Sierra Club*, 833 F.Supp. 2d. at 30. In *Sierra Club v. Jackson*, while the District Court found that Administrator Jackson's Delay Notice did not require notice and comment, the court invalidated the stay because the EPA failed to apply the appropriate four-part test for stays and injunctions, holding that the EPA must either apply the test or provide a reasoned decision for its change of position. *Id.* at 11. Here, EPA has considered each prong, and determined that justice requires a stay.

Whether a stay of a final decision pending judicial review is appropriate turns on four factors: likelihood of success on appeal, irreparable harm to other interested parties, substantial harm to other interested parties, and the public interest. *Id.* at 30. These factors need not be given equal weight. *Special Counsel v. Campbell*, 58 M.S.P.R. 455 (M.S.P.B. 1993). Potential success on the merits is the most salient factor. *Griffin v. Department of Army*, 68 M.S.P.R. 240 (M.S.P.B. 1995) (holding that if support from the other factors is slight, a stay will issue only if possibility of success on merits is strong). Here, support from other factors is strong, but there is high potential for success on the merits as well. Judicial review of the "2015 Rule" is pending, but temporarily in abeyance. Seven petitioners have argued against the rule and have substantial

evidence to support their claims. The UWAG petition in particular "points to new data, claiming that plants burning subbituminous and bituminous coal cannot comply" with the standards in question. 40 C.F.R. 423. A pilot study on the issue has been conducted at UWAG's Pleasant Prairie plant, and new data have emerged from American Electric Power that

> illustrate that variability in wastewater performance can also impact performance at bituminous plants such that additional technologies beyond what EPA's model technology will be needed to achieve these limits. *Id.*

These data suggest that petitioners are likely to succeed on the merits, so that the compliance deadlines, if not stayed, may well be vacated in the Fifth Circuit. EnerProg should not be forced to comply with a rule that may be revised by EPA or overturned by a court in the imminent future.

The second factor, irreparable harm, is a controlling factor. *Associated Securities Corp v. Sec. Exchange Comm.*, 283 F.2d 773 (10th Cir. 1960). The prong has been used in environmental litigation to successfully justify suspension of deadlines where an industrial defendant would face irreparable injury from compliance with regulations that may be overturned in court. See *Salt Pond Associates v. Army Corp*, 815 F.Supp. 766 (D. Del. 1993). EPA has evaluated the harm that would result from a failure to suspend compliance deadlines and determined that "in light of the capital expenditures that facilities incurring costs under the rule will need to undertake... justice requires [EPA] to postpone the compliance dates..." 40 C.F.R. 423. Without an agency stay, EnerProg will endure a vast and unnecessary expenditure of resources before EPA finalizes rulemaking or the 5th Circuit rules on the 2015 rule. The company's substantial investments require consideration, and EPA should not force EnerProg to expend resources to comply with standards that are in the process of revision.

The third prong is substantial harm to other parties. In the instant case, no harm to EPA or EnerProg will result from the stay. FCW may experience *de minimis* harm from delayed public participation, but the organization has ample opportunity to participate in notice and comment during the formal rule revision. In fact, by eliminating the risks to industry posed by complying with one standard, only to be forced to comply with a new standard shortly thereafter, the Notice may serve to *reduce* risks to environment posed by an additional construction project. Clear standards may reduce the amount of trucks needed for compliance, the severity of noise and air pollution, threats to wildlife, and other adverse environmental effects caused by an iterative compliance process. EPA has considered risks to other parties imposed by the stay, and mitigated them appropriately by ensuring public process in the official rulemaking. Pruitt Notice at 2. As the Notice states, "because an administrative stay lasts only during the pendency of judicial review, the EPA intends to conduct notice and comment rulemaking during the reconsideration period." *Id.*

In the final prong, the agency must consider the public interest. Postponement of the compliance dates is in the public interest. Administrator Pruitt explicitly determines in the April 12 Notice that "it is appropriate and in the public interest to reconsider this rule." *Id.* at 1. If utilities are forced to comply with a rule that is overturned shortly thereafter, they will incur additional costs. These costs will be passed on to rate payers, harming the public's interest in affordable power and potentially raising public health concerns.

Even if there was an environmental concern associated with transport water it would not justify removal of a stay to preserve the status quo. In *B&D Land and Livestock Co. v. Conner*, 534 F.Supp. 2d. 891 (N.D. Iowa 2009), the public interest in not filling wetlands could not justify barring a preliminary injunction to preserve the status quo while judicial review was underway,

because the environmental risks were insufficient to justify the economic harm to the corporate producer. Our case is analogous, but the associated risk to the public's interest in environmental health is lower. MEGS already treats transport water with sedimentation and then discharges it into the Moutard Reservoir, which is isolated from Fossil Creek. *See* Record. Upon conversion to a dry ash handling system these flows will be eliminated from Internal Outfall 008 and instead be disposed of in a dry landfill. *B&D Land*, 534 F.Supp. at 891. This treatment is sufficient in the interim period, and the Notice simply assures that compliance is in accordance with a reliable standard, not one subject to immediate change.

The EPA has a duty to protect the environment and the flexibility to do so in accordance with its technical expertise. Administrator Pruitt was fulfilling that duty in his April 12 Notice suspending compliance deadlines. His decision was founded in the agency's inherent authority, bolstered by authority from the CWA and APA, and supported by decisions in the nation's highest Court. Using his professional judgment and responding to the valid concerns of the entities most affected by the rule, the Administrator exercised his authority to temporarily preserve the status quo after a careful analysis of the four prong test. This decision was not only legal; it was necessary to avoid the public policy concerns associated with regulatory uncertainty. For these reasons, the court should uphold the Administrator's stay.

III. USE OF BPJ TO IMPOSE ZERO DISCHARGE BAT FOR ASH TRANSPORT WATERS WAS PROPER

Even if imposition of zero discharge for bottom and fly ash is not required by the 2015 Rule, the zero-discharge requirement is proper as an exercise of the permit writer’s BPJ. The CWA and the EPA’s regulations contemplate establishing BAT ELGs on a case-by-case basis when no industry-wide ELG exists for certain toxic pollutants discharged by an otherwise

regulated source. Further, the permit as written is reasonable and is supported by the record by the factors enumerated in 40 CFR 123(d)(1)-(2).

A. Statutory and Regulatory Background

The Act prohibits discharges of pollutants from any point source unless dischargers acquire a NPDES permit under the Act. 33 U.S.C. § 1342. EPA Region XII issued a NPDES permit renewal for MEGS. Problem at 6-7. NPDES permits establish limitations on the amount of pollutants discharged based on water quality standards, 33 U.S.C. § 1313, and impose technology-based controls per industry standards. *Id*. at § 1311(b), 1314(b). Together, the limitations and technology standards are meant to achieve the greatest pollutant reductions economically achievable for industry. EPA has promulgated rules establishing ELGs that set parameters for pollutants dischargeable for certain point source categories. MEGS is subject to the Steam Electric Power Generating Point Source ("STEPS") category. 40 C.F.R. 423.12. However, the STEPS category does not contain ELGs for arsenic, mercury, and selenium, which are pollutants discharged by MEGs. *Id*.; Problem at 9.

The Act envisions different pollutant types, including conventional and toxic pollutants, which require corresponding standards for technology controls. 33 U.S.C. § 1314(a)(4). Arsenic, mercury, and selenium are all listed as "Toxic Pollutants." *See* 40 C.F.R. 401.15(6), (45), (56). Toxic pollutants are subject to the strictest technology standard, BAT. Congress explicitly provides that industry must do as much as possible to control toxic discharges, stating that BAT must "result in reasonable further progress towards the national goal of eliminating the discharge of all pollutants." 33 U.S.C. § 1311(b)(2)(A)(i). Courts have interpreted this standard strictly. *See Kennecott v. U.S. E.P.A*., 780 F.2d 445, 448 (4th Cir. 1985).

To determine which specific technologies a discharger must comply with, an EPA permit writer will apply one of three methods. 40 C.F.R. 125.3(c). First, a permit writer will check for EPA promulgated ELGs, and apply those if applicable. *Id*. at 125.3(c)(1). Second, if there are no applicable standards, EPA will apply a case-by-case analysis using a list of enumerated factors. *Id*. at 125.3(c)(2). Lastly, if an established ELG category covers only "certain aspects of the discharger's operation, or to certain pollutants," then EPA will regulate "other aspects or activities… on a case-by-case basis in order to carry out the provisions of the Act." *Id*. at 125.3(c)(3). A case-by-case determination requires that EPA permit writers consider a variety of factors enumerated at 40 C.F.R. 125.3(d) and ultimately rely on their Best Professional Judgment ("BPJ"). While MEGS baseline pollutant discharge is covered under the STEPS ELG category, certain aspects are omitted, including toxic heavy metals arsenic, mercury, and selenium. Thus, the structure of the CWA and EPA's own regulations specifically contemplate that permit writers will use their BPJ to craft technology-based limitations in instances exactly like those presented in the MEGS permit renewal. Considering the dangers posed by those chemicals, it would be unreasonable for EPA not to impose BAT on dischargers.

B. Need for BAT to Address Toxic Chemicals Arsenic, Mercury, and Selenium

Arsenic, mercury, and selenium pose unacceptable risks to people and the aquatic environment, and as such, are precisely the type of chemicals the CWA is meant to regulate. 40 C.F.R. 423. When these toxic metals reach surface waters, they accumulate in the aquatic food chain and contaminate drinking water supplies. *Id*. The adverse effects of this process include "cancer, cardiovascular disease, neurological disorders, kidney and liver damage, and lowered IQs in children." *Id*. These grave risks to society prompted EPA to promulgate the 2015 Rule.

Settling ponds pose a risk of catastrophic failure, which risks public exposure to toxic chemicals. Recognizing this deficiency, the continued rise of new waste streams, and the development of widely affordable technology to control these chemicals, the 2015 Rule regulated certain toxics under uniform standards for the first time. 40 C.F.R. 423. Yet if Administrator Pruitt's April 2017 Notice requires a stay of the 2015 Rule, the need to control for toxic chemicals demands that permit writers apply a case-by-case BPJ determination of BAT. In fact, in the absence of a promulgated rule to address this risk, a case-by-case determination according to BPJ is the only possible standard to apply for regulating these toxic chemicals.

C. EPA is Required to Impose BAT for Toxic Pollutants without an Established ELG

Not only does the structure of the CWA and its regulations envision a permit writer's use of BPJ to address circumstances like those posed by MEGS, case law demands it. *See Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 863 F.2d 1420, at 1432-33 (9th Cir. 1988) ("*NRDC*"). In *NRDC*, the Ninth Circuit reviewed a NPDES permit written by EPA for offshore oil and gas operations in the Gulf of Mexico. *Id*. at 1423-24. Industry-wide regulations for discharge from drilling had not yet been promulgated. *Id*. at 1424. Thus, the court noted that in the absence of such standards, EPA must issue permits necessary to carry out the purposes of the Act. *Id*. at 1425. The proper standard by which permits are issued in cases like *NRDC* is on a case-by-case basis according to BPJ. *Id*. at 1424.

Among the chemicals discharged by the operations at issue in *NRDC* were cadmium and mercury, two listed toxic chemicals. *Id*. at 1432. However, EPA chose not to include a case-by-case BAT determination for these chemicals in the NPDES permit. *Id*. EPA justified its decision not to include those two chemicals with a finding that it had insufficient information regarding the quantity of "clean barite." *Id*. Yet the court held that EPA's failure to regulate those two

listed toxic chemicals in the NPDES permit was invalid. *NRDC*, 863 F.2d at 1433. The court reasoned that "Congress has demonstrated its intent to require industry to do as much as possible to control toxic discharges." *Id*.

The same logic from *NRDC* should apply to EnerProg's generating station. Just as an industry-wide ELG for oil and gas operations had not yet been developed in *NRDC*, the same is applicable for arsenic, mercury, and selenium in the STEPS category absent the 2015 Rule. In fact, one of the very same toxic chemicals at issue in *NRDC* is also discharged by MEGs – mercury. If Congress intended for mercury and cadmium to be regulated during oil and gas production more than three miles offshore, then surely EPA must also regulate those same toxic chemicals when they are at risk of harming the people and environments of Fossil, Progress and other downstream communities. Therefore, not only was EPA's BPJ determination of a zero discharge BAT for MEGS permissible, but the Ninth Circuit has held that it would be required.

D. EPA's Zero Discharge Requirement via BPJ is Reasonable Under Administrative Procedure Act Review

EPA's use of zero discharge for bottom and fly ash under BPJ is reasonable under the standards of review for final agency action under the APA. 5 U.S.C. § 706(2)(A). The zero discharge standard is reasonable because it is both technologically and economically feasible, which are conditions of a BAT determination. *See* 33 U.S.C. § 1314(b)(2)(B).

A court reviews NPDES permits under the APA to determine whether the actions of the EPA were "arbitrary and capricious*." Nat. Resources Defense Council v. U.S. E.P.A.*, 808 F.3d 556, 569 (2d Cir. 2015). To be found reasonable under the APA, an EPA decision must rely on a record demonstrating that EPA relied on relevant data and articulated a satisfactory explanation for its actions. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts defer to agency actions regarding factual matters involving scientific

matters within its area of technical expertise at the frontiers of science. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Further, courts defer to agency interpretations of its own regulations "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Determining the allowable effluent limits for toxic heavy metals is within the EPA's area of technical expertise, and the use of BPJ is an interpretation of EPA's own regulations, thus this court should defer to the use of BPJ to impose a zero discharge BAT on MEGS. Further, EPA's permit is both technologically and economically feasible in accordance with the CWA.

1. The Zero Discharge Requirement is Technologically Feasible.

The zero discharge standard for bottom and fly ash is technologically feasible because it is supported by considering relevant regulatory factors and because many profitable steam electric generators have already adopted this standard. When setting case-by-case limitations pursuant to 40 C.F.R. part 125.3(c), the permit writer should consider a variety of factors including the age of equipment involved, the process employed by the discharger, engineering challenges, and the costs of attaining a reduction in effluent and the effluent reduction benefits derived. 40 C.FR. 125(d)(2)(i)-(vii). When these factors are applied to technological feasibility, it is sufficient that the best operating facilities can achieve the limitation. *See Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 816-17 (9th Cir.1980). If fact, the "BAT standard must establish effluent limitations that utilize the latest technology." *Kennecott*, 780 F.2d at 448

EPA has known that the industry can meet the requirements for zero discharge from bottom and fly ash discharge for many years. *See* 40 C.F.R. 423. Thus the 2015 Rule demonstrates that it is technologically feasible for MEGS to achieve zero discharge of bottom and fly ash transport waters. Here, EPA has followed the correct process by determining what

the best achievable standard is, and then applying it. When EPA overlooks evidence of what the best achievable technology is, and instead applies a lesser standard, such a decision will be found arbitrary and capricious. *See Nat. Res. Def. Council v. U.S. E.P.A.*, 808 F.3d 556, 570 (2d Cir. 2015). The zero discharge BAT standard will ensure that EPA complies with its mandate to set the best achievable technology that will "result in reasonable further progress towards the national goal of eliminating the discharge of all pollutants." 33 U.S.C. § 1311(b)(2)(A)(i).

2. The Zero Discharge Requirement is Economically Feasible.

The record below also demonstrates that the zero discharge for bottom and fly ash transport waters is economically feasible. Economic feasibility is a permissive standard under which EPA has wide discretion to weigh the costs of BAT under a case-by-case BPJ analysis. *See American Iron and Steel Inst. v. U.S. E.P.A.*, 526 F.2d 1027, 1052 (3d Cir.1975). The Fourth Circuit has stated that under the permissive BAT standard for economic feasibility, the EPA is not required to do a formal balancing test, only consider costs along with the other listed factors. *Reynolds Metals Co. v. U.S. E.P.A.*, 760 F.2d 549, 565 (4th Cir.1985).

In *Riverkeeper, Inc. v. U.S. E.P.A.*, 358 F.3d 174, 196 (2d Cir. 2004), the court noted that the party best equipped to balance the costs of new regulating technology and the benefits of effluents eliminated was the EPA. The court noted that it was "not well equipped, however, to meaningfully weigh a 95 percent reduction in entrainment against .027 percent of new generating capacity, 300 pounds of mercury, and $443 million dollars." *Id.* These kinds of cost appraisals are precisely the kind of technical determinations that agencies are designed to make, which is why this court should defer to EPA's decision below.

EnerProg's costs of imposing the zero discharge requirements are *de minimis*, and therefore EPA's BAT requirement for ash transport waters is reasonable. The record does not

establish a total cost, but states that technology required to achieve zero discharge would increase the average ratepayer only twelve cents per month. Problem at 9. This low amount suggests that EnerProg could implement new technology at a low cost and recoup its costs by making minor rate increases. It also suggests that "those costs can be reasonably borne by the industry," which the Fifth Circuit found was a sufficient condition for imposing new technology on industry. *Chem. Mfrs. Ass'n v. U.S. E.P.A.,* 870 F.2d 177, 262 (5th Cir.1989).

E. EPA's Permit as Written in Accordance with BPJ Supports the Purpose of the Act.

In addition to being compelled by interpretation of the text of the CWA and EPA's own regulations, and being reasonable under APA review, the use of BPJ to establish a zero discharge BAT for EnerProg's MEGS bottom and fly ash water transport is consistent with the regulatory philosophy of the CWA. The Act's stated goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters…" 33 U.S.C. § 1251(a)(1). This aspirational goal should compel EPA to act decisively and apply the highest standards to all regulated entities.

Further, because EnerProg's MEGS plant discharges toxic chemicals, its NPDES permit deserves special scrutiny. The Act states "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C.A. § 1251(a)(3). The Act provides the EPA with many avenues to reach this goal. One of those avenues was taken by EPA in this case when it used BPJ to impose BAT on a recalcitrant industry party who has failed to adopt reasonable technology that would prevent discharge of toxic chemicals. The Second Circuit explained this guiding principle of the CWA, stating that "Congress did not intend to permit continuance of pollution by industries which have failed to cope with and attempt to solve the problem of polluted water." *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620, 636 (2d Cir. 1976).

In the present case, there are industry-wide regulations governing most of the discharges from steam electric power generating plants. However, there are no industry-wide regulations governing the discharge of certain toxic chemicals. This CWA encourages EPA to address this precise situation on a case-by-case basis. When the 2015 Rule takes effect, EPA's discretion to use BPJ will cease. Until then, this court should defer to EPA's interpretation of its own regulations and uphold EPA's BPJ application of a zero discharge BAT.

IV. NPDES PERMITTING REQUIREMENTS DO NOT APPLY TO DISCHARGES INTO THE MEGS ASH POND, IN LIGHT OF EPA'S SUSPENSION OF 40 C.F.R. SECTION 122.2.

EnerProg's discharges into the MEGS ash pond are not subject to NPDES permitting requirements, because a key provision of 40 C.F.R. 122.2, which originally included wastewater treatment systems formed by impounding pre-existing WOTUS within the regulatory definition of WOTUS, was suspended in 1980 and has not been given affect in the thirty-seven years since. While Fossil Creek, a tributary to a navigable waterway, is undoubtedly a WOTUS and should be regulated as such, the MEGS pond itself is not a WOTUS. *See* Record.

FCW bases its claim on 40 C.F.R. 122.2 which defines WOTUS to include "all impoundments of waters otherwise identified as waters of the United States." 40 C.F.R. 122.2 (1983). Section 2 of the WOTUS definition exempts "waste treatment system, including ponds or lagoons designed to meet the requirements of the [CWA]." *Id.* The MEGS pond fits neatly into this exemption. However, FCW cites the last sentence of the exemption which, prior to the EPA's suspension, contained a caveat. That sentence provides, "this exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United

States." *Id.* FCW claims that because the MEGS pond was constructed via impoundment of the Fossil Creek, which is a WOTUS, the impoundment itself is a WOTUS.

This claim is untenable. The sentence FCW relies on was stayed by EPA on July 2, 1980 and continued on April 1, 1983. 40 C.F.R. 122 (1980); 40 C.F.R. (1983). On July 29, 2015, an amendment published at 80 Fed. Reg. 37114 reaffirmed the stay. Record at 12. Nonetheless, FCW claims the stay should not be given effect because (a) it lacked statutory authorization and (b) it failed to comply with the requirements of APA section 553. Both arguments must fail, because the EPA needs no additional statutory authority to revise its own rulemaking and because the agency's decision not to require NPDES permits for impoundments of a WOTUS is a general statement of policy explicitly exempted from formal rulemaking requirements under APA §553.

A. EPA Does Not Need Additional Statutory Authorization to Revise Its Own Interpretation of An Ambiguous Statutory Term.

FCW contends that EPA lacked statutory authorization to stay the final sentence of the regulatory provision exempting impoundments from section 402 permitting, but the agency has authority to revise its own interpretation of ambiguous statutory terms. As addressed above, agencies have inherent power to reconsider and revise past decisions when consistent with the law and supported by a reasoned explanation. When a statutory term is ambiguous, agencies have wide discretion as to its interpretation. *Chevron,* 467 U.S. 837.

Here, EPA interpreted the statutory definition of "navigable waters" provided in the CWA, "waters of the United States." 33 U.S.C. 1314. The United States Supreme Court has long acknowledged that term "waters of the United States," is ambiguous, and that accordingly, agency interpretations of the term are entitled to deference. See *United States v. Riverside Bayview*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of*

Engineers, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). The Supreme Court has further held that when an agency rescinds or revises a previous rule, the same degree of deference applies as if the agency was promulgating a new rule for the first time. See *F.C.C. v. Fox*, 556 U.S. 502. The EPA needs no additional authority to interpret a decidedly ambiguous statutory provision.

The agency also has inherent authority to interpret its own rules, and again, is entitled to deference when doing so. The Supreme Court held as early as 1945 in *Seminole Rock*, and affirmed more recently in *Auer*, that when an agency interprets its own rules, that interpretation is entitled to substantial deference unless it is "plainly erroneous or inconsistent with the regulation." See *Seminole Rock & Sand Co.*, 325 U.S. 410; *Auer v. Robbins*, 529 U.S. 452 (1997). This standard sets a high bar for overturning reasonable agency interpretations. As the EAB notes in *In Re: EnerProg*, EPA's discretion in declining jurisdiction over impoundments has been upheld by successive administrations with disparate views towards environmental regulations for thirty-seven years. Record at 12. EPA has the authority to interpret both ambiguous statutory language and its own interpretations thereof, and has done so with acquiescence from Congress, the executive, and the judiciary for almost four decades. No further authority is required.

B. EPA's Decision Not To Require NPDES Permits For Impoundments Is A General Statement of Policy Exempt from Formal Rulemaking Requirements under §553(b)(3)(A).

FCW further contends that the EPA's interpretation of its own jurisdiction is impermissible because the agency failed to conduct a formal rulemaking. However, the agency's stay of the final sentence of section 2 was a general statement of policy, exempt from the requirements FCW seeks to impose. The APA outlines the requirements for formal rulemaking

in section 553. 5 U.S.C. §553. At section 553(b)(3)(a), the APA exempts from those requirements "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." As the Congressional Research Service explains, "general statements of policy are not legally binding; rather, they are issued in order to advise the public about the manner in which the agency intends to exercise its discretionary authority." Jared P. Cole and Todd Garvey, Cong. Research Serv., R44468, General Policy Statements: Legal Overview (2016). Such is the case here, where the EPA has discretionary authority regarding its own jurisdiction over WOTUS, and has advised the public as to its intent in exercising that authority. The statement does not have binding legal affect, and creates no enforceable cause of action, distinguishing it from a legislative rule, which would require notice and comment.

Moreover, FCW's procedural concerns have already been addressed. Even if EPA's 1980 suspension of the contested portion of the WOTUS rule failed to comply with APA section 553, that suspension envisioned future notice and comment rulemaking. See 40 C.F.R. 122 (1980) ("EPA intends promptly to develop a revised definition and to publish it as a proposed rule for public comment"). On April 1, 1983 EPA promulgated a final rule through formal rulemaking upholding the suspension. In doing so, the agency followed through on its vision, and exposed the suspension to the crucible of public process. 40 C.F.R. 122 (1983). The public has had numerous opportunities to comment on the exemption since. The 1986 WOTUS rule, 1988 rule, and the 2015 Clean Water Rule ("CWR") all retained the suspension, so that regardless of whether the CWR is upheld or rescinded, the public has had notice and an opportunity to comment on the suspension of NPDES permitting for impoundments of a WOTUS. See 33 C.F.R. 120 (1986), 40 C.F.R. 232 (1988), and 33 CFR Part 328 (2015).

The EPA has the authority to interpret ambiguous provisions of statutes, and has interpreted the CWA to determine that impoundments like the MEGS pond are not subject to the CWA's 402 permitting requirements. This decision was within the agency's discretion, and requires no additional authority to validate it. FCW's contention that the EPA's determination was invalid because the agency did not engage in formal rulemaking is incorrect. The APA exempts general statements of policy from notice and comment, and the EPA's decision is exactly such a statement. FCW's concerns about public process are moot, because since the 1980 suspension the public has had several opportunities to comment on the suspension. EPA's suspension is therefore valid, and Enerprog has no duty to comply with 402 permitting requirements for its internal discharges into the MEGS pond.

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

EnerProg's ash pond closure and capping plan does not require a permit for discharge of fill material pursuant to section 404 of the CWA, because the 40 C.F.R. 122.2 exclusion from the definition of a WOTUS for waste treatment systems applies to closed and capped coal ash ponds, and the EPA has suspended the impoundment of a WOTUS exception as addressed above. 33 U.S.C. § 1344. The issue of 404 permitting for closure and capping of the ash pond is closely related to the section 402 issue discussed *supra.* To avoid redundancy, this section focuses on the EPA's definition of waste treatment systems to argue that closed and capped ponds fall within that definition, and concludes that whether the pond was created by impoundment of an extant WOTUS is irrelevant for the reasons already discussed.

Closing and capping a coal ash pond in accordance with congressionally mandated and EPA coordinated procedures is waste treatment, and as such is specifically excluded from the

regulatory definition of a WOTUS. When properly adjusted to remove the suspended provision FCW relies on, 40 C.F.R. §122.2 provides as follows:

> The following are not 'waters of the United States' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition. (i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. 40 C.F.R. 122.2 (1983).

40 C.F.R. §260.10 clarifies the regulatory definition of "treatment" in implementing the CWA:

> Treatment means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. 40 C.F.R. §260.10 (1980).

Closing and capping EnerProg's MEGS pond is waste treatment. The Act's definition of treatment is expansive, and the very purpose of the closure process is to neutralize waste by changing its physical character through dewatering. Capping prevents leakage, which renders waste less hazardous. The stated purpose for closure and capping in Progress's CACA legislation is to "prevent public hazards associated with the failures of ash treatment pond containment systems." Record at 11-12. According to John McCormkick, TVA's vice president of safety, "digging up the coal ash and moving it someplace else has more potential environmental impacts than closure-in-place and adds significantly more time and costs for our ratepayers." Dave Flessner, TVA to cap and close ash ponds, Times Free Press (July 29, 2016), http://www.timesfreepress.com/news/business/aroundregion/story/2016/jul/29/tva-cap-and-close-coal-ash-ponds/378565/. A closed and capped MEGS pond fits squarely within the CWA's definition of a treatment pond designed to fulfill the Act's requirements.

FCW bases its section 404 permitting claim on a portion of the regulatory definition of a "fill," arguing that because closure and capping changes the bottom elevation of the MEGS pond,

a permit is required. Fatally, FCW ignores the jurisdictional component of that definition. 33 C.F.R. §323.2 provides:

> the term fill material means material placed in *waters of the United States* where the material has the effect of: (i) Replacing any portion of a *water of the United States* with dry land; or (ii) Changing the bottom elevation of any portion of a *water of the United States.* 33 C.F.R. §323.2 (1986) (emphasis added).

The MEGS pond is not a WOTUS, and does not convert into one upon closure. The CWA makes no distinction between the definition of a WOTUS for 402 and 404 purposes, and longstanding canons of statutory construction indicate that when the same word or phrase appears multiple times in a statute, it ordinarily has the same meaning throughout. Cong. Research Serv., 97-589, Statutory Interpretation: General Principles and Recent Trends (2014). Absent some sort of "recapture provision," the regulatory definition of a fill is irrelevant, and as the EAB notes in *In Re: Enerprog*, "the 40 C.F.R. section 122.2 exemption for waste treatment systems does not contain any recapture provision that would convert these features back into waters of the United States upon their retirement." Record at 13. Because the MEGS pond is a treatment facility, is not a WOTUS, and does not become a WOTUS upon retirement, no 404 permit is required.

Respectfully submitted,

Attorneys for Respondent

November 27, 2017

United States Environmental Protection Agency

CERTIFICATION

We hereby certify that the brief for University of Colorado Law School is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

/s/ Gunnar Paulsen

Team Member

/s/ John Rader

Team Member

November 27, 2017
Date