Team No. 49

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

September Term, 2017

Docket Nos. 17-000123 and 17-000124

ENERPROG, L.L.C.,

Petitioner,

and

FOSSIL CREEK WATCHERS, INC.,

Petitioner

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

On Consolidated Petitions for Review of a

Final Permit Issued Under Section 402 of the Clean Water Act

Attorneys for the Respondent

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JURISDICTIONAL STATEMENT

On April 1, 2017, EnerProg, L.L.C, the permittee, and Fossil Creek Watchers, Inc., an environmental group, filed petitions for review of a National Pollutant Discharge Elimination System (NPDES) permit that was issued to EnerProg for the Moutard Electric Generating System by Region XII Environmental Protection Agency, requesting on a number of grounds that the permit be remanded to Region XII for further consideration. The Environmental Appeals Board (EAB) of the United States Environmental Protection Agency denied both of those petitions for review. All issues raised have been properly preserved for appeal, and jurisdiction properly lies in the United States Court of Appeals for the Twelfth Circuit pursuant to 33 U.S.C. § 1369(b)(1). Application has been made within 120 days of the date in which the determination was made.

STATEMENT OF THE ISSUES

I. Whether the Final Permit properly included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the Clean Water Act (CWA) section 401 certification?
   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 condition 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 EPA Region XII could rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash wastes, independent of the applicability or effectiveness of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines?

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

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. § 122.2 that originally included waste treatment systems formed by

impounding pre-existing waters of the United States within the regulatory definition of water 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

This is an appeal from a judgment of the Environmental Appeals Board (EAB) of the United States Environmental Protection Agency. On January 18, 2017, EPA Region XII issued a NPDES permit to EnerProg, L.L.C., pursuant to section 402 of the CWA. 33 U.S.C. § 1342 (2012). R. at 6. The permit authorized EnerProg to continue water pollution discharges associated with the continued operation of the Moutard Electric Generating Stations (MEGS), a coal-fired steam electric power plant located in Fossil, Progress. *Id.* On April 1, 2017 both EnerProg and Fossil Creek Waters, Inc. (FWC), filed petitions for review of this NPDES permit pursuant to 40 C.F.R. part 124, requesting on a number of grounds that the permit be remanded to Region XII for further consideration. *Id.* Specifically, they both challenge the inclusion in the final permit of a condition in the CWA § 104 Certification issued by the State of Progress requiring EnerProg to terminate its use of the coal ash settling pond by November 1, 2018, dewater the ash pond by September 1, 2019, and cap the remaining coal combustion residuals by September 1, 2018. *Id.* Additionally, EnerProg also challenges the inclusion of the zero discharge requirements for the coal ash transport waters, despite the notice issued by the EPA administrator suspending the compliance dates, and also challenges the permit writer's reliance on Best Professional Judgment as an alternative ground for requiring MEGS to implement dry handling of bottom and fly ash wastes in order to achieve zero discharge. R. at 6-7. FCW challenges the permit provisions authorizing coal ash solids to remain in the Ash Pond after it is closed, and also contends that the permit illegally authorizes discharges of bottom ash and fly ash

pollutants into the coal ash pond without subjecting the discharges to CWA effluent limitations. *Id.*

The EAB denied both petitions and held the following: that the inclusion of State of Progress conditions requiring ash pond closure and capping complies with CWA section 401(d), reliance on the best professional judgment as alternative ground for zero discharge for ash transport and treatment wastes is justified, the administrator may not postpone the compliance dates of a rule that has already become effective without undergoing a notice and comment process, discharges into the ash pond is an internal discharge and does not require a 402 permit, and a section 404 permit is not required for the coal ash pond closure and capping. R. at 10-12.

STATEMENT OF FACTS

EnerProg operates Moutard Electric Generating Station ("MEGS"), a coal-fired steam electric power plant located in Fossil, Progress. R. at 6. MEGS is subject to the EPA effluent limitation guidelines for the Steam Electric Power Generating Point Source Category. R. at 7. To make up for evaporative losses and drinking water needs in MEGS, water is withdrawn from the Moutard Reservoir. *Id.* The facility has a cooling tower, wet fly ash handling system, Flue Gas Desulfurization ("FGD") system, vapor compression evaporator ("VCE"), and an ash pond with a treatment system. R. at 7-9. All of these systems, either directly or indirectly, discharge into the ash pond. *Id.* The ash pond was created in June 1978 by damming Fossil Creek. R. at 7. Fossil Creek is a perennial tributary to the Progress River which is a "navigable-in-fact interstate body of water." *Id.* Fossil Creek does not discharge into the Moutard Reservoir. *Id.* Internal outfall 008 combines cooling tower blowdown with the ash sluice from the wet fly ash and wet bottom ash handling systems prior to discharging into the ash pond. R. at 8.

For the renewal of MEGS NPDES permit pursuant to section 401 of the Clean Water Act ("CWA"), the State of Progress included conditions relating to ash pond remediation to comply with the Progress Coal Ash Cleanup Act ("CACA"). R. at 8. The ash pond remediation requires EnerProg to "cease operation of its ash pond by November 1, 2018, completely dewater its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020." R. at 8. CACA's purpose is to prevent public hazards relating to the failures of ash treatment pond containment systems, as well as leaks form those treatment ponds into ground and surface waters. R. at 8-9. Discharge from the MEGS ash pond contains elevated levels of toxic pollutants such as mercury, arsenic, and selenium. R. at 9.

The Best Available Technology ("BAT") for discharges associated with bottom ash and fly ash is zero discharge. R. at 9. MEGS is capable of meeting the BAT of implementing dry handling of bottom and fly ash by November 1, 2018. *Id.* However, EPA Administrator Scott Pruitt extended the deadline of meeting this deadline based on Best Professional Judgment ("BPJ"). R. at 2, 11. MEGS is profitable enough to implement dry handling of the ash with an increase of about 12 cents per month in the average consumer's electric bill. R. at 9.

EnerProg just installed the FGD system to "remove S0x by mixing flue gas with a limestone slurry." *Id.* The company also recently installed the VCE system in February 2015. *Id.* EnerProg will also be required to build a Retention Basin to reroute all of the discharges into the ash pond in order to comply with CACA. *Id.* Additionally, the company is constructing a FGD settling basin. R. at 10.

The Environmental Appeals Board ("EAB") issued the Final Permit to EnerProg for discharges associated with MEGS. R. at 2. The Final Permit included the zero discharge of

pollutants in fly ash and bottom ash transport water requirements. R. at 10. Also, the Final Permit included the ash pond remediation conditions pursuant to CACA. Id.

In regards to the ash pond remediation conditions, the EAB could not say that the conditions were completely unrelated to surface water quality. R. at 11. Additionally, the EAB concluded that the EPA lacks discretion to reject State conditions included on any Federal license. *Id.* The permit writer's reliance on the BPJ was justified because the MEGS ash pond contains toxic pollutants not regulated by the 1982 Effluent Limitation Guidelines ("ELG"). *Id.*

Scott Pruitt incorrectly postponed compliance dates of the ELG's because, the EAB held, an administrator cannot postpone compliance dates of a rule that has already become effective. R. at 12. In regards to internal outfall 008, no effluent limitations are required because it does not discharge into a "water of the United States." *Id.* Lastly, the EAB held that a CWA section 404 permit was not required for discharge into the MEGS ash pond because a section 402 permit is not required and the definition of "waters of the United States" is the same for both sections. R. at 13.

SUMMARY OF THE ARGUMENT

The EPA has jurisdiction to consider the permissibility of State conditions on Federal licenses. EPA is tasked with administering the CWA and has therefore, been given deference to its interpretations. The Supreme Court's broad approach to what State requirements are appropriate requires the ash pond remediation conditions to be included in the Federal license. The policies behind CACA and the CWA are consistent, as they both aim to protect the public health. The overriding public policy concern dictates that the ash pond be dewatered and covered because it can affect the publics' health.

For toxic pollutants not regulated by the ELG's, a permit writer may rely on Best Professional judgment. The permit writer considered the total cost of applying the dry handling systems to achieve zero discharge. This cost to the company, along with all of its other installations, would significantly burden it and its customers. BAT is the most stringent standard and need not be followed in this case since there were other pollutants not regulated.

The postponement notice of compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is lawful because the EPA has satisfied both requirements of 5 U.S.C § 705. Specifically, EPA postponed the compliance dates while the rule was "pending judicial review," and when "justice so required the postponement." Furthermore, when reading the plain language of the rule, the APA broadly defines agency action, which in turn requires us to read the statute broadly to authorize the extension of not only the effective date, but of compliance dates as well. Lastly, if Congress intended for notice and comment to apply to § 507 it would have expressly stated so in the rule.

The July 21, 1980 suspension of the sentence "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," should be given effect because the EPA administrator, Scott Pruitt, had statutory authorization to stay the sentence indefinitely, and complied with the requirements of 5 U.S.C § 553. Due to compliance with § 553, and having authorization to stay the sentence, no effluent limitations are required for internal outfall 008, as it does not discharge into a "Water of the United States" as the term is defined in the regulations.

The ash pond closure and capping does not require a permit under section 404 of the CWA because, according to the definition of "water of the United States," a section 402 permit is

not required. The waste treatment systems exception applies which excludes these systems from being considered a "water of the United States." In the alternative, if the waste treatment exception does not apply, the EPA's interpretation that the ash pond was not a "water of the United States" was not "plainly erroneous or inconsistent with the regulation." A section 402 permit was not required in this case because the Supreme Court has taken a narrow view on "navigable waters" to only include waters such as streams, lakes, rivers, etc. Therefore, since sections 402 and 404 have the same meaning of "waters of the United States," a section 404 permit is not required.

ARGUMENT

I. The Ash Pond Closure and Remediation Conditions Are Appropriate Requirements of State Law, Which EPA Has Jurisdiction to Determine the Appropriateness of Such Conditions.

The CWA is meant to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.S. § 1251(a). The Act seeks to eliminate the "discharge of pollutants into the navigable waters." § 1251(a)(2). In accomplishing this goal, Congress has vested the Environmental Protection Agency ("EPA") with administering this act through an EPA Administrator. 33 U.S.C.S. § 1251(d).

In *Morton v. Ruiz*, the Supreme Court recognized, "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Again in *Chevron*, the Supreme Court reasoned that delegating a particular legislative question to the EPA is implicit rather than explicit and a court should uphold a reasonable interpretation of the statute by the agency. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). The Supreme Court has

consistently given considerable weight to an agency's construction of a statute when that agency is entrusted to administer it and deference to administrative determinations. *Id.* at 844.

A. EPA Has Jurisdiction to consider the permissibility of conditions included in State certification because Congress vested the EPA with authority to carry out the Act.

The EAB incorrectly found that EPA does not have discretion to reject a condition included in a State certification. Under 33 U.S.C. § 1341(d), state conditions "shall become a condition on any Federal license or permit subject to the provisions of this section." In *American Rivers*, the Federal Energy Regulatory Commission ("Commission") argued that it had the authority to review and reject state conditions imposed on the federal license. *American Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997). The Commission pointed to § 1341(a)(3) which assumes that conditions imposed by the state fulfill federal requirements. 33 U.S.C. § 1341(a)(3). This assumption can be overcome if certain conditions arise. *Id.* However, the court held that the Commission is not vested with the authority of Congress to determine whether the state conditions are consistent with the Clean Water Act. *American Rivers*, 129 F.3d at 108.

The facts of *American Rivers* are easily distinguishable from the present case. Here, EPA is determining whether the state-imposed conditions are appropriate, not FERC. The Supreme Court has consistently recognized that EPA has the authority to administer and interpret the CWA and fill in any gaps. Deference has consistently been given by the Supreme Court to the EPA and its interpretations. EPA in this case argues that it has been given jurisdiction to determine whether the state-imposed conditions are permissible. Therefore, consistent with the Supreme Court, the EPA's interpretation of the CWA should be upheld because EPA has been vested with the authority by Congress to administer the CWA.

B. The ash pond remediation conditions are appropriate requirements of State law as they are consistent with the policy of the CWA.

The EAB correctly concluded that the State of Progress requirements, including closure of the MEGS ash pond, dewatering, and covering it with an impermeable cap, are appropriate conditions that shall be included in the Final permit. The EAB recognized that ash pond remediation "is [not] so completely unrelated to surface water quality as to be beyond the scope of section 401(d)." R. at 11.

State requirements included in a federal permit may be included in the permit. 33 U.S.C. § 1341(d). Under § 1341(d), "any other appropriate requirement of State law set forth in such certification shall become a condition on any Federal license." *Id.* Under 33 U.S.C. § 1311, state requirements included in the federal permit must be based on achieving State water quality standards or related to achieving affluent limitations. Congress through the CWA, recognized that States have the right "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

The Supreme Court has held that "an agency's reasonable, consistently held interpretation of its own regulation is entitled to deference." *INS v. National Ctr. for Immigrants' Rights*, 502 U.S. 183, 189-190 (1991). Furthermore, the Supreme Court has recognized, even prior to *Chevron*, that the EPA is entitled to deference for interpreting the language of the statute it is entrusted to administer. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

1. <u>The broad view of "appropriate requirements" in Washington dictates that the ash pond remediation shall be included in the Final permit.</u>

The Supreme Court in *Washington* interpreted the language of § 1341(d) and held that it "allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'" *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711

(1994). The activities, not just the discharge, must comply with § 1341(d) and various provisions of the CWA as a whole. *Id.* at 711. The State, once the existence of a discharge is determined, may impose conditions on the activity. *Id.* at 712. The Court determined that this was EPA's reasonable interpretation of the language which was entitled to deference. *Id.*

Here, the EPA determined that dewatering the ash pond and covering it with an impermeable cap were appropriate requirements. The ash pond remediation is meant by the State to prevent leaks from the treatment pond into surface water. The Supreme Court in *Washington* took a broad view of what conditions are to be included in the Final permit. The EPA's decision to include these State provisions should be given deference, as the Court has consistently held. *Id.* Because the State requirements comply with the purpose of the CWA, the requirements should be upheld. Under *INS*, a reasonable, consistently held interpretation is entitled to deference. This Court should find that the broad view of "appropriate" requirements should include the ash pond remediation conditions.

2. <u>The policy underlying the State requirement is consistent with the policy of the CWA therefore, the requirements should be included.</u>

The Supreme Court in *Arkansas* dealt with a city in Arkansas applying for a National Pollution Discharge Elimination System (NPDES) permit for the new sewage system. *Ark. v. Okla.*, 503 U.S. 91, 95 (1992). The discharge would empty into a stream and that stream empties into a river close to the Arkansas-Oklahoma border. *Id.* at 95. EPA argued that the discharge must comply with Oklahoma water quality standards. *Id.* at 97. The Supreme Court ultimately recognized that EPA, through the CWA, is authorized to "create and manage a uniform system of interstate water pollution regulation" and is therefore entitled to deference. *Id.* at 110. The Court then held that the purposes of the State law are consistent with the purpose of the CWA and thus, the Oklahoma standards were included. *Id.* at 110-11.

Here, the policies underlying the State law is consistent with the policies of the CWA. CACA is meant to prevent public hazards relating to the failure of the ash treatment pond systems which encompasses protecting the public from leaks from these ponds into ground and surface waters. The overriding policy concern of the CWA is protecting the nation's waters from hazards so that the public can utilize them in various ways. 33 U.S.C. § 1251. The purposes of both CACA and CWA are to protect the water and the public health. Therefore, because CACA is consistent with CWA, the Progress requirements should be included in the Final permit.

3. Public policy dictates that MEGS dewater and cover the ash pond.

The public consumes a large amount of drinking water. That water should not be soiled with chemicals emanating from a coal plant when they can be avoided. Outfall 002 is where all of the runoffs and coal ash come together. This outfall receives:

> Bottom ash and fly ash, coal pile runoff, storm water runoff, cooling tower blowdown, flue gas desulfurization ("FGD") wastewater, and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis ("RO") wastewater, plant area wash down water, landfill leachate, monofill leachate, equipment heat exchanger water, groundwater, yard sump overflows, occasional piping leakage from limestone slurry and the FGD system, and treated domestic wastewater. R. at 7-8.

All of these chemicals are discharged into the Moutard Reservoir. Water from the Reservoir is withdrawn in order to make up for drinking needs of those whom work at MEGS as well as evaporative losses from the various systems. These chemicals can also be seeping down into the earth and getting into the ground water which is then withdrawn from wells. The FGD contains elevated levels of metals and chloride. This system was just put in so the numbers on these contaminants and its effects cannot be adequately known. Liquid runoff from the landfill and old tires are going into the ash pond. Oil and limestone slurry are gathering there.

The policy of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.S. § 1251(a). Allowing all of these chemicals and runoff to continue collecting in a pond which is then discharged into water which is used to make up for drinking water needs is against the overall policy of the CWA. These chemicals should not be allowed into drinking water either directly through the reservoir or indirectly by seeping through the earth and getting into the ground water. Therefore, dewatering the ash pond and covering it with a cap would be beneficial to the public by consuming water without these chemicals.

II. The April 25, 2017 EPA Notice suspending future ELG compliance deadlines for ELG's is effective to require suspending of the compliance deadlines for achieving zero discharge of coal ash transport water.

The Supreme Court has recognized that the EPA is challenged with a massive burden of "promulgating categories of sources and setting affluent limitations." *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 132 (1985). These complex industries require enormous amounts of researching and analyzing the information to create the affluent limitations. *Id.* at 132. Because plants can have unique aspects, the Court has recognized that the national standards should be flexible. *Id.* at 133. In regards to deference, the Supreme Court has given deference to EPA's decisions when its interpretation of a statute or regulation is reasonable and does not conflict with the intent of Congress. *Chem. Mfrs. Ass'n* 470 at 125; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

A. The EPA permit writer properly relied on Best Professional Judgment as an alternative ground for requiring the implementation of dry handling systems.

The Environmental Appeals Board ("EAB") incorrectly refused to extend the deadline for compliance with zero discharge requirements for coal ash transport waters. EPA Administrator Scott Pruitt relied on BPJ and extended the compliance deadlines. This Notice should effectively

extend the compliance deadline because it cannot be said that this exercise of discretion was unauthorized.

Permit writers may rely on Best Professional Judgment ("BPJ") for pollutants not regulated under the ELG's. 40 C.F.R. § 123(c)(3). Under 40 C.F.R. 125.3(c)(3): "[w]here promulgated effluent limitation guidelines only apply to certain aspects of a discharges operation, or to certain pollutants, other aspect or activities are subject to regulation on a case-by-case basis." *Id.* While it is recognized that permit writers do not have unlimited discretion, courts have consistently held that when there are not national standards, permit writers may issue permits which contain conditions that they deem necessary in order to comply with the Clean Water Act. *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 863 F.2d 1420, 1425 (9th Cir. 1988). These conditions may be based on a case-by-case determination. *Id.* at 1425.

For example, in *Texas Oil*, the permit writer encountered a point source which had unique subcategories and variations within that point source which were not regulated under the ELG's. *Texas Oil & Gas Ass'n v. United States EPA*, 161 F.3d 923, 940 (5th Cir. 1998). The EPA chose to not to disrupt the previously regulated effluent limitations and instead, exercised its authority to set different limits which proved to be more efficient. *Id.* at 940. The court could not say that the EPA's actions were unauthorized and therefore, the reliance on BPJ was proper. *Id.*

In this case, there is no argument that there is elevated level of mercury, arsenic, and selenium contained in the discharge from the MEGS coal ash pond. These pollutants are not regulated by the 1982 ELGs. Under 40 C.F.R. § 125.3(c)(3), because there are other pollutants not covered by the ELGs, the coal ash pond is properly subject to BPJ. The permit writer may

issue certain conditions in the permit, such as suspending the deadline, to comply with the Clean Water Act. Therefore, it cannot be said that using BPJ in this case was unauthorized.

B. The total cost of applying the dry ash technology would outweigh the benefits to be achieved.

Because reliance on the BPJ as an alternative ground for the zero discharge requirement was justified in the event that a pollutant was not covered by the ELGs, the permit writer must base his judgment of the effluent limitations on a variety of factors. 40 C.F.R. § 123(c)(3). Permit writers consider a combination of both the Best Practicable Control Technology Currently Available ("BPT") and the Best Conventional Pollutant Control Technology ("BCT"). *Id.*

Under both BPT and BCT, the permit writer considers: (1) the cost of applying the technology compared to the effluent reduction benefits to be achieved from that application; (2) age of the equipment and facilities; (3) the process employed; (4) the engineering aspects of the application of various types of control techniques; (5) process changes; and (6) non-water quality environmental impact. BCT adds another factor that the permit writer should compare the costs and level of reduction of pollutants from the discharge of a publicly owned treatment works as compared to the cost and level of reduction from a category of industrial sources. *Id.*

For example, in *Costle*, EPA's considered the costs versus the benefits in relation to BPT. *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 657 (1st Cir. 1979). EPA determined the capital and operating costs that "each plant would incur in meeting the effluent limits." *Id.* at 657. The court rejected criticisms that the EPA did not produce accurate estimates. *Id.* Accordingly, the court held that the EPA need only produce a rough estimate of the costs that the plant would incur. *Id.* The EPA case regulated the effluent limits based on the price estimates and therefore, the court could find no basis in which to overrule the EPA. *Id.*

The facts in *Costle* are analogous to this case. Here, the permit writer determined that MEGS could meet the zero discharge requirement by implementing dry handling systems. To meet this, MEGS would have to increase the average consumers bill by about twelve cents per month. Although it was determined that MEGS could meet the zero discharge requirement, the permit writer still decided to suspend the deadlines for meeting this requirement. It cannot be said that the permit writer failed to consider the cost of attaining this technology. Therefore, EPA cannot be overruled for suspending the zero discharge deadline.

C. The process changes to the facility would cause a burden on MEGS.

The EAB erred in including the zero discharge requirement in the final permit because it is based on BAT instead of BPT. The Supreme Court has recognized that forcing a power plant to spend an enormous amount of money to fix one problem leaves that company without enough resources to fix other problems. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009). Justice Breyer has recognized that we are "in an age of limited resources available to deal with grave environmental problems." *Id.* (5-4 decision) (Breyer, J., dissenting).

Here, while it was recognized that MEGS is sufficiently profitable to implement dry handling systems, implementing these systems, along with MEGS installing other systems, would cause a burden on the plant. MEGS recently installed a FGD System. Along with that system, MEGS also had to install a VCE. The facility is also required to build a new Retention Basin. Additionally, MEGS is constructing a new FGD settling basin. With all of these improvements either recently installed or needing to be installed promptly, MEGS is expending many resources into improving the facility prior to the dry handling system determination. While MEGS may be profitable to implement the dry handling system under BAT, under BPT and BCT, the permit writer can consider process changes and the facilities. Requiring MEGS to

implement dry handling systems would fix one problem, but all of their other improvements would have to be put on hold.

The BAT is the most stringent standard. *Entergy Corp* 556 U.S. at 221. The BPT is the least stringent. *Id.* When utilizing the BPT, the Supreme Court has recognized that the permit writer need not be guided by the BAT determinations. *Id*. Under BPT, the permit writer properly suspended the zero discharge requirement because forcing MEGS to implement dry handling systems along with all of its other improvements, would have put a burden on the facility.

III. The postponement notice of compliance deadlines for 2015 Final Effluent Limitation Guidelines (ELG's) for the Steam Electric Power Generating Industry is a lawful and reasonable exercise of the EPA's discretion under 5 U.S.C. § 705.

The Administrative Procedure Act (APA) contains a provision that allows an agency to postpone the effectiveness of a rule while a legal challenge to that rule is pending. The provision states: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5. U.S.C. § 705. A court may set aside an agency's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A court must also reject agency action if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C § 706(2)(C). However, a review under this standard "is narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Additionally, an agency's decision can be set aside "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012).

A. EPA satisfied Section 705's Requirements

The first sentence in § 705 governs an agency's ability to postpone the effective date of an action: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. The statute sets forth two requirements for an agency's postponement of the effective date of an action: (1) the postponement must be made "pending judicial review," and (2) the agency must find that "justice so requires" the postponement. EPA satisfied both of these requirements when it postponed the future compliance deadlines for 2015 ELG's.

1. EPA postponed the rule's future compliance deadlines "pending judicial review" in the U.S. Court of Appeals for the Fifth Circuit.

The postponement notice was issued "pending judicial review" of the ELG in the U.S. Court of Appeals for the Fifth Circuit. On November 3, 2015, the EPA issued a final rule amending 40 CFR part 423, the effluent limitations guidelines and standards for the steam electric power generating point source category, under sections 301, 304, 306, 307, 308, 402, and 501 of the CWA. 80 Fed. Reg. 67838 (Nov. 3, 2015). Immediately after the Rule was issued, EPA received seven petitions for review of the Rule, and the United States Judicial Panel on Multi-District Litigation issued an order consolidating all of the petitions. 82 Fed. Reg. 19005 (Apr. 25, 2017). EPA explained in the notice that, "while EPA is not making any concession of error with respect to the rulemaking, the far-ranging issues contained in the reconsideration petitions warrant careful and considerate review of the Rule." *Id.* Furthermore the notice stated,

> In light of the capital expenditures that facilities incurring costs under the Rule will need to undertake in order to meet the compliance deadlines for the new, more stringent limitations and standards in the Rule…the Agency finds that justice requires it to postpone the compliance dates of the Rule that have not yet passed, pending judicial review.

Id.

The Supreme Court has held that although the scope of review under the "arbitrary and capricious" standard "is narrow and a court is not to substitute its judgment for that of the agency," the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Burlington Truck Lines, Inc. v. United* States, 371 U.S. 156, 168 (1962). Here, EPA has satisfied its obligation by showing a rational connection between its postponement of future compliance deadlines and the pending litigation in the U.S. Court of Appeals for the Fifth Circuit. The postponement notice draws a connection between looking out for the public's best interest by taking into account the costs that will be incurred by the facilities that will have to make changes to meet the new, more stringent limitations.

2. EPA reasonably found that "justice so requires" postponement of future compliance deadlines.

As EPA explained in the postponement notice, the agency found that justice required the postponement of the Rule's future compliance dates given the "capital expenditures that facilities incurring costs under the Rule will need to undertake in order to meet the compliance deadlines for the new, more stringent limitations and standards in the Rule." 82 Fed. Reg. 19005 (Apr. 25, 2017). The court in *Sierra* held that the standard for a stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test in this circuit." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C 2012). It considers the following four things, "(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. *Id.* The court concluded that because EPA failed to address the four factors their actions were arbitrary and capricious. *Id.* at 31.

This Court should decide differently than the court in *Sierra*. The plain language of the second sentence in § 705, which applies to courts, does not require that the four factors test be applied. It states, "on such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve the status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. If Congress intended for there to be a factor test or if it wanted agencies and courts to be held to the same standard it would have explicitly written that in the statute.

B. Section 705 Permits Agencies to Postpone Future Compliance Dates

The EAB incorrectly determined that § 705 of the APA does not authorize the extension of compliance dates, only of the effective date. Under § 705, the EPA may postpone "the effective date of an action taken by it." 5 U.S.C. § 705. The term "effective date" is not explicitly defined in the APA, however it is commonly used within other rules of the APA to refer to the date that a rule initially takes effect. Although it is commonly interpreted within the APA to mean the date a rule takes effect, the Supreme Court has held that there is a "fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129 (1993). Here, when looking at the context in which "effective date" is used it can be interpreted as including future compliance dates.

The APA broadly defines an "agency action" as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). When we apply the definition of agency action in § 705 it reads as follows: "When an agency finds that justice so requires, it may postpone the effective date of 'the whole or part of [a] rule' taken by it, pending judicial review." To read this literally it allows agencies to postpone a "part" of a rule that is already in effect so long as the rule is pending judicial review. In this case, the EPA postponed a "part" of the compliance deadlines for the 2015 ELG's whenever the case was under judicial review.

C. Section 705 does not require notice and comment.

The EAB incorrectly held that an administrator may not postpone the compliance dates of a rule that has already become effective without undergoing notice and comment rulemaking. A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Contrary to that, a postponement is a "temporary measure for preserving the status quo," meaning that the rest of the rule stays in effect while a "part" of the rule is stayed pending a decision from the court. *Sierra Club,* 833 F.Supp. 2d at 28. The Supreme Court held that a court "must [] give effect to the unambiguously expressed intent of Congress when reviewing an agency's interpretation of a statue." *Chevron,* 467 U.S. at 842.

When considering Congress' intent we look first to the structure of the APA. Congress included § 553 as part of the "Administrative Procedure" chapter, and § 705 as part of the "Judicial Review" chapter. Had Congress intended for the rules to be used interchangeably it would have included them under the same chapter or it would have explicitly cross referenced § 553 in § 705 indicating its intent for the notice and comment requirements. Since § 705 does not

explicitly state that an agency must refer to § 553 and follow all notice and comment requirements, it can be inferred that Congress did not intend the rulemaking section to apply.

IV. The NPDES permitting requirements do not apply to EnerProg's discharges into the MEGS ash pond because the EPA's July 21, 1980 suspension of the provision of 40 C.F.R. § 122.2 maintains that outfall 008 does not discharge into a "water of the United States."

Congress authorizes "the administrator of the Environmental Protection Agency [to] administer [the CWA]." 33 U.S.C. § 1251(d). Additionally, Congress authorizes the administrator to "prescribe such regulations as are necessary to carry out his functions" under the CWA. 33 U.S.C. § 1361(a). It has commonly been held that if Congress has explicitly or implicitly delegated authority to an agency, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S at 844. This deference is a product both of awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time. *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 556 (1979).

A. The stay should be given effect because the EPA administrator had statutory authorization to change its original interpretation of the regulation without following the notice and comment procedural requirements of 5 U.S.C. § 553.

1. EPA Administrator had statutory authorization to stay the regulation.

The EAB correctly determined that the July 21, 1980 suspension should be given effect because the administrator had the statutory authorization to suspend the rule without compliance of the notice and comment requirements set out in 5 U.S.C. § 553. When determining whether an administrator has statutory authority to make a change to a regulation, courts will inquire as to what kind of authority Congress authorized the administrator to have. Here, Congress authorized

the administrator to "prescribe such regulations as necessary to carry out his functions under the CWA." 33 U.S.C. § 1361(a).

On May 19, 1980, the EPA revised the definition of "waters of the United States" by adding the sentence, "this exclusion applies only to manmade bodies of water which neither were created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States." 45 Fed. Reg. 33,424. (May, 19, 1980). Then on July 21, 1980, EPA suspended the May 19, 1980 exception. R. at 12. The reason for the suspension was in response to industry objections that the added sentence would require industries to "obtain permits for discharges into existing waste treatment systems which had been in existence for many years, and for which EPA had issued NPDES permits for discharges from, not into these systems." 45 Fed. Reg. 48,620 (July 21, 1980). EPA agreed that "the regulation should be carefully reexamined and that it may be overly broad," and suspended it until further notice. *Id.* Here, the administrator, upon learning that the rule would create problems that were not foreseeable at the time, acted within his statutory authority to prescribe the regulation that he felt necessary to carry out his functions under the Act. Moreover, not only was the indefinite stay allowed, but it has been reincorporated in two subsequent reconsiderations of the definition sections of §122.2. This means that there has been provided sufficient amounts of time in order for individuals to provide the EPA with their concerns. The EPA has read the comments and taken them into consideration, but still decided that it was best to continue the stay at least for this period of time.

2. <u>The Administrator did not have to follow the notice and comment procedural requirements of § 553 because the regulation was ambiguous.</u>

An agency must issue a "general notice of proposed rulemaking under the Federal Register." 5 U.S.C. § 553(b). Then, if "notice [is] required," the agency must "give interested

persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Lastly, when an agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." *Id.* However, not all rules must be issued through the notice and comment process. *Perez v. Mortg. Bankers Ass'n*, 135 U.S 1199, 1203 (2015). Section 553(b)(A) provides that unless another statute states otherwise, the notice and comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. 5 U.S.C. § 553(b)(A).

There used to be a jurisdictional split regarding whether an agency may alter its interpretation of its own regulation without notice and comment. *United States v. Magnesium Corp of Am*., 616 F.3d 1129, 1139 (10th Cir. 2010). The United States Court of Appeals for the Third, Fifth, and Sixth Circuits adopted the view that "if an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish" under the APA "without notice and comment." *Perez,*135 U.S. at 1205; (quoting) *Paralyzed Veterans of Am. V. D.C. Arena L.P.*, 117 F.3d 579, (1997). This interpretation was overturned in *Perez* when the Court held that the Paralyzed Veterans doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA. *Perez,*135 U.S. at 1206. Now the standard is that an agency's interpretation of its own ambiguous regulation is entitled to deference from the courts. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). This deference is a product both of awareness of the practical expertise which an agency normally develops, and of a willingness to accord some

measure of flexibility to such an agency as it encounters new and unforeseen problems over time. *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 (1979).

This case is similar to *Maier*. *Maier v. United States EPA*, 114. F3d 1032 (10th Cir. 1997). In *Maier*, the court held that the EPA's interpretation of the CWA was not arbitrary or capricious, and that the EPA's rejection of making a rule regarding oxygen-depleting pollutants was upheld. *Id*. This Court should award the same level of deference in the EPA refuses to add a sentence that the court in *Maier* awarded because the regulation was so ambiguous that it required the EPA to use its expertise to reconsider its position.

B. Since the stay is effective the impoundment is not considered a water of the United States.

The court in *Chevron* has held that it will reverse an agency's interpretation if it does not conform to the plain meaning of the statute. *Chevron,* 467 U.S at 844. Therefore, a regulation must be interpreted by its plain language unless another authorized reason is given. Here, the regulation clearly exempts "waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act." 40 C.F.R. § 122.2. To read the statute otherwise would be to add meaning to the regulation that is not there or intended to be there. Therefore, because the ash pond is not a water of the United States and the internal discharge from outfall 008 does not discharge into a water of the United States the ash pond is exempted. The ash pond was created in order to catch outfall from a wet fly ash handling system and a wet bottom ash handling system, which use water to sluice ash solids through pipes to one ash pond, where the transport water undergoes treatment by sedimentation before it is discharged to the Moutard Reservoir. This constitutes a waste treatment system.

V. The ash pond closure and capping plan does not require a permit under section 404 of the CWA because section 402 of the CWA does not require a permit.

The EPA is tasked with enforcing and administering the Clean Water Act by Congress. 33 U.S.C. § 1251(d). With the authority to enforce the CWA, the EPA issues regulations to fill in the gaps of the statutory language. *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 601 (2013). In interpreting the EPA's own regulation, the EPA's interpretation does not have to be the only interpretation, nor the best one possible, to prevail. *Id.* at 613. The agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

The Supreme Court defers to the agency's interpretation of its own regulation when the interpretation is consistent with the regulatory text itself. *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011). If the interpretation and the text are consistent, the Court need not look any further. *Id.* at 208.

A. The EPA was not "plainly erroneous or inconsistent with the regulation" in concluding that the ash pond remediation does not require a permit.

The EPA included an exemption for waste treatment systems in which, even if it is designed to meet provisions of the CWA, waste treatment systems are not considered "waters of the United States." 40 C.F.R. § 122.2 (b)(3)(d)(b)(b)(2)(i). Even if the water area was created from the impoundment of waters designated as "waters of the United States," the exemption still applies. *Id.* at (b)(3)(d)(b)(b)(1). "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.* However, the previous sentence that begins with, "[t]his exclusion applies only…" was suspended by the EPA in order to issue a revised definition. *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177,

213 (4th Cir. 2009). Under 40 C.F.R. § 122.2, waste treatment systems excluded from being considered "waters of the United States" included treatment ponds. 40 C.F.R. § 122.2.

In *Ohio Valley*, the court recognized that the excluded sentence was significant. *Ohio Valley* 556 F.3d at 213. The excluded sentence includes what waste treatment systems are covered in the exclusion and which ones are not. *Id.* It was not clear from language what was meant to be covered nor the intent behind the exclusion. *Id.* Therefore, because the language was ambiguous, the court looked to whether the agency's interpretation of the language was "plainly erroneous or inconsistent with the regulation." *Id.*

Here, the EPA argues that the ash pond remediation does not require a permit for the discharge of fill pursuant to section 404 of the CWA. The exclusion language in 40 C.F.R. § 122.2 may be ambiguous, but the language in 40 C.F.R. § 122.2(b)(3)(d)(b)(b)(1) clearly encompasses the ash pond before or after the ash pond closure. The ash pond was a result of damming Fossil Creek. This impoundment of water has existed since June 1978. Therefore, the ash pond is exempted from constituting a "water of the United States" thereby, not requiring a permit.

Even if this Court finds the language to be ambiguous, the Supreme Court has found EPA's interpretation to prevail unless "plainly erroneous or inconsistent with the regulation." The text in this case is labeled "waste treatment systems are not waters of the United States." The EPA interpreted this language to mean that the coal ash pond, which accepts coal ash, landfill runoff, tire runoff, etc., constituted a waste treatment system. The language of the regulation is clearly consistent with the EPA's interpretation of the text itself. Therefore, under the deferential standard the Supreme Court has set out, the ash pond remediation does not require a permit, which is consistent with EPA's interpretation.

B. A section 404 permit is not required under the CWA because a section 402 permit is not required under the Supreme Court's narrow interpretation of "navigable waters of the United States."

Under Section 402 of the CWA, the discharge of pollutants into navigable waters of the United States requires a permit. 33 U.S.C.S. § 1342. This is part of the underlying policy of the CWA to protect the nations wildlife and preserve the waters for recreation. 33 U.S.C. § 1251.

The Supreme Court addressed an issue of section 402 regarding discharge into a navigable water. The Court in *Miccosukee* reasoned that a pump between an impoundment and a canal did not constitute "discharge of a pollutant" because they were "simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). Therefore, a permit was not required under section 402 of CWA because there was no discharge into a "water of the United States." *Id.* at 109. The Court focused on whether an "addition" was made to a navigable water. *Id.*

The Supreme Court in *Rapanos* concluded that "waters of the United States" does not have an expansive reach. *Rapanos v. United States*, 547 U.S. 715, 739 (2006). In that case, the Court concluded that wetlands were not considered a "navigable water" under the CWA. *Id.* at 739. The phrase "waters of the United States" can only include those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes" under the dictionary definition. *Id.* The statute cannot be expanded to include channels in which "water flows intermittently or ephemerally." *Id.*

This case is analogous to *Miccosukee* because the ash pond and reservoir are two parts of the same body of water. Water is directly discharged from Moutard Reservoir to make up for

evaporative losses and drinking water needs for MEGS. The water then is discharged into Outfall 002, the ash pond treatment system, from all of the outfalls. Outfall 002 is then directly discharged back into the Moutard Reservoir. There is no indication in the record that the Moutard Reservoir discharges into a different body of water. Fossil Creek does not discharge into the Moutard Reservoir. Therefore, the Moutard Reservoir and the ash pond are two parts of the same body of water in which water is taken from and discharged into from MEGS. Because there was no addition of discharge into the water, there was not a discharge of a pollutant into a navigable body of water which does not require a permit under the CWA.

Similar to *Rapanos*, the ash pond in this case cannot be considered a "navigable water of the United States." The ash pond does not have a continuous flow of water similar to a stream, river or lake. The Supreme Court did not allow "navigable water" to extend to a wetland so this Court should not allow the phrase to extend to a man-made pond meant to collect waste. The pond will not be used for recreational activities, such as boating, which the CWA is meant to protect. Therefore, because the Supreme Court has restricted the phrase "navigable water" to a limited meaning, the ash pond cannot constitute a "navigable water of the United States." A section 402 permit under the CWA is not required. Subsequently, a section 404 permit is not required for the ash pond remediation because the jurisdictional definition of "waters of the United States" is the same for section 402 and 404 permitting.

CONCLUSION

EPA has jurisdiction to consider whether State conditions included in a Federal license are permissible. The CACA conditions in this case were "appropriate requirements of State law." Additionally, the April 25, 2017 Notice by Scott Pruitt was effective to require suspension of the compliance deadlines. The EPA may rely on BPJ as an alternative ground for requiring zero

discharge of coal ash transport wastes. Furthermore, discharges into the MEGS coal ash pond are not subject to effluent limits. Finally, the ash pond closure and capping plan does not require a permit for the discharge of fill material.

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