Team No. 9

Docket No. 17-000123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Fossil Creek Watchers
Plaintiff -Appellee

AND

EnerProg, LLC.
Plaintiff-Appellee

- v.-

United States Environmental Protection Agency
Defendant- Appellant

(Appeal from the United States District Court for the State of Progress in No. 17-0123)

BRIEF OF PLAINTIFF- APPELLEE FOSSIL CREEK WATCHERS

Oral Argument Requested

Attorneys for Plaintiff- Appellee

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JURISDICTIONAL STATEMENT

This case involves an appeal from a final decision of the Environmental Appeals Board of the United States Protection Agency. The Environmental Appeals Board had subject-matter jurisdiction under 40 C.F.R. § 124.2(a), because the claims arose under the laws of the United States, namely the Clean Water Act ("CWA"). The United States Court of Appeals for the Twelfth Circuit has jurisdiction under the Administrative Procedure Act to hear appeals from a final decision of the Environmental Appeals Board. 5 U.S.C. § 704. The notice of appeal was filed timely. Fed. R. App. 15(a); 33 U.S.C. § 1369(b) (2012).

STATEMENT OF THE ISSUES

I. Did the Environmental Protection Agency's Final Permit properly include State of Progress conditions intended to protect Progress ground water quality proper?

II. Is the Environmental Protection Agency's Notice suspending Enerprog's compliance with 2015 effluent limitations valid without notice and comment procedure?

III. Is the Environmental Protect Agency's Final Permit writer's use of Best Professional Judgment standard to require zero discharge of coal ash transport waste proper where there is no other pollution limits established by statute?

IV. Is Clean Water Act section 402 permitting required for EnerProg's direct pollutant discharges into the MEGS ash pond, in light of the Environmental Protection Agency's 1980 suspension that violates the Administrative Procedures Act?

V. Is Clean Water Act section 404 permitting required for the closed MEGS ash pond once it no longer serves as a waste treatment system?

STATEMENT OF THE CASE

This is an appeal of the Environmental Appeals Board of the United States Protection Agency' final decision. This case involves application of the Clean Water Act's ("CWA") to issue a National Pollutant Discharge Elimination System ("NPDES") permit to EnerProg, L.L.C. ("EnerProg"). On January 18, 2017, the Environmental Protection Agency ("EPA") Region XII issued a federal NPDES permit to EnerProg. This permit allows EnerProg's coal plant, the Moutard Electric Generating Station ("MEGS"), to continue discharging polluted water.

In response to the continued discharge of environmental waste, Fossil Creek Watchers ("FCW") filed this action against both EnerProg and the EPA with the Environmental Appeals Board pursuant to 40 C.F.R. section 124. FCW requested that the Environmental Appeals Board ("EAB") remand the EnerProg permit to Region XII for further consideration. FCW claimed the EPA violated CWA Section 402 because the EnerProg permit allowed interim discharge of untreated coal ash waste into the MEGS ash pond. Additionally, FCW challenged EnerProg's permit on the grounds that the dewatered ash pond contemplated in the closure plan is illegal without a fill permit under Section 404 of the CWA.

The EAB's final decision affirmed EnerProg's NPDES permit. The EAB determined that pollutant discharge into the MEGs ash pond did not require a CWA Section 402 permit. Furthermore, the EAB found the closed ash pond did not require a CWA Section 404 permit. Both FCW and EnerProg filed petitions for judicial review of EAB's final decision in this Court.

STATEMENT OF THE FACTS

The facts of this case encompass regulations placed on EnerProg's MEGS by both the federal and state government and how these regulations impact compliance standards.

The Moutard Electric Generating Station. EnerProg owns MEGS, a coal fired electric generating plant. R at 7. Water for the plants is withdrawn from the Moutard Reservoir make up for evaporative losses from the cooling tower More water is taken from the Reserve for boiler ash, ash transport water, and drinking water needs. *Id*. MEGS cooling system alone intakes up to 125 million gallons of water from the Reserve per day. *Id.* The facility has a wet fly ash handling system and a wet bottom ash handling system that both use water to sluice ash solids through pipes to an ash pond. These pollutant discharges from MEGS only undergo treatment by sedimentation before being discharged directly into the Moutard Reservoir. *Id*.

National Pollutant Discharge Elimination System Permit. MEGS is facility subject to EPA's Effluent Limitation Guidelines ("ELGs") per 40 C.F.R. Section 423. *R at* 8. The State of Progress issued a certification pursuant to Section 401 of the CWA for the renewal of the MEGS NPDES permit. *Id*. This certification included compliance with Progress' Coal Ash Clean-Up Act ("CACA") Under, CACA EnerProg must cease operation of its ash pond by November 1, 2018, complete dewatering of its as pond by September 1, 2019, and cover the watered ash pond with an impermeable cap by September 1, 2020. *Id*. CACA is a state-enacted law requiring assessment, closure and remediation of substandard coal ash disposal facilities in the State of Progress. R at 9. Pursuant to section 401(d) of the CWA, Progress requirements are incorporated as additional conditions to the permit. *Id*. The CACA legislation was established to prevent public hazards associated with the failures of ash treatment pond contaminant systems, as well as leaks from these treatment ponds into ground and surface waters. *Id*.

Best Available Technology Standard. The 2015 ELGs, pursuant to 40 C.F.R. part 423, require discharge limits associated with bottom ash and fly ash to be zero based on Best Available Technology ("BAT"). R at 9. The EPA determined MEGs is well equipped and capable of meeting this standard by the initial compliance deadline of November 1, 2018. *Id*. the 2015 ELGs' address toxic pollutants such as mercury, arsenic and selenium, however the rule is currently subject to an industry challenge in the Fifth Circuit. *Id*. The discharge from the MEGS coal ash pond currently has elevated levels of mercury, arsenic and selenium. *Id*.

Because toxic pollutants are dangerous to public health and the environment, permits must contain limits for them independent of the 2015 ELGs. *Id*. The EPA has determined that dry handling ash has been in use at existing plants in the industry for many years. The burden on industry to implement a zero-discharge limit is minimal. *Id*. The zero-discharge limit would only

increase customer's bills by less than twelve cents a month. An EPA permit writer uses their Best Professional Judgment to implement a zero discharge limits reliant on current BAT's. *Id*.

Flue Gas Desulfurization System. MEGS is also required by CACA to reduce S0x and N0x air emissions. R at 9. In response, EnerProg installed a Flue Gas Desulfurization ("FGD") scrubber system, which removes S0x by mixing flue gas with slurry. *Id*. The FGD blowdown has elevated concentrations of metal and chloride. *Id*. EnerProg treats the blowdown through a vapor compression evaporator (VCE). The VCE causes a majority of wastewater produced b to evaporate. The VCE produces two waste streams, and both are utilized in the plant process.

EPA Notice to Suspend Compliance Deadlines. On April 25, 2017, EPA Administrator, Scott Pruitt, issued a Notice suspending compliance deadlines of the 2015 ELGs. The Administrator relied on industry reports alleging burdensome expenses for compliance with zero discharge limits for electric power plants. The Notice states the EPA has authority to issue suspensions under Section 705 of the Administrative Procedure Act.

SUMMARY OF THE ARGUMENT

Under the Clean Water Act, States have the power to enforce appropriate requirements of state law on federal permits. Specific to this case, states must create water quality standards for intrastate waters. These standards are incorporated into section 401 of the CWA. This allows states to enact water quality standards more stringent than the EPA. The State of Progress enacted CACA with the purpose of preventing both public hazards caused from ash pond failures and leaks from ash ponds into the ground water. CACA provides section 401 conditions for closure and redemption of coal ash ponds. Since CACA is incorporated into section 401(d), the EPA has no jurisdiction to deny Progress section 401 certifications. Therefore, CACA is properly included in the EPA's Final Permit.

The EPA violated the Administrative Procedure Act ("APA") by acting in an arbitrary and capricious manner when suspending compliance deadlines for the 2015 ELG rule. On November 3, 2015, the ELG rule was published in the Federal Register and on January 4, 2016, the ELG rule became effective. The EPA does not have the authority for retroactive rulemaking as the 2015 ELG rule was already effective. The suspension of a compliance deadline is considered a rule as it is suspending standards that have gone through the APA mandated notice-and-comment period. Here, the EPA violated the APA by failing to conduct a formal notice-and-comment period in promulgating a suspension rule. Further, the EPA failed to act within the statutory bounds given to them by the legislature. The Clean Water Act ("CWA") does not provide language authorizing the EPA to issue suspension or extensions of compliance deadlines. The EPA also failed to provide adequate reason for the suspension Notice and failed to consider the benefits in upholding the 2015 ELG rule.

If the Notice is valid under the APA and suspension of compliance deadlines of the 2015 ELG rule stands, then the EPA can still issue a zero-discharge limit under the Agency's "Best Professional Judgment" ("BPJ") standard. The EPA is authorized to use a BPJ standard when certain toxins and pollutants are not explicitly regulated under an agency rule or statute. If the Notice is valid, the 2015 ELG standards are moot, and the 1982 ELG standards are still applicable. The 1982 ELGs do not include toxic pollutants such as mercury, arsenic, and selenium, all of which have an impact on public health and the environment. The EPA is therefore obligated to regulate toxic pollutants under 33 U.S.C. 1342(a)(1).

The EAB erred in relying on a 1980's suspension to the definition of "waters of the United States." The EPA and the Army Corps of Engineers each have regulations dedicated to specific definitions of "waters of the United States." Any rulemaking that amends of altars this

definition must comply with the APA. A substantive rule promulgated pursuant to Congress' delegation under the CWA requires notice and comment procedure according to the APA. Analyzing the issuance of the 1980 suspension in the Federal Register allows a reviewing court to find that the suspension failed to meet the procedural notice and comment requirements of the APA. Therefore, for purposes of this case, the definition of waste disposal excludes impoundments of waters of the United States.

If the Twelfth Circuit finds that the 1980's suspension is valid, then the MEGS coal ash pond falls within the recapture provision of section 404 of the CWA. Since CACA requires the closing of the MEGS ash pond, the use for the impoundment has been substantially altered. This converts the previously navigable waters of Fossil Creek back to "waters of the United States." Since "fill" of this impoundment would both replace navigable waters with dry land and change the bottom elevation, EnerProg must apply for a section 404 permit.

STANDARD OF REVIEW

Under the Clean Water Act, the Twelfth Circuit may review the EAB's final decision to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *See Adams v. EPA*, 38 F.3d 43, 49 (1st Cir. 1994). The EAB receives deference only if its interpretation of its own regulation is reasonable. *See Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996). FCW asserts that the EAB's decision to honor the EPA's 1980 suspension is not in accordance with the Administrative Procedures Act. Furthermore, FCW asserts the EAB's holding there was no recapture provision for waste disposal sites is both arbitrary and not in accordance with the Clean Water Act.

ARGUMENT

I. The Environmental Protection Agency Lacks Jurisdiction to Consider the Inclusion of Progress' Closure and Remediation Conditions Pursuant to Section 401(d), Though Conditions are Consistent and Appropriate with Applicable Sections of the Clean Water Act

The Clean Water Act ("CWA") is a complex statutory and regulatory scheme that creates a partnership between States and federal agencies. *Pud No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994); 33 U.S.C. § 1251 *et seq*. The Supreme Court has determined "Congress provided the States with power to enforce appropriate requirement of State law by imposing conditions on federal licenses for activities that may result in a discharge." *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006). Through this partnership, the CWA is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a).

Under CWA section 303, each state must implement a comprehensive water quality standard for its intrastate waters. § 1313. Generally, section 303 endeavors to protect public health and enhance the quality of water. § 1313(c)(2)(A). Thus states consider: the use and value of the public water supply, propagation of aquatic wildlife, and navigational use. § 1313(c)(2)(A). A state water quality standards must consist of (1) "designed uses of navigable waters," (2) water quality criteria for such uses, and (3) an anti-degradation policy. §§ 1313(c)(2)(A); 1313(d)(4)(B); *See* 40 C.F.R. § 131.12(a).

Under CWA section 401, the Environmental Protection Agency ("EPA") cannot issue a federal permit for pollutant discharges into navigable waters without a State water quality certification. § 1341. State certification requires compliance with effluent limitations and "other limitations." § 1341(d). The Supreme Court determined state water quality standards created pursuant to section 303 incorporate "other limitations" a State must require for § 401

certification. *Pud No. 1*, 511 U.S. at 713. Also, section 401(d) includes "any other appropriate requirements of State law." 33 U.S.C. § 1341(d). Thus, section 401(d) incorporates (1) effluent limitations, (2) state water quality standards, and (3) appropriate requirements of state law.

The CWA authorizes states to establish water quality standards more stringent than the EPA. *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99 (1st Cir. 1989). However, as part of the partnership, EPA must approve all original and revised state water quality standards.[1] 33 U.S.C. §§ 1313(b); 1313(c). Upon approval, standards "become a condition on and Federal license or permit subject to the provisions of this section. § 1341(d). Accordingly, section 401(d) requires compliance with section 303. *Pud No. 1*, 511 U.S. at 712.

Section 1.A. argues that the EPA lacks jurisdiction to approve or deny state certifications under section 401(d). Section 1.B. argues that if the Twelfth Circuit finds the EPA has jurisdiction, then Progress' closure and remediation conditions comply with section 401(d). Section 1.C. claims that EnerProg can dispute Progress' section 301 conditions in state court.

A. The EPA Does Not Have Jurisdiction to Deny Progress section 401 Conditions

The Twelfth Circuit should uphold the Environmental Appeals Board's ("EAB") holding that the "EPA has no discretion to reject a condition included in a State section 401 certification: such conditions 'shall become a condition on any Federal license or permit subject to the provisions of this section.'" R. at 11; 33 U.S.C. § 1341(d); *quoting American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997).

The Second District concluded that the EPA does "not have the ability to amend or reject conditions" in a State certification. *Id*. at 107; 33 U.S.C. § 1251(d). Additionally, the D.C. Circuit has held that where a petitioner fails to show the EPA has "power to amend or reject the

[1] In this respect, the EPA maintains an extraordinary level of involvement. *Department of Energy v. Ohio*, 503 U.S. 607, 634 (1992).

states certification at issue," the petitioner waives right to any objection. *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 7 (D.C. Cir. 2011).

In *American Rivers*, the Federal Energy Regulatory Commission wanted to limit Vermont conditions included in a hydropower electricity permit because they were unrelated to water quality. 129 F.3d 99, 106 (2nd Dis. 1997). The Second Circuit noted "review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State." *Id*. *quoting* 40 C.F.R. § 124.44(e). For this reason, the Circuit Court found that the Federal Energy Regulatory Commission receives no judicial deference. *Id*. at 107.

Likewise, in *Lake Carriers*, petitioners argued that state certifications were invalid because they were not incorporated during the final rulemakings notice and comment period. 652 F.3d 1, 3 (D.C. Cir. 2011). The D.C. Circuit found there was no way to interpret section 401 to permit the EPA to reject state certifications. *Id*. at 10. Therefore, the D.C. Circuit held the EPA "correctly concluded that it did not have to ability to amend or reject conditions in a state's CWA 401 certification." *Id*. (quotation omitted).

The Twelfth Circuit should join the Second Circuit and the D.C. Circuit in determining that the EPA lacks jurisdiction to amend or deny Progress certifications. The Progress Coal Ash Cleanup Act (CACA) is "a state-enacted law requiring assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress." R. at 8. The requirements of this Act are incorporated into CWA section 401(d) as additional conditions. R. at 9. Thus, since CACA is already incorporated, the Twelfth Circuit should find the EPA lacks jurisdiction.

B. Progress Coal Ash Cleanup Act Conditions Are Properly Under 401(d)

If the Twelfth Circuit finds that the EPA does not have jurisdiction pursuant to the last section, then this issue is moot.

The Supreme Court has stated that a State's authority under § 401(d) "is not unbounded." *Pud No. 1*, 511 U.S. at 712. The Supreme Court has found that section 401(d) "restricts conditions that states can impose to those affecting water quality." *American Rivers v. FERC*, 129 F.3d 99, 107 (2nd Dir. 1997). Still, the EPA has interpreted section 401(d) to regulate not just discharges, but activities that must comply with state water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). Water quality standards are "promulgated by the States and establish the desired condition of a waterway. *Id*. at 101.

1. The Closure and Remediation Condition are Consistent with 401(d)

The Twelfth Circuit should give deference to the EAB finding that ash pond remediation is related enough to surface water quality to be within the scope of section 401(d). R. at 11.

When the EPA issues a permit under the CWA, it must determine if a valid state certification exists. *Keating v. Federal Energy Regulatory Comm'n*, 9277 F.2d 616, 623 (D.C. Cir. 1991). Any risk to water quality falls "within a State's legitimate business, and the Clean Water Act provides for a system that respects the States' concerns." *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006). The Supreme Court has posited "the Clean Water Act vests in the EPA and the States broad authority to develop long-range, areawide programs to alleviate and eliminate pollution." *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992).

Here, it is within the State of Progress' legitimate business to protect against leaks from coal ash ponds, like the MEGS ash pond, into ground and surface waters.[2] R. at 9. The potential discharge of a pollutant into ground water can have serious effects on public health. This is

[2] Coal ash waste streams, and ash sluice water, contain harmful chemicals that can cause cancer, liver disease, and neurological complications. Robert Overby, *NOTE: Sitting on Their Ashes: Why Federal Regulations Should Plug the Gaping Holes in State Coal Ash Disposal Regulatory Regimes*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 107, 107 (2013). In the last decade, "the carcinogens contained in coal ash have contaminated drinking water supplies across the United States." *Id*.

principle obligation of state certifications under section 303. 33 U.S.C. § 1313(c)(2)(A). For this reason, the Twelfth Circuit should find the CACA requirements align with the purpose of 401(d).

2. The Closure and Remediation Condition are Appropriate Under 401(d)

The Twelfth Circuit should find that CACA conditions requiring closure and remediation are "appropriate requirements of state law."

The EAB correctly determined that "the Supreme Court has taken a broad view of what sorts of conditions may be considered "appropriate[ly]" related to a water quality under section 401(d)." R. at 11; *citing Pud No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). Also, the Court has found "limitations imposed pursuant to state water quality standards adopted pursuant to [section] 303 are 'appropriate' requirements of state law. *Id.* at 713.

The purpose of the CACA requirements is to prevent "public hazards associated with failure of ash treatment pond containment systems." R. at 9. The dewatering of the MEGS coal ash pond will remove many potential hazards.[3] Since these potential hazards include leaks of contaminated wastewater into ground water, CACA establishes "appropriate requirements" of Progress law to ensure value to the public water supply. § 1313(c)(2)(A). Thus, the Twelfth Circuit should find these conditions "appropriate" under section 401(d).

C. EnerProg May Seek Judicial Review for Progress' Conditions in State Court

The D.C. Circuit has found that a petitioner can seek relief for a State certification requirement in that state's courts. *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 10 (D.C. Cir. 2011); *See Roosevelt Compbello Int'l Park Comm'n v. EPA*. 684 F.2d 1041, 1056 (1st. Cir. 1982) (finding the proper forum to review the appropriateness of a state's certification is the state

[3] In 2009, the walls of an ash pond in Tennessee collapsed discharging a "flood of black sludge across 300 acres. Overby at 107.

court). Federal Regulation establishes that "review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State." 40 C.F.R. 124.55. EnerProg's contention that there is no opportunity for judicial review has not found support in other Circuits of the United States.

II. The April 12, 2017 Notice by the Environmental Protection Agency suspending certain future compliance deadlines for the Final Effluent Limitation Guidelines for the Stream Electric Power Generating Industry violated the Administrative Procedure Act as it was arbitrary and capricious.

The EAB correctly decided that the EPA Administrator, Scott Pruitt, acted beyond the EPA's discretion in issuing a notice to suspend compliance deadlines. The 2015 revised effluent limitation guidelines went into effect as of January 4, 2016. *See* 40 C.F.R. Section 423.13(g)(1)(ii). Though the Agencies have broad discretion to reconsider regulation, they must follow and adhere to standards established by the Administrative Procedure Act ("APA")., 5 U.S.C. 553, *see Perez v Mortgage Bankers Association* 135 S. Ct. 1199, 1206 (2015) (The D.C. Circuit correctly read Section 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance).

On April 25, 2017, EPA published a notice purporting to stay indefinitely "the compliance deadlines for the new more stringent limitations and standards" of the ELG rule. 82 Fed. Reg. at 19,005 ("the Notice"). The EPA unlawfully acted beyond its discretion in issuing in indefinite stay on ELG compliance deadlines because (1) the EPA does not have authority under the CWA to postpone or suspend compliance deadlines, (2) the EPA acted with disregard by ignoring the notice-and-comment period mandated by the APA, (3) the EPA failed to make required findings for reconsideration under the APA and, (4) historically, the EPA does not encourage suspension or delays of compliance deadlines.

A. The Environmental Protection Agency does not have authority under the Clean Water Act to postpone compliance deadlines and congressional history provides no basis in doing so.

The Clean Water Act does not authorize the EPA to postpone compliance deadlines, as there is no statutory language allowing the EPA to do so. The EPA is a federal agency and is subject to the statutory authority upon which Congress has granted it. *North Carolina v. EPA*, 531 F. 3d 896, 922 (D.C. Cir. 2008). An agency, when issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter such a rule without notice and comment. *National Family Planning and Reproductive Health Association Inc. V. Sullivan*, 979 F. 2d 227, 234 (D.C. Cir. 1992). (explaining how agencies are bound by statutes). The EPA is "a creature of statute" and "if there is no statute conferring authority, a federal agency has none." *Michigan v. EPA*, 260 F. 3d 1075, 1081 (D.C. Cir. 2001).

Here, the EPA is bound by both the language of the CWA and the procedures for rulemaking set forth the APA. There is no language in the Clean Water Act in which Congress authorizes the EPA to postpone BAT compliance deadlines. Rather, the Administrator incorrectly relied on 33 U.S.C. Section 1311 (d), as this provision only allows revisions "at least every five years" but makes no mention of suspending deadlines. (stating "the Administrator shall…publish…regulations, providing guidelines for effluent limitations, and at least annually thereafter, revise, if appropriate such regulations"). Had the legislature wanted to include EPA authority to extend or suspend compliance deadlines, they would have done so. The Clean Air Act ("CAA") clearly states that the effectiveness of the CAA can be postponed for up to 90 days. 42 U.S.C. 7607(d)(7)(B). The lack thereof in the CWA exemplifies that postponements and suspensions of compliance deadlines are not within the Administrator's authority and not an intention put forth by the legislature.

The Congressional history of the CWA supports stringent compliance deadlines and cuts against the argument of broad Agency discretion. When framing the CWA, members of Congress clearly stated that if dischargers were unable to meet the March 31, 1989 deadline as a result of EPA's failure to promulgate effluent limitations in time to allow compliance by the deadline, the EPA would specify a schedule of compliance as expeditiously as practicable, but no later than three years after the date of permit issuance. *H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 115 (1986)*. The three-year standard has been stringent and not easily extended. *See Chemical Mfrs Ass'n v. EPA,* 870, F. 2d 177, 241 (5th Cir. 1989) (stating that plaintiffs cannot receive an extension for compliance past three years). The effective date of the 2015 ELGs was January 4. 2016. R at 12. Administrator Pruitt recommended a suspension of compliance for at least another two years, thus pushing compliance well over the three-year grace period provided by the CWA.

The Twelfth Circuit should follow Congressional intent, and find that the EPA has no explicit authority in issuing a compliance suspension of ELGs. The CWA exhibits no statutory language or interpretation appealing to such a conclusion, and nor does the legislative history of the Act. Further, case law has exemplified that Agency's must act within the bounds provided to them by the legislature. *See Chemical Mfrs Ass'n v. EPA,* 870, F. 2d 177, 241 (5th Cir. 1989); *See also National Family Planning and Reproductive Health Association Inc. V. Sullivan*, 979 F. 2d 227, 234 (D.C. Cir. 1992). The EPA has overstepped their boundaries as a government agency by issuing a suspension of compliance deadline which is not within the statutory language of the CWA. By acting outside of its discretion, the EPA has acted in an arbitrary and capricious manner with disregard towards our country's fundamental principle of separation of powers established through administrative law. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

B. The indefinite suspension of compliance deadlines is considered a rule and the Environmental Protection Agency failed to provide a notice and comment period in accordance with the Administrative Procedure Act.

The EPA acted in an arbitrary and capricious manner by indefinitely suspending compliance deadlines without providing a notice and comment period for rulemaking as required by the APA. Under the APA, agencies are required to "provide interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C. 533(c). Suspending compliance deadlines of ELGs by the EPA is considered "rulemaking" and is subject to APA rulemaking procedures. *See Nat. Resources Defense Council, Inc. v. EPA,* 683 F. 2d 752, 762 (3d Cir. 1982). All administrative rules are subject to notice and comment requirements established by APA. *Perez v Mortgage Bankers Association* 135 S. Ct. 1199, 1206 (2015). It has been established that an effective date is considered to be an "essential part of any rule" and the postponement of such an essential element of a rule is subject to the notice and comment requirements established by the APA. *See NRDC v. EPA,* 683 F. 2d 752, 762 (3d Cir. 1982). These same requirements are applicable to compliance deadlines as well. *See Envt'l Def. Fund, Inc. v. Gorsuch,* 713 F.2d 802, 818 (D.C. Cir. 1983).

The EPA's argument of the Notice simply being a temporary "postponement" designed to maintain the status quo is invalid because the real "status quo" established by the APA is to conduct a notice-and-comment period. As established in *Public Citizen*, when an Agency indefinitely suspends regulation that is the product of thought out and comprehensive rulemaking to reevaluate a program, it cannot be seen as a temporary measure for preserving the status quo. *Public Citizen v. Department of Health and Human Services,* 671 F.2d 518 (D.C. Cir. 1981). The Effluent Limitation Guidelines established by the EPA in 2015 were a result of years of studies and public comments. 80 Fed. Reg. at 67,841 and 67,844. The process the ELGs had gone

through were proper and adhered to by the APA as valid rulemaking. By suspending the deadlines of an established and commented rule under the APA, the EPA is constructively establishing a new rule without a notice and comment period. Postponement of Certain Compliance Dates for Limitations Guidelines and Standards for the Stream Power Generating Point Source Category, 82 Fed. Reg. 19005 (proposed Apr. 25, 2017) (to be codified at 40 CFR 423)

Here, the EPA indefinitely suspended the 2015 ELG deadlines "pending judicial review" even though the rule has been commented on and studied. The EPA failed to provide new deadlines and failed to provide the public with notice and the opportunity to comment as required by the APA. Therefore, the suspension notice, which is considered a final rule by the EPA, violated the APA by failing to conduct a notice and comment period for civic engagement. The Twelfth Circuit should uphold the EAB's final decision and find the indefinite stay to be outside the discretion of EPA's authority and reinstate the original deadlines because the EPA failed to follow APA procedures.

C. The EPA violated the Administrative Procedure Act by failing to make the required findings for a stay under 5 U.S.C. § 705

The Agency acted beyond its discretion by ignoring the APA's requirement for findings in issuing a stay, or extension on compliance deadlines. The Supreme Court has stated that an agency must further "examine the relevant data and articulate a satisfactory explanation for its action, including, a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm. Mut. Auto. Ins. ("State Farm"),* 463 U.S. 29, 43 (1983). An important aspect in rulemaking is the consideration of both the cost and benefits of any new rule. *See Michigan v. EPA,* 135 S. Ct. 2699, 2707 (2015). However, in this case, the EPA has failed to meet APA requirements by ignoring the potential benefits of the implementation of ELGs.

An Agency must explain why their action is permissible under the statute in question. *F.C.C. v. Fox Television Stations Inc*., 556 U.S. 502, 514–515 (2009). The EPA has failed to justify or explain the basis for the Notice issued on April 25, 2017. Rather, the Notice alludes to a convoluted argument regarding burdens on industry without citing to any studies. For example, the Administrator states "…take some time to carefully review…concerns and ensure any such requirements are technologically available and economically achievable within the meaning of the statute." *EPA April 12, 2017 Notice Letter*. The EPA is required under 5 U.S.C. § 705 to apply a four-part test when considering a motion to stay. The factors to consider include (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. *Sierra Club v. Jackson,* 833 F.Supp. 2d 11, 36 (D.C. Cir. 2012). This four-part test is applicable to both agency and court considerations for a stay. *Id*. at 31. In *Sierra Club*, the courts found a delay in compliance deadlines to be arbitrary and capricious because the four factors were not considered. *Id*. Similarly, in the case at hand, The EPA failed to consider any of the four factors in the Notice to not just delay compliance deadlines, but suspend them indefinitely.

The Supreme Court in *Michigan* established that courts must recognize and examine the costs of new rulemaking, especially the disadvantages of agency decisions. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (stating "cost is almost always relevant- and usually, a highly important- factor in regulation"). One of the costs not considered by the EPA is the foregone benefits of the existing regulation. *Sierra Club v. Jackson,* 833 F.Supp. 2d 11, 36 (D.C. Cir. 2012). In *Sierra Club*, EPA failed to consider the benefits given to the public associated with the Boiler Rule when issuing a delay notice on compliance of the rule. *Id.* at 36. The costs of

pollutants through steam electric power generating plants is significant and impacts both public health and the environment. The ELGS were projected to yield $451 million to $566 million per year in benefits, in the form of lowered cancer risks, increased childhood IQ's, lowered risks of cardiovascular disease and decreased damages to ecosystems and surface water quality. *See* 80 Fed. Reg. at 67,873-75, 67,877-78. Similar to *Sierra Club*, these benefits were not considered in EPA's April 25, 2017 Notice. The notion of "maintaining the status quo" that the EPA stated, is misconstrued as the real status quo in the rulemaking process is to assess the economic impact including accumulated benefits to accrue in the future, which EPA has failed to do so here. *See Guidelines for Preparing Economic Analysis ("Guidelines")* at 503, 5013 (2010).

The EPA inadequately explained that the upfront costs and expenditures to industry would be far too burdensome while litigation is pending. Postponement of Certain Compliance Dates for Limitations Guidelines and Standards for the Stream Power Generating Point Source Category, 82 Fed. Reg. 19005 (proposed Apr. 25, 2017) (to be codified at 40 CFR 423) (stating "postponement is appropriate to prevent industry from spending unnecessary resources"). The EPA should have compared the benefit of ELG standards to the costs industry would have had to incur had the rule gone into effect. Further costs to industry could have been brought up during the initial ELG notice and comment period. Even if these costs were brought up, they would not be deemed burdensome on industry, as the EPA passed the 2015 ELG rule in consideration of costs on industry.

Rather than establishing EPA's own studies, the EPA relied on studies and reports filed by industry on the 2015 ELG rule. Postponement of Certain Compliance Dates for Limitations Guidelines and Standards for the Stream Power Generating Point Source Category, 82 Fed. Reg. 19005 (proposed Apr. 25, 2017) (to be codified at 40 CFR 423). The sudden reconsiderations of

ELGs is rash as the EPA had already spent two years gathering copious amounts of data and reports regarding the costs and benefits of the new technology standard. 80 Fed. Reg. 67, 844. An agency's' decision to suspend a program while it "further studied" an alleged problem with the program is arbitrary and capricious. *Pub. Citizen, 733 F. 2d at 98*. Here the EPA suspended the 2015 ELG rule while they further studies and examined the cost to industry. This action is arbitrary and violates the APA under the *Chevron* deference test, and the legislature has clearly left out any language regarding compliance deadlines. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

D. The EPA, historically, does not encourage compliance deadline extensions or "no action" assurances.

On November 16, 1984, EPA released a memorandum expressly prohibiting "no action" assurances. Policy Against "No Action" Assurance (Nov 16, 1984). No action assurances are defined as "definitive assurances (written or oral) outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation or other legal requirement.". *Id*. The Administrator emphasized that no action assurances mitigated the credibility of EPA's enforcement program by establishing inequities in the Agency's treatment of the regulated community. The notice further explained the that the commitment not to enforce a legal requirement against a particular regulated party can severely hamper later enforcement efforts against said party because of the party's good faith reliance on the assurance. EPA established two exceptions to this policy. EPA may issue a no action assurance notice (1) if a no action assurance is expressly allowed by the applicable statute or regulation, or (2) in extremely unusual cases in which a no action assurance is clearly necessary to serve the public interest. *Id*.

Here, the EPA issues a "no action" assurance, also referred to as a suspension of compliance deadlines, without satisfying any of the exceptions established by the EPA. Historically, compliance extensions and suspensions are for events such as natural disasters. In 2012, the EPA granted a suspension on compliance for EPA regulation post Hurricane Sandy. Securities Exchange Commission, "SEC Approves Further Regulatory Relief and Assistance for Hurricane Sandy Victims" (Nov. 14, 2012). The EPA noted that during emergencies, EPA has discretion to not pursue enforcement for violations of Title V, NPDES permits, and electric generating unit pollution limits. However, in this case, there was no emergency. *Id*. The EPA does not stand to have "good cause" and cannot justify issuing an extension or suspension on compliance deadlines. For these reasons, the EPA acted out of an already established Agency "status quo" that was established, and failed to state good reason or the current compliance suspension.

III. The Environmental Protection Agency Region XII can rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash transport wastes, independent of the applicability of effectiveness of the 2015 Stream Electric Power Generating Industry Effluent Limitations.

If the 2015 ELG Rule is eliminated or vacated, the EAB's final decision correctly decided that reliance on the EPA's Best Professional Judgment ("BPJ") is not only justified, but required. The EPA must use the BPJ standard because it is (1) required by statute; and (2) when certain toxins are not considered or regulated under law, and have an impact on public health and the environment, the EPA has a duty to set standards based on their best professional judgment. *Natural Resources Defense Council, Inc. v. Muszynski* 268 F.3d 91, 102 (2d Cir. 2001). Toxic pollutants such as mercury, arsenic, and selenium are not regulated by the 1982 Effluent Limitation Guidelines, and can therefore be subject to EPA's BPJ standard to set zero discharge limitations. 40 C.F.R. § 125; *see also* 40 C.F.R. § 423.

Under the CWA, the discharge of any pollutant is unlawful, unless the discharger is in possession of, and in compliance with a NPDES permit that limits the amount and kinds of pollutants that can be lawfully discharged. *Natural Resources Defense Council v. EPA*, 822 F. 2d 104, 108 (D.C. Cir. 1987). The Clean Water Act provides for administration of the NPDES program to be administered and delegated to the states. 33 U.S.C. 1342(b). Here, EPA Region XII administers NPDES permits to New Union. R at 9.

A. Best Professional Judgment standards are required by the plain language of the Clean Water Act

The CWA provides for two types of effluent limitations on discharges of water pollutants to be included in NPDES permits. 33 U.S.C. 1362(11). "Technology based effluent limitations" (TBELs) establish limits on discharges of pollutants based on the level of pollution reduction that can be achieved using a designated model pollution treatment technology. These are selected by the EPA based on an evaluation of statutorily prescribed performance and cost factors. *NRDC*, 822 at 123.

The crux of the technology based regulatory scheme are the national Effluent Limitation Guidelines (ELGs) promulgated by the EPA. ELGs are federal regulations prescribed by the CWA to set national effluent limitations for categories and subcategories of point sources. 33 U.S.C. 1314(b). An effluent limitation is an "any restriction established by a State or the Administrator on quantities, rates and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters…" 33 U.S.C. 1362(11). ELGs are the rulemaking device prescribed by the CWA to set national effluent limitations for categories and subcategories of point sources. 33 U.S.C. 1314(b)Accordingly, the EPA has a certain amount of leeway in determining how the BAT standard will be incorporated into final ELGs.

In situations where the EPA has not yet promulgated any ELGs for the point source category or subcategory, NPDES permits must incorporate "such conditions as the Administrator determines are necessary to carry out the provisions of the Act". 33 U.S.C. 1342(1). *Am. Petroleum Inst. v. EPA,* 787 F.2d 965, 969 (5th Cir. 1986). Through this standard, the EPA must determine on a case-by-case basis regarding what effluent limitations represent the BAT level, using its "best professional judgment." 40 C.F.R. 125.3(c)-(d).

B. The EPA did not set Best Available Technology limits on the discharge of certain toxic pollutants therefore, EPA Region XII must use its Best Professional Judgment to set case-by-case permit limits.

In situations where the EPA has not yet promulgated any ELGs for the point source category or subcategory, NPDES permit must incorporate "such conditions as the Administrator determines are necessary to carry out the provisions of the Act." 33 U.S.C. 1342(a)(1). This means that the EPA must determine on a "case-by-case" basis what effluent limitations represent the BAT level, using its "best professional judgment". In these situations, individual judgments take place of uniform national guidelines, but the technology based standard remains the same. Remains. *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 929 (5th Cir. 1998).

When the EPA exercises its BPJ to set effluent limitations, it is not in an arbitrary or capricious manner. The EPA must still adhere to the technology-based standards set out in 33. U.S.C.A. 1311; *See also Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1380-81 (D.C. Cir. 1977). This technology-based standard is still intact because the EPA has not yet rigorously defined effluent standards through notice-and-comment rulemaking. *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 183 (D.C. Cir. 1968). Here, in the 1982 ELGs, the EPA failed to set limits on toxic pollutants such as selenium, mercury and arsenic. Therefore, according to *Texas Oil & Gas Ass'n*, the EPA must make individual judgments to establish a

zero-discharge limit. When considering the BPJ standard, the EPA must consider the same four factors established in the BAT standard. These factors include (1) age of the equipment and facilities involved (2) the process employed (3) the engineering aspects of the application of various types of control techniques (4) process changes (5) the cost of achieving such effluent reduction (6) non-water quality impact (including energy requirements). 40 C.F.R. 123.3(c)(3).

When applying these factors to MEGS, it is important to consider that EPA has already done a preliminary study. The "EPA staff have determined that dry handling of bottom ash and fly ash has been in use at existing plants in the industry for many years" and that "MEGS is sufficiently profitable to adopt dry handling of these wastes with zero liquid discharge, with no more than twelve cents per month increase in the average consumer's electric bill." R at 9. Industry will clearly not be burdened, as they are already capable of meeting a zero-liquid discharge standard.

IV. The Environmental Protection Agency's July 21, 1980, Suspension Lacks Legal Effect Because it is Not a Valid Exercise of Administrative Authority Under the Administrative Procedures Act

The Environmental Appeals Board ("EAB") erred in relying on the "longstanding policy judgment of successive EPA administrations" when the original suspension lacks force of law under the Administrative Procedures Act ("APA"). R. at 12. Therefore, the Twelfth Circuit should find that section 402 permitting is required for EnerProg's pollutant discharges into the MEGS ash pond.

Under the Clean Water Act ("CWA"), the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402 regulates discharges from point sources that directly or indirectly reach waters of the United States. § 1342. "Discharge of a pollutant" includes any discharge of a pollutant from pipes that lead into privately owned treatment works.

40 C.F.R. 122.2. Furthermore, effluent limitations for point sources must meet water quality standards established pursuant to State law. 33 U.S.C. § 1311(b)(1)(C).

Under the regulation defining "waters of the United Stated," waters that have been used for interstate commerce are included. 40 C.F.R. 122.2. Also, this definition encompasses "all impoundments of waters otherwise identified as waters of the United States." *Id*. However, it exempts "waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act." *Id*. This exemption does not apply to manmade ponds created from the "impoundment of waters of the United States." The EAB asserts this exclusion to the exemption has been stayed indefinitely since July 21, 1980. R. at 12 (*referencing* 45 FR 48620 (July 21, 1980)).

Section IV.A. argues that the EPA's 1980 suspension lacks effect of law because it fails the procedural requirements of notice and comment. Section IV.B. argues that without the 1980 suspension the MEGS ash pond must meet effluent limits of section 301(b) and 402.

A. The EPA's 1980 Suspension, and Subsequent Affirmations, Lacks Observance of Procedure Required by Law

For the EPA to engage in rulemaking it must abide by the APA. 5 U.S.C. §§ 551, 553. The APA regulates the formulating, amending, or repealing of a rule. § 551(5). A rule with substance has "the character of a legislative enactment carried out at an administrative level." *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 895 (2nd Cir. 1960). For a substantive rule to take effect an agency must give (1) notice and (2) allow a comment period. 5 U.S.C. §§ 553(b), 553(c). However, notice and comment procedure are not required for interpretive rules or under the "good cause" exception. § 553(b)(3).

A reviewing court may "hold unlawful and set aside agency action found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(d).

1. The 1980 Suspension is a Rulemaking Aimed to Create a Substantive Rule

In order for a regulation to be given effect, the regulation must have substantive characteristics. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). The APA does not define "substantive rule," but judicial sources frequently define the term through negative inference. *Id*. at 302. The Supreme Court has found that a substantive rule affects "individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). Conversely, an interpretive rule advises "the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1204 (2015).[4]

The D.C. Circuit has held a deferment of regulatory implementation is a substantive rulemaking subject to the requirements of the APA. *Council of Southern Mountains, Inc. v. Donovan*, 653 F. 2d 573, 582 (D.C. Cir. 1981). In *Donovan*, the Department of Labor promulgated regulations then deferred implementation of those regulations. *Id*. at 575. The D.C. Circuit found that "by deferring the requirement . . . it had "'palpable effects' upon the regulated industry and the public in general." *Id*. at 580 n.28 (*quoting National Helium Corp. v. Federal Energy Administration*, 569 F.2d 1137, 1146 (Temp. Emer. Ct. App. 1977)).

Conversely, in *Perez* an internal advisory opinion repealed the exclusion of mortgage bankers from requirements of the Fair Labor Standards Act. *Perez*, 135 S.Ct. at 1206–7. Since the advisory opinion in dispute was not codified in the Federal Register, the Supreme Court found it was interpretive and lacked the force and effect of law. *Id*. at 1204.

The EAB observed that the summary of the 1980 regulatory action was to suspend "a portion of the definition of the term, 'waters of the United States' in the Consolidated Permit Regulations pending further rulemaking." 45 FR 48620. The summary of this agency action

[4] In *Perez*, the Court held that "a repeal or amendment should be treated the same as the initial rulemaking." 135 S.Ct. 1199, 1207 (2015).

explicitly states and confirms it is a rulemaking. Therefore, the Twelfth Circuit must decide if this rulemaking is substantive.

The Twelfth Circuit should find the suspension was intended to be a substantive rule. In accordance with *Donovan*, this suspension has "palpable effects" upon the regulated coal industry. *Donovan*, 653 at 580 n.28. Its effect is to alter the obligations of utility companies that utilize coal ponds derived from "waters of the United States." In contrast with *Perez*, this suspension was codified in the Federal Register. 45 FR 48620. Thus, the EPA intended the suspension to be a substantive rule.

2. The 1980 Suspension Fails the Procedures of Notice and Comment

Congress delegates legislative authority to agencies so that they can create standards. *Mission Group Kan. v. Riley*, 146 F3d 775, 784 (10th Cir. 1998). This delegation imposes a duty to perform a legislative task on behalf of Congress. *Id*. A rule promulgated pursuant to this delegation intended to bind is a substantive rule, which requires notice and comment procedure according to the APA. *Id*. *See also Morton*, 415 U.S. at 232. The APA requires that a substantive rule must (1) publish general notice in the Federal Register, and (2) give interested persons an opportunity to comment.[5] 5 U.S.C. §§ 553(b), 553(c).

The D.C. Circuit has held "an agency decision which effectively suspends the implementation of important and duly promulgated standards . . . constitutes rulemaking subject to notice and comment requirements." *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983). In *Gorsuch*, petitioners challenged the EPA's decision to defer operating permits required by the Solid Waste Disposal Act. *Id*. at 804. In response, the EPA published a

[5] Agencies are reluctant to subject their rules to the procedures of notice and comment because it requires significant time and effort, therefore making them non-binding. *Perez*, 135 S.Ct. at 1204 (2015).

suspension notice for permitting requirements in the Federal Register without any formal notice or comment period. *Id*. at 808, 814. This suspension indefinitely delayed Solid Waste Disposal Act compliance for owners and operators of the hazardous waste storage industry. *Id*.

The Twelfth Circuit must conclude that the 1980's suspension did not meet the procedural requirements of the APA. There is nothing in the Record or 45 FR 48620 that indicates any notice of proposed rulemaking. Conversely, the EPA acknowledged, "Petitions for review were filed in several courts of appeals." 45 FR 48620. This does not constitute the comment period required for a substantive rule to be given the effect of law. 5 U.S.C. § 553(c).

3. The Good Cause Exemption Does Not Save the 1980's Suspension

Since the 1980 Suspension fails the APA procedural requirements of notice and comment, the Twelfth Circuit must determine if the "good cause" exemption applies.

Generally, "any claims of exemption from rulemaking procedures will be construed narrowly and granted reluctantly." *Mast Indus. V. Regan*, 596 F. Supp. 1567, 1582 (Ct. Int. Trade. 1984); *See*, e.g., *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983). Any claims of exemption "of the CWA's broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA."[6] *N. Cal. River Watch v. City of Healdsburg*, 496 F3d 993, 1001 (9th Cir. 2007) (citations omitted). A regulator faces the burden of proof that a good cause exemption applies. *Id*.

In *Gorsuch*, the court determined "scrutiny of a claimed exemption should be exacting where an agency seeks, as EPA does here, to 'undo all it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.'" *Id*. at 816–17 (*quoting Consumer Energy Council of America v. F.E.R.C.*, 673 F.2d 425, 446 (D.C. Cir. 1982)).

[6] The purpose of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251.

The D.C. Circuit found no exemption justified where the "substance of the decision was exemption of a whole class from prescribed obligations required by law for the protection of the public." *Id*. at 817.

The EPA supported the1980's suspension because industry petitioners objected to obtaining section 402 permits for discharges into existing ash ponds. 45 FR 48620. This justification is in direct conflict with the purpose of the CWA. Alternatively, the EPA did not then, nor now, raise a "good cause" exemption. R. at 12. The Twelfth Circuit should rule that the EPA failed to meet the burden of proof for a "good cause" exemption.

4. The Suspension Is Not Ratified Through Subsequent Affirmations

There are two relevant revisions of the definition "waters of the United States," one in 1983 and one in 2015. 48 FR 14146; 80 FR 37054. The 1983 revision did not follow notice and comment procedures. *Id*. In fact, the only reference to the 1980 substantive law is the statement "this revision continues that suspension." *Id*. In contrast, the 2015 revision met notice and comment requirements. 80 FR 37054. This revision incorporates the Supreme Court jurisprudence on the subject.[7] *Id*. However, the 2015 revision does not contain the "Note" referenced in both prior revisions and the EAB ruling. *Id*.

Additionally, on October 9, 2015, the Sixth Circuit stayed the 2015 Rule nationwide pending further action. *In re U.S. Dep't of Def. and U.S. Envtl. Protection Agency Final Rule: Clean Water Rule*, No. 15–3751(lead), slip op. at 6. If the Sixth Circuit's nationwide stay were to expire, the 2015 Rule would be in effect in the State of Progress. 82 FR 55542, 55543.

[7] In *Rapanos v. United States*, the Supreme Court noted that "there is no reason to suppose that out construction today significantly affects the enforcement of § 1342 . . . . The Act does not forbid the addition of any pollutant *directly* to navigable waters from any point source, but rather the addition of any pollutant to navigable waters." 547 U.S. 715, 743 (2006).

Regardless of the outcome of the Sixth Circuit, the Twelfth Circuit should find that neither revision ratifies the suspension. The 1983 revision lacks the procedural requirements of notice and comment. 48 FR 14146. The 2015 revision is not currently applicable to the State of Progress and does not include the "Note" that suspends the sentence in dispute. 80 FR 37054.

For these reasons, the EAB erred in stating that the suspension is part of a "longstanding policy judgment of successive EPA administrations." R. at 12. Furthermore, the broader policy objective of the CWA supports permitting of dangerous coal ash ponds[8].

Therefore, under section 706, the Twelfth Circuit should set aside the 1980 Suspension for failure to observe procedures required by law.

B. Under Section 402 of the Clean Water Act, EnerProg Must Receive a Permit for Pollutant Discharges into the MEGS Ash Pond

As confirmed above, waters of the U.S. includes "all impoundments of waters otherwise identified as waters of the United States," including waste treatment systems originally created by impounding waters of the United States. 40 C.F.R. section 122.2. Under the CWA, any direct discharge of pollutants requires implementation of effluent limits under section 301(b) and a section 402 permit. 33 U.S.C. § 1311, 1342. "Discharge of a pollutant" includes pollutants from pipes. 40 C.F.R. 122.2.

The MEGS Internal Outfall 008 directly discharges sluice water, waste streams, and ash transport water directly into the MEGS ash pond. R. at 8. The MEGS ash pond is an

[8] In 2002, it was discovered that a local coal ash landfill in Indiana "leaked harmful chemicals into the aquifer below the surface for more than twenty years." Robin Overby, *NOTE: Sitting on Their Ashes: Why Federal Regulations Should Plug the Gaping Holes in State Coal Ash Disposal Regulatory Regimes*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 107, 107 (2013). In 2005, a Pennsylvania coal-fired power plant leaked over hundred million gallons into the Delaware River. *Id*. at 108 (quotation omitted). This affected a large supply of drinking water. *Id*. In 2011, a coal ash enclosure collapsed and discharged pollutants directly into the Michigan River. Id. This incident "released toxic sludge into the drinking water supply of forty million people." *Id*.

impoundment of Fossil Creek, "a perennial tributary to the Progress River, a navigable-in-fact interstate body of water." R. at 7. Under section 402 of the CWA, the MEGS ash pond is a water of the United States. Since MEGS Internal Outfall 008 directly discharges pollutants into the MEGS coal ash pond, the Twelfth Circuit should find that EnerProg's pollutant discharges into the MEGS ash pond require section 402 permitting.

V. If the Court Finds That the 1980 Suspension is Valid, Then Section 404(f)(2) Recaptures the MEGS Ash Pond Requiring a Section 404 Permit for Closure

If the Twelfth Circuit finds, as FCW previously argued, that the 1980 Suspension is not valid, then this issue is moot. Nevertheless, the EAB erred by relying on 40 C.FR. section 122.2, when the appropriate regulation is 33 C.F.R. section 328.3.

As referenced previously, the CWA is a comprehensive piece of regulation designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's water. 33 U.S.C. § 1251, *et seq*. Under section 404, a permit authorizes the discharge of fill material into navigable waters of the United States at specified disposal sites. 33 U.S.C. § 1344(a). "Waters of the United States" includes waters previously used in interstate commerce and "all impoundments of waters otherwise identified as waters of the United States." 33 C.F.R. §§ 328.3(a)(1); 328.3(a)(4). This regulation excludes "waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." § 328.3(b)(1). Issuance of section 404 permits is handled by the Army Corps of Engineers ("Corps"), but both the EPA and the Corps share authority to enforce the CWA. § 328.3(b)(2).

Section 404 permits contain a recapture provision for fill material discharged into waters of the United States. 33 U.S.C. § 1344(f)(2). This provision applies if (1) the area was not previously subject to the new use, and either (2) "the flow or circulation of navigable waters may be impaired", or "the reach of such waters be reduced," then (3) the discharger is required to

obtain a section 404 permit. § 1344(f)(2). Under CWA, "unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States." § 323.3(d)(4) n.

Section V.A. argues that the drained and abandoned coal ash in the MEGS ash pond falls under section 404 "fill material." Section V.B. argues that the recapture provision of section 404(f)(2) converts the MEGS ash pond into a water of the United States. Section V.C. argues that the Twelfth Circuit should not give deference to the decision of the EAB.

A. The Abandoned Coal Ash and Impermeable Cap Represent Fill Material

The Secretary of the Army, acting with the Army Corps of Engineers, may issue an individual section 404 permit on a case-by-case basis if a discharge of fill material is in the public interest.[9] 33 C.F.R. 323.2(g). "Fill material" includes material placed in "waters of the United States" where the material: (1) replaces any portion "water of the United States" with dry land; or (2) changes the bottom elevation of any portion of "waters of the United States." 33 C.F.R. 323.3(e)(1) (quotation omitted). The term includes overburden from mining, slurry, or tailings. § 323.3(f). 328.3(b)(1).

The Fifth Circuit has held that burying material in an impoundment filled with water is a "fill" that changed the bottom elevation of waters of the United States. *Ayoyelles Sportsmen's Legaue, Inc. v. Marsh*, 715 F.2d 897, 924 (5th Cir. 1983). The Fifth Circuit determined the design of this action was "to replace the aquatic area with dry land." *Id*. at 924–25. The Fourth Circuit has found the discharge of excess coal waste into navigable water is "fill material" for

[9] Coal ash, and other coal ash by-products, contains carcinogenic and neurotoxic elements. Robin Overby, *NOTE: Sitting on Their Ashes: Why Federal Regulations Should Plug the Gaping Holes in State Coal Ash Disposal Regulatory Regimes*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 107, 109 (2013). The chemicals contained in coal ash can cause serious health problems to humans, plants, and animals. *Id*. at 107. These chemicals can slowly seep from unlined landfills and contaminate the drinking water supply. *Id*.

section 404 evaluation. *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 190 (4th Cir. 2009). Likewise, the Third Circuit has held any drainage to convert a water of the United States, along with inclusion of surficial materials, is regulated under section 404. *United States v. Brace*, 41 F.3d 117, 128 (3rd Cir. 1994).

The Twelfth Circuit should find the abandoned coal ash and the cap material from the MEGS ash pond are "fill material" regulated under 33 C.F.R. section 323.2. The contested NPDES permit requires EnerProg to: "terminate use of the coal ash pond at MEGS by November 1, 2018, dewater the ash pond by September 1, 2019, and cap the remaining coal combustion residuals by September 1, 2020." R. at 6. By draining the ash pond and abandoning the cumulated surficial materials, Enerprog will have placed "fill material" in an impoundment of Fossil Creek, a perennial tributary to an interstate body of water. R. at 7. This "fill" has the effect of replacing a historic portion Fossil Creek with dry land. The Circuits are in agreement that this conversion falls within the regulatory definition of "fill material."

B. The Recapture Provision in Section 404 Converts the MEGS Ash Pond Into a Water of the United States

The recapture provision allows for a narrow exemption for uses "that have little or no adverse effect on the waters of the U.S." *Marsh*, 715 F.2d at 926; *Brace*, 41 F.3d at 124. To be exempt from section 404 permit requirements, "one must demonstrate that proposed activities both satisfy the requirements of § (f)(1) and avoid the exception to the exemption." *United States v. Akers*, 785 F. 2d 814, 819 (9th Cir. 1986). Additionally, it the burden of the discharger to "demonstrate that he falls within an exception to the CWA." *Brace*, 41 F.3d at 124.

As stated above, the Corps' recapture provision requires a (1) new use that (2) impairs the flow of the navigable water in dispute. § 1344(f)(2).

In *United States v. Huseby*, the discharger asserted that his property had been historically used for logging. 862 F. Supp. 2d 951, 964 (D. Minn. 2012). The observing court found that the discharger had transformed the site into a plantation. *Id*. The court held that although still harvesting trees, the discharger clearly intended for the site to have new use. *Id*. Similarly, the Third Circuit held that drainage activity for the purposes of farming was a new use of the property. *Brace*, 41 F.3d at 125. The Ninth Circuit has held that converting cattle lands into an orchard constituted a new use because it converts waters of the U.S. into a use it had not previously been subject. Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810, 815 (9th Cit. 2001).

The Twelfth Circuit should join the Third and Ninth Circuits in determining that conversion of the MEGS pond into dry land is a new use. The draining and capping of the MEGS ash pond converts a water of the United States to a landfill. R. at 6. This directly converts the impoundment of Fossil Creek into dry land. While the closure is mandated by the State of Progress, EnerProg's intent is not dispositive. Thus, the draining and capping of the MEGS ash pond meets the first requirement of the recapture provision.

The second requirement is that the closure and capping impairs the flow of water in MEGS ash pond. The Third Circuit has found that the recapture provision cannot be used where no "significant impairment to the reach or flow of waters has been proven." *Brace*, 41 F.3d at 120. However, the Third Circuit found that converting cattle lands to plantation lands impaired the flow of wetland waters. *Id*. Similarly, the Ninth Circuit held that any activity that requires "substantial hydraulic alterations" may impair the flow of navigable water. *Borden Ranch P'ship*, 261 F.3d at 816.

The Twelfth Circuit must find that completely draining of the MEGS coal ash pond impairs the flow of what once was Fossil Creek. For this reason, the Twelfth Circuit should hold that under the recapture provision of section 404, the MEGS ash pond has been recaptured through conversion from a waste treatment system to a landfill. Therefore, under its new use, Enerprog must apply for a section 404 permit for the coal ash pond closure and capping.

C. The Environmental Appeals Board's Decision Should Not be Given Deference

The Twelfth Circuit should not give any deference to the EAB decision on this matter because the EPA is not congressionally authorized to administer section 404 permits. *West v. Bowen*, 879 F. 2d 1122, 1137 (3d Circuit 1989) (holding "no deference is owed an agency's interpretation of another agency's statute). However, if the Twelfth Circuit finds that the EAB interpreted its own regulation, "the agency's interpretation is 'controlling unless plainly erroneous inconsistent with the regulation.'" *Aracoma.*, 556 F.3d at 193 (*citing Auer v. Robbins, 519 U.S. 452, 461 (1997)*).

The Twelfth Circuit should find that the EAB interpretation of the CWA is plainly erroneous and inconsistent with the regulation. In its analysis, the EAB relies on the waste treatment system exemption contained in 40 C.F.R. section 122.2. R. at 13. The relevant regulation for section 404 permitting is 33 C.F.R. 323.2. Additionally, section 404 of the CWA contains a recapture provision. 33 U.S.C. § 1344(f)(2). This provision alters the jurisdictional definition of "waters of the United States" in 33 C.F.R. 232.2. Thus, EAB's interpretation of the CWA and its relevant regulations is clearly erroneous and inconsistent with 33 C.F.R.

CONCLUSION

The EPA acted beyond their discretion when suspending compliance deadlines for the 2015 ELG rule. Their action was arbitrary and capricious and violated APA standard by failing to provide a notice-and-comment period. When the federal government fails to act, it is the

responsibility of States to protect their citizens from public hazards and environmental harm. The State of Progress rightfully enacted CACA for the public health of its citizens. Since CACA is incorporated into section 401(d) of the CWA, EPA has no jurisdiction to deny Progress section 401 certifications. Further, the EAB erred in relying on the 1980's suspension to the definition of "waters of the United States", such that the definition did not comply with the APA. Even if the 1980's suspension is valid, the MEGS coal ash pond falls within the recapture provision of section 404 of the CWA. For these reasons, the court should reverse the Order of the District Court in part, and find in favor of the positions asserted by Fossil Creek Watchers.

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respectfully submitted,

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