Team No. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket Nos. 17-000123 and 17-000124

ENERPROG, L.L.C.,

Petitioner,

and

FOSSIL CREEK WATCHERS, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Consolidated Petitions for Review of a
Final Permit Issued Under Section 402 of the Clean Water Act
NPDES Appeal No. 17-01234

BRIEF FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Respondent

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CONT.)

UNITED STATES DISTRICT COURTS

FEDERAL STATUTES

TABLE OF AUTHORITIES (CONT.)

FEDERAL RULES AND REGULATIONS

TABLE OF AUTHORITIES (CONT.)

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Jurisdiction properly lies in this court pursuant to 33 U.S.C. section 509(b) because this petition is a request to review administrator's actions. Under 33 U.S.C. section 1369, this court has jurisdiction to review an administrator's action(s) in promulgating effluent or pretreatment standards, making determinations as to state permits, and issuing or denying a permit. 33 U.S.C. § 1369 (1988).

QUESTIONS PRESENTED

I. Is the Environmental Protection Agency's issuance of an ash pond remediation permit for closing and capping of the ash pond a permissible exercise of authority under section 401(d) of the Clean Water Act?

II. Did Administrator Pruitt's April 25, 2017 Notice of Postponement effectively suspend the zero discharge compliance requirements of 40 C.F.R. section 423 pending judicial review?

III. Was the Environmental Protection Agency Region XII's reliance on Best Professional Judgment as an alternative ground to set zero discharge standards appropriate under 40 C.F.R. section 123?

IV. Do the NPDES permitting requirements apply to EnerProg's pollutant discharges *into* the Moutard Electric Generating Station ash pond, in light of the Environmental Protection Agency's July 21, 1980 suspension of 40 C.F.R. section 122.2?

V. Did the Environmental Protection Agency properly determine that a section 404 permit for discharge of fill material was not required for the capping and closure of the ash pond?

STATEMENT OF THE CASE

Statement of Facts

On January 18, 2017, a federal National Pollutant Discharge Elimination System ("NPDES") permit was issued by Environmental Protection Agency ("EPA") Region XII to EnerProg, L.L.C ("EnerProg") to support the continued operation of the Moutard Electric Generating Station ("MEGS"), a coal-fired steam electric power plant. R. 6.

MEGS is a large-scale electric generating facility, with one unit rated at a maximum dependable capacity of 745 megawatts (MW). R. 7. There are four discharge stations for the excretion of water gathered initially from the Moutard Reservoir, two of which are pertinent to the matter at hand. R. 7-8. Outfall 001 is a cooling tower system that, less than once per year, is drained by gravity and discharged directly to Moutard Reservoir. R. 7. Outfall 002 is an ash pond treatment system, which discharges directly to Moutard via a riser structure after the wastewater undergoes sedimentation. R. 7-8. Internal Outfall 008 discharges into the ash pond after mixing ash sluice water and cooling tower blowdown. R. 8. Internal Outfall 002A is not yet complete, but will re-direct the ash pond to the retention basin. R. 8.

The ash pond will no longer accept any wastewater; the retention basin, once complete, will accept wastes, then discharge to Moutard Reservoir via Outfall 002. R. 7-8. The ash pond was created in June, 1978, by damming Fossil Creek. R. 7. Fossil Creek does not discharge to the Moutard Reservoir, but is a tributary to Progress River, a navigable body of water. R. 7. The facility is regulated by EPA effluent limitation guidelines per 40 C.F.R. Sec 423. R. 7.

On September 30, 2015, the EPA, through notice and comment rulemaking, revised the Steam Electric Power Generating Point Source Category Regulations ("2015 Rule"). 40 C.F.R. § 423 (2015). Under these new regulations, MEGS and other similar facilities would be required

to meet zero discharge standards by November 1, 2018. 40 C.F.R. § 423. However, the EPA has received seven petitions for review of the 2015 Rule, which have been consolidated before the U.S. Court of Appeals for the Fifth Circuit. Postponement of Certain Compliance Dates Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19005,19005 (April 25, 2017). Through a letter dated April 25, 2017, EPA Administrator Scott Pruitt announced the decision to reconsider the 2015 rule pending the Fifth Circuit's judicial review. R. 2. However, EPA Region XII relied on Best Professional Judgment ("BPJ") as an alternative ground to require zero discharge of ash transport pollutant at the MEGS facility. R. 2.

The EPA granted an NPDES permit to EnerProg pursuant to the Clean Water Act ("CWA") for pollutant discharges associated with the continued operation of MEGS. R. 2.

Procedural History

Two parties, Fossil Creek Watchers, Inc. ("FCW") and EnerProg, have various concerns with the reissuance of the MEGS NPDES permit and filed petitions for review of the Administrator's actions. R. 1.

EnerProg challenges the inclusion of a condition requiring EnerProg to terminate, dewater, and subsequently cap the coal within the MEGS coal ash settling pond. R. 6. EnerProg also challenges the inclusion of zero discharge requirements, as well as the permit writer's reliance on Best Professional Judgment as a standard. R. 6.

FCW challenges authorization of a permit allowing coal ash solids to remain in the ash pond after the pond is closed, as well as the allegedly illegal disregard of CWA effluent limitations that, according to FCW, should apply to bottom and fly ash pollutant discharges into the ash pond. R. 7.

EnerProg and FCW appeal the Environmental Appeals Board's ("EAB") denial of both EnerProg and FCW's timely petitions pursuant to section 509(b) of the CWA. R. 2. After seeking judicial review of the EAB decision affirming the issuance of a final NPDES permit to EnerProg, L.L.C, the appeals of EnerProg and FCW were denied by the Environmental Appeals Judges. R. 6. EnerProg and FCW now seek review by the United States Court of Appeals for the Twelfth Circuit. R. 2.

STANDARD OF REVIEW

The court's review of this case is subject to Administrative Procedure Act section 706(2) which allows a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is a "highly deferential" standard that allows the court to review only the administrative record compiled with and utilized by the agency. *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

SUMMARY OF ARGUMENT

The EPA properly implemented both the CWA regulations and the more comprehensive state-imposed provisions included in the Coal Ash Cleanup Act ("CACA"). The CACA was in compliance with the mandates of the CWA, and was enacted by the City of Progress to ensure adequate protection and maintenance of local waters. Because the CACA is an approved state-implemented provision, the EPA's enforcement of both provisions was not only proper, but also required.

EPA Administrator Scott Pruitt's April 25, 2017 Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power

Generating Point Source Category ("Notice of Postponement") is not reviewable because it is not a final agency action. Regardless, justice requires that the effective date of 40 C.F.R. section 423 be postponed pending judicial review.

EPA Region XII has the statutory authority to use BPJ to set zero discharge standards for pollutants that are not covered by the 1983 effluent limitation guidelines ("ELGs"). 40 C.F.R. § 125.3.

The MEGS ash pond is a waste treatment system formed by impounding pre-existing waters of the United States ("WOTUS"), thus NPDES permitting requirements do not apply. Pollutant discharges into the MEGS ash pond are not subject to effluent limitations because the definitions section of the CWA states clearly that waste treatment systems formed by impounding pre-existing WOTUS are not to be included in the definition of WOTUS. 40 C.F.R. § 122.2 (2017). NPDES permitting requirements only apply to WOTUS.

A CWA section 404 permit is only required for the discharge of "fill" materials into WOTUS. The process of capping and closing the ash pond did not meet the requirements for a section 404 permit because the ash pond is not a WOTUS; thus, the resulting discharge is not subject to section 404 requirements. Further, there exists no plan to convert the ash pond back into a flowing WOTUS.

ARGUMENT

I. THE ENVIRONMENTAL PROTECTION AGENCY HAS THE AUTHORITY TO ISSUE A PERMIT REQUIRING COMPLIANCE WITH THE CLEAN WATER ACT SECTION 401 CONDITIONS FOR PROPER CLOSURE AND CAPPING OF THE ASH POND.

Pursuant to Section 401 of the CWA, an applicant for a federal license for any activity that may result in a discharge into the navigable WOTUS must apply for certification from the state in which the discharge does or will originate in order to ensure compliance with state and

federal water quality standards. *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 707 (1994). Section 401 (d) of the CWA requires that certifications provided by the Administrator under section 401 (b) shall set forth effluent (and other) limitations and monitoring requirements necessary to ensure that applicants comply with the CWA's effluent guidelines, and with state water law. 33 U.S.C. § 1131 (1995). The effluent limitations guidelines set forth in 33 U.S.C. section 1311 require limitations for point sources and publicly-owned treatment works, and more stringent limitations for pollutants, toxic, and otherwise. *Id*. The EPA is required to administer these effluent limitations for individual discharges from point sources into the WOTUS. *American Rivers, Inc. v. Federal Regulatory Commission*, 129 F.3d 99 (2nd Cir. 1997).

Each state, subject to Federal approval, is required by the Act to institute water quality standards and implement water quality goals for all intrastate waters. 33 U.S.C. § 1311. The state receives wide discretion for implementation and regulation of local standards, so long as the standards are equally or more stringent than those enacted on the federal level. *Id*. Once implemented, agencies receive little to no judicial deference regarding statutes that they are not tasked with administering. *American Rivers*, 129 F.3d at 107; *see also Chevron USA Inc., v. National Resources Defense Council*, 467 U.S. 837, 865 (1984) (holding that when Congress is silent on an issue, an Administrator's interpretation of the statute is entitled to great deference because they are charged with administering those statutes, and judges are not experts in the field).

States may include stricter regulatory provisions pursuant to the CWA so long as they are necessary to enforce and comply with a state water quality standard. *PUD No. 1*, 511 U.S. at 723. In *PUD No. 1*, Washington State adopted comprehensive water standards to regulate all of

the state's navigable waters. *PUD No. 1*, 511 U.S. at 709. City and local utility districts proposed a hydroelectric project that would divert water from a bypass of the river, run it through electric turbines, and then return the water to the river. *Id*. The state ecology department imposed minimum flow requirements that were challenged by the city and local utilities. *Id*. The Petitioner challenged these regulations by claiming that the State could only impose water quality limitations specifically tied to a "discharge"; Petitioner also claimed that the CWA required States to protect water use solely through implementation of numbered "criteria." *Id.* at 711. The Supreme Court held that the State had discretion to enforce these minimum flow requirements as authorized by section 401 (d) of the CWA. *Id.* at 723.

A federal agency that is not tasked with administering a statute does not have authority to refuse to include state-imposed conditions supplemental to that statute. *American Rivers*, 129 F.3d at 112. In *American Rivers*, Vermont's Agency of Natural Resources issued a certification for the Turnbridge restoration project. *Id.* at 102. Turnbridge then sought a license from the Federal Energy Regulatory Commission ("FERC"), who granted the license but excluded Vermont's local conditions, stating that those conditions were beyond the scope of the State's authority under the CWA. *American Rivers*, 129 F.3d at 103. The court held that FERC did not have the right to refuse to uphold the State's conditions. *Id.* at 106. The express language of the CWA required any state-imposed criterion to become conditioned on the subsequent federal license. *Id.* at 102. Therefore, because Congress tasked the EPA, and not the FERC, with implementing the CWA, the FERC had no authority to refuse implementation of Vermont's additional certification conditions. *Id.* at 110.

A. EnerProg Errs in Alleging That the EPA's Ash Pond Closure and Capping Mandates Were Beyond the Agency's Scope of Regulation Because Local Agencies Have the Authority to Enact Regulations That are in Compliance With the CWA.

Pursuant to the CWA, the EPA acted appropriately in requiring the cessation of operation, dewatering, and covering of the coal ash pond in compliance with the local CACA. Just like in *PUD No. 1*, EPA Region XII acted pursuant to sections 303 and 401 of the CWA by setting local guidelines that ensure the protection of intrastate waters. The City of Progress ("City") enacted the CACA to, abiding by the best available technology, handle the wastes generated from the coal ash pond. The City determined that by requiring the local CACA requirements of stopping operation, dewatering, and covering the coal ash pond, MEGS is capable of meeting a zero discharge standard by November 1, 2018. The City has determined that dangers posed by the discharge from MEGS containing elevated levels of toxic mercury, arsenic, and selenium posed a hazard to the citizens of Progress, and therefore required action conforming with the CACA.

The EPA does not have jurisdiction to consider the permissibility of the CACA conditions, but rather is compelled to enforce the statute as written. As stated in the CWA, state certifications "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d). The CACA is the City's supplement to the CWA requirements, and is a certification that the City has deemed necessary in order to protect their intrastate waters. Though the EPA is tasked with administering the CWA, the pond ash remediation is within the scope of CWA section 401 (d), and thus the EPA does not have the authority to consider the permissibility or to strike these state-implemented conditions.

Further, the overall purpose of the CWA is to attain water quality that is suitable for the protection of fish, shellfish, and wildlife. 33 U.S.C. §1251. The purpose of the effluent

limitations is to ensure that this water quality is attained. 33 U.S.C. §1131. By enforcing the pond ash remediation measures, the EPA is acting as required by the CWA. EnerProg's challenge to the scope of the ash pond remediation measures is thus meritless because the City enacted such measures pursuant to the state's regulatory authority under the CWA, and the EPA is required to enforce such state-implemented conditions.

B. The EPA Was Well Within Its Discretion to Implement the Ash Pond Remediation Conditions as Written by the State of Progress and Was Not Required to Enact Additional, More Stringent Measures.

The steps taken by the EPA in enforcing the dewatering, closure, and capping of the coal ash pond were sufficiently in compliance with the mandates of the CWA. The effluent limitations regulations require that state water standards include an "anti-degradation policy" to ensure the maintenance of the water quality necessary to protect waters and their use. 33 U.S.C. § 1131. The EPA's actions in enforcing the ash pond remediation clearly comply with this standard, for they provide a more than adequate level of protection against degradation of waters governed by the City. In addition to the mandates of the CWA itself, the EPA properly enforced the City's supplementary conditions for the closure of the ash pond. The CWA does not require the EPA to bolster water protections in response to all organizational challenges because to do so would be unsustainable and a substantial drain of EPA resources.

The ash pond remediation conditions complied with the overall CWA mandates because the remedial measures protected against any potential degradation of the waters in the City. The best available technology determined that compliance with the process of ash pond remediation would result in zero discharge from MEGS. This is directly in accordance with the CWA's effluent limitations because the EPA has determined that dry handling of bottom and fly ash constitutes the best available technology for handling such pollutants. Further, the dates that

were set for each step ensured that the toxic pollutants would be disposed of as expeditiously as practicable, and did not exceed three years. The EPA is not required to enact more stringent regulatory measures than those required by the CWA and by the state.

II. EPA ADMINISTRATOR PRUITT'S APRIL 25, 2017 NOTICE EFFECTIVELY SUSPENDED COMPLIANCE DEADLINES FOR ACHIEVING ZERO DISCHARGE OF COAL ASH TRANSPORT WASTE.

On September 30, 2015 the EPA finalized 40 C.F.R. section 423 ("2015 zero discharge requirements"), revising regulations for steam electric power generating point sources under which MEGS would be required to meet a zero discharge standard by November 1, 2018. However, EPA Administrator Scott Pruitt's April 25, 2017 Notice of Postponement effectively deferred compliance deadlines pending judicial review.

A. The EPA's Decision to Suspend Future Compliance Deadlines is Not a Reviewable Final Administrative Action.

Secretary Pruitt's April 25, 2017 Notice of Postponement is an agency decision to grant a petition to reconsider a regulation and, as such, is not a reviewable final agency action. *See Portland Cement Ass'n v. E.P.A*, 665 F.3d 177, 185 (2011). Two conditions must be satisfied to be considered a final agency action. *Bennett v. Spear*, 520 U.S. 154, 177 (1997). First, the action must mark the "consummation" of the administrative decision making process. *Id. citing to Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 112-13 (1948). Second, rights or obligations must be determined, and legal consequences must flow from the agency action. *Id. citing to Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970).

The suspension of compliance deadlines does not "consummate" the administrative decision making process because it is both tentative and interlocutory in nature. *Chicago*, 333 U.S. at 112-13, *see also Bennett* at 178. The EPA does not yet concede error with respect to the

2015 finalized rulemaking, and simply seeks to preserve the regulatory status quo during ongoing litigation. 82 Fed. Reg. 19005. Secretary Pruitt's Notice of Postponement is far from "definitive"; the Notice instead demonstrates intra-agency disagreement and a need to further consider the consequences of the 2015 revisions before the zero discharge requirements take permanent effect. *Sabella v. United States*, 863 F.Supp. 1, 3 (D.C. Cir. 1994) citing to *Natural Resources Defense Council v. EPA*, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994). This is a "tentative agency position," and the EPA does not view its deliberative process as "sufficiently final to demand compliance with its announced position." *Id.*

Rights and obligations do not flow from the Notice of Postponement. The decision to halt the 2015 zero discharge requirements during ongoing litigation does not "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago*, 333 U.S. at 113. In fact, the Notice of Postponement does the very opposite; the Notice of Postponement instead pauses the imposition of the obligation to meet zero discharge requirements, and temporarily unfixes the legal relationship created in the 2015 requirements. Additionally, the Notice of Postponement temporarily rids the regulatory structure of the "day-to-day" business effects of the final 2015 requirements. *Sabella*, 863 F.Supp. at 3. The Notice of Postponement does not have "the status of law" nor is "immediate compliance with its terms . . . expected." *American Paper Institute, Inc. v. EPA*, 726 F.Supp. 1256, 1259 (S.D. Alabama 1989). There is no immediate legal effect associated with the Notice of Postponement because it imposes no additional legal obligations on regulated parties that impacts their day-to-day business operations.

The 2015 zero discharge requirements were a reviewable final agency action that marked the finalization of the administrative process and imposed additional, immediate legal obligations

on regulated parties; Administrator Pruitt's Notice of Postponement merely "hit[s] the pause button" on the enforcement of that rule, and, as such, is not a reviewable final action. *Clean Air Council v. Pruitt*, 862 F.3d 1, 15 (D.C. Cir. 2017) (Brown, dissenting).

B. The April 25, 2017 Notice of Postponement Satisfied the Requirements of the Administrative Procedure Act Section 705 and Therefore Stayed Zero Discharge Standard Enforcement.

Under section 705 of the Administrative Procedure Act ("APA"), justice requires that the "effective date" of the EPA's action be postponed pending judicial review. 5 U.S.C. 705 (1966). FCW claims that the effective date of 40 C.F.R. section 423 was January 4, 2016, however the effective date of when compliance must take place is November 1, 2018.

The traditional four prong test to determine appropriateness of a stay, outlined in *Sierra Club v. Jackson*, is not appropriate here. 833 F.Supp.2d 11, 30 (D.C. Cir. 2012). Instead, the EPA need only show that justice so requires the stay in accordance with the provisions of APA section 705. *Id.* However, assuming arguendo that the court finds the *Sierra Club* four prong analysis applies, a balancing of the relevant considerations demonstrates that a stay of the regulatory status quo is appropriate.

1. The EPA Need Only Show That Justice Requires the Postponement, and Has Done So Effectively.

The statutory language of the APA creates a lower standard for an agency's postponement of effective dates of its own rule making. 5 U.S.C. § 705. "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." *Id.* Congress clearly intended to create a different standard for stays issued by agencies instead of courts. Congress chose to make a violation of justice the predicate for an administrative stay rather than the judicial four prong approach.

The language "justice so requires" provides agencies broad discretion to exercise this stay authority. And the EPA's decision to suspend compliance deadlines is effective with this authority. Compliance with the 2015 zero discharge requirements is complex, demanding, and expensive. Much of the work may have to be redone pending the outcome of litigation, thereby placing an undue burden on these regulated entities. Requiring facilities like MEGS to invest in the necessary technologies despite determinative ongoing litigation is unreasonable and unjust.

2. The EPA Notice of Postponement Concurrently Meets the Judicial Stay Requirements.

The court can only overturn the EPA's Notice of Postponement if it was arbitrary and capricious. *Sierra Club*, 833 F.Supp.2d, 29-30 (D.C. Cir. 2012). Courts have applied a four-part test to determine whether a judicial stay is appropriate. *Id.* at 30. Courts will consider (1) the likelihood that the appeal will prevail on the merits; (2) the likelihood of irreparable harm absent the stay; (3) the likelihood that others will be harmed if the stay is granted; and (4) the public interest gained from granting the stay. *Id.*

Challenges to the 2015 Steam Electric Power Generating Point Source Categories ELGs ("2015 ELGs") are likely to prevail on the merits. The 2015 ELGs have been challenged in the U.S. Court of Appeals for the Fifth Circuit. All seven challenges have been consolidated at *Southwestern Electric Power Co., et al. v. EPA*, No. 15-60821. These consolidated cases bring a variety of claims against the EPA and the 2015 ELGs including: failure to consider evidence that more effective treatment options were available to achieve more stringent pollution limits, failure to collect wastewater data or perform analysis before setting limits, withholding essential data and methodologies, and more. Brief for Petitioner Earthjustice at 3, Southwestern Electric Power Co., et al. v. EPA (No. 15-60821), Dec. 5 2016; Brief for Petitioners City of Springfield, Missouri, dba Ameren Missouri, Duke Energy Indiana, Inc. at 2, Southwestern Electric Power

Co., et al. v. EPA (No. 15-60821), Dec. 5, 2016. It is likely that one or more of these challenges will prevail on its merits, and the EPA will be forced to revise its 2015 ELG rulemaking.

The likelihood of irreparable harm absent the stay is high. Absent the stay, operations subject to the 2015 ELGs will be forced to meet zero discharge requirements despite the likelihood that the Fifth Circuit challenges are successful and the 2015 ELGs are struck down. This will force electric generating facilities to invest heavily in technologies that they will not need once the litigation is complete. Being forced to meet zero discharge requirements in the interim is extremely costly and may financially devastate electric generating plants like MEGS.

The likelihood of harm to others if the stay is granted is low. Though water quality is of utmost concern, there is no substantial evidence that postponement of the effective date of the 2015 ELGs will result in any substantial harm. The likelihood of irreparable harm to regulated entities far outweighs the likelihood of harm to water quality or community members.

There is a strong public interest in granting the stay. Electric power generation is essential to the functioning of the American economy and livelihood. The stay will ensure uninterrupted electrical conveyance. Additionally, the MEGS facility provides a multitude of jobs for the Progress community. If forced to shut down or pause operations due to these regulations, the economy of Progress may suffer.

III. THE BEST PROFESSIONAL JUDGMENT STANDARD WAS USED APPROPRIATELY TO SET ZERO DISCHARGE REQUIREMENTS FOR ASH TRANSPORT AND TREATMENT WASTES AT THE MEGS FACILITY.

Independent of the effectiveness of the Notice of Postponement discussed above, EPA Region XII's reliance on BPJ to require zero discharge of coal ash transport wastes at the local level was appropriate.

A. EPA Region XII has the Statutory Authority to Rely on Best Professional Judgment as an Alternative Ground for Zero Discharge Requirements.

The relevant statutory language allows for the use of BPJ for pollutants that are not covered by the 1983 ELGs. 40 C.F.R. § 125.3. Section 125.3(c) provides the EPA with broad discretion to choose how to regulate these pollutants: "[t]echnology-based treatment requirements may be imposed through one of . . . three methods." *Id.* EPA Region XII simply chose to regulate effluent levels of toxic pollutants under Section 125.3(c)(3). *Id.* "Where promulgated effluent limitation guidelines only apply to certain aspects of a discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act." *Id.*

Effluent from the MEGS coal ash pond contains toxic pollutants including mercury, arsenic, and selenium that are unregulated by promulgated effluent limitation guidelines. As such, these pollutants fall under the language of Section 125.3(c)(3) and are appropriately regulated on a case-by-case basis. EPA Region XII is permitted to use BPJ to set effluent limits at zero as they see fit. There is simply no statutory language that prohibits the action taken by the EPA here.

Courts have specifically recognized the EPA's statutory authority to impose un-uniform discharge requirements under the BPJ standard. *See Riverkeeper, Inc. v. U.S. EPA*, 358 F.3d 174, 202 (2nd Cir. 2004). In *Riverkeeper*, the court recognized that while there is some benefit to uniformity in regulations, "foolish consistency is the hobgoblin of small minds." *Id.* at 203. There is simply "no textual bar. . . to regulating. . . on a case-by-case basis." *Id.* And ultimately, the toxic pollutants regulated by EPA Region XII under a zero discharge standard are such that categorical regulation may not be technologically feasible. *See National Wildlife Federation v. EPA*, 286 F.3d. 554, 566 (D.C. Cir. 2002).

Courts are particularly deferential where the regulation does not specifically violate the statutory language and is consistent with Congress' goal improving the quality of the nation's waters. Here, use of BPJ to set zero discharge requirements is authorized under Section 125.3(c)(3) and furthers Congress' goal in passage of the CWA to improve the water quality of the nation's waterways.

B. The Application of the Best Professional Judgment Standard is an Agency Interpretation of Its Own Statutory Mandate Deserving of Deference.

Administrative implementation of a statutory mandate demands *Chevron* deference when Congress has delegated the authority "to make rules carrying the force of law and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-27 (2001). Courts will defer to agency interpretation when Congress left a "gap" in the statutory language and requires interpretation by the agency to properly implement and effectuate. *Id*. at 227 citing to *Chevron*, 467 U.S. at 843-44.

In *U.S. v. Mead*, the Court held that a tariff classification ruling was not entitled to *Chevron* deference because the Harmonized Tariff Schedule of the United States did not provide any indication that Congress intended to delegate the authority to issue classification rulings with the "force of law." 533 U.S. at 226-27. The Court enumerated one indicator of Congressional intent to delegate authority: "an agency's power to engage in adjudication or notice-and-comment rulemaking." *Id.* at 227. However, a want of notice and comment rulemaking is not determinative, particularly where such a formality was not required. *Id.* at 231. The court will instead look for "some other indication of a comparable congressional intent." *Id.* at 227. Here, unlike in *Mead*, it is clear that Congress intended to delegate to the EPA permitting authority backed by the "force of law." *Id.* As obviated by "the agency's generally conferred authority and other statutory circumstances," Congress intended that the EPA implement the

NPDES permitting regime with the force of law. *Mead, 553 U.S.* at 229. The EPA is the sole implementing agency for the NPDES permit program. *E.g., Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S 200, 206 (1976); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d. 492, 516 (2nd Cir. 2017) ("[CWA] leaves a considerable amount of policymaking discretion in the hands of. . . the EPA").

The court will apply the *Chevron* two prong framework when reviewing an agency's construction of the statute it administers. EnerProg challenges the EPA's construction of CWA Section 125.3 and, therefore, *Chevron* analysis is appropriate. The court is confronted with two questions: (1) "whether Congress has directly spoken to the precise question at issue" and, if not, (2) "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43.

Congress has spoken directly to the question at issue. The language of section 125.3(c) clearly provides the EPA the authority to regulate mercury, arsenic, and selenium on a case-by-case basis under the BPJ standard. 40 C.F.R. § 125.3(c). However, assuming arguendo that the court finds the language ambiguous, the decision to regulate these pollutants under a zero discharge standard is a permissible construction of the statute.

Congressional declaration of goals and policies reveals that a zero discharge standard is consistent with congressional intent. 33 U.S.C. § 1251 (1972). "It is the objective. . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at (a). Enforcement of a zero discharge standard under the BPJ standard furthers the overall goals of the CWA.

IV. THE MEGS ASH POND IS NOT A WATER OF THE UNITED STATES, THEREFORE THE NPDES PERMIT DOES NOT ILLEGALLY AUTHORIZE DISCHARGES INTO THE COAL ASH POND WITHOUT SUBJECTING THEM TO CLEAN WATER ACT EFFLUENT LIMITATIONS.

The CWA prohibits "the discharge of any pollutant" without a permit into "navigable waters," which it defines, in turn, as "the waters of the United States." 33 U. S. C. §§ 1311(a), 1362(7), (12) (1995). There must be a discharge of a pollutant into a WOTUS from a point source in order for an NPDES permit to be required. 33 U.S.C.S. § 1311 (2017). In the case at bar, the ash pond is not a WOTUS. 40 CFR Sec. 122.2 (2017). Because the ash pond is not a WOTUS, the conveyance of wastewater into the coal ash pond is not a discharge. *Id.* Finally, because the conveyance of wastewater into the coal ash pond is not a discharge, outfall 008 should not be a regulated point source.

A. Per 40 CFR 122.2, The MEGS Ash Pond Is Not A "Water Of The United States."

40 CFR 122.2 (b)(3)(d)(b)(b)(2)(i) excludes waste treatment systems in the CWA, 33 U.S.C. 1251 definitions of "Waters of the United States."

> The following are not "waters of the United States" even where they otherwise meet the terms . . . Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. 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. [See Note 1 of this section.]

The last sentence, "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States . . . nor resulted from the impoundment of waters of the United States", would be applicable to the MEGS ash pond, however, it was stayed in 1980, as referenced in Note 1.[1] This stay is still in effect, meaning that

[1] NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension. n1

waste treatment systems are still exempted whether or not they are manmade. The coal ash pond is a waste treatment system formed to meet the requirements of the CWA. R. 12. The ash pond is, therefore, not a WOTUS per 40 C.F.R. section 122.2.

Furthermore, the purpose of the Agency's inclusion of the now exempted sentence ("This exclusion applies only to manmade bodies of water...") was to ensure that dischargers did not escape treatment requirements. 40 CFR § 122 (1980). In the present case, the transport water undergoes treatment by sedimentation before it is discharged to the Moutard Reservoir, meaning that it does not escape treatment requirements, and fits squarely within the Agency's purpose outlined in the original rule. *Id*.

B. The July 21, 1980 Suspension in Regard to Manmade Bodies of Water Should Be Given Effect Because it Was Statutorily Authorized and is Valid.

The Suspension ("Suspension") of the CWA reading "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the US nor resulted from the impoundment of waters of the United States" had statutory authority. This authority is listed within this suspension, 45 FR 48620, and is issued under authority of the CWA, 33 U.S.C. § 1251 et seq. 33 USCS § 1251 (2017). This suspension is still part of the United States Code until it has been repealed.

The definitions section has been under much debate recently. On June 29, 2015, in the wake of commenters suggesting changes to the definition, the Army Corps of Engineers adopted a new rule modifying the definition of the scope of waters covered by the CWA, as seen in 80 FR 37054, however this did not affect the inclusion of waste water treatment systems. FR 37054 reconfirmed the exemption of waste water treatment systems in the definition of "Waters of the United States": "waste treatment systems have been excluded from this definition since 1992 and

1979, respectively, and they remain substantively and operationally unchanged." 80 FR 37054 (2015).

On October 9, 2015, in *In re EPA*, 803 F.3d 804, 809, the rule was stayed nationwide pending further order of the court. In *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, FN 1 (2016), the nationwide stay is debated then confirmed yet again, pending outcome of claims suggesting the stay is "arbitrary and capricious."

On July 27, 2017, in 82 FR 34899, a proposed rule was published considering the redefining of "waters of the United States" according to pre-2015 definitions. 82 FR 34899 (2017). The proposal retains the exclusion of waste treatment systems from the definition of "waters of the United States". *Id*. In other words, the stay is still valid until further notice.

C. The July 21, 1980 Suspension Complied With The Requirements Of Section 553 Of The Administrative Procedure Act.

5 U.S.C. § 553, the statute governing the requirements for the general notice of proposed rulemaking, states that the notice, which must be published in the Federal Register, shall include: 1) a statement of the time, place, and nature of public rule making proceedings; 2) reference to the legal authority under which the rule is proposed; and 3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553 (b) (2017).

45 FR 48620 includes all of these things. A statement of the time, place, and nature of public rule making proceedings is listed in Note 1.: "suspended until further notice. [FR Doc. 80-21878 Filed 7-17-80; 11:32 am]." Reference to the legal authority under which the rule is proposed is included: "this suspension is issued under authority of the Clean Water Act, 33 U.S.C. § 1251 et seq." Lastly, a description of the terms of the proposed suspended rule is also included: "Accordingly, the Agency is today suspending its effectiveness." 45 FR 48620 (1980).

D. Because Conveyance of Wastewater From Outfall 008 To The Coal Ash Pond Is Internal, Implementation Of Effluent Limitations Under CWA Sections 301(b) and 402 Is Neither Required, Nor Applicable.

Because the distribution of wastewater from Outfall 008 is into a waste water treatment system, not a WOTUS, it is not a discharge, and therefore not subject to effluent limitations, per sections 301(b) and 402. 40 CFR 122.2 defines "discharge as "any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source'." 40 CFR § 122.2(a) (2017). As previously discussed, the MEGS ash pond is not a WOTUS. This important distinction relieves the MEGS ash pond from NPDES requirements concerning wastewater into the ash pond, as opposed to discharges from the ash pond into the Moutard Reservoir, a WOTUS.

CWA Sec 301(b) concerns effluent limitations, which, per 33 USC §1362(11), are defined as "constituents...discharged from point sources into navigable waters." The MEGS ash pond is not a navigable water; it was formed as a holding pond for waste associated with a privately-owned coal-fired power plant. Sec 402 states that point source discharges of pollutants to WOTUS are prohibited unless they are in compliance with certain provisions of the CWA, but, as previously discussed, the MEGS ash pond is not a WOTUS.

In a plurality opinion, the Court held in *Rapanos v. United States*, that the CWA phrase "the waters of the United States" included only relatively permanent, standing or continuously flowing bodies of water "forming geographic features" described in ordinary parlance as streams, oceans, rivers, and lakes, of which the ash pond, created to serve solely as a privately-owned coal-fired treatment plant waste holder, is not included. 547 U.S. 715, 739 (2006).

Petitioner may try to assert that, under the nexus rule established in *United States v. Riverside Bayview Homes, Inc.*, the holding pond should be included in the federal jurisdiction of

WOTUS for the pond is connected to the Moutard Reservoir via a riser structure. *Riverside*, 474 U.S. 121, 133 (1985). This argument is flawed, however, as a riser structure does not create adjacent proximity between the two containments of water. *Riverside* concerned naturally occurring wetlands that were "apart of the aquatic system". *Id.* In our case, the ash pond is not a naturally occurring part of the aquatic system – it is a manmade structure meant to contain and sediment coal ash waste.

In *Friends of Sakonnet v. Dutra*, the court held that the current landowner was still responsible for the violations of the CWA that were put in place by the former landowner. 738 F. Supp 623, 637 (1990). The relevant holding of that case, decided by the United States District Court for the District of Rhode Island, comes in footnote 20 when the court notes that, under 40 CFR § 122.3(g), "discharges of pollutants into privately owned treatment works as an activity... does not require a permit." *Id.* at FN 20. Similarly in the case at bar, the activity of depositing pollutants into the privately owned MEGS ash pond treatment system does not require a permit.

V. A SECTION 404 PERMIT WAS NOT REQUIRED FOR THE CAPPING AND CLOSURE OF THE ASH POND BECAUSE SECTION 402 ADHERES TO THE SAME STANDARDS AS 404 AND NO PERMIT WAS REQUIRED FOR THE DISCHARGES OF THE ASH POND.

Section 404 of the CWA allows for the Army Corps to review requests specifically for the discharge of dredged or fill materials, and, after notice and a public hearing period, issue permits for the discharge of dredged or fill materials into specified disposal sites in the navigable WOTUS. 33 U.S.C. § 1344. Section 301 of the CWA makes a section 404 permit a prerequisite to the discharge of fill material into a water of the United States. 33 U.S.C. § 1311. The term "fill material" means material placed in WOTUS where the material either replaces any portion of a WOTUS with dry land, or changes the bottom elevation of any portion of a WOTUS. 33 U.S.C. § 1344 (1972). According to 40 C.F.R. section 122.2, however, waste treatment systems,

including manmade treatment ponds or lagoons are not considered waters of the United States. 40 C.F.R. § 122.2.

The Court has upheld both the requirement and validity of a permit for the discharge of fill material issued by the Army Corps. *Coeur Alaska v. Southeast Alaska Conservation*, 557 U.S. 261, 264 (2009). In that case, Coeur Alaska proposed the dumping of waste material from a gold mine into a nearby lake, and then discharging purified lake water into a downstream creek. *Id.* at 261. The permit was challenged by various environmental groups who alleged that the Army Corps overstepped their jurisdiction and did not have the authority to issue such a permit, for the "slurry" material constituted a pollutant, and was therefore subject to the EPA's issuance of a permit for discharging a pollutant. *Id.* at 262. The Court used a plain text analysis to support the permit because the discharge of the slurry would raise the floor of the lake, and thus would serve to "fill" the body of water rather than pollute it; the Army Corps was therefore within its rights to issue a fill permit. *Id.* at 291.

Here, a plain meaning analysis lends to the conclusion that a 404 filling permit is not required for the MEGS ash pond. The MEGS ash pond is not considered a WOTUS because it is exempt under 40 C.F.R. section 122.2 as a waste treatment system. The capping of the ash pond also does not result in *filling*, as defined by the CWA because, unlike in *Coeur*, there is no proposal to discharge material from or into the ash pond that would result in raising the floor level of a water of the United States. Additionally, a fill permit may only be issued by the Army Corps, and thus the FCW's challenge against the EPA is misplaced because the EPA does not have the discretion to grant or reject fill permits. *Coeur*, 557 U.S. at 291.

Further, a plain textual analysis of the CWA shows that its overall purpose is to ensure swimmable and fishable waters in part by eliminating hazardous and illegal discharge into the

waters. Since the action of closing and capping the ash pond does not result in discharge into a WOTUS, nor does it result in degradation of national waters, it clearly follows that this activity is not at odds with the CWA. The EPA is not required to police the waters with stricter standards than mandated by the CWA, and to uphold the FCW's challenge would be to require a reallocation of the EPA's resources to issue superfluous permits for activities that do not impact WOTUS.

Additionally, the MEGS discharges into the ash pond do not require a CWA section 402 permit. A section 402 permit abides by the same 404 definition of waters of the United States, and thus a waiver of the section 402 permit requirement supports a finding that the MEGS ash pond is not considered a WOTUS. Since the ash pond falls under the section 122.2 exemption as a waste treatment system that will not soon be converted back into a WOTUS, no section 404 permit is required for the closure of this ash pond.

The FCW incorrectly asserts that abandonment and capping of the coal ash pond are activities that constitute filling and thus bring them within the CWA permitting requirements for discharge of such fill materials. Although water did once run where the MEGS ash pond is now located, there is a specific exemption for waste treatment plants that releases them from the CWA requirement of a fill permit. The MEGS ash pond was created specifically for the purpose of acting as a water treatment facility, and there is currently no proposal that the closed ash pond be converted back into a flowing water of the United States.

The measures in place to dewater, close, and cap the ash pond are what the best available technology has determined to be the best way to dispose of the remaining pollutants from the ash pond. Proper enforcement of the remediation measures as was done by the EPA are all that is necessary in order for the closure of the MEGS ash pond to remain in compliance with the CWA.

Upholding FCW's challenge of the EPA's actions would be to rewrite the CWA exemptions for water treatment systems as well as redefine waters of the United States.

CONCLUSION

The EPA properly required the cessation, closure, and capping of the ash pond pursuant to the CACA because state enacted provisions must be enforced by the EPA as though they were included in the original CWA. The EPA did not have discretion to question or modify the CACA requirements. The suspension has been in effect for over 35 years, and has been reincorporated in two subsequent reconsiderations of the definitions section of section 122.2.

The EPA's decision to suspend the effective date of 40 C.F.R. section 423 pending judicial review is not a reviewable final administrative action. A stay during pending litigation is appropriate because justice so requires it.

Because internal outfall 008 does not discharge into a WOTUS, no effluent limitations are required. The staying of this suspension has been in effect for over 35 years. So as to preserve the sanctity of past precedence, and to respect the reliance of many on the effect of this suspension, this suspension should continue to be stayed. Therefore, no effluent limitations are required for internal outfall 008, as it does not discharge into a WOTUS.

Waste treatment systems are not "waters of the United States" and thus the closure of the ash pond did not require a section 404 "fill" permit for the discharges remaining in the ash pond. The EPA acted fully in accordance with the mandates of the CWA.

Dated: November 27, 2017

Respectfully Submitted,

Team No. 1