Team No. 13

C. A. Nos. 17-000123 and 17-000124

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

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

BRIEF FOR FOSSIL CREEK WATCHERS, INC.

Petitioner

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This Court has original jurisdiction, pursuant to 33 U.S.C. § 1369(b)(1)(F) (2012), to review the Environmental Protection Agency ("EPA") Administrator's action in issuing a National Pollutant Discharge Elimination System ("NPDES") permit pursuant to 33 U.S.C. § 1342 (2012). Fossil Creek Watchers, Inc. ("FCW") has exhausted all administrative remedies as required by 40 C.F.R. § 124.19(l)(1) (2017) by challenging this permit before the EPA's Environmental Appeals Board ("EAB"). R. at 6. On April 1, 2017, EnerProg, L.L.C. ("EnerProg") and FCW each filed petitions for review of the issuance of the permit, and the EAB denied both petitions. R. at 6. On September 1, 2017, this Court consolidated FCW and EnerProg's petitions for review, and both parties timely filed petitions within the 120 days specified under the Clean Water Act, 33 U.S.C. § 1369(b)(1)(F). R. at 2.

ISSUES PRESENTED FOR REVIEW

1. Whether EPA Region XII properly included conditions imposed by the State of Progress for its Clean Water Act section 401 certification in the final permit.

2. Whether the EPA Administrator may suspend compliance deadlines mandated by the 2015 Steam Electric Power Generating Point Source Category Effluent Limitation Guidelines, when the Administrative Procedure Act only authorizes suspending effective dates in response to pending judicial review.

3. Whether EPA Region XII can rely upon Best Professional Judgment to require zero discharge of coal ash transport wastes, independent of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines, when no other published rules address certain pollutants released by EnerProg's coal-fired power plant.

4. Whether the Clean Water Act regulates the discharges from Outfall 008 into the ash pond, despite the July 21, 1980 notice excluding impoundments from the regulatory definition of "waters of the United States."

5. Whether the ash pond closure and capping plan, which requires leaving coal ash wastes unattended for almost a year before placing an impermeable cap, requires a section 404 permit.

STATEMENT OF THE CASE

The Clean Water Act ("CWA" or "the Act") was enacted in 1972 to "maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2012). FCW, an environmental group, works to preserve Fossil Creek. R. at 6. The EPA issued a final permit authorizing the continued operation of EnerProg's coal-fired steam electric power plant. R. at 7. FCW does not challenge the issuance of a federal permit if it complies with applicable provisions of the Act. Rather, FCW only insists that the EPA issue a permit that abides by the Act's regulations, preserves Fossil Creek, and considers the permit's impact on surrounding water bodies.

A. Statement of Relevant Facts

EnerProg currently operates the Moutard Electric Generating Station ("MEGS"), a coal-fired steam electric power plant with one unit rated at a maximum dependable capacity of 745 megawatts (MW). R. at 7. The plant uses water withdrawn from the Moutard Reservoir to compensate for evaporative losses from the cooling tower, boiler water, ash transport water, as well as drinking water needs. *Id.* To dispose of coal ash wastes resulting from these operations, the facility has both a wet fly ash handling system and a wet bottom ash handling system that uses water to send solids through pipes to an ash pond. *Id.* The ash pond was created in 1978 by impounding the upper reach of Fossil Creek, a perennial tributary to Progress River, which is a navigable-in-fact interstate body of water. *Id.* On January 18, 2017, EPA Region XII issued a NPDES permit to EnerProg, pursuant to 33 U.S.C. § 1342 ("Section 402"). R. at 6. The final permit included conditions imposed by the State of Progress in its section 401 certification, which allows EnerProg to discharge wastes into the ash pond until November 1, 2018. R. at 2. EnerProg challenges the deadline to reach zero discharge of coal ash transport wastes with dry

handling, despite the EPA's determination that the MEGS can adopt this method by increasing consumers' electricity bills by no more than twelve cents per month. R. at 9.

1. The MEGS ash pond receives, contains, and discharges toxic metals.

Fossil Creek does not discharge into the Moutard Reservoir, but the MEGS ash pond was once a natural part of Fossil Creek, which connects to Progress River. R. at 7. The facility uses several outfalls to dispose of wastes: Outfall 001, Outfall 002, Internal Outfall 008, and Internal Outfall 009. R. at 7-8. Internal Outfall 008 discharges wastes directly into the ash pond. *Id.* Wastes from the outfalls include: fly ash, bottom ash, coal pile runoff, stormwater runoff, cooling tower blowdown, flue gas desulfurization (FGD) wastewater, and various low volume wastes. *Id.* Despite the continual discharges into the ash pond, the EPA did not require EnerProg to obtain a section 402 permit for this activity. R. at 12.

Additionally, the discharges from the ash pond contain elevated levels of mercury, arsenic, and selenium, which are all toxic pollutants identified by the Act. R. at 9. In order to regulate these discharges, the EPA issued the Steam Electric Power Generating Point Source Category Effluent Limitation Guidelines ("2015 ELGs"). 40 C.F.R. § 423 (2017). Effective January 4, 2016, the 2015 ELGs established that the Best Available Technology ("BAT") for discharges associated with bottom ash and fly ash is zero discharge. R. at 9. After receiving several petitions for reconsideration, EPA Administrator, Scott Pruitt, suspended the compliance deadlines of the 2015 ELGs but did not suspend the rule itself. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (April 25, 2017). Since the 1982 ELGs did not regulate all of the pollutants produced by the MEGs, the NPDES permit writer used Best Professional Judgment ("BPJ") as an alternative to achieve zero discharge of

pollutants for bottom ash and fly ash. R. at 11. The EPA included several conditions in the NPDES permit that were imposed by the State of Progress pursuant to the Progress Coal Ash Cleanup Act (CACA). R. at 6. The CACA is a law that requires the evaluation, closure, and remediation of "substandard coal ash disposal facilities," including the ash pond. R. at 8.

2. The EPA's inclusion of the state's conditions in the final permit created this controversy.

"Special Condition A" of the Progress CACA has three phases of completion: (1) discontinuing the operation of the ash pond by November 1, 2018; (2) dewatering the ash pond by September 1, 2019; and (3) covering the dewatered ash pond with an impermeable cap by September 1, 2020. R. at 10. The conditions were included in the state section 401 certification to eliminate risks associated with the failures of ash pond treatment systems. R. at 9. The state's conditions allow EnerProg to discontinue the ash pond's use as a waste treatment system, drain the ash pond, and leave the ash pond solids uncovered for up to a year before placing the impermeable cap, but the EPA did not require a section 404 permit for these activities. R. at 13.

B. Procedural History

On January 18, 2017, EPA Region XII issued a federal NPDES permit to EnerProg authorizing the continued operation of the MEGS pursuant to section 402 of the Act. R. at 6. EnerProg and FCW petitioned the EAB for review of the issuance of the permit and requested that it be remanded to EPA Region XII for further consideration. *Id.* FCW claimed that the permit unlawfully authorized EnerProg to discharge pollutants and fill material into waters regulated by the Act. R. at 7. EnerProg challenged the federal permit's requirement of zero discharge of coal ash transport wastes by November 1, 2018 and the permit writer's reliance on BPJ to meet this goal. R. at 6. The EAB extended the filing deadlines for both parties, who submitted supplemental briefing following the April 25, 2017 Notice of the suspension of the

2015 ELG compliance deadlines. *Id.* On September 1, 2017, the Honorable Judge Knod entered an order denying both petitions for review, ultimately upheld the federal permit's inclusion of the state's conditions, accepted BPJ as an alternative to the 2015 ELGs, and required no additional permits for EnerProg's operations. R. at 13. Both FCW and EnerProg timely filed petitions for review pursuant to section 509(b) of the CWA, 33 U.S.C. § 1369(b). R. at 2. This Court entered an order granting both parties' petitions for review on September 1, 2017. R. at 4.

STANDARD OF REVIEW

Because this appeal arises as a result of a decision rendered by the EAB, a tribunal of the EPA, the specific standard of review is whether the EPA acted arbitrarily and capriciously in issuing a federal permit. A final agency action may be overturned only if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). *See Adams v. EPA*, 38 F.3d 43, 49 (1st Cir. 1994). This standard presumes the validity of agency action and upholds that action if it satisfies minimum standards of rationality. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 412, 415 (1971). In reviewing an agency's interpretation of its own regulations, the courts weigh the agency's interpretation heavily "unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

SUMMARY OF THE ARGUMENT

This Court should uphold the EAB's conclusions on all grounds, except for the EAB's determination that a section 404 permit was not required to decommission the ash pond; the EAB's refusal to subject the discharges from Outfall 008 to section 402 permitting requirements; and the permit's inclusion of the state's conditions. R. at 10-13. As part of the Act's enforcement, parties must obtain a permit before discharging either materials or pollutants into

regulated waters. Because EnerProg, the EPA, and EPA Administrator Scott Pruitt allowed unregulated discharges into "waters of the United States," their actions contradict the goals of the Act. R. at 12.

First, the EPA is not required to include the state's conditions in the federal NPDES permit. The conditions imposed by the State of Progress are "appropriate requirement[s] of state law" under section 401(d) of the Act because the requirements terminate the use of a substandard waste disposal facility. R. at 8. The ash pond will then rejoin "waters of the United States" regulated by the Act once it no longer functions as a waste treatment system. R. at 7. If completed immediately, the dewatering and capping would possibly eliminate the discharge of pollutants into Fossil Creek and Progress River; however, the condition allows a one-year gap between the dewatering and capping phases. R. at 10. Failing to immediately cap the dewatered ash pond qualifies as a discharge of fill material into Fossil Creek and Progress River that threatens the wellbeing of these water bodies. R. at 7.

Second, EPA Administrator Scott Pruitt issued a notice suspending compliance deadlines set forth by 2015 ELGs on April 25, 2017. The suspension notice was issued without statutory authority and should not be given effect. An agency can postpone the effective date of its action pending judicial review, but the Administrator issued the notice in response to petitions for reconsideration. Furthermore, section 705 of the Administrative Procedure Act ("APA") only authorizes postponing effective dates, not compliance dates.

Third, under section 402 of the Act, BPJ is a suitable alternative to require zero discharge of coal ash transport wastes. The EPA must determine on a case-by-case basis what limitations represent the BAT in the absence of the applicable effluent guidelines. Independent of the 2015

ELGs, the 1982 ELGs do not regulate pollutants at issue; therefore, the NPDES permit writers properly relied on BPJ. R. at 9.

Fourth, the regulatory definition of "waters of the United States" originally included man-made impoundments of federal waters, but the EPA issued a notice removing these impoundments from the definition on July 21, 1980. R. at 12. The Act does not support this suspension because it allows continual discharges into an ash pond created by impounding a tributary to a navigable-in-fact river. R. at 7. Pursuant to the CWA, the ash pond is a "water of the United States," and the discharges of pollutants into the pond require a 402 permit.

Fifth, dewatering and capping the ash pond will terminate its use as a waste treatment system, subjecting it to the Act's regulation. R. at 7. Leaving coal ash wastes in the abandoned pond and placing the cap are discharges of fill material into regulated waters. Because the Act outlaws the discharge of fill material without a permit, a section 404 permit is necessary to ensure prompt compliance with the Act.

ARGUMENT

This Court should reverse the EAB's decision to include the conditions set forth by the State of Progress without requiring a section 404 permit for the dewatering and capping of the ash pond. R. at 13. This Court should also require a section 402 permit for the discharges into the ash pond from Outfall 008, despite the EAB's determination that those discharges are not governed by the Act. *Id.*

I. THE EPA IMPROPERLY INCLUDED THE CONDITIONS IMPOSED BY THE STATE OF PROGRESS IN THE FINAL PERMIT.

The EAB correctly determined that the EPA has no discretion to reject the conditions included in State of Progress' section 401 certification; however, the dewatering and capping of the MEGS ash pond independently violate section 404 of the Act, 33 U.S.C. § 1344 (2012). R. at

10. The Federal Water Pollution Control Act of 1948 was the first major piece of U.S. legislation to address water pollution, and it was amended in 1972 to become the Clean Water Act. *Citizens Coal Council v. EPA*, 447 F.3d 879, 882 (6th Cir. 2006). The primary goal of the Act reverberates across relevant jurisprudence and is to preserve federal waters. 33 U.S.C. § 1251. To achieve this goal, Congress prohibited the "discharge of any pollutant by any person," pursuant to 33 U.S.C. § 1311 (2012) ("Section 301"). *See Nat. Res. Defense Council ("NRDC") v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987). Congress expanded the meaning of "person" to include corporations and other entities. 33 U.S.C. § 1362(5) (2012). The EPA should require EnerProg to obtain permits before discharging both materials and pollutants into "waters of the United States" in accordance with 33 U.S.C. § 1344 (2012) ("Section 404") and 33 U.S.C. § 1342 ("Section 402"). The Act requires dischargers to obtain section 404 permits for discharges of materials and section 402 permits for discharges of pollutants. *Id.* Congress gave states the authority to condition federal permits on "appropriate" requirements under section 401 of the Act. 33 U.S.C. § 1341 (2012). The EPA accepts or rejects the final NPDES permit. *See Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99 (2d Cir. 1997).

First, Special Condition A of the Progress CACA is an "appropriate requirement of state law" because both the dewatering and capping of the ash pond are reasonably related to achieving state water quality standards. *See P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 701 (1994). If completed immediately, all phases of the condition would effectively terminate the use of a substandard ash pond. R. at 10. But the one-year timeframe between abandoning the ash pond and leaving the remaining wastes at the bottom of the pond qualifies as a discharge into waters of the United States that requires a section 404

permit. 33 U.S.C. § 1344(f)(2). Because EnerProg has not obtained a permit for these activities, the condition violates the CWA. *Id.*

A. The EPA is not required to include the Progress certification conditions in the final NPDES permit, but it lacks jurisdiction to determine the permissibility of the state's conditions.

The EPA has the authority to issue a federal NPDES permit, but it does not have the discretion to reject or alter the conditions set forth by the State of Progress. The Act specifies that a person who conducts an activity "which may result in any discharge into the navigable water[s] shall provide a licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). An applicant applying for a state certification must comply with "appropriate" requirements of state law, which "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d). Appropriate requirements are those that are reasonably related to water quality standards. *P.U.D.,* 511 at 701. Courts have repeatedly faced the challenge of pinpointing where the state's discretion begins and where the federal agency's authority ends. 33 U.S.C. § 1251(a).

The Supreme Court has limited a federal agency's ability to reject or modify a state's conditions for a federal permit. For example, in *Escondido Mut. Water Co. v. La Jolla, et al.*, a water company applied to the Federal Energy Regulatory Commission ("the Commission") for a license pursuant to the Federal Power Act ("FPA") for its two hydroelectric facilities. 466 U.S. 765 (1984). The operation of the facilities would burden multiple Indian reservations, so the Secretary of the Interior placed certain conditions on the project's permit. *Id.* at 770. Section 4(e) of the FPA provides that licenses issued under that section "shall be subject to and contain such conditions" as the Secretary "shall deem necessary" to protect the reservations. *Id.* at 771. Ultimately, the Court decided that the only major limit on the Secretary's authority was that the

conditions had to be "reasonably related" to the goal of protecting the reservation. *Id.* While the Commission was not bound to include the Secretary's conditions in the final federal permit, the Commission lacked authority to determine the necessity of the state's conditions to protect state resources. *Id.*at 771.

While the issues in *Escondido* involved the construction of the FPA, the Second Circuit adopted the analysis used by the Court in *Escondido* to determine that only the courts can decide whether states' conditions are appropriate for a section 401 certification. *Am. Rivers, Inc.*, 129 F.3d at 99. In *American Rivers, Inc.*, Turnbridge Mill Corporation ("Turnbridge") sought a federal license from the Commission, but the Commission rejected three of the state's conditions in the application. *Id.* at 103. The Commission asserted that it only had to accept those state conditions that were related to water quality. *Id.* at 107. The Second Circuit ultimately limited the agency's authority under the CWA. *Id.* at 110. The court clarified that there is no "roving mandate" for the agency to decide whether the substantive aspects of a state's conditions are consistent with section 401. *Id.*

Section 401 of the Act permits certifications "with any other requirement of State law." 33 U.S.C. § 1341(d). The plain language of this provision clearly suggests that Congress intended for states' conditions to achieve state water quality standards. *Id.* If there is no express legislative intent to the contrary, "[statutory] language must ordinarily be regarded as conclusive." *Escondido*, 466 U.S. at 772 (citing *North Dakota v. U.S.*, 460 U.S. 300, 312 (1983)). Similar to the Court's interpretation of the FPA in *Escondido*, the plain meaning of section 401 gives the State of Progress authority to determine the permissibility of its conditions. Because the Court's interpretation of section 401 is at issue, any agency interpretation of the

statute that is contrary to congressional intent must be rejected. *See Chevron, U.S.A.*, *Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984).

The Court upheld the state's ability to control and protect its natural resources. *Escondido*, 466 U.S. at 773. Section 401 of the Act provides a balancing system that reconciles the EPA's ability to reject a final permit application with the state's concerns. *See S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006). The Act provides that Congress must "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Section 401 of the Act also requires certifications issued from the state "in which the discharge originates." 33 U.S.C. § 1341(a)(1). Here, the relevant discharges originate from the MEGS in Fossil, Progress. R. at 7. Accordingly, the state of Progress would best determine the appropriate water quality standards due to increased familiarity with its resources.

Like the Commission in *American Rivers, Inc.*, EnerProg and the EPA may argue that giving the State of Progress unlimited authority to impose its conditions will subvert the preemptive reach of the Act to the will of the state. 129 F.3d at 111. But the Act preserves federal authority by allowing the EPA to either reject or incorporate state conditions into the final permit. 33 U.S.C. § 1341(a)(2). Section 401 of the Act inherently limits the state's conditions to those that are "*appropriate* requirements." 33 U.S.C. § 1341(d) (emphasis added). An appropriate requirement is one that must "relate to water quality." *Am Rivers*, *Inc.*, 129 F.3d at 108. The state's authority is not unbridled. If the EPA finds that the state-imposed conditions are not based on water quality standards, the EPA can reject the NPDES permit application. *P.U.D.*, 511 U.S. at 711-13.

B. The Progress CACA conditions are appropriate requirements of state law, but they independently violate the requirements for a section 404 permit.

The dewatering and capping of the ash pond separately violate the requirements for a section 404 permit because each activity qualifies as a discharge of fill material that will remain in the ash pond for at least one year. R. at 10. EnerProg has not obtained a permit for the interim in which the ash pond must be dewatered (September 1, 2019) and subsequently covered with the cap (September 1, 2020). *Id.* These activities will negatively impact Fossil Creek and surrounding waterways in violation of section 404 of the CWA.

1. The dewatering and capping are "appropriate requirements of state law" because these activities are designed to achieve state water quality standards.

If completed immediately, the dewatering and capping of the MEGS ash pond would achieve state water quality standards because both activities would terminate the use of a substandard ash pond in compliance with applicable effluent limitations.[1] Section 303 of the Act requires states to implement water quality standards in order to meet its objectives. 33 U.S.C. § 1313(a)(1) (2012). The state's 401 certification must "set forth any effluent limitations" and "any other appropriate state law requirement." *P.U.D.*, 511 U.S. at 701.

The Supreme Court has upheld state certification conditions if those conditions are reasonably related to the laws they are designed to advance. For example, in *P.U.D.*, a city and local utility district wanted to build a hydroelectric project on a specific river. *Id.* at 708. The proposed project would include a diversion dam that would completely block the river, channel 75 percent of the river's water into a tunnel, and return 25 percent of the water. *Id.* A section 401

[1] An "effluent limitation" means "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, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11) (2012).

certification was required for these activities because the project would discharge pollutants into the river, which provided a habitat for two species of fish. *Id.* at 709. The State of Washington issued a section 401 certification that imposed a minimum stream flow requirement to maintain the then-current fish population. *Id.* at 710.

In evaluating the necessity of the state's minimum stream flow condition, the Court examined 33 U.S.C. § 1311(c)(2)(A) (2012), which states that a water quality standard "must consist of the designated uses of the navigable waters involved and the water quality criteria based upon such uses." *Id.* The Court noted that the reduction in water quantity could destroy the river's designated uses for fisheries, drinking water, recreation, and navigation. *Id.* at 719. Water quantity was directly related to water quality, so the minimum flow requirement was necessary to enforce a designated use in the state water quality standard. *Id.* at 723.

Similar to Washington's minimum flow requirements in *P.U.D.*, Special Condition A of the Progress CACA is necessary to achieve state water quality standards pursuant to sections 401 and 301 of the Act. R. at 10. Here, the ash pond, which treats transport water containing various wastes[2] produced by the MEGS, was originally a part of the upper-reach of Fossil Creek before it treated wastewaters. R. at 7. In order to prevent coal combustion residuals from reaching Fossil Creek, dewatering and capping the ash pond are necessary to achieve state water quality standards. R. at 6.

[2] "Wastes" in the ash pond include: bottom ash and fly ash, coal pile runoff, stormwater runoff, cooling tower blowdown, flue gas desulfurization (FGD) wastewater, and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis (RO) wastewater, plant area wash down water, landfill leachate, monofill leachate, equipment heat exchanger water, groundwater, yard sump overflows, occasional piping leakage, and treated domestic wastewater. R. at 7-8.

2. The dewatering and subsequent capping of the ash pond will adversely affect "waters of the United States" in violation of the requirements for a section 404 permit.

The phases of Special Condition A are appropriate requirements of state law, but they violate the requirements for a section 404 permit because both activities will jeopardize the health of Fossil Creek and Progress River. R. at 10. The Administrator may deny an application for a section 404 permit if "the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c). Dewatering and then waiting up to a year to cap a pond filled with wastes threatens the water supply and wildlife in Fossil Creek and Progress River. R. at 7.

First, Special Condition A requires dewatering of the ash pond by September 1, 2019. R. at 10. The waste could remain accumulated in the ash pond for up to a year and qualify as an unregulated discharge of fill material. R. at 10. Whether or not an activity qualifies as a "fill" depends on its use. In *Save Our Community v. EPA*, Valley Reclamation, Inc. ("Trinity") drained several ponds on the site of a proposed landfill expansion. 971 F.2d 1155, 1157 (5th Cir. 1992). The city and Save Our Community claimed that the draining of the ponds required a section 404 permit. *Id.* at 1159. Because Trinity ensured that a minimal amount of effluent would enter the ponds, the court excluded the draining of the ponds from the Act's jurisdiction. *Id.* at 1168.

Unlike the actions taken by Trinity in *Save Our Community*, the dewatering of the ash pond is a discharge of fill material that violates section 404 of the Act. A discharge of fill material has the effect of "(1) replacing any portion of a water of the United States with dry land; or (2) changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.3(e) (2017). While Trinity exercised due care in minimizing discharges in *Save Our Community*, the CACA allows EnerProg to dewater its ash pond and leave coal ash wastes at the

bottom of the pond for up to a year. R. at 10. This will change the creek's bottom elevation and possibly expose Fossil Creek and Progress River to contamination via horizontal groundwater. *See Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 3:15-CV-00424, 2017 WL 3476069 *2 (M.D.T.N. Aug. 4, 2017). Leaving the deposits of wastes in the dewatered pond and failing to place a cap immediately qualifies as discharges of fill material governed by the Act. 33 U.S.C. § 1344(f)(2).

Next, covering the ash pond with an impermeable cap adversely affects Fossil Creek by limiting its circulation. Placing the cap will prevent both the reversion of the ash pond as part of Fossil Creek and would also replace "waters of the United States" with material similar to dry land pursuant to 33 C.F.R. § 323.3(e). R. at 7. The Supreme Court upheld the issuance of section 404 permits where the risk to waterways and wildlife was temporary or inconsequential. *See Couer Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009). In *Couer Alaska, Inc.*, the United States Army Corps of Engineers issued a section 404 permit for the discharge of mining slurry into a lake. *Id.* at 266. The Court deferred to the Corps' reasoning because placing the slurry in the lake would be temporary, the water flowing downstream from the lake would be treated, and the population of fish that would be destroyed could later be replaced. *Id.* at 269. In contrast, capping of the MEGS ash pond would change the flow of Fossil Creek into Progress River. R. at 7. The state's conditions do not require EnerProg to mitigate the degradation of these waters, which violates section 404 of the Act. 33 U.S.C. § 1344(c).

II. EPA ADMINISTRATOR SCOTT PRUITT'S DELAY NOTICE WAS NOT EFFECTIVE TO POSTPONE COMPLIANCE DATES OF THE 2015 EFFLUENT LIMITATION GUIDELINES.

On April 25, 2017, EPA Administrator Scott Pruitt issued a notice suspending future compliance deadlines included in the 2015 ELGs. Administrator Pruitt's notice refers to section

705 of the APA, which gives an agency the power to "postpone the effective date of an action taken by it, pending judicial review." Postponement of Certain Compliance Dates, 82 Fed. Reg. 19,005 (relying on 5 U.S.C. § 705 (2012)). The Administrator improperly relied on section 705, and the delay notice was unlawful for two reasons. First, the basis for the delay notice was rule reconsideration rather than "pending judicial review," making it "arbitrary and capricious" under the precedent of *Sierra Club v. Jackson*, 833 F. Supp. 2d. 11 (D.C. Cir. 2012). Second, the APA does not give the agency the power to postpone compliance dates of an action taken by it. *Becerra v. United States Department of Interior*, No. 17-CV-02376-EDL, 2017 WL 3891678 (N.D.Cal. Aug. 30, 2017). For both reasons, Administrator Pruitt exceeded statutory authority by postponing the compliance dates of the 2015 ELGs.

A. The Administrator issued the delay notice in response to petitions for reconsideration instead of pending judicial review, rendering the notice unlawful and ineffective.

Section 705 of the APA gives the Administrator authority to delay the effective date of agency action only when the action is subject to "pending judicial review." 5 U.S.C. § 705. EPA Administrator Scott Pruitt issued the April 25, 2017 notice in response to petitions for reconsideration, not pending litigation. Postponement of Certain Compliance Dates, 82 Fed. Reg. 19,005. In *Sierra Club v. Jackson,* the court determined that EPA Administrator Jackson had no authority under section 705 to delay effective dates under the Clean Air Act. 833 F. Supp. 2d. at 11. In *Sierra*, the EPA issued two separate rules promulgating air emission standards. *Id.* at 14. A number of petitions requested review of the two rules in the D.C. Circuit. *Id.* at 15. Two days before the rule's effective date, the Administrator issued a delay notice staying the effective date of both rules "until the proceedings for judicial review of these rules are completed or the EPA completes its reconsideration of the rules, whichever is earlier." Method 301—Field Validation

of Pollutant Measurement Methods from Various Waste Media, 76 Fed. Reg. 28,664 (May 18, 2011).

In *Sierra Club*, Administrator Jackson's delay notice was unlawful under section 705 because the notice did not articulate a "rational connection between its stay and the underlying litigation." 833 F. Supp. 2d. at 34. The Administrator must base the notice on pending litigation. *Id.* at 33. The delay notice referenced the pending litigation in passing, but the court referred to it as "lip service." *Id.* The reasons provided in the delay notice revolved around reconsideration instead of judicial review. *Id.* For example, the notice stated an intention to reconsider several issues in the two final rules, including a lack of sufficient data when the first rule was promulgated. *Id.* at 33. The agency could incorporate the data into the rule following reconsideration, but the notice's basis in reconsideration rendered the notice unlawful. *Id.* at 34.

Administrator Pruitt's attempted delay also relies on section 705 of the APA. Postponement of Certain Compliance Dates, 82 Fed. Reg. 19,005. Similar to *Sierra Club,* Administrator Pruitt's delay notice merely mentions underlying litigation, specifically, one consolidated case with different parties contesting the 2015 ELGs. *Id.* But the reasons articulated in the notice directly cite reconsideration as motivation for the stay. *Id.* After considering the objections in the reconsideration petitions, Administrator Pruitt determined it was in the public interest to reconsider the rule. *Id.* The Administrator's focus on reconsideration petitions indicates that the delay was not grounded in pending litigation.

The EPA argues that Administrator Pruitt's delay notice was issued in response to, or in anticipation of, pending litigation, but a court will not uphold an agency decision "where the agency has offered a justification in court different from what it provided in its opinion." *Morgan Stanley Capital Group, Inc. v. Public Util. Dis. No. 1 of Snohomish Cnty.,* 554 U.S. 527, 544

(2008). The delay notice fails to weigh the consequences of pending litigation upon the merits of its rule. Because the delay itself does not articulate the rational connection between the stay and pending litigation, it is unauthorized under APA section 705.

B. Because there is no rational connection between the delay notice and underlying litigation, the Administrator's delay notice was arbitrary and capricious.

The failure of the Administrator to rationally connect the notice to pending judicial review renders the Administrator's delay "arbitrary and capricious." *Sierra Club*, 833 F. Supp. 2d. at 34. In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, the Supreme Court demonstrated the level of the reasoning an agency must provide before rescinding a prior rule. 463 U.S. 29 (1983). In *Motor Vehicle Mfrs.*, the National Highway Traffic Safety Administration ("NHTSA") issued a rule requiring installation of seatbelts in all automobiles and required passive restraint systems in new vehicles. *Id.* at 35. This rule was rescinded after the agency concluded that the passive restraint systems would not provide significant safety benefits. *Id.* at 39. The Court characterized the agency's action as arbitrary and capricious because the agency neglected to consider differences between detachable automatic seatbelts and manual seatbelts, and it failed to present an adequate explanation for rescinding the requirement. *Id.* at 40.

Under section 706 of the APA, a reviewing court must reject agency action that is "arbitrary and capricious." 5 U.S.C. § 706(2)(A). The court must evaluate whether the decision was based on consideration of relevant factors and whether there has been a clear error in judgment. *See Citizens to Preserve Overton Park*, 401 U.S. at 402; *See also Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). An action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs.*, 463 U.S. at 29. Under the plain meaning of APA section 705, and in light of the court's interpretation

of the statute in *Sierra Club*, pending judicial review is the primary factor that Congress intended the Administrator to consider before issuing a delay notice. 5 U.S.C. § 705. Because Administrator Pruitt cites reconsideration instead of pending judicial review to justify the issuance of the notice, the delay was based on factors outside of what Congress intended the agency to consider. *Motor Vehicle Mfrs.*, 463 U.S. at 29. In this case, there is no connection between the relevant facts and the agency's decision, so the Administrator's action is arbitrary and capricious. *Id.* at 57. Because the Administrator exceeded his authority in issuing the notice, he ineffectively postponed the compliance deadlines for the 2015 ELGs; therefore, EnerProg must comply with the deadlines in the 2015 ELGS.

C. The APA only authorizes delays of effective dates, not compliance dates.

Administrator Pruitt lacked statutory authority to postpone the compliance dates of the 2015 ELGs. Section 705 of the APA gives the agency the power "to postpone the *effective* date of an action taken by it," but it does not grant authority to postpone compliance dates. 5 U.S.C. § 705 (emphasis added). For instance, in *Becerra*, the Office of Natural Resources Revenue ("ONRR") had issued a final rule regarding the valuation of oil, gas, and coal production from Federal and Indian leases on July 1, 2016. 2017 WL 3891678, The effective date of this rule was January 1, 2017, and on February 27, 2017, ONRR postponed the rule. *Id.* at *2. Plaintiffs filed suit claiming the ONRR had violated section 705, that the violation was arbitrary and capricious, and that the court should vacate the postponement of the rule. *Id.* at *3.

ONRR conflated "effective date" with "compliance date," despite the plain language of section 705. *Id.* at *8. ONRR asserted that an agency will not have time to exercise its statutory authority under section 705 after a lawsuit is filed and before the effective date of the challenged rule. *Id.* The court referred to the plain language of the statute, which authorizes postponement of

the effective date, not compliance date. *Id.* A mandatory compliance date should not be misconstrued as the effective date for revisions of regulations. *See Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995). Effective and compliance dates have distinct meanings. *See Nat. Res. Defense Council, Inc. v. EPA*, 683 F. 2d 752 (3d Cir. 1982). Also, courts avoid reading words or elements into a statute that do not appear in the statute's text. *Bates v. United States*, 522 U.S. 23, 29 (1997). The court concluded that ONRR had no authority under the APA to postpone compliance dates in their final rule. *Becerra*, 2017 WL 3891678 at *12.

Like the ONRR, Administrator Pruitt conflated effective dates with compliance dates. Postponement of Certain Compliance Dates, 82 Fed. Reg. 19,005. Specifically, Administrator Pruitt implied that "effective date" incorporated compliance dates. *Id.* In light of the court's analysis in *Becerra*, section 705 only authorizes the suspension of effective dates. Allowing suspension of compliance dates would give the agency broad power to retroactively overturn an effective rule. *Becerra*, 2017 WL 3891678 at *12. The 2015 ELGs became effective on January 4, 2016, and Administrator Pruitt announced the notice on April 12, 2017. Postponement of Certain Compliance Dates, 82 Fed. Reg. 19,005. Under the plain meaning of 5 U.S.C. § 705, Administrator Pruitt cannot suspend compliance dates of the 2015 ELGs.

III. THE EPA PROPERLY RELIED ON BEST PROFESSIONAL JUDGMENT TO REQUIRE ZERO DISCHARGE OF COAL ASH TRANSPORT WASTES.

Other than the 2015 ELGs, no other guidelines regulate the toxic metals at issue in this case, making BPJ the correct method to achieve zero discharge of coal ash transport wastes. R. at 11. Independent of the applicability or effectiveness of the 2015 ELGs, the EPA would refer to the 1982 ELGs when issuing an NPDES permit for operation of the MEGS. R. at 11. The 1982 ELGs, however, do not regulate the toxic metals at issue, which include mercury, selenium, and

arsenic. R. at 9. Without regulation, the determination of effluent limitations and BAT is based on the NPDES permit writer's best professional judgment. 40 C.F.R. § 125.3(c)(3) (2017). BPJ is the highest quality technical opinion developed by a permit writer after consideration of all reasonably available information.[3] When an ELG does not address certain metals or pollutants, BPJ should be used to "arrive at appropriate technology-based effluent limits." *Louisville Gas & Elec. Co. v. Ky. Waterways All.* 517 S.W.3d 479, 488 (Ky. 2017).

The law allows NPDES permit writers to use BPJ when published ELGs do not address certain pollutants. *Id.* Section 402 of the Act authorizes the EPA Administrator to issue a permit containing "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." 33 U.S.C. § 1342(a)(1)). Other aspects or activities are subject to regulation on a "case-by-case basis." 40 C.F.R. § 125.3(c)(3). The Court should read section 402 of the CWA and 40 C.F.R. §125.3(c)(3) together to establish a single rule regarding BPJ: when an ELG does not apply to certain pollutants, the EPA can issue a permit on a case-by-case basis as necessary to comply with the Act. This rule synthesis directly applies to EnerProg's operation of the MEGS because, apart from the 2015 ELGS, no other ELGs regulate certain toxic metals produced by the plant. R. at 9.

For example, in *Am. Petroleum Inst. v. EPA*, EPA Region X issued two permits that regulated the cadmium and mercury content of barite in American Petroleum's ("API") drilling fluid compounds. 787 F.2d 965, 969 (5th Cir. 1986). The 1984 permits were the first in the nation to incorporate case-by-case effluent limitations based on BAT for this particular industry. *Id.* at 971. The permits provided that a drilling mud may not be discharged if the barite used in the drilling mud exceeded a certain numerical limit. *Id.* at 972. The EPA borrowed these

[3] NPDES PERMIT WRITER'S MANUAL, 5-4 (2010) https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf (last visited Nov. 24, 2017).

limitations from an industry survey. *Id.* The court could find no study that correlated increased cadmium and mercury levels "with any sustained change in sediment composition near offshore drilling sites." *Id.* at 973. The EPA made a BPJ determination, and the court upheld the agency's use of BPJ because applicable standards were absent. *Id.* at 984.

In *Nat. Res. Defense Council, Inc. v. EPA*, Regions IV and VI of the EPA issued an NPDES permit establishing conditions for the discharge of pollutants by the American Petroleum Institute and Conoco, Inc. (collectively referred to as "API"). 863 F.2d 1420, 1423 (9th Cir. 1988). API challenged the permit on the basis that some of the limitations were too stringent. *Id.* at 1424. API's facilities were existing sources, and the limitations for toxic pollutants were based on BAT. *Id.* The EPA required compliance with industry-wide effluent standards for toxic and conventional pollutants by 1983, but the compliance deadlines were twice extended. *Id.* Because the EPA could not incorporate the relevant ELGs into a NPDES permit, the Ninth Circuit upheld the permit because the national guidelines were not yet established. *Id.*

American Petroleum, *NRDC,* and the circumstances in this case share four important commonalities: (1) the EPA's regional offices issued the permits; (2) the permits established limitations upon the discharge of toxic pollutants; (3) applicable ELGs were not available for incorporation; and (4) the permit writers relied upon BPJ to determine both BAT and appropriate limitations. R. at 9. The courts in both *American Petroleum* and *NRDC* reasoned that BPJ is justified when national standards are absent; therefore, BPJ in the present case is also justified in the absence of promulgated guidelines. The coal ash wastes in the present case contains elevated levels of mercury, arsenic, and selenium. R. at 9. The 1982 guidelines included these metals in its list of toxic chemicals, but the EPA did not issue limitations for them because reduction was not possible with the then-existing technology. 40 C.F.R. § 125 (1982). In effect, the 1982 ELGs

are silent, and the permit writer may rely upon BPJ when determining limitations for mercury, arsenic, and selenium in coal ash transport wastes.

While EnerProg argues that the EPA should not employ BPJ to achieve zero discharge of coal ash transport wastes, the EPA properly applied BPJ by requiring EnerProg to reach this discharge limit. R. at 2. When issuing a permit on a case-by-case basis, the permit writer must consider the following factors: (1) the age of 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 environmental impact (including energy requirements); and (7) such other factors as the Administrator deems appropriate. 33 U.S.C. § 1314(b)(2)(B) (2012). Region XII determined that, regardless of age, the wet handling process could be replaced by dry handling, which eliminates discharges of wastes. R. at 9. An increasing number of plants have employed dry handling for many years. *Id.* When analyzing cost and impact, Region XII found that MEGS is "sufficiently profitable to adopt dry handling of these wastes with zero liquid discharges." *Id.* According to the EPA, the average consumer would experience no more than a twelve cents per month increase in his or her electricity bill. *Id.* BPJ was reasonably utilized based on the aforementioned factors; therefore, this Court should uphold the NPDES permit writer's decision to require zero discharge of coal ash transport wastes.

IV. OUTFALL 008 DIRECTLY DISCHARGES INTO "WATERS OF THE UNITED STATES" AND IS SUBJECT TO EFFLUENT LIMITS UNDER THE CLEAN WATER ACT.

The EAB erred in determining that the discharges from Outfall 008 into the ash pond do not require a section 402 permit. R. at 12. The Act generally prohibits discharges "of any pollutant by any person" into "waters of the United States." 33 U.S.C. § 1311(a). The regulatory

definition of "waters of the United States" includes certain impoundments, interstate waters, all tributaries within the definition, and those waters with a "significant nexus" to "waters of the United States." 40 C.F.R. § 122.2 (2017). On July 21, 1980, the EPA issued a suspension that removed two phrases from § 122.2: (1) "the exclusion applies only" and (2) "the impoundment of 'waters of the United States.'" Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980). This suspension excluded impoundments from the regulatory definition of "waters of the United States." *Id.* The EPA issued the suspension under the authority of the CWA, but it allows EnerProg to circumvent treatment requirements and dump unregulated wastes into wetlands. *Id*. The suspension lacked authority under 5 U.S.C. § 553 (2012) because it allows for continual discharges of pollutants and undermines the Act. Due to the unlawfulness of the suspension, 40 C.F.R. § 122.2 still regulates impoundments like the MEGS ash pond as "waters of the United States." R. at 7. Because the Act regulates the ash pond as "waters of the United States," the discharges from Outfall 008 into the ash pond require a section 402 permit.

A. The EPA's July 21, 1980 suspension should not be given effect because it lacked statutory authority.

Because the July 21, 1980 suspension allows for the continued discharge of pollutants into an ash basin created by impounding a water of the United States, it lacked statutory authorization under 33 U.S.C. § 1251 ("Section 101"). Section 553 of the APA sets the standard for agency rulemaking. 5 U.S.C. § 553. Section (b) requires "general notice" of any proposed rulemaking that must include "reference to the legal authority under which the rule is proposed." 5 U.S.C § 553(b). In the 1980 suspension, the EPA cites section 101 of the Act as its legal authority to suspend the inclusion of impoundments of "waters of the United States." Consolidated Permit Regulations, 45 Fed. Reg. 48,620. This portion of the Act defines policies, but it does not mention agency authority to suspend former action. 33 U.S.C. § 1251.

Section 101(f) of the Act explicitly states that the procedures for reducing pollutants in navigable waters are designed to "eliminate unnecessary delays at all levels of government." 33 U.S.C. § 1251(f). The suspension has lasted for thirty-seven years, which defeats its purpose to expeditiously develop a new definition. Consolidated Permit Regulations, 45 Fed. Reg. 48,620. The EAB inaccurately characterized the suspension as "a longstanding policy judgment." R. at 12. Instead, the suspension was meant to be a brief opportunity for commentary, after which the EPA would "amend the rule, or terminate the suspension." Consolidated Permit Regulations, 45 Fed. Reg. 48,620. The EPA never amended the rule, nor did it terminate the suspension, which has allowed continued discharges of pollutants into impoundments of "waters of the United States." Because the suspension impedes the goals of the CWA, it should be rendered ineffective.

B. The July 21, 1980 suspension has allowed continual discharges into "waters of the United States."

The July 21, 1980 suspension allows continuous discharges into an ash pond, which is an impoundment that qualifies as "waters of the United States." R. at 7. A U.S. district court illustrated the danger of discharging pollutants into impoundments of these waters in *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC.,* 141 F.Supp.3d 428 (M.D.N.C. 2015). In *Yadkin*, Duke Energy Carolinas, LLC. owned a power plant and obtained an NPDES permit for its discharges of pollutants at Buck Stream Station ("Buck"). *Id.* at 436. The Riverkeepers, an environmental group dedicated to protecting the Yadkin River, claimed that the pollutants in one of Duke Energy's coal ash pond impoundments entered the groundwater at Buck and carried the pollutants via a hydrological connection to surface waters (Yadkin River, High Rock Lake, and their tributaries and streams). *Id.* at 437.While other courts were split on the issue of jurisdiction over groundwater, the district court in North Carolina ultimately determined that it had

jurisdiction under the Act to adjudicate a claim where "pollutants travel from a point source to navigable waters through hydrologically connected groundwater." *Id.* at 445. The Court extended the Act's section 402 authority to Duke Energy's coal ash pond. *Id.*

EnerProg's operation of Outfall 008 has discharged pollutants into the ash pond and potentially the surface waters of Fossil Creek and Progress River through a hydrological connection. R. at 7. This is because Outfall 008 was created in 1978 by impounding the northern part of Fossil Creek. R. at 7. Groundwater, or "water below the surface of the earth," tends to flow from places of higher elevation to places of lower elevation. *Tennessee Clean Water Network,* 2017 WL 3476069 at *2. Due to the ash pond's location, the pollutants discharged into the ash pond could migrate in groundwater to the nearby surface waters. R. at 7. Section 402 of the Act governed similar discharges in *Yadkin*, so section 402 should govern the discharges from Outfall 008 based on the ash pond's hydrological connection to Fossil Creek and Progress River. *Id.* The circumstances in *Yadkin* exemplify the high likelihood that pollutants discharged into an impoundment will seep into nearby waters regulated by the Act. Because the July 21, 1980 suspension allows continuous discharges that were regulated in *Yadkin*, the suspension impedes the goals of the Act and should not be given effect.

C. Discharges from Outfall 008 require an NPDES permit under section 402 of the CWA.

EnerProg needs an NPDES permit to discharge any pollutants from Outfall 008 into the ash pond. *See* 40 C.F.R. §122.2. Outfall 008 qualifies as a point source, and the Act makes it unlawful to discharge pollutants from any point source without an NPDES permit. *See* 33 U.S.C. § 1311(a); *See also United States v. Alpha Nat. Res., Inc.*, No. 2:14-11609, 2014 WL 6686690 *1 (S.D.W.Va. Nov. 26, 2014) (Impoundments and settlement ponds at a coal operation plant qualify as "point sources."). A "point source" is "any discernible, confined, and discrete

conveyance…from which pollutants are or may be discharged." 33 U.S.C. §1362(14). Courts have interpreted this definition broadly. *See Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991). The EPA uses ELGs and NPDES permits to regulate point sources under the Act. *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928 (5th Cir.1988). These permits set technology-based discharge limits for all categories and subcategories of water pollution point sources. *Id.*

In *Texas Oil*, the court illustrated how ELGs and NPDES permits interact to further the goals of the CWA. *Id.* at 928. ELGs are the "rulemaking device" that set national effluent limitations for point sources. *Id.* An effluent limitation is any restriction established by a state or the Administrator on quantities of "chemical, physical, biological, and other constituents" discharged from point sources into "navigable waters." 33 U.S.C. § 1362(11). Despite their central role in the Act's framework, the ELGs are not self-executing. *Texas Oil*, 161 F.3d at 928. ELGs cannot be enforced until they are incorporated into NPDES permits. *See Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) ("NPDES permits transform generally applicable effluent limitations into obligations of the individual discharger."); *See generally EPA v. California Ex Rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). These permits must incorporate, as a technology-based floor, all applicable ELGs promulgated by the EPA for the pertinent point source category or subcategory. *Texas Oil*, 161 F.3d at 928.

The pertinent point source category for EnerProg's Outfall 008 is the Steam Electric Power Generating Industry Category. R. at 3. The guidelines for this category, the 2015 ELGs, apply to plants rated at a maximum dependable capacity of over 50 MW, and the MEGS operates with one unit rated at 745 MW. R. at 7. *See* 40 C.F.R. § 423.10. There are only two ways an individual discharger can avoid incorporation of applicable ELGs into an NPDES permit. *Texas Oil*, 161 F.3d at 928. The first exception applies when the discharger is operating under a permit

that was issued prior to the promulgation of the ELGs. *Id.* The second exception applies when the EPA determines that the discharger is "fundamentally different" from other dischargers in the category, though this rarely occurs. *Id.*

Neither of the aforementioned exceptions apply to EnerProg's operation of the MEGS in this case. The effective date of the 2015 ELGs was January 4, 2016, and EnerProg's NPDES permit was issued on January 18, 2017. R. at 6. The permit was issued one year after the promulgation of the pertinent ELGs, so EnerProg's operations do not fall within the first exception. *Texas Oil*, 161 F. 3d at 928. Furthermore, the MEGS is a standard coal-fired electric plant, and there is nothing to indicate that the exception for a "fundamentally different" discharger applies to the MEGS. *Id.*

Outfall 008 is an external discharge regulated by the 2015 ELGs because it releases pollutants into impounded "waters of the United States." 40 C.F.R. § 122.2. Outfall 008 also serves as a potential point source discharging pollutants into Fossil Creek and Progress River through horizontal groundwater. It is illegal under the Act to discharge any pollutant from a point source without an NPDES permit. *Am. Petroleum Inst.*, 787 F.2d at 969. In order to comply with the CWA, EnerProg must obtain a section 402 permit for the operation of Outfall 008. If an NPDES permit is issued to EnerProg, it must incorporate the zero discharge requirements of the 2015 ELGs. 40 C.F.R. § 423.

V. THE DEWATERING AND CAPPING OF THE MEGS ASH POND ARE DISCHARGES OF FILL MATERIAL THAT REQUIRE A SECTION 404 PERMIT.

The EAB improperly excluded the dewatering and capping of the MEGS ash pond from section 404 permitting requirements. R. at 12. Special Condition A of the CACA mandates that EnerProg cease the operation of its ash pond, dewater the pond, and cover it with an impermeable cap by September 1, 2020 in order to meet state certification requirements for a

federal NPDES permit. R. at 10. The EAB excluded the ash pond from the regulatory definition of "waters of the United States" because the ash pond currently operates as a waste treatment system. R. at 13. Contrary to the EAB's conclusion, a section 404 permit is required for the fulfillment of the state's conditions. First, the ash pond will fall within the Act's jurisdiction once it no longer operates as a waste treatment system. *See* 40 C.F.R. § 122.2(2)(i). Second, the primary purpose of decommissioning the ash pond is to replace it with dry material, which requires a section 404 permit. *See* 33 U.S.C. § 1344(f)(2).

A. The ash pond will fall within the regulatory definition of "waters of the United States" once it no longer functions as a waste treatment system.

Once EnerProg no longer uses the ash pond as a waste treatment system, the decommissioned and capped ash pond will be considered "waters of the United States" subject to section 404 permitting requirements. 33 U.S.C. § 1344(a). Section 404 provides that "the Secretary may issue permits…for the discharge of dredged or fill material into navigable waters." *Id.* If an entity or person wishes to discharge fill material, it must obtain a section 404 permit to comply with the Act. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985); *See also Rapanos v. United States*, 547 U.S. 715 (2006). The coal ash pond was created by damming the upper reach of a perennial tributary to Progress River. R. at 7. Progress River has been designated as a "navigable-in-fact" interstate body of water, which makes it "waters of the United States." *Id. See* 33 C.F.R. § 329.4 (2017) (classifying "navigable waters" as those that are subject to the "ebb and flow of the tide."). Defining "waters of the United States" is a somewhat murky concept that has caused much controversy throughout jurisprudence and the federal government. In the late 19th century, the Court defined navigable waters as those that formed "a continued highway over which commerce is or may be carried on with other States." *The Daniel Ball*, 77 U.S. 557 (1870); *See also The Montello*, 87 U.S. 430 (1874). A century later,

the Court characterized "adjacent wetlands" as "waters of the United States." *Riverside Bayview Homes*, 474 U.S. at 134. In 2001, the Court recognized that Congress intended to have jurisdiction over waters that "were or had been navigable-in-fact" or could be made to be. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

At issue in this case is the applicability of the regulatory definition of "waters of the United States." R. at 12. It includes "all impoundments of waters otherwise identified as 'waters of the United States.'" 40 C.F.R. § 122.2(1)(iv). As of July 21, 1980, impoundments were excluded from this definition, and the exclusion remains in place today. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,114 (June 29, 2015) (codified at 40 C.F.R. pt. 122). Because of this exclusion, the EAB incorrectly excluded the ash pond from the definition of "waters of the United States" due to its current use as a waste treatment system. R. at 13. Contrary to the EAB's reasoning, the definition in section 122.2 applies to the ash pond because decommissioning the ash pond will reconnect the pond with Fossil Creek. R. at 8. Dewatering and capping the ash pond after its retirement qualify as discharges of fill material governed by section 404 of the Act. 33 U.S.C. § 1344(f)(2).

For example, in *United States v. Cundiff*, landowners began converting wetlands of two creeks into farmland. 555 F.3d 200 (6th Cir. 2009). The creeks were tributaries of the Green River, which flowed into the Ohio River, an interstate body of water. *Id.* at 204. The court adopted Justice Kennedy's concurring opinion and the plurality opinion in *Rapanos* to determine that the wetlands were governed by the Act. *Id.* According to Justice Kennedy's opinion in *Rapanos*, a section 404 permit is needed to fill wetlands that "possess a significant nexus to waters that are or were navigable in fact or which could reasonably be so made." *Rapanos*, 547

U.S. at 759 (quoting *SWANCC*, 531 U.S. at 172). The *Rapanos* plurality opinion described regulated waters as those with a "continuous surface connection" with "waters of the United States." *Id.* at 717. The landowner in *Cundiff* excavated ditches that created a "continuous surface connection" between the creeks and his operations, and it did not matter whether the ditch was man-made or naturally occurring. *Id.* at 213. Both tests were met in *Cundiff* to require permits under section 404 of the Act. *Id.* Like the creeks in *Cundiff*, the MEGS ash pond is a wetland for a creek that flows into a navigable-in-fact river. R. at 7. A section 404 permit is necessary for the dewatering and capping of the ash pond because, like the farming in *Cundiff*, these activities effectively "fill" a wetland. R. at 11.

The EAB mistakenly determined that 40 C.F.R. § 122.2 lacks a "recapture provision" that would convert the ash pond into "waters of the United States" upon its retirement. R. at 13. The regulation clarifies that waste treatment systems "designed to meet the requirements of the Clean Water Act" are not "waters of the United States." § 122.2(2)(i). As soon as the ash pond is abandoned and capped, it will no longer be "designed to fulfill the requirements of the Act" and will resume its original state as a part of Fossil Creek. R. at 7.

B. The primary purpose of dewatering and capping the ash pond is to replace an aquatic area with material similar to dry land, which requires a section 404 permit.

After the ash pond no longer functions as waste treatment system, the dewatering and capping will be discharges of fill material that require a section 404 permit. "Fill" in the context of the Act "has the effect of (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e) (2017). Whether or not an activity qualifies as a "fill" depends on its primary purpose. *Resource Investments, Inc. v. U.S. Army Corps. Of Engineers*, 151 F.3d 1162 (9th Cir. 1998). In *Resource Investments, Inc.*, a private company sought to construct and operate a

municipal solid waste landfill in Washington. *Id.* This required filling several acres of wetlands. *Id.* at 1164. After initial review, the U.S. Army Corps of Engineers denied the company's permit application because the activities posed a significant risk of groundwater contamination. *Id.* at 1165. The Ninth Circuit ultimately determined that these activities (excavation, dumping waste, and lining) were not dredge or fill activities within the purview of 33 C.F.R. § 323.2(e). *Id.* First, the solid waste was not "dredged material" because it was not material that was "excavated or dredged from waters of the United States." *Id.* at 1168. Second, the solid waste was not fill material because it was not used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Id.*

Unlike the landfill operation in *Resource Investments, Inc.*, dewatering and capping the ash pond is a discharge of fill material governed by the Act because the primary purpose of these activities is to replace an aquatic area with a solid cap to prevent discharges of pollutants. R. at 9. Dewatering the ash pond will "replace" the water with dry land within the meaning of 33 C.F.R. §323.2(e) because it will drain the entire pond and leave deposits of leftover coal combustion residuals. R. at 6. Next, placing the cap prevents water from vertically entering the pond by rainwater, which both replaces the water with material similar to dry land and significantly impacts the ash pond's bottom elevation as a former bed of Fossil Creek. R. at 13.

The EAB noted that 40 C.F.R. § 122.2 does not contain any "recapture provision" that would convert the ash pond back into "waters of the United States" upon its retirement. R. at 13. But the Act provides an exception to activities otherwise exempt from section 404 governance:

> Any discharge of dredged or fill material into navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f). The aforementioned exemptions are a narrow "class of activities." *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934 (7th Cir. 2004). In *Greenfield Mills*, the Seventh Circuit applied the recapture provision to the activities of two riparian landowners who dammed a river to form a supply pond. *Id.* at 956. The landowners opened the gates of the dam to drain the pond in order to repair a pump. *Id.* at 941. Instead of letting the pond drain minimally, the operators left the dam gates open for over five hours. *Id.* at 956. The court required a section 404 permit for this activity because the negligence of the operators "impaired" the river. *Id.* Specifically, the sediment from the dam elevated the river's floor and decreased the flow of water in areas that flowed constantly before the accidental discharge. *Id.*

While the activities in *Greenfield Mills* differ from physically placing a cap, dewatering and covering the ash pond will likewise impair the circulation of Fossil Creek. Instead of allowing water to flow from the ash pond into Fossil Creek, the cap will replace a wetland with material similar to dry land. R. at 7. Courts heavily weigh the impact of the fill along with its primary purpose, and this Court should duly consider such effects. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 925 (5th Cir. 1983). Abandoning the ash pond and placing the impermeable cap will impair "waters of the United States" and fall within the class of activities that require a fill permit pursuant to section 404 of the Act.

CONCLUSION

For the foregoing reasons, FCW respectfully requests that this Court reverse the EAB's determination that a section 404 permit was not necessary for the activities specified in the Progress CACA. FCW also requests that this Court overturn the EAB's decision to include the state's conditions in the NPDES permit, as well as the EAB's decision to allow operation of Outfall 008 without a section 402 permit. This Court should affirm the remaining decisions.

Respectfully submitted,

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Counsel for Fossil Creek Watchers, Inc.