Team. No. 18

Nos. 17–000123 & 17–000124

In the 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.

PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY'S
ENVIRONMENTAL APPEALS BOARD

BRIEF FOR FOSSIL CREEK WATCHERS, INC.,
Petitioner.

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JURISDICTIONAL STATEMENT

Following the Environmental Protection Agency's (EPA) issuance of a National Pollutant Discharge Elimination System (NPDES) permit pursuant to § 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342 (2012), Petitioner Fossil Creek Watchers, Inc. (FCW) pursued timely administrative remedies through the Environmental Appeals Board (EAB). 40 C.F.R. §§ 124.71–124.91 (2015). FCW petitioned this Court to review the EAB's denial, a final order that resolves all claims with respect to the parties, within 120 days. 33 U.S.C. § 1369(b)(1). Accordingly, this Court has jurisdiction to review FCW's petition pursuant to 33 U.S.C. § 1369(b)(1)(F).

STATEMENT OF THE ISSUES

1. Whether EPA properly included Progress' certification conditions in EnerProg's permit, according to § 401 of the CWA, and specifically:

   (a) Whether EPA must adhere to the plain language and animating policy of the CWA by incorporating any facially valid certification condition into a federal NPDES permit; and

   (b) Assuming the question is open to EPA and this Court, whether Progress' certification conditions, which safeguard the quality of the State's waters, are "appropriate requirements of State law" as contemplated by § 401(d) of the CWA.

2. Whether NPDES permitting requirements apply to discharge into EnerProg's Ash Pond when EPA lacked statutory authority to indefinitely suspend a rule that prohibited converting waters of the United States into private waste treatment systems.

3. Whether EnerProg may abandon coal ash in a water of the United States without a § 404 permit, where a functioning waste treatment system is converted into dry land.

4. Whether EPA's Notice is effective to indefinitely postpone compliance dates despite violating the CWA, failing to undergo notice and comment rulemaking, misconstruing § 705 of the APA, and departing from its prior policy.

5. Whether, consistent with the fundamental purpose of the CWA, EPA is entitled to deference for reasonably relying on Best Professional Judgment to prevent EnerProg's permit from backsliding to the less stringent 1982 Effluent Limitation Guidelines.

STATEMENT OF THE CASE

A. Factual Background

This action stems from EPA Region XII's issuance of a federal NPDES permit to EnerProg, L.L.C. (EnerProg) on January 18, 2017. R.6. Under the permit, EnerProg may continue to operate the Moutard Electric Generating Station (MEGS). *Id.* MEGS is a coal-fired steam electric plant in Fossil, Progress located off the banks of Fossil Creek. R.7. In the upper reaches of Fossil Creek, EnerProg maintains a coal ash pond (Ash Pond) to dispose of its coal ash. *Id.* Fossil Creek is a perennial tributary to Progress River, an interstate river that is also navigable-in-fact. *Id.* The Ash Pond was appropriated in June 1978 by damming Fossil Creek—a then free-flowing stream. *Id.*

The Ash Pond receives discharge from Internal Outfalls 008 and 009. R.8. Internal Outfall 008 discharges cooling tower blowdown as well as ash transport waters containing fly ash and bottom ash. *Id.* Internal Outfall 009 discharges flue gas desulfurization (FGD) wastewater. *Id.* The FGD and cooling tower blowdown indirectly discharge from the Ash Pond to Moutard Reservoir. *Id.* Then, EnerProg draws water from Moutard Reservoir to operate MEGS. R.6. Although the cooling tower blowdown and FGD undergo treatment by sedimentation before discharging to Moutard Reservoir, the fly and bottom ash from Internal Outfall 008 remain in the Ash Pond. R.6–7.

EnerProg's NPDES permit does not currently limit the toxic pollutants associated with EnerProg's fly and bottom ash in the discharge from Internal Outfall 008 to the Ash Pond. R.10. Under the current permit, EnerProg may continue to discharge toxic fly and bottom ash pollutants until November 1, 2018, at which time EnerProg must cease discharging those toxic pollutants. *Id.* Zero discharge of fly and bottom ash reflects Best Available Technology (BAT)

and is consistent with the 2015 Effluent Limitations Guidelines for the Steam Electric Power Generating Category (2015 ELGs). R.9.

EPA alternatively relied on Best Professional Judgment (BPJ) to require zero discharge of the pollutants in EnerProg's fly and bottom ash discharge—mercury, arsenic, and selenium—by November 1, 2018. *Id.* The permit writer considered relevant factors, including MEGS' sufficient profitability to achieve zero discharge, and knowledge that industry has long-used this technology. *Id.* Confident that EnerProg could achieve zero discharge by November 1, 2018, the permit writer relied on BPJ, irrespective of the 2015 ELGs, to prevent EnerProg from prohibitively backsliding to the less stringent 1982 ELGs, which did not limit these three pollutants. R.9, 11. Almost one year after the 2015 ELGs' effective date, EPA issued a notice indefinitely postponing compliance dates (Notice) to reconsider the 2015 ELGs. R.6, 10–11.

The State of Progress' § 401 certification also requires zero discharge of fly and bottom ash. R.8. EnerProg's NPDES permit includes Progress' § 401 certification, which incorporates conditions that guarantee compliance with the State's Coal Ash Cleanup Act (CACA). *Id.* CACA responds to Progress' water quality concerns with ash pond failures and contamination of ground and surface waters. R.9. As such, EnerProg must terminate operating the Ash Pond by November 1, 2018, the same date that it must attain compliance with the 2015 ELGs. R.8–9. Subsequently, EnerProg must dewater the Ash Pond by September 1, 2019. R.8. Coal ash will remain in the Ash Pond upon completion of dewatering. R.7. By September 1, 2020, EnerProg must cover the dry pond and remaining coal ash with an impermeable cap. *Id.*

B. Procedural History

On April 1, 2017, FCW and EnerProg filed petitions for review of EnerProg's reissued NPDES permit under 40 C.F.R. part 124. R.6. The EAB denied both petitions for review,

affirmed the reissuance of the permit, and resolved five claims as follows: (1) although Progress' certification conditions were unreviewable by EPA, those conditions are "appropriate requirements of state law"; (2) irrespective of the 2015 ELGs, EPA permissibly relied on BPJ by requiring EnerProg to achieve zero discharge of toxic fly and bottom ash pollutants by November 1, 2018; (3) EPA's Notice was ineffective to indefinitely postpone future compliance dates, and, therefore, ineffective to postpone EnerProg's November 1, 2018 compliance date; (4) NPDES permitting requirements do not apply to discharge from Internal Outfall 008 to the Ash Pond, an impoundment of a water of the United States; and (5) closing and capping the Ash Pond does not require a § 404 permit. R.6, 10–13. EnerProg appeals the first three of those five claims. R. 2–4. FCW appeals only the fourth and fifth claims, *id.*, and asks this Court to remand EnerProg's permit to EPA with instructions that NPDES permitting requirements be applied to Internal Outfall 008, and that EnerProg obtain a § 404 permit.

STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs judicial review of EPA's issuance of a NPDES permit under § 402 of the CWA. 5 U.SC. §§ 701–706 (2012). Under the APA, "a reviewing court shall '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.'" *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376 (1989) (quoting 5 U.S.C. § 706(2)(A)). Although review under the APA is deferential, "[d]eference, of course, does not mean blind obedience." *Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999). Alternatively, the APA requires a reviewing court to vacate any agency action taken "without observance of the procedure required by law," 5 U.S.C. § 706(2)(A), and such agency action is reviewed de novo. *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006).

SUMMARY OF THE ARGUMENT

This case extends far beyond protecting our local Fossil Creek, which EnerProg continues to pollute today. This case is about the fundamental promise of the CWA: eradicating toxic pollutants from our nation's waters. To achieve this goal, EnerProg's NPDES permit must comply with state and federal law if they wish to continue operating a coal-fired steam electric power plant—a current health threat to the Fossil, Progress community, as well as populations unfortunate enough to live downstream of this toxic plant.

First, where a NPDES permit condition seeks to safeguard the quality of a state's waters, the plain language of the CWA and its implementing regulations make abundantly clear that EPA is without discretion to review or modify any such condition. Not only is EPA's lack of discretion apparent from the plain text of § 401 itself, but that bar on federal interference is also evident from the CWA's statutory structure and purpose. Further, even if EPA or this Court could review the permissibility of Progress' certification conditions, their operative prohibitions reveal their validity under § 401(d) of the CWA. Indeed, Progress' conditions explicitly seek to protect the State's waters against a recurring threat—failing coal ash impoundments. Thus, where the State of Progress has taken definitive steps to halt an inevitable contamination of its waters through the certification process, its corollary conditions are more than appropriate within the context of § 401(d).

Second, the Ash Pond is an impoundment of Fossil Creek and, therefore, a water of the United States. While a July 21, 1980 Suspension excluded waste treatment systems created by impounding waters of the United States from the CWA's jurisdiction, the Suspension has no effect because it was contrary to clear, congressional intent, an impermissible construction of the

Act, and failed to follow notice and comment requirements. As such, this Court should give no effect to the Suspension.

Third, the CWA requires that EnerProg obtain a § 404 permit for its Ash Pond closure plan. EnerProg's closure plan will abandon toxic pollutants in the Pond, which will change the bottom elevation of a water of the United States and transform Progress' water into dry land. Absent a § 404 permit, the CWA prohibits both actions. Should this Court give effect to EPA's 1980 Suspension or recognize that the Corps has its own waste treatment exclusion, neither applies to the Ash Pond closure plan. Any rule excluding waste treatment systems from the CWA's jurisdiction applies only so long as a system exists.

Fourth, EPA's Notice postponing compliance dates under the 2015 ELGs is ineffective to postpone EnerProg's obligation to achieve zero discharge of toxic pollutants associated with fly ash and bottom ash by November 1, 2018. The Notice is unlawful for four reasons: (1) it violated the CWA; (2) it erroneously relied on § 705 of the APA; (3) it failed to satisfy notice and comment requirements; and (4) it arbitrarily departed from its prior policy of satisfying the four preliminary injunction factors. EPA is not entitled to deference for its interpretation of the APA, and this Court should hold EPA accountable for this blatant disregard of the law.

Fifth, EPA is entitled to both *Chevron* and *Auer* deference for its reasonable decision to alternatively rely on BPJ to prevent prohibitive backsliding to the less stringent 1982 ELGs. In the event that the 2015 ELGs were eliminated or vacated, the 1982 ELGs would not limit the mercury, arsenic, and selenium in EnerProg's fly and bottom ash discharge. Indeed, at the time the permit writer made this decision, the 2015 ELGs were threatened by litigation before the Fifth Circuit. In this context, the CWA and its implementing regulations are ambiguous; it is unclear whether the permit writer may rely on BPJ to prevent backsliding when the 2015 ELGs

limit those three pollutants. Nevertheless, EPA is entitled to deference for reasonably prioritizing the CWA's purpose: to one day achieve pollutant-free waters.

ARGUMENT

I. AS APPROPRIATE REQUIREMENTS OF STATE LAW, PROGRESS' CERTIFICATION CONDITIONS WERE PROPERLY INCLUDED IN ENERPROG'S PERMIT PURSUANT TO § 401 OF THE CWA.

Under § 401 of the CWA, the State of Progress certified EnerProg's permit upon the condition that EnerProg take definitive steps to comply with the State's Coal Ash Cleanup Act (CACA). R.6. To honor the plain language of the CWA and its implementing regulations, as well as the policies animating the Act, EPA was required to include Progress' "appropriate requirement[s] of State law" in EnerProg's permit. *See* 33 U.S.C. § 1341(d) (2012). Accordingly, this Court should affirm the EAB's resolution of this issue.

A. The CWA's plain language and underlying policies compel EPA to incorporate all facially valid conditions into a federal permit during the § 401 certification process.

1. The text of the CWA and its implementing regulations do not allow EPA to review or modify any facially valid condition of state law.

As with any statute, an analysis of the CWA begins with "the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987). Under § 401, NPDES permit applicants are required to obtain "certification" from the state in which permitted discharge will occur. 33 U.S.C. § 1341(a). A state's denial of certification forecloses the issuance of a federal NPDES permit. *Id.* However, where a state chooses to grant certification, it "shall set forth" any limitations "necessary to assure that any applicant for a Federal license or permit will comply with any . . . appropriate requirement of State law set forth in such certification . . . ." *Id.* § 1341(d).

In turn, the CWA commands that those conditions "*shall* become a condition on any Federal license or permit" issued by the EPA. *Id.* (emphasis added). Of course, Congress' "use of the word 'shall' is mandatory, not precatory." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996). Indeed, the legislative history of the CWA reveals that "[t]he purpose of the certification mechanism provided in [§ 401] is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3735. Further, the Supreme Court has counseled that the "use of a mandatory 'shall'" in the CWA "impose[s] discretionless obligations" upon the EPA, which are typically "impervious to judicial discretion." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007) (internal citations and quotation marks omitted).

In short, § 401(d) "is unequivocal, leaving little room for [a federal agency] to argue that it has authority to reject state conditions it finds to be *ultra vires*." *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997). Consequently, "courts have consistently agreed" that EPA is "without authority to review conditions imposed under state law or in a state's certification." *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (citations omitted); *see also Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 10 (D.C. Cir. 2011) (per curiam); *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006); *Ackels v. EPA*, 7 F.3d 862, 867 (9th Cir. 1993); *Proffitt v. Rohm & Haas*, 859 F.2d 1007, 1009 (3d Cir. 1988).

EPA's implementing regulations also mirror the CWA's plain language by stating that "[r]eview . . . of limitations and conditions attributable to State certification" may not be conducted through the agency's procedures. 40 C.F.R. § 124.55(e) (2015). It is axiomatic "that an agency must abide by its own regulations." *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990). Thus, where "an identifiable requirement of State law exists, and

limitations based upon such requirements are incorporated into a State certification under § 401," EPA itself acknowledges that it is "without authority to review the substance of a facially valid State certification." EPA, Decision of the General Counsel No. 44, at 5 (June 22, 1976).

In light of this overwhelming authority, EPA was unquestionably required to include the certification conditions required under Progress' state law. Pursuant to its authority under § 401(d), Progress conditioned its certification of EnerProg's permit upon compliance with CACA. R.8–9, 11. As discussed below, CACA is, by any measure, an "appropriate requirement of State law," 33 U.S.C. § 1341(d), which simply imposes "standards that are more stringent than those required by federal law." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). Thus, contrary to EnerProg's assertion, once EPA received Progress' conditions and determined they were facially valid, there was nothing left for the Agency to do. Accordingly, the EAB "correctly concluded that it did not have the ability to amend or reject [the] conditions in [Progress'] CWA 401 certification." *See Lake Carriers' Ass'n*, 652 F.3d at 10; R.11.

2. The statutory scheme and underlying policy of the CWA affirm state authority to impose more stringent limitations on a NPDES permit without federal interference.

The policy animating the CWA "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). In furtherance of that policy, the CWA is predicated upon a system of cooperative federalism through which states are free to impose "more stringent water quality controls" that flow from that state's own law. *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 705 (1994). Importantly, "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in [§] 401 of the Act." *Keating*, 927 F.2d at 622. The permissibility of a given condition naturally "turns on

questions of substantive state environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence." *Id.* Thus, condoning EPA's review of state certification conditions would fundamentally subvert the very system envisioned by Congress in the CWA. *See id.* at 624; *see also S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

Other provisions of the CWA also echo the Act's emphasis on state authority under § 401. For instance, an examination of § 301(b) of the CWA affirms that any modification or review by EPA would be futile. Section 301(b) requires EPA's permit writer to incorporate "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulation . . . ." 33 U.S.C. § 1311(b)(1)(C). Where, as here, a state law necessitates "more stringent limitation[s]" to protect its waters, "it is clear that even in the absence of state certification, EPA would be bound to include [Progress' conditions] in the federal permit . . . ." *Roosevelt Campobello*, 684 F.2d at 1056. In short, § 401(d) does not stand alone; rather, its limitation on federal intervention permeates the CWA and clarifies that Congress did not intend to allow federal agencies to override state laws that provide additional protection to that state's waters. Accordingly, this Court should affirm the EAB's finding that "EPA has no discretion to reject a condition in a State [§] 401 certification . . . ." R.11.

B. Despite the validity of Progress' conditions under § 401, a substantive challenge to those conditions falls outside the appropriate scope of this Court's jurisdiction.

1. As a question of state law, the propriety of Progress' certification conditions is properly contested in the courts of that State.

Beyond ensuring that a state facially satisfies the requirements of § 401, EPA and this Court appropriately retain jurisdiction "to hear a claim that defendants have violated the *floor*

level of clean water requirements imposed by the CWA, *i.e.*, the requirements which the state regulations *share* with the federal CWA." *Dubois*, 102 F.3d at 1300. However, with respect to questions predicated upon state law, a federal court makes "a more fundamental error" when it "seek[s] to determine which requirements of state law were appropriately affixed to the state's certification." *Roosevelt Campobello*, 684 F.2d at 1056. "The reason for this rule is plain enough." *City of Tacoma*, 460 F.3d at 67. As explained above, conditions imposed through the § 401 certification process flow from state-enacted law. *Keating*, 927 F.2d at 622. Thus, whether a challenged condition is an appropriate derivation of the state's environmental laws, is a question that turns on "substantive state environmental law—an area that Congress expressly intended to reserve to the states" under the CWA. *Id.* Out of respect to this unique system of federalism, courts find that where "a party seeks to challenge a state certification issued pursuant to [§] 401, it *must* do so through the state courts." *See, e.g.*, *City of Tacoma*, 460 F.3d at 67 (emphasis added); *PUD No. 1*, 511 U.S. at 734 (Thomas, J., dissenting) ("Because of § 401(d)'s mandatory language, federal courts have uniformly held that . . . the proper forum for review of those conditions is state court."); *accord* 40 C.F.R. § 124.55(c) (2015).

Although judicial review of Progress' certification conditions is not immediately available under that State's law, R.10–11, this Court is not compelled to exercise a form of impromptu jurisdiction. Rather, where "there [i]s no available state procedure for obtaining a hearing on the appropriateness of a state-originated [condition]," courts have held that "a hearing on the validity of the state standards under the United States Constitution would be available in an action against the state officers in the federal district court" or that state's courts. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 836 (7th Cir. 1977), *abandoned in part on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983); *see also Lake*

Carriers' Ass'n, 652 F.3d at 10. Thus, EnerProg is free to maintain a suit against the State of Progress "alleging deprivation of [due process]" in the enforcement of its certification conditions. *U.S. Steel Corp.*, 556 F.2d at 836. While this Court may well be EnerProg's preferred forum, it is nevertheless the incorrect venue to challenge the propriety of Progress' state law.

Here, the Court will search the record in vain for any indication that Progress' conditions are facially invalid under § 401. Rather, EnerProg's challenge to Progress' certification conditions is, in reality, an attack on Progress' state law. Indeed, EnerProg seeks to use the federal courts as a vehicle for reviewing the propriety of a state law under the guise of challenging the "permissibility" of Progress' conditions. R.3. However, in recognition of Progress' role under the CWA, this Court should find that EnerProg's "only recourse is to challenge the state certification in state judicial proceedings." *Ackels*, 7 F.3d at 867.

2. CACA's purpose and operative prohibitions reveal that Progress' certification conditions are appropriate under § 401(d).

Even assuming, *arguendo*, that this Court (or EPA) retained jurisdiction to determine the permissibility of Progress' certification conditions, the function and purpose of CACA—the state law upon which the conditions are predicated—demonstrate their validity under § 401(d). The Supreme Court has granted states broad latitude in determining the range of conditions that are "appropriate" within this context. *See PUD No. 1*, 511 U.S. at 712–13; *see also S.D. Warren Co.*, 547 U.S. at 373 ("[A] federal license under § 401 of the [CWA] requires state certification that *water protection laws* will not be violated." (emphasis added)). Although, that authority "is not unbounded," courts have generally held that "[§] 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another." *Am. Rivers*, 129 F.3d at 107 (quoting *PUD No. 1*, 511 U.S. at 712). Indeed, Congress "intended the phrase 'any other appropriate requirement of State law' to refer broadly to all state

water quality-related laws, not just to state water quality standards adopted pursuant to [§] 303." *Dep't of Ecology v. Pub. Utility Dist. No. 1*, 849 P.2d 646, 651–52 (Wash. 1993) (en banc), *aff'd*, 511 U.S. 698 (1994). Accordingly, "[o]nly if a goal or plan provision has absolutely no relationship to water quality would it not be an 'other appropriate requirement of State law.'" *Arnold Irr. Dist. v. Dep't of Envtl. Quality*, 717 P.2d 1274, 1279 (Or. Ct. App. 1986) (quoting 33 U.S.C. § 1341(d)); *see also U.S. Steel Corp.*, 556 F.2d at 838–39 ("[EPA]'s obligation to put the state limitations in the permit, is not limited to restrictions based on water quality standards but extends to 'any more stringent limitation' the state adopts pursuant to the authority preserved by § 510." (quoting 33 U.S.C. § 1311(b)(1)(C)).

The dangers posed to water quality by coal ash impoundments are legion. Where coal ash impoundments fail, the adjacent waters have "become heavily contaminated with arsenic, selenium, [and] mercury"—amongst other toxic pollutants.[1] *See, e.g.*, *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 801 (E.D.N.C. 2014). Accordingly, several courts have acknowledged the devastating effects that faulty coal ash impoundments have on both ground and surface water quality. For instance, in *Sierra Club v. Virginia Electric & Power Co.*, the court found that leachate emanating from a coal ash impoundment conveyed hazardous pollutants "directly into the groundwater and thence into the surface waters," in violation of the CWA. 247 F. Supp. 3d 753, 763 (E.D. Va. 2017); *accord Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015). Likewise, in *Cape Fear River Watch, Inc.*, discharge from a coal ash pond into a body of water, "created by

[1] EPA itself found that residents near coal ash impoundments have a *1 in 50* chance of being diagnosed with certain cancers as a result of contact with coal ash contaminated waters. EPA, Human and Ecological Risk Assessment of Coal Combustion Wastes, 2050-AE81, at 58 (Apr. 2010). Moreover, "surface impoundments typically showed higher risks than landfills, regardless of liner type." *Id.* at 61.

damming a navigable creek that flows into the Cape Fear River," constituted a prima facie CWA violation. *See* 25 F. Supp. 3d at 808–09. Thus, whether coal ash travels via groundwater or a direct discharge, its effect on water quality yields the same devastating results. Consequently, jurisdictions are taking preemptive measures to protect their waters from failing coal ash impoundments. *See, e.g.*, Coal Ash Management Act, N.C. Gen. Stat. §§ 130A–309.200–.231 (2015) (facilitating restoration of water quality through closure and capping of coal ash ponds).

The State of Progress is one of those jurisdictions taking preemptive measures to protect its waters. CACA's stated purpose is to "prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into *ground and surface waters*." R.8–9 (emphasis added). In view of that purpose, CACA mandates the "assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress." R.8. Here, Progress determined that MEGS qualifies as a "substandard coal ash disposal facilit[y]," which threatens Progress' waters. R.8. Accordingly, Progress certified EnerProg's permit upon the condition that it take deliberate steps towards complying with CACA. Specifically, Progress requires EnerProg to "terminate its use of the [Ash Pond] by November 1, 2018, dewater the [A]sh [P]ond by September 1, 2019, and cap the remaining coal combustion residuals by September 1, 2020." *Id.* Given the relationship between CACA and the future quality of Progress' waters, the conditions predicated upon that statute explicitly target activities "affecting water quality in one manner or another." *Am. Rivers*, 129 F.3d at 107. Consequently, Progress' conditions share an overt "relationship to water quality," rendering them an "appropriate requirement of State law" under § 401(d). *Arnold Irr. Dist.*, 717 P.2d at 1279 (quoting 33 U.S.C. § 1341(d)). Thus, if this Court decides to exercise jurisdiction over

EnerProg's challenge to CACA and its concomitant conditions, this Court should find that Progress' conditions are "appropriate" within the meaning of § 401(d).

II. NPDES PERMITTING REQUIREMENTS APPLY TO ENERPROG'S DISCHARGE BECAUSE EPA HAD NO AUTHORITY TO RELINQUISH PUBLIC WATERS.

Absent compliance with a NPDES permit and its effluent limitations under § 301, the CWA prohibits the "addition" of "any pollutant to navigable waters from any point source." 33 U.S.C. § 1311(a) (2012); *id.* § 1362(12). Although EnerProg has a NPDES permit, it does not apply effluent limitations to discharge from Internal Outfall 008 to the Ash Pond, located directly in Fossil Creek. R.10. Because discharge from Internal Outfall 008 meets all the criteria in the definition of "discharge of pollutants," FCW asks this Court remand the permit to EPA with instructions to apply effluent limitations to Internal Outfall 008.

Internal Outfall 008 discharges fly and bottom ash transport water and cooling tower blowdown into the Ash Pond. R.8. There is no dispute that ash transport water and cooling tower blowdown constitute "pollutants" or "additions," as evidenced by EPA's issuance of a NPDES permit regulating these substances. R.8, 10. The ash transport water enters the Ash Pond through Internal Outfall 008—a "discernible, confined and discrete conveyance"—i.e., a point source as defined by the CWA. 33 U.S.C. §1362(14); *see also United States v. Aluminum Co. of Am.*, 824 F. Supp. 640, 643 (E.D. Tex. 1993) (indicating that internal outfalls are point sources). And, as FCW argues below, the Ash Pond is within the CWA's jurisdiction because it is a navigable water, defined as a water of the United States. *See* 33 U.S.C. § 1362(7).

A. Fossil Creek is a water of the United States because it is a perennial tributary of Progress River.

The Ash Pond it is an in-stream impoundment of Fossil Creek, itself a water of the United States. R.7. The regulatory definition of waters of the United States extends CWA

jurisdiction to the Ash Pond. 40 C.F.R. § 122.2 (2014) ("[A]ll impoundments of waters otherwise identified as waters of the United States" are waters of the United States).[2] Since 2006, the extent of the CWA's jurisdiction has been a legal quagmire. *See generally Rapanos v. United States*, 547 U.S. 715 (2006) (resulting in a plurality opinion with three significant views of CWA jurisdiction). As a result, the Obama administration underwent extensive rulemaking to define "waters of the United States," Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015); however, the Sixth Circuit stayed the rule. *See In re Envtl. Prot. Agency*, 803 F.3d at 806. Now, the Trump administration proposes to recodify preexisting rules. *See* Definition of "Waters of the United States", 82 Fed. Reg. 34,899 (June 27, 2017).

Despite these turbulent legal waters, Fossil Creek meets the definition of a water of the United States. Fossil Creek is a perennial tributary to Progress River, which is a navigable-in-fact river. R.7. Each opinion in *Rapano*s would find that a perennial stream of a navigable-in-fact waterway is a water of the United States. *Rapanos*, 547 U.S. at 732 n.3, 769–770, 801. The 2015 Clean Water Rule also included perennial tributaries as waters of the United States. 80 Fed. Reg. at 37,104–05. Further, preexisting regulations also include perennial tributaries within the definition of waters of the United States. *See* 40 C.F.R. § 122.2. Therefore, under any legal regime, a perennial tributary—like Fossil Creek—falls under the CWA's jurisdiction.

B. EPA exceeded its statutory authority by allowing industry to discharge pollutants into waste treatment systems made from impounding waters of the United States.

This Court should give no effect to EPA's July 21, 1980 indefinite suspension that removed any waste treatment system created by impounding waters of the United States from the CWA's jurisdiction. Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980) [hereinafter 1980 Suspension]. Such a removal was beyond EPA's statutory authority. 5 U.S.C.

[2] Because the Sixth Circuit stayed the 2015 definition of waters of the United States, the 2014 definition applies. *See In re Envtl. Prot. Agency*, 803 F.3d 804, 806 (6th Cir. 2015).

§ 706(2)(C) (2012). Despite the six-year statute of limitations that typically attaches to APA challenges, 28 U.S.C. § 2401 (2012), "a party who possesses standing may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them." *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987). EPA, through the EAB, applied the 1980 Suspension against FCW by relying on it to deny FCW's petition for review. R.6, 12. As such, this court has jurisdiction to hear FCW's "contention that the regulations upon which EPA relies are contrary to statute and therefore invalid." *Legal Envtl. Assistance Found. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997).

In reviewing whether a federal agency acted in excess of its statutory authority, courts apply the two-step *Chevron* inquiry. *See, e.g.*, *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008). The first step under *Chevron* is "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Courts proceed to the second step if Congress was silent and uphold only those actions that are "based on a permissible construction of the statute." *Id.* at 843.

1. Discharging pollutants into the Ash Pond is contrary to Congress' intent.

"An examination of the statutory language and its legislative history" guides a court's inquiry under *Chevron*'s first step. *See Nat. Res. Def. Council, Inc. v. EPA*, 526 F.3d 591, 603 (9th Cir. 2008). Although Congress defined "navigable waters" as waters of the United States, it left "waters of the United States" undefined. 33 U.S.C. § 1362(7) (2012). Moreover, courts have struggled to agree on the plain meaning of waters of the United States. *See generally Rapanos*, 547 U.S. 715 (2006) (yielding three different interpretations of the term). But, the legislative history clarifies that Congress spoke to the precise question at issue: "The use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 92-414 (1971), *as*

reprinted in 1972 U.S.C.C.A.N. 3668, 3674. Six years later, Congress did not waiver: "There is no defense for the practice of dumping all of the waste that this country generates into its rivers, lakes, and streams." S. Rep. No. 95-370 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4330. Because "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842.

EPA also acknowledged Congress' intent. On May 19, 1980 EPA issued a final rule that expressly included waste treatment systems that were impoundments of existing waters of the United States as jurisdictional under the CWA. Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) [hereinafter 1980 Rule]. "Because the CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the *definition makes clear* that treatment systems created in those waters or from their impoundment remain waters of the United States." *Id.* at 33,298 (emphasis added). The 1980 Rule was not a dramatic shift in the regulatory scheme—it merely clarified prior rulemaking from 1979. *Id.*; *see also* NPDES Revision, 44 Fed. Reg. 32,854, 32,858 (June 7, 1979) (excluding waste treatment systems from the definition of waters of the United States, but failing to define "impoundment").

The 1980 Rule is consistent with EPA's long-standing definition of waters of the United States, which includes "all impoundments of waters otherwise identified as waters of the United States." 40 C.F.R. § 122.2 (2014); 1980 Rule, 45 Fed. Reg. at 33,424. EPA has not defined impoundments in its regulations because "impoundments . . . are not treated differently from other waters under these regulations." 1980 Rule, 45 Fed. Reg. at 33,299. In other words, it was so clear that CWA jurisdiction would—and should—extend to impoundments of waters of the United States, EPA was not compelled to define the term.

Moreover, EPA itself has recognized that applying the 1980 Suspension to in-stream impoundments is contrary to the CWA's goals. In *West Virginia Coal Ass'n v. Reill*y, the Fourth

Circuit affirmed EPA's authority to extend § 402 permitting requirements to in-stream ponds. No. 90-2034, 1991 WL 75217, at *2 (4th Cir. May 13, 1991). Regardless of whether the Ash Pond was designed to meet the CWA's requirements, "in-stream treatment ponds and the waters above such ponds fall within the definition of waters of the United States . . . ." *Id.* at *5. EPA contended that "suspension of the last sentence [of the 1980 Rule] has no effect upon the clear definitional mandate that impoundments of waters of the United States remain 'waters of the United States.'" *Id.* Therefore, EPA's own precedent evinces that "a mere man-made diversion" cannot "turn[] what was part of the waters of the United States into something else and, thus, eliminate[] it from national concern." *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007). In sum, Congress "directly spoke" to the issue. *Chevron*, 467 U.S. at 842.

2. EPA's actions are not based on a permissible construction of the CWA.

Even if this Court finds that the question is ambiguous, EPA's actions fail under the second step of *Chevron*. EPA's interpretation is not based on a permissible construction of the CWA. *Id.* at 843. An interpretation is permissible when it represents "a reasonable choice within a gap left open by Congress." *Id.* at 866. The 1980 Suspension was unreasonable because, although the CWA has a complex regulatory scheme, the Suspension does not represent a "detailed and reasonable" decision, nor one that reconciles "conflicting policies." *Id.* at 865.

First, far from detailed, EPA offered a less than one-page explanation for its actions. 1980 Suspension, 45 Fed. Reg. at 48,620. In comparison, the 1980 Rule comprised over 200 pages of explanations and responses to comments. 45 Fed. Reg. at 33,290–513. Nor was the 1980 Suspension reasonable, because the only explanation offered was that industry members protested that the 1980 Rule was too broad. *Id.* Second, by prioritizing industry fears over Congress' intent to keep waste out of our nation's waters, S. Rep. No. 92-414 (1971), *as*

reprinted in 1972 U.S.C.C.A.N. 3668, 3674, EPA failed to reconcile conflicting policies. Industry complained that the 1980 Rule would require a second NPDES permit for discharge into "ash ponds, which had been in existence for many years." 1980 Suspension, 45 Fed. Reg. at 48,620. Here, FCW does not seek a duplicative permit; rather, the existing permit should also apply effluent limitations for discharges from Internal Outfall 008 to the Ash Pond. R.7. FCW's solution would reconcile conflicting policies, but EPA's Suspension only considered half of the relevant policy. Because EPA failed under both steps of *Chevron*, EPA acted in excess of its statutory authority. As such, this court should give no effect to the 1980 Suspension.

C. EPA violated the APA when it suspended the 1980 Rule without undergoing notice and comment procedures.

An indefinite suspension of a final rule is itself an agency rule subject to notice and comment rulemaking. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982) ("EPA's action in indefinitely postponing the effective date of the amendments fit the definition of 'rule' in the APA . . . subject to the APA's rulemaking requirements."). Yet, EPA suspended the 1980 Rule without any notice and comment. *See* 1980 Suspension, 45 Fed. Reg. at 48,620. As such, this Court should give no effect to the 1980 Suspension because EPA failed to observe "procedure[s] required by law." 5 U.S.C. § 706(2)(D) (2012); *see also Safety-Kleen Corp. v. EPA*, No. 92-1639, 1996 U.S. App. LEXIS 2324, at *2–3 (D.C. Cir. Jan. 19, 1996).

The APA has long defined rulemaking as the "process for formulating, *amending*, or repealing a rule." 5 U.S.C. § 551 (emphasis added). The 1980 Rule took effect on June 2, 1980. 45 Fed. Reg. at 33,290. On July 21, 1980, EPA amended the definition of waters of the United States to exclude waste treatment systems made by impounding waters therein. 1980 Suspension, 45 Fed. Reg. at 48,620. The subsequent amendment was, therefore, "subject to the APA's [notice and comment] requirements." *Nat. Res. Def. Council, Inc.*, 683 F.2d at 761. EPA conditioned the

1980 Suspension on prompt rulemaking to either amend the rule or terminate the Suspension. *Id.* In thirty-seven years, EPA has done neither. Instead, each subsequent rulemaking has included a note that the Suspension continues "until further notice." *See, e.g.*, 40 C.F.R. §122.2 note (2014).

The APA allows a limited exception in which agencies may forego notice and comment rulemaking for good cause. 5 U.S.C. § 553(d). Only under narrow circumstances, particularly when "delay would do real harm" will a court apply the good cause exception. *United States v. Valverde*, 628 F.3d 1159, 1164–65 (9th Cir. 2010); *see also Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (holding that "concern about the threat to public safety" satisfied the good cause exception). Here, there was no emergency. Rather, EPA indefinitely suspended an effective rule with only one reason: industry stakeholders asked it to. 1980 Suspension, 45 Fed. Reg. at 48,620. Bowing to industry does not satisfy the good cause exception. As such, the 1980 suspension was, and remains, procedurally deficient for failing to satisfy notice and comment requirements. Therefore, this Court should give no effect to the 1980 Suspension. Holding otherwise would allow EPA to diminish Congress' intended scope of the CWA, while allowing EPA to nullify duly promulgated rules to quell industry quibbling.

III. ENERPROG MUST OBTAIN A § 404 PERMIT TO REPLACE PART OF FOSSIL CREEK WITH DRY LAND.

To comply with Progress' state law, EnerProg's § 402 permit includes conditions that EnerProg must dewater the Ash Pond, an impoundment of Fossil Creek. R.6, 8. After, EnerProg must "cap the remaining coal combustion residuals." R.6. As discussed above, those conditions are properly challenged in state court; however, this Court retains jurisdiction to decide whether there was a facial violation of the CWA. *See supra* Section II.A; *Dubois*, 102 F.3d at 1300. Absent a § 404 permit, the CWA prohibits the discharge of fill material into waters of the United States from a point source. 33 U.S.C. § 1331(a) (2012); *id.* § 1362(12).

Congress delegated regulation of fill material, one category of pollutants, to the U.S. Army Corps of Engineers (Corps), which may issue permits "for the discharge of . . . fill material into the navigable waters at specified disposal sites." *Id.* § 1344(a); *see also id.* § 1362(6) (defining pollutant to include "rock, sand, [and] cellar dirt"). Abandoning coal and subsequently capping it represents "the continued presence of fill material" in violation of the CWA. *See, e.g.*, *Stepniak v. United Materials, LLC*, No. 03-569A, 2009 WL 3077888, at *4 (W.D.N.Y. Sept. 24, 2009); *see also* 33 U.S.C. § 1311(a). A primary benefit of the § 404 permitting process is the Corps' obligation to undergo an environmental impacts analysis prior to issuing the permit. *Id.* § 1344(b)(2) (2012); *see also* 40 C.F.R. § 230.2 (2015). Thus, the Ash Pond closure plan must undergo the § 404 permitting process. Otherwise, EnerProg will discharge and abandon fill material into a water of the United States without any assessment of environmental impacts to Fossil Creek—a critical facet of the community in Fossil, Progress.

A. The § 404 permitting prerequisites squarely govern EnerProg's Ash Pond closure plan.

Fill material is anything that either changes "the bottom elevation of any portion of a water of the United States," or replaces "any portion of water of the United States with dry land." 33 C.F.R. § 323.2(e) (2015). The Corps' regulations provide specific examples of what constitutes a "discharge of fill material": "Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States." *Id.* § 323.2(f).

Here, the closure plan proposes to dewater the Ash Pond and keep the remaining ash in the now empty Pond. R.8. Because the Ash Pond is part of Fossil Creek, R.7, the ash will create a new creek-bed. Thus, the bottom elevation will change. After dewatering the Ash Pond, EnerProg will cap it by adding enough earthen material to fill it. R.8. As a result of capping, the Ash Pond, a water of the United States, will become dry land. *See, e.g.*, U.S. Army Corps Eng'rs,

Pub. Notice No: LRL-2014-417-mdh, at 1 (Apr. 22, 2016) (filling an ash pond would create a new structure requiring at least *70 cubic yards* of earthen material). Both abandoning coal ash and capping the pond meet the definition of "fill material." 33 C.F.R. § 323.2(e). A "discharge of fill material" occurs because leftover coal ash and earthen material in the Ash Pond will create a new structure in a water of the United States. *Id.* § 323.2(f). Essentially, the Ash Pond closure plan will turn the pond into a coal ash disposal site, subject to a careful environmental impacts analysis prior to the issuance of a § 404 permit. 33 U.S.C. § 1344(b)(2); 40 C.F.R. § 230.2.

Both the coal ash and capping material will derive from a point source. First, coal ash enters the Pond via Internal Outfall 008—a point source. *See supra* Section II. In addition, EnerProg will undoubtedly use construction equipment, also a point source, to move earthen material to cap the Ash Pond. *See United States v. Banks*, 873 F. Supp. 650, 657 (S.D. Fla. 1995) ("The act of 'discharging of a pollutant' occurred here when Defendant Banks utilized dump trucks, bulldozers and other equipment."). Finally, the Ash Pond is a water of the United States. *See supra* Section II.A; *see also* 33 C.F.R. § 328.3(a)(4) (2014) ("All impoundments of waters otherwise defined as waters of the United States under the definition."). As such, the § 404 permitting prerequisites squarely govern EnerProg's Ash Pond closure plan.

B. Because no waste treatment system will exist once the Ash Pond closes, no exclusion is available to the Ash Pond closure plan.

The EAB improperly stated that the Corps and EPA share an analogous definition of waters of the United States. R.13. Certainly, the definitions are very similar and "[t]he Corps' definition of 'waters of the United States' relies heavily on that adopted by EPA." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 212 (4th Cir. 2009). However, the 1980 Rule and Suspension only apply to NPDES permitting requirements under § 402. *See* 45 Fed. Reg. at 33,298. As such, EPA regulations include both the definition as it first appeared in the 1980 Rule

and a note explaining the 1980 Suspension. 40 C.F.R. § 122.2 (2014). In contrast, the Corps' regulations exclude all waste treatment systems from the definition of waters of the United States. 33 C.F.R. § 328.3 (2014). Accordingly, the 1980 Suspension does not apply to § 404.

Regardless, no waste treatment system exclusions apply to the Ash Pond. Once the Ash Pond closes, EnerProg will no longer maintain any waste treatment system. Because the exemption "refers to waste treatment *systems*. . .[i]t would appear then that the Agency intended the waste treatment system exemption to apply to systems where wastewaters are contained." Borden, Inc./Colonial Sugars, 1 E.A.D. 895 (1984). Without contained wastewater, no exclusion for a waste treatment system applies. *Compare id.*, *with* R.8 (requiring waste system closure).

Moreover, the Corps itself has not applied any waste treatment system exclusion to recent ash ponds closures. Recently, two coal-powered generating stations closed their ash ponds and appropriately submitted applications for a § 404 permit. U.S. Army Corps Eng'rs, Pub. Notice No: LRL-2014-417-mdh (Apr. 22, 2016); U.S. Army Corps Eng'rs, Pub. Notice No: LRL-2017-104 (Aug. 24, 2017). Consistent with the Corps' obligation to undergo environmental impacts analysis, the notices included "avoidance, minimization, and mitigation measures" to adjacent waters of the United States. *Id.* In contrast to the ash ponds in the Corps' § 404 notices, EnerProg's Ash Pond is located directly *in* Fossil Creek. R.7. Its impact on waters of the United States is certain, rather than probable, because it is either: (1) a water of the United States itself, as FCW contends; or (2) located in the middle of a water of the United States. *See supra* Section II.A. The future of Fossil Creek's health depends on careful application of avoidance, minimization, and mitigation measures considered under § 404 permitting.

Therefore, § 404 permitting applies to the Ash Pond closure plan. First, the process meets the definition of a "discharge of fill material." Second, consistent with the Corps' own practice,

no waste treatment system exclusion applies to closure of coal ash ponds. As such, EnerProg must conform to industry standards, and this Court should remand the permit with instructions to apply § 404 permitting.

IV. EPA'S NOTICE IS ARBITRARY AND CAPRICIOUS AND THUS INEFFECTIVE TO INDEFINITELY POSTPONE COMPLIANCE DATES UNDER THE 2015 ELGS.

EPA's April 25, 2017 Notice indefinitely postponing certain compliance dates under the 2015 ELGs is ineffective for four reasons: (1) it violates the CWA; (2) it erroneously relies on § 705 of the APA; (3) it fails to satisfy obligatory notice and comment requirements; and (4) EPA arbitrarily departs from its prior policy of satisfying the four preliminary injunction factors. *See* Postponement of Certain Compliance Dates, 82 Fed. Reg. 19,005 (Apr. 25, 2017) [hereinafter Notice]. For any one of these reasons, this Court should affirm the EAB's resolution of this issue and find the Notice ineffective.

A. EPA's indefinite postponement violates the CWA's mandatory three-year timetable.

The Notice's indefinite postponement of compliance dates violates the CWA, thereby rendering the Notice both ineffective and "not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). The effluent limitations under the CWA include a "[t]imetable for achievement of objectives," that compel "compliance with effluent limitations . . . as expeditiously as practicable *but in no case later than three years after the date such limitations are promulgated* . . . ." 33 U.S.C. § 1311(b)(2)(C)-(D) (2012) (emphasis added); *see also* 40 C.F.R. § 401.15 (2015) (listing the toxic pollutants applicable to the three-year time limit, which include mercury, arsenic, and selenium—toxic pollutants discharged into EnerProg's coal ash pond). Further, EPA has no authority to issue permits that include compliance dates extending beyond the statutory timetable. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 663 (3d Cir. 1976).

As initially promulgated, the 2015 ELG compliance dates already lag five years behind

the CWA's mandatory timetable. Under that timetable, November 3, 2018 is the latest compliance date that EPA may lawfully include in a NPDES permit, because it marks three years from the date EPA promulgated the 2015 ELGs on November 3, 2015. *See* 40 C.F.R. § 423.10 (2015). Yet, the Notice goes a step further by postponing these charitable compliance dates. Under the 2015 ELGs, the compliance dates for five BAT categories—including fly and bottom ash transport water—must be met by November 1, 2018, but no later than December 31, 2023. *See* 40 C.F.R. § 423.13(g)(1)(i)–(k)(1)(i). Thus, any postponement of these December 31, 2023 compliance dates is unlawful, because they *already* extend five years beyond the CWA's last permissible compliance date of November 3, 2018. *See* 33 U.S.C. § 1311(b). Nevertheless, EPA further postponed these compliance in its Notice. Notice, 82 Fed. Reg. at 19,005–06.

The Notice also poses an imminent violation. EPA's earliest compliance date under the 2015 ELGs is November 1, 2018, leaving EPA with just one or two days to extend this compliance date without violating the CWA's three-year limit. *See* 33 U.S.C. § 1311(b); Notice, 82 Fed. Reg. at 19,005. Given that EPA postponed compliance dates to reconsider the stringency of the 2015 ELGs, and to save industry's "capital expenditures" in the meantime, any thoughtful reconsideration or any actual savings of expenditures would entail postponement of more than one or two days. Notice, 82 Fed. Reg. at 19,005. Therefore, the Notice does, and will again, violate the CWA. *See* 33 U.S.C. § 1311(b). Accordingly, this Court should set aside the Notice as an unlawful agency action. *See* 5 U.S.C. § 706(2)(A).

B. Section 705 of the APA authorizes postponement of effective dates pending judicial review, not postponement of compliance dates under EPA's own reconsideration.

As a preliminary matter, because EPA does not administer the APA, its interpretation of § 705 is not entitled to deference. *Ardestani v. INS*, 502 U.S. 129, 148 (1991); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Therefore, because the Notice unlawfully relied

on § 705 to authorize its indefinite postponement of the 2015 ELG compliance dates, this Court should set it aside as arbitrary and capricious. 5 U.S.C. § 706(2)(A) (2012).

1. Section 705 applies only to effective dates that have not yet passed.

As discussed above, "[i]t is well settled that the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 56. Thus, § 705 applies only to effective dates, not compliance dates. *See* 5 U.S.C. § 705. Indeed, § 705 makes no mention or implication of compliance dates: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." *Id.* And because courts "ordinarily resist[] reading words into a statute that do not appear on its face," this Court should resist reading "compliance dates" into § 705, as EPA has done here. *Bates v. United States*, 522 U.S. 23, 29 (1997).

EPA's injection of extra words into § 705 is a novel approach for the agency. In 2011, EPA interpreted § 705 to apply only to an effective date that has not yet passed. But here, in a blatant volte-face, EPA has decided that § 705 encompasses compliance dates. *Compare* National Emission Standards, 76 Fed. Reg. 28,318, 28, 326 (May 17, 2011) ("First, the effective date of the [rule]—November 8, 2010—has already passed and thus a stay under APA [§] 705 is not appropriate."), *with* Notice, 82 Fed. Reg. at 19,005 ("These [compliance] dates have not yet passed, and they are within the meaning of the term 'effective date' as that term is used in § 705 of the APA."). The Supreme Court mandates that "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Yet, here, EPA nevertheless departed *sub silentio*.

To be sure, courts do not interpret "effective date" to mean "compliance date." *See, e.g.*, *Silverman v. Eastrich Multiple Inv'r Fund*, 51 F.3d 28, 31 (3d Cir. 1995) (explaining that if the

compliance date becomes the effective date, then the effective date "is unmoored to any purpose"). With respect to § 705, in *Safety-Kleen Corp. v. EPA*, the D.C. Circuit issued the most relevant decision to date on this issue: "[Section 705] permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It does not permit the agency to suspend without notice and comment a promulgated rule, as respondent has attempted to do here." 1996 U.S. App. LEXIS 2324, at *2–3. In short, "[e]ffective dates and compliance dates have distinct meanings," and that distinction renders EPA's Notice ineffective in the instant case. *Becerra v. U.S. Dep't of Interior*, No. 17-02376, 2017 WL 3891678, at *9 (N.D. Cal. Aug. 30, 2017).

2. EPA may only invoke § 705 pending judicial review.

The plain meaning of § 705 authorizes an agency to extend effective dates that are pending judicial review, not pending an agency's own reconsideration of the rule. *See* 5 U.S.C. § 705; *see also Gwaltney of Smithfield, Ltd.*, 484 U.S. at 56. To stay a rule, an agency "must have articulated, at a minimum, a rational connection between its stay and the underlying litigation." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (D.D.C. 2012). Further, the stay must be driven by a concern for the "substantive merits" of the rule, and an agency is prohibited from invoking § 705 "simply because litigation in the court of appeals *happens to be pending*." *Id.*

Here, EPA unlawfully invoked § 705 so that the agency could "reconsider the Rule." Notice, 82 Fed. Reg. at 19,005. Further, EPA emphasized in its Notice that the agency is "not making any concession of error with respect to the rulemaking," and "will also file a motion requesting the Fifth Circuit to *hold the litigation* challenging the Rule in abeyance while the Agency *reconsiders* the Rule . . . ." *Id.* (emphasis added). While EPA acknowledged that it received numerous petitions for reconsideration—"*some of which* overlap with the claims in the ongoing litigation challenging the Rule in . . . the Fifth Circuit" —a motion to hold the Fifth

Circuit litigation in abeyance vitiated any possibility that EPA postponed compliance dates pending judicial review. *Id.* (empahsis added). Therefore, EPA prohibitively relied on § 705 to reconsider its own rule.

The Notice also critically misrepresented the timing of the motion to stay the Fifth Circuit litigation. *See New Eng. Coal. on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1130 (D.C. Cir. 1984) (Scalia, J.) (explaining that for an agency to say one thing and do another "is the essence of arbitrary and capricious action"). In its Notice, EPA stated that they "*will* also file a motion requesting the Fifth Circuit to hold the litigation." Notice, 82 Fed. Reg. at 19,005 (emphasis added). In reality, EPA had already moved to stay the Fifth Circuit litigation on April 14, 2017, and the Fifth Circuit granted that motion on April 24, 2017—the day before the Notice was issued. *See* Postponement of Certain Compliance Dates, 82 Fed. Reg. 26,017, 26,018 (June 6, 2017) [hereinafter Fifth Circuit Stay]. Therefore, at the time EPA issued the Notice, there was no pending litigation. Accordingly, § 705 provided no lawful basis to postpone compliance dates in the Notice, and EPA's reliance on the provision was arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A).

C. EPA's indefinite postponement failed to satisfy notice and comment requirements.

EPA's Notice indefinitely postponing compliance dates is a functional repeal, thereby constituting agency rulemaking that failed to satisfy notice and comment requirements before the rule took effect. *See* 5 U.S.C. § 553(b)–(c) (2012); *see also supra* Section II.C (defining "rule making"). As an agency action taken "without observance of procedure required by law," the Notice must be set aside. 5 U.S.C. § 706(2)(A).

Courts treat indefinite postponements as an "effective[] repeal[]" subject to notice and comment before the delay takes effect. *See, e.g.*, *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802,

813 n.24, 816 (D.C. Cir. 1983) ("[W]e hold that an agency decision which effectively suspends the implementation of important and duly promulgated standards . . . constitutes rulemaking subject to notice and comment requirements of 5 U.S.C. § 553"); *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *Nat. Res. Def. Council, Inc.*, 683 F.2d at 761; *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981). Here, EPA's Notice immediately postponed future compliance dates under the 2015 ELGs without first satisfying notice and comment obligations. Notice, 82 Fed. Reg. at 19,006 (indicating an "inten[t] to conduct notice and comment rulemaking" in the future).

The only possible exception to notice and comment that EPA may argue is good cause. 5 U.S.C. § 553(b)(3). As discussed above, good cause may only be invoked under narrow, emergency circumstances. *See supra* Section II.C. Here, EPA's indefinite postponement jeopardized the public's prolonged exposure to toxic pollutants so that EPA could reconsider the stringency of the 2015 ELGs, and save industry capital expenditures in the meantime. Notice, 82 Fed. Reg. at 19,005. Such an incentive is contrary to the good cause exception. *Haw. Helicopter Operators Ass'n*, 51 F.3d at 214. Accordingly, the Notice—an indefinite postponement of compliance dates—is a functional repeal that must be set aside as an unlawful agency action because it was "without observance of [notice and comment] procedure[s]." *See* 5 U.S.C. § 553(b)-(c); *id.* § 706(2)(A).

D. EPA departed from its prior policy of reviewing preliminary injunction factors.

In its Notice, EPA arbitrarily departed from its prior policy. Typically, EPA consistently applies the four-part preliminary injunction test when reviewing a request to stay its rules.[3]

[3] Four factors must be met to satisfy the preliminary injunction test: (1) a likelihood of success on the merits; (2) a likelihood to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tip in the petitioner's favor; and (4) that the the injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

While an "agency's discretion is unfettered at the outset," routine application of a "general policy by which its exercise of discretion will be governed," followed by "an irrational departure from that policy," may "constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion.'" *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (quoting 5 U.S.C. § 706(2)(A)); *see also Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010). Thus, even if EPA is not required by law to satisfy the preliminary injunction test, the agency is nevertheless governed by its general policy of having done so in the past, unless the agency provides an explanation for its departure. *Yueh-Shaio Yang*, 519 U.S. at 32; *see also Atchison, Topeka, & Santa Fe Ry. Co. v. Wichita Bd. of Trad*e, 412 U.S. 800, 808 (1973).

In *Sierra Club v. Jackson*, the court addressed a scenario nearly identical to the instant case: EPA departed from its well-established policy of applying the four-part preliminary injunction test when reviewing a request to stay its rule. *See Sierra Club*, 833 F. Supp. 2d at 30–33. The court held that EPA's failure to mention, let alone satisfy, the preliminary injunction factors constituted an arbitrary and capricious departure from prior policy. *Id.* at 33.

Thus, while EPA's discretion may have been "unfettered from the outset," EPA's settled policy is to evaluate the four preliminary injunction factors when reviewing a request to stay its rules. *See, e.g.*, National Emission Standards, 76 Fed. Reg. 28,318, 28,326 (May 17, 2011) (evaluating the preliminary injunction factors); Denial of Petitions to Reconsider a Final Rule, 76 Fed. Reg. 4,780, 4,800 (Jan. 26, 2011) (same); EPA's Denial of Petitions to Reconsider, 75 Fed. Reg. 49,556, 49,563 (Aug. 13, 2010) (same); National Emission Standards, 61 Fed. Reg. 28,508, 28,509 (June 5, 1996) (referring to the preliminary injunction factors as the "criteria for a stay" and explaining why EPA departed from those criteria in its analysis to stay a rule).

Here, despite *Sierra Club v. Jackson*'s warning, EPA again departed from its prior policy by failing to even mention the preliminary injunction factors to justify its indefinite postponement. Notice, 82 Fed. Reg. at 19,005–06. EPA also provided no explanation for its abrupt deviation. Such a departure was arbitrary and capricious. 5 U.S.C. § 706(2)(A). For any one of the four reasons discussed above, the Notice is not in accordance with law, and this Court should set it aside as an unlawful agency action. *See* 5 U.S.C. § 706(2)(A).

V. EPA APPROPRIATELY RELIED ON BPJ TO PREVENT PROHIBITIVE BACKSLIDING THAT WOULD FURTHER POLLUTE FOSSIL CREEK.

The CWA is "ambiguous with respect to" whether permit writers may alternatively rely on their Best Professional Judgment (BPJ) to enforce anti-backsliding, irrespective of the ELGs in effect. *Chevron*, 467 U.S. at 843; R.9. Nevertheless, EPA's reasonable interpretation of the CWA and its implementing regulations is entitled to deference. "As the agency charged with interpreting the complicated statutory provisions that comprise the CWA, EPA is entitled to considerable deference in the interpretive process of making the regulatory machine work." *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 226 (D.C. Cir. 1988). Further, because the implementation of BPJ "is a creature of [EPA's] own regulations, [its] interpretation of it is . . . controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal citations and quotation marks omitted); *see also* 40 C.F.R. § 125.3(c)(3) (2015).

The CWA includes two provisions relevant to the permit writer's decision to alternatively rely on BPJ. First, the CWA authorizes reliance on BPJ "as the Administrator determines [is] necessary to carry out the provisions of this chapter." 33 U.S.C. § 1342(a)(1)(B) (2012). Second, in 1987, Congress amended the CWA to include anti-backsliding, which ensures that "permits . . . may not be renewed, reissued, or modified . . . to contain effluent limitations which are less

stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. § 1342(o)(1); Water Quality Act of 1987, Pub. L. No. 100-4, § 404, 101 Stat. 7, 67–69 (1987).

With respect to anti-backsliding, the 1982 ELGs do not limit pollutants in fly ash and bottom ash—and EnerProg's permit was subject to those 1982 ELGs. *See* Effluent Limitations Guidelines, 47 Fed. Reg. 52,290, 52,296 (Nov. 19, 1982); 33 U.S.C. § 1311(d); *see also* R.11 (indicating that EnerProg's prior permit was subject to the 1982 ELGs). The 2015 ELGs require zero discharge of fly and bottom ash pollutants, which include the mercury, arsenic, and selenium present in EnerProg's fly and bottom ash discharge. R.9; Effluent Limitations Guidelines, 80 Fed. Reg. 67,838, 67,841 (Nov. 3, 2015). But, the permit writer understood that, "in the event that the 2015 ELGs were eliminated or vacated," EnerProg's permit would prohibitively backslide to its prior permit subject to the 1982 ELGs, which would not limit the mercury, arsenic, and selenium in EnerProg's fly and bottom ash discharge. R.11; 33 U.S.C. § 1342(o)(1); *see also* 80 Fed. Reg. at 67,840 ("The processes employed and pollutants discharged by the industry look very different today than they did in 1982."). Indeed, the permit writer was aware of the pending litigation before the Fifth Circuit regarding the stringency of the 2015 ELGs, and that litigation was not stayed until after the permit writer decided to rely on BPJ. R.9, 11; Notice, 82 Fed. Reg. at 19,005; Fifth Circuit Stay, 82 Fed. Reg. at 26,018.

Therefore, the permit writer invoked the following regulation to alternatively rely on BPJ to prevent anti-backsliding: "Where promulgated effluent limitation guidelines only apply to certain aspects of the discharger's operation, or to *certain pollutants*, other aspects or activities are subject to regulation on a case-by-case basis." 40 C.F.R. § 125.3(c)(3) (emphasis added); *see also Tex. Oil & Gas Co. v. EPA*, 161 F.3d 923, 928–29 (5th Cir. 1998) (explaining that 40 C.F.R. § 125.3(c)(3) authorizes EPA to "determine on a case-by-case basis what effluent limitations

represent the BAT level, using its 'Best Professional Judgment.'"). Thus, the 2015 ELGs only apply to "certain pollutants"—the mercury, arsenic, and selenium actually present in EnerProg's fly and bottom ash discharge. 40 C.F.R. § 125.3(c)(3); R. 9, 11.

Here, the permit writer confronted a latent ambiguity. This regulation does not say that BPJ may be applied only if the current ELGs do not limit those "certain pollutants." 40 C.F.R. § 125.3(c)(3). Further, the permit writer was driven to limit these "certain pollutants" to prevent EnerProg's permit from backsliding to the 1982 ELGs, in the event that the 2015 ELGs were eliminated or vacated. 33 U.S.C. § 1342(o)(1). The BPJ provision does not speak to whether such an invocation of BPJ is "necessary" under these circumstances. *Id.* § 1342(a)(1)(B).

In light of the ambiguity and tension evident from the plain language of the CWA and its implementing regulations, EPA's alternative reliance on BPJ "is based on [a] permissible construction" of the CWA, as well as a reasonable implementation of its own regulation. *Chevron*, 467 U.S. at 843; 40 C.F.R. § 125.3(c)(3). Accordingly, EPA is entitled to *Chevron* and *Auer* deference. *Chevron*, 467 U.S. at 843; *Auer*, 519 U.S. at 461. "Nothing in the Clean Water Act prevents the EPA from retaining a case-by-case approach to certain environmental problems." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 198 (2d Cir. 2004).

EPA's reliance on BPJ also merits deference in light of the CWA's overarching policies. The court in *Natural Resources Defense Council, Inc. v. EPA* held that the CWA's "primary goal" to achieve the "complete elimination of pollutant discharges" trumped any uniformity goals with respect to the application of effluent guidelines:

> EPA's anti-backsliding approach obviously results in the discharge of fewer pollutants, in conformity with the overriding goal of the CWA. Although this position may conflict with the competing goal of uniformity . . . [T]he primary purpose of the CWA is the *elimination* of all pollutant discharges . . . In light of this, it is reasonable for the EPA to require conformance with the most stringent limit applicable to a particular source, whether that be BPJ or a national guideline.

822 F.2d 104, 197–99, 201–02 (D.C. Cir. 1987). Here, not only was alternative reliance on BPJ reasonable, but the permit writer's decision had no practical effect on EnerProg—either zero discharge would be required under the 2015 ELGs, or zero discharge would be required under BPJ. R.9. The only difference BPJ serves is to further the purpose of the CWA: to prevent EnerProg's permit from prohibitively backsliding to the less stringent 1982 ELGs, in the event that the 2015 ELGs were eliminated or vacated. 33 U.S.C. § 1342(o)(1); R.9, 11. This decision embodies the CWA's primary goal of one day achieving pollutant-free waters, and in the meantime, ensuring the health of our community members living in Fossil, Progress. Accordingly, EPA's alternative reliance on BPJ is entitled to *Chevron* and *Auer* deference.

CONCLUSION

For the foregoing reasons, FCW asks this Court to remand EnerProg's permit to EPA with instructions to apply effluent limitations to Internal Outfall 008 and require EnerProg to obtain a § 404 permit. In all other respects, FCW asks this Court to affirm the EAB's order.

Respectfully submitted,

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Counsel for Fossil Creek Watchers, Inc.