Docket Nos. 17-000123 and 17-000124

Team 24

*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.*

On Consolidated Petitions for Review of

the Environmental Appeals Board in NPDES Appeal No. 17-0123

# BRIEF IN SUPPORT OF ENERPROG, L.L.C.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities

**Rules**



**Regulations**

## JURISDICTIONAL STATEMENT

The Twelfth Circuit has subject matter and appellate jurisdiction under 33 U.S.C.A. § 1369(b)(1)(F) to review the EPA's decisions in issuing or denying NPDES permits. Both EnerProg and Fossil Creek Watchers have filed timely petitions. R2.

## STATEMENT OF THE ISSUES

1a. Whether the additional conditions of the Progress Coal Ash Cleanup Act (CACA) were inappropriate requirements of state or federal law that bear no relationship to achieving state water quality standards.

1b. Whether the Administrator was required to review the additional conditions of the Progress CACA before including them into a federal National Pollutant Discharge Elimination System (NPDES) permit.

2. Whether the EPA had authority under § 705 of the Administrative Procedure Act to postpone certain future compliance dates for the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines pending judicial review.

3. Whether EPA Region XII violated the Clean Water Act and its implementing regulations when it relied on Best Professional Judgment to require zero discharge of pollutants in coal ash transport waters, independent of the applicability of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines.

4. Whether EnerProg can discharge into the MEGS ash pond without a NPDES permit when the EPA's suspension of a portion of the regulatory definition of "waters of the United States," which would exempt the ash pond from NPDES requirements, was upheld for almost forty years.

5. Whether EnerProg could carry out its ash pond closure and capping plan without a Section 404 permit when "navigable waters" is defined in 33 U.S.C.A. § 1362(7) for both CWA Section 402 and 404 and it does not contain a recapture provision.

## STATEMENT OF THE CASE

Congress carefully crafted a statutory scheme under the Clean Water Act (CWA) to balance the rights of industry with the need to protect the nation's waters. Though Congress recognized a need to impose regulatory burdens on industry, it did so within reasonable limits. One of the primary means of regulation under the CWA is the National Pollutant Discharge Elimination System (NPDES) permitting program. The NPDES program facilitates a regulated entity's right to discharge pollutants into "navigable waters" while still furthering the CWA's goals. *See* 33 U.S.C.A. § 1342 (West 2014). "Navigable waters" is defined under 33 U.S.C.A. § 1362(7) (West 2014) as "waters of the United States." "Waters of the United States," for the purposes of the NPDES program, is defined in 40 C.F.R. § 122.2(2)(i) (2015). Thus, the NPDES requirements only apply to those bodies of waters fitting within this regulatory definition. Another main tool of CWA regulation is the § 404 permitting program for the discharge of dredge or fill material. Similar to the NPDES program, Section 404 facilitates a regulated entity's right to discharge dredged for fill material into "navigable waters." *See* 33 U.S.C.A. § 1344 (West 2014).

EnerProg lawfully operated the Moutard Electric Generating Station (MEGS) under the NPDES program and was reissued a permit on January 18, 2017 by EPA Region XII to continue its water pollution discharges. R6. The permit included requirements from the EPA's 2015 Effluent Limitation Guidelines (ELGs) for the Steam Electric Power Generating Point Source Category, along with various conditions imposed by the state of Progress pursuant to § 401 of the CWA. R2. Based on the conditions imposed in the permit, both EnerProg and Fossil Creek Watchers, Inc.

(FCW) appeal the decision of the Environmental Appeals Board (EAB). R2. FCW challenges the EAB's holding as to whether MEGS's discharges into its ash pond require a permit. R3-R4. EnerProg challenges the EAB's holding as to the inclusion of certain state conditions included in its NPDES permit; the effectiveness of EPA's postponement of certain compliance dates; and EPA Region XII's reliance on Best Professional Judgment (BPJ) to require zero-discharge of pollutants in coal ash transport water. R2.

MEGS is a coal-fired electric generating plant subject to EPA's 2015 ELGs. R7. MEGS withdraws water from the Moutard Reservoir and discharges ash byproduct into the MEGS ash pond. R7. The pond is a non-navigable, man-made body of water created by damming the then free-flowing Fossil Creek, which is a perennial tributary to Progress River, a navigable-in-fact body of water. R7. MEGS operates several outfalls, two of which are at issue in the present case: Outfall 008, which covers discharges from the facility's wet ash handling system to the ash pond; and Outfall 002, which covers discharges containing elevated levels of mercury, arsenic, and selenium from the ash pond to the Moutard Reservoir. R7-R8. The EAB rejected FCW's argument that MEGS's man-made ash pond required a permit for discharges. R3-R4. The EAB held that since Outfall 008 does not discharge into "waters of the United States" as defined by § 402 of the CWA, EnerProg did not need a permit for this discharge. R12-R13.

Congress also intended for a state role under the CWA, but only within appropriate bounds. Congress provided that states may impose additional conditions on regulated entities through the NPDES program by going through a state certification process. The State of Progress issued a certification pursuant to § 401 of the CWA for the renewal of the MEGS NPDES permit. R.2. This permit was contingent on EnerProg complying with the Progress Coal Ash Cleanup Act (CACA), which is a state-enacted law. CACA is aimed at preventing public hazards, including ground or

surface water leaks, through assessment and closure or remediation of substandard coal ash disposal facilities. R8-R9. Pursuant to the CACA, EnerProg must terminate the use of MEGS's ash pond by November 1, 2018; dewater the ash pond by September 1, 2019; and cap the remaining coal combustion residuals by September 1, 2020. R10. These requirements, called "Special Condition A," were incorporated as additional conditions to the reissued NPDES permit. R10. The EAB held that Special Condition A was sufficiently within the scope of state certification authority and that the EPA had no jurisdiction to review the conditions once incorporated into the certification. R10-R11.

In addition to the conditions imposed under the CACA, EPA Region XII also required EnerProg to meet a zero-discharge standard for its coal ash transport waters, pursuant to the 2015 ELGs, by November 1, 2018. R10. In response to new information regarding the difficulties and burdens imposed by the 2015 ELGs, EPA Administrator Scott Pruitt issued a notice of postponement of the November 1, 2018 deadlines. R11. The notice was issued on April 12, 2017 without undergoing notice-and-comment procedures, and the 2015 ELGs had taken effect on January 4, 2016. R11-R12. Despite this Notice, the November 1, 2018 compliance deadlines in EnerProg's NPDES permit was not extended. R11. In addition to the 2015 ELGs, EPA Region XII relied upon Best Professional Judgment (BPJ) as an alternative ground to support the requirement of zero discharge of pollutants in coal ash transport waters. R11. The EAB held the April 12th postponement to be unlawful because the Administrator is not authorized to extend compliance deadlines once the 2015 ELGs had already become effective. R11-12. Alternatively, if the 2015 ELGs were suspended, the EAB held that EPA Region XII was justified in relying on BPJ as an alternative ground for requiring zero discharge of the pollutants not covered by the 1982 ELGs. R12.

Through its holdings, the EAB allowed additional state conditions to be imposed on EnerProg's operations without requiring the EPA to first review them for compliance with the CWA. The EAB also prohibited the EPA from exercising authority under the APA to ease the burdens imposed on regulated entities by the 2015 ELGs. The EAB did recognize some statutory limits on regulatory burden, however, when it held that the MEGS man-made ash pond was not a "water of the United States" and did not require a § 402 or § 404 permit.

## SUMMARY OF THE ARGUMENT

**Issue I:** The EAB's holding that Progress's closure and capping conditions for the MEGS ash pond complies with the CWA should be reversed as not in accordance with law because these conditions are not focused on achieving state water quality standards. Conditions imposed during any state certification process must be related to "water quality." Because CACA, the state law in question, is not relevant to water quality as it pertains to the CWA, it is not an appropriate requirement imposed on MEGS. Furthermore, the EPA Administrator was required to review the state certification submitted by Progress because conditions inconsistent with federal or state law must be altered or removed. The Administrator's approval of the conditions also constituted a final decision, which could then be reviewed in state courts if challenged. Therefore, since the Administrator was required to review state-imposed conditions, EAB's holding that the Administrator was without this authority was arbitrary and capricious.

**Issue II:** The EAB's holding that the EPA's April 25, 2017 notice of postponement of certain compliance dates was ineffective should be reversed because the EPA did have the authority to postpone the future compliance dates of its actions pending judicial review. Under 5 U.S.C. § 705, federal agencies have the authority to postpone the "effective date" of its actions pending judicial review. However, the Supreme Court has stated that statutes should be

construed to effectuate their purpose. The text of § 705 indicates that its purpose is to preserve the status quo because the second sentence, which is informative of the whole section's purpose, focuses on the power to preserve status. Thus, effective date as used in §705 should be construed to effectuate the purpose of preserving the status quo.

In order to effectuate the purpose of § 705, effective date must be read to include compliance date because a literal reading would, in some circumstances, unduly shorten an agency's opportunity to make a reasoned decision over whether to postpone an action and preserve the status quo. Federal agencies must provide reasoned explanations as to why they have exercised their discretion in a given manner. Though the effective date of the 2015 ELGs was January 4, 2016, the EPA did not have reason to postpone the compliance dates until March 24, 2017 when it received letters pointing to new data showing that certain power plants would not be able to comply by November 1, 2018. Therefore, a literal reading of effective date would not provide EPA with enough time to comply with both the purpose of § 705 to preserve the status quo and the administrative law principle that it must make a reasoned decision.

Additionally, effective date should be read to include compliance date in order to effectuate § 705's purpose because the compliance date may be when changes to the status quo would occur. Though the effective date of the 2015 ELGs was January 4, 2016, regulated entities were not required to even begin coming into compliance until November 1, 2018. Furthermore, even if regulated entities began making changes upon the effective date, status quo, as used for purposes of judicial stays, is considered to be the last uncontested status that preceded the controversy. Therefore, effective date should be read to include compliance date because a literal construction would frustrate the purpose of § 705 to preserve the status quo. Thus, the EAB's holding should

be reversed because the EPA had authority under § 705 of the APA to postpone certain future compliance dates in the 2015 ELGs.

**Issue III:** The EAB's holding that EPA Region XII could rely on BPJ as alternative ground for requiring zero discharge of pollutants in coal ash transport water, independent of the 2015 ELGs, should be reversed because it violates the Clean Water Act and its implementing regulations. Under 40 C.F.R. § 125.3(c), EPA permit writers may issue permits on a case-by-case basis using BPJ where promulgated ELGs only apply to certain aspects of the regulated entity's operation, or to certain pollutants. The EAB held that EPA Region XII could issue a permit based on BPJ to regulate discharges of mercury, arsenic, and selenium in the MEGS coal ash pond because those pollutants are not covered by the 1982 ELGs. Though the 1982 ELGs do not cover these three pollutants, it does cover the discharge of PCBs in coal ash transport water. Because EPA Region XII's permit requires zero discharge of pollutants in MEGS coal ash transport water, it effectively regulated the discharge of PCBs as well, which is contrary to the CWA and 40 C.F.R. § 125.3(c). Therefore, because EPA Region XII's permit effectively regulates an activity and pollutant already covered by the 1982 ELGs, the EAB's holding that this was permissible should be reversed.

**Issue IV:** The EAB's holding that § 402 of the CWA does not require EnerProg to obtain a permit to discharge pollutants into the MEGS ash pond should be affirmed because the EPA's 1980 suspension of 40 C.F.R. § 122.2(2)(i) is legally binding and man-made ponds are not "waters of the United States" under the CWA. The first sentence of the regulatory definition of "waters of the United States" excludes waste treatment systems, including ponds used in such systems. The second sentence of the definition exempts manmade bodies of water created from waters of the United States from this exception. Thus, the MEGS ash pond, because it was made from a water

of the United States, would not be excluded from the definition of "waters of the United States." However, under threat of multiple lawsuits pending in the courts of appeals at the time in 1980, the EPA suspended the second sentence of the regulatory definition. While this suspension was not done through a notice-and-comment rulemaking, it has been upheld and has remained unchanged through at least eleven amendments or revisions to 40 C.F.R. § 122.2. Thus, it is a longstanding practice, and the Supreme Court has held on multiple occasions that longstanding practices should be upheld even if they violated procedure at the time they were enacted. Additionally, both the Eastern District of Washington and the Seventh Circuit have explicitly held that man-made ponds are not "waters of the United States" under the Clean Water Act. Therefore, because MEGS ash pond is not a "water of the United States" subject to the NPDES permitting requirements, the decision of the EAB should be affirmed.

**Issue V:** The EAB's holding that § 404 of the CWA does not require EnerProg to obtain a permit for the discharge of fill material in order to close and cap the MEGS ash pond should be affirmed because the ash pond is not a "navigable water" under § 404 and no definition of "navigable waters" contains a recapture provision to convert a closed ash pond back into "navigable waters." The jurisdictional definition of "waters of the United States" is the same under both § 402 and § 404 of the Clean Water Act. Thus, if the MEGS ash pond is not a "water of the United States" under § 402, then it is likewise not a "water of the United States" under § 404. Additionally, the regulatory definition of "waters of the United States" for § 404, found at 40 C.F.R. § 230.3(o)(2)(i), explicitly excludes waste treatment ponds. Unlike the regulatory definition in § 122.2, the definition in § 230.3 is not subject to a question regarding the validity of a suspension of any part of its definition. Finally, neither the statutory nor the regulatory definition of "navigable waters" contains a recapture provision stating that once a waste treatment pond is

no longer used for waste treatment purposes, it becomes a navigable water once again. Thus, because both a textual examination of the relevant authorities and the canon of *expressio unius exclusio alterius* suggest that the MEGs ash pond is not a "water of the United States", the decision of the EAB should be affirmed.

Congress created a careful regime under the CWA to impose regulatory burdens upon industry only to a certain extent in order to protect the nation's waters. When these burdens go far beyond what Congress could have intended, they must be reined back within permissible bounds. The procedures Congress provided under the CWA must be followed to provide a needed check on state conditions irrelevant to the statutory scheme and to allow agencies to lighten the burden on industry when necessary.

## STANDARD OF REVIEW

Orders of the Environmental Appeals Board (EAB) represent final agency action. Accordingly, the Twelfth Circuit should overturn the EAB's determinations when they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" under § 706(2)(A) of the APA. 5 U.S.C. § 706. This would occur if the EAB "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## ARGUMENT

### I. SPECIAL CONDITION A DOES NOT COMPLY WITH CWA SECTION 401(d) BECAUSE IT IS NOT BASED ON ACHIEVING WATER QUALITY STANDARDS, AND THE EPA WAS NOT REQUIRED TO INCLUDE THESE CONDITIONS AS THEY WERE INCONSISTENT WITH FEDERAL LAW.

Special Condition A should not be included in EnerProg's NPDES permit because it does not comply with the CWA, and the EPA Administrator was not required to accept these additional state conditions. States, in achieving water quality standards (WQS), regulate intrastate pollution through a certification system. 33 U.S.C. § 1341 (1977). Section 401(d) specifies that a state's certification "shall set forth any effluent limitations and other limitations…necessary to assure that any applicant [for a Federal license] will comply with…various provisions of any other appropriate state law requirements." Special Condition A should not be included in EnerProg's NPDES permit because (1) the conditions imposed are not based on achieving state WQS, and (2) the EPA Administrator was not required to accept additional state conditions before reviewing the state certification.

#### A. Special Condition A Does Not Comply with Section 401(d) Because CACA Is Not Based On Achieving State Water Quality Standards.

Special Condition A, namely the conditions requiring closure and capping of the ash pond at MEGS, does not comply with section 401(d) of the Clean Water Act because it is not within the scope of achieving state WQS. WQS is defined as "the designated uses of the *navigable waters* involved and the water quality criteria for such waters based on such use." 33 U.S.C. § 1313 (2000) (emphasis added). According to the Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, a state is authorized to impose conditions on an entire activity once discharges are present. 511 U.S. 700, 712 (1994). However, this "authority is not unbounded." *Id*. The Court made clear that conditions related to achieving WQS, under § 303 of

the CWA, are permissible, but refused to decide what constitutes other "appropriate" conditions pursuant to state law. *Id* at 713 ("we do not speculate on what additional state laws, if any, might be incorporated by this language"). There is some uncertainty over the precise meaning of this language among state courts, but all agree that certification conditions must be related to 'water quality.' *See e.g., Arnold Irrigation Dist. v. Dep't of Envtl. Quality*, 717 P.2d 1274, 1279 (Or. App. 1986) (404(d) does not "allow [conditions] which are not related to water quality"); *Niagara Mohawk Power Corp. v. Dep't of Envtl. Conservation*, 624 N.E.2d 146, 149-51 (N.Y. 1993) (certification conditions may only be based on water quality standards approved by the EPA).

The Progress Coal Ash Cleanup Act (CACA) is not an appropriate condition of state certifications because it is not relevant to WQS of navigable waters as defined by § 303 of the CWA. CACA is primarily focused on assessing and remediating or closing substandard ash pond disposal facilities to prevent leaks to ground water. Man-made ponds, such as the ash pond at issue here, are not navigable waters covered by the Clean Water Act. *See* discussion *infra* Section IV(B). Even if man-made ponds were covered under the CWA, additional state conditions must still be related to achieving WQS. The record is absent on whether the ash pond is interfering with any designated uses of the pond itself or any body of water that received discharges from the pond. Therefore, it was inappropriate to condition the state certification on CACA, a state law completely unrelated to achieving the goals of the CWA or *relevant* state WQS.

B. The Administrator Was Not Required to Include All Progress Certification Conditions Because the Administrator is Mandated to Review and Remove or Alter Certification Conditions Inconsistent with Applicable Federal Law.

The Administrator was not required to include the Progress Certification Conditions pursuant to CACA because the Administrator must remove or alter permit conditions inconsistent with applicable federal or state law. The detailed regulatory scheme promulgated by the EPA

governing state certifications requires the Administrator, before issuing any NPDES permit, to review permit conditions, if any, on several grounds. 40 C.F.R. § 124.53 (2000). First, states must adequately certify that the conditions are "necessary to assure compliance with the applicable provisions of the CWA…and with appropriate requirements of State law. *Id*. Second, for any conditions more stringent, as present here, the state must cite the CWA or state law references upon which that condition is based. *Id.* Third, the state must include a statement of the extent to which each condition of the permit can be made "less stringent without violating the requirements of state law, including water quality standards." *Id.* While the Administrator does not review the conditions substantively, he must review whether the state adequately certified compliance with applicable federal or state law. Once the Administrator deems state certification to be adequate, any disputes governing certification conditions can then be reviewed by a court of proper jurisdiction. *Am. Rivers, Inc. v. Fed. Energy Regulatory Comm'n*, 129 F.3d 99, 107 (2d Cir. 1997). Therefore, because these provisions require that the Administrator review state certifications, the Administrator was not required to accept all state conditions before first reviewing the certification.

In sum, because the additional state conditions imposed on EnerProg's NPDES permit are irrelevant to achieving state WQS, and because the Administrator was not required to accept all state conditions prior to reviewing the state certification, the EAB's holding that Progress's conditions requiring ash pond closure and capping complies with the CWA should be reversed.

## II. THE EPA HAD AUTHORITY TO POSTPONE THE 2015 ELG'S COMPLIANCE DATES FOR ZERO-DISCHARGE BECAUSE EFFECTIVE DATE AS USED IN SECTION 705 OF THE APA INCLUDES COMPLIANCE DATE.

The EPA's notice to postpone the compliance dates for achieving zero discharge of pollutants in coal ash transport water is effective because effective date should be read to include

compliance date in order to effectuate the purpose of 5 U.S.C.A. § 705 (2014). "In the interpretation of statutes, the function of the courts is… to construe the language so as to give effect to the intent of Congress." *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 542 (1940). According to the Court in *United States v. Bryan*, the "history of [the] statute, its original purpose, and its present status are all relevant considerations in its interpretation" and "the Court will not reach [a] result if it is contrary to the congressional intent and leads to absurd conclusions." 339 U.S. 323, 338 (1949). Effective date as used in § 705 should be read to include compliance date because (1) the text of § 705 indicates that its purpose is to preserve the status quo, and (2) a literal reading of effective date would in some circumstances be contrary to the purpose of the statute to preserve the status quo.

A. The Text of Section 705 Indicates That Its Purpose Is To Preserve the Status Quo.

The text of § 705 alludes to its design as a tool to preserve the status quo. The second sentence of § 705 provides a reviewing court with the power to postpone the "effective date" of an agency action, similar to the power granted to agencies in the first sentence. *See* 5 U.S.C. § 705. The second sentence reads: "the reviewing court… may issue all necessary and appropriate process… to *preserve status* or rights pending conclusion of the review proceedings." *Id.* (emphasis added). "Preserve" is defined in the legal context as "to keep valid, or in existence." MERRIAM-WEBSTER, PRESERVE, https://www.merriam-webster.com/dictionary/preserve (last visited Nov. 4, 2017). "Status" is defined in the legal context as "the current state of affairs." MERRIAM-WEBSTER, STATUS, https://www.merriam-webster.com/dictionary/status (last visited Nov. 4, 2017). "Status quo" is defined as "the existing or current state of affairs." BLACK'S LAW DICTIONARY ONLINE, STATUS QUO, http://thelawdictionary.org/status-quo/ (last visited Nov. 4,

2017). Therefore, to preserve status under § 705 means the same thing as preserving the status quo, which is to keep valid, or in existence, the current state of affairs.

Though the phrase "preserve status" is only present in the second sentence, which describes court authority rather than agency authority, § 705 should be read as a whole to understand its purpose. *See Richards v. United States*, 369 U.S. 1, 11 (1962) (finding "fundamental that a section of a statute should not be read in insolation from the context" and that "we must not be guided by a single sentence… but (should) look to the provision of the whole law"). Additionally, the court in *Sierra Club v. Jackson* further likened the two sentences when it determined that the legislative history of the APA "makes clear the intent" that the "standard for the issuance of a stay pending judicial review is the same whether a request is made to an agency or to a court." 833 F. Supp. 2d 11, 28, 31 (D.D.C. 2012) (finding also that "[s]uch a stay is not designed to do anything other than preserve the status quo"). Therefore, because the plain meaning of the second sentence of § 705 is informative of the whole section's purpose, the purpose of § 705 is to preserve the status quo, and its language should be read to effectuate that purpose.

B. Effective Date Should Be Read to Include Compliance Date Because a Literal Reading Would Be Contrary to the Purpose of Section 705 to Preserve the Status Quo.

"Effective Date" should be interpreted to include "compliance date" because a literal interpretation may, in some circumstances, unduly shorten an agency's opportunity to make a reasoned decision and preserve the status quo, and compliance dates are often the dates where changes to the status quo would actually occur.

First, effective date should not be read literally because agencies may have an unreasonably short amount of time between the date when a challenge to a rule is filed and the rule's effective date to gather necessary information in order to make a reasoned decision whether to postpone.

The District Court for the District of Columbia has held that an agency's decision to postpone may fail if the agency does not provide reasoning for its decision and if the reasoning is not based on the underlying litigation that provides authority to postpone under § 705. *See Sierra Club*, 833 F. Supp. 2d at 30. In *Sierra Club*, the court disagreed with the agency's interpretation of § 705, in which the agency only needed to find that justice requires it – according to its broad discretion in determining what constitutes justice – in order to postpone a rule, and the court held that the agency must provide more reasoning. *Id* at 30. The district court's holding is based on a well-grounded principle of administrative law: "that an agency must cogently explain why it has exercised its discretion in a given manner" and should be given weight. *State Farm*, 463 U.S. at 48-49. In the instant case, although the EPA had a little over a month to issue a postponement, it had no reason to do so until March 24, 2017 when it received letters pointing to new data showing that certain power plants would not be able to comply with the rule. *See* Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19005, 19005 (Apr. 25, 2017). If the EPA had issued a postponement prior to the rule's January 4, 2016 effective date in order to comply with a literal reading of § 705, it would not have had the reasoning behind its decision that the Court required in *State Farm*. Therefore, if effective date is given a literal meaning, then, in some instances, an agency may not have enough time to comply with both the purpose of § 705 to preserve the status quo and the fundamental principle of administrative law that it needs to make a reasoned decision.

Second, effective date should be read to include compliance date because the compliance date may be when actual changes to the status quo would occur. Here, the permit requirement at issue is the condition pursuant to the 2015 ELGs that MEGS has zero-discharge of coal ash transport water. The effective date of the 2015 ELGs was January 4, 2016, but the date by which

regulated entities must begin coming into compliance regarding discharge of coal ash transport water is November 1, 2018. *See* Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67837, 67895-96 (Nov. 3, 2015). Thus, the status quo for regulated entities discharging coal ash transport water would not be affected upon the effective date, but regulated entities would begin making changes upon the compliance date. *See id.* This reasoning stands up against the holding in *Becerra v. U.S. Dept. of Interior*, where the argument that compliance dates are the "dates with teeth" failed because the court found it significant that there was a "build-up" from the effective date until the compliance date. No. 17-cv-02376-EDL, 2017 WL 3891678, at *8 (N.D. Cal. Aug. 30, 2017). In the instant case, not only was there no build-up from the effective date of the 2015 ELGs until the compliance date for zero-discharge of coal ash transport water like that in *Becerra*, there was an anticipated period for coming into compliance between November 1, 2018 and December 31, 2023. *See* 80 Fed. Reg. at 67895-96. Thus, the 2015 ELGs created a regime where the compliance date is actually when regulated entities would have to begin making changes to their operations. A strict reading of effective date in this case would focus on a date when no changes to the status quo would occur, while ignoring the date where the rights of regulated entities are seriously affected. Therefore, effective date must be read to include compliance date in order to effectuate § 705's purpose of preserving the status quo.

Furthermore, even if regulated entities began making changes upon the effective date, status quo, as used for purposes of judicial stays, has been "defined as 'the last uncontested status between the parties which *preceded the controversy* until the outcome of the final hearing." *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 n. 8 (10th Cir. 1991) (citing *Stemple v. Bd. of Educ. of Prince George's Cty.*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981))

(emphasis added). Because the pending litigation in this case was filed prior to the effective date of the 2015 ELGs, even if regulated entities began making changes before the compliance date, the status quo that is meant to be protected is the status that preceded the rule's effective date. Therefore, to effectuate the purpose of § 705, effective date should be interpreted to include compliance date because that is the date when changes to the status quo may actually occur, and even if changes had begun between the effective date and compliance date, the status quo should be understood to mean the status preceding the pending litigation that gave rise to § 705 authority.

In sum, 5 U.S.C. § 705 should be read to effectuate its purpose of preserving the status quo, and a strict reading of effective date would be contrary to that purpose. The EAB completely ignored this aspect of Section 705. As such, it "entirely failed to consider an important aspect of the problem." *See State Farm*, 463 U.S. at 43. Therefore, the EAB's holding that the EPA's April 25, 2017 notice of postponement was ineffective was not in accordance with law, and it should be reversed.

## III. EPA REGION XII COULD NOT RELY ON BPJ AS AN ALTERNATIVE GROUND TO REQUIRE ZERO-DISCHARGE, INDEPENDENT OF THE 2015 ELGS, BECAUSE DOING SO IS PROHIBITED BY THE CWA.

EPA Region 12 could not rely on Best Professional Judgment (BPJ) as an alternative ground to issue a permit requiring zero discharge of pollutants in coal ash transport water because it would violate the Clean Water Act by effectively regulating an activity and pollutant that is already covered by promulgated ELGs. Where "promulgated [ELGs] only apply to certain aspects of the discharger's operation, or to certain pollutants," the regulations implementing the CWA authorize EPA permit writers to regulate "other aspects or activities…on a case-by-case basis in order to carry out the provisions of the Act." 40 C.F.R. § 125.3(c) (2017). Thus, "BPJ permits are

no longer to be created once national guidelines are in place." *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 859 F.2d 156, 200 (D.C. Cir. 1988).

Here, if the 2015 ELGs do not apply, then the 1982 ELGs are effective and EPA's permit requiring zero discharge of pollutants coal ash transport water must not cover any aspect of EnerProg's operation, or to certain pollutants, already regulated by the 1982 ELGs. *See* 80 Fed. Reg. at 67840 (referencing ELGs that were last promulgated in 1982). The EAB held that because effluent from the MEGS coal ash pond contain mercury, arsenic, and selenium, which are not regulated by the 1982 ELGs, those pollutants are appropriately subject to BPJ limits. R11. However, the EAB erred because although the 1982 ELGs do not cover mercury, arsenic, or selenium, they impose a "prohibition on discharges of PCBs" for fly ash transport and "contain BAT limitations for PCBs" for bottom ash transport water. Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52290, 52296, 52303 (Nov. 19, 1982). Thus, because EPA Region XII required zero discharge of pollutants in fly ash and bottom ash transport water, without specific mention of which pollutants it intended to target, the permit effectively also requires zero discharge of PCBs. Therefore, EPA Region XII may not rely on BPJ to require zero discharge of pollutants in coal ash transport water because it would also be regulating discharges of PCBs in coal ash transport water, which is already covered by the 1982 ELGs.

In sum, EPA Region XII acted outside the bounds of CWA authority when it required zero-discharge of pollutants in coal ash transport waters and regulated an activity and pollutant already covered by promulgated ELGs. Because the EAB did not consider that the 1982 ELGs impose a prohibition on the discharge of PCBs, it "entirely failed to consider an important aspect of the problem." *See State Farm*, 463 U.S. at 43. Therefore, the EAB's decision to allow EPA Region

XII to rely on BPJ as an alternative ground to require zero-discharge of coal as transport water was not in accordance with law, and it should be reversed.

## IV. THE NPDES PERMIT REQUIREMENTS DO NOT APPLY TO ENERPROG'S POLLUTANT DISCHARGES INTO THE MEGS ASH POND BECAUSE THE EPA'S SUSPENSION OF THE RELEVANT 40 C.F.R. § 122.2 PROVISION IS LEGALLY BINDING AND THE COURTS HAVE CONFIRMED THAT MAN-MADE PONDS ARE NOT "NAVIGABLE WATERS" UNDER THE CLEAN WATER ACT.

Section 402 of the CWA does not require EnerProg to obtain a permit to discharge pollutants into the MEGS ash pond because (1) the EPA's 1980 suspension of 40 C.F.R. § 122.2(2)(i) is legally binding and (2) multiple courts have held that man-made ponds, like the ash pond, are not "navigable waters" under the CWA.

### A. The EPA's Suspension of The Relevant Provision of 40 C.F.R. § 122.2 Is Legally Binding Because It Has Withstood Thirty-Seven Years of Regulatory Amendments.

The EPA's 1980 suspension of 40 C.F.R. § 122.2(2)(i) is legally binding because it has been continued over multiple amendments to the regulation since the EPA first announced the suspension. 40 C.F.R. § 122.2(2)(i) (2015) excludes waste treatment systems, including ponds used for such systems, from the definition of "waters of the United States." The second sentence of this provision then excludes from this exemption manmade bodies of water created from waters of the United States. *See id.* In this case, the ash pond is made from a tributary of a navigable water. Thus, it is made from a "water of the United States" and so, according to the plain meaning of § 122.2(2)(i), should be excluded from this provision's exemption. However, there is a footnote to this provision which the EPA wrote in 1980. *See* § 122.2 note 1. This note suspends the effectiveness of the second sentence of § 122.2(2)(i), meaning that *all* waste treatment systems and the ponds used for them are exempt from the definition of "waters of the United States." As such, under the suspension to this provision, the ash pond is *not* a "water of the United States."

Before the EAB, FCW argued that the 1980 suspension is not binding because it violates the requirements for notice and comment rulemaking under APA § 553, but such requirements are not needed due to the fact that the suspension has been longstanding. Section 122.2 has undergone at least eleven amendments and revisions since the original 1980 suspension and there have been no cases or mention of any entity protesting this suspension. *See* § 122.2. The EAB leaned strongly on this fact when it "decline[d] to disturb this longstanding policy judgment of successive EPA administration, which has been reincorporated in two subsequent reconsiderations of the definitions section of section 122.2." R7. Like the EAB held, a longstanding practice should be upheld even if it violates procedure. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (affirming that, among other factors, consistency in interpretation over time given an interpretation power to persuade); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15-16 (2011) (adding force to an interpretation when it has been held for a sufficient length of time to suggest that it "reflected careful consideration, not post-hoc rationalization"); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-30 (1982) (noting that the Supreme Court normally accords great deference to a longstanding interpretation). Thus, because the suspension is a longstanding part of practice under the CWA's statutory scheme, it should be upheld even though it was not promulgated following a procedural requirement of the APA.

In sum, the EAB was correct in holding that, as a matter of policy and in accordance with precedent upholding longstanding practices, a court should not disturb a policy judgment that has survived multiple reconsiderations and EPA administrations.

B. Multiple Courts Have Affirmed That Man-Made Ponds, Such as Coal Ash Ponds, Are Not "Navigable Waters" Under The CWA.

EnerProg's pollutant discharges into the ash pond also do not require a NPDES permit because multiple courts have held that man-made ponds are not "navigable waters" under the CWA. In *Washington Wilderness Coalition v. Hecla Mining Company*, a highly factually similar case, plaintiffs suggested that a man-made tailing pond was a "navigable water" and thus a NPDES permit was needed to discharge pollutants into this pond. 870 F. Supp. 983, 989 n. 3 (E.D. Wash. 1994). The court flatly rejected this suggestion, stating that the EPA's definition of "navigable waters" includes only "natural" ponds, not man-made ones. *Id.* Here, the MEGS ash pond was created by damming the upper reach of Fossil Creek. The ash pond is thus man-made, just like the tailing pond in *Washington Wilderness Coalition*.

The Seventh Circuit made a similar finding in *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962, 964-65 (7th Cir. 1994). In that case, the Seventh Circuit found that a six-acre artificial waste retention pond, built in conjunction with the construction of a warehouse, was not a "navigable water" under the CWA, even if the pond drained into groundwater which reached a navigable-in-fact body of water. *Id.* Although this case focused more on the groundwater connection and did not concern a NPDES permit, it similarly held that a man-made retention pond was not a "navigable water" within the context of the CWA. Thus, this case provides appellate-level support for the contention that a man-made body of water, in the instant case the ash pond, is not a "navigable water" under the CWA. Therefore, the Twelfth Circuit should hold that the ash pond is not subject to the NPDES permitting requirements.

In sum, the Twelfth Circuit should affirm the EAB's holding that EnerProg's pollutant discharges into the MEGS ash pond do not require a NPDES permit under § 402 of the CWA

because the EPA's suspension of 40 C.F.R. § 122.2(2)(i) is legally binding, and because two other courts have explicitly held that man-made or artificial ponds are not "navigable waters" in CWA context. Again, there is no evidence here that "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. As such, the EAB's determinations on this issue were not arbitrary and capricious and therefore, the Twelfth Circuit should affirm the decision of the EAB that EnerProg's discharges into the MEGS ash pond do not require a NPDES permit.

## V. THE ASH POND CLOSURE AND CAPPING PLAN DOES NOT REQUIRE A CWA SECTION 404 PERMIT BECAUSE THE ASH POND IS NOT A "NAVIGABLE WATER" AND THERE IS NO RELEVANT RECAPTURE PROVISION.

Section 404 of the CWA, which lays out the requirements for permits for the discharge of fill material, is not applicable to the plan to close and cap the MEGS ash pond because (1) the ash pond is not a "navigable water" for the purposes of § 404 and (2) there is no relevant recapture provision which would convert the closed ash pond back into a "navigable water."

### A. The Ash Pond Is Not A "Navigable Water" Under CWA Section 404.

The ash pond is not a "navigable water" for the purposes of § 404 of the CWA because the ash pond was not a "navigable water" under § 402 of the CWA, and a second, relevant regulatory definition of "waters of the United States" would also exempt the ash pond from being a "navigable water." The EAB found that because "discharges to the ash pond do not require a § 402 permit...and [because] the jurisdictional definition of waters of the United States is the same for § 402 and § 404 permitting, no § 404 permit is required for the ash pond closure and capping activities." R8. EnerProg's pollutant discharges to the ash pond do not require a § 402 permit

because the ash pond is not a "navigable water" under § 402 of the CWA. Additionally, 33 U.S.C.A. § 1362(7) defines "navigable water" for all of Chapter 26 of Title 33 of the United States Code Annotated. Because both § 402 and § 404 of the CWA are contained within Chapter 26 of Title 33 of the United States Code Annotated, the definition of "navigable water" for both sections is the same. Therefore, because the EAB correctly held that the jurisdictional definition of "waters of the United States" is the same under both § 402 and § 404, its conclusion that a § 404 permit is not required for the ash pond closure and capping activities should be affirmed.

Even if the jurisdictional definition of "waters of the United States" is not the same for § 402 and § 404 of the CWA, 40 C.F.R. § 230.3 would still provide that the ash pond is not a "water of the United States" for the purposes of § 404. 40 C.F.R. § 122.2 states that its definition of "waters of the United States" only applies to Parts 122 through 124 of Title 40, Chapter I, Subchapter D, and none of those three Parts concern permitting requirements for the discharge of fill material. *See* § 122.2. However, the Title 40 regulatory definition of "waters of the United States" as pertains to the discharge of fill material is contained in Subchapter H, Part 230. The language of 40 C.F.R. § 230.3(o)(2)(i) (2015) clearly excludes waste treatment ponds, such as coal ash ponds, from the definition of "waters of the United States." Though Subchapter H of Title 40, which contains § 230.3, deals with Ocean Dumping, the stated purpose of Part 230 is "to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material." 40 C.F.R. § 230.1(a) (2015). Nothing in Section 230.1 states that Part 230 applies only to Ocean Dumping - it simply states that it applies to "discharges of dredged or fill material." *Id.* Furthermore, Section 230.2, discussing the applicability of provisions contained within Part 230 of this regulation, provides that "[t]hese Guidelines will be applied in the review of proposed discharges of dredged or fill material into

navigable waters which lie inside the baseline from which the territorial sea is measured." 40 C.F.R. § 230.2(b) (2015). The "baseline from which the territorial sea is measured" is determined in the Convention on the Territorial Sea and the Contiguous Zone. 40 C.F.R. § 230.3(n). The Convention defines the "baseline" as the low-tide mark along the coast. Convention on the Territorial Sea and the Contiguous Zone, at *2 (Apr. 29, 1958), available from http://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf. In this case, the ash pond is clearly within this baseline and therefore, the section 230.3 definition of "waters of the United States" applies.

Therefore, because the definition of 40 C.F.R. § 230.3(o)(2)(i) would apply even if the jurisdictional definition of § 402 and § 404 are different, the EAB's holding that no § 404 permit is required for the closure and capping activities of the MEGS ash pond should be affirmed.

B. Neither 40 C.F.R. § 122.2 nor § 230.3(o)(2)(i) Contains A Recapture Provision.

The MEGS ash pond closure and capping plan also does not require a § 404 permit because neither 40 C.F.R. § 122.2 nor § 230.3(o)(2)(i) contains a recapture provision. Before the EAB, FCW argued that once the ash pond is closed, it is no longer a waste treatment system and thus no longer falls under the waste treatment exception to the definition of "waters of the United States." R8. Section 122.2 contains on recapture provision, but even if § 122.2 is not relevant for the purposes of § 404 permitting, § 230.3 also contains no recapture provision. *See* 40 C.F.R. §§ 122.2, 230.3. Neither the regulatory nor the statutory definition of "navigable waters" contains a recapture provision, a provision stating that once a body of water is no longer used for waste treatment, the exemption disappears, and the body of water becomes a "water of the United States" once again. *See* 33 U.S.C.A. §§ 1344, 1362 (West 2014); 40 C.F.R. §§ 122.2, 230.3. Additionally, the *expressio unius exclusio alterius* canon of statutory interpretation instructs that when one

possibility is expressly included, it excludes another by implication. *See e.g., Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 392 (2013). Thus, because the regulatory definition of "waters of the United States" expressly states that waste treatment systems and their ponds are exempt from the definition, but does say anything about recapture, it implicitly excludes the possibility of a reversion, Therefore, even once it is closed, the MEGS ash pond remains exempt from the definition of "waters of the United States," and § 404 permitting requirements do not apply.

In sum, because the MEGS ash pond is not within the jurisdictional definition of "waters of the United States" for the purposes of § 404 of the CWA, the EAB's holding that the ash pond closure and capping activities do not require a § 404 permit should be affirmed. It did not "rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or [was] so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. As such, the EAB's determinations on this issue were not arbitrary and capricious and therefore, the Twelfth Circuit should affirm the decision of the EAB that EnerProg's closure and capping plan did not require a CWA Section 404 permit.

## CONCLUSION

For the foregoing reasons, EnerProg respectfully requests this Court to reverse the judgment of the Environmental Appeals Board on Issues I through III and affirm the judgment of the Board on Issues IV and V.