Team 47

Docket Nos. 17-000123 and 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.

ON APPEAL FROM
THE ENVIRONMENTAL APPEALS BOARD
FOR
ENVIRONMENTAL PROTECTION AGENCY REGION XII

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY
Respondent

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JURISDICTIONAL STATEMENT

This case is properly before this court because this is an appeal from the final decision of the Environmental Appeals Board of the United States Environmental Protection Agency, affirming the issuance of a National Pollution Discharge Elimination System (“NPDES”) permit to EnerProg L.L.C. Proper jurisdiction lies in this court pursuant to 33 U.S.C. 1369. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Because both FCW and EnerProg L.L.C. challenge the EPA’s final administrative decision regarding the Administrator’s actions, it is appropriate for federal review. FCW and EnerProg L.L.C. both have standing and all issues raised by them were properly preserved for appeal.

STATEMENT OF THE CASE

After the EPA Region XII issued a National Pollutant Discharge Elimination System ("NPDES"), EnerProg L.L.C. ("EnerProg") and Fossil Creek Watchers Inc. ("FCW") both filed petitions for review by the Environmental Appeals Board ("EAB"). R. at 2. The EAB denied both petitions for review pursuant to 40 C.F.R. part 124 (2017). *Id.* EnerProg challenges the NPDES permit as issued, specifically, EAB's refusal to extend the deadline for zero discharge requirements, and Region XII's reliance on Best Professional Judgment ("BPJ") as an alternative ground for requiring zero discharge of ash transport pollutants, 40 C.F.R. 125.3(c)(3). *Id.* at 7. FCW challenges the NPDES permit finding that the ash pond closure and capping plans of the remaining coal ash pond is illegal, and that it requires a permit for the discharge of fill material pursuant to §404 of the Clean Water Act ("CWA"). *Id.* In addition, FCW contends that the interim discharge of untreated coal ash wastes is illegal because the Moutard Electric Generating Station ("MEGS") ash pond is a water of the United States. R. at 7. The parties filed petitions for judicial review of the Final Permit issued pursuant to §402 of the CWA. *Id.* at 2.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Final Permit properly included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in CWA section 401 certification, including the questions:

    a. Whether EPA was required to include all such Progress certification conditions without regard to their consistency with CWA section 401(d); and

    b. Assuming the question of the consistency of the conditions with CWA section 401(d) is open to EPA and to this reviewing court, whether the ash pond closure and remediation conditions constitute "appropriate requirements of State law" as required by CWA section 401(d)

2. Whether the April 12, 2017 EPA Notice suspending certain future compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water.

3. Whether EPA Region XII could rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash transport wastes, independent of the applicability or effectiveness of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines.

4. Whether NPDES permitting requirements apply to EnerProg's pollutant discharges into the MEGS ash pond, in light of EPA's July 21, 1980 suspension of the provision of 40 C.F.R. section 122.2 that originally included waste treatments systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States.

5. Whether the ash pond closure and capping plan requires a permit for the discharge of fill material pursuant to section 404 of the CWA.

STATEMENT OF FACTS

On January 18, 2017, EPA Region XII issued a federal National Pollutant Discharge Elimination System ("NPDES") permit to EnerProg, L.L.C., for their operation of the Moutard Electric Generating Station ("MEGS"), pursuant to section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342. (R. 6.) "On April 1, 2017, both EnerProg and Fossil Creek Watchers, Inc. (FCW), filed petitions [with the Environmental Appeals Board (EAB)] for review of this NPDES

permit pursuant to 40 C.F.R. part 124, requesting on a number of grounds that the permit be remanded to Region XII for further consideration." (R. 6).

Moutard Electric Generating Station

MEGS "is a coal-fired electric generating plant with one unit rated at a maximum dependable capacity of 745 megawatts (MW)". (R. 7). The ash pond in question here was created in 1978 by the construction of a dam that contained the upper reach of Fossil Creek. (R. 7). Fossil Creek is a perennial tributary of the Progress River, and the upper reach was previously a free-flowing body of water. (R. 7). "Fossil Creek does not discharge to the Moutard Reservoir." (R. 7). "This facility is subject to EPA effluent limitation guidelines per 40 C.F.R. section 423 - Steam Electric Power Generating Point Source Category." (R. 7).

The plant draws water from the Moutard Reservoir as needed to make up for evaporative losses from the cooling tower, boiler water, ash transport water, and drinking water needs. (R. 7). This water is used to move ash solids through pipes to the ash pond, the water then undergoes treatment by sedimentation, and is discharged back into the Reservoir. (R. 7). The ash pond was created in June, 1978 by damming the then free-flowing upper reach of Fossil Creek. (R. 7). Fossil Creek does not discharge to the Moutard Reservoir, but is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water." (R. 7).

The plant has five outfalls that discharge water. (R. 7-8). Outfall 001 is comprised of the Cooling Tower System. (R. 7). Fewer than one time per year the cooling towers and circulating water system are drained by gravity and discharged directly into Moutard Reservoir. (R. 7). Outfall 002 is the Ash Pond Treatment System which discharges directly to Moutard Reservoir via a riser structure. (R. 7-8). The ash pond receives ash transport water containing bottom ash and fly ash, coal pile runoff, storm water runoff, cooling tower blowdown, flue gas desulfurization

(FGD) wastewater, and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis (RO) wastewater, plant area wash down water, landfill leachate, monofill leachate, equipment heat exchanger water, groundwater, yard sump overflows, occasional piping leakage from limestone slurry and the FGD system, and treated domestic wastewater. (R. 7-8).

Internal Outfall 008 transports fly ash, bottom ash transport, and cooling tower blowdown. (R. 8). Cooling tower blowdown is mixed with ash sluice water and is discharged into the ash pond. (R. 8). "These waste streams and ash transport water are directly discharged to the ash pond [and] [c]ooling tower blowdown is usually indirectly discharged to Moutard Reservoir via Outfall 002." (R. 8). "Ash transport flows will be eliminated from this outfall upon completion of conversion to dry ash transport handling, whereby fly ash and bottom ash will be disposed of into a dry landfill." (R. 8).

Elevated levels of the toxic pollutants, mercury, arsenic, and selenium, are present in the discharge from the MEGS ash pond. (R. 9). Enerprog has installed a Flue Gas Desulfurization (FGD) system that removes sulfur oxides (SOx) from air emissions by mixing flue gas with a limestone slurry in order to comply with Progress's Clean Air Act State Implementation Plan. (R. 9). The fourth outfall (Internal Outfall 009) transports discharge from the FGD blowdown treatment system into the ash pond. (R. 8). FGD blowdown is also indirectly discharged to Moutard Reservoir via Outfall 002. (R. 8).

The Permit

The permit allows the continuance of water pollution discharges from MEGS. (R. 6). However, the permit further requires that Enerprog terminate use of the MEGS ash pond by November 1, 2018, dewater the pond by September 1, 2019, and cover the pond with an

impermeable cap by September 1, 2020. (R. 6). These requirements were added to the permit pursuant to section 401(d) of the CWA, in order to bring MEGS into compliance with the Progress Coal Ash Cleanup Act (CACA). (R. 8-9). CACA was enacted to facilitate the remediation of Progress's substandard coal ash disposal facilities. (R. 8). It is aimed at preventing leaks from these facilities into the ground and surface water, as well as preventing other risks to the public linked to failed ash pond containment systems. (R. 8-9). Additionally, EPA staff has determined that it is economically feasible for MEGS to adopt dry handling of the waste it generates without adding more than twelve cents per month to average customer's electric bills. (R. 9). Thus the permit writer used his best professional judgment to determine that dry handling is the Best Available Technology (BAT), and wrote the zero discharge requirements into the permit. (R. 9).

In order to meet all of the requirements of CACA and decommission the ash pond, the facility must build a new Retention Basin, and reroute all current discharges into the ash pond. (R. 9). Outfall 002A will, once constructed, discharge from the new lined retention basin. (R. 8). "The flows from the ash pond will be re-directed to the retention basin when the construction of the retention basin is completed." (R. 8). At that point, the ash pond will no longer accept any wastewater. The "[r]etention basin will accept wastes from the holding cell". (R. 8). The wastewater from this outfall discharges to Moutard Reservoir via Outfall 002. (R. 8). In addition to remediation and capping, the permit requires that MEGS cease discharge of pollutants in fly ash transport water and bottom ash transport water by Novermber 1, 2018. (R. 10).

The EAB denied both Enerprog and FCW's petitions for review of the final decision on the issuance of the permit. (R. 2). Both sides timely filed petitions for review in this Court requesting on various grounds that the permit be remanded to the EAB for further consideration. (R. 2). This Court consolidated the petitions for review. (R. 2).

STANDARD OF REVIEW

This case involves judicial review of a final permitting decision of the Environmental Appeals Board of the United States Environmental Protection Agency. "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). "The [Administrative Procedure Act requires a reviewing court] to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016). Accordingly, this Court should afford deference to the EPA's opinions and conclusions. *See id.*

SUMMARY OF THE ARGUMENT

First, the Environmental Appeals Board correctly held that Progress's capping plan for the ash pond constituted an appropriate requirement of state law, as states have authority to impose conditions that are related to state water quality standards. However, the EAB erred in holding that the EPA lacked discretion to reject the state of Progress's requirements for capping and remediation of the ash pond under CACA. As the agency charged with administration of the Clean Water Act, the EPA may determine which conditions of state law are sufficiently related to water quality such that they are considered "appropriate requirements of state law" within the meaning of the statute.

Second, although there is a small amount of persuasive authority that the EPA Administrators 2017 notice was insufficient to suspend compliance deadlines for the 2015 Effluent Limitation Guidelines that should not deter this Court from making its own determination based on the facts of this case. This Court should hold that given the narrow scope of the Notice, and the

inherent authority of the EPA to conduct review of promulgated rules, the notice was sufficient to suspend certain 2015 ELG compliance deadlines.

Third, EPA Region XII could rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash transport wastes, independent of the applicability or effectiveness of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines. BPJ is warranted because the 1982 ELGs do not adequately cover some of the riskiest pollutants at issue today. Given that EPA has such broad discretion to interpret the statutes it is charged with administering, and the fact that is in the best position to interpret the statute, this Court should defer to the Agency's reasoning.

Fourth, the EAB correctly held that NPDES permitting requirements do not apply to EnerProg's pollutant discharges into the MEGS ash pond, in light of EPA's July 21, 1980 suspension of the provision of 40 C.F.R. section 122.2 that originally included waste treatment systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States. If the intent of Congress is not clear enough from the fact that they took the time to add a note suspending the portion of the statute that applied to such discharges, the rule it has been reincorporated twice by the Supreme Court since it was first promulgated thirty-five years ago. These factors militate in favor of upholding the current rule.

Finally, the ash pond closure and capping plan does not require a permit for the discharge of fill material pursuant to section 404 of the CWA. 40 C.F.R. 122.2, the regulation that defines "Waters of the United States,"" specifically exempts . . . water treatment systems, including ponds designed to meet the requirements of the CWA." Because 40 C.F.R. exempts waters, such as the ash pond, from being included in the definition of water of the United States, the fill permit is inapplicable.

ARGUMENT

I. The Final Permit properly included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the CWA section 401 certification because the EPA is required to include requirements of state law and remediation and closure are rationally related to water quality, thus constituting appropriate requirements of state law.

The Final Permit properly included the conditions provided by the State of Progress in the CWA section 401 certification requiring the closure and remediation of the coal ash pond even though the Environmental Appeals Board (EAB) was incorrect in concluding that "EPA has no discretion to reject a condition included in a State section 401 certification". (R. 11.) Section 401(d) of the CWA states that "any other appropriate requirement of State law set forth in [a] certification [granted under this section], … shall become a condition on any Federal license or permit." 33 U.S.C.S. § 1341. This portion of that statute clearly requires that for a condition the become a part of a permit under the CWA that there is some threshold requirement of appropriateness.

There is no bright line rule to establish what constitutes an "appropriate requirement of state law" for the purposes of this statute. *See Pud No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 713 (1994). However, "[i]n conjunction with the permitting process, the CWA gives states an express role in approving or barring discharges into their navigable waters, and in setting out the conditions under which such discharges may occur." *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 3 (2011). The permitting conditions that required the remediation and closure of the ash pond were properly included in the permit because Congress intended that such appropriate conditions that bear a relation to state water quality standards would be incorporated into permits issued under CWA 33 U.S.C. § 1342.

a. The EPA has jurisdiction to consider the consistency of Progress certification conditions with CWA section 401(d) because the EPA is the agency charged with administering the CWA, and thus may determine what constitutes an appropriate requirement of state law.

The EAB erroneously relied on *Am. Rivers v. FERC* in determining that the EPA had no discretion to reject a requirement of state law's inclusion in an NPDES permit. See *Am. Rivers v. FERC*, 129 F.3d 99, 102 (2d Cir. 1997) (discussing the *Federal Energy Regulatory Commission's* authority to reject a state law condition incorporated into an NPDES permit under the CWA). The EPA is the agency vested with express authority to administer the provisions of the CWA. *See* 33 U.S.C.A. § 1251(d).

Pursuant to § 401(a)(1) of the CWA, 33 U.S.C.A. § 1341(a)(1), an applicant for a permit or federal license, for any activity that may result in a discharge into the navigable waters of the United States, must also apply for a certification from the state in which the discharge originates stating that the licensed activity will comply with state and federal water quality standards. "[I]t is generally assumed -- absent a clearly expressed legislative intention to the contrary -- "that Congress expresses its purposes through the ordinary meaning of the words it uses . . . ." *Am. Rivers*, 129 F.3d at 107 (citing *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984)). The plain language of the CWA section 401(d) states that "appropriate requirements of state law *shall* become" a condition of such permits. 33 U.S.C.A. § 1341 (emphasis added). In *Am. Rivers*, the Second Circuit also pointed to 40 C.F.R. § 124.55(e) which provides that "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part." 129 F.3d at 106. However, 40 C.F.R. § 124.55(c) requires the EPA administrator to ignore any condition of state law that is less stringent than the applicable Federal

licensure requirements. This shows that the EPA has some ability to consider the conditions imposed by state law.

In *Am. Rivers*, the Second Circuit chose to emphasize Congress's use of the word "shall" to discern the meaning of 401(d). 129 F.3d at 107. However, use of the qualifier "appropriate" suggests that there are requirements of state law that could be deemed "inappropriate". "Although § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded." *Pud No. 1*, 511 U.S. at 712. Other agencies issuing permits pursuant to the CWA are not vested with as much discretion as the EPA. *See Am. Rivers*, 129 F.3d at 107 ("This language is unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions it finds to be *ultra vires*."). In *Am. Rivers*, the Second Circuit stated that because FERC is not charged with administration of the CWA, they need not afford any deference to FERC's interpretation of the Act. 129 F.3d at 107.

While the Second Circuit was correct in concluding that FERC did not have discretion to reject state law requirements when issuing permits, it does not follow from that conclusion that the EPA is also barred from such considerations. *See id.* Here, the Court should defer to EPA's interpretation of the statute that they are charged with administering. *See Chevron*, 467 U.S. at 844. While conditions of state law that are otherwise appropriate within the meaning of section 401(d) must be challenged through the judicial procedures of the state, the EPA has discretion to review such conditions with regard to appropriateness. *See* 40 C.F.R. §§ 124.55(e), 124.55(c); *see also Pud No. 1*, 511 U.S. at 712. Given that the authority of a state to impose restrictions on the certification is not unbounded, and EPA is the agency charged with administering the statute, they have the authority to reject a condition that is inappropriate or not sufficiently related to water quality. *See Pud No. 1*, 511 U.S. at 712 (1994).

b. Assuming that EPA and this Court have the power to review the consistency of the State law conditions with CWA section 401(d), the ash pond closure and remediation conditions constitute "appropriate requirements of State law" as required by CWA section 401(d) because they are rationally related to preserving Progress's water quality standards.

The ash pond closure and remediation conditions are "appropriate requirements of State law". "A state water quality standard 'shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.' 33 U.S.C. § 1313(c)(2)(A)." *Pud No. 1*, 511 U.S. at 704. "§ 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 711-12. "The [CWA] also allows States to impose more stringent water quality controls. See 33 U.S.C. §§ 1311(b)(1)(C), 1370. See also 40 CFR § 131.4(a) (1993) ('As recognized by section 510 of the Clean Water Act[, 33 U.S.C. § 1370], States may develop water quality standards more stringent than required by this regulation')." *Id.* at 705.

The Supreme Court has thus far declined to adopt a conclusive test for what constitutes an appropriate requirement of state law. *Id.* at 713 ("We do not speculate on what additional state laws, if any, might be incorporated by this language. But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law."). Section 303 of the CWA requires States to formulate water quality standards and submit them to the EPA Administrator for approval. 33 U.S.C. § 1313. If the standards do not meet the requirements of the CWA then the Administrator will return them to the State so that they can be amended. *Id.*

"Section 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 v. FERC*, at 107 (citing *Pud No. 1 of Jefferson County,* 511 U.S. at 711). State water quality standards must contain

three elements, (1) designated uses, (2) numeric or narrative water quality criteria, and (3) antidegradation rules. *North Dakota v. United States Army Corps of Eng'rs*, 270 F. Supp. 2d 1115, 1124 (D.N.D. 2003). Additionally, "EPA's conclusion that *activities* -- not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference." *Pud No. 1*, 511 U.S. at 712 (citing *See, e. g., Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

"The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.10(a). In *Pud No. 1*, the Supreme Court held that requiring a minimum stream flow between 100 and 200 cubic feet per second depending on the season was sufficiently related to water quality so as to constitute an appropriate requirement of state law under 401(d). 511 U.S. at 723 (stating that a "[s]tate may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard.").

Here, Fossil's CACA requirements for remediation and capping of the ash pond are clearly related to water quality, as they are directed at abating certain risks to the public including the leaking of harmful pollutants into ground and surface waters. (R. 8-9). The state of Progress is clearly empowered to determine the designated uses of its waters. *See North Dakota v. United States Army Corps of Eng'rs*, 270 F. Supp. 2d at 1124. Given that designated uses include industrial activities, the operation of a coal-burning power plant falls squarely within that definition. *See* 40 C.F.R. § 131.10(a); *see also Pud No. 1*, 511 U.S. at 712. While pollutant

seepage from an ash pond into ground and surface water is factually distinct from stream flow levels, it is clearly a concern directly related to the water quality of that state of Progress, and the remediation is a requirement contained in a state law water quality standard. *See Pud No. 1*, 511 U.S. at 723.

II. The April 25, 2017 EPA Notice suspending certain future compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water.

Section 705 of the Administrative Procedure Act states that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C.A. § 705. The United States Court of Appeals for the D.C. Circuit has held that "section 705 does not permit an agency to suspend a promulgated rule without notice and comment." *Becerra v. United States Dep't of Interior*, No. 17-CV-02376-EDL, 2017 WL 3891678, at *8 (N.D. Cal. Aug. 30, 2017) (citing *Safety–Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS, *2 (D.C. Cir. Jan. 19, 1996)). *Safety–Kleen Corp. v. EPA*, is an unpublished opinion and therefore not binding on any court. 1996 U.S. App. LEXIS, *2 (D.C. Cir. Jan. 19, 1996); *see Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 739 (1979) ("[A]s an unpublished opinion, the decision in that case does not establish precedent in this circuit. D.C. Cir. R. 8(f)").

"Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation." 82 FR 43494, 43496 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). "Where the rulemaking involves review of the agency's technical or scientific evaluations and determinations, the highest level of deference to the agency is to be applied." *Citizens Coal Council v. U.S. Envt'l. Protection Agency*, 447 F.3d 879, 890 (6th Cir. 2006) (citing *Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)). Additionally, the CWA expressly bestows upon

the EPA the authority to reconsider and revise effluent limitation guidelines. 33 U.S.C. § 1311(d) ("Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed *at least* every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.") (emphasis added).

In this case, the EPA is only suspending compliance deadlines under the 2015 ELGs for two very specific categories of discharges, FGD wastewater and bottom ash transport water. 82 FR 43494, 43495. The revisions are being considered specifically due to concerns regarding the feasibility of compliance with new technology requirements. *Id.* at 43496. Although the current EPA Administrator did not stay the 2015 ELGs until after the effective date had passed, the guidelines were already slated for judicial review in the 5th Circuit prior to their effective date. (R. 9). This is because several interested parties filed complaints regarding their ability to comply with the technological requirements of the ELGs. 82 FR 43494, 43496. As the purpose of the revisions of the ELGs are technological in nature the Courts should afford the EPA the highest level of deference. *See Citizens Coal Council*, 447 F.3d at 890. Given the EPA's inherent discretion in reconsidering past rulemakings, this Court should hold that the EPA has authority under the APA to suspend compliance deadlines where failure to do so would result in excessive costs to industries before they find out what the outcome of the new rulemaking will be and if the proposed suspension is narrow in scope. *See* 82 FR 43494, 43496-97.

III. The EPA could rely on best professional judgment as an alternative ground requiring zero discharge of coal ash transport wastes.

40 C.F.R. 423.10 statute provides the following:

> "provisions of this part apply to discharges resulting from the operation of a generating unit by an establishment whose generation of electricity is the predominant source of revenue or principal reason for operation, and whose generation of electricity results

> primarily from a process utilizing fossil-type fuel (coal, oil, or gas). . . ."

In the present case, EnerProg L.L.C. pollution discharge is associated with its operation of the Moutard Electric Generating Station ("MEGS"). (R. 6). MEGS is a coal-fired steam electric power plant and EnerProg's operation of MEGS is the principal reason for operation. *Id.* The zero discharge requirement for bottom ash and fly ash is an element of the 2015 ELG's for Steam Electric Power Generating Industry category. *See* 40 C.F.R. 423.13(h)(1) and (k)(1).

Although the zero discharge requirement for bottom ash and fly ash is an element of the 2015 ELGs for the Steam Electric Power Generating Industry Category, the EPA's staff alternative reliance on best professional judgment ("BPJ") is justified. The staff's reliance on BPJ is not a supporting mechanism for the effect of the 2015 ELGs, in fact, BPJ on its own is justified if the "2015 ELGs were eliminated or vacated." (R. 11). The staff's reliance on BPJ in requiring zero discharge is justified independent of the 2015 ELG's.

a. The EPA's reliance on BPJ is justified because statutory interpretation provides that the statute's literal meaning extends BPJ to pollutants not covered by the 1982 ELGs.

The BPJ statute provides that "[w]here promulgated effluent limitations 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 in order to carry out the provisions of the Act." 40 C.F.R. 125.3(c)(3). "There are only two ways for an individual discharger to avoid the incorporation of applicable ELGs into an NPDES permit: first, where the discharger is operating under a permit that was issued prior to the promulgation of the ELGs ; or second, in rare cases, where the EPA grants the discharger a variance based on the discharger's demonstration that it is "fundamentally different" from other dischargers in the category or subcategory." *Texas Oil & Gas Ass'n v. United States Environmental Protection Agency*, 161 F.3d 923, 928–29 (5th

Cir.1998). The MEGS coal ash pond contains toxic pollutants such as mercury, arsenic, and selenium that are not adequately regulated by the 1982 ELGs. The toxic pollutants associated with MEGS remain in the environment for years. Unites States Environmental Protection Agency, *Steam Electric Power Generating Effluent Guidelines – 2015 Final Rule*, https://www.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-2015-final-rule. (last visited November 26, 2017). The regulations for the industry were last updated in 1982 and do not adequately address toxic metal discharges. *Louisville Gas and Elec. Co. v. Ky. Waterways All.*, 517 S.W.3d 479, 481 (Ky. 2017). Because the 1982 ELGs do not address the pollutants associated with MEGS coal ash pond, the BPJ limits is applicable to MEGS.

The term "promulgated effluent limitations" is addressing pollutants that have been publicly announced and covered by a law. In this case, the 1982 ELGs was a publicly announced guideline which addressed certain pollutants, none of which are selenium, arsenic, and mercury. In 1982, selenium, arsenic, and mercury had such a *de minimis* impact on the water at that time that the court did not address those pollutants. *See Louisville Gas and Elec. Co.*, 517 S.W.3d at 481. The BPJ statutes literal meaning provides the EPA the ability to rely on its BPJ to regulate pollutants not covered by the ELGs. Because Congress's intent is clear in this statute, this should have ended the matter. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

The plain meaning rule applies in this instance and as such the Environmental Appeals Board ("EAB") correctly applied BPJ as it is written in the statute. The starting point of statutory interpretation is at the plain meaning rule. Construing a federal statute such as BPJ, the court should start with the meaning of the words in the statute. *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 Tul. L. Rev. 955. The Supreme Court has strictly adhered to strictly textual plain

meaning rule. *Id.* The Court first looks at the plain meaning of the statue. In this case, the statue specifically sates that the EPA can regulate pollutants that are not covered by effluent limitations on a case-by-case basis. As it stands, the plain meaning of the statue provides that the EPA can rely on this statute independent of the 2015 ELGs.

In *Louisville Gas and Elec. Co.*, the two parties disagreed over whether the 1982 Guidelines applied to mercury, selenium, and arsenic or whether the promulgated effluent limitations did not apply to those pollutants at all. In that case, the Court held that because the Cabinet, an environmental state agency for Kentucky, reasonably interpreted the statute, that such an agency is accorded great deference when interpreting a statute. Although the Court in this case held that 40 C.F.R 125.3(c)(3) did not apply because the guidelines "covered" mercury, selenium, and arsenic in the 1982 Guidelines, the Court's decision was primarily based on according the agency in that case great deference. Similarly, in the present case, the EPA, the federal agency has determined that the 1982 ELG's does not cover the pollutants above. Because of Chevron's deference, the EPA's finding that BPJ does apply to mercury, selenium, and arsenic, the Court should accord great deference to the EPA. In addition, the EPA, the agency who creates these Guidelines has determined that the 1982 ELGs did not effectively cover those pollutants and the fact that a new set of guidelines were promulgated to cover arsenic, selenium, and mercury, clearly shows that Congress's intent is to have 125.3(c)(3) apply where the statute did not apply to those pollutants. The fact that the EPA has determined that BPJ applies in this case and a new set of guidelines were specifically created to cover those pollutants clearly shows that BPJ is applicable to toxic pollutants such as mercury, arsenic, and selenium.

b. Even if the Court were to find that the plain meaning approach was not applicable to the BPJ statute, the legislative history and the purpose of the CWA supports the EPA's reliance on BPJ.

In the rare event that the Court finds that the plain meaning rule does not apply, the legislative history, underlying policy, and legislative intent, equally implies the purpose of the BPJ statute was to regulate activities and pollutants not covered by the ELGs. *Burke v. Port Resort Realty Corp.*, 1999 ME 193 (1998). The BPJ was implemented to address toxic metal discharges that were not addressed in the 1982 ELGs.

Starting with the Clean Water Act ("CWA"), the broad comprehensive scheme, which includes BPJ, shows the legislative intent behind the statute in its broadest sense. *See Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 134 (1985). The CWA, from which the BPJ statute comes from, goals are to "regulat[e] discharges of pollutants into the waters of the United States and regulating quality standards for surface waters." 33 U.S.C. §1251 et seq. (1972). In order to regulate discharges of pollutants into the waters of the U.S. and surface waters, laws were implemented to prevent and control pollutant discharges. The legislative history shows that the 1972 CWA was created to address environmental advocates concerns about the "increasingly serious deterioration in the quality of the nation's water." N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstoneon a Decade of Extraordinary Environmental Reform*, 4 George Washington Journal of Energy & Environmental Law 80 (July, 2013). The federal program was implemented as a means to combat water pollution across its pre-1972 history. *Id.* The 1972 CWA clearly shows the purpose behind creating this Act, which is to protect U.S. water by regulating water pollution.

As the court held in *Texas Oil & Gas Ass'n*, where one of the parties argued that the importance of national uniformity and categorical rather than individual treatment of point sources

within each category or class should be upheld, the court held that "[n]othing . . . in the legislative history or case law, suggests that Congress intended to deny the EPA discretion to set different limits for different point sources within the same category or subcategory when circumstances so warrant. *Texas Oil & Gas Ass'n v. United States Environmental Protection Agency*, 161 F.3d 923, 928–29 (5th Cir.1998). Similarly, BPJ is warranted because the 1982 ELGs do not adequately cover selenium, arsenic, and mercury. *See Louisville Gas and Elec. Co.*, 517 S.W.3d at 481. Because the EPA has such broad discretion and is in the best position to interpret the statute, their reasoning must be followed. It is safe to say that reliance on BPJ is adequate. The legislative history shows the comprehensive scheme of the CWA is to regulate water pollution, and if the EAB were not to apply the BPJ statute, their ruling would go against the purpose of the CWA.

IV. Discharges into the ash pond are not subject to effluent limitations.

40 C.F.R. 122.2 determines which bodies of waters are subject to effluent limits. The statute provides that "waters of the Unites States" to include "all impoundments of waters otherwise identified as waters of the United States." 40. C.F.R. 122.2. In addition, subsection (2) of this statute, specifically, excludes "water treatment systems, including treatment ponds or lagoons designed to meet the requirements of [CWA]." The last sentence of this subsection provides that this exclusion only applies to "manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of the waters of the United States." *Id.* However, incorporated in the statute is a notation to see Note 1 which states the following:

> NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . . " "appearing in § 122.2 within the definition of Waters of the United States." This revision continues that suspension. N1

a. The EAB and the EPA's interpretation that the suspension language in Note 1 must be followed because it is Congress's intent that Note 1 applies.

40 C.F.R. 122.2 initially excluded ponds from being subject to effluent limits and further describes these bodies of water. The bodies of water that are excluded are those bodies of waters that were never originally created in waters of the United States nor was a result from an impoundment of the waters of the United States. The statue does state that the exclusion applies only to waters that are not U.S. bodies of waters. The ash pond resulted from an impoundment of waters in the United States, Fossil Creek. (R. 7). However, the statute incorporates Note 1 that specifically suspends the last part of statute. Because the court has suspended the last part of the statute, the statute excludes ponds, such as Fossil Creek, from effluent limitations. The suspension has been in effect for over 35 years and has been reincorporated twice "in two subsequent reconsiderations of the definitions section of section 122.2." (R. 12.) The fact that the legislature has reviewed this statute twice and never changed the language of Note 1 or removed it, shows that the legislature's intent is to keep the note in effect.

As the Court held in *Umatilla*, where the statute did not include underground waters within the definition and there were proposals to amend the statute, the Court held that even though the CWA's NPDES program should have applied to groundwater to protect surface water, that the law as it were written and intended by Congress, and as it has applied for decades that the statute does not apply to underground water. *Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods*, 962 F. Supp. 1312, 1318 (D. Or. 1997). In addition, the court factored in the fact that the proposed amendment to change the statute failed clearly showed Congress's intent, "the failure of a proposed amendment strongly militates against a judgment that Congress intended a result that it expressly declined to enact." (internal quotes omitted) *Id.; See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S.

186, 200, 42 L. Ed. 2d 378, 95 S. Ct. 392; *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986).

As in *Umatilla*, Congress in this case clearly intended not to have effluent limitations apply to the ash pond. The fact that Congress added a note suspending the last part of the statute shows Congress's intent. Not only was the statute suspended, the court kept the language in effect for over 35 years. Even though there have been two subsequent reconsiderations to change the definitions section of 122.2, the Court continued to reincorporate the Note in the statute. These facts taken together shows Congress's intent for the statute. Congress's intent was not to have effluent limitations apply to ponds, such as the ash pond in this case.

V. The ash pond closure and capping plan does not require a permit for the discharge of fill material pursuant to section 404 of the CWA.

The 404 Permit is not required for the coal ash pond closure and capping because the pond is not considered a "water of the United States". 40 C.F.R. 122.2, the regulation that defines "Waters of the United States," "specifically exempts . . . water treatment systems, including ponds designed to meet the requirements of the CWA." Because 40 C.F.R. exempts waters, such as the ash pond, from being included in the definition of water of the United States, the fill permit is inapplicable. The statute FCW argues, 33 C.F.R. 323.2, is not applicable to the ash pond. The statute states that "the term fill material means material places in waters on the United States where the material has the effect of: replacing any portion of a water of the United States . . . or changing the bottom elevation of any portion of a water of the United States." Because it has already been determined that the ash pond is not a water of the United States by definition, 33 C.F.R. 323.2 does not apply.

Even though closure and capping of the ash pond will take place, this alone does not determine that these features will convert the area back into "Waters of the United States". As the EAB has held, "the 40 C.F.R. section 122.2 exemption for waste treatment systems does not contain any recapture provisions that would convert these features back to waters of the United upon their retirement." (R. 13). In Chevron, the court held:

> "[where] the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

Because the statute is silent on the issue of whether closure and capping reverts these features back to waters of the United States, the EAB's finding that the pond does not convert back to waters of the United States was permissible. (R. 13). As in *Chevron*, the court held that a permissible construction is one that is "not capricious, arbitrary, or manifestly contrary to the statute, it is a very low standard." *Id.* at 844. Because the EAB's interpretation of the statute is permissible, Chevron Deference requires this reviewing Court to accord great deference to the EAB's decision.

CONCLUSION

For the foregoing reasons, Respondent, the United States Environmental Protection Agency, respectfully requests that this Court reverse the EAB's decision that the EPA does not have discretion to review the permissibility state conditions to an NPDES permit and that EPA's April 2015 notice suspending certain ELG compliance deadlines is ineffective. We request that this Court affirm the decision of the EAB on all other grounds.

Respectfully Submitted,

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Attorneys for Respondent

November 27, 2017

The United States Environmental Protection Agency