Team No. 5

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.

Nos. 17-000123 and 17-000124

BRIEF OF PETITIONER, FOSSIL CREEK WATCHERS, INC.

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This case concerns the issuance of a Federal National Pollution Discharge Elimination System ("NPDES") Final Permit of the Clean Water Act ("CWA"), 33 U.S.C. § 1342 (2012). The Environmental Appeals Board ("EAB") had proper jurisdiction to review the initial petition. 40 C.F.R. § 124.19(a)(1) (2017). Jurisdiction is now proper in this Court for review of final decisions issued by the EAB. 33 U.S.C. § 1369(b) (2012); *see also* R. at 2.[1]

STATEMENT OF THE ISSUES

I. Whether 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, including the questions:

   a. Whether Environmental Protection Agency ("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).

II. Whether 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.

III. 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.

IV. 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 treatment systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States.

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

[1] The citations "R. at __" refer to pages of the Final Problem, Revised on October 25, 2017.

STATEMENT OF THE CASE

The mission of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). In order to accomplish that goal, the EPA, States, private businesses, and citizens alike have substantial roles to play. EnerProg, L.L.C. operates the Moutard Electric Generating Station ("MEGS"), a coal-fired electric generating power plant that provides the people of Progress with electricity. In an attempt to hold facilities like EnerProg's accountable, both the EPA and the State of Progress create and implement laws that encourage efficient and environmentally-friendly power generation. Similarly, Fossil Creek Watchers, Inc. ("FCW") aims to preserve the Earth by keeping a close eye on Fossil Creek in the face of constant pollution, legal loopholes, and regulatory oversight or inaction.

As technology advances, different entities argue amongst themselves rather than work toward the ambitious goals of the CWA. Power plants complain that more stringent regulations dilute efficiency even as technology and science advance. While the EPA and individual States work jointly under the statutory scheme Congress has gifted, specific questions do not come to the surface until the issue has threatened or already begun to pollute and degrade specifically protected resources.

This case concerns the legal and practical consequences of pushback from big businesses against the EPA as well as the detrimental effects an unlined coal ash pond can have on Progress River — a Water of the United States — and the entire Nation.

A. Statement of the Facts

1. EnerProg's Facility

MEGS is a coal-fired electric generating plant that withdraws less than 125 million gallons of water per day from the Moutard Reservoir in Fossil, Progress. R. at 7. The station is subject to EPA Effluent Limitations Guidelines ("ELGs") per 40 C.F.R. § 423 - Steam Electric Power Generating Point Source Category. R. at 7. MEGS operates a wet fly ash handling system and a wet bottom ash handling system, both of which use water to sluice ash solids through pipes to an ash pond that then discharges to the Moutard Reservoir. R. at 7. The facility utilizes two outfalls and two internal outfalls to treat the wastewater before it is either dumped into the ash pond or directly discharged to the Reservoir. R. at 7-8.

The first outfall ("Outfall 001") is the cooling tower system which, once a year, is drained and discharged directly into the Moutard Reservoir. R. at 7. The second outfall ("Outfall 002" or "the ash pond") is an ash pond treatment system that receives ash transport water containing bottom ash and fly ash, flue gas desulfurization ("FGD") wastewater, landfill leachate, and monofill leachate. R. at 7-8. The first internal outfall ("Internal Outfall 008") is the fly ash and bottom ash transport water system and cooling tower blowdown. R. at 8. This blowdown is mixed with ash sluice water before then discharging into the ash pond. R. at 8. Both the waste streams and the ash transport water directly discharge into the ash pond. R. at 8.

EnerProg's facility is about to undergo construction in order to comply with new industry standards. R. at 8. Specifically, a new lined Retention Basin will be built in order to decommission the use of wet fly ash and wet bottom ash. The wet ash transport flows from Internal Outfall 008 will eventually be eliminated from the ash pond upon completion of conversion to dry ash transport handling; fly ash and bottom ash will then be disposed of into a

dry landfill. R. at 8. The ash pond currently in use will be decommissioned by November 1, 2018. R. at 10.

2. The Bed of Fossil Creek, EnerProg's Ash Pond

EnerProg currently discharges its wet coal ash into an ash pond created in 1978 by damming the then free-flowing upper reach of Fossil Creek, a perennial tributary to the Progress River. R. at 7. The Progress River is a navigable-in-fact interstate body of water. R. at 7. Besides receiving ash transport water containing both bottom and fly ash, FGD wastewater, landfill leachate, and monofill leachate, the ash pond also receives coal pile runoff, stormwater runoff, cooling tower blowdown, and low volume wastes. R. at 8. Low volume wastes include boiler blowdown, oily waste treatment, wastes and backwash from the water treatment processes including Reverse-Osmosis wastewater, plant area wash down water, equipment heat exchanger water, groundwater, yard sump overflows, occasional piping leakage from limestone slurry and the FGD system, and treated domestic wastewater. R. at 8. Tests reveal that EnerProg's current system produces discharges that contain elevated levels of mercury, arsenic, and selenium, all toxic pollutants. R. at 9.

3. Progress's Legislative Initiative

Fearing the impact the pollutants can have on the community, Progress enacted the Coal Ash Cleanup Act ("CACA"), a law requiring the assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress. R. at 8. CACA's purpose is to "prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters." R. at 8-9. Because EnerProg is subject to comply with State certification conditions when applying for a NPDES permit

through the EPA, Progress incorporated CACA into EnerProg's final permit as "Special Condition A." R. at 10. It provides:

> EnerProg must cease operation of its ash pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020.

R. at 10.

4. EPA's Final Permit Conditions

According to both the 2015 revised ELGs for the Steam Electric Power Generating Point Source Category (40 C.F.R. § 423) and Best Professional Judgment ("BPJ") of the EPA, the Best Available Technology ("BAT") for toxic discharges associated with bottom ash and fly ash is zero discharge by utilizing the dry handling of these wastes. R. at 9. The EPA found that EnerProg would be sufficiently profitable in adopting dry handling of these wastes with zero liquid discharges since dry handling of bottom ash and fly ash had been in use at existing plants in the industry for many years. R. at 9. BPJ certified that the change would increase an average consumer's electric bill no more than twelve cents a month. R. at 9. Thus, EnerProg's final permit contained this condition from the EPA along with Progress's Special Condition A:

> By November 1, 2018 there shall be no discharge of pollutants in fly ash transport water. This requirement only applies to fly ash transport water generated after November 1, 2018.
>
> By November 1, 2018 there shall be no discharge of pollutants in bottom ash transport water. This requirement only applies to bottom ash transport water generated after November 1, 2018.

R. at 10.

During the construction of the lined retention basin that will eventually reroute the waste to utilize dry handling and ultimately decommission the ash pond, the permit currently authorizes the continued use of Internal Outfall 008 to transport bottom and fly ash to the coal pond subject

to no effluent limits until the closure of the coal ash treatment pond on November 1, 2018. R. at 9-10.

B. Procedural History

EPA Region XII re-issued EnerProg a federal NPDES permit on January 18, 2017, authorizing EnerProg to continue water pollution discharges associated with the operations of its generating station. R. at 6. On April 1, 2017, EnerProg and FCW filed petitions for review of the re-issuance of the NPDES permit, requesting that the permit be remanded for further consideration. R. at 6. The EAB denied both of the petitions and affirmed EnerProg's NPDES permit as issued. R. at 6. Both EnerProg and FCW timely filed petitions seeking judicial review of the final decision of the EAB to deny re-consideration of the permit. R. at 2. This Court determined that both petitioners have standing to pursue the petitions for review, consolidated the two petitions for review, and certified that all issues raised in the petitions were properly preserved for appeal. R. at 2.

SUMMARY OF THE ARGUMENT

The EAB improperly denied review of EnerProg's NPDES permit. First, the Board erroneously stated that the EPA has jurisdiction to determine the appropriateness of state-imposed conditions that are incorporated into NPDES permits under section 401(d) of the CWA. Simply put, the EPA does not have the authority to reject state-imposed conditions within the scope of section 401(d). Furthermore, though the Board correctly determined that the State of Progress's conditions were "appropriate requirements of State law" under 33 U.S.C. § 1342(d), the Board failed to recognize that the final condition constitutes a discharge under section 404 of the CWA.

Second, the Board incorrectly held that EPA Administrator Scott Pruitt's April 25, 2017 Notice is effective to require the suspension of permit compliance deadlines in the 2015 final ELG for the Steam Electric Power Generating Industry for achieving zero discharge of coal ash transport water. By contrast, the Administrator's Notice is *not* effective to require the suspension of permit compliance deadlines because (1) the BAT is readily available to effectively limit pollutant discharge, (2) industry cost, if any, is significantly outweighed by environmental benefits, and (3) the EPA lacks authority to postpone compliance deadlines under the Administrative Procedures Act ("APA").

Third, the EAB correctly found that absent the 2015 ELGs, EPA Region XII could rely on best professional judgment as an alternative ground to require zero discharge of coal ash transport wastes because EnerProg's ash pond contains pollutants that were not regulated by the 1982 ELGs, meaning EnerProg can be subjected to a case-by-case assessment.

Fourth, the Board incorrectly held that discharges into EnerProg's ash pond are not subject to effluent limits, even though Outfall 008 is a point source defined under the CWA and the intermittent tributary to the Progress River constitutes a tributary to a water of the United States. Because of this, discharges into the MEGS ash pond are subject to NPDES permit regulations.

Finally, the EAB failed to determine pollutant discharges into the ash pond are subject to effluent limits due to the ash pond historically being a water of the United States. Thus, while EnerProg's general activities are still subject to NPDES permitting authority, the specific closure and capping plan for EnerProg's ash pond mandated by Progress's legislation requires EnerProg to also apply for a discharge of fill material permit under section 404 of the CWA.

STANDARD OF REVIEW

This Court may only uphold the EAB's final decision if the decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). Though this Court cannot substitute its judgment for the agency, the agency must have examined the relevant data and articulated a satisfactory explanation for its decision including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. Though the Final Permit's capping requirement is an "appropriate requirement of State law" under section 401 state certification standards of the CWA, the capping provision is subject to a section 404 fill permit.

The EPA has no authority to determine the appropriateness of conditions implemented in State CWA section 401 certifications. Section 402 of the CWA specifically prohibits discharges of pollutants unless NPDES permits are issued. 33 U.S.C. § 1342 (2012). The NPDES is a "federal permit program designed to regulate the discharge of polluting effluents." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). Some states have EPA-programs which empower the state to issue NPDES permits and conduct the regulatory processes, with the EPA providing oversight only when necessary. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007). Other states, like Progress, do not have delegated authority from the EPA to regulate such programs.[2] Rather, EPA Region XII issued EnerProg's NPDES permit. Regardless of whether a state or the EPA issues an applicant the final permit, all states are authorized under 401(d) to condition such permits to ensure water-quality standards of the state

[2] The EPA retains authority to issue NPDES permits in the District of Columbia, Idaho, Massachusetts, New Hampshire, and New Mexico. *See,* https://www.epa.gov/npdes/npdes-state-program-information.

are met, even if such conditions go beyond the minimum federal regulations. 33 U.S.C. § 1341(d) (2012).

First, the Board incorrectly stated that the EPA has jurisdiction to reject a condition a state imposes on an NPDES permit. Instead, the EPA has two choices: accept and certify the permit as a whole or reject and veto the permit in its entirety. Though the Board correctly concluded that Progress's certification requirement for EnerProg's facility was an "appropriate requirement of state law" under section 401(d), the Board erroneously stated that the EPA could reject such conditions. But, the EPA has no jurisdiction to discard a specific state-imposed condition so long as it conforms with section 401's broad statutory language.

Second, while the Board correctly determined that Progress's condition was appropriate, FCW objects to the Final Permit's capping requirement insofar that the permit unlawfully allows EnerProg to cap coal-ash solids without first removing the waste from the impoundment pond. Failing to remove the coal ash solids constitute a discharge and thereby mandates EnerProg apply for a section 404 permit. The State of Progress requires three special conditions be met before EnerProg may receive a section 401 NPDES permit: EnerProg must (1) terminate its use of the coal ash settling pond at MEGS by November 1, 2018, (2) dewater the ash pond by September 1, 2019, and (3) cap the remaining coal combustion residuals by September 1, 2020. R. at 6.

Specifically, FCW objects to the third condition of the section 401 certification. Allowing coal combustion residuals to remain where a stream once flowed is in conflict with section 404 of the CWA, regardless of what a state's section 401 certification condition provides. The CWA encourages states to incorporate stringent, additional requirements in order to protect the

Nation's waters and air. The statutory scheme does not, however, permit states to misapply or circumvent applicable provisions of the CWA.

Therefore, although Progress has presented an appropriate requirement for EnerProg's NPDES permit, the third condition will, in practice, violate the CWA. Because EnerProg will be discharging fill and dredge into a waterbody of the United States, EnerProg accordingly must apply for a section 404 dredge and fill permit.

A. EPA has no jurisdiction to determine the appropriateness of state certification conditions imposed pursuant to section 401 of the Clean Water Act.

Section 401(a) of the CWA requires that EPA obtain certification from the state where the discharge will occur to ensure that the discharge will be in compliance with both state and federal regulations. 33 U.S.C. § 1341(2012). State certification requirements unambiguously encourage states to add additional water-quality standards conditions to the license of any applicant, so long as the conditions comply with minimum standards under federal law. *Id.* § 1341(d). Specifically, the statute reads:

> *Any* certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, *and with any other appropriate requirement of State law* set forth in such certification, and *shall* become a condition on any Federal license or permit subject to the provisions of this section.

Id. (emphasis added).

In *PUD No. 1 v. Wash. Dep't of Ecology*, the United States Supreme Court articulated the balance of authority between federal agencies and states regarding section 401 certification. 511 U.S. 700, 724 (1994). The Court interpreted the language of section 401(d) to encourage states to impose "other limitations" on a project to ensure compliance with various provisions of the

CWA and "any other appropriate requirement of State law." *Id.* at 711. The Supreme Court held that this interpretation of section 401(d) follows the EPA's interpretation:

> A certification made by a certifying agency shall include a statement that there is a reasonable assurance that the *activity* will be conducted in a manner that will not violate applicable water quality standards.

Id. at 712 (emphasis added) (quoting 40 C.F.R. § 121.2(a)(3) (2017)). The Court concluded that the term "activities" rather than merely "discharges" must comply with "effluent limitations, water quality standards, . . . and with 'any other appropriate requirement of State law'" was a reasonable interpretation of section 401, given the deference owed to the EPA in construing their own statutes. *Id.*

For example, in *American Rivers v. FERC*, the Second Circuit Court of Appeals held that the Federal Energy Regulatory Commission ("FERC") had no authority to reject conditions imposed by the State of Vermont on a NPDES permit prior to the issuance of the license. 129 F.3d 99, 102 (2d Cir. 1997). After Vermont certified the State's conditions to the applicant, a hydroelectric facility, FERC reviewed the conditions and refused to incorporate three into the license that was issued, reasoning that Vermont exceeded their scope of authority under section 401(d). *Id.* at 103. The State and the facility objected, citing to the statutory language of section 401(d) that "FERC had no authority to review and reject the substance of a state certification or the conditions contained therein." *Id.* at 106. The Second Circuit agreed, finding the plain language of section 401(d) foreclosed FERC's belief that Vermont exceeded its authority in conditioning the permit.

PUD No. 1 and *American Rivers* are illustrative to the present case. Section 401(d) unequivocally states that "any certification provided under this section . . . shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. §

1341(d) (2012). Furthermore, unless there is a clear legislative intent language declaring otherwise, "Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Although a state's authority is not unbounded when contemplating section 401(d) certification requirements, *PUD No. 1*, 500 U.S. at 713, EPA is not authorized to reject the condition and still issue the NPDES permit.

The EPA promulgated 40 C.F.R. § 124.55(e), which states that "review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State . . ." 40 C.F.R. § 124.55(e) (2017). EnerProg claims that because the State of Progress has no judicial review process through its state courts, the EPA now has jurisdiction over state-imposed conditions. R. at 10. But Progress's lack of a judicial review process neither negates 40 C.F.R. § 124.55(e) nor assigns jurisdiction over state legislative matters to the EPA. The Board correctly noted in its final decision that it has "no discretion to reject a condition included in a State section 401 certification." R. at 11. Therefore, the EPA has no authority to reject a State's legislative initiatives that are required to be incorporated in NPDES permits.

B. Progress's ash pond closure and remediation conditions are "appropriate conditions of State law" so long as EnerProg applies for and receives a section 404 permit.

Assuming that this Court has proper jurisdiction to determine whether or not a state-imposed condition is an "appropriate requirement of state law," 33 U.S.C. § 1341(d), and conceding that the EPA does have the power to veto an application if it chooses, Progress's state law is an appropriate condition for section 401 certification purposes. Progress's Coal Ash Clean Up Act ("CACA") requires "assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress." R. at 8. CACA's purpose is to "prevent public hazards

associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters." R. at 8-9.

The Supreme Court, Congress, and the EPA have made clear that States have broad authority to control the impact of polluting activities within its borders. *See PUD No. 1*, 577 U.S. at 735 (holding that a State's minimum streamflow conditions in a section 401(d) certification was lawful to enforce a designated use contained in a state water quality standard).

Here, EnerProg's assertion that Progress's legislation is "not an appropriate requirement of State law" under section 401 is meritless. First, Progress's section 401 certification fits well within the requirements of 33 U.S.C. § 1341(d). Progress can use section 401 to ensure that the whole of an activity meets state water quality requirements whenever the threshold conditions of a permit and a discharge are met. *PUD No. 1*, 577 U.S. at 712. *See also*, Debra L. Donahue, *The Untapped Power of the Clean Water Act Section 401*, 23 Ecology L. Q. 201, 217 (1996). EnerProg's activity results in a pollutant discharge, thus requiring EnerProg to obtain a NPDES permit and ensure its ash ponds satisfy Progress's state water quality requirements. Furthermore, the EPA challenges States to consider "all of the potential effects of a proposed activity on water quality — direct and indirect, short and long term, upstream and downstream, construction and operation — should be part of a State's certification review." *Id.*

II. The EPA Administrator's Notice to Suspend Future Compliance Deadlines is not effective to require EnerProg's NPDES permit compliance deadlines for achieving zero discharge of coal transport water.

The April 25, 2017 Notice suspending certain future compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is not effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water. First, the technological bases underlying the 2015 Rule are widely available

and affordable now. Many steam electric plants have already installed or are in the process of implementing these technologies, thus postponing the compliance dates would hinder technological development. Second, any postponement allows power plants to continue discharging pollutants, thereby harming the public health and the environment. These forgone public health and environmental benefits outweigh any industry cost due to postponement. Finally, the EPA lacks authority to postpone the compliance dates.

A. Best Available Technology under the 2015 ELG exists and utilizes current and profitable means for compliance.

BAT under the 2015 rule is available, and postponing the compliance dates of the ELGs would hinder the development of this existing technology. The ELGs set effluent limitations for categories and subcategories of point sources. 33 U.S.C. § 1314(b) (2017). The limitations are technology-based rather than harm-based, meaning they reflect the capabilities of "available pollution control technologies to prevent or limit different discharges." *Tex. Oil & Gas Ass'n v. United States EPA*, 161 F.3d 923, 927 (5th Cir. 1998). Under this scheme, a majority of ELGs have been required to represent the best available technology economically achievable. 33 U.S.C. §§ 1311(b)(2), 1314 (2012). When determining BAT, factors must take into account the age of the equipment and facilities involved, the process employed, the engineering aspect of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors the Administrator deems appropriate. *Tex. Oil & Gas Ass'n*, 161 F.3d at 928.

In this case, the EPA determined that dry handling of bottom ash and fly ash has been in use at existing plants in the industry for many years. R. at 9. MEGS is sufficiently profitable to adopt dry handling of these wastes with zero liquid discharges, with no more than a twelve cents per month increase in the average consumer's electric bill. R. at 9. Although the EPA suggested

postponing the compliance dates for the new, more stringent requirements applicable to fly ash transport water, gasification wastewater, and flue gas mercury control wastewater, this final rule does not postpone the former compliance dates. The EPA agrees that the final rule should postpone only those requirements that the Agency plans to potentially revise in the next rulemaking. Because EPA is not conducting a new rulemaking concerning issues regarding requirements for fly ash transport water, the Agency is not postponing the compliance dates for the waste streams or any of the other compliance dates for the requirements in that Rule.

Here, the EPA issued BAT determinations for the steam electric power plant industry requiring EnerProg to terminate its use of the coal ash settling pond by November 1, 2018. R. at 6. Three years from the first compliance date is November 1, 2020. EPA's proposal would set compliance deadlines for BAT which exceed the three-year deadline in the Clean Water Act. In fact, any postponement of the BAT deadlines in the final ELG rule would be unlawful because the EPA lacks authority under the Act to extend compliance deadlines beyond the three year maximum in the statute. *Nat. Res. Def. Couns. v. EPA*, 489 F.3d 1364, 1373-74 (D.C. Cir. 2007). Therefore, extending the compliance date of the ELGs. Therefore, because the EPA is not conducting new rulemaking procedures concerning coal ash transport water and the best available technology is currently in use at other similar facilities, the compliance dates should not be subject to postponement.

B. Postponing the compliance deadlines unwisely weighs industry cost as more significant than the public health and environmental benefits.

Postponing the compliance deadlines is a detriment to public health, and the public health and environmental benefits outweigh industry cost. EPA's proposal to postpone the ELG compliance dates is based on the bare assertion that "[i]n light of these imminent planning and capital expenditures that facilities incurring costs under the Rule will need to undertake in order

to meet the compliance deadlines for the new, more stringent limitations and standards in the Rule . . . the Agency views that it is appropriate to postpone the compliance dates of the Rule that have not yet passed." 82 Fed. Reg. 26,017, 26,018 (June 6, 2017).

EnerProg asserts that the effect of this suspension notice is to relieve it from compliance with the November 1, 2018 deadline for achieving zero discharge of coal ash related effluents. R. at 11. However, EnerProg has not demonstrated that the compliance deadline in the issued permit as issued is infeasible. R. at 11. EPA's perceived need to postpone the compliance deadlines ignores this reality: The majority of power plants are not spending significant capital now to comply with the ELGs. Moreover, plants that are currently moving forward with projects to comply with the rule for one or more waste streams are doing so because the facilities were planning to undertake the needed treatment advancements as a result of state law or water-quality requirements. The overall industry cost to EnerProg for complying with the ELGs would be less than three-tenths percent (.3%) of the company's revenue. 82 Fed. Reg 26,017,015. (June 6, 2017). This minute cost is far outweighed by the risk to the environment and public safety. Consequently, EnerProg must comply with the ELGs. Because the cost is far less and the need for safety is far more, EnerProg must comply with the promulgated 2015 ELG. Therefore, issuing the postponement of the compliance deadlines would only burden the environment and the communities surrounding EnerProg's facilities, and the public health should outweigh the industry costs.

C. EPA cannot postpone compliance deadlines for standards that have already been promulgated without undergoing notice and comment rulemaking.

Under the CWA and the APA, the EPA lacks legal authority to alter compliance deadlines for standards lawfully promulgated. 33 U.S.C. § 1311(b)(2) (2012). The EPA is a creature of statute and possesses only the authority Congress has granted it. *North Carolina v. EPA*, 531 F.3d 896,

922 (D.C. Cir. 2008). The CWA contains no provision for staying regulations pending consideration, and, moreover, requires compliance with BAT standards within three years of promulgation. The APA allows an agency to stay the effective date of a regulation pending judicial review only if the agency can make a satisfactory showing under the four-factor test for preliminary injunctions. 82 Fed. Reg. 26,017. Because the proposed stay (1) is expressly pending reconsideration, not judicial review, (2) is proposed long after the effective date of the rule, and (3) the notice makes no showing of any kind regarding the four factors, the APA does not provide authority for the EPA's action. *Id.* As neither the CWA nor the APA authorized EPA's action here, the agency's proposed action is *ultra vires*.

First, the four factors rely on a distinction between reconsideration and judicial review. This distinction is essential since unlike a judicial proceeding where the parties may seek expedited consideration, EPA's timeline for reconsideration is subject to considerable discretion, effectively allowing the agency to indefinitely eliminate the protections provided by the original ELG Rule by slow-walking its reconsideration process. Here, EnerProg and the EPA are attempting to postpone the compliance dates of a pending reconsideration and not a judicial review, to which 5 U.S.C. § 705 applies. Second, the proposal of postponing the compliance dates of the ELGs was long after the effective date of the rule. The effective date of the 2015 ELGs was January 2, 2016. R. at 11-12. The postponement of effective dates of the ELGs was April 25, 2017. R. at 11. The APA only allows an agency to stay the effective date of a rule before the effective date has passed, not after. 5 U.S.C. § 705 (2012). Since the effective date for the 2015 ELGs has long passed, the APA does not permit the EPA to postpone the effective date of the ELGs Rule. Last, since the APA provides no authority for the EPA's notice, the EPA's action is unauthorized and should be granted no discretion.

EPA Administrator Pruitt issued a Notice purporting to postpone the compliance deadlines for the 2015 Steam Electric Power Generating Point Source Categories ELGs, and EnerProg has not demonstrated that that the November 1, 2018 compliance deadline is infeasible. R. at 12. Regardless, two independent sources demand this deadline: the BPJ standard and Progress's State certification, independent of the 2015 ELGs. R. at 12. Furthermore, section 705 of the APA does not authorize the extension of compliance dates. R. at 12. Instead, section 705 only extends the effective dates. Any Administrator, without undergoing notice and comment rulemaking, may not postpone the compliance dates of a rule that has already become effective.

Therefore, the Notice to stay the ELGs have no effect because it is illegal. Even if the Notice did not run afoul of the APA's mandate, the guidelines themselves are implemented in other legally binding ways, namely BPJ and 401(d) certification.

III. Regardless of whether the notice is effective, EPA Region XII can rely on Best Professional Judgment because Mercury, Arsenic, and Selenium are not regulated by the promulgated effluent limitations guidelines.

EPA Region XII can rely on BPJ as an alternative ground for requiring zero discharge of coal ash transport wastes. The EAB held that "reliance on BPJ [is] justified even in the event that the 2015 ELGs were eliminated or vacated." R. at 11. The Board quotes 40 C.F.R. § 125.3(c)(3) in saying that the use of BPJ for pollutants not covered by the ELGs for an industry category is specifically provided for:

> [w]here promulgated effluent limitation guidelines only apply to certain aspects of a discharger's operation, or to certain pollutants, other aspect or activities are subject to regulation on a case-by-case basis.

R. at 11; 40 C.F.R. § 125.3(c)(3) (2017). The pollutants from the MEGs coal ash pond are subject to BPJ limits because the pond contains toxic pollutants including Mercury, Arsenic, and Selenium that were not regulated by the 1982 ELGs. R. at 11.

Once the EPA promulgates applicable standards, "regulation of those facilities subject to those standards on a best professional judgment basis must cease." *Riverkeeper Inc., v. United States EPA*, 358 F.3d 174, 203 (2d Cir. 2004) (citing *Nat. Res. Def. Couns.l v. EPA*, 859 F.2d at 200). Here, the EAB is correct in finding that the BPJ standard applies to this situation. Because the pollutants are not subject to the standards set in the 1982 ELGs and the 2015 ELGs are not promulgated, regulation of EnerProg for their pollutants are subject to the BPJ standard.

Therefore, because the Board ruled in FCW's favor on this issue and the existing chemicals in the coal ash pond are not regulated by the 1982 ELGs, this Court should allow the use of the BPJ as an alternative standard.

IV. EnerProg's Pollutant Discharges into the MEGS Ash Pond are Subject to NPDES Permitting Requirements Regardless of the Suspension of 40 C.F.R. § 122.2

EnerProg and the EPA incorrectly argue that the discharges into the ash pond are not subject to effluent limitations. Because the discharge meets the statutory definition of being from a point source into a navigable water of the United States, Outfall 008 discharges are subject to a NPDES permit. The CWA prohibits "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2012). In order to be subject to the effluent limitations guidelines, (1) there must be a point source and (2) pollutants must be discharged into navigable waters of the United States. *Id.* § 1362(14).

A. EnerProg's coal ash pond constitutes a point source.

The CWA defines a point source as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft. *Id.* The waters of the United States are interpreted by a Corps regulation at 33 C.F.R. § 328.3 stating that a water of the United States is:

> (1) all interstate waters including interstate wetlands; (2) all other waters such as intrastate . . . streams (including treatment streams) . . . wetlands . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce; (3) tributaries of such waters; and (4) wetlands adjacent to such waters and tributaries (other than waters that were themselves wetlands).

Rapanos v. United States, 547 U.S. 715, 724 (2006) (quoting 33 C.F.R. § 328.3 (2017)).

Even if this Court looks to the exemption attempting to preclude the MEGS ash pond, 40 C.F.R. § 122.2, Outfall 008 discharges into a perennial tributary to the Progress River, a navigable-in-fact interstate body of water not to the Moutard Reservoir. R. at 7. First, EnerProg's pollutant discharges are subject to NPDES permitting because a point source is utilized and the CWA regulates this act. In *Sierra Club*, the Court found that the Coal Ash Piles constituted point sources under the Clean Water Act. The Court went on to find that the Coal Ash Piles "channel and convey arsenic into groundwater that eventually discharges into the surrounding surface waters." *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 762 (E.D. Va. 2017). Here, the effluent from the MEGS coal ash pond contains toxic pollutants such as Mercury, Arsenic, and Selenium. R. at 11. EnerProg's outfall 008 discharges chemicals into the MEGS coal ash pond. Toxins such as these are then able to seep through the ground and traverse to a navigable body of water if precautions are not taken by facilities like EnerProg.

Congress intended a "point source" to be interpreted broadly, stating that the concept of a point source was to "embrace the broadest definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *United States v. Earth Sci., Inc.*, 599 F.2d 368, 373 (10 Cir. 1979). A lower court in the Fourth Circuit recently held that a coal ash dump constituted a point source regulated by the CWA. *Yadkin Riverkeeper, Inc., v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 444 (M.D. N.C. 2015). The defining question of whether something is or is not a point source comes down to whether "pollutants were discharged from

discernible, confined, and discrete conveyances either by gravitational or non-gravitational means." *Ohio Valley Envtl. Coal., Inc., v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 599 (S.D. W. Va. 2013).

Here, EnerProg's unlined coal ash pond does precisely what *Ohio Valley* describes. EnerProg built the coal ash pond to concentrate coal ash and its pollutants in one location. This one location channels and conveys Mercury, Arsenic, and Selenium directly into the groundwater and then into surface waters. That being said, the coal ash pond is a discrete mechanism that conveys pollutants from the power plant to the tributary of the Progress River. Because of this, the MEGS ash pond should constitute a point source under the CWA.

B. Pollutants from the point source — the ash pond — discharge to a navigable-in-fact body of water — the Progress River.

Even though the MEGS ash pond constitutes a point source, there must also be a discharge to the tributary of the Progress River. Based on the statutory language, there must be both a statutorily defined point source to prove there was actual addition of chemicals to the waters and a discharge to navigable waters. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F. Supp. 3d 488, 493 (5th Cir. 2017). The EPA gave power to the Army Corps of Engineers to determine the definition of a navigable water of the United States. *Rapanos*, 547 U.S. at 723. According to 33 C.F.R. § 328.3, a navigable water of the United States includes:

> waters such as intrastate . . . streams (including intermittent streams) . . . wetlands . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce; and tributaries of such waters.

33 C.F.R. § 328.3 (2017).

According to the Ninth Circuit, "there can be little doubt that a tributary of waters of the United States is itself a water of the United States." *United States v. Moses*, 496 F.3d 984, 989 n. 8 (9th Cir. 2007). Furthermore, in *Rapanos*, all of the Justices agreed that the term "navigable

waters" encompass some waters that are not navigable in the traditional sense, or navigable-in-fact. *Rapanos*, 547 U.S. at 730-31.

Here, Fossil Creek does not discharge to the Moutard Reservoir, but Fossil Creek is a perennial tributary to the Progress River. R. at 7. Consequently, the chemicals from the MEGS ash pond discharge into a navigable body of water of the United States. It is undisputed that the discharge is to a perennial tributary to the Progress River, a navigable-in-fact interstate body of water. R. at 7. Both the EPA and the Corps have defined "waters of the United States" to include both traditional navigable waters and non-navigable tributaries of such waters. 33 C.F.R. § 328.3(a)(5) (2017). In this case, the MEGS ash pond toxins seep into a navigable-in-fact interstate body of water. According to *Rapanos*, even though the ash pond "body of water" is not traditionally navigable but is still considered to be navigable. *Rapanos*, 547 U.S. at 730-31.

Because the toxic pollutants in the ash pond travel through a tributary to a non-traditional navigable body of water, this meets the second prong of the test to require a NPDES permit and, therefore, the permit should be enforced.

C. 40 C.F.R. § 122.2 defines "waters of the United States" to include "all impoundments of waters otherwise identified as waters of the United States."

The regulatory definition of fill, 40 C.F.R. § 122.2, applies to bodies of water that "neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. "Wetlands" are defined as "areas that are inundates or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *United States v. Lucas*, 516 F.3d 316, 323 (5th Cir. 2008).

According to *Lucas*, wetlands are considered waters of the United States if they are adjacent to a navigable body of open water. *Id.* at 324. If there is a significant nexus between the wetlands in question and a navigable-in-fact waterway, then the land in question is considered a wetland under the CWA. *Id.*

Here, the flow rate of the questioned wetland and the navigable body of water is significant because from the MEGS ash pond, the groundwater seeps into an intermittent tributary of the Progress River, which is undisputed to be a navigable body of water. The groundwater flowing from the MEGS ash pond is contaminated with elevated levels of Mercury, Arsenic, and Selenium. R. at 9. These contaminants impact not only the navigable body of water but also the community surrounding the river. Therefore, the MEGS ash pond was created in a disposal area such as a wetland.

In order to not meet the exception of 40 C.F.R. § 122.2, the MEGS ash pond could not result from the impoundment of water of the United States. Impoundment is defined as "a reservoir formed by a dam." U.S.C. §§ 1311, 1342 (2012). Here, the MEGS coal ash pond was created by damming Fossil Creek which is a water of the United States. R. at 12.

The exception to 40 C.F.R. § 122.2 relied on by EnerProg states that the suspension of the provision 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. R. at. 3. Even though the sentence beginning with "This exclusion applies . . . " was stayed by the EPA on July 21, 1980 and the stay was confirmed June 29, 2015, the suspension should not be given effect because it lacked the statutory authorization, and it failed to comply with the requirements of section 553 of the APA. 5 U.S.C. § 553 (2012); R. at 12.

Based on the requirements of the 2015 ELGs, EnerProg will no longer meet the "waste treatment system" definition because EnerProg will no longer be a waste treatment facility once the MEGS ash pond is closed and capped. Therefore, the MEGS ash pond is subject to CWA jurisdiction because EnerProg is required to comply with the 2015 ELGs because the exception lacks statutory authorization.

V. A section 404 permit is required for EnerProg's Coal Ash Pond Closure and Capping condition because abandoning the remaining coal ash solids constitutes a discharge of fill material under the CWA.

Because the ash pond is historically a perennial tributary to the Progress River, a navigable-in-fact interstate body of water, EnerProg must receive a section 404 permit before dewatering the pond and capping coal ash residuals inside the retired ash pond. R. at 7; 33 U.S.C. §§ 1311, 1344 (2012). EPA is authorized to "issue a permit for the discharge of any pollutant," "except as provided in" section 404. *Id.* § 1342(a). In contrast, the Army Corps of Engineers (USACE) is authorized to "issue permits . . . for the discharge of . . . fill material." *Id.* § 1344(a). Both the EPA and USACE fill material is defined as:

> material placed in waters of the United States where the material has the effect of:
> (1) Replacing any portion of a water of the United States with dry land; or
> (2) Changing the bottom elevation of any portion of a water of the United States.

40 C.F.R. § 323.2 (2017); 33 C.F.R. § 323.2. (2017).

The tandem of authority between the EPA and the USACE is explained in *Couer Alaska, Inc. v. Southeast Alaska Conservation Council*. 557 U.S. 261, 269-71 (2009). There, the Court held that the Army Corp of Engineers was the exclusive and proper authority for the discharge of fill. *Id.* at 266. Though the Court held that the EPA has an important role within the realm of section 404 permits, the Court highlighted the narrowness. Specifically, the EPA has the authority to

veto a permit should there be a determination that the discharge would impose unreasonable environmental harm. *Id.* at 270.

In EnerProg's case, both permits are necessary. When contemplating EnerProg's activities separately because though coal-fired electric generating plants like MEGS have only required section 402 permits in the past, Progress's state-enacted law requiring the retirement of impoundment ponds subjects old waterbodies of the United States to different standards. Analyzing EnerProg's activity of continuing to generate energy and discharge pollutants into a point source, the NPDES permit authorizes the continued operation of MEGS via the new, lined retention basin. The 404 dredge and fill permit is only needed for the specific ash pond closure and capping condition that is required by Progress's "appropriate requirement of State law" under section 401(d). EnerProg's unlined ash pond was created in 1980 by damming the then free-flowing upper reach of Fossil Creek. R. at 7. Though Fossil Creek does not discharge to the Moutard Reservoir, Fossil Creek is a perennial tributary to the Progress River which is a navigable-in-fact interstate body of water. R. at 7. EnerProg must acquire a section 404 permit for the discharge of fill material before EnerProg can seal the ash pond with an impermeable cap because once the coal ash pond is sealed, it no longer qualifies as a waste treatment system. It has already been established that the coal combustion residuals constitute a discharge of a pollutant under section 502.

Therefore, even if 40 C.F.R. § 122.2 exempted waste treatment systems including pools and lagoons from the regulatory definition of fill in 40 C.F.R. § 323.2, that exemption no longer applies since EnerProg's ash pond will no longer function as a waste treatment system. Specifically, it is unlawful to dewater the pond and leave the coal ash solids in place where a stream once flowed without first obtaining a fill permit under section 404 of the CWA.

CONCLUSION

The EAB erroneously refused to reconsider EnerProg's NPDES permit. The Board failed to determine that the permit as issued created several regulatory loopholes. First, the Board did not affirmatively hold that States have exclusive jurisdiction to certify conditions for activities that affect specific water quality standards implemented in their legislatures so long as such conditions do not violate separate provisions of the CWA. Even while making the point that the EPA could determine the appropriateness of a State-imposed condition, the Board failed to find that capping solid waste in a retired ash pond that connected to a water of the United States violates section 404 of the CWA.

Second, the Board incorrectly held that the April 25, 2017 EPA Notice suspending particular deadlines for the 2015 final ELGs is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water because the technological bases are available to EnerProg and the EPA lacks authority to postpone the compliance dates.

Third, the Board correctly determined that the EPA can rely on BPJ as an alternative ground to require zero discharge of coal ash transport wastes, independent of the applicability of the 2015 ELGs because BPJ reliance is administered on a case-by-case basis when pollutants have no applicable effluent guidelines.

Fourth, the EAB incorrectly held that discharges into the ash pond are not subject to effluent limits. Such discharges are subjected to effluent limits because the 1980 suspension of 40 C.F.R. § 122.2 lacked statutory authorization.

Finally, the Board failed to determine that EnerProg's ash pond closure and capping plan require a permit for the discharge of fill material under section 404 of the CWA. A section 404

permit is necessary because the ash pond is subject to effluent limits due to the pond having been the bed of Fossil Creek before EnerProg converted it to a pollution site.

For the foregoing reasons, FCW asks this Honorable Court to remand EnerProg's final permit to the Board for further consideration.

Respectfully submitted,

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Attorneys for Petitioner

November 27, 2017 Fossil Creek Watchers, Inc.