**Brief**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TWELFTH CIRCUIT**

**Docket No. 17-000123 and 17-000124**

**ENERPROG, L.L.C.,**
***Petitioner*,**
***and***

**FOSSIL CREEK WATCHERS, INC.,**
***Petitioner*,**

- **v. -**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,**
***Respondent*.**

**On Consolidated Petitions for Review of a Final Permit Issued Under Section 402 of the Clean Water Act**

**BRIEF OF FOSSIL CREEK WATCHERS, INC., *Petitioner***

**Oral Argument Requested**

Table of Contents

Table of Authorities

**United States Code**



**United States Code of Federal Regulations**



**United States Court of Appeals Cases**



**United States District Court Cases**

**United States Supreme Court Cases**



**Federal Register**



**State Court Cases**

## STATEMENT OF JURISDICTION

The district court has jurisdiction pursuant to the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365 (2017), and under federal question jurisdiction 33 U.S.C. § 1331(2017). On April 1,2017, both EnerProg, L.L.C. (EnerProg) and Fossil Creek Watchers, Inc. (FCW), filed petitions for review of a National Pollutant Discharge Elimination System (NPDES) permit pursuant to 40 C.F.R. pt. 124, requesting on a number of grounds that the permit be remanded to Region XII for further consideration. The Environmental Appeals Board (EAB) extended the filing deadline for both parties and the parties filed supplemental briefing with regards to the April 25, 2017 Notice of the suspension of the 2015 ELG compliance deadline. The EAB denied both petitions for review, and the district court's order is a final decision. The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the EAB pursuant to 28 U.S.C. § 1291 (2017).

## STATEMENT OF THE ISSUES

I. Did the Final Permit properly include state-imposed conditions regarding the closure and remediation of the coal ash pond, regardless of the conditions' consistency with CWA requirements?

II. Is the April 25, 2017 EPA Notice effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water?

III. Can EPA Region XII rely on Best Professional Judgment to require zero discharge of coal ash transport wastes, independent of the applicability or effectiveness of the 2015 Steam Electric Power Generating Industry ELGs?

VI. Did EPA follow proper rulemaking procedures when it suspended waste treatment systems impounding "waters of the United States" from the definition of "waters of the United States", excluding them from NPDES permit requirements?

V. Does closure of the ash pond and addition of an impermeable cap to the bed of Fossil Creek require a fill permit for discharging material into "waters of the United States"?

## STATEMENT OF THE CASE

### I. Facts

On January 18, 2017, the Environmental Protection Agency (EPA) issued a NPDES permit to EnerProg so that its coal-powered electric power plant, Moutard Electric Generation Station (MEGS) may continue discharging pollution at several points. Order at 6, 7. This permit was conditional upon several state-imposed requirements pursuant to the CWA 401(d) permitting requirement. Order at 6. These conditions require that EnerProg:

1) Discontinue discharge in the fly ash transport water by November 1, 2018;
2) Cease discharging bottom ash transport water by November 1, 2018;
3) And stop using the ash pond by November 1, 2018, dewater the pond by September 1, 2019, and place an impermeable cap on the ash pond by September 1, 2020.

These conditions allow EnerProg to leave coal ash in the ash pond after closure. Order at 7. They do not restrict the continued discharge of fly and bottom ash into the ash pond. Order at 10.

Water discharges at five outfalls at MEGS. Order at 7-8. These outfall points are:

1) Outfall 001 drains directly into Moutard Reservoir. Less than 1 ounce of water per year is released from Outfall 1 and comes from the cooling towers and circulating water system;
2) Outfall 002 also drains directly into Moutard Reservoir via a riser (piping) structure and releases ash transport water containing, among other things, both bottom and fly ash;
3) Internal Outfall 008 releases into the ash pond and contains fly and bottom ash water. Outfall 008 also releases cooling tower blowdown, which releases into the ash pond, is treated, and discharged into Moutard Reservoir;
4) Internal Outfall 009 discharges into Moutard Reservoir once treated in the ash pond treatment system in Outfall 002;
5) Outfall 002A, which is not yet complete, nor has MEGS disclosed a proposed opening date. Once built, however, it will act as a retention basin to replace the ash pond. The water will then discharge into Moutard Reservoir. The record does not disclose any treatment processes will occur in Outfall 002A. Order at 7-8.

On April 1, 2017, EnerProg and FCW filed petitions for review of the permit because these conditions were inappropriate. Order at 6. EPA Administrator Scott Pruitt suspended the compliance dates for these zero discharge effluent limitation guidelines (ELG) via notice on April 25, 2017. The effectiveness of the notice is currently undergoing judicial review. EnerProg proceeded to file another petition for the use of Best Professional Judgment standard of review regarding the compliance of the zero discharge for ash transport and treatment wastes. The petition highlights that the situation at hand, where pollutants are permeating the MEGS coal ash pond not regulated by the 1982 ELGs are in question for case-by-case compliance deadline setting.

MEGS withdraws water from the Moutard Reservoir for processing purposes, drinking water, and other activities at the plant. It also discharges water into five outfalls that are sent directly into Moutard Reservoir and an ash pond. Order at 7-8. Because of this discharge, MEGS is subject to EPA's effluent limitation requirements. Order at 7. The ash pond is treated before discharge into Moutard Reservoir and was created by damming Fossil Creek, a "perennial tributary to the Progress River, a navigable-in-fact interstate body of water." Order at 7.

**II. Procedural History**

EnerProg and FCW, filed petitions for a judicial review of the final decision from the EAB, which upheld EPA's issuance of a final NPDES Permit to EnerProg. This permit governs the discharges from the MEGS in Fossil, Progress. The EAB denied petitioner's request for review.

## ARGUMENT

### I. THE FINAL PERMIT IMPROPERLY INCLUDED CONDITIONS REQUIRING CLOSURE AND REMEDIATION OF THE COAL ASH POND AS PROVIDED BY THE STATE OF PROGRESS IN THE CWA SECTION 401 CERTIFICATION.

The goal 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) (2017). To achieve this goal, the CWA limits effluent – pollutant – discharges. 33 U.S.C. § 1311(a) (2017). Any discharge is unlawful unless EPA issues a 401, 404, or NPDES permit. 33 U.S.C. § 1311. *See also* 33 U.S.C. § 1312 (2017), 1342 (2017), 1344 (2017). Section 401 permits must contain appropriate state certifications meeting the requirements of the CWA. 33 U.S.C. § 1341(d) (2017). Section 404 permits limit the discharge of dredge or fill material into navigable waters to specified disposal sites. 33 U.S.C. § 1344(a), (c). EPA may issue NPDES permits "for the discharge of any pollutant" as long as it meets the requirements in CWA sections 1311, 1312, 1316, 1617, 1318, and 1348. 33 U.S.C. § 1342(a)(1). Although EPA must include all State of Progress certification conditions that conform to CWA section 401(d) requirements and are legal under state law, the ash pond closure and remediation certifications

included in the Final Permit to EnerProg violate CWA section 401 permit requirements. Therefore, even if the conditions are appropriate under state law, EPA inappropriately included them in the Final Permit since they violate the CWA.

Because EPA's Final Permit improperly included conditions that violate the CWA, this court has may review EPA's decision. EPA may issue permits to polluters who discharge effluent material at point sources into "waters of the United States", as long as the "affected state certifies that discharges conducted pursuant to the permit will comply with certain water-quality standards" required by the CWA. *In re 401 Water Quality Certification*, 822 N.W.2d 676, 677

(Minn. Ct. App. 2012). However, EPA may not issue permits if "the proposed discharge will cause or contribute to significant degradation to the "waters of the United States"." *Ohio Valley Envtl. Coal. v. United States Army Corps of Eng'rs*, 479 F.Supp.2d 607, 624 (W. Va. 2007) (reversed on other grounds). "Waters of the United States" includes "all waters which are currently used… in interstate or foreign commerce" and all tributaries adjacent to waters used in interstate or foreign commerce, including ponds. 40 C.F.R. § 122.2(1)(V) (2015).

Section 401 certifications limit waste discharge into navigable waters while section 404 certifications restrict discharge of dredge or fill material into navigable waters. 33 U.S.C. § 1341, 1344. The state agency administrator may prevent the use of a specific site as a waste disposal site if she determines that pollution discharges will have "an unacceptable adverse effect on municipal water supplies . . . wildlife, or recreational areas. 33 U.S.C. § 1344. Section 401 and 404 permits may contain conditions limiting the amount and quality of pollutants discharged into "waters of the United States". 33 U.S.C. § 1341, 1344. EPA must insert state-required conditions as long as they comply with CWA sections 301, 302, 306, and 307. 33 U.S.C. § 1341(d).

State-imposed requirements are appropriate as long as they do not degrade navigable waters. *PUD No. 1 Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 705, 114 S.Ct. 1900, 1905 (1994). They should protect the health and welfare of citizens and "enhance the quality of water." *PUD*, 511 U.S. at 704-05, (citing 33 U.S.C. § 1313(c)(2)(A)). Conditions must also protect waters' "use and value for public water supplies, propagation of fish and wildlife" and recreation. *PUD*, 511 U.S. at 704-05, 114 S.Ct. at 1905 (citing 33 U.S.C § 1313(c)(2)(A)). Finally, the affected state must issue a certification before a federal agency may issue a license. *Tacoma v.Federal Energy Regulatory Commission*, 460 F.3d at 67 (D.C. 2006). EPA has limited

jurisdiction to reject appropriate state-imposed conditions and may only review state permit proceedings to ensure they conform to the CWA. *Tacoma*, 460 F.3d at 68 (explaining federal agencies must at least verify that the state has "satisfied the express requirements of section 401"). Therefore, EPA must ensure that state-imposed conditions comply with sections 301, 302, 306, 307, and 404. According to section 301, any discharge violating sections 302, 306, 307, 404 certification, or NPDES permitting requirements is illegal. 33 U.S.C. § 1311(a). Section 302 limits discharges that interfere with public health and water supplies, agricultural and industrial uses, wildlife, and recreational activities. 33 U.S.C. § 1312(a). Section 306 governs steam electric power plants like MEGS, and advises that conditions and regulations may change as technology and methods develop. 33 U.S.C. § 1316(a)(1), (b)(1)(A). Section 307 defines and limits toxic pollutants. 33 U.S.C. § 1317(a)(1)-(2). Fly ash is a toxic material that EPA may limit based on:

> "Toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organism and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under regulatory authority. 33 U.S.C. § 1317(a)(2).

Lastly, section 404 limits the introduction of fill and dredge material into navigable waters. 33 U.S.C. § 1344(a).

When a federal agency issues a permit, courts presume the decision is correct, deferring to the agency's expertise unless the decision is "affected by an error of law, unsupported by substantial evidence in view of the entire record as submitted, or arbitrary or capricious." *In re 401*, 822 N.W.2d at 682. Although agencies enjoy deference, courts must review the entire record and determine whether the agency decision was rational given the situation. *Ohio*, 479 F.Supp.2d at 621 (reversed on other grounds) (quoting *Ethyl Corp v. EPA*, 541 F.2d 1, 36 (D.C.

Cir. 1976)). The CWA, however, has a heightened standard of review, requiring the court to prevent agency actions that negatively affect the environment. *Ohio*, 479 F.Supp.2d at 623 (reversed on other grounds) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985)). Therefore, the court can overrule EPA's final permit if the court finds that EPA erred in its decision to issue the Final Permit. Because the CWA has a heightened standard of review and because the State of Progress' conditions violate Section 401, the court should find the Final Permit was improper.

### A. The CWA mandates that EPA must include state conditions that conform to CWA requirements and exclude conditions violating it.

EPA must accept State of Progress' certifications as long as they comply with CWA sections 301, 302, 306, and 307. If EPA determines that Progress' conditions violate the CWA sections in 401(d), it may not issue the license. EPA improperly included State of Progress' conditions that degrade waters of the United States.

Progress has expansive authority to determine appropriate certifications to protect its waters. *PUD*, 511 U.S. at 704-05, 114 S.Ct. at 1905. The state agency in *PUD* wanted to condition a section 401 permit with a minimum streamflow requirement to protect fisheries. *PUD*, 511 U.S. at 705, 114 S.Ct. at 1908. The Court held that a state may impose broad conditions appropriate under state law and the CWA. *PUD*, 511 U.S. at 736, 114 S.Ct. at 1921. Just as the state agency in *PUD* wanted to impose broad water-quality standards, the State of Progress wants to impose broad certifications protecting state water quality. EPA is required to insert the conditions into the Final Permit prior to issuance if the conditions conform to state law and the CWA. The State of Progress included the three conditions related to the MEGS ash pond into the final permit, so EPA must only determine if they comply with the CWA. Only if EPA finds the conditions inconsistent with CWA section 401(d), may they remove them from the Final Permit.

**B. State of Progress issued certifications inappropriate under CWA section 401(d) and the EPA may not include them in the Final Permit.**

Courts grant EPA deference when reviewing EPA's final decisions, except when EPA errs or is arbitrary and capricious. Progress' certifications do not comply with the CWA because they allow MEGS to degrade navigable waters by leaving fly ash in the coal ash pond, which pollutes navigable waters. Therefore, by including State of Progress' conditions in the final permit, EPA erred and was arbitrary and capricious.

The CWA does not protect percolation ponds as "waters of the United States" and it does not recapture them upon retirement. 40 C.F.R. § 122.2(2)(vii). EnerProg dammed Fossil Creek to form the ash pond. Fossil Creek is tributary to Progress River - a navigable-in-fact river protected as part of "waters of the United States." Progress's conditions allow toxic materials to stay in the ash pond. However, Fossil Creek could transport these toxins into soils, groundwater, and, though groundwater, into Progress River. This pollution is illegal since the CWA protects Progress River as part of "waters of the United States."

While the CWA does not explicitly govern groundwater since it is not a point source, the court in *Yadkin* determined that coal power plants are point sources and that the CWA prevents pollution of groundwater connecting a point source to "waters of the United States." *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F.Supp.3d 428, 444 (N.C. 2015). The *Yadkin* court determined that coal ash lagoons are point sources because they are "confined and discrete," just as the ash ponds at MEGS are confined and discrete. *Yadkin*, 141 F.Supp.3d at 444 (N.C. 2015). The *Yadkin* court held that unpermitted discharges from point sources that enters groundwater and pollutes "waters of the United States" are illegal. *Id.*

EPA adopted a similar interpretation in 1991, stating the CWA "requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between

groundwater's and surface waters." *Yadkin*, 141 F.Supp.3d at 445 (N.C. 2015). It explained, "In these situations, the affected groundwaters (sic) are not considered "waters of the United States," but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters." *Id.* Although this approach splits jurisdictions, this court should adopt the *Yadkin* interpretation for policy reasons. If the court does not adopt the *Yadkin* holding and instead holds that groundwater does not connect point source pollution in percolation ponds to navigable waters, then the ruling would violate the goal of the CWA.

The EPA, by allowing State of Progress to insert their conditions into the Final Permit, violates the CWA since the coal ash remaining in the ash ponds will degrade the quality of Progress River. Because the ash ponds are contained and discrete, because the toxins can leach into the groundwater, and because the contaminated groundwater can degrade Progress River, the court should follow the precedent established in *Yadkin* and find that the Final Permit is invalid.

Furthermore, Progress River's pollution from the ash pond's toxic sludge violates the CWA because it can compromise the health and welfare of citizens and wildlife, may limit recreation on polluted surface waters, and degrade environmental health. Section 404 states EPA must consider whether state certifications have "unacceptable adverse[s] on municipal water supplies . . . wildlife, or recreational areas." 33 U.S.C. § 1344(c). If EPA finds that state conditions adversely affect these considerations in violation of the CWA, it may refuse to issue them with the Final Permit. This court should find that State of Progress' conditions permitting water quality degradation that may negatively affect human and wildlife health are invalid since they violate the CWA.

## II. THE EPA NOTICE SUSPENDING FUTURE COMPLIANCE DEADLINES IS NOT EFFECTIVE TO REQUIRE THE SUSPENSION OF THE PERMIT COMPLIANCE DEADLINES.

The April 25, 2017 EPA notice issued to suspend compliance deadlines for the 2015 ELGs for the Steam Electric Power Generating Industry is not effective because EPA is not permitted to alter compliance deadlines after the effective date of the rule establishing those deadlines passes. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19005-01 (April 25, 2017) (amending 40 C.F.R. pt. 423). The Administrative Procedure Act (APA) has established a procedure of postponement for established effective dates of agency actions. 5 U.S.C.A. § 705 (1966). The APA states, "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review… may issue a necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." *Id.* The above process must occur first in order for the EPA to postpone the effective date, and subsequently EPA must evaluate the compliance deadline for postponement. *Id.* This is precisely the issue in the case at hand. EPA notice is calling for a suspension of compliance deadlines, but EPA fails to postpone the effective date first, which is not the procedure recognized by the APA. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19005-01 (April 25, 2017) (amending 40 C.F.R. pt. 423). EPA is postponing these compliance dates pending judicial review. 40 C.F.R. § 423 (2017). Therefore, the only process EPA could take at this time would be to provide a notice and comment period to postpone the effective date pending judicial review. 5 U.S.C.A. § 553 (1966).

Two major roadblocks occur in this case that prevent the ability for EPA notice to be effective in suspending compliance deadlines. First, the term "compliance deadline" is not explicitly mentioned in section 705 of the APA, only the term "effective date" is mentioned. 5 U.S.C.A. § 705 (1966). Therefore, the court must consider the meaning of "effective date" in conjunction with the meaning of "compliance deadline" and identify if they are synonymous. Secondly, the original established effective date had already passed at the time EPA distributed the notice suspending compliance guidelines. The court must look at the ability of EPA to retroactively postpone the compliance deadline in order for EPA notice to be effective. In both issues, the court will find EPA at fault when it attempted to suspend compliance deadlines in this procedure, and therefore EPA notice is not able to stand as a presiding rule, thus making it not effective.

**A. Section 705 of the APA does not expressly mention the term "compliance deadline" and this term is not interchangeable with the term "effective date."**

EPA and EnerProg will argue that the term "compliance deadline" translates to the term "effective date" in this instance. They will also argue that EPA was authorized to send out EPA notice, and that EPA notice is effective. This sort of interpretation of section 705 of the APA is broad, and broad interpretations of the APA are not typically used. Alternatively, FCW interprets section 705 of the APA's definition of effective date narrowly, explicitly defining the effective date to mean the final, promulgated effective date. The court in *Bates v. US* corroborates this position by stating "…and we ordinarily resist reading words or elements into a statute that do not appear on its face". *Bates v. United States*, 522 U.S. 23, 29 (1997). This is a case that helps to identify the course the Courts typically take when statutory interpretation is the issue. *Id.* The above translates to the case at hand because it helps to define that courts should interpret the term effective date to mean exactly that: effective date, not compliance deadline.

Further, in *Silverman v. Eastrich,* a dispute regarding an effective date definition dispute with the Equal Credit Opportunity Act (ECOA) under the APA, the court states, "the mandatory compliance date should not be misconstrued as the effective date. . . ." *Silverman v. Eastrich,* 51 F.3d 28, 31 (3rd Cir. 1995). The language clearly indicates that when the APA states effective date, it truly means effective date, not the compliance date. In the case in question, EPA could be writing effective date, but meaning compliance deadline. *Silverman* helps us to establish that the compliance deadline and the effective date are two different dates, and EPA needs to expressly state its meaning when it distributes official notices. *Id.* If it fails to do so, this is not the fault of the Courts or the APA, but the fault of EPA, and they must suffer the consequences of their terminological inaccuracies.

**B. EPA cannot postpone the compliance deadline retroactively.**

If the court rejects the Supreme Court's holding in Bates and reads "effective date" broadly to include compliance date, the question of retroactive postponement arises. FCW proposes that the Court interpret the statute expressly, and stand by its decisions of procedure when it comes to retroactivity.

In *Bowen v. Georgetown University,* the court held "An agency may not promulgate retroactive rules absent express congressional authority." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Similarly, in the case at hand, the governing rules for the situation, the APA, did not give express congressional authority. 5 U.S.C.A. § 553 (1966). *Bowen* also provides processes the agency could enact to bypass the express congressional authority requirement. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 208. The most applicable and navigable process is to persuade Congress that the rule is crucial enough for them to give ad hoc permission for retroactivity. EPA could have attempted this process in order to change the

effective date and similarly the compliance date, but EPA did not, causing this argument of the allowance of retroactivity to fail.

Further, the following cases are similar to the above situation in which the outcome proves that attempting to postpone effective dates or compliance deadlines after the rule has been deemed effective is found to be legally unsound.

In *California v. Bureau of Land Management*, the BLM posted a notice postponing compliance dates for certain sections of a specific rule after the effective date passed. S*tate of Cal. v. BLM*, Nos. 17–cv–03804–EDL, 17–cv–3885–EDL, 2017 WL 4416409 (D. Cal. Oct. 4, 2017). Despite the fact that the BLM did not postpone the entire rule and engaged in notice and comment sessions, California established that it is still a violation because the BLM postponed part of the rule. *Id*. The court ruled for California and said that postponing an effective date after it has already passed is a violation of the APA's rulemaking procedure. *Id*. This case is like the current case because EPA is attempting to postpone the compliance date for zero coal ash deposits after the effective date of the regulation had already passed. Even though EPA plans to provide the notice and comment sessions, the process is not sufficient to allow for the postponement of an already-passed effective date.

Similarly, in *Becerra v United States Dept. of Interior*, the Attorney General's office of California stated that the USDI violated the APA when they required the defendant to vacate postponement of an oil and gas regulation. *Becerra v. United States Dept. of Interior*, No. 17–cv–02376–EDL, 2017 WL 3891678 (D. Cal. Aug. 30, 2017). The USDI stayed the rule, then changed the effective deadline retroactively, and was utilizing the effective date as a compliance deadline without expressly stating so. *Id*. This was an issue because as seen above in *Silverman*, compliance deadline and effective date have distinct meanings. *Silverman v. Eastrich*, 51 F.3d

28 (3rd Cir. 1995). The Court held that the effective dates were posing as compliance deadlines in this case, and that regardless of the meaning, neither could be retroactively applied. *Becerra*, WL 3891678. This is extremely similar to the case at hand because EPA attempted to postpone the compliance deadline retroactively, and regardless of the meaning of compliance deadline or effective date, the court should find that the APA does not allow for retroactive adjustments of the effective date or compliance deadline.

In conclusion, EPA's notice suspending compliance deadlines is not effective because section 705 of the APA explicitly states that when justice so requires, the effective date of the rule may be postponed. 5 U.S.C.A. § 705 (1966). This statement does not expressly reference compliance deadlines, which the statement would require if the intent of the statute was to include compliance deadlines. Further, the APA does not reference or address retroactively adjusting promulgated effective dates for the alteration of compliance deadlines. 5 U.S.C.A. § 553 (1966). This does not give EPA the authority to retroactively alter the compliance deadlines or effective date because express congressional authority is not given in this situation. The court should find that EPA notice is not effective, and the original compliance deadlines and effective date should stand.

## III. EPA CAN RELY ON BEST PROFESSIONAL JUDGMENT STANDARDS REGARDLESS OF APPLICABILITY OR EFFECTIVENESS OF THE 2015 STEAM ELECTRIC POWER GENERATING INDUSTRY ELGs.

The EPA Region XII can rely on the Best Professional Judgment ("BPJ") standard to require zero coal ash deposit compliance regardless of applicability or effectiveness of the 2015 Steam Electric Power Generating Industry ELGs because the CWA interpreted by case law does not expressly deny the use of BPJ on these types of issues. The CWA explains specific requirements for imposing technology-based treatments, which is what the current case

concerns. 40 C.F.R. § 125.3 (1977). The final NPEDS permit requires new fly ash transport water to be clear of pollutants starting November 1, 2018. In this situation, the permit writer used BPJ to determine that when specific companies are subject to the CWA regulations and they utilize the Best Available Technology ("BAT") to comply, that they would collectively be able to comply with said regulations by the compliance deadline. This is the portion of the NPEDS permit that EnerProg opposes. It states that an EPA NPEDS permit writer cannot decide on the compliance date using BPJ, and that the method of evaluation for compliance should be by rulemaking processes only.

The call of the question then turns to the utilization of BPJ using BAT regardless of the applicability or effectiveness of the 2015 ELGs. Because the 2015 ELGs are promulgated under the nationally enacted CWA and the state-enacted Progress Coal Ash Cleanup Act ("CACA"), we can turn to the CWA for over-arching regulating processes or requirements. The CWA may impose technology-based treatment requirements by rulemaking, on a case-by-case-basis, or a combination of both. 40 C.F.R. § 125.3 (1977). In the situation of utilizing BPJ, EPA could apply the case-by-case basis evaluation method because the option allows for an individual judgment of each NPEDS permit situation on technology-based treatments. *Id.* This process would allow the NPEDS permit writer to apply the BPJ standard based on BAT through the CWA regardless of the applicability or effectiveness of the 2015 ELGs.

This situation is highlighted in *Riverkeeper v. EPA,* where EPA chose to regulate smaller, newly built facilities utilizing cooling water structures on a case-by-case basis because "categorical regulation was not technologically feasible for such below-threshold structures." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 202 (2nd Cir. 2004). EPA chose the combination of rulemaking and case-by-case basis regulation even though the CWA directed

EPA to require that *every* cooling water intake structure must utilize the BAT to minimize adverse environmental impacts. 40 C.F.R. § 125.3 (1977). In interpreting the CWA regulations, the court decided that although EPA was required to regulate, it did not have to do so with a singular overarching regulation. *Riverkeeper,* 358 F.3d at 202 (2nd Cir. 2004). This situation is similar to the case at hand because there are no specifications in the CWA that say case-by-case basis regulation is expressly prohibited to regulate and eliminate coal ash deposits.

Further, these two situations are within the same industry, dealing with roughly the same issues of regulation, which proves that the Court has already evaluated and established precedent for the situation at hand.

*NRDC v. EPA* also allows for the usage of the BPJ in NPEDS permit requirements. *Nat. Res. Def. Council, Inc. v. EPA,* 683 F.2d 752 (3rd Cir. 1982). In this case, EPA held that a NPEDS permit under the CWA was able to authorize the discharge of pollutants for oil and gas operations in the Gulf of Mexico. *Id*. The NPEDS permit established specific limitations on the discharge of pollutants based on water quality standards and on imposition of technology-based controls. *Id.* These types of permits are generally required to incorporate technology based effluent limitation promulgated by EPA on a nationwide, industry-wide basis. *Id.* In the situation above, the unprocessed and not finalized ELGs prompted EPA to turn to section 125 of the CWA, which allows EPA to establish effluent limitations on a case-by-case basis. 40 C.F.R. § 125.3 (1977). The Court found that EPA in this situation was allowed to apply the BPJ case-by-case basis regulations, but that EPA must employ BPJ standards in accordance to the CWA factors established in section 125.4. *Nat. Res. Def. Council, Inc.*, 683 F.2d at 752; 40 C.F.R. § 125.4 (1977). Even though in *NRDC v EPA* the EPA did not comply with the elements of the BAT analysis, they were still permitted to use BPJ in determining compliance with the

BAT. *Id.* Returning to the question of the ability to apply BPJ standards regardless of the 2015 ELGs, the above case is like the case at hand because the toxicity requirements in the water are regulated by the CWA, just like the coal ash deposits in the reservoir are regulated by the CWA. 40 C.F.R. § 423 (1977). The case above pertains to an industry attempting to comply with the CWA through NPEDS permits, just like the case in question that is trying to comply with the CWA and CACA through NPEDS permits. *Nat. Res. Def. Council, Inc.*, 683 F.2d at 752. *NRDC* provides a strong case for EPA and FCW in utilizing the BPJ standard because the revised 2015 ELGs EnerProg is challenging are undergoing review and are not yet final, and in *NRDC* the ELGs were not yet final either. *Id.* The conclusiveness of the doctrine speaks to the uncertainty of the effectiveness or applicability of the 2015 ELGs, and would cause the courts to rely on the CWA for regulatory power.

In *Louisville Gas*, where the permit writer deferred to BPJ in anticipation of new effluent limitation guidelines in order to give an individual evaluation of specific situations, the permit writer in the case at hand should be authorized to utilize BPJ in order to make specific situation determinations in anticipation of new guidelines. *Louisville Gas and Elec. Co. v. Kentucky Waterways All.*, 517 S.W.3d 479, 492 (Ken. 2017). As a policy matter this is a good practice because if new situations arise that comply with overarching regulations, it could cause the individual companies to spend unnecessary funds to comply with current regulations and then spend even more to comply with the new regulations if they differed. The company then could potentially sue for arbitrary and capricious practices for the requirement of over-spending in order to comply with consecutively issued differing regulations. The permit writer in the disputed case would be utilizing best practice for EPA and the industry if he or she chose to operate on the case-by-case BPJ standard. *Louisville* explains that the CWA allows EPA permit

writers to make the judgment call when the guidelines' applicability or effectiveness are not certain. *Id.*

In *Texas Oil and Gas v. EPA,* environmental groups filed petitions regarding the differing treatment of coastal facilities with other coastal facilities in terms of requiring zero discharge limits under ELGs. *Texas Oil and Gas Ass'n v. EPA*, 161 F.3d 923 (5th Cir. 1998). This is similar to the case in question because EPA is deferring to BPJ practices in determining BAT compliance deadlines on a case-by-case basis, causing differing treatment of facilities. In *Texas Oil and Gas,* the ELGs did not specifically define or deny the usage of BPJ, just like the case at hand, the guidelines or CWA did not specifically deny the usage of BPJ. *Id.* This sets the precedent for situations like this one, in that EPA is typically authorized to utilize BPJ when it is not expressly defined and the ELGs are not finalized or are unclear. This regulation would not be altered in a way that would alter the industry in an unreasonable fashion because it only allows"individual judgment to take the place of uniform national guidelines, but the technology-based standard remains the same". 40 C.F.R. § 125.4 (1977).

In *NRDC v. Pollution Control,* the Pollution Control Board granted a NPEDS permit granting the electricity producer for the discharge of mercury as a result of a case-by-case basis analysis. *Nat. Res. Def. Council v. Pollution Control Bd.*, 37 N.E.3d 407 (Ill. App. Ct. 2015). The Court determined that the Pollution Control Board's authorization of exercising the case-by-case basis analysis because the "EPA permit writers' manual directed writers to refrain from imposing best-professional-judgment limitations in such instances, and EPA implicitly agreed that case-by-case limitation should not be imposed." *Id.* This case is unlike the disputed case because EPA permit writer's manual did not expressly direct NPEDS permit writers to refrain from using BPJ in the instance of monitoring coal ash deposits.

All of the cases above point to the conclusion that EPA Region XII can turn to the BPJ/ case-by-case basis standard as an alternative to require zero coal ash waste deposit independent of the 2015 ELGs. As seen in *Riverkeeper,* EPA is required to regulate, but there are no specifications on requiring a singular, national overarching regulation in the CWA. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2nd Cir. 2004). This gives EPA full power to choose how they regulate certain industries. *NRDC* specifies this rule regarding situations where the finalization, processing, or dispute of ELGs, known as the 2015 ELGs in this case, is occurring. *Nat. Res. Def. Council v. Pollution Control Bd.*, 37 N.E.3d 407 (Ill. App. Ct. 2015). The Court in *NRDC* held that the BPJ standard was justified. *Id.* The revised 2015 ELGs in this case are pending judicial review, which relates to the situation of ELGs being disputed in the case above. The rule is further specified in *Louisville* where the NPEDS permit writer utilized BPJ in anticipation of new ELGs being passed. *Louisville Gas and Elec. Co. v. Kentucky Waterways All.*, 517 S.W.3d 479 (Ken. 2017). The situation relates to the case at hand because the permit writer could alternatively use BPJ with the intention that the 2015 ELGs would become effective in the future. The above case law reasoning is all justified by the *Texas Oil and Gas* case which established that EPA is authorized to utilize BPJ when its use is not expressly stated against in the CWA. *Texas Oil and Gas Ass'n v. EPA*, 161 F.3d 923 (5th Cir. 1998). Conclusively, regardless of the existence of the 2015 ELGs, EPA is authorized to apply the case-by-case/BPJ standard to require zero discharge of coal ash transport wastes because the CWA allows it.

## IV. WASTE TREATMENT SYSTEMS IMPOUNDING U.S. WATERS REQUIRE AN NPDES PERMIT FOR POLLUTANT DISCHARGE.

The Order inappropriately finds the coal ash pond is not part of the "waters of the United States" and therefore Outfall 008 is exempt from a NPDES permit. The Order relies on The Suspension of the Last Sentence of the Definition of Waters of the United States, 45 Fed. Reg.

48,620 (July 21, 1980) (to be codified at 40 C.F.R. pt. 122) (The suspension), an EPA administrative act omitting an important provision of the CWA. The suspension deletes a definitional sentence in section 122.2 of the CWA stating waste treatment ponds created over former "waters of the United States", or impounding "waters of the United States", are not free from NPDES requirements. The suspension cites the CWA for jurisdiction, and states it is a temporary measure, awaiting review and rulemaking. FCW asserts a *Chevron* deference analysis shows EPA lacked jurisdiction under the CWA. Further, the indefinite suspension evades administrative rule making procedure, which requires public notice and comment. Upon review, this court should find the suspension without jurisdiction and in violation of regulatory rule making processes. Discarding the suspension, Outfall 008 clearly needs a NPDES permit.

**A. EPA lacks jurisdiction to alter the CWA's definition of "Waters of the United States."**

EPA's indefinite stay claims jurisdiction under the CWA, et seq. While courts typically give broad deference to agency's interpretations, it is not without limits. EPA does not have authority to override the expressed will of Congress laid out in the CWA. Suspending an important part of the definitions of "waters of the United States" (40 C.F.R. § 122.2 (2015)) is an exercise in policy making going beyond the plain language and clear meaning provided by Congress.

Agencies enjoy great deference in rulemaking. The court's scope when reviewing an agency's judgment is narrow, only overturning agency determinations where they are arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Arbitrary and capricious a narrow standard, but still requires agencies to examine relevant data and articulate a satisfactory explanation, including a rational connection between the facts found and choices made. *Id.* (Agency failed to show an adequate basis and explanation).

"Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action." *Petroleum Commc'ns, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (Holding an agency decision is arbitrary and capricious if it fails to take account of circumstances that appear to warrant different treatment for different parties).

When examining jurisdiction of an agency to change statutory language, courts apply the two-step *Chevron* deference analysis. *Util. Air Regulatory Grp v. EPA*, 134 S. Ct. 2427, 2439 (2014). The first step in the process asks the court to decide "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Both agencies and courts must carry out Congress's unambiguously expressed intent. *Id.* Only when a statute is silent or ambiguous about the specific issue, does the court move to determine if the agency's answer is based on a permissible construction of the statute. *Id.* When looking for ambiguity in a statute, the normal rules of statutory interpretation apply, beginning with that statute's plain language and legislative intent. *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991). In *Util. Air Regulatory Grp.*, the Court held EPA was bound by an Act-wide definition, "no matter how incompatible that inclusion is with those programs' regulatory structure." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442. In *Wagner Seed Co*, both the statute's plain language and legislative history were too general to show affirm or preclude EPA's decision. *Wagner Seed Co.*, 946 F.2d at 925.

Congressional intent in the case at hand is clear and unambiguous, mirroring *Util. Air Regulatory Grp*. The original definitions exempting waste treatment systems reads, in full:

> "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA. This exclusion applies only 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 "waters of the United States"."

40 C.F.R. § 122.2.

Congress clearly included the second sentence of this definition to modify the first. There is no ambiguity, no plain language to interpret. To suspend a crucial part of the definition directly goes against Congress's express intent. *Chevron* binds EPA and the court to uphold the statute. The suspension therefore fails the *Chevron* analysis' first part. The court should consider the CWA's original, plain language, which includes Outfall 008 into the ash pond in NPDES permit requirements.

If the court decides the plain language of the statute does not express the intent of Congress, the discussion moves to *Chevron's* second step. Where the statute is silent or ambiguous on the specific issue, courts examine if the agency based its answer on a permissible construction of the statute. *Chevron U.S.A., Inc.*, 467 U.S. at 843. This "reasonable interpretation" standard gives great deference to agency decisions, but must consider both the specific context in which the language is used, and the statute as a whole. *Id*; *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442. An agency interpretation "inconsistent with the design and structure of the statute as a whole does not merit deference." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442. (Internal citations omitted). In *Util. Air Regulatory Grp.*, the Court held an EPA interpretation unreasonable where it enormously expanded EPA's regulatory authority without clear Congressional authorization. *Id.* at 2445. Contrast this with *Wagner Seed Co.*, holding Congress's silence in legislative history to either preclude or affirm EPA's interpretation, the interpretation was permissibly in line with Congressional objectives. *Wagner Seed Co.*, 946 F.2d at 925.

In this case, the suspension fails part two of a *Chevron* analysis. It unreasonably interprets the CWA, and dangerously expands EPA's rulemaking power. The stated objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2017). To that end, it included effluent limitations, to control the discharge of pollutants into "waters of the United States". 33 U.S.C. § 1311 (2017). Section 122.2 defines these protected waters. EPA controls pollutant discharge, other than dredge and fill material, with the NPDES permit system, which runs in tandem with the rest of the CWA. 33 U.S.C. § 1342(a)(1) (2017). For the purpose of NPDES permits, section 122.2 defines "waters of the United States", which includes the currently contested definition. 40 C.F.R. § 122.1(b)(1). Both the specific section, and the CWA as a whole, were designed to protect against pollutants entering U.S. waters by requiring a permit. To allow EPA to alter the definition of "waters of the United States" grossly increases its power, and impermissibly changes the goals of the CWA. The suspension does not point to specific Congressional authorization for its creation, just the CWA as a whole, which clearly means to control the discharge of pollutants. Therefore, the suspension is unreasonable and should not be relied upon to determine the appropriateness of an NPDES permit for Outfall 008 into the ash pond.

The original definition would include the ash pond into "waters of the United States" protected by NPDES permits. Under section 122.2, the Progress River qualifies as "waters of the United States", and Fossil Creek gains that distinction by extension as its tributary. When the court overturns the suspension for lack of jurisdiction, the original language specifically includes waste treatment systems that impound "waters of the United States" like the ash pond in the definition of U.S. waters. The discharge of coal ash sediments from Outfall 008 into the ash pond therefore discharges pollutants into U.S. waters, and statute requires a NPDES permit.

**B. The suspension shows a blatant disregard for Section 553 of the APA administrative rulemaking procedure.**

When an agency creates a legislative rule, section 553 of the APA states agencies need to get public notice and comment unless the agency asserts either a 1) procedural rule exception; 2) interpretive rule exception; or 3) good cause exception. The notice and comment procedure consists of three parts: agencies must give prior notice, allow interested parties opportunity to participate, and issue a statement of basis and purpose with the final rule. The suspension is legislative in nature, substantially altering responsibilities of EPA and the public. However, EPA ignored APA procedures: it never gave notice of a proposed rule, never opened it to public comment, and never released a detailed basis or purpose. Nor did the suspension or its progeny assert an exception. Indefinitely renewing the suspension creates a *fiat accompli* rule, leaving the public no option but to accept, which is illegal.

Section 553 of the APA, agencies' informal rulemaking process, is quite simple. When a rule binds either the agency or public, it is considered legislative and must follow informal rulemaking. *Nat. Res. Def. Council v. EPA.*, 643 F.3d 311, 321 (D.C. Cir. 2011); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (A rule is legislative when "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties."). Unless an agency asserts an exception, legislative rules lead to three obligations: providing prior notice, allowing public participation, and a final rule incorporating public comment with a statement of basis and purpose. 5 U.S.C. § 553.

EPA would not meet the burden of asserting any of the three exceptions, procedural rulemaking, interpretive rulemaking, and good cause exception, to the legislative rulemaking process. Procedural rule exceptions involve "general statements of policy, or rules of agency

organization, procedure, or practice. 5 U.S.C. § 553(b)(A). They only change how people or businesses interact with an agency; they do not impose substantive obligations on others. *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). Interpretive rules do not legislate, but merely provide "crisper and more detailed lines" than the rule it interprets. *Am. Mining Cong.*, 995 F.2d at 1112. They do not need notice and comment because they do not change the original text. *Id.* The good cause exception bypasses normal rulemaking when "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). An agency still must publish a finding and brief statement of the rules. *Id.*

None of these applies to EPA's rule. The suspension changes more than how the public interacts with agencies. It changes their obligations for discharging pollutants into U.S. waters. EPA cannot assert a procedural rule exception. The suspension does not provide "crisper and more detailed lines," as much as substantially alters the meaning of the regulation. EPA cannot assert an interpretive rule exception. Nor has the suspension or any of the subsequent reiterations published any finding that public notice and comment are impracticable. To the contrary, the original suspension showed intent to give notice of a proper informal rule. 45 Fed. Reg. 48,620. EPA cannot assert a good cause exception.

Having ruled out the exceptions, the discussion shifts to whether EPA followed rulemaking procedure of prior notice, public comment, and final publishing. First, an Agency must give public notice in the Federal Register. 5 U.S.C. § 553(b). Next, "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments…" *Id* at (c). After considering relevant material presented, the agency publishes the final rule with a brief statement of their basis and purpose. *Id.*

EPA failed all three steps. EPA did not intend the suspension as public notice. The suspension reads, “EPA intends promptly to develop a revised definition and to publish it as a proposed rule for public comment.” 45 Fed. Reg. 48,620. However, EPA never proposed a rule. Likewise, there is no record of a public comment period or issuance of a final rule.

Instead, it moved straight to enforcement. The continuances in 1983 and 2015 shows awareness of the rule’s fundamentally deficient nature, but a lack of initiative to fix it. EPA has created seven rules for section 122.2 in the thirty-five years of this temporary suspension. Perhaps realizing their mistake, EPA recently initiated proper informal rulemaking to reverse the indefinite suspension in 2017. Definition of “Waters of the United States”-Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) (public comment period ending Aug. 28, 2017). FCW urges the court recognize these shortcomings in the 1980 suspension of waste treatment systems that impound "waters of the United States" from NPDES permits.

There are clear problems with the suspension. EPA lacked jurisdiction to override the express intent of congress. It goes unreasonably beyond the scope of its authority. Further, it failed entirely to follow administrative rulemaking. The court should not rely on the suspension to influence its determination. The court should use the original definition of waste treatment systems that does not exempt systems that impound "waters of the United States" from NPDES permits. The ash pond sits on the original bed of Fossil Creek, a tributary to the navigable-in-fact Progress River. Its creating impounded "waters of the United States" and any effluent entering it requires a NPDES permit.

## V. ADDING MATERIAL TO THE BED OF FOSSIL CREEK IMPACTS "WATERS OF THE UNITED STATES" AND REQUIRES A SECTION 404 PERMIT.

Even if the court upholds the suspension of waste treatment systems, section 404 fill permits have different requirements and exceptions. Dischargers like EnerProg need fill permits when material is added affecting navigable waters. Section 404 has its own exceptions independent from section 122.2 definitions. Those exceptions are subject to a recapture provision, returning previously excepted uses to "waters of the United States" The coal ash and an impermeable cap mark a new use, and a change to Fossil Creek, requiring a fill permit. Neither EPA or EnerProg asserted an exception, but had they, the abandoned waste pond would still qualify for recapture when its use changes.

First, FCW must reiterate Fossil Creek's coverage under the CWA to connect it to fill permit requirements. The CWA covers navigable-in-fact waters as a part of interstate commerce, and related relatively permanent tributaries and adjacent wetlands. *Rapanos v. United States,* 547 U.S. 715, 734 (2006). The order concedes the Progress River is a navigable-in-fact body of water, and that Fossil Creek is a permanent tributary to it. Regardless of the issue of connecting the ash pond itself to "waters of the United States", Fossil Creek is protected under the CWA.

Next, the court must determine if adding material into the bed of Fossil Creek necessitates a fill permit. The purpose 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) (2017). Effluent limitations make discharging fill material from a point source into navigable waters without a section 404 permit unlawful. CWA § 301(a); 33 U.S.C. § 1362(12)(A). Fill permits govern added dredged or fill material, while NPDES section 402 permits are for the discharge of other pollutants. When deciding if a fill permit is appropriate, section 404(c) lets EPA to "assess the effects of the fill beyond the fill's footprint…" *Mingo Logan Coal Co. v. EPA,* 829 F.3d 710, 725

(D.C. Cir. 2016). The Mingo Logan court upheld EPA's cancellation of a coal mine's fill permit after EPA assessed downstream effects of the discharge. *Id.*

Should the court conclude the ash pond is free from the protections granted "waters of the United States", the impact on the integrity of Fossil Creek beyond the fill's footprint demands a fill permit. The concern is not over just the specific area of the ash pond, but its overall effect on Fossil Creek and Progress River. Leaving the ash and covering it with an impermeable cap adds material to the bed of Fossil Creek, changing its flow, constituting adding fill material. This addition will not affect just the ash pond, but the flow of Fossil Creek below it, and eventually the Progress River. The EPA has not addressed the impact on the integrity of these waters or the order. The addition of material needs to be assessed in terms of the impact to Fossil Creek below the pond as well, and not requiring a fill permit constitutes an unlawful discharge.

Exceptions to fill permits are different from NPDES permits, and more limited. Defendants bear the burden of showing an exception and the recapture provision does not apply. *U.S. v. Cundiff*, 555 F.3d 200, 215 (6th Cir. 2009). Most exceptions concern agricultural uses or temporary construction or maintenance. 33 U.S.C. §1344(f)(1) (2017). The recapture provision requires a permit even for exceptions when a fill has "as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," and the "flow or circulation of navigable waters may be impaired or the reach of such waters reduced." 33 U.S.C. §1344(f)(2). Cundiff found addition of new material to wetlands did not qualify for exceptions, and defendants would be subject to recapture due to changing the use from wetlands to crops, altering the connected waters. *Cundiff*, 555 F.3d at 215.

EnerProg has not asserted any exception into the record, and EPA has not recognized one. Further, these exceptions would not apply because they are based around agricultural uses

and temporary maintenance and construction. The record implies the fill material and impermeable cap are a permanent addition, and not maintenance but a changed use by decommissioning the pond. Even if an exception did apply, respondents cannot evade recapture. This additional material marks a change bringing Fossil Creek into a use to which it was not previously subject, and impairs its historical flow to the Progress River. Regardless of the court's decision on a NPDES permit, the addition of coal ash and an impermeable cap clearly call for a fill permit under the CWA.

## CONCLUSION

EPA improperly included State of Progress conditions in the Final Permit because they violate CWA section 401 requirements. The conditions violate the CWA because they degrade the water quality of "waters of the United States" by allowing pollution from a point source to pollute groundwater, which in turn contaminates Progress River. The contamination degrades human and wildlife health, in direct violation of the mandate and goal of the CWA.

The EPA notice suspending compliance deadlines is not effective because section 705 of the APA explicitly states that when justice so requires, the effective date of the rule may be postponed. 5 U.S.C.A. § 705 (1966). This statement does not expressly reference compliance deadlines, which the statement would require if the intent of the statute was to include compliance deadlines. Further, the APA does not reference or address retroactively adjusting issued effective dates for the alteration of compliance deadlines. 5 U.S.C.A. § 553 (1966). This does not give EPA the authority to retroactively alter the compliance deadlines or effective date because express congressional authority is not given in this situation.

EPA Region XII is authorized to employ the BPJ case-by-case basis standard as an alternative to require zero coal ash waste deposit independent of the 2015 ELGs. As seen in the

case law, EPA is required to regulate coal ash deposits, but is not exclusively limited to singular, overarching regulations via the CWA. Further, when ELGs are under review or there are new guidelines anticipated to be enacted soon, case law permits EPA to use BPJ in cases such as these so that entities do not have to change compliance methods back to back. Conclusively, regardless of the existence of the 2015 ELGs, EPA is authorized to apply the case-by-case/BPJ standard to require zero discharge of coal ash transport wastes because the CWA allows it. Because of the above reasoning and regardless of the existence of the 2015 ELGs, EPA is authorized to apply the case-by-case/BPJ standard to require zero discharge of coal ash transport wastes because the CWA does not expressly state against it.

When determining if Outfall 008 requires an NPDES permit, the court should rely on the original definition that includes waste treatment systems impounding water of the U.S. EPA's 1980 suspension of waste treatment systems from the definition of "waters of the United States" lacked jurisdiction to alter the express intent of Congress, and circumvented agency rulemaking procedures, imposing an unreasonable restriction on the public without notice or comment. The original definition requires EnerProg to obtain a NPDES permit to discharge pollutants into the waste treatment system.

Regarding the addition of coal ash and an impermeable cap to the bed of Fossil Creek when decommissioning the ash pond, a section 404 fill permit is required. The waste treatment exception, if upheld, would no longer apply because the pond changes to a new use. Further, EPA must consider the impact on Fossil Creek downstream, not just the footprint of the fill. When the facts are considered, the addition of new material significantly impacts Fossil Creek, both at the point source and downstream. Filling the bed without a permit is unlawful. The court should require EnerProg to petition EPA for a fill permit before capping the pond.