Pace Environmental Law Review Online Companion

Volume 9
Issue 1 *Thirtieth Annual Jeffrey G. Miller National Environmental Law Moot Court Competition*

Article 4

November 2018

Measuring Brief (Enerprog, LLC)

Mehrded Safvati
Loyola Law School

Joshua Smith
Loyola Law School

Gabriela S. Perez
Loyola Law School

THIRTIETH ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Measuring Brief*

LOYOLA LAW SCHOOL
MEHRDED SAFVATI, JOSHUA SMITH, GABRIELA S. PEREZ

C.A. Nos. 17-000123 and 7-000124
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ENERPROG, L.L.C.,
Petitioner,

and

FOSSIL CREEK WATCHERS, INC.,
Petitioner,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

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

Brief of ENERPROG, L.L.C.,
Petitioner

* *This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.*

STATEMENT OF JURISDICTION

This court has jurisdiction under section 509(b)(1)(F) of the Clean Water Act ("CWA"), 33 U.S.C. § 1369(b)(1)(F) (2012), to review the final federal National Pollutant Discharge Elimination System ("NPDES") permit issued to EnerProg, L.L.C. ("EnerProg") for discharges associated with the continued operation of the Moutard Electric Generating Station ("MEGS") located in Fossil, Progress. On April 1, 2017, pursuant to 40 C.F.R. § 124.19(a) (2017), Petitioners EnerProg and Fossil Creek Watchers, Inc., ("FCW") timely filed for review of the permit with the Environmental Appeals Board ("EAB") of the United States Environmental Protection Agency ("EPA"). Record ("R.") at 6. After the EAB issued an order denying review, EnerProg and FCW timely petitioned this Court for review. *Id.* 2.

STATEMENT OF THE ISSUES

I. Is the EPA required to include conditions requiring closure and remediation of the ash pond as provided by the State of Progress in the CWA section 401 certification without regard to their consistency with section 401(d) of the CWA? And if so, do the conditions constitute appropriate requirements of state law as required by section 401(d)?

II. Does the April 25, 2017, EPA temporary stay notice effectively require the postponement of certain compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry, given that EPA reasonably concluded under section 705 of the Administrative Procedure Act that justice so requires the postponement of the deadlines in light of pending judicial review in the Fifth Circuit?

III. Under section 402 of the CWA, did EPA Region XII properly determine it could rely on Best Professional Judgment to require zero discharge of coal ash transport wastes given that EnerProg's MEGS is subject to properly promulgated

Steam Electric Power Generating Point Source Category Effluent Limitation Guidelines?

IV. Does the MEGS ash pond treatment system classify as a "waste treatment system" under 40 C.F.R. § 122.2, given the legal effect of Note 1, thereby excluding it from the jurisdictional reach of the CWA and NPDES permitting requirements for internal Outfall 008 and Outfall 009?

V. Does dewatering and capping the MEGS ash pond trigger section 404 of the CWA requiring EnerProg to obtain a fill permit when fill material is not being placed into a water of the United States?

STATEMENT OF THE CASE

On April 1, 2017, EnerProg and FCW petitioned EAB for review of the NPDES Permit No. PG000123 ("NPDES Permit"), requesting on numerous grounds that the permit be remanded to EPA Region XII for further consideration. R. at 6. Both petitions were timely filed in accordance with EAB's filing deadline extension. *Id.* On January 18, 2017, EPA Region XII issued the NPDES Permit to EnerProg. *Id.* at 6. The NPDES Permit authorizes EnerProg to continue water pollution discharges associated with the continued operation of the MEGS. *Id.*

EnerProg objected to the permits's inclusion of conditions set in the CWA section 401 certification issued by the State of Progress. *Id.* at 2. Further, EnerProg objected to the November 1, 2018, deadlines for compliance with zero discharge requirements for coal ash transport waters as contemplated by a notice issued by EPA Administrator Scott Pruitt on April 25, 2017 ("Temporary Stay Notice"). *Id.* Lastly, EnerProg challenged the permit writer's reliance on Best Professional Judgment ("BPJ") as a ground for requiring implementation of dry handling of bottom ash and fly ash wastes to achieve the zero discharge requirements. *Id.* On the other hand, the FCW argued that internal discharges of fly ash and bottom ash from Outfall 008 into the MEGS coal ash pond treatment system ("MEGS Pond") required an NPDES permit.

FCW also asserted that the closure and capping required a section 404 permit. *Id.* at 12–13.

The EAB, in affirming the issuance of the NPDES Permit to EnerProg, subsequently denied EnerProg's and FCW's petition for review and all of the arguments raised. *Id.* at 2, 10–13. EnerProg and FCW then timely petitioned this Court for judicial review of the final decision of the EAB. *Id.* at 2.

STATEMENT OF FACTS

The MEGS is a coal-fired steam electric power plant located in Fossil, Progress. *Id.* at 6. Because it is a steam electric power generating point source, MEGS is subject to EPA's effluent limitation guidelines ("ELGs"). *Id.* at 9. MEGS utilizes water resources from Moutard Reservoir to operate its facility, mainly to operate the closed-cycle cooling system. *Id.* at 7. Water is also withdrawn from the Moutard Reservoir to make up for evaporative losses from the cooling tower, for boiler water, and to transport fly ash and bottom ash. *Id.*

To remove ash build up, MEGS maintains a wet fly ash and bottom ash handling and waste treatment system in order to remove coal by-products that build up in the plant's boiler and furnace systems during steam generation. To remove the coal ash, MEGS sluices the coal combustion residuals through water pipes, discharging the fly ash and bottom ash transport water into the MEGS Pond via Internal Outfall 008. *Id.* There the transport water undergoes treatment by sedimentation before being discharged to the Moutard Reservoir via Outfall 002. *Id.* The MEGS Pond was created in June 1978 by damming the then free-flowing upper reach of Fossil Creek, which does not discharge to the reservoir, but is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water. *Id.*

In response to Progress' Clean Air Act Implementation Plan, EnerProg installed a Flue Gas Desulfurization ("FGD") system. *Id.* The FGD blowdown generates a flow of approximately 125 million gallons of water per day and was designed to discharge into the MEGS Pond via Outfall 009. *Id.* However, in February 2015 EnerProg installed a vapor compression evaporator ("VCE") to treat the FGD blowdown. The VCE evaporates the majority of the

water waste produced from the FGD, typically eliminating the majority of waste water blowdown from the FGD that discharges into the MEGS Pond via Outfall 009. *Id.* The MEGS plant converts the rest of the waste stream for use in other MEGS processes. *Id.* Currently, MEGS is also constructing a new FGD settling basin. *Id.* at 10. The waste from the basin will be treated by VCE. *Id*. In case of the severe storms, overflow from the basin may be routed to Outfall 002. *Id.*

The facility operates five outfalls. *Id.* Outfall 001 is a cooling tower system that directly discharges to Moutard Reservoir. *Id.* Outfall 002 is an ash pond treatment system that also discharges directly to Moutard Reservoir. *Id.* at 7–8. Internal Outfall 008 is a fly ash and bottom ash transport water system which discharges directly to the MEGS Pond. *Id.* at 8. Internal Outfall 009 is the discharge from the FGD blowdown treatment system to the MEGS Pond. *Id.* Lastly, Outfall 002A will contain the discharge from the new lined retention basin, upon completion of construction. *Id.* at 8.

To continue operation of the MEGS, EnerProg applied for a renewal of its NPDES Permit. *Id.* at 7. As a condition for state certification under section 401 of CWA, the State of Progress requires EnerProg to comply with the Progress Coal Ash Cleanup Act ("CACA")—a state law purported to prevent the hazards associated with the failures of ash treatment pond containment systems. The law requires the "assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress." *Id.* at 8–9. To comply with CACA, EnerProg must: (1) terminate use of the MEGS Pond 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. *Id.* As a result, the MEGS will be required to build a new retention basin to reroute all waste streams currently discharged into the MEGS Pond. *Id.* at 9. Upon completion, the new lined retention basin will receive MEGS wastewater discharge via Outfall 002A. *Id.* at 8.

Pursuant to the 2015 revised ELGs for the Steam Electric Power Generating Point Source Category ("2015 ELGs Rule"), Best Available Technology ("BAT") for toxic discharges associated with bottom ash and fly ash is zero discharge, based on the available technology of dry handling of these wastes. *Id.* at 9. The discharge

from the MEGS Pond contains elevated levels of arsenic, mercury, and selenium. It was therefore determined by the permit writer that independent of the 2015 ELGs Rule, the NPDES Permit must contain limits for toxic pollutants present in the discharge. *Id.* Accordingly, the permit writer—using his BPJ—determined that zero discharge of ash handling wastes by November 1, 2018, constitutes BAT for discharges associated with coal ash wastes. *Id.* The permit writer reasoned that dry handling of bottom ash and fly ash has been in use in the industry and that the MEGS is sufficiently profitable to adopt the dry handling of these wastes with no more than a twelve cents per month increase in the average consumer's electric bill. *Id.*

STANDARD OF REVIEW

Challenges to EPA actions under section 509(b) of the CWA, 33 U.S.C. § 1369(b), are reviewed under the extremely deferential arbitrary and capricious standard. *See Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1165 (9th Cir. 2010). Under the APA a court must set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). Review under this standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is arbitrary and capricious only where an agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . , or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

SUMMARY OF THE ARGUMENT

EnerProg takes issue with the final NPDES Permit as issued by EPA Region XII and affirmed by the EAB. First, EnerProg takes issue with the NPDES Permit's inclusion of certain requirements for the closure of its MEGS Pond mandated by the State of Progress as conditions to the state certification under section 401(d), 33 U.S.C. § 1341(d) (2012). EPA is required to include in an NPDES

permit only those conditions which are consistent with the CWA. Here, the coal ash pond closure and remediation conditions set by the State of Progress are not appropriate requirements of state law and are outside of the scope of section 401(d), 33 U.S.C. §1341(d), because they are not based on achieving state water quality standards established under section 303 of the CWA, 33 U.S.C. § 1313 (2012).

Second, EnerProg takes issue with the EAB's refusal to postpone the NPDES Permit's November 1, 2018, compliance deadlines for achieving zero discharge of coal ash transport waters as contemplated by the April 25, 2017, Temporary Stay Notice. The Temporary Stay Notice issued by EPA pursuant to section 705 of the APA, effectively postpones the November 1, 2018, deadlines for achieving zero discharge of coal ash transport waters for the 2015 ELGs Rule because it comports with the APA. EPA reasonably concluded that: (1) justice so requires the postponement of the compliance deadlines in light of pending judicial review in the Fifth Circuit; (2) compliance deadlines that have not passed are within the meaning of "effective date"; and (3) section 705 temporary stays do not require notice and comment rulemaking.

Lastly, EnerProg takes issue with EPA Region XII's reliance on BPJ for requiring zero discharge of coal ash transport waters by November 1, 2018, because the CWA does not require BPJ determinations where a nationwide ELG applies. The 2015 ELGs Rule has the full force and effect of law and thus reliance on BPJ has a negative practical effect on EnerProg's NPDES Permit requirements. Even if the 2015 ELGs Rule was eliminated or vacated, reliance on BPJ is still improper since the 1982 ELGs regulate arsenic, mercury, and selenium. Assuming BPJ applies, EPA Region XII failed to consider if BAT effluent limitations was economically achievable.

On the other hand, EPA Region XII and the EAB properly determined that no effluent limitations are required for Internal Outfall 008 as it does not discharge into a "water of the United States." The MEGS Pond is not a "water of the United States," as that term is defined in 40 C.F.R. § 122.2 (2017), because it is a waste treatment system and is therefore not subject to NPDES permitting requirements. Although the exclusion was initially limited to only manmade bodies of water which were neither

originally created in waters of the United States nor resulted from impoundment of waters of the United States, the EPA properly suspended the qualifying sentence of the exclusion.

Additionally, EPA Region XII and the EAB properly determined that the coal ash pond closure and capping plan does not require a permit under section 404 of the CWA, 33 U.S.C. § 1344 (2012). The jurisdictional definition of "waters of the United States" is almost identical for section 402 and section 404 permitting. Under both the EPA's and the Army Corps of Engineers' regulations for administering the section 404 program, the coal ash pond is not a "water of the United States," and an exemption for waste treatment systems apply. However, even if the MEGS Pond is found to be a "water of the United States," EPA is not the proper agency to issue a section 404 permit as the Secretary of the Army is tasked with that responsibility.

ARGUMENT

I. THE FINAL NPDES PERMIT IMPROPERLY INCLUDED CONDITIONS SET BY THE STATE OF PROGRESS IN THE CWA SECTION 401 CERTIFICATION.

Section 401(a)(1) of the CWA, 33 U.S.C. §1341(a)(1), requires an applicant for a federal license or permit, whose activity may result in a discharge into navigable waters, to obtain a certification from the state in which the discharge originates. The purpose of the certification is to ensure that the applicant's discharge complies with sections 301, 302, 303, 306, and 307, which congress enumerated in section 401(a). *See* 33 U.S.C. § 1341(a). Conditions included by the state in the certificate become conditions on the federal license or permit, so long as they are "necessary to assure" compliance with limitations enumerated in the code and with "any other *appropriate* requirement of State law." *Id.* § 1341(d) (emphasis added). This Court reviews EPA's action under the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); *Am. Wildlands v. Browner*, 260 F.3d 1192, 1196 (10th Cir. 2011).

A. The EPA Must Verify That the Conditions Set by the State of Progress for EnerProg to Obtain Certification are Consistent With CWA Section 401(d) Before Those Conditions are Incorporated in an NPDES Permit.

The EPA is Congressionally authorized to administer the CWA. *Am. Rivers, Inc. v. FERC.*, 129 F.3d 99, 107 (2d Cir. 1997). Furthermore, several courts have ruled that the EPA has the discretion to review state water standards to verify they comply with the CWA. *Defs. of Wildlife v. EPA*, 415 F.3d 1121, 1127 (10th Cir. 2005) (holding that the EPA correctly found ambiguous state regulation adopted under state's water quality act did not apply, and that the regulation was contrary to the CWA); *Nw. Envtl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1211 (D. Or. 2012) (noting that the EPA had a duty to review the State of Oregon's water quality standards to verify it met CWA's requirements); *Nat. Res. Def. Council v. EPA*, 806 F. Supp. 1263, 1273 (E.D. Va. 1992) (holding the EPA sufficiently reviewed state standards under statutory scheme of the CWA). Agency decisions should not be disturbed or substituted by judges who, unlike agency administrators, have no duty or expertise with regard to the statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984).

Here, the EAB mistakenly cited *Am. Rivers, Inc.* in proposing that the EPA does not have the authority to review the certification requirements set by the State of Progress. *See Am. Rivers, Inc.*, 129 F.3d at 107. However, the court in *Am. Rivers, Inc.* only held that the Federal Energy Regulation Commission ("FERC") does not have the discretion to review a state's certification requirements. *Id.* ("[T]he [FERC] is not Congressionally authorized to administer the CWA . . .'[e]xcept as otherwise expressly provided in this chapter, the Administrator of the [EPA] shall administer this chapter.'").

Moreover, the laws of Progress do not provide for review of such certifications in the state's courts. Because there is no procedure available under the laws of Progress for EnerProg to obtain judicial review of the state certification conditions, EnerProg would be substantially prejudiced. *Cf.* 40 C.F.R.

§ 124.55(e) (2017). Allowing review where a court does not have procedures available would lead to efficiency in the judicial system, certainty, and fairness.

B. The Ash Pond Closure and Remediation Conditions are Not "Appropriate Requirements of State Law" as Required by Section 401(d) of The CWA Because the CACA Requirements are Not Based on Achieving State Water Quality Standards Established Under CWA Section 303.

Although section 401(d) of the CWA, 33 U.S.C. § 1341(d), authorizes the state to place restrictions on a permit applicant's activity, that authority is limited. *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 712, (1994). The state can only certify that the project conforms with limitations prescribed in the CWA. *Id.* One such limitation is prescribed in section 303 of the CWA, 33 U.S.C. § 1313 (2012). *See* 33 U.S.C. § 1341(a), (d) (limitation is incorporated into section 401(d) because it is expressly enumerated in section 401(a)). Accordingly, states may condition an applicant's section 401(d) certification on their compliance with section 303.

Section 303 grants states the authority, *subject to federal approval*, to establish water quality standards for all intrastate waters. *PUD No. 1 of Jefferson Cty*., 511 U.S. at 700. Section 303(c) defines "water quality standard" as: (1) "the designated uses of the navigable waters involved," and (2) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A).

Here, the EAB erred when it affirmed the certification conditions set by the State of Progress because the coal ash pond remediation and closure requirements pursuant to CACA are outside the scope of section 303. The authority of the State of Progress under section 401 is limited to the extent the permit complies with water quality standards under section 303. *See* 33 U.S.C. § 1341(a), (d). The CACA conditions which require EnerProg to terminate use of the MEGS Pond by November 1, 2018, dewater the pond by September 1, 2019, and cap the remaining coal combustion residuals by September 1, 2020, cannot be applied under section 401(d) independently of section 303

because they do not concern water quality standards. This is evident in the statute, as the CACA does not designate the use of the navigable waters, nor does it set water quality criteria for such waters based upon such uses. Instead, CACA is a state-enacted law that requires assessment closure, and remediation of substandard coal ash disposal facilities in the State of Progress in order to prevent public hazards. Hence, these state law requirements are not appropriate because they are not based on achieving water quality standards as established under CWA section 303, and is thus beyond the scope of section 401(d).

II. THE APRIL 25, 2017, TEMPORARY STAY NOTICE EFFECTIVELY POSTPONES THE NOVEMBER 1, 2018, DEADLINES FOR ACHIEVING ZERO DISCHARGE OF COAL ASH TRANSPORT WATERS FOR THE 2015 ELGS RULE BECAUSE IT IS A LAWFUL AND REASONABLE EXERCISE OF THE EPA'S DISCRETION UNDER SECTION 705 OF THE APA.

APA section 705, broadly authorizes an agency to "postpone the effective date of action taken by it, pending judicial review," where the agency finds that "justice so requires." 5 U.S.C. 705 (2012). The April 25, 2017, Temporary Stay Notice is a valid and reasonable exercise of EPA's authority under the APA because it comports with section 705, compliance dates are within the meaning of "effective date," and notice and comment is not required when issuing a section 705 temporary stay. This Court reviews EPA's decision on the deferential arbitrary and capricious standard. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 18 (D.C.C. 2012).

A. The Temporary Stay Notice Comports with APA Section 705 Because EPA Reasonably Concluded that Justice So Requires the Postponement of Certain 2015 ELGs Rule Compliance Deadlines in Light of Pending Judicial Review in the Fifth Circuit.

APA section 705, imposes only two conditions on an agency's authority to stay the effectiveness of a rule: (1) the agency must find that "justice so requires;" and (2) the rule stayed must be "pending judicial review." 5 U.S.C. § 705. Here, EPA Administrator Scott Pruitt did not violate section 705 in issuing the April 25, 2017, Temporary Stay Notice of certain compliance deadlines in the final 2015 ELGs Rule because the statute places broad authority on EPA to provide equitable relief pending judicial review when it finds that justice so requires. *Id.*

On April 25, 2017, EPA published the Temporary Stay Notice[1] reasoning that pursuant to APA section 705 justice so requires it to postpone certain not yet effective compliance dates of the 2015 ELGs Rule to preserve the status quo while litigation is pending. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (temporary stay notice). Particularly, the Temporary Stay Notice postpones compliance deadlines for achieving zero discharge of fly ash and bottom ash transport water. *Id.*

1. EPA reasonably concluded that "justice so requires" a stay of compliance deadlines.

Section 705 does not impose any specific standard for issuance of administrative stays, other than when "justice so requires" it. 5 U.S.C. § 705. Because section 705 does not specify what factors an agency must consider in determining whether "justice so requires" a stay, EPA is free to follow its own; and "absent extraordinary circumstances, it is improper for a reviewing court to prescribe the procedural format an agency must follow." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 541 (1978). This is because "[b]eyond the APA's minimum requirements, courts lack authority to impose upon [an] agency its

[1] The April 25, 2017, Temporary Stay Notice is being challenged in the U.S. District Court for the District of Columbia. Complaint, *Clean Water Action, et al. v. Pruitt*, No. 17-817 (D.D.C. May 3, 2017), ECF Doc. No. 1.

own notion of which procedures are best." *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1207 (2015).

Despite section 705's clear language, one district court held that the standard for a section 705 stay at the agency level is "the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test." *Sierra Club*, 833 F. Supp. 2d at 29–30; *see also* 5 U.S.C. § 705 (courts may only grant stays under section 705 to prevent irreparable injury). However, because the *Sierra Club v. Jackson* court's interpretation is neither binding nor consistent with the plain language of section 705, EPA's section 705 reasonable determination should be reviewed under the appropriate "justice so requires" standard. *See S. Shrimp All. v. United States*, 33 Ct. Int'l Trade 560, 572 (2009).

In light of the broad authority expressly delegated to the EPA in section 705, the EPA reasonably determined that based on the circumstances justice required staying the approaching compliance deadlines. In the Temporary Stay Notice the EPA explained that the administrative petitions for reconsideration raises "sweeping and wide ranging" objections to the 2015 ELGs Rule that overlap with issues in the litigation. 82 Fed. Reg. at 19,005. EPA emphasized that the petitions raised issues relating to the feasibility and costs of the new limits. *Id*. EPA reasonably determined that—in light of the "capital expenditures that facilities incurring costs under the [2015 ELGs] Rule will need to undertake" to meet the fast approaching compliance deadlines and EPA's reconsideration of the 2015 ELGs Rule—justice so requires it to postpone the compliance dates of the rule that have not yet passed. *Id.; see also* Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source 80 Fed. Reg. 67,838, 67,854 (Nov. 3, 2015) (codified at 40 C.F.R. pt. 423) (2015 final ELGs rule).

2. The 2015 ELGs Rule is pending judicial review in the Fifth Circuit.

Under section 705, an agency may only postpone an action taken by it that is pending judicial review. 5 U.S.C. § 705. Following EPA's promulgation of the 2015 ELGs Rule, numerous parties filed petitions for review of the rule, which were

consolidated in the Fifth Circuit. Consolidation Order, *Sw. Elec. Power Co. v. EPA*, No. 15–60821 (5th Cir. Dec. 9, 2015), Doc. No. 2.

Here, the EPA rightfully issued the Temporary Stay Notice under section 705 because it stayed certain compliance deadlines of the 2015 ELGs Rule that are "pending judicial review." As the EPA explained in the Temporary Stay Notice, the "sweeping and wide-ranging objections" raised in the reconsideration petitions overlap with issues in the Fifth Circuit litigation. 82 Fed. Reg. at 19,005. On April 12, 2017, when EPA announced it would reconsider the 2015 ELGs Rule, it faced an impending May 4, 2017, deadline to file its merits brief. *Id.* Thereafter, EPA moved to hold the case pending in the Fifth Circuit in abeyance for 120 days and the Fifth Circuit granted EPA's motion. Abeyance Order, *Sw. Elec. Power Co. v. EPA*, No. 15–60821(5th Cir. Apr. 24, 2017), Doc. No. 00513964356; *see also* 82 Fed. Reg. at 19,005–06. Thus, EPA clearly articulated a link between the pending judicial review and the stay of certain 2015 ELGs Rule compliance deadlines since the pending judicial challenges underlie both the reconsideration and the stay.

B. Section 705 Authorizes the Postponement of Future Compliance Dates Because they are Within the Meaning of the Term "Effective Date."

Section 705 broadly authorizes EPA to postpone the "effective date of action taken by it." 135 U.S.C. § 705. The EPA reasonably construed section 705 to permit it to stay specific compliance dates that fall after the initial effective date of the 2015 ELGs Rule. Specifically, EPA reasonably concluded that compliance dates that have not passed are within the meaning of "effective date." The Supreme Court in *United States v. Mead Corp.*, noted that agency action, whatever its form, is due some deference given the "specialized experience and broader investigations and information" available to the agency. 533 U.S. 218, 234 (2001) (citing *Skidmore v. Swift Co.*, 323 U.S. 134, 139 (1944)). Thus, because EPA's determination that compliance deadlines fit within "effective date" involve the interplay of the APA, CWA, and the 2015 ELGs Rule, EPA is owed deference.

The view that EPA is without authority to postpone certain deadlines of the 2015 ELGs Rule because the January 4, 2016, effective date has already passed relies on an overly restrictive interpretation of "effective date." Under section 705, EPA may stay "the effective date of action taken by it." 5 U.S.C. § 705. The term "effective date" is not defined in the APA and therefore must be viewed in context. The APA defines "agency action" broadly as "the whole or a part" of any agency rule, order, license, or sanction, relief, or the equivalent or denial thereof, or the failure to act," *Id.* § 551(13); *see also id.* § 701(b)(2). Thus, it is reasonable to read effective date to include multiple dates because an agency action may have more than one part.

Here, the 2015 ELGs Rule established an effective date of January 4, 2016, but the earliest compliance dates take effect November 1, 2018. 80 Fed. Reg. at 67,838, 67,894–97; *see* 40 C.F.R. § 423.13(g)(1)(i), (h)(1)(i), (i)(1)(i), (k)(1)(i) (2017). EPA's interpretation gives full effect to the APA's definition of "agency action" and allows an agency to postpone part of a rule by postponing certain future compliance dates. The EPA's interpretation also gives meaning to "justice so requires" as it allows the EPA to narrowly tailor its postponement to only the particular future compliance dates that may cause hardship.

Also, neither case law nor prior agency practice precludes the EPA's interpretation of including compliance dates within the meaning of "effective date." EPA has never interpreted section 705 to not authorize the agency to postpone compliance dates of a rule whose effective date has already passed. Although a lower court recently addressed this issue, the opinion is unpublished and the facts are highly distinguishable. *See Becerra v. U.S. Dep't of Interior*, No. 17-cv-02376-EDL, 2017 WL 3891678, at *8–11 (N.D. Cal. Aug. 30, 2017).

The court in *Becerra v. U.S. Department of Interior* relied on another unpublished decision, *Safety-Kleen Corp. v. EPA*, to hold that the term "effective date" in section 705 did not encompass "compliance dates." *Id.* However, the lower court's reliance on *Safety-Kleen Corp.* was unjustified given that it does not address if the meaning of "effective date" includes compliance dates that have not yet passed. *See Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2–*3 (D.C. Cir. Jan. 19, 1996). Most

importantly in *Becerra* the Department of the Interior tried to postpone the entire rule based on the fact that some compliance dates had not yet passed. *Becerra*, 2017 WL 3891678, at *8–9. In our case, the EPA is not staying the entire 2015 ELGs Rule, but is merely postponing certain compliance dates that have yet to become effective. It was thus reasonable for the EPA to conclude that because the compliance deadlines reflect the dates when specific parts of the 2015 ELGs Rule take effect, they fit perfectly within the meaning of "effective date."

C. The EPA May Postpone the Compliance Dates of a Rule Under APA Section 705 Without Notice and Comment Rulemaking Because Section 705 Does Not Require Notice and Comment and an Agency Issued Stay is Not a "Rule."

Section 705 is a free-standing grant of authority to provide equitable relief pending judicial review that does not mention or cross-reference the APA's separate rulemaking provisions. The APA has numerous cross-references, indicating that Congress chose to intentionally include them when it so wanted to. *See, e.g.*, 5 U.S.C. § 553(c) (2012) (cross-referencing sections 556 and 557); 5 U.S.C. § 556(a) (2012) (cross-referencing sections 553 and 554); 5 U.S.C. § 706(2)(E) (cross-referencing sections 556 and 557). Courts are reluctant to read additional requirements into a statutory provision when there is no indication in the text or legislative history that Congress intended to incorporate those terms. *See, e.g.*, *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (rejecting dissent's interpretation of statute because "[i]t reads into the provision a limitation . . . that the language nowhere mentions"). The fact that Congress did not cross-reference section 553 shows that it did not intend for section 705 to require notice and comment rulemaking.

Additionally, the EPA is not required to undertake notice and comment rulemaking when issuing a section 705 stay of not yet effective compliance deadlines because the stay is not a "rule" within the meaning of APA section 553. Under the APA, a "rule" is an "agency statement . . . designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The Temporary Stay

Notice does none of these things, and is therefore not a rule. A court recently addressed this issue and held that a section 705 stay "does not constitute a substantive rulemaking because, by definition, it is not 'designed to implement, interpret, or prescribe law or policy[.]'" *Sierra Club*, 833 F. Supp. 2d at 28 (citations omitted). Nor does the Temporary Stay Notice repeal or amend the 2015 ELGs Rule. *See* 5 U.S.C. § 551(5) ("'[R]ule making' means agency process for formulating, amending, or repealing a rule."). The Temporary Stay Notice has not altered the substance of the 2015 ELGs Rule.

Some courts have recognized that when an agency puts off compliance indefinitely, such a suspension is "tantamount to a revocation" and should be subject to the same notice and comment requirements as a repeal under the APA. *See Nat. Res. Def. Council, Inc. v. EPA,* 683 F.2d 752, 763 (3d Cir. 1982); *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984). However, section 705 stays are temporary procedural tools employed by agencies to preserve the status quo pending judicial review.

Lastly, interpreting section 705 to require notice and comment defeats the policy behind section 705 since the upcoming deadlines that the agency intends to postpone will likely have passed. Clearly, an agency cannot undergo notice and comment rulemaking within the limited time between a final rule's publication and initial effective date. *See* 5 U.S.C. § 553(d). Therefore, the EPA did not act arbitrarily or capriciously in issuing the Temporary Stay Notice postponing certain compliance deadlines under the 2015 ELGs Rule.

In sum, because the Temporary Stay Notice postponing the 2015 ELGs Rule's compliance deadlines for achieving zero discharge of coal ash waters is a valid and reasonable exercise of EPA's authority under section 705, it has the effect of relieving EnerProg from complying with the November 1, 2018, deadlines for achieving zero discharge of fly ash and bottom ash transport water. *See* 82 Fed. Reg. at 19,005; *see infra* Section III.

III. EPA REGION XII'S RELIANCE ON BPJ FOR REQUIRING ZERO DISCHARGE OF COAL ASH TRANSPORT WATERS IS UNJUSTIFIED

BECAUSE AS A MATTER OF LAW THE 2015 ELGS RULE APPLIES.

CWA section 301(a), 33 U.S.C. § 1311(a) (2012), prohibits the discharge of pollutants to "waters of the United States" unless authorized by, among other things, an NPDES permit. EPA implements the federal NPDES program by issuing permits that allow for the discharge of pollutants subject to limitations. 33 U.S.C. § 1342 (2012). Here, EPA Region XII's reliance on BPJ was unjustified given that the 2015 ELGs Rule has the full force and effect of law. This Court reviews EPA's action under the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A).

A. The CWA Does Not Require Case-by-Case BPJ Limits Where a Final Nationwide ELG Applies.

The plain language of the CWA does not allow permitting authorities to perform a BPJ analysis when applicable ELGs are in place. Effluent limitations in NPDES permits may be either technology-based ("TBELs") or water quality-based. *See* 33 U.S.C. §§ 1311(b), 1313, 1342. If the EPA has developed industrial category-wide ELGs such limits must be included in that facility's permit. *Id.* § 1342; 40 C.F.R. § 125.3(c)(1) (2017). However, where the EPA has not developed an ELG for a particular industry, or has not addressed a particular pollutant discharged by an industry, the CWA authorizes EPA to use its BPJ to develop permit limits based on case-by-case analysis. 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3(c)(2)–(c)(3). Thus, the imposition of BPJ is required only "[i]f no national standards have been promulgated for a particular category of point sources." *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 199 (D.C. Cir. 1988).

Here, EPA Region XII was required to include in EnerProg's January 18, 2017, issued NPDES Permit only the 2015 ELGs Rule's limits, pursuant to section 402(a) of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. § 125.3(c)(1). The ELGs for the Steam Electric Power Generating Point Source Category are codified in 40 C.F.R. § 423. On November 3, 2015, EPA properly promulgated the final 2015 ELGs Rule entitled, "Effluent Limitations Guidelines and Standards for the Steam Electric Power

Generating Point Source Category," thereby amending 40 C.F.R. § 423. *See* 80 Fed. Reg. at 67,839. The EPA determined in the 2015 ELGs Rule that power plants are able to meet a zero-discharge standard for fly ash and bottom ash wastewaters based on the available technology of dry handling of these wastes. *See id.* at 67,841. The 2015 ELGs Rule applies to EnerProg's NPDES Permit because the MEGS is a coal fired steam electric power plant with one unit rated at a maximum dependable capacity of 745 megawatts. *See* 40 C.F.R. § 423.10. Thus, the 2015 ELGs Rule applied to EnerProg's MEGS wastewaters.

Moreover, although the 2015 ELGs Rule is currently being challenged in the Fifth Circuit and EPA announced that it will conduct a new rulemaking to revise portions of the 2015 ELGs Rule, it is still a final rule because it has not been vacated or remanded. *See* 82 Fed. Reg. at 19,005; Abeyance Order, *Sw. Elec. Power Co. v. EPA*, No. 15–60821(5th Cir. Apr. 24, 2017), Doc. No. 00513964356. EPA has held that it must issue permits based on effluent regulations promulgated in final form pursuant to CWA sections 301 and 304, 33 U.S.C. §§ 1311, 1314, even when those regulations are undergoing judicial review. *See* In re Inland Steel Co., 1975 WL 23870, at *4 (E.P.A.G.C.); In re U.S. Steel Corp., 1975 WL 23847, at *1 (E.P.A.G.C.); In re U.S. Steel Corp., 1975 WL 23866, at *3 (E.P.A.G.C.); In re Youngstown Sheet and Tube Co., 1975 WL 23875, at *1 (E.P.A.G.C.). The fact here remains that the 2015 ELGs Rule is a properly promulgated rule with the full force and effect of law. *See* 80 Fed. Reg. at 67,839. Accordingly, as a matter of law, the EPA should have issued EnerProg's NPDES Permit based on the current 2015 ELGs Rule.

B. EPA Region XII's Unjustified Reliance on BPJ Has a Negative Practical Effect on EnerProg's NPDES Permit Requirements.

Because the April 25, 2017, Temporary Stay Notice effectively postpones the November 1, 2018, compliance deadlines for achieving zero discharge limits of coal ash transport waters, it has the effect of relieving EnerProg from complying with the November 1, 2018, deadlines for achieving zero discharge of fly ash and bottom ash transport water. *See* 82 Fed. Reg. at 19,005. The EPA

also announced a proposed rule to postpone the compliance date for the more stringent BAT effluent limitations for fly ash and bottom ash transport water which would thereby relieve EnerProg from compliance. Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 26,017 (proposed June 6, 2017) (to be codified at 40 C.F.R. pt. 423).

Also, the 2015 ELGs Rule is currently being challenged in the Fifth Circuit so there is a possibility that it may be vacated or modified. EPA's policy for revision of issued NPDES permits following a modification is as follows: only those permit conditions and limitations based upon promulgated effluent guidelines which were subsequently modified as the result of a court order or remand may be revised pursuant to this policy. In re U.S. Steel Corp., 1975 WL 23847, at *3. Here, if the 2015 ELGs Rule is modified as the result of a court order, EnerProg will be unable to request a revision of its NPDES Permit because the permit requirements are based on BPJ and not the 2015 ELGs Rule. Therefore, EPA Region XII's reliance on BPJ to support the zero discharge limits requirement for bottom ash and fly ash transport waters negatively impacts the practical effect on EnerProg's NPDES Permit.

C. Even if the 2015 ELGs Rule Was Eliminated or Vacated, Reliance on BPJ is Unjustified Because the 1982 ELGs Apply.

Where a current rule has been invalid, the prior agency rule will control "until validly rescinded or replaced." *Cumberland Med. Ctr. v. Sec'y of Health & Human Servs.*, 781 F.2d 536, 538 (6th Cir. 1986). Thus, assuming the 2015 ELGs Rule was eliminated or vacated, the 1982 ELGs control since it has the full force and effect of law. Steam Electric Power Generating Point Source Category Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52,290 (Nov. 19, 1982) (codified at 40 C.F.R. pt. 423) (1982 final rule).

1. The 1982 ELGs regulate arsenic, mercury, and selenium.

Here too the plain language of the CWA state that EPA is not to perform a BPJ analysis when applicable ELGs are in place. 33 U.S.C. § 1342. Only where EPA has not developed an ELG for a particular industry, or has not addressed a particular pollutant discharged by an industry, is the EPA authorized to use its BPJ to develop permit limits based on case-by-case determinations. *See* 40 C.F.R. § 125.3(c)(2)–(c)(3).

Here, the 1982 ELGs regulate arsenic, mercury, and selenium and therefore EPA Region XII should have applied the 1982 ELGs as required by the CWA. There are only two published court opinions directly addressing this issue and both held that the 1982 ELGs regulate arsenic, mercury, and selenium and therefore the 1982 ELGs applied. *See Louisville Gas & Elec. Co. v. Kentucky Waterways All.*, 517 S.W.3d 479, 492 (Ky. 2017); *Nat. Res. Def. Council v. Pollution Control Bd.*, 37 N.E.3d 407, 413 (Ill. App. Ct. 2015). When developing the 1982 ELGs the EPA declined to impose BAT based limits on thirty-four metals and toxins and explained that they were "excluded . . . because they are present in amounts too small to be effectively reduced by technologies known to the Administrator." 47 Fed. Reg. at 52,303–04. Both courts reasoned that although the 1982 ELGs do not provide a TBEL for the thirty-four toxic chemicals it lists— including mercury, arsenic, and selenium—the lack of a TBEL for that pollutant does not mean that the unregulated pollutant was unaddressed by or is outside the scope of the 1982 ELGs. *See* 37 N.E.3d 407, 413; 517 S.W.3d 479, 488–89.

Additionally, both courts found support for their holding under the NPDES Permit Writer's Manual ("Permit Manual"). *See Louisville Gas & Elec. Co.*, 517 S.W.3d at 489 (approving and discussing *Pollution Control Bd.*); *Pollution Control Bd.*, 37 N.E.3d at 413–14. The Permit Manual states that case-by-case TBELs are established only in situations where ELGs are inapplicable, such as:

> When [ELGs] are available for the industry category, but no effluent guidelines requirements are available for the pollutant of concern . . . . The permit writer should make sure that the pollutant of concern is not already controlled by the effluent guidelines and was not considered by EPA when the Agency developed the effluent guidelines.

U.S. EPA, *National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual*, § 5.2.3.2, at 5-45 to 5-46 (Sept. 2010). Thus, both courts concluded that because the EPA considered and addressed arsenic, mercury, and selenium when creating the 1982 ELGs, the permit writer was required "to refrain from imposing [BPJ] limitations" and must instead apply the 1982 ELGs. *See Louisville Gas & Elec. Co.*, 517 S.W.3d at 489; *Pollution Control Bd.*, 37 N.E.3d at 414. Therefore, because arsenic, mercury, and selenium are regulated under the 1982 ELGs, EPA Region XII's decision to set BPJ limits was arbitrary and capricious.

2. Assuming BPJ is justified, EPA Region XII failed to consider whether the BAT effluent limitation was economically achievable.

The EPA does not have unlimited discretion to establish permit effluent limitations when issuing permits on a case-by-case basis using its BPJ. EPA Regions are required to consider the factors enumerated in section 304 of the CWA, 33 U.S.C. § 1314(b). *See also* 40 C.F.R. § 125.3(c)–(d). In addition, courts reviewing permits issued on a BPJ basis hold EPA to the same technology-based standard and factors that must be considered in establishing the national ELGs. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984) (reasoning EPA must consider statutorily enumerated factors in its BPJ determination of effluent limitations). For existing sources, toxic pollutants are subject to BAT. *See* 33 U.S.C. §§ 1311(b)(2), 1314(b)(2), 1317(a)(2). "[T]he basic requirement for BAT effluent limitations is only that they be technologically and economically achievable." *Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 265– 66 (5th Cir. 1988). A technology is "available" even if it is used only by the best facility in the industry. *See Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 226 (5th Cir. 1989). A technology is economically achievable if the costs can be reasonably borne by the industry as a whole. *See Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 516 (2d Cir. 2005); *Rybachek v. EPA*, 904 F.2d 1276, 1290-91 (9th Cir. 1990).

Arsenic, mercury, and selenium are toxic pollutants and thus, assuming BPJ reliance is justified, EPA Region XII was required

to determine what effluent limitations represent BAT level using its BPJ by considering all the factors. *See* 40 C.F.R. § 125.3(c)-(d). Here, EPA Region XII determined, in its BPJ, that zero discharge of coal ash handling wastes by November 1, 2018, constitutes BAT for discharges associated with fly ash and bottom ash transport wastes. The EPA properly determined that the BAT effluent limitation was technologically achievable because dry handling of bottom ash and fly ash has been in use at existing industry plants. However, the EPA wrongly determined that the BAT effluent limitation was economically achievable because it failed to consider if the costs can be reasonably borne *by the industry as a whole*. The EPA only determined that the MEGS is sufficiently profitable to adopt dry handling of bottom ash and fly ash because it "would cost no more than twelve cents per month increase in the average consumer's electric bill." EPA should have considered what the costs would be to the industry as a whole, not what the cost increase would be to the consumer.

Although Congress intended BAT to be technology-forcing an agency determination is rejected as arbitrary and capricious if it fails to consider appropriate factors. *See St. Elizabeth Cmty. Hosp. v. Heckler*, 745 F.2d 587 (9th Cir. 1984). Therefore, because EPA Region XII acted arbitrary and capricious in determining that zero discharge of fly ash and bottom ash transport wastes by November 1, 2018, constituted BAT for discharges associated with waste, this Court should reject EPA's Region XII's determination.

IV. OUTFALL 008 IS NOT A DISCHARGE SUBJECT TO NPDES PERMITTING REQUIREMENTS BECAUSE THE MEGS POND IS NOT A WATER OF THE UNITED STATES AND IS OUTSIDE THE JURISDICTIONAL REACH OF THE CWA.

The CWA prohibits the discharge of any pollutant from a point source into "waters of the United States," unless authorized by, among other things, an NPDES permit. 33 U.S.C. § 1311(a). Congress explicitly limited the jurisdiction of the CWA to "waters of the United States." *Id.* § 1362(7) (2012); *Rapanos v. United States*, 547 U.S. 715, 756 (2006). Importantly, the CWA does not apply to all waters within the United States, and certain bodies of

water have been specifically excluded from the CWA's jurisdictional reach. *See* 40 C.F.R. § 122.2 (defining "waters of the United States"); *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) (holding that CWA jurisdiction does not apply to isolated ponds that are not adjacent to open water). These excluded bodies of water are not subject to the requirements of the CWA, including the NPDES permitting requirements. 33 U.S.C. § 1342.

EPA Region XII and the EAB properly determined that the MEGS Pond is not a "water of the United States" as defined in 40 C.F.R. § 122.2, specifically under the exclusion for "waste treatment systems" and incorporation of Note 1. Accordingly, discharges from internal Outfalls 008 and 009 into the MEGS Pond are not subject to the NDPES permitting requirements. Once again, this Court reviews EPA's action under the extremely deferential arbitrary and capricious standard. 5 U.S.C. § 706(2)(A).

A. The Internal Discharges into the MEGS Pond are Exempted from NPDES Requirements Because the MEGS Pond is a Waste Treatment Pond and Not a Water of the United States.

The MEGS Pond is outside the jurisdictional reach of the CWA and exempt from NPDES permitting requirements because it is excluded from EPA's definition for "waters of the United States." The MEGS Pond is a "waste treatment system . . . designed to meet the requirements of the CWA" and is therefore not a water of the United States. 40 C.F.R. § 122.2. This exclusion applies even though the MEGS Pond was originally created by impounding a water of the United States because the EPA properly suspended the sentence which limited the exclusion by including Note 1 in 40 C.F.R. § 122.2.

1. The EPA has authority to define "waters of the United States" for purposes of administering the CWA.

An administrative agency has the authority to form policy and promulgate rules "to fill any gap left, implicitly or explicitly, by Congress" when administering a congressionally created program.

Morton v. Ruiz, 415 U.S. 199, 231 (1974). "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute." *Chevron, U.S.A. Inc.*, 467 U.S. at 844.

Congress drafted the CWA to prohibit the discharge of any pollutant from a point source into "navigable waters." 33 U.S.C. 1311(a). "Navigable waters," is statutorily defined as the "waters of the United States." *Id.* § 1362(7); *Rapanos,* 547 U.S. at 730–31. For purposes of administering the CWA and issuing permits, including NPDES permits, EPA promulgated a regulatory definition defining the scope of "waters of the United States." *See* 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.1. The regulatory definition for waters of the United States includes, among other things, "all impoundments of waters otherwise identified as waters of the United States." 40 C.F.R.§ 122.2(a)(4). However, the regulatory definition for "waters of the United States" also explicitly excludes "waste treatment systems, including ponds . . ., designed to meet the requirements of the [CWA]." *Id.* §122.2(b)(1).

2. The MEGS Pond is excluded from the regulatory definition of waters of the United States because it is a "waste treatment system . . . designed to meet the requirements of the [CWA]."

EnerProg does not contest that Fossil Creek and the MEGS Pond fall within the scope of EPA's definition for "waters of the United States" pursuant to 40 C.F.R. § 122.2. Fossil Creek is a perennial tributary of a navigable in-fact interstate body of water, the Progress River, and is a "water of the United States" within the jurisdictional reach of the CWA. 40 C.F.R. § 122.2(a)(2), (a)(5). The MEGS Pond is an impoundment of Fossil Creek, a water of the United States, and thereby fits within the definition of a "water of the United States" for impoundments. *Id.* § 122.2(a)(4). However, the MEGS Pond qualifies as "a waste treatment system, including treatment ponds . . . designed to meet the requirements of the CWA." 40 C.F.R. § 122.2(b)(1).

EnerProg acknowledges that the waste treatment system exclusion was initially limited to "only manmade bodies of water which neither were originally created in waters of the United

States nor resulted from the impoundment of waters of the United States." 40 C.F.R. § 122.2(b)(1); Hazardous Waste and Consolidated Permit Regulations, 45 Fed. Reg. 33,066, 33,424 (May 19, 1980). However, following the adoption of the regulation, regulated parties in the industry filed petitions for review which prompted the EPA to suspend and re-examine the provision. Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980) (codified at 40 C.F.R. pt. 122.2, Note 1). Specifically, EPA suspended the qualifying sentence of the exclusion, amending 40 C.F.R. § 122.2 to include Note 1 which states: "[i]n 40 C.F.R. § [122.2], in the definition of 'Waters of the United States,' the last sentence, beginning 'This exclusion applies. . .,' is suspended until further notice." *Id.* Note 1 effectively suspends the qualification to the exclusion, providing that *all* "waste treatment systems, including treatment ponds . . . designed to meet the requirements of the [CWA]" are not waters of the United States. 40 C.F.R. § 122.2(b)(1).

3. The EPA intended for the waste treatment system exclusion to supersede the classification of a water as an impoundment.

The classification of the MEGS Pond as a "waste treatment system" supersedes its classification as "an impoundment" of a water of the United States. Subsection (b) of the EPA's regulatory definition for "waters of the United States" exempts specific water bodies and water features, "even where they otherwise meet the terms of [an impoundment of waters of the United States]." 40 C.F.R. § 122.2(b).

EPA's interpretation of the exclusion and the Note 1 suspension are "the ultimate criterion" when determining the meaning of an agency's regulation "unless it is plainly erroneous or inconsistent." *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945). The court "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). "Unless an alternative reading is compelled by the regulation's plain language or by other indications of the [Administrator's] intent at the time of the regulation's promulgation," the court must defer to the EPA's

interpretation. *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). Such deference is warranted when the regulation concerns "a complex and highly technical regulatory program." *Thomas Jefferson,* 512 U.S. at 512 (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

Here, EPA clearly interprets the waste water treatment exclusion to apply even if the "treatment pond" is an "impoundment." As discussed above, the EPA intentionally suspended the limiting language of the waste water exclusion because it created too many problems with pre-existing waste treatment systems. The subsequent publications and amendments of EPA's regulatory definitions manifest the EPA's intent to exclude impoundments like the MEGS Pond when the impoundment qualifies for the exclusion under 40 C.F.R. § 122.2(b).

The Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 40 C.F.R. pt. 122.2) ("Final Rule") is the most recent publication of 40 C.F.R. § 122.2. The Final Rule expressly states: "[w]aters and features that are excluded under paragraph (b) of the rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a)." 80 Fed. Reg. at 37,073. Additionally, EPA specifically states: "[i]mportantly, under the rule all waters and features identified in paragraph as excluded will not be "Waters of the United States" *even if they otherwise fall within one of the categories in paragraphs (a)(4) through (a)(8).*" *Id.* at 37,096. (emphasis added). Paragraph (a)(4) identifies "all impoundments of waters of the United States as falling within the jurisdiction of the CWA. *See* 40 C.F.R. § 122.2(a)(4).

Additionally, Note 1 has been included in all subsequent publications of 40 C.F.R. § 122.2, specifically the: 1983 Amendments to section 122.2 (Environmental Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control); the CWA National Pollution Discharge Elimination System; CWA section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration, 48 Fed. Reg. 14,146 (Apr. 1, 1983) (codified at 40 C.F.R. pt. 122.2), and the recent amendments to "waters of the United States" in 2015, 80 Fed. Reg. at 37,054. The EPA's consistent and longstanding practice to include Note 1,

suspending the qualification limiting the waste treatment system exclusion, in all subsequent publications of 40 C.F.R. § 122.2 further demonstrates EPA's intent to exclude waste treatment systems even when the pond is created from an impoundment of a water of the United States.

Furthermore, there is no evidence that EPA included this explanation as a post-hoc rationalization just for "the purpose of litigation." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212 (1988). Rather, the explanation makes it clear that the EPA purposely intended to exclude impoundments specifically designed to be a waste treatment system, like the MEGS Pond, from the jurisdictional reach of the CWA.

B. EPA's Suspension of the Limitation on the Waste Treatment Exclusion is Effective Because the EPA Adhered to the Requirements for Administrative Rulemaking Pursuant to Section 553 of the CWA.

Petitioner FCW claims that the suspension of the last sentence of paragraph (b)(1) of 40 C.F.R. § 122.2, Note 1, originally published in 45 Fed. Reg. 48,620, and retained in the most recent amendment to the code section is invalid because it does not comply with the statutory requirements of section 553 of the APA. *See* 45 Fed. Reg. at 48,620. Section 553 establishes "the maximum procedural requirements which Congress was willing to have courts impose upon agencies in conducting rulemaking procedures." *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 524.

Section 553 expressly requires a federal agency to provide public notice and an opportunity to comment whenever an agency proposes, amends, or repeals a rule. 5 U.S.C. § 553(c). It also provides that "[g]eneral notice of the proposed rulemaking shall be published in the Federal Register." *Id.* § 553(b). The notice requirements are intended to "assure fairness and mature consideration of rules." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763 (1969). "Section 553(b) does not require that interested parties be provided precise notice of each aspect of the regulations eventually adopted. Rather, notice is sufficient if it affords interested parties a reasonable opportunity to participate in the

rulemaking process." *Forester v. Consumer Product Safety Comm'n.,* 559 F.2d 774, 787 (D.C. Cir. 1977).

Petitioner FCW's claim is not supported as evidenced by EPA's actions. Note 1 was promptly published in the Federal Register when the suspension was first issued by EPA in 1980. *See* 45 Fed. Reg. at 48,620. Since the initial publication, the EPA included the suspension in two amendments to 40 C.F.R. § 122.2, the 1983 Amendments to section 122.2, 48 Fed. Reg. at 14,146, and the 2014 proposed rulemaking to amend section 122.2, Definition of "Waters of the United States" Under Clean Water Act, 79 Fed. Reg. 22,187 (proposed Apr. 21, 2014) (to be codified at 40 C.F.R. pt. 122.2). In both rulemakings, EPA followed the notice and comment requirements of section 553 by including the notice of the proposed amendments in the Federal Registrar and allowing interested parties the opportunity to comment on the potential impacts of the proposed amendments to the rule. The suspension is therefore compliant with section 553 of the APA and effectively excludes the MEGS Pond from CWA jurisdiction.

C. Alternatively, the EPA's Suspension of the Limitation on the Waste Treatment Exclusion is a Policy Judgment Not Subject to the Requirements of APA Section 553.

On the other hand, if this court finds that the EPA did not adhere to the requirements of APA section 553, this court should dismiss FCW's claims because the inclusion of Note 1 and suspension of the limiting language of the "waste treatment system" exclusion is not a rulemaking as defined by the APA. Rather, the inclusion of Note 1 and suspension of the limiting language of "waste treatment system" constitutes a policy judgment by the EPA Administrator. Statements of policy are specifically excluded from the 553 requirements. 5 U.S.C. § 553(b)(3)(A).

While section 553 generally requires notice and an opportunity to comment for an agency's proposed rulemaking, it also contains an exemption for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* "Policy statements are exempt from the APA's notice-and-comment

requirements, and thus may take effect without the rigors and presumed advantages of that process." *Bechtel v. F.C.C.,* 10 F.3d 875, 878 (D.C. Cir. 1993).

A rule is a policy statement if the statement "merely guide[s] future exercise of agency discretion by advising agency officials, staff, and the public in a manner in which the agency intends to exercise a discretionary power." *Brown Express, Inc. v. United States,* 607 F.2d 695, 701 (5th Cir. 1979). If the policy statement leaves "agency decision-makers free to exercise discretion" then the policy statement is distinguishable from a substantive rule. *Am. Bus Ass'n. v. United States,* 627 F.2d 525, 529 (D.C. Cir. 1980). Additionally, a policy statement "is one that does not impose any rights and obligations on [a regulated party]." *Texaco, Inc. v. Fed. Power Comm'n.*, 412 F.2d 740, 744 (3d. Cir. 1969).

Here, the EPA's suspension of the qualifying limitation to the "waste treatment system" exclusion found in Note 1 fits the description of a policy statement. The suspension still allows for discretion to determine whether a water body qualifies as a waste treatment system. In fact, the suspension actually expands EPA's discretion by removing the limitation because the suspension permits EPA to determine whether *any* impoundment qualifies for the waste treatment system exclusion, rather than just impoundments that are "man-made."

Moreover, the suspension does not create an obligation or right to a regulated party. Suspending the limitation on the waste treatment exclusion does not provide EnerProg an exclusion by right. Whether EnerProg's internal discharges into the MEGS Pond are excluded from the NPDES permitting requirements is still a decision left to EPA's discretion.

V. THE CLOSURE AND CAPPING OF THE MEGS POND DOES NOT REQUIRE A DREDGE AND FILL PERMIT PURSUANT TO SECTION 404 OF THE CWA BECAUSE THE MEGS POND DOES NOT INVOLVE A "WATER OF THE UNITED STATES."

The Clean Water Act prohibits the discharge of any pollutant, including dirt, rock, clay and other materials into the "waters of

the United States, except as authorized by section 404, 33 U.S.C § 1344. *See* 31 U.S.C. § 1311(a), The Secretary of the Army is charged with issuing permits for "the discharge of dredged or fill material" into the jurisdictional waters of the United States at "specified disposal sites." *Id.* § 1344(a), (d).

FCW asserts that dewatering and capping of the MEGS Pond requires a fill permit pursuant to section 404 of the CWA. However, because the MEGS Pond is not a "water of the United States," any discharge of fill material into the MEGS pond is not subject to the section 404-permitting scheme. Accordingly, section 404 of the CWA does not apply to the closure and capping of the MEGS Pond.

A. The MEGS Pond is not a "Water of the United States" Under the Regulatory Definitions Implemented by the EPA and the Army Corps of Engineers.

A water body must be within the jurisdictional reach of the CWA for its statutory requirements to apply. For section 404 of the CWA, jurisdiction is satisfied if the discharge of dredged or fill materials is discharged into "navigable waters." 33 U.S.C. § 1344(a); *Solid Waste Agency of N. Cook Cty*, 531 U.S. at 162. "Navigable waters" is defined under the CWA as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1344(a), 1362(7).

"The statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps." *United States v. Deaton*, 332 F.3d 698, (4th Cir. 2003). However, both EPA and the Corps of Engineers have developed nearly identical regulatory definitions of "waters of the United States" for purposes of implementing permits. Both regulatory definitions for "waters of the United States" include "impoundments" of jurisdictional waters, such as the MEGS Pond. *Compare* 40 C.F.R. § 232.2 (EPA's definition for "waters of the United States"), *with* 33 C.F.R. § 328.3(a)(4) (2017) (Corps of Engineers definition of "waters of the United States").

Both agencies also have identical exclusions for "waste treatment systems" that define waste treatment systems as "not waters of the United States." *Compare* 40 C.F.R. § 232.2 (EPA's definition states "waste treatment systems, including treatment

ponds . . . designed to meet the requirements of the Act . . . are not waters of the United States."), *with* 33 C.F.R. § 328.3(b)(1) (Corps of Engineers definition states "waste treatment systems, including treatment ponds . . . designed to meet the requirements of the [CWA]."). Most importantly, both EPA and the Army Corps share the view that a designation as a "waste treatment system" supersedes a designation as an "impoundment." *Compare* 40 C.F.R. § 232.2 (EPA notes "[Waste treatment systems] are not "waters of the United States" even where they otherwise meet the terms of [an impoundment] of this definition."), *with* 33 C.F.R. § 328.3(b) (Corps of Engineers note "[Waste treatment systems] are not 'waters of the United States' even where they otherwise meet the terms of [an impoundment].").

As previously stated, EnerProg does not contest that the MEGS Pond is an impoundment of Fossil Creek, a water of the United States. However, the MEGS Pond is a waste treatment system designed to meet the requirements of the CWA. The MEGS Pond sole function is to collect ash transport water for sedimentation treatment in order to meet the effluent limitations placed on Outfall 002, which directly discharges into the Moutard Reservoir. Therefore, the Corps of Engineers and EPA properly used their discretion to determine that the MEGS Pond is a waste treatment system designed to meet the requirements of the CWA and properly excluded it from section 404 requirements.

B. EPA is Not the Proper Authority to Issue a Section 404 Fill Permit.

Even if a fill permit is required, the Army Corps of Engineers—not the EPA—possesses the authority to issue section 404 fill permits under the CWA. Section 404 assigns "the Secretary of the Army, acting through the Chief of Engineers" the responsibility of administering and issuing permits for the discharge of fill materials. 33 U.S.C. § 1344(a), (d). Additionally, section 402 "prohibits the EPA from exercising permitting authority that is provided [to the Corps] in section 404." *Couer Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 273 (2009). Both EPA and the Army Corps of Engineers share the view that section 402 "prohibits the EPA from issuing permits for

discharges that are regulated under section 404." *Id.* at 274; *see also* 40 C.F.R. § 122.3(b); Water Pollution Control Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8,871 (March 14, 1986) (Memorandum of Agreement between EPA and the Corps to address the applicability and overlap of 402 and 404 permit programs). Once again, the agencies' interpretation should be granted deference unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

In *Couer Alaska,* the Supreme Court affirmed the EPA and the Corps of Engineers interpretation of the section 402 and 404 interplay. 557 U.S. at 272–76. The Supreme Court found that EPA's authority over section 404 permits is limited to providing "guidelines" and the "power to veto a permit." *Id.* at 274. The Court found that the EPA's authority to issue "guidelines" permitted the EPA to write rules to help determine "whether to permit a discharge or a fill." *Id.* However, "those guidelines do not strip the Corps of Engineers of power to issue permits for fill cases." *Id.* at 276. Under the "veto" power, the EPA may object to a disposal site if use of the defined area causes "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." *Id.*; *see also* 33 U.S.C. § 1344(c). Regardless which role the EPA takes, the Supreme Court in *Couer Alaska* made it clear "[i]f the Corps has authority to issue a permit, then the EPA may not do so." *Id.* at 275.

In the matter at hand, should EnerProg require a section 404 permit for the closure and capping of the MEGS Pond, the Army Corps is the appropriate agency to issue the permit. As discussed *supra*, if the EPA chooses to exercise its authority regarding the closure and capping of the MEGS Pond, it may do so by conditioning the dewatering of the MEGS Pond via the NPDES Permit for Outfall 002. However, the EPA is limited to its advisory role and veto power when the discharge of fill material is subject to the Corps authority under section 404.

Since the EPA did not raised any issues with the disposal site and/or recognized any potential impacts the closure and capping of the MEGS Pond may have to municipal water supplies, shellfish beds, fisheries, wildlife, or recreation, the EPA's involvement is limited to providing guidance to the Army Corps of Engineers to ensure compliance with the CWA. The EPA has done so by

promulgating the regulations and guidelines found in Parts 230-32 of Title 40 in the Code of Federal Regulation. *See* 40 C.F.R. § 230.1 (2017) ("Congress has expressed a number of policies in the [CWA]. These Guidelines are intended to be consistent with and to implement those policies."). However, the EPA is not the proper authority to determine whether the dewatering and capping of the MEGS pond requires a fill permit pursuant to section 404 of the CWA as such discretion belongs to the Army Corps of Engineers.

CONCLUSION

For the reasons stated above, EnerProg respectfully requests that this Court remand NPDES permit PG000123 to EPA Region XII for further consideration and additionally find that: (1) inclusion of State of Progress' conditions requiring coal ash pond closure and capping were improper because they don't comply with section 401(d); (2) the April 25, 2017 Temporary Stay Notice effectively postpones the 2015 ELGs Rule's November 1, 2018, compliance deadlines for achieving zero discharge coal ash transport waters, thereby also postponing EnerProg's NPDES permit deadlines; (3) EPA Region XII could not rely on BPJ limits as a ground for requiring zero discharge of coal ash transport waters; (4) EPA Region XII properly excluded Internal Outfall 008 from NPDES permitting requirements; and (5) EPA Region XII properly determined that the coal ash pond closure and capping plan does not require a permit under section 404 of the CWA.