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2018 Bench Memorandum

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

2018 Bench Memorandum*

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

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

REGULATORY AND FACTUAL FRAMEWORK.

A. PARTIES.

EnerProg, L.L.C., operates the Moutard Electric Generating Station (MEGS), a coal-fired steam electric power plant, located in Fossil, Progress. EnerProg was issued a renewed Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit for the continued operation of MEGS. EnerProg filed comments on the MEGS NPDES permit renewal. EnerProg petitioned the Environmental Appeals Board (EAB) challenging the renewed NPDES permit. EnerProg's petition for review was denied by the EAB. EnerProg appeals the EAB's decision herein.

Fossil Creek Watchers, Inc. (FCW), is an environmental group concerned with the environmental impacts of the Moutard Electric Generating Station. FCW filed comments on the MEGS NPDES permit renewal. FCW petitioned the EAB challenging the renewed NPDES permit, but the petition was denied. FCW appeals the EAB's decision herein. The court has already determined that FCW has standing to pursue judicial review of the permit.

United States Environmental Protection Agency (EPA) is the federal agency responsible for enforcing and administering select environmental laws and regulations. Its mission is to protect human health and the environment. MEGS is located in Fossil, Progress, within the jurisdiction of EPA Region XII. There is no state delegated NPDES program. Therefore, EPA Region XII issued the renewed NPDES permit for the continued operation of MEGS. EPA Region XII included conditions from the CWA Section 401 Certification issued by the State of Progress in the final permit. The Region XII permit writer also relied on Best Professional Judgment as an alternative ground for requiring MEGS to implement dry handling of bottom and fly ash wastes in order to achieve zero discharge of toxic pollutants. The petitioners named the United States Environmental Protection Agency as the respondent in their petitions to review the final decision of the

Environmental Appeals Board. The respondent may be referred to as EPA or Region XII, herein.

B. OVERVIEW OF APPLICABLE LEGAL AUTHORITY.

This case is an appeal from a final decision of the Environmental Appeals Board affirming the re-issuance of a final National Pollutant Discharge Elimination System Permit. The parties raise issues stemming from two legal authorities: 1) the Clean Water Act; and 2) the Administrative Procedure Act. The Clean Water Act issues, in short, are: 1) the inclusion of conditions as a part of the section 401 certification; 2) the permit writer's reliance on Best Professional Judgment as an alternative ground for zero discharge requirements; and 3) whether a NPDES permit and a section 404 dredge and fill permit are required for the coal ash pond. The Administrative Procedure Act issues concern whether the suspension of two provisions were effective, as they pertain to requirements related to this NPDES permit. These claims will be discussed in greater detail in sections IV through VIII, below.

The first major federal law addressing water pollution was the Federal Water Pollution Control Act of 1948, which became commonly known as the Clean Water Act after amendments made in 1977.[1] The objective of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). In order to meet this objective, the Clean Water Act sets the goals of eliminating the discharge of pollutants into navigable waters and attaining a water quality that provides for waters to be both swimmable and fishable. 33 U.S.C. § 1251(a)(1), (2).

To effectuate these goals, section 301 sets forth the basic prohibition of the Clean Water Act: "the discharge of any pollutant [into waters of the United States] by any person shall be unlawful" without a permit. 33 U.S.C. § 1311(a). *See also* 33 U.S.C. §§ 1342(k), 1344(p); 40 C.F.R. § 122.2(a) (2017). Permits are issued under two permitting schemes: 1) section 402 National Pollutant

1. For more on the history of the Clean Water Act, *see* U.S. EPA, *History of the Clean Water Act*, https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Oct. 27, 2017).

Discharge Elimination System (NPDES) permits; and 2) section 404 dredge and fill permits.

Section 402 of the Clean Water Act established a permitting scheme that authorizes the discharge of pollutants into navigable waters from point sources, called the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342. NPDES permits include effluent limitations applicable to the specific applicant and associated pollutant discharges, a compliance schedule, and monitoring and reporting requirements. Effluent limitations limit the amount or concentration of a particular pollutant that may be discharged. *See* 40 C.F.R. §§ 122.44, 122.45. Effluent limitations are derived from water quality standards or technology-based standards. Water quality standards seek to achieve water quality that precisely meets the desired goals of a particular water body. *See* 33 U.S.C. § 1313(c); 40 C.F.R. § 131.2. These standards are adopted by states and approved by the EPA. 33 U.S.C. § 1313(c)(2)(A). Technology-based standards are promulgated as effluent limitation guidelines (ELGs) on an "industry-by-industry" basis. 33 U.S.C. § 1311(b). The EPA selects a particular technology on which to base a guideline, based on the category of pollutant or point source. Members of that industry need not use that specific technology, rather they must meet the standards achieved by the selected technology. Where a promulgated effluent limitation is lacking for an industry or sub-category of industry or for a specific pollutant, the permit writer may exercise Best Professional Judgment (BPJ) to determine an appropriate effluent limitation. 40 C.F.R. § 125.3(c)(3).

Section 404 sets forth a permitting scheme, administered by the United States Army Corps of Engineers ("Army Corp"), for activities that result in "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). These permits may be denied upon a determination "that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fisher areas . . . , wildlife or recreational areas." 33 U.S.C. § 1344(c).

Applicants for permits under the Clean Water Act must also receive a certification from the state within which the discharge will originate:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may results in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State. . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). The federal agency issuing the permit, generally, must either include the section 401 certification conditions or reject the issuance of the permit. 33 U.S.C. § 1341(d) (. . . shall become a condition on any Federal license of permit subject to the provisions of this section."). Section 401(d) describes what can be included in the section 401 certification and is described further in section IV, *infra*.

The Administrative Procedure Act (APA) governs how administrative agencies can develop and issue regulations. 5 U.S.C. § 551 *et seq*. The purpose of the APA is "[t]o improve the administration of justice by prescribing fair administrative procedure." APA, Pub. L. No. 404, 60 Stat. 237, ch. 324 (June 11, 1946). Relevant to this case, section 553 describes the basic process for notice and comment rulemaking, and when such process is applicable. 5 U.S.C. § 553. A more detailed description of this requirement is included in section V(C), *infra*. "The notice-and-comment procedure assures that the public and the persons being regulated are given an opportunity to participate, provide information, and suggest alternatives so that the agency is educated about the impact of a proposed rule and can make a fair and mature decision." Alexa L. Ashworth et al., 2 FED. PROC., L. ED. § 2:80 (2017). The APA also sets forth the standard of review that the Twelfth Circuit must apply when reviewing the decision of the EAB. 5 U.S.C. § 706. *See* section III, *infra*.

1. List of Applicable Statutory and Regulatory Provisions:

CWA, 33 U.S.C. § 1251 – *Congressional declaration of goals and policy*

CWA, 33 U.S.C. § 1311 – *effluent limitations*

CWA, 33 U.S.C. § 1341 – *state certification*

CWA, 33 U.S.C. § 1342 – *NPDES permits*

CWA, 33 U.S.C. § 1344 – *dredge and fill permits*
CWA, 33 U.S.C. § 1369(b) – *judicial review*
40 C.F.R. § 121.2 – *state certification*
40 C.F.R. § 125.3(c)(3) – *Best Professional Judgment*
40 C.F.R. § 122.2 – *NPDES definitions*
33 C.F.R. § 328.3(b)(1) - *Army Corps definition of WOTUS*
40 C.F.R. § 124.19 – *EAB review*
APA, 5 U.S.C. § 705 – *relief pending judicial review*
APA, 5 U.S.C. § 553 – *rulemaking*
APA, 5 U.S.C. § 551(5) – *rulemaking definition*
APA, 5 U.S.C. § 706 – *standard of review*
28 U.S.C. § 2401(a) – *statute of limitations for civil suits v. United States*

2. List of Agency Guidance Documents:

U.S. EPA, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES (2010).
U.S. EPA, NPDES PERMIT WRITERS' MANUAL § 5.2.3.2 (Sept. 2010).

C. SUMMARY OF FACTS.

On January 18, 2017, EPA Region XII issued a federal National Pollutant Discharge Elimination System (NPDES) permit to EnerProg, L.L.C., pursuant to section 402 of the Clean Water Act (CWA). 33 U.S.C. § 1342. The permit authorizes EnerProg to continue water pollution discharges associated with the continued operation of the Moutard Electric Generating Station (MEGS), a coal-fired steam electric power plant located in Fossil, Progress.

The underlying factual background for the permit renewal at issue is adequately stated in the following excerpts from the Fact Sheet for the permit:[2]

2. Although this factual summary contains all pertinent facts and procedure as developed by the opinion of the Environmental Appeals Board, it is condensed. Judges and brief graders should also review the Problem.

A. Summary and Background

This is a renewal for the Moutard Electric Generating Station (MEGS). The facility is a coal-fired electric generating plant with one unit rated at a maximum dependable capacity of 745 megawatts (MW). Water for plant uses is withdrawn from the Moutard Reservoir as required to make up for evaporative losses from the cooling tower, boiler water, ash transport water, and drinking water needs. This facility is subject to EPA effluent limitation guidelines per 40 C.F.R. section 423 - Steam Electric Power Generating Point Source Category. The facility has a closed-cycle cooling system (cooling tower), with an actual intake flow and design intake flow of less than 125 million gallons per day (MGD). The facility has a wet fly ash handling system and a wet bottom ash handling system, which use water to sluice ash solids through pipes to one ash pond, where the transport water undergoes treatment by sedimentation before it is discharged to the Moutard Reservoir. The ash pond was created in June, 1978 by damming the then free-flowing upper reach of Fossil Creek. Fossil Creek does not discharge to the Moutard Reservoir, but is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water.

The facility operates the following outfalls:

Outfall 001. Cooling Tower System. Less than once per year the cooling towers and circulating water system are drained by gravity and discharged directly to Moutard Reservoir.

Outfall 002. Ash Pond Treatment System. Outfall 002 discharges directly to Moutard Reservoir via a riser structure. The ash pond receives ash transport water containing bottom ash and fly ash, coal pile runoff, stormwater runoff, cooling tower blowdown, flue gas desulfurization (FGD) wastewater, and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis (RO) wastewater, plant area wash down water, landfill leachate, monofill leachate, equipment heat exchanger

This summary includes background information that was not included in the Problem, but is necessary for the teams to develop independently. These facts are indicated as such, *see* sections I(C)(3), (4) infra.

water, groundwater, yard sump overflows, occasional piping leakage from limestone slurry and the FGD system, and treated domestic wastewater.

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

Internal Outfall 009. Discharge from the FGD blowdown treatment system to the ash pond. FGD blowdown is indirectly discharged to Moutard Reservoir via the ash pond treatment system (Outfall 002).

Outfall 002A. Upon completion of construction, discharge from the new lined retention basin. The flows from the ash pond will be re-directed to the retention basin when the construction of the retention basin is completed. At that point, the ash pond will no longer accept any wastewater. Retention basin will accept wastes from the holding cell (vacuumed sediments and solids), monofill leachate (coal ash), coal pile runoff, stormwater runoff, cooling tower blowdown, FGD wastewater, and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis (RO) wastewater, plant area wash down water, landfill leachate, equipment heat exchanger water, groundwater, occasional piping leakage from limestone slurry and FGD system, chemical metal cleaning waste, and treated domestic wastewater. The wastewater from this outfall discharges to Moutard Reservoir via Outfall 002.

B. Permit Limits and Conditions Development

The State of Progress has issued a certification pursuant to section 401 of the Clean Water Act for the renewal of the MEGS NPDES permit. One of the conditions of the Progress Section 401 certification is that, in order to comply with the Progress Coal Ash Cleanup Act (CACA), EnerProg must cease operation of its ash

pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020. CACA is a state-enacted law requiring assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress. The CACA legislation recites that its purpose is to prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters. Pursuant to Clean Water Act section 401(d), these Progress requirements are incorporated as additional conditions to the permit.

Pursuant to the 2015 revised Effluent Limitation Guidelines for the Steam Electric Power Generating Point Source Category, 40 C.F.R. part 423, 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. Based on the requirements of the Progress 401 certification, it is determined that MEGS is capable of meeting this zero discharge standard by the initial compliance deadline of November 1, 2018. The 2015 Steam Electric Power Generating Point Source Category ELGs are the subject of an industry challenge that is pending in the Fifth Circuit. *See* subsection I(C)(3), *infra*. The discharge from the MEGS coal ash pond contains elevated levels of mercury, arsenic, and selenium, which are all toxic pollutants.

It is determined that, independent of the 2015 ELGs, this permit must contain limits for toxic pollutants actually present in the discharge based on the BAT. The EPA permit writer determined (as evident in the 2015 ELGs) that dry handling of bottom ash and fly ash has been in use at existing plants in the industry for many years. MEGS is sufficiently profitable to adopt dry handling of these wastes with zero liquid discharges, with no more than a twelve cents per month increase in the average consumer's electric bill. Accordingly, the permit writer has determined, in the exercise of his best professional judgment, that zero discharge of ash handling wastes by November 1, 2018 constitutes BAT for discharges associated with coal ash wastes.

The facility will be required to build a new Retention Basin to reroute all waste streams that are currently discharged to the ash pond. This change is necessary to decommission the existing ash

pond and meet the requirements of CACA. The Retention Basin will have a cell where various vacuumed sediments and solids can be decanted prior to disposal. The Basin will also accept the monofill leachate. The monofill contains coal ash.

The facility is also constructing a new FGD settling basin. The waste from the basin will be treated by VCE. In the case of severe storms, overflow from the basin may be routed to Outfall 002. Appropriate TBEL limits are applied to Outfall 002 to accommodate such overflows.

The final permit contained the following conditions relevant to this appeal:

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

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

Special Condition A:

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

In addition, the final permit authorized the continued use of internal outfall 008 to transport bottom and fly ash to the coal ash pond without any effluent limits on an interim basis until closure of the coal ash treatment pond on November 1, 2018.

C. 2015 ELG Suspension

The following factual summary was not included in the Problem, but teams were expected to research and understand this background for the purposes of this case:[3]

The EPA issued Final Effluent Limitations Guidelines (ELGs) in 2015 for the Steam Electric Power Generating Point Source Category. Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67838-01 (Nov. 3, 2015) (codified at 40 C.F.R. pt. 423). These ELGs included zero-discharge requirements for coal ash transport water. *Id.* The effective date of the 2015 ELGs was January 4, 2016; the compliance date is November 1, 2018. *Id.* at 67838, 67882. In 2015, petitions were filed for review of the 2015 regulations, which were consolidated in the Fifth Circuit in December, 2015. *See* Consolidation Order, *In re: EPA, Effluent Limitation Guidelines*, MCP No. 136, ECF Doc. 3 (J.P.M.L. Dec. 8, 2015); Consolidation Order, *Sw. Elec. Power Co. v. EPA*, No. 15-60821, ECF Doc. 00513301255 (5th Cir. Dec. 9, 2015).

In March and April 2017, two petitions for administrative reconsideration were filed.[4] On April 11, 2017, EPA Administrator Scott Pruitt sent a letter to Virginia Governor, and Chair of the National Governors' Association, Terry McAuliffe notifying him of the flexibility provided to the state in the application of the new effluent limitations. Letter from EPA Administrator Scott Pruitt to Virginia Governor Terry McAuliffe (Apr. 11, 2017). On April 12, 2017, Pruitt sent a letter to the March/April 2017 petitioners announcing the agency's decision to: 1) postpone the November 1, 2018 compliance deadlines; 2) reconsider the 2015 ELGs rule; 3) file a motion requesting the Fifth Circuit to hold the litigation challenging the Rule in abeyance during reconsideration; and 4) conduct notice and comment rulemaking. *Id.* The Notice cites section 705 of the APA as legal authority for this action. Letter from EPA Administrator Scott Pruitt to Petitioners Hunton &

3. See Appendix III for this factual background set forth in a timeline.

4. *See* U.S. EPA, *Steam Electric Power Generating Effluent Guidelines – Petitions for Reconsideration*, https://www.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-petitions-reconsideration (last visited Nov. 27, 2017).

Williams, L.L.P., and U.S. Small Business Administration (Apr. 12, 2017). *See* 5 U.S.C. § 705.

On April 25, 2017, the notice given by letter to petitioners was detailed in the Federal Register ("the Notice"). Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19005 (Apr. 25, 2017). The Notice reads: ". . . after considering the objections raised in the reconsideration petitions, the Administrator determined that it is appropriate and in the public interest to reconsider the Rule. Under Section 705 of the APA . . . , and when justice so requires, an Agency may postpose the effective date of action taken by it pending judicial review." *Id.* at 19005. The Notice states that the November 1, 2018 compliance dates have not yet passed and "are within the meaning of the term 'effective date' as that term is used in Section 705 of the APA." *Id.* The Notice cites the capital expenditures required by facilities in order to meet the new standards. *Id.* The Notice also states: "This will preserve the regulatory status quo with respect to wastestreams subject to the Rule's new, and more stringent, limitations and standards, while the litigation is pending and the reconsideration is underway." *Id.*

On April 14, 2017, prior to the Notice, the EPA requested that the Fifth Circuit hold the consolidated case in abeyance while the Agency reconsiders the Rule. On April 24, 2017, the Fifth Circuit granted the motion and placed the case in abeyance. On June 6, 2017, the EPA published notice of the proposed rule to postpone deadlines. Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 26017-01 (June 6, 2017). The EPA explained: "Because Section 705 of the APA authorizes an Agency to postpone the effective date of an action pending judicial review, EPA is undertaking this notice-and-comment rulemaking to postpone certain compliance dates in the rule in the event that the litigation ends." *Id.* at 26018. On August 11, 2017, the EPA sent a letter to the petitioners stating their intention to conduct rulemaking to revise the ELGs. Letter from EPA Administrator Scott Pruitt to Petitioners Hunton & Williams, L.L.P., and U.S. Small Business Administration (Aug. 11, 2017).

There has been development on this issue following the September 1, 2017 cut-off date established for the purposes of this competition. Teams have been instructed to not cite any decisions or documents dated after September 1, 2017 in briefs or in oral argument.

D. WOTUS Exception Suspension

The following factual summary was not included in the Problem, but teams were expected to research and understand this background for the purposes of this case:[5]

40 C.F.R. section 122.2 defines "waters of the United States" to include "all impoundments of waters otherwise identified as waters of the United States." 40 C.F.R. § 122.2. Subsection 2 of this definition specifically excludes "waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act." *Id.* However, there is an exception to this exclusion: "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*." *Id.* (emphasis added).

To further complicate this back-and-forth, Note 1 to this section explains: "At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence beginning 'This exclusion applies ___' in the definition of 'Waters of the United States.' Th[e 1983] revision continues that suspension." *Id.* n.1. *See* Consolidated Permit Regulations, 45 Fed. Reg. 48620-01 (July 21, 1980). The suspension was in response to petitions for review from industry groups and one environmental group. 45 Fed. Reg. at 48620. Industry objections included concerns "that the language of the regulation would require them to obtain permits for discharges into existing waste treatment systems . . . which had been in existence for many years. In many cases, [industry groups] argued, EPA has issued permits for discharges from, not into, these systems." *Id.* The EPA suspended this exception after determining "that the regulation should be carefully re-examined and that it

5. See Appendix IV for this factual background set forth in a graphic.

may be overly broad." *Id.* The EPA cited their intention to "*promptly* . . . develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the rule or terminate the suspension." *Id.* (emphasis added).

In sum, as a result of this suspension (of the exception to the exclusion), waste treatment systems, including ponds or lagoons designed to meet the requirements of the CWA, including those that resulted from the impoundment of waters of the United States do not fall under the definition of waters of the United States. Despite the EPA's stated intent, rulemaking was never conducted – and the suspension remained in place.

However, the 2015 Clean Water Rule "[l]ift[ed] the suspension of the last sentence of the definition."[6] Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37054, 37114 (June 29, 2015). The Rule then asserts to, again, "suspend[] the last sentence of the definition," *id.*, likely as a measure to properly employ notice and comment rulemaking for this suspension. In effect, the 2015 Clean Water Rule retains the suspension. Of course, the 2015 Clean Water Rule was stayed by the Sixth Circuit, thus the 1983 revisions currently apply.[7] *In re* EPA, 803 F.3d 804 (6th Cir. 2015).

6. This sentence is the suspension made in 45 Fed. Reg. 48620 (July 21, 1980), discussed above.

7. On February 28, 2017, President Trump, by executive order, ordered the review of the 2015 Clean Water Rule, in light of a declaration of policy that reads: "It is in the national interest that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017). On July 27, 2017, EPA and the Army Corps of Engineers published a proposed rule to rescind the 2015 Clean Water Rule and recodify the prior regulations. Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (July 27, 2017). The agencies would then re-evaluate the definition. *Id.* Public comment for the proposed rule closed on September 27, 2017, after an extension. Definition of "Waters of the United States" – Recodification of Pre-Existing Rules; Extension of Comment Period, 82 Fed. Reg. 39712 (Aug. 22, 2017).

PROCEDURAL BACKGROUND

On April 1, 2017, after being granted an extension by the Environmental Appeals Board, both EnerProg and Fossil Creek Watchers, Inc. (FCW), filed timely petitions for review in front of the EAB of the NPDES permit pursuant to 40 C.F.R. part 124, requesting on a number of grounds that the permit be remanded to Region XII for further consideration. Both parties filed supplement briefing on the issue of the April 25, 2017 Notice suspending the compliance date of the 2015 ELGs. EnerProg and FCW both properly preserved their respective claims by filing comments on the draft permit.

EnerProg challenged the inclusion in the final permit of a condition in the Clean Water Act Section 401 Certification issued by the State of Progress requiring EnerProg to terminate its use of the coal ash settling pond at MEGS by November 1, 2018, dewater the ash pond by September 1, 2019, and cap the remaining coal combustion residuals by September 1, 2020. EnerProg challenged the inclusion of the zero discharge requirements for coal ash transport waters from the 2015 revised Effluent Limitation Guidelines (ELGs) for the Steam Electric Power Generating Point Source Category, despite the Notice issued by EPA Administrator Scott Pruitt on April 25, 2017 suspending the compliance date for these ELGs. EnerProg also challenged the permit writer's reliance on Best Professional Judgment as an alternative ground for requiring MEGS to implement dry handling of bottom and fly ash wastes in order to achieve zero discharge of toxic pollutants associated with these wastes by November 1, 2018.

FCW challenged the ash pond closure and capping provisions, on the grounds that these requirements are unlawful unless a section 404 permit is obtained. In addition, FCW contended that the permit illegally authorizes discharges of bottom ash and fly ash pollutants into the coal ash pond without subjecting the discharges to CWA effluent limitations, because the MEGS ash pond itself is a water of the United States.

During the Spring Term, 2017, the EAB issued their decision to deny both petitions for review. The EAB rejected EnerProg's objections to the inclusion of the ash pond closure and capping conditions because they are sufficiently related to surface water quality and, therefore, fall within the scope of section 401(d). The

EAB found the EPA's reliance on BPJ as an alternative ground for the zero discharge requirement for ash transport and treatment wastes to be justified because the 1982 ELGs did not regulate the toxic pollutants within these wastes, rejecting EnerProg's claim. The EAB denied EnerProg's claim that the inclusion of the 2015 ELG compliance deadlines was inappropriate given the April 25, 2017 Notice of their suspension, therefore also denying the party's request for modification. EAB found that this suspension was ineffective because section 705 of the APA does not authorize the postponement of compliance dates, therefore notice and comment rulemaking was required for such a suspension.

The EAB also rejected both of FCW's claims. The EAB found that the suspension of a provision that included the coal ash pond as a water of the United States was effective, and therefore Outfall 008 into the coal ash pond was internal. Therefore, this discharge does not require a section 402 permit. The EAB also found that a section 404 permit is not required for the closure and capping of the coal ash pond.

EnerProg and FCW both filed timely petitions pursuant to section 509(b) of the Clean Water Act (CWA), 33 U.S.C. § 1369(b),[8] seeking judicial review of the final decision of the EAB, affirming the issuance of the Final NPDES Permit to EnerProg.

The Court has determined that both petitioners have standing to pursue their petitions for review, that jurisdiction properly lies in this court pursuant to 33 U.S.C. section 1369(b), and that all issues raised in the petitions were properly preserved for appeal.

8. "Review of the Administrator's action . . . may be had by any interested person in the Circuit Court of Appeals." 33 U.S.C. § 1369(b)(1).

ISSUES

I. Whether the Final Permit properly included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the CWA section 401 certification, including the questions:
   a. Whether EPA was required to include all such Progress certification conditions without regard to their consistency with CWA section 401(d); and
   b. Assuming the question of the consistency of the conditions with CWA section 401(d) is open to the EPA and to this reviewing court, whether the ash pond closure and remediation conditions constitute "appropriate requirements of State law" as required by CWA section 401(d).

On appeal, **EnerProg** will argue that EPA must review the permissibility of the conditions and the closure conditions are not appropriate.

On appeal, **EPA** will argue that it does have jurisdiction to consider the permissibility of conditions, but that these conditions are appropriate.

On appeal, **FCW** will argue that EPA has no jurisdiction to determine the appropriateness of the conditions of State CWA section 401 certifications, and that while these conditions are "appropriate requirements of State law," they independently violate the requirement for a CWA section 404 permit.

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

On appeal, **EnerProg** and **EPA** will argue that the April 25, 2017 Notice is effective to require suspension of the compliance deadlines, and their inclusion in the NPDES permit was improper.

On appeal, **FCW** will argue that the April 25, 2017 Notice is ineffective in requiring suspension of the compliance deadlines, and their inclusion in the NPDES permit was proper.

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

On appeal, **EnerProg** will argue that EPA could not rely on Best Professional Judgment.

On appeal, **EPA** and **FCW** will argue that the agency could rely on Best Professional Judgment as an alternative ground for requiring zero discharge of coal ash transport wastes.

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

On appeal, **EnerProg** and **EPA** will argue that the discharges into the ash pond are not subject to effluent limits because this suspension was effective.

On appeal, **FCW** will argue that the discharges into the ash pond are subject to effluent limits because this suspension was ineffective and the other requirements are met.

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

On appeal, **EnerProg** and **EPA** will argue that it does not.

On appeal, **FCW** will argue that it does.

STANDARD OF REVIEW

Administrative exhaustion requires that the final NPDES permit first be reviewed by the Environmental Appeals Board. 40 C.F.R. § 124.19(*l*)(2); 5 U.S.C. § 704. Petitions must be filed within thirty days after the issuance of the final NPDES permit,[9] and "[a]ny person who filed comments on the draft permit . . . may file a petition for review." 40 C.F.R. § 124.19(a)(2), (3). The final decision of the EAB is reviewable by the appropriate Circuit Court of Appeals. 33 U.S.C. § 1369(b)(1). Petitions for judicial review must be filed within 120 days of the final agency action challenged. *Id.*

In this proceeding, the Twelfth Circuit is reviewing the EAB's denial of petitions to review a final NPDES permit. Under the Administrative Procedure Act, a federal court will review the EAB's decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). *See City of Pittsfield, Mass. v. U.S. EPA*, 614 F.3d 7, 13-14 (1st Cir. 2010). With regard to how the court should treat the EAB's interpretation: "To the extent that the EAB's decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial deference, deferring to them unless they are arbitrary, capricious, or otherwise 'plainly' impermissible." *Pepperell Assocs. v. U.S. EPA*, 246 F.3d 15, 22 (1st Cir. 2001). The court's review of the agency's interpretation of the statute that Congress has entrusted it to administer must be guided by *Chevron* deference. *See Chevron v. NRDC,* 467 U.S. 837, 843 (1984) (holding that where the statute is either "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). "[A] reviewing court must generally be at its most deferential" when the agency is "making predictions, within its area of special expertise, at the frontiers of science." *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 103 (1983). *But see P.R. Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 77 (1st Cir. 1993) ("But in the end an agency decision must also be rational – technically speaking, it must not be 'arbitrary or capricious,' . . .

9. The EAB granted both parties an extension of this 30-day deadline.

and that requirement exists even in technical areas of regulation.").

The Supreme Court set forth a four-part test to determine if a decision was arbitrary or capricious: "[I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENTS

I. SECTION 401 CERTIFICATION: *Did the Final Permit properly include conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the section 401 certification?*

In front of the Environmental Appeals Board, **EnerProg** argued that the inclusion of the ash pond closure and capping conditions[10] as permit requirements was in violation of section 401(d) of the Clean Water Act because the conditions are not "appropriate requirements of State law." **EnerProg** argued that these CACA conditions are not based on achieving State water quality standards, nor are they related to achieving effluent limitations. **EnerProg** also argued that the EAB has the authority to review these conditions because there is no procedure available under the Laws of Progress for it to obtain judicial review of the conditions included in the section 401 certification. The EAB rejected both arguments.

EnerProg *and* ***EPA*** *can make a strong argument that the EAB had the authority to review the section 401 certification conditions because no available channels for state review are available.* ***EPA*** *and* ***FCW*** *will be able to make a persuasive argument that the EAB was not arbitrary or capricious in determining that the section 401*

10. Note: In conjunction with the closure and capping of the coal ash pond, this waste stream will subsequently be subject to dry ash transport handling, whereby fly ash and bottom ash will be disposed of into a dry landfill. R. at 8.

conditions were "appropriate requirements of state law" under a commonly accepted broad reading of this phrase. ***EnerProg*** *will have to rely on a strict reading of the phrase.*

II. REVIEWING AUTHORITY: *Was the EPA required to include all such Progress certification conditions?*

Generally, the conditions included in a section 401 state certification are not reviewable by federal courts or administrative proceedings. The NPDES implementing regulations read: "Review and appeals of limitations and conditions attributable to State certification *shall* be made through the applicable procedures of the State and may not be made through the procedures in this part." 40 C.F.R. § 124.55(e) (emphasis added).

While this issue has never been decided by the Supreme Court, circuit courts have consistently held that in order to challenge conditions included in a section 401 certification, the "only recourse is to challenge the state certification in state judicial proceedings." *Del Ackels v. U.S. EPA*, 7 F.3d 862, 867 (9th Cir. 1993). *See also Am. Rivers Inc. v. FERC*, 129 F.3d 99, 112 (2d Cir. 1997); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). The First Circuit further reasoned that the authority to review these conditions is limited "because a state law determination is involved." *Marathon Dev. Corp.*, 867 F.2d at 102.

In *American Rivers*, the Second Circuit looked to the language of section 401(d) which reads, "[a]ny certification provided under this section . . . *shall* become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d) (emphasis added); *Am. Rivers, Inc.*, 129 F.3d at 107. The court found the "language [of section 401(d) to be] unequivocal, leaving little room for [the federal agency] to argue that it has authority to reject state conditions it finds to be *ultra vires*." *Am. Rivers, Inc.*, 129 F.3d at 107. Rather, "[w]hile the [federal agency] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, the [federal agency] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are

inconsistent with the terms of § 401." *Id*. at 110-11. This is the reasoning followed in the EAB decision. R. at 11.

Agency guidance documents also reflect this interpretation. In the 2010 *Clean Water Act Section 401 Water Quality Certification Handbook*, the EPA distinguishes the scope of review of state versus federal courts or administrative proceedings, where federal courts or agencies solely have the authority to review procedural requirements. U.S. EPA, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES 31 (2010) [hereinafter CWA SECTION 401 HANDBOOK]. *See also* EPA, Decision of the General Counsel No. 58 (Mar. 29, 1977).

EnerProg and **EPA** will rely on the special circumstances rule established by the Fourth Circuit that allows for federal judicial or administrative review. In *Consolidation Coal Company, Inc. v. Environmental Protection Agency*, the court found that the permit recipient had "no available channels of State review, either administratively or judicially." 537 F.2d 1236, 1239 (4th Cir. 1976). Therefore, "due process requires that" the permittee be granted an administrative proceeding in front of the EPA. *Id. See* U.S. CONST. amend. XIV. Here, as **EnerProg** argued in front of the EAB, a fact uncontested by FCW, "there is no procedure available under the Laws of Progress for it to obtain judicial review of its challenge to the conditions established in the Progress CWA section 401 certification, as Progress law does not provide for review of such certifications in the state's courts." R. at 10-11. Therefore, the only available avenue is a federal administrative or judicial proceeding. These parties will conclude that the EAB "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, by not considering the lack of a state channel for review, and therefore their determination was arbitrary and capricious.

FCW will argue that the Fourth Circuit decision in *Consolidation Coal* is not binding on the Twelfth Circuit, and that the prevailing view is that the EPA is not authorized to review the section 401 certification conditions. **FCW** will also note that the Seventh Circuit specifically declined to follow the reasoning of *Consolidation Coal*. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 836 (7th Cir. 1977) (*overruled on other grounds by W. Chi., Ill. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983)).

EnerProg and **EPA** might also choose to make the due process argument from scratch, rather than rely on *Consolidation Coal*. *See* U.S. CONST. amend. XIV. **FCW** would respond that, regardless, the proper remedy to ensure due process is to review the section 401 conditions in state court or administrative proceeding, not before the EPA or the Twelfth Circuit.

III. APPROPRIATE REQUIREMENTS: *Were the ash pond closure and remediation conditions "appropriate requirement[s] of State law" as required by CWA section 401(d)?*

Section 401(d) allows for certification conditions to include conditions "to assure that any applicant for a Federal . . . permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, . . . and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). *See also* 40 C.F.R. § 121.2(a)(4) (State certification shall include, "[a] statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity."). The EAB found that the ash pond remediation was sufficiently related to surface water quality as to fall within the scope of section 401(d), relying on the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). *See* R. at 11.

In *PUD No. 1 of Jefferson County*,[11] the Supreme Court adopted a broad reading of section 401(d). 511 U.S. 700 (1994). First, the Court held that section 401 state certification conditions do not need to be related to the specific discharges for which the permit is sought, rather "401(d) is most reasonably read as authorizing additional conditions and limitations on the *activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 711. Second, the Court held that conditions "imposed pursuant to state water quality standards" are

11. In *PUD No. 1 of Jefferson County*, the section 401 certification condition at issue was the requirement of maintaining minimum stream flow in order to support spawning salmon. 511 U.S. at 714-15. This condition was held to be appropriate as "a proper application of state and federal antidegradation regulations, as it ensures that an 'existing instream water us[e]' will be 'maintained and protected.'" *Id.* at 719.

appropriate requirements of state law, but refused to speculate as to what other conditions would satisfy this standard. *Id.* at 713. The Court further noted that water quality standards "consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." *Id.* at 714 (quoting 33 U.S.C. § 1313(c)(2)(A)) (emphasis in original).

EnerProg will argue that the ash pond closure and capping conditions are not related to water quality standards, and are therefore inappropriate section 401 certification conditions. CACA does not refer to any specific standards that could be considered "water quality standards." Similar to the Supreme Court's holding in *PUD No. 1 of Jefferson County*, the *Clean Water Act Section 401 Water Quality Certification Handbook* explains that "[w]ater quality standards consist of designated uses, criteria (narrative and numeric), and an antidegradation policy, which together provide environmental benchmarks for each class of water body." U.S. EPA, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES 19 (2010). The party will argue that the conditions are not sufficiently linked to water quality standards, or that the State of Progress has not clearly articulated their relation to these standards, such that their inclusion as conditions was arbitrary and capricious.

FCW and **EPA** will advocate for a broader reading of section 401(d). A broad reading is supported by the implementing regulation for section 401 which states that the certification may include any condition "desirable" with respect to the activity. 40 C.F.R. § 121.2(a)(4). *See also Power Auth. of State of N.Y. v. Dep't of Envtl. Conservation of State of N.Y.*, 379 F. Supp. 243, 249 (N.D. N.Y. 1974) ("[T]he Congressional intent is clear that the states retain the right to set more restrictive standards than those imposed by the Act."). Several courts have taken expansive readings of what conditions are permitted, including those related to water quality generally. *See, e.g.*, *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 929 (9th Cir. 1988) (concluding that a state "mixed" land use and environmental regulation was an appropriate basis for a section 401 condition); *Arnold Irrigation Dist. v. Dep't of Envtl. Quality*, 717 P.2d 1274, 1279 (Or. Ct. App. 1986) (concluding that section 401(d) permits all conditions necessary to meet "*all* water quality-related statutes and rules,"

including land use regulations). *See also* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOLOGY L.Q. 201, 254 (1996) ("[W]hile the limits of the term "any other appropriate requirement of State law" have yet to be defined, a broad interpretation, not confined to state water quality standards approved by EPA per CWA section 303, seems justified."). The *Clean Water Act Section 401 Water Quality Certification Handbook* also explains: "Under CWA § 401(d) the *water quality concerns* to consider, and the range of potential conditions available to address those concerns, extends to *any provision of state or tribal law relating to the aquatic resource*. Considerations can be quite broad so long as they relate to water quality." CWA SECTION 401 HANDBOOK at 23 (emphasis added). Therefore, even where there are no water quality *standards* to apply, or if they were not considered, so long as the condition relates to water quality, it is appropriate under section 401(d).

Here, the section 401 conditions stemmed from the Progress Coal Ash Cleanup Act (CACA), a law whose purpose is "to prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters." R. at 8-9. The law is directly related to preserving water quality. Furthermore, the capping and closure conditions can also be considered to directly relate to the purpose of the Clean Water Act in that they aim to prevent the discharge of pollutants from the closed ash pond (pollutants that might otherwise be subject to section 301 and 402 if discharged from the pond). Furthermore, these conditions are standard requirements for the closure of coal ash ponds. *See, e.g.*, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule, 80 Fed. Reg. 21302 (Apr. 17, 2015).

EnerProg might note the underlying reasoning for urging the court to not include the ash pond closure requirements as conditions on the NPDES permit. If these conditions are included, EnerProg's compliance, or lack thereof, is subject to the citizen suit provision of the CWA. 33 U.S.C. § 1365. If these requirements remain solely under the purview of CACA, the citizen suit provision does not apply; rather the Progress agency would be solely responsible for ensuring compliance.

FCW might also note here that the section 401 ash pond closure conditions, while appropriate requirements of state law, independently violate the requirement for a CWA section 404 permit. *See* section VIII, *infra*.

IV. ELG COMPLIANCE DATE: *Did the April 25, 2017 EPA Notice effectively suspend permit compliance deadlines for achieving zero discharge of coal ash transport water?*

In front of the EAB, **EnerProg** requested an extension of the compliance deadline for the zero discharge requirement for coal ash transport waters from the 2015 Final ELGs for the Steam Electric Power Generating Point Source Category, consistent with the Notice issued by EPA Administrator Scott Pruitt on April 25, 2017 suspending the compliance date for these ELGs. The EAB found that EnerProg had not demonstrated that the November 1, 2018 deadline in the permit was infeasible. Furthermore, the EAB found that section 705 of the APA only authorizes the suspension of effective dates, not compliance dates, as the one at issue here. Instead, the EAB concluded that the EPA must conduct notice and comment rulemaking in order to suspend the compliance date.

EnerProg *and* ***EPA*** *will argue on appeal that the EAB's refusal to extend the compliance date, despite its suspension by the EPA, was arbitrary and capricious because the use of section 705 to suspend the compliance date was proper, adequately justified, and, regardless, notice and comment rulemaking was not required for the suspension as it was not substantive rulemaking.* ***FCW*** *has the stronger argument here. The EAB's denial of EnerProg's claim was not arbitrary or capricious because the section 705 suspension was not proper, nor was it justified, and notice and comment rulemaking was required for such a suspension.*

EnerProg and **EPA** might first argue that 40 C.F.R. section 122.62 authorizes the modification of an existing permit when:

> [t]he standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations . . . after the permit was issued. Permits may be modified during their terms for this cause only as follows:
>
> (i) For promulgation of amended standards or regulations, when:

> (A) The permit condition requested to be modified was based on a promulgated effluent limitation guideline . . . ; and
>
> (B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based . . . ; and
>
> (C) A permittee requests modification in accordance with § 124.5 within ninety (90) days after Federal Register notice of the action on which the request is based.

40 C.F.R. § 122.62(a)(3). Here, relying on a successful argument that the 2015 ELGs were properly revised, according to the parties' arguments outlined below, **EnerProg** and **EPA** would argue that EnerProg properly requested modification through the EAB petition. **FCW** would argue that, for the reasons outlined below, a proper basis for the permit modification cannot be established because the revision to the 2015 ELGs was improper. **FCW** would also argue that **EnerProg** did not follow the proper procedure in requesting this permit modification. 40 C.F.R. section 124.5 requires that a request for modification must be submitted to the Region XII Administrator and "shall be in writing and shall contain facts or reasons supporting the request." 40 C.F.R. § 124.5(a). Instead, EnerProg sought a modification through the EAB proceeding already in progress.

V. INVOCATION OF SECTION 705: *Was the invocation of section 705 to suspend the compliance date proper?*

EnerProg and **EPA** will argue that this suspension was an effective invocation of section 705 of the APA, and that notice and comment rulemaking was not required prior to issuing the Notice. As the Notice states, the compliance date is "within the meaning of the term 'effective date' as that term is used in Section 705 of the APA." 82 Fed. Reg. at 19005. The term effective date is not defined in this chapter. 5 U.S.C. ch. 7. *See* 5 U.S.C. § 701. The parties might argue that the agency should be granted *Chevron* deference with regards to this interpretation. *Chevron*, 467 U.S. at 843. **EnerProg** and **EPA** might also argue that considering the purpose of section 705, to maintain the status quo while pending litigation is resolved, the court must find a broad reading of section 705 that includes compliance dates. Since the compliance date is the "date with teeth," it is this date that must be the subject of

section 705. However, the Northern District of California rejected this argument, finding in a case with similar facts that, ". . . the Rule began to require compliance when it went into effect . . . . Thus, rather than being toothless as of the effective date and only suddenly acquiring a set of teeth as of the . . . compliance date, in actuality the Rule imposed compliance obligations starting on its effective date . . . that increased over time." *Becerra v. U.S. Dep't of Interior*, No. 17-cv-02376-EDL, 2017 WL 3891678, at *8 (N.D. Cal. Aug. 30, 2017).

FCW will argue, in response, that section 705 of the APA does not apply to compliance dates. The plain language of the statute only refers to the postponement of "effective date[s]." 5 U.S.C. § 705. The Supreme Court has stated that courts should "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). *See also Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993). The court should not read into section 705 the inclusion of compliance dates within its scope, despite the arguments from EnerProg. Furthermore, since the language of section 705 is unambiguous as to what can be postponed, the EPA's interpretation should not be granted *Chevron* deference. *Chevron*, 467 U.S. at 843.

Contrary to EnerProg's argument that the meaning of "compliance date" is within the meaning of the term "effective date," as the Notice itself claimed, these two terms have distinct meanings. *Becerra*, 2017 WL 3891678, at *9 (citing *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995) ("The mandatory compliance date should not be misconstrued as the effective date of the revisions."); *NRDC v. U.S. EPA*, 683 F.2d 752, 762 (3d Cir. 1982)). Section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review." *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996). The existence of both an effective date *and* a compliance date in the rule itself seems to defy **EnerProg** and **EPA**'s argument. *See* 80 Fed. Reg. at 67838, 67854.

EnerProg and **EPA** might also argue that possible timing constraints require a broader reading of the language in section 705. For example, the parties may argue that an agency will not be able to invoke section 705 after a lawsuit is filed, yet before the

effective date. This argument was raised in front of the district court in *Becerra*, but was met unsympathetically given the clear language of the statute. *Becerra*, 2017 WL 3891678, at *8. If these parties raise this argument, **FCW** will cite to the specific timing of this case. Here, litigation was first filed in 2015, with the cases consolidated on December 8, 2015. The effective date of the 2015 ELGs is January 4, 2016. The Notice of the section 705 suspension was not published until April 25, 2017, only after the transition of administrations and the filing of petitions for administrative reconsideration. This timeline shows that tight timing was likely not at issue here, and therefore should not be considered as a basis for an expanded reading of section 705.

VI. SECTION 705 JUSTIFICATION: *Was the section 705 notice adequately justified (arbitrary and capricious)?*

FCW should also argue that the April 25, 2017 Notice was ineffective because it did not meet the additional statutory requirements of section 705 that it be based on "pending litigation" and that "justice so requires" postponement. In the Notice, EPA found that justice requires the postponement "[i]n light of the capital expenditures that facilities incurring costs under the Rule will need to undertake in order to meet the compliance deadlines for the new, more stringent limitations and standards in the Rule . . . [and] the far-ranging issues contained in the reconsideration petitions." 82 Fed. Reg. at 19005. No other justification is included.

A. Four-Part Preliminary Injunction Test.

FCW may argue that EPA did not meet the four-part preliminary injunction test in issuing the postponement under section 705, as is required given that administrative stays must meet the same standard as stays at the judicial level. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30-31 (D. D.C. 2012); *Affinity Healthcare Services, Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D. D.C. 2010); *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983); *Jeffrey v. Office of Pers.*

Mgmt., 28 M.S.P.R. 434, 435-36 (M.S.P.B. 1985). The standard is as follows:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972 (D.C. Cir. 1985). *See also Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981); *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg.Co., Inc.*, 550 F.2d 189, 193 (4th Cir. 1977). Courts have applied these factors to evaluate administrative stays issued under section 705. *See, e.g.*, *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288 (6th Cir. 1987); *Hamlin Testing Labs., Inc. v. U.S. Atomic Energy Comm'n*, 337 F.2d 221 (6th Cir. 1964); *Associated Sec. Corp. v. Sec. & Exch. Comm'n*, 283 F.2d 773 (10th Cir. 1960).

The EPA failed to apply the four-part preliminary injunction test in order to establish that "justice so requires." **FCW** need not make the argument that these four-factors are not met, since EPA entirely failed to mention or employ the test.

FCW might also note the long-standing practice of the EPA employing this four-part test. The EAB has applied the test to a request for a stay under section 705, *In the Matter of Pub. Serv. Co. of N.H.*, 1 E.A.D. 389 (EAB 1977), and the EPA has evaluated the four factors in considering petitions for administrative stays under the same statute. *See, e.g.*, 76 Fed. Reg. 28318 (May 17, 2011); 76 Fed. Reg. 4780 (Jan. 26, 2011); 75 Fed. Reg. 49556 (Aug. 13, 2010); 61 Fed. Reg. 28508 (June 5, 1996). If the EPA wished to depart from this precedent it would need to provide justification, for "[l]ike a court, '[n]ormally, an agency must adhere to its precedents in adjudicating cases before it.'" *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010) (quoting *Consol. Edison Co. of N.Y., Inc. v. FERC.*, 315 F.3d 316, 323 (D.C. Cir. 2003). The EPA did not provide any justification for departing from its precedent of employing this test.

B. "Pending Judicial Review"

FCW will argue that EPA's invocation of section 705 was further improper in that, *in effect*, it did not postpone the compliance date "pending judicial review." The Notice indicated the agency's intention to stay the litigation, rather than await its resolution: "EPA will also file a motion requesting the Fifth Circuit to hold the litigation challenging the Rule in abeyance while the Agency reconsiders the Rule, after which it will inform the Court of any portions of the Rule for which it seeks a remand so that it can conduct further rulemaking." 82 Fed. Reg. at 19005-06. This statement itself is misleading, given that EPA moved to stay the litigation on April 14 and the motion was granted on April 24 – both prior to the issuance of the Notice. The purpose of section 705 is to allow pending disputes be resolved by the courts before a rule is put into effect. By holding the cases in abeyance, the EPA undermined the entire purpose of the suspension. *See Becerra*, 2017 WL 3891678, at *9. The true purpose of the April 25, 2017 Notice was not, in fact, to suspend the compliance date "pending judicial review," but perhaps it was used as a stopgap measure until the reconsideration of the rule is complete.

C. Failure to Consider Important Aspect of the Problem

FCW will also argue that the EPA "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The only statement made in the April 25, 2017 Notice that indicated the EPA's justification was in reference to the costs imposed upon industry to meet the new standards. The EPA did not appear to weigh the benefits of the 2015 ELGs, which would be foregone given the postponement of the compliance deadline. **FCW** may also argue that other important aspects were not discussed in the Notice.

VII. NOTICE AND COMMENT RULEMAKING: *Was notice and comment rulemaking required?*

EnerProg and **EPA** will argue that notice and comment rulemaking was not required. First, these parties might argue that section 705 effectively stands in for the notice and comment rulemaking requirement, therefore rulemaking is not required where section 705 is invoked. Section 705 does not include any cross reference to section 553(d) of the APA. *Cf.* 5 U.S.C. § 554(c) (includes cross references to sections 556 and 557); 5 U.S.C. § 556(a) (includes cross references to sections 553 and 554). However, **FCW** will note, this argument was found to be unpersuasive in *Becerra* by the Northern District of California. *Becerra*, 2017 WL 3891678, at *10. The D.C. Circuit has held that section 705 "does not permit the agency to suspend without notice and comment a promulgated rule." *Safety-Kleen Corp.*, 1996 U.S. App. LEXIS 2324, at *2-3. Second, **EnerProg** and **EPA** might argue that requiring notice and comment rulemaking could undermine the purpose of section 705 because of the time necessary to complete the process, during which litigation would resume. **FCW** would respond by noting the other mechanisms to temporarily suspend litigation, such as a motion for abeyance, which could be employed during the notice and comment rulemaking process.

Generally, rulemaking includes the amendment or repeal of a rule. 5 U.S.C. § 551(5) ("'Rule making' means agency process for formulating, amending, or repealing a rule."). In other words, rulemaking is required for a "substantive" rule, but not for: "(A) . . . interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). The Supreme Court noted that the term "'substantive rule' is not defined in the APA," *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979), but the Court has determined that a substantive rule is "one 'affecting individual rights and obligations.'" *Id.* at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). *See also N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 267 F.3d 128, 131 (2d Cir. 2001) (quoting *Sweet v. Sheehan*, 235 F.3d 80, 91 (2d Cir. 2000) (substantive rules "are

those that 'create new law, right, or duties, in what amounts to a legislative act'").

EnerProg and **EPA** will argue that even if section 705 does not override section 553, the rulemaking requirement does not apply here because the suspension of the compliance date was not substantive. To prove this point, the parties may analogize this case to *Sierra Club v. Jackson*, in which the EPA issued a Delay Notice staying the effective date of two rules regulating emission standards under the Clean Air Act, relying on section 705 as its authority. 833 F. Supp. 2d 11 (D. D.C. 2012). The court held that "the Delay Notice does not constitute substantive rulemaking . . . and therefore is not subject to notice and comment requirements," but ultimately found that the notice was arbitrary and capricious. *Id.* at 29, 34. The court found:

> [T]he Delay Notice simply preserves the status quo. A temporary stay to preserve the status quo does not constitute a substantive rulemaking because, by definition, it is not "designed to implement, interpret, or prescribe law or policy." . . . Such a stay is not designed to do anything other than preserve the status quo.

Id. at 28 (quoting 5 U.S.C § 551(4) (citations omitted)).

Similarly, **EnerProg** and **EPA** will argue that the suspension of the compliance date is to preserve the status quo. The Notice stated: "This will preserve the regulatory status quo with respect to wastestreams subject to the Rule's new, and more stringent, limitations and standards, while the litigation is pending and the reconsideration is underway." 82 Fed. Reg. at 19005. The suspension was not substantive, as it simply retained the status quo of the regulatory scheme prior to the 2015 ELGs, while the ongoing litigation or the new notice and comment rulemaking were concluded. As an indication of the temporary nature of this suspension, EPA subsequently published a proposed rule suspending the compliance dates until full reconsideration of the rule is complete. Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed Reg. 26017 (June 6, 2017). This suspension by rulemaking, and intention to continue with further reconsideration, signals that the EPA intended to use the section 705 suspension solely to maintain the status quo until such actions were taken, and not as an

indefinite measure that would constitute substantive rulemaking. No substantive changes to the requirements of the rule, beyond a mere postponement of compliance, were made.

FCW will respond by differentiating *Sierra Club v. Jackson* from our case, in that *Sierra Club* involved the suspension of an effective date, not a compliance date. *See Becerra*, 2017 WL 3891678, at *11. The difference in the effect of suspending a compliance date is significant. The 2015 ELGs had already gone into effect and industry groups had begun to invest in infrastructure so as to meet the upcoming compliance deadlines. *See Becerra*, 2017 WL 3891678, at *8. The D.C. Circuit held that the deferral of a compliance deadline for mine safety regulations was "in effect an amendment to a mandatory safety standard." *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 n.26 (D.C. Cir. 1981). "[B]y deferring the requirement that coal operators supply life-saving equipment to miners, it had 'palpable effects' upon the regulated industry and the public in general.'" *Id.* at 580 n.28 (quoting *Nat'l Helium Corp. v. Fed. Energy Admin.*, 569 F.2d 1137, 1146 (Temp. Emer. Ct. App. 1977). Similarly, here, the effect of suspending the compliance deadline is substantive in that it affects the obligations of regulated industries and the rights of the public whom the promulgated rule considered. Furthermore, *Sierra Club v. Jackson* is not binding on the Twelfth Circuit.

FCW may further argue that the suspension does not preserve the status quo. As the Northern District of California found in *Becerra*:

> [The agency's] suspension of the Rule did not merely "maintain the status quo," but instead prematurely restored a prior regulatory regime. . . . Defendants' interpretation would allow the agency broad latitude to delay implementation long after a rule was formally noticed to the public as taking effect by characterizing other later dates as compliance dates and thereby retroactively abrogating the published effective date.

Becerra, 2017 WL 3891678, at *9. The suspension of a deadline for the purposes of reevaluating the policy is not a matter of preserving the status quo. In a dissenting opinion for the D.C. Circuit, Judge Edwards explains: "Certainly a decision to suspend indefinitely regulations that are the product of exhaustive study and comprehensive rulemaking, in order to allow a wholesale reevaluation of a major regulatory program, cannot be viewed as a

temporary measure for preserving the status quo." *Public Citizen v. Dep't of Health & Human Servs.*, 671 F.2d 518, 520 (D.C. Cir. 1981) (Edwards, J., dissenting). *See also Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (a suspension that "will remain in effect indefinitely unless and until the agency completes a full notice and comment rulemaking proceeding to reinstate the . . . program [is 'a paradigm of a revocation']"). "The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

The Third Circuit also addressed the issue in *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*. 683 F.2d 752 (3d Cir. 1982). The court found that the indefinite postponement of the effective date required rulemaking, otherwise "it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date."[12] *Id.* at 762. *See also Envtl. Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983); *NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004). A rule "without an effective date . . . would be a nullity because it would never require compliance." *NRDC*, 683 F.2d at 762. Similarly, an indefinite postponement of a compliance date would also nullify a rule – therefore, rulemaking is required.

Finally, **FCW** might note that any subsequent rulemaking does not cure the error of invoking section 705 or failing to undertake notice and comment rulemaking prior to the suspension of the compliance date. *Becerra*, 2017 WL 3891678, at *11.

12. "By postponing the effective date of the amendments, EPA reversed its course of action up to the postponement. That reversal itself constitutes a danger signal. Where the reversal was accomplished without notice and an opportunity for comment, and without any statement by EPA on the impact of that postponement on the statutory scheme pursuant to which the amendments had been promulgated, the reviewing court must scrutinize that action all the more closely to insure that the APA was not violated." *NRDC*, 683 F.2d at 760-61.

VIII. RULEMAKING EXCEPTION: *Do any exceptions to the requirement for rulemaking apply?*

Notice and comment is required for rulemaking, or the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The notice and comment rulemaking requirement does not apply:

> (A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b).

All parties should agree that the EPA did not seek to invoke the good cause exception to the requirement for notice and comment rulemaking when the agency suspended the compliance date in the April 25, 2017 Notice. In order to invoke the good cause exception, the agency must make a determination that the procedure is "impracticable, unnecessary, or contrary to the public interest," and must "include this finding and a short statement of reasons with the new regulations." *Buschmann v. Schweiker*, 676 F.2d 352, 356 (9th Cir. 1982); 5 U.S.C. § 553(b). The requirement for express invocation is strict, as "the good cause exception is essentially an emergency procedure." *Buschmann*, 676 F.2d at 357. *See also United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) ("The Agency must overcome a high bar if it seeks to invoke the good cause exception to bypass the notice and comment requirement."); *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984); *Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 610 (D.C. Cir. 1982); *N.J. Dep't of Envtl. Prot. v. U.S. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980); *U.S. Steel Corp. v. U.S. EPA*, 595 F.2d 207, 214 (1979). If the agency has not included such a finding, the court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The EPA did not expressly invoke the good cause exception to the requirement for notice and comment rulemaking. **EnerProg** will note that EPA did cite the mounting "capital expenditures that facilities incurring costs under the Rule will undertake in order to meet the new, more stringent limitations and standards in the Rule, . . . [therefore] justice requires it to postpone the compliance dates." 82 Fed. Reg. at 19005. However, this was unlikely an attempt to invoke the good cause exception, and if it were, it was not sufficient. No other exceptions to the requirement are applicable.

IX. RELIANCE ON BEST PROFESSIONAL JUDGEMENT: *Can EPA Region XII rely on BPJ as an alternative ground to require zero discharge of coal ash transport wastes?*

Before the EAB, **EnerProg** challenged the permit writer's reliance on Best Professional Judgment as an alternative ground (if the 2015 ELGs were properly suspended) for requiring MEGS to implement dry handling of bottom and fly ash wastes in order to achieve zero discharge of toxic pollutants associated with these wastes by November 1, 2018. The EAB responded to this issue, despite the fact that "this [BPJ] requirement does not currently have any practical effect on the permit requirements." R. at 11. The EAB found that the reliance on BPJ was justified because 40 C.F.R. section 125.3(c)(3) specifically provides for the use of BPJ for pollutants not covered by the ELGs for an industry category: "[w]here promulgated effluent limitation guidelines only apply to certain aspects of a discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis." 40 C.F.R. § 125.3(c)(3). It is undisputed that the effluent from the MEGS coal ash pond contains toxic pollutants such as mercury, arsenic, and selenium, that are not regulated by the 1982 ELGs. R. at 11. *See* Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52290, 52303 (Nov. 19, 1982).

On appeal, ***EnerProg*** *has a strong argument that the EAB's determination that the reliance on BPJ was justified was arbitrary and capricious because the toxic pollutants were "considered" by the*

EPA in the 1982 ELGs, and the pollutants at issue were properly covered by the 2015 ELGs at the time this NPDES permit was issued. ***FCW*** *and* ***EPA*** *will argue that the EAB decision was not arbitrary and capricious because the toxic pollutants, while considered in the 1982 ELGs, can now be properly treated by technology that has since developed.*

Generally, NPDES permits include:

> all applicable ELGs promulgated by the EPA for the pertinent category or subcategory. . . . In situations where the EPA has not yet promulgated any ELGs for the point source category or subcategory, NPDES permits must incorporate "such conditions as the Administrator determines are necessary to carry out the provisions of [the CWA]."

Tex. Oil & Gas Ass'n v. U.S. EPA, 161 F.3d 923, 928-29 (5th Cir. 1998) (footnotes and citations omitted) (quoting 33 U.S.C. § 1342(a)(1)). "[I]n the true absence of an applicable Guideline, permitters are obliged to engage in BPJ analysis in order to satisfy the Act's requirement of appropriate technology-based effluent limits." *Louisville Gas & Electric Co. v. Ky. Waterways Alliance*, 517 S.W.3d 479, 491 (Ky. 2017). Thus, the permit writer will exercise her best professional judgment to fill in these gaps in such a way that will meet the goals of the statute.[13] NPDES regulations provide guidance on how these determinations should be made:

(c)(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in § 125.3(d) and shall consider: (i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and (ii) Any unique factors relating to the applicant. . . . (d) In setting case-by-case limitations pursuant to § 125.3(c), the permit writer must consider the following factors . . . (3) For BAT requirements: (i) The age of equipment and facilities involved; (ii) The process

13. "In the absence of national standards, the Act authorizes the Administrator to issue permits on 'such conditions as the Administrator determines are necessary to carry out the provisions of [the Act].' However, in issuing permits on a case-by-case basis using its 'Best Professional Judgment,' EPA does not have unlimited discretion in establishing permit effluent limitations." *NRDC v. U.S. EPA*, 863 F.2d 1420, 1425 (9th Cir. 1988) (insertion in original) (citation omitted).

employed; (iii) The engineering aspects of the application of various types of control techniques; (iv) Process changes; (v) The cost of achieving such effluent reduction; and (vi) Non-water quality environmental impact (including energy requirements).

40 C.F.R. § 125.3. In their analysis, the permit writer considered that dry handling of bottom ash and fly ash has been in use at existing plants in the industry for many years. R. at 9. The permit writer also noted that MEGS is sufficiently profitable to adopt dry handling of these wastes with zero liquid discharges, with no more than a twelve cents per month increase in the average consumer's electric bill. *Id.* **EnerProg** might argue that the EPA did not consider all the required factors listed in 40 C.F.R. section 125.3(d) based on their absence from the record. Therefore, the permit writer improperly employed BPJ.

EPA and **FCW** will note, as the EAB also determined, that if the compliance date for the 2015 ELGs is properly suspended, the current applicable guidelines are the 1982 ELGs for the Steam Electric Power Generating Point Source Category. *See* Daniel H. Conrad, *Filling the Gap: The Retroactive Effect of Vacating Agency Regulations*, 29 PACE ENVTL. L. REV. 1, 3 (2011). The parties will argue that the provision for employing BPJ does not just apply to the broader category of point sources, but also to specific pollutants. The most recent *NPDES Permit Writers' Manual* explains:

> When effluent guidelines 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, NPDES PERMIT WRITERS' MANUAL § 5.2.3.2 at 5-45-5-46 (Sept. 2010). *See also Louisville Gas & Elec. Co.*, 517 S.W.3d at 488 ("In the case . . . where an existing ELG applies to some part or aspect of the applicant's discharge, but the existing ELG leaves other parts or aspects of the discharge unaddressed, then the permit writer applies the Guideline to the extent possible, and employs the BPJ analysis to the extent necessary, to arrive at appropriate technology-based effluent limits."). Therefore, even though the MEGS point source category is covered by the 1982 ELGs, toxic pollutants in bottom and fly ash wastes are not

regulated by the 1982 ELGs – a fact that is undisputed by the parties. R. at 11.

However, **EPA** and **FCW** must also establish that these pollutants were not "considered" by the EPA when the 1982 ELGs were developed. The EPA explained, in the 1982 ELGs, that these pollutants, among others, were "excluded from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator." Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52290, 52303 (Nov. 19, 1982). Courts have found that an agency's determination that current technology cannot meaningfully reduce the amount of a pollutant serves as "consideration." *Louisville Gas & Elec. Co.*, 517 S.W.3d at 488-89; *NRDC v. Pollution Control Bd.*, 37 N.E.3d 407, 414 (Ill. App. Ct. 2015). **EPA** and **FCW** might try to overcome this by noting that the available technology has changed since the issuance of the 1982 ELGs, therefore it is appropriate that the permit writer consider the current available technology – and it should be noted that EnerProg has not established that compliance with a zero-discharge standard for these pollutants was not feasible. R. at 11. *But see Louisville Gas & Elec. Co.*, 517 S.W.3d at 490 (suggesting that the appropriate remedy would be to bring suit against the EPA for failing to comply with its mandatory duty to timely review ELGs).

EnerProg will further argue that at the time the permit was finalized (January 18, 2017), the 2015 ELGs were still in place and covered the toxic pollutants in bottom and fly ash wastes. The NPDES regulations only authorize the permit writer to employ best professional judgment when "EPA-promulgated effluent limitations are inapplicable." 40 C.F.R. § 125.3(c)(2). The regulations do not authorize the permit writer to use BPJ to establish standards in the case where those standards already existed.

EnerProg might also argue that given anticipated reconsideration of the rule, it was not appropriate for the permit writer to rely on BPJ and establish an alternate ground for zero discharge of these pollutants. Given that, upon the finalization of this permit, several cases challenging the 2015 ELGs had already been filed and the transition of administrations was imminent,

EnerProg might reasonably argue that this regulatory scheme (the 2015 ELGs) were due to be reconsidered. This argument requires an extension of an argument found in *Louisville Gas and Electric Company*, where the court explained that "a permitter may defer the BPJ exercise so as to avoid issuing a permit not in keeping with national standards." 571 S.W.3d at 491. *See also NRDC v. U.S. EPA*, 863 F.2d 1420, 1427-28 (9th Cir. 1988). The court found that it was reasonable for the permitter to refrain from exercising BPJ where the "EPA [was] apparently poised to issue a new national Guidelines."[14] *Louisville Gas & Elec. Co.*, 571 S.W.3d at 491. Thus, a permit writer is permitted to not exercise BPJ, but the permissive language implies that the permit writer would not be abusing her discretion if she *did* exercise BPJ regardless of impending rulemaking. This argument relies on a degree of speculation as to what was forthcoming, given that no rulemaking had been initiated. The argument also would result in the freezing of the authority of an agency upon an impending transition of administrations, by limiting the exercise of judgment by permit writers.

X. NPDES PERMIT: *Is a NPDES permit required for the pollutant discharges into the ash pond?*

Before the EAB, **FCW** asserted that the discharges from outfall 008 to the coal ash pond[15] should not be considered internal discharges, but rather should be treated as a direct discharge to the waters of the United States that requires implementation of effluent limits under CWA sections 301(b) and 402. FCW argued that the July 21, 1980 suspension should not be given effect because it lacked statutory authorization and failed to comply with the requirements of section 553 of the APA.

14. The facts of *Louisville Gas and Electric Company v. Kentucky Waterways Alliance* run parallel to this case, yet the decision made by the permit writer diverges from the EPA here. 517 S.W.3d 479 (Ky. 2017). In *Louisville Gas*, the permit writer did not exercise BPJ, citing pending rulemaking. Here, EnerProg would be arguing that the EPA should not have exercised BPJ because of pending rulemaking.

15. The coal ash pond was impounded from Fossil Creek, a perennial tributary to the Progress River, a navigable-in-fact interstate body of water, for the purposes of waste treatment. R. at 7.

The EAB declined to disturb the longstanding policy judgment of successive EPA administrations. The July 21, 1980 suspension of this language has been in effect for over 35 years, having been reincorporated in two subsequent reconsiderations of section 122.2. Therefore, no effluent limitations are required for internal outfall 008, as it does not discharge into a water of the United States as that term is defined in the regulations. **FCW** appeals this determination.

On appeal, ***FCW*** *will argue that the EAB was arbitrary and capricious in failing to consider that the suspension of the exception was ineffective given that notice and comment rulemaking was required. Therefore, the coal ash pond is a water of the United States, and a NPDES permit is required for the internal outfall 008.* ***EnerProg*** *and* ***EPA*** *will argue that the EAB was not arbitrary or capricious in their determination, and that the statute of limitations for challenging the 1980 suspension has since passed, as well as this being the inappropriate venue or remedy.*

FCW will argue that the suspension of the exception that would bring the ash pond back within the definition of "waters of the United States" required notice and comment rulemaking. *See* section V(C), *supra*, for the legal authorities describing the notice and comment rulemaking requirement for substantive rulemaking. In sum, as the Supreme Court held in *Chrysler Corporation v. Brown*, a substantive rule is "one 'affecting individual rights and obligations.'" 441 U.S. at 302 (quoting *Morton*, 415 U.S. at 232). **FCW** will argue that the suspension effectively terminates certain obligations regarding CWA requirements by removing a category of a body of water from the jurisdiction of the statute. The definition of "waters of the United States" lies at the heart of the CWA, underlying the two core permitting schemes (section 402 NPDES permits and section 404 dredge and fill permits). *See* 33 U.S.C. §§ 1311, 1342, 1344. Any amendment to this definition alters the obligations of a potential permittee and qualifies as a substantive rulemaking. As seen here, it dictates whether or not a permit is required for a discharge. Therefore, the suspension of this exception was not effective. With no such suspension, the ash pond falls outside the jurisdiction of section 301, and no permit is required for the discharge of pollutants into it.

FCW might also note the purpose of the exemption exception included in the notice of its promulgation: "Because [the] CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States." Consolidated Permit Regulations, 45 Fed. Reg. 33290, 33298 (May 19, 1980). The suspension, however, removes these waste treatment impoundments from the definition of WOTUS. This suspension is not merely interpretational; rather, again, it affects rights and obligations. **EnerProg** and **EPA** might cite to *West Virginia Coal Association v. Reilly*, in which the district court agreed with the EPA's argument that the exception was "not definitional, rather it was merely explanatory in nature," therefore the "definitional mandate" was unaffected by the suspension. 728 F. Supp. 1276, 1290 (S.D. W.V. 1989).

Similar to the application in section V(D), *supra*, the good cause exception to rulemaking was not properly invoked by the **EPA** in making the suspension. While the EPA supplied a brief statement of its reasoning for suspending the exception, it does not relate this statement to the good cause exception or to an inability to employ notice and comment rulemaking. Even if this were an invocation of the good cause exception, the EPA would have since been required to conduct notice and comment rulemaking. In *American Federation of Government Employees, AFL-CIO v. Block*, the D.C. Circuit held that "once an emergency situation has been eased by the promulgation of interim rules, it is crucial that the comprehensive permanent regulations which follow emerge as a result of the congressionally-mandated policy of affording public participation that is embodied in section 553." 655 F.2d 1153, 1158 (D.C. Cir. 1981).

After **FCW** establishes that the suspension was ineffective, and that the ash pond is a water of the United States subject to section 301, the party must also establish that the other elements of section 402 are met, such that a NPDES permit is required for internal outfall 008 which discharges into the ash pond. A section 402 NPDES permit is required for any discharge of pollutants into waters of the United States from a point source. *See* 33 U.S.C. § 1311(a) ("Except in compliance with this section and section[] . . . 1342 of this title, the discharge of any pollutant by any person shall

be unlawful."); 40 C.F.R. § 122.2 ("Discharge of a pollutant means: (a) Any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source' . . . . Point source means any discernible, confined, and discrete conveyance . . . ." Also, defining "waters of the United States" as described herein.). Fly ash and bottom ash wastes, containing toxic pollutants, are discharged from MEGS via internal outfall 008, a discrete conveyance, into the coal ash pond. R. at 8. This discharge clearly meets the other elements of the section 402 permit requirement.

EnerProg and **EPA** might cite support for the EAB's deferential treatment of the EPA's longstanding policy judgment. *See, e.g.*, *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (longstanding agency views entitled to deference); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15-16 (2011) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 ("The length of time the agencies have held them suggests that they reflect careful consideration, not 'post hoc rationalizatio[n].'").

EnerProg and **EPA** will argue that even if notice and comment rulemaking was required, the statute of limitations for challenging the ineffective suspension has long passed. 28 U.S.C. section 2401(a) establishes the statute of limitations for civil suits brought against the United States: "[E]very civil action commenced against the United States shall be barred unless the complaint it filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This statute of limitations applies to claims brought under the APA. *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988).

An APA claim against the EPA for failure to employ notice and comment rulemaking for the 1980 suspension first accrued upon the date of notice of the suspension (July 21, 1980). Consolidated Permit Regulations, 45 Fed. Reg. 48620 (July 21, 1980). In *Herr v. U.S. Forest Service*, the Sixth Circuit explains:

A classic example would be an agency that issues a rule without following all requirements of notice-and-comment

rulemaking. *See* 5 U.S.C. § 553(c). This denial of process to the public at large violates the statute, and any party concretely injured by the action (say, a party who has to pay a fee because of the rule) may sue to correct that wrong. The clock for the injured party begins to tick the moment the agency took its final action because the agency's lack of notice-and-comment rulemaking already legally injured the party. 803 F.3d 809, 820 (6th Cir. 2015). Furthermore, "[a]ctual knowledge of government action . . . is not required for a statutory period to commence." *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990). Because the six-year statute of limitations has since long-passed, FCW can no longer challenge the 1980 suspension. A challenge of the NDPES permit is also not the appropriate venue for this challenge against the EPA's 1980 suspension.

FCW may respond by stating that it can still bring a timely as-applied challenge, despite the fact that the suspension was issued in 1980. The agency action was not "final" for the purposes of judicial review until the issuance of the NPDES permit here.

The Supreme Court has identified four factors for determining when agency action is final: (1) whether the challenged action is a definitive statement of the agency's position, (2) whether the action has the status of law with penalties for noncompliance, *(3) whether the impact on the plaintiff is direct and immediate*, and (4) whether the agency expects immediate compliance. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Parl Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997) (emphasis added) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-53 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)). The Fifth Circuit has held "that when an agency *applies* a rule, the limitations period running from the rule's publication will not bar a claimant from challenging the agency's statutory authority. . . . [Many Circuit Court decisions] stand for the proposition that an agency's application of a rule to a party creates a new, six-year cause of action to challenge to the agency's constitutional or statutory authority." *Dunn-McCampbell Royalty Interest, Inc.*, 112 F.3d at 1287. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990); *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). The issuance of the NPDES permit served as the final agency

action relevant to FCW, restarting the statute of limitations six-year clock; therefore **FCW** can still challenge the 1980 suspension.

XI. SECTION 404 PERMIT: *Does the ash pond closure and capping require a permit for the discharge of fill material pursuant to section 404?*

Before the EAB, **FCW** claimed that even if the section 122.2 exclusion from the definition of "waters of the United States" applies for the purpose of a section 402 permit for the discharge of pollutants, once the coal ash pond is closed, it no longer qualifies as a waste treatment system. Therefore, both the abandonment of the remaining coal ash and the placement of an impermeable cap constitute the discharge of fill material requiring a permit under CWA section 404. The EAB held that the exclusion does not contain any recapture provision that would convert the ash pond back into waters of the United States upon its retirement. Since the discharges to the ash pond do not require a section 402 permit, and since the jurisdictional definition of the waters of the United States is the same for section 402 and 404 permitting, the EAB reasoned, no section 404 permit is required for the ash pond closure and capping activities.

*On appeal, **FCW** will argue, as above, that the 1980 suspension was not valid, therefore a section 404 permit is required. **EnerProg** and **EPA** have the stronger argument here. These parties will argue that the correct definition (for the Army Corps) clearly states that the coal ash pond is not a water of the United States, and the definition does not include a recapture provision.*

FCW might first argue, relying on their arguments detailed in the section above, that the suspension of the exception to the exclusion of 40 C.F.R. section 122.2 was never valid. Therefore, the ash pond is a water of the United States, subject to the requirement for a 404 permit. Section 404 of the Clean Water Act describes the permitting scheme for "the discharge of dredged or fill material into the navigable waters at specific disposal sites" administered by the Army Corps of Engineers. 33 U.S.C. § 1344. **FCW** argues, as it did before the EAB, that the closure and capping of the coal ash pond requires a section 404 permit, as these actions constitute the discharge of fill material. The regulatory definition of "fill" as: "material placed in waters of the United States where the material

has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2017). The capping of the ash pond will both replace the coal ash pond, which was impounded from Fossil Creek, with dry land, and will change the bottom elevation. Therefore, the closure of the coal ash pond requires a section 404 permit. 33 U.S.C. §§ 1311, 1344.

EnerProg and **EPA** will respond that regardless of whether the suspension in 40 C.F.R. section 122.2 is valid, the relevant definition for the purposes of section 404 permit requirements is the Army Corps definition found at 33 C.F.R. section 328.3, contrary to the holding of the EAB. 40 C.F.R. section 122.2 only applies to the 402 permitting program. Here, the history is much simpler. In this definition, "waters of the United States" do not include "[w]aste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act." 33 C.F.R. § 328.3(b)(1). There is no exclusion or exception listed. By the plain language of the regulation, the ash pond is not a "water of the United States," and not subject to the section 404 permit requirement.

The EAB held that 40 C.F.R. section 122.2 exception does not include a recapture provision. **EnerProg** and **EPA** will note that the same can be said for the Army Corps definition (33 C.F.R. § 328.3). The language of both 40 C.F.R. section 122.2 and 33 C.F.R. section 328.3(b)(1) do not indicate that the exclusions are temporary, whilst the waste treatment purpose is in effect. The Supreme Court has stated that courts should "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). *See also Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993). The Proposed Rule explicitly stated, in reference to the exclusion of waste treatment systems, among other exclusions: "There is no recapture provision for these excluded waters in the proposal." Definition of "Waters of the United States" Under the Clean Water Act; Proposed Rule. 79 Fed. Reg. 22187, 22189 (Apr. 21, 2014). This holds true for the final rule.

A comment on the proposed rule urged the agencies to include a recapture provision for the excluded waters, indicating that "the permanency of these exclusions [was unsupported] with science." U.S. EPA, Clean Water Rule Comment Compendium, Topic 7:

Features and Waters Not Jurisdictional 47 (June 2015).[16] The EPA responded: "The agencies believe the exclusions contained in the final rule provide a balance between protection and clarity that is reasonable and consistent with the statute's goals and objectives." *Id.* at 23. Furthermore, Congress chose to include a recapture provision for a separate category of waters, therefore its absence for the category at issue is more significant. *See* 33 U.S.C. § 1344(f)(2).

FCW might make a policy argument to support their contention that the ash pond should revert into a water of the United States upon termination of its use for waste treatment. The party may argue that the definitional exclusion clearly states the purpose of these ponds as serving as waste treatment systems to meet the requirements of the Clean Water Act.

This is not intended to be an exhaustive analysis of the problem, merely an indicative list of issues to be discussed in teams' written submissions and oral arguments. One should appreciate reasoned and reasonable creativity and ideas beyond those in this limited analysis.

16. *Available at* https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_7_njd.pdf.

SAMPLE QUESTIONS FOR JUDGES

These questions are suggested as a starting point. Please feel free to develop your own.

Issue 1: Did the Final Permit properly include conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the section 401 certification?

Issue 1(a): Does the EPA or federal court have the authority to review section 401 state certification conditions?

EnerProg and **EPA**

1. Under section 401 and its implementing regulations, who has jurisdiction to review section 401 conditions?
2. Why should this court ignore this jurisdictional grant [requiring review of section 401 certification conditions to be in state courts]?
3. Even if due process requires a judicial or administrative avenue for review of these conditions, why should review be in federal courts or administrative proceedings, rather than the appropriate remedy be in state courts?

FCW

1. What is the EPA's proper remedy when it does not approve of certification conditions?
2. Given that there are no available channels of state review in Progress, why should the section 401 certification conditions not be reviewable by federal judicial or administrative means? [Why shouldn't this court following the reasoning in *Consolidation Coal*?]

Issue 1(b): Were the section 401 state certification conditions appropriate?

EnerProg

1. How should this court define "appropriate requirements of State law?" What are the bounds of "water quality standards" as they pertain to section 401 conditions?
2. Why does the capping and closure requirement fall outside of these bounds?
3. Does a narrow definition of "water quality standards" properly serve the purpose of the CWA and section 401 conditions?
4. If these requirements will still apply to the coal ash pond, under CACA, why is it important that they also not be included in Progress' section 401 certification?

FCW and **EPA**

1. What are the bounds of "appropriate requirements" or "water quality standards" such that conditions included in section 401 certifications are appropriately limited? How should this court define these terms in order to rationally and reasonably limit their scope?
2. How do the closure and capping conditions relate to water quality standards?
3. How do state section 401 conditions, and corresponding state review, comport with the authority of the CWA over the issuance of NPDES permits?

Issue 2: Did the April 25, 2017 EPA Notice effectively suspend permit compliance deadlines for achieving zero discharge of coal ash transport water?

Issue 2(a): Was the invocation of section 705 to suspend the compliance date proper and adequately justified?

EnerProg and **EPA**

1. Why should section 705 apply to "compliance dates," when the statute clearly states that it applies to "effective dates?" Why should this court consider an expanded view of this term?
2. How was the section 705 suspension based on "pending litigation" when the litigation was stayed prior to the issuance of the Notice?
3. Was the EPA required to apply the four-part preliminary injunction test to a postponement under section 705? If not, what is the justification for EPA to depart from the long-standing practice of employing this test?
4. What is the appropriate test to evaluate whether "justice so requires"?

FCW

1. If the purpose of section 705 is to maintain the status quo pending litigation, why should the term "compliance date" not be read broadly?
2. What is the "status quo" to be maintained as applicable here?
3. Was the section 705 suspension made based on "pending litigation"?
4. Was EPA required to apply the four-part preliminary injunction test to a postponement under section 705?

Issue 2(b): Was notice and comment rulemaking required?

EnerProg and **EPA**

1. Does section 705 replace the notice and comment rulemaking requirement? [Can a statute override a separate statutory duty simply by failing to reference it?]
2. How does the suspension of a compliance date preserve the status quo?
3. How is the suspension of an already effective rule not a substantive rulemaking?

4. Why should this court not follow the reasoning set forth in *Becerra*, which held that suspension of a deadline for the purposes of reevaluating the policy is not a matter of preserving the status quo?
5. How is this suspension not an effective repeal of the rule?

FCW

1. Does section 705 replace the notice and comment rulemaking requirement? Does requiring notice and commenting rulemaking for a section 705 suspension undermine the suspension's purpose?
2. Why does the suspension of a compliance date differ from the suspension of an effective date, as related to whether it is a substantive rulemaking?
3. Did the EPA properly invoke the good cause exception to the notice and comment rulemaking requirement?

Issue 3: Can EPA Region XII rely on BPJ as an alternative ground to require zero discharge of coal ash transport wastes?

EnerProg

1. When is it appropriate to rely on BPJ?
2. Is the reliance on BPJ permissible where ELGS exist for an industry category, but not for a specific pollutant within that category? (Does "no applicable ELGS" refer to only ELGs for a particular industry, or more specifically to pollutants within ELGs for an industry?)
3. Did the EPA "consider" these pollutants when establishing the 1982 ELGs?
4. Given the changes in available technology since 1982, why should EPA not be permitted to use BPJ to establish standards?

FCW and **EPA**

1. When is it appropriate to rely on BPJ?

2. Why should the EPA's conclusions [in the 1982 ELGs] that these pollutants should not be regulated because then-existing technologies cannot effectively reduce them not constitute as "consideration"?
3. Is EPA permitted to establish BPJ standards when ELGs were currently in place for those pollutants at the time the permit was issued, yet expected to be subject to litigation/reconsideration?
4. What factors does a permit writer need to consider when relying on BPJ, and did the permit writer, in this case, consider all appropriate factors?

Issue 4: Is a NPDES permit required for the pollutant discharges into the ash pond?

EnerProg and **EPA**

1. Does the ash pond constitute a "water of the United States"?
2. Was rulemaking required for the suspension of the exception that would bring the ash pond back within the definition of "waters of the United States"?

FCW

1. Why was the exception not merely explanatory, therefore rendering its suspension non-substantive (and not subject to notice and comment rulemaking)?
2. Why should this court depart from EPA's longstanding policy judgment of considering such ash ponds as outside of the definition of "waters of the United States"?
3. Did EPA meet the requirements of the "good cause" exception to rulemaking?
4. Is the challenge of this suspension timely?

Issue 5: Does the ash pond closure and capping require a permit for the discharge of fill material pursuant to section 404?

EnerProg and **EPA**

1. What is the appropriate "waters of the United States" definition for this issue?
2. Can the status of a wastewater treatment system change when its use is terminated?
3. Why should this court not read into the "waters of the United States" definition a recapture provision, as a matter of public policy?

FCW

1. Why should this court not look to the Army Corps definition of "waters of the United States"?
2. Why should the court rely on the EPA's definition of "waters of the United States," when the Army Corps has its own definition?
3. Is this court permitted to read a recapture provision into this definition?