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Measuring Brief (EPA)

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

Measuring Brief*

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

ENERPROG, L.L.C.,
Petitioner,

and

FOSSIL CREEK WATCHERS, INC.,
Petitioner,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

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

Brief of UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent

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

STATEMENT OF JURISDICTION

The re-issuance of a National Pollutant Discharge Elimination System (NPDES) permit for discharges from the Moutard Electric Generating Station (MEGS) by the Environmental Protection Agency (EPA) Region XII was petitioned for review by EnerProg, L.L.C., the permittee, and Fossil Creek Watchers, Inc., an environmental group. Pursuant to 40 C.F.R. 124.19 (2017), the authority to review was reserved to the Environmental Appeals Board (EAB), which denied both petitions for review. A notice of appeal was timely filed by both parties seeking review under this Court's jurisdiction pursuant to section 509(b) of the Clean Water Act (CWA). 33 U.S.C. § 1369(b) (2012). The petitions have been rightfully consolidated by this Court for the purpose of its review.

STATEMENT OF ISSUES

I. Does the EPA have jurisdiction to review the permit conditions imposed by a State?

II. Are the conditions imposed under State of Progress law consistent with section 401(d) of the Clean Water Act, independent of whether EPA has jurisdiction to review State required permit conditions?

III. Does the April 25, 2017 Notice issued by EPA suspend permit compliance deadlines for certain requirements promulgated under the 2015 Effluent Limitations Guidelines for the Steam Power Generating Industry?

IV. Notwithstanding 2015 Effluent Guidelines, is Best Professional Judgment valid alternative grounds to require zero discharge of coal ash transport wastes?

V. Is the MEGS coal ash pond a water of the United States subject to section 402 permitting requirements?

VI. Does closure of the MEGS coal ash pond require a fill permit subject to CWA section 404?

STATEMENT OF CASE

I. Facts

The Moutard Electric Generating Station (MEGS) is a coal-fired steam electric power plant owned and operated by EnerProg, L.L.C. in the State of Progress. *In re EnerProg, L.L.C.,* NPDES Appeal No. 17-0123, slip op. at 6 (EAB, 2017). The MEGS plant provides baseload generating capacity for Progress, with a maximum dependable capacity of 745 megawatts (MW). *Id.* at 7. The MEGS plant draws water from the nearby Moutard Reservoir to produce steam for electricity generation. *Id.* Overall, the facility has an actual intake flow of less than 125 million gallons per day (MGD) from the Moutard Reservoir. *Id.* This water is used in the plant's closed-cycle cooling system via operation of a cooling tower, as well as in the transport and treatment of coal ash waste created through electricity production. *Id.* This wastewater undergoes treatment through sedimentation in a coal ash pond before it is discharged back into the Moutard Reservoir via a riser structure at Outfall 002. *Id.* The coal ash pond is a free-standing body of water created in 1978 by impounding waters from the upper reach of Fossil Creek, a perennial tributary to the Progress River. *Id.*

The EPA regulates discharges from Outfall 002 under the authority of the Clean Water Act (CWA) which prohibits the discharge of any pollutants into regulated waterways without a permit issued under the National Pollution Discharge Elimination System (NPDES) or other approved state permitting program. 33 U.S.C. §§ 1311, 1342 (2012); *EnerProg*, slip op. at 7. Direct discharges from the MEGS facility into the Moutard Reservoir via Outfall 002 are authorized and regulated under an NPDES permit issued by EPA Region XII. *Id.*

The NPDES permitting process requires EPA Region XII staff to work closely with regulatory authorities in the State of Progress to ensure that any discharges authorized under the permit are in compliance with federal effluent limits and water quality standards under the CWA. 33 U.S.C. § 1341. This relationship underlines the EPA's congressional directive to improve and

promote the health of the nation's waterways through enforcement of federal standards in cooperation with state and local government. *See* Congressional Declaration of Goals and Policy, 33 U.S.C. § 1251. The section 401 state certification process exemplifies this approach, wherein the state affirms that a proposed NPDES permit meets all relevant CWA standards and applicable state law. *Id.* §§ 1341(a)(1), 1342. In the present case, the certifying entity is the State of Progress. *EnerProg*, slip op. at 6.

As part of its certification, the State of Progress sought to include conditions requiring EnerProg to cease operation of its coal ash pond by November 1, 2018, completely dewater the pond by September 1, 2019, and cover the dewatered pond with an impermeable cap by September 1, 2020. *Id.* The conditions are rooted in the State of Progress Coal Ash Cleanup Act (CACA), and additionally entail rerouting of all ash transport waters currently discharged into the coal ash pond to a new lined retention basin. *Id.* at 9. Shutting down the coal ash pond as a part of the transition to dry-handling of coal ash wastes would necessarily eliminate direct discharges of bottom ash and fly ash discharges ("ash handling wastes") from the pond to the Moutard Reservoir at Outfall 002. These wastes include elevated levels of mercury, arsenic, and selenium, which are toxic chemicals regulated by the EPA. *Id.*

EPA Region XII staff reviewed the proposed requirements of the section 401 certification for both feasibility and consistency with federal water quality standards. *Id.* at 9. Upon review, Agency staff found that the section 401 certification conditions proposed by the State of Progress were consistent with CWA pollution and water quality standards. *Id.* Specifically, the permit writer concluded that a transition to dry-handling of coal ash wastes, which eliminates toxic discharges associated with ash transport waters, was feasible for the MEGS facility. *Id.* The permit writer thus determined that zero discharge of ash handling wastes by November 1, 2018—the date of closure of the coal ash pond—constitutes Best Available Technology (BAT) for such discharges and was an appropriate permit requirement. *Id.* Zero discharge of coal ash handling wastes was determined to be BAT under the 2015 revised Effluent Limitation Guidelines for the Steam Electric Generating Point Source Category ("2015 ELGs"). 40 C.F.R. 423.

However, compliance deadlines for the 2015 ELGs have been postponed by order of the Administrator, pending a legal challenge to the rule in the Fifth Circuit. *See* Postponement of Compliance Dates for Effluent Limitations Guidelines for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017).

Upon completion of review and finding that the certification conditions proposed by the State of Progress were appropriate, the Region XII Administrator provided public notice and opportunity for a hearing on the NPDES permit in accordance with 40 C.F.R. § 121.23. *EnerProg*, slip op. at 10. EnerProg, the MEGS facility operator, and Fossil Creek Watchers, Inc. (FCW), a local environmental organization, both filed comments on the permit. On January 18, 2017, EPA Region XII officially re-issued the NPDES permit to EnerProg. *Id.* at 6.

II. Procedural History

Upon the EPA Region XII's re-issuance of the NPDES permit, EnerProg and FCW filed timely petitions for review with the EAB requesting the permit be remanded to Region XII for further consideration. *Id.* EnerProg challenged the following: the inclusion in the final permit of a cap-and-closure condition in the CWA Section 401 Certification; the inclusion of zero discharge requirements from the 2015 revised Effluent Limitation Guidelines for the Steam Electric Power Generating Point Source Category; and, in the event that 2015 ELGs do not apply, EPA Region XII's reliance on Best Professional Judgment to impose the same zero discharge requirements. FCW challenged Region XII's determination that internal discharges into the coal ash pond were not subject to effluent limits under section 402, and separately challenged the requirements for dewatering and capping the coal ash pond as unauthorized without first obtaining a section 404 fill permit. The EAB denied both EnerProg and FCW's petitions for review.

SUMMARY OF ARGUMENT

The EPA has the authority to review the permissibility of State of Progress certification conditions for EnerProg's NPDES

permit under CWA section 401(d). The conditioning authority given to states under section 401(d) is not "unbounded." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994). The bounded nature of state certification conditions implies that an entity must be entrusted with the authority to review such conditions. This entity must be the EPA based on its existing authority to review state water quality standards under CWA section 303 and its role in administering the CWA. 33 U.S.C. § 1313 (2012); *PUD No. 1*, 511 U.S. at 712–13. Therefore, the EPA has the authority to review state certification conditions based on similar authority already given to it under the CWA, as well as to preserve the regulatory balance between the EPA and states as envisioned by Congress in enacting the CWA.

The State of Progress' certification conditions requiring capping and closure of the MEGS coal ash pond constitute an "appropriate requirement of state law." 33 U.S.C. § 1341(d). In determining whether a state certification condition is an appropriate requirement of state law, courts first look to its consistency with other CWA sections pertaining to state water quality standards and effluent limitations. *PUD No. 1*, 511 U.S. at 713–14. Courts then look to its consistency with "additional state laws." *Id.* The State of Progress' capping and closure requirements for coal ash ponds can reasonably be seen as "narrative statements" consistent with state water quality standards as the requirements are set with the intention of ensuring that any leakage from the coal ash pond will not adversely affect the quality of surrounding navigable waters. *See* 40 C.F.R. § 131.3(b); *PUD No. 1*, 511 U.S. at 715. Furthermore, these capping and closure requirements can also be seen as effluent limitations as their purpose is to limit total effluent from the closed coal ash pond to zero. Even if capping and closure requirements are not considered water quality standards or effluent limitations, they can still reasonably be considered appropriate requirements of state law based on the broad deference given to states under CWA section 401. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

EPA's April 25, 2017 Notice is valid and effective to suspend the compliance deadlines of the 2015 ELGs pursuant to section 705 of the Administrative Procedure Act (APA). Section 705 states: "[w]hen an agency finds that justice so requires, it may postpone

the *effective date of action* taken by it, pending judicial review." 5 U.S.C. § 705 (2012) (emphasis added). A statute is interpreted in the context of any explicit definitions that Congress assigned to words pertinent to the statute's language. *See Burgess v. United States*, 553 U.S. 124, 129 (2008). "Agency action" and "rule" have distinct definitions in the APA. Therefore, a plain reading of the statute suggests that Congress authorized an agency to postpone the effective date of an agency action, not merely the effective date of a rule. Because compliance deadlines are agency actions, the Administrator's finding that "justice so require[d]" staying the compliance deadlines is valid in light of pending litigation involving the 2015 ELGs in the Fifth Circuit. Furthermore, EPA was not required to undergo notice-and-comment procedures before issuing the Stay Notice, as the notice is not a rulemaking.

If this Court upholds the Stay Notice, the zero discharge requirements can still be included in EnerProg's permit on the basis of Best Professional Judgment (BPJ). In order to further the objectives of the CWA, Congress authorized the EPA to regulate pollutants and set effluent limits on a case-by-case basis when national guidelines are inadequate. 33 U.S.C. § 1342 (a). Courts are highly deferential to the technical expertise of EPA and its permit writers when reviewing BPJ requirements, and review such agency conclusions applying an arbitrary and capricious standard. *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 569 (2d Cir. 2015). Requiring zero discharge in this case is neither arbitrary nor capricious because it is the Best Available Technology (BAT) for MEGS discharges.

This Court should uphold EAB's determination that discharges into the MEGS coal ash pond are not subject to effluent limits. The EAB correctly held that the agency is not required to regulate discharges into waste treatment systems designed to meet the purposes of the CWA. 40 C.F.R. § 122.2. FCW invokes a suspended clause from a 1980 agency rulemaking in arguing that the MEGS coal ash pond is not a wastewater treatment system. *EnerProg*, slip op. at 12. From a procedural standpoint, the suspension is a valid exercise of agency discretion and is consistent with both the APA and the CWA. As the EAB properly ascertained, the suspension reflects a longstanding policy determination of the agency and should not be disturbed. *Id.* Moreover, as the coal ash pond is already subject to end-of-pipe effluent limits, applying the

same effluent limits to waters *entering* the pond would render it inoperable as a waste treatment system. Petitioners cannot simply upend longstanding agency policy to force immediate closure of the coal ash pond.

FCW's secondary argument that the closure and capping of the pond would require a section 404 fill permit is similarly without merit. *Id.* at 12–13. The pond's historical connection with Fossil Creek notwithstanding, the pond is not currently a "water of the United States" (WOTUS) subject to section 404 permitting requirements, nor is there any precedent to suggest that it will transform into a WOTUS upon retirement. *See* 33 C.F.R. § 323.2. Furthermore, requiring a fill permit to close a coal ash pond is well outside the scope and stated objectives of section 404, and serves no clear purpose under the CWA. Therefore, this Court should uphold the EAB's determination that a fill permit is not required for closure and capping activities.

ARGUMENT

I. EPA HAS JURISDICTION TO REVIEW THE PERMISSIBILITY OF STATE OF PROGRESS CERTIFICATION CONDITIONS UNDER CWA SECTION 401(d).

Section 401(a)(1) of the Clean Water Act (CWA) expressly requires that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). Based on the certification authority given to states under CWA section 401(a), section 401(d) directs states to grant, condition, or deny certifications based on a state-conducted review of the activity to ensure consistency with CWA sections 301, 302, 306, and 307 as well as "with any other appropriate requirement of State law." *Id.* § 1341(d). The state authority to condition under CWA section 401 is not absolute. The EPA, as the issuing agency for NPDES permits, retains authority to review state certification conditions.

A. States Do Not Have Absolute Authority to Issue Conditions on Federal Licenses Under CWA Section 401(d).

A plain reading of CWA section 401(d) shows that state certification conditions are not absolute. States certification conditions must "comply with applicable effluent limitations and other limitations" under the above stated sections of the CWA and "any other appropriate requirement of state law." 33 U.S.C. § 1341(d). EPA regulations implementing section 401 provide further guidance on state certification conditions. The regulations require certifying agencies—the State of Progress in this case—to include "[a] statement that there is a *reasonable assurance* that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3) (emphasis added). While deferring to states to set certification conditions, the "reasonable assurance" requirement nonetheless bounds their authority under section 401(d). The Supreme Court in *PUD No. 1* affirmed this interpretation, holding that "[a]lthough § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded." 511 U.S. at 712. *See also Keating v. FERC*, 927 F.2d 616, 623 (D.C. Cir. 1991) ("The certification power of the states under section 401 is not . . . unbounded.").

B. The EPA Is the Appropriate Authority to Review and Reject State Certification Conditions Under CWA Section 401(d).

The bounded nature of state conditioning authority under CWA section 401 necessitates a reviewing entity. This entity is the EPA. This is evident upon a holistic examination of the CWA, particularly analogous sections providing states with authority to establish water quality standards. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a holistic endeavor."); *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."). Additionally, this Court in interpreting CWA section 401 should be mindful of the

balance of regulatory authority between federal agencies and states. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."). The EPA would effectively relinquish its congressional mandate under the CWA to regulate water pollution without the authority to review state certification conditions.

1. The CWA Already Gives EPA the Authority to Review State Standards.

The Ninth Circuit in *Pronsolino v. Nastri* explained that, pursuant to section 303 of the CWA, "[t]he states are required to set water quality standards . . . . If a state does not set water quality standards, or if the EPA determines that the state's standards do not meet the requirements of the Act, the EPA promulgates standards for the state." 291 F.3d 1123, 1127 (9th Cir. 2002). The CWA already gives the EPA authority to review state standards, and EPA has similar authority to review state certification conditions under CWA section 401(d). This inference is further supported by the Supreme Court's analysis in *PUD No. 1* outlining the link between section 401(d) and section 303 of the CWA: "Although § 303 is not specifically listed in 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, and § 301 in turn incorporates § 303 by reference." 511 U.S. at 701. Based on the Supreme Court's holding that section 303 of the CWA is part of section 401 (by reference) and that state authority is bounded, it can be reasonably inferred that the EPA's reviewing authority under section 303 also extends to section 401.

The EAB erred in ruling that EPA does not have discretion to reject a state certification condition. *EnerProg*, slip op. at 11. In its decision, EAB cited *American Rivers v. FERC*, where the Second Circuit held that the Federal Energy Regulatory Commission (FERC) did not have the authority to reject certain state-imposed conditions on hydropower project licenses. 129 F.3d 99, 107 (2d Cir. 1997). However, the CWA establishes EPA as the predominant authority in implementing the Act, making its role distinct from other federal agencies in regulating state certification conditions. *See* 33 U.S.C. § 1251. While other federal agencies such as FERC

are given licensing authority under CWA section 401, it is clear that the EPA—as the administering agency of the CWA—has additional authority and expertise to review state certification conditions to ensure consistency with the CWA at large. The court recognizes this distinction in *American Rivers* stating that "FERC's interpretation of § 401 . . . receives no judicial deference under the doctrine of *Chevron* . . . because the Commission is not Congressionally authorized to administer the CWA." 129 F.3d at 107 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). Also implicit in the court's holding in *American Rivers* is the assumption that the administering agency of the CWA should be granted judicial deference. This Court should therefore defer to EPA's interpretation of CWA section 401 as giving EPA the authority to review state certification conditions.

2. Without EPA Authority to Review State Standards, the EPA Would Be Subordinate to State Control in Administering the CWA.

Courts have recognized the intent of CWA section 401(d) to give "broad authority" to states to include their own substantive policies in certification conditions. *Keating v. FERC*, 927 F.2d 616, 623 (D.C. Cir. 1991). However, courts are wary of giving states the final say in imposing certification conditions. In *California v. FERC*, the Supreme Court held that "[a]llowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in [this] considered federal agency determination" and agreed with FERC's position that the significantly more stringent California standards would "interfere with its comprehensive planning authority." 495 U.S. 490, 506 (1990). A similar interpretation should extend to EPA in the case at hand. EPA's position as a check on the authority of the states to set their own certification conditions is consistent with the intent of the CWA as stated above.

The EPA is best positioned to review state decisions due to both its subject matter expertise and its unique vantage point allowing it to make assessments on inter-state water quality beyond the parochial concerns of states. This does not leave states without recourse, however. As evidenced by the case at hand, should states and the EPA be at odds over section 401(d)

certification conditions, the EAB and relevant courts have the authority to make final rulings based on the merits. This Court should therefore recognize EPA's authority to review state certification conditions under section 401.

II. THE ASH POND CLOSURE AND REMEDIATION CONDITIONS SET BY THE STATE OF PROGRESS CONSTITUTE APPROPRIATE REQUIREMENTS OF STATE LAW UNDER CWA SECTION 401(d).

Parties do not dispute whether the MEGS coal ash pond requires an NPDES permit for discharges into the Moutard reservoir or that this permit is subject to state certification. Instead, the dispute centers on whether the State certification conditions related to the coal ash pond (the "CACA requirements") fall within the scope of CWA section 401(d). The certification requirements set by the State of Progress fall within the scope of the CWA provisions on state water quality and effluent limitations referenced and incorporated in section 401(d). Even in the case that such requirements fall outside of the scope of these provisions, they would still fall within the broad conditioning authority given to states under the "appropriate state requirement" clause of section 401(d). 33 U.S.C. § 1341(d).

A. CACA Requirements Are Consistent with CWA Provisions Referenced and Incorporated by Section 401(d) And Are Therefore "Appropriate Requirements of State Law."

CWA section 401(a)(1) states that a permit is required for any activity which "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). "Discharge" is defined as "any addition of any pollutant of navigable water from any point source." *Id.* § 1362(12). If there is any discharge, "the activity as a whole" can be subject to "additional conditions and limitations." *PUD No. 1*, 511 U.S. at 712. Currently, end-of-pipe discharges from the coal ash pond are regulated under the NPDES permit. However, even after closure of the pond, the MEGS facility will still require an NPDES permit for *other* facility discharges (e.g., cooling

tower blowdown and discharges from the planned retention basin). *EnerProg*, slip op. at 7–8. Therefore, dewatering, capping, and other remediation conditions of the coal ash pond can be incorporated into this permit because "activities—not merely discharges—must comply with state water quality standards." *PUD No. 1*, 511 U.S. at 712. Moreover, pursuant to section 401(a)(1), the mere risk of discharges from the closed coal ash pond renders it subject to CWA section 401 regulation. *See* 33 U.S.C. § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity . . . which *may* result in any discharge into the navigable waters, shall provide the licensing . . . agency a certification from the State in which the discharge originates.") (emphasis added).

1. Closure and Capping of the Coal Ash Pond Are Legitimate Requirements for Achieving State Water Quality Standards Under CWA Section 303.

Section 303 requires states to establish water quality standards for both intrastate and interstate waters. 33 U.S.C. § 1313. The Supreme Court in *PUD No. 1* held that "ensuring compliance with § 303 is a proper function of the § 401 certification" and that these state water quality standards would be "among the other limitations with which a State may ensure compliance through the § 401 certification process." 511 U.S. at 713. The EPA has consistently interpreted section 303 water quality standards to include numerical as well as non-numerical criteria. "Criteria" is defined as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements . . . ." 40 C.F.R. § 131.3(b). Courts have upheld the EPA's non-numerical interpretation of "criteria." *See, e.g., PUD No. 1*, 411 U.S. at 715. Capping and closure requirements qualify as non-numerical standards—or "narrative statements." The requirements are intended to prevent significant contamination of waters in the event that pollutants from the ash pond seep into groundwater systems and enter surface waters regulated by the CWA; as such, they are clearly related to water quality standards. The possibility of pollutants discharging into regulated waters meets the threshold condition of CWA section 401(a)(1), which requires only that the activity *may* result in a

discharge to trigger licensing requirements. 33 U.S.C. § 1341(a)(1). Therefore, the State of Progress' inclusion of conditions for capping and closure of the pond are appropriate under the CWA.

2. CACA Requirements for Ash Pond Closure and Capping Are Consistent with CWA Sections 301 and 302 Establishing Effluent Limitations.

The effluent limitations under sections 301 and 302 of the CWA pertain to discharges to surface waters. In establishing closing and capping requirements for the coal ash pond, the State of Progress is in effect setting an effluent limitation for the coal ash pond to zero. *Id.* §§ 1311– 1312. Even if this Court finds that the state capping and closure conditions fall outside the boundaries of regulating "the activity as a whole," the coal ash pond can independently be viewed as a point source subject to CWA regulation. Under the CWA, a "point source" is "any discernible, *confined and discrete conveyance* . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Courts have held that coal ash ponds can be point sources. *See Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 443–44 (M.D.N.C. 2015) ("coal ash lagoons are surface impoundments designed to hold accumulated coal ash in the form of liquid waste . . . [and] appear to be confined and discrete."). *Cf. Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 763 (E.D. Va. 2017) (finding that coal ash piles are point sources and that any discharge that connects with surface water is broadly considered surface water subject to CWA regulation). Furthermore, even if a coal ash pond is dewatered, it is still a confined and discrete conveyance to nearby navigable waters that constitutes a point source. *See Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 3:15-CV-00424, 2017 WL 3476069 (M.D. Tenn. Aug. 4, 2017). Therefore, even without the broad regulatory authority provided to states under the CWA, the state closure and capping requirements can independently be considered appropriate effluent limitations under CWA section 401.

B. CACA Requirements Are Appropriate State Requirements Under CWA Section 401(d), as States

Have Broad Authority Beyond the Scope of the CWA to Impose Certification Conditions.

Even if this Court does not deem the CACA requirements to be consistent with water quality standards or effluent limitations under the CWA, they are clearly "appropriate state requirement[s]." 33 U.S.C. § 1341(d). Courts have not explicitly ruled on the limits of the "appropriate state requirement" clause of section 401(d). However, in practice, courts have given broad deference to states and tribes in establishing standards under the CWA. For example, in *Albuquerque v. Browner*, the Tenth Circuit upheld ceremonial standards established by an Indian tribe, which were neither water quality standards nor effluent limitations. 97 F.3d. 415, 423 (10th Cir. 1996). The EPA has recognized this broad deference to states in its regulations implementing section 401, where it merely requires states provide "[a] statement that there is a *reasonable assurance* that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3) (emphasis added). In *PUD No. 1*, the Supreme Court interpreted the EPA's "reasonable assurance" standard to give broad authority to States under section 401. 511 U.S. at 715. This deference fits within the federalism Congress envisioned in enacting the CWA. *See S.D. Warren Co.*, 547 U.S. at 386 ("State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution."). Therefore, state capping and closure requirements fall within the "appropriate state requirements" clause under CWA section 401(d).

III. THE STAY NOTICE IS EFFECTIVE TO REQUIRE SUSPENSION OF COMPLIANCE DEADLINES OF THE 2015 ELGS UNDER APA SECTION 705.

The April 25, 2017 EPA notice ("the Stay Notice") is effective to require suspension of compliance dates for the 2015 Steam Electric Power Generating Source Category ELGs ("2015 ELGs"), including the November 1, 2018 compliance deadline for achieving zero discharge of coal ash transport water.[1] *See* Postponement of Compliance Dates for Effluent Limitations Guidelines for the

Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017).

EPA has specific authority under section 705 of the Administrative Procedure Act (APA) to postpone compliance deadlines of its own duly promulgated rules "when justice so requires." 5 U.S.C. § 705. Specifically, "[w]hen an agency finds that justice so requires, it may postpone the *effective date of action* taken by it, pending judicial review" *Id.* (emphasis added). The statute itself is silent on the definition of "effective date." However, when read as a phrase, "effective date of an [agency action]" is clearly not the same as the "effective date of a rule," especially when separate statutory definitions are assigned to "agency action" and "rule." *See id.* §§ 551(4), (13). Because compliance deadlines are agency actions, EPA reasonably construed the statute to allow for the postponement of compliance deadlines. In this case, the Administrator determined that postponement of the compliance deadlines of the revised 2015 ELGs is required by justice, pending judicial review of the 2015 ELGs in the Fifth Circuit. Furthermore, the Stay Notice does not require notice and comment procedures pursuant to section 553 of APA because it is not a formal rulemaking. *See id.* §§ 551(4)–(5).[1]

A. EPA Reasonably Interpreted "Effective Date" in Section 705 of APA To Include Compliance Dates.

EAB relied on a misreading of section 705 of the APA in holding that the Stay Notice is not effective to postpone compliance dates of 2015 ELGs. *EnerProg*, slip op. at 11. As previously stated, section 705 allows an agency to delay the "effective date of an action taken by it." 5 U.S.C. § 705. EAB appears to interpret "effective date of an action" to mean the "effective date of a rule." Such a reading does not comport with the plain text of the statute.

When a word or phrase is defined in a statute, that definition governs as long as it is applicable in the context used and does not conflict with other language in the statute or its purpose. *See, e.g.*,

[1] Regardless of the validity of the Stay Notice, EnerProg is separately required by its NPDES permit to achieve zero discharge by November 1, 2018. This requirement was included by the permit writer applying Best Professional Judgment (BPJ) in the drafting process, and is discussed further in Section IV.

FCC v. AT&T, 562 U.S. 397, 404–407 (2011) (holding that the undefined term "personal" is different from the explicitly defined term "person"); *Burgess*, 553 U.S. at 129, 135 (holding that "felony drug offense" should be read as per the definition in the statute because it is "coherent, complete, and by all signs exclusive"); *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (upholding explicit statutory definition of "partial birth abortion"); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (denying to extend the statutory definition of "viable" to "may be viable" because it would frustrate the purpose of the provision).

On its face, the plain language of the APA does not communicate intent on Congress' part that an action taken by an agency should be understood to apply *only* to the effective date of a promulgated rule. In fact, Congress has distinguished between "rule" and "agency action" in the APA. "Agency action" is defined broadly as "the whole or *a part of any agency rule*, order, license, or sanction, relief or the equivalent or denial thereof, or the failure to act." 5 U.S.C. § 551(13) (emphasis added). Whereas, "rule" is defined very specifically as:

> whole or a part of an agency statement . . . designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Id. § 551(4). The definitions enumerated in the APA clearly indicate that an agency action is meant to encompass a broad array of decisions and undertakings, only one of which is a rule. Compliance dates are but one of the types of agency actions and therefore, may be postponed pursuant to section 705 of the APA. *See id.* § 551(4)–(5), (13).

Superimposing unstated restrictions on the plain text of a statute is inappropriate and should be avoided – particularly when doing so risks material injury to stakeholders by subjecting them to costly—and potentially unnecessary—compliance measures. More importantly, a restricted interpretation, which is unsupported by the statute itself, would frustrate APA's purpose in granting an agency power to stay its own actions when justice

so requires, which the Supreme Court has repeatedly held to be a primary consideration when interpreting statutes. *See Colautti*, 439 U.S. at 392 (1979). Therefore, the Court should treat "effective date of action taken by [an agency]" to encompass compliance deadlines within the purview of APA section 705.

B. EPA is Generally Authorized to Postpone Effective Dates of Agency Actions Pending Judicial Review When Justice So Requires.

There are only two explicit factors that EPA has to satisfy under APA section 705 to stay the effective date of its action: (1) EPA must find that "justice so requires;" and (2) the action must be "pending judicial review." 5 U.S.C. § 705. The Stay Notice meets both of these factors.

1. EPA Reasonably Concluded That "Justice So Requires" Staying the 2015 ELG Compliance Deadlines.

Within the purview of APA section 705, EPA concluded that justice required it to postpone the compliance deadlines in light of the significant compliance costs and uncertainty created by a legal challenge to the Rule. *See* Postponement of Compliance Dates for Effluent Limitations Guidelines for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017). The Stay Notice merely purports to protect the status quo of the current industry environment, without imposing additional obligations or duties on regulated parties while the matter is being litigated. *Id.* This alone should satisfy the first factor of APA section 705 to postpone compliance dates.

Moreover, it is important to note that EPA declared its intent to reconsider the Rule in the Stay Notice. *Id.* There is no question that EPA has the authority to revise its rules. *See* 5 U.S.C. § 553. Particularly, "change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its policies. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). The Stay Notice was issued only months after

the new EPA Administrator took office. Agency review of previous policies and promulgated rules is reasonable under the precedent set by *Home Builders*. Furthermore, the CWA specifically authorizes EPA to review effluent guidelines. 33 U.S.C. § 1311(d). These revisions would be subject to appropriate notice and comment rulemaking procedures pursuant to APA section 553, which would take considerable time to complete. Meanwhile, EPA is taking additional steps to address issues raised by other stakeholders with the promulgated 2015 ELGs. *See* Postponement of Compliance Dates for the Effluent Limitations Guidelines for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 26,017 (June 6, 2017). In light of reconsideration of the Rule, EPA has requested the Fifth Circuit to hold the case at abeyance, which was granted. *Id.* at 26,018, While reconsideration of a rule is not a sufficient reason to postpone effective dates under section 705, reconsideration in this instance is directly related to the pending litigation. Staying the compliance deadlines offers an immediate—and just— approach to relieve regulated parties from complying with standards that might be ultimately remanded (due to changes in the rule itself) or vacated. Therefore, EPA reasonably determined that justice so requires staying the compliance deadlines.

2. EPA Issued Stay Notice Pending Judicial Review in the Fifth Circuit.

In *Sierra Club v. Jackson*, the court held that a postponement of effective dates of an EPA action was inappropriate because the Delay Notice issuing the stay merely referenced the litigation in passing and did not ground the stay in the existence or consequences of the pending litigation. 833 F. Supp. 2d 11, 33 (D.D.C. 2012). Unlike the Delay Notice of *Sierra Club*, the Stay Notice at issue was announced pending a direct legal challenge to the 2015 ELGs in the Fifth Circuit. The stay is grounded in the potential consequences of this litigation as discussed previously. *See supra* Section III.B.1. Therefore, EPA is acting within its authority to stay the compliance deadlines pursuant to section 705 of the APA.

C. The Stay Notice Is Not Subject to Notice and Comment Rulemaking Procedures Because It Is Not a Rule.

A rule by definition is "designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4). EPA is required to carry out specific procedures pursuant to section 553 of the APA in order to engage in rulemaking, which is the "process for formulating, amending, or repealing a rule." *Id.* §§ 551(5), 553. In *Sierra Club*, the court held that a Delay Notice meant 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" and was not subject to notice and comment requirements. 833 F. Supp. 2d at 28 (citing 5 U.S.C. § 551(5)) (internal punctuation omitted).

EPA is not implementing, interpreting, or prescribing law or policy in issuing the Stay Notice. Similar to the purpose of the Delay Notice in *Sierra Club*, the Stay Notice here simply stays the compliance deadlines in order to preserve status quo until the judicial review of the rule is complete to prevent subjecting regulated parties to uncertain regulatory demands. Therefore, the Stay Notice is not a rule that would require EPA to initiate notice-and-comment rulemaking procedures before issuance, and it is effective to suspend the compliance deadlines pursuant to section 705 of APA.

IV. BEST PROFESSIONAL JUDGMENT IS VALID ALTERNATIVE GROUNDS TO REQUIRE ZERO DISCHARGE OF COAL ASH TRANSPORT WASTES, INDEPENDENT OF 2015 ELGS.

The 2015 ELGs require NPDES permits to include zero discharge of ash transport water as a permitting condition. 40 C.F.R. § 423.13. However, given the uncertain status of the compliance deadlines proposed by the 2015 ELGs, EPA can alternatively rely on Best Professional Judgment (BPJ) to require zero discharge of coal ash transport wastes. *See* 33 U.S.C. § 1342(a)(1)(B) (authorizing the Administrator to issue NPDES permits if discharge meets "such conditions as the Administrator

determines are necessary to carry out the provisions of [section 402]").

Technology based effluent limitations (TBELs), established by the EPA in ELGs, must be incorporated into NPDES permits. 33 U.S.C. § 1314. *See Nat. Res. Def. Council*, 808 F.3d at 563–564; *Texas Oil & Gas Ass'n v. E.P.A.*, 161 F.3d 923, 928–29 (5th Cir. 1998). However, TBELs are not all-encompassing. When there is no ELG that applies to the permit applicant's specific discharge, or an existing ELG applies to only a part of the discharge, the permit writer is authorized under section 402(a)(1) of CWA to use his or her BPJ to determine appropriate TBELs. 40 C.F.R. § 125.3(c)(2)–(3); 33 U.S.C. § 1342(a)(1). Unless BPJ application in these circumstances is arbitrary or capricious pursuant to the judicial review standard established in the APA, 5 U.S.C. § 706, courts are highly deferential to the technical expertise of the permit writer and the agency in setting TBELs. *See Nat. Res. Def. Council*, 808 F.3d at 569, *Texas Oil*, 161 F.3d at 933.

If the 2015 ELGs are inapplicable, requiring zero discharge of coal ash transport wastes is authorized under the CWA through BPJ. EPA determined that dry handling of ash transport water is the best applicable technology (BAT) and therefore, a reasonable TBEL for this category. BAT, here, results in zero discharge. Furthermore, the permit writer reasonably concluded that MEGS can comply with this standard. Therefore, zero discharge requirement of ash transport as a TBEL is an appropriate exercise of BPJ because it is neither arbitrary nor capricious.

A. EPA Is Authorized to Set Effluent Limits on a Case-By-Case Basis Using BPJ Under 33 U.S.C. § 1342(a) and 40 C.F.R. § 125.3(c)(2), When ELGs are Inapplicable to The Permit Applicant's Discharges.

Under 40 C.F.R. § 125.3(c)(2)–(3), which incorporates section 402(a) of CWA, the Administrator and permit writer are authorized to use their best professional judgment in setting effluent limits for a specific plant where there is no applicable ELG regulating a specific discharge, or an existing ELG applies to some aspects of the applicant's discharge but does not address others. *See Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 203 (2d Cir. 2004) (holding case-by-case permit issuance valid when categorical

regulation is not feasible); *Nat. Res. Def. Council v. EPA*, 859 F.2d 156, 197 (D.C. Cir. 1988) (holding that BPJ is valid grounds to issue permits when there is no national guideline on the issue); Consolidated Permit Application Forms for EPA Programs, 45 Fed. Reg. 33,516, 33,520 (May 19, 1980) (discussing situations where permit writer's BPJ must be used to set effluent limits). Case-by-case effluent limits established through BPJ allow EPA to achieve the pollution reduction goals of the CWA when there are regulatory gaps in the promulgated national guidelines.

In the case at hand, EnerProg contests the inclusion of the zero discharge requirement in the re-issued NPDES permit. When the permit was issued, the 2015 ELGs were already in effect. *See* Effluent Limitations Guidelines for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,837 (Nov. 3, 2015) (codified at 40 C.F.R. pt. 423). Under the 2015 ELGs, BAT was zero discharge through dry handling for ash transport wastes. 40 C.F.R. § 423.13. Regardless of the status of the 2015 ELGs, the outcome would be the same for this permit. If the 2015 ELGs stand, the zero discharge requirement in the permit can be upheld on the basis of the ELGs. On the other hand, if the 2015 ELGs are vacated by the Fifth Circuit or this Court upholds the Stay Notice, the category-specific national ELGs would revert back to the 1982 ELGs, which were in effect before the 2015 revision. The 1982 ELGs do not cover all the pollutants pertaining to the MEGS coal ash waste (such as mercury, arsenic and selenium) that EPA is required to regulate. *See* Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, 47 Fed. Reg. 52,290, 52,307 (Nov. 19, 1982) (codified at 40 C.F.R. pts. 125, 423). Where such regulatory gaps exist, EPA is empowered to enforce pollution limits on a case-by-case basis using BPJ even when such limits are more stringent than national standards. 40 C.F.R. § 125.3(c)(2)–(3). *See Nat. Res. Def. Council*, 859 F.2d at 201–202 (holding that stricter standards imposed through BPJ are valid even if the ELGs in effect are more lenient). Therefore, use of BPJ in this instance would be appropriate, if the 1982 ELGs (not the 2015 ELGs) are in effect.

B. Courts Should Defer to EPA's Expertise Because BPJ Application Here Is Neither Arbitrary nor Capricious.

The APA establishes the appropriate standard for this Court to apply in reviewing the agency application of BPJ at issue. 5 U.S.C. § 706(2)(A).[2] *See also Nat. Res. Def. Council*, 808 F.3d at 569 (applying arbitrary and capricious standard to the review of NPDES permit); *Texas Oil*, 161 F.3d at 933 (upholding EPA's use of BPJ in formulating BAT as neither arbitrary nor capricious). Applying this standard of review, courts have largely enforced requirements imposed through BPJ. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009); *Texas Oil*, 161 F.3d at 933. *See also Nat. Res. Def. Council*, 808 F.3d at 569,; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 29, 43. Regardless, EnerProg bears the burden of proving that the permit writer's application of BPJ is unsupported by evidence or otherwise doesn't conform to "minimal standards of rationality." *See Texas Oil*, 161 F.3d at 934. The permit drafting process and its consistency with the CWA and other agency regulations make it abundantly clear that petitioners cannot meet this burden.

EPA specifies several factors that a permit writer should consider when setting BAT limitations as per 40 C.F.R. § 125.3(c).[3] 40 C.F.R. § 125.3(d). These factors overlap with the conditions that the agency itself must consider in promulgating the ELGs. 33 U.S.C. § 1314(b)(2)(B). By considering largely the same factors, limitations set through BPJ are necessarily consistent with ELGs, other relevant EPA regulations, and the CWA itself. *See* EPA, *NPDES Permit Writers' Manual*, 5–44 to 5–48 (Sept. 2010).

The 2015 ELGs, which were subject to extensive notice-and-comment procedures and stakeholder involvement, arrived at the same conclusion as BPJ application in this case: dry handling was BAT for this industry. Dry handling of coal ash transport wastes to achieve zero discharge is not even unique as an industry practice. In fact, 67% of facilities that EPA studied in formulating

[2] "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5. U.S.C. 706(2)(A).

[3] Factors include: "[t]he age of equipment and facilities involved; . . . [t]he process employed; . .. [t]he engineering aspects of the application of various types of control techniques; . . . [p]rocess changes; . . . [t]he cost of achieving such effluent reduction; and . . . [n]on-water quality environmental impact (including energy requirements)." 40 C.F.R. §125.3(d).

the 2015 ELGs were already dry handling or removing their fly ash transport through scrubbing. EPA, *Technical Development Document for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 4–21 (Sept. 2015). Furthermore, the permit writer in this case determined that MEGS does not deviate from the point-source category significantly to merit substantially different TBELs, and that it is sufficiently profitable to adopt dry handling and achieve zero discharge with minimal economic impact. *EnerProg*, slip op. at 9. This finding has also been upheld by the EAB. *Id.* at 11.

EnerProg may take exception to the EPA requiring MEGS to eliminate discharge of coal ash waste, but there is no real argument that use of BPJ in formulating this requirement was arbitrary or capricious – particularly when dry handling is already a widespread industry practice. EPA's decision to incorporate this requirement in the permit through BPJ is valid in the case that the 2015 ELGs are vacated, and this Court should concur with the EAB's judgment on this issue.

V. SECTION 402 PERMITTING REQUIREMENTS DO NOT APPLY BECAUSE THE CWA EXEMPTS WASTE TREATMENT SYSTEMS AND THIS COURT SHOULD DEFER TO EPA AUTHORITY TO IMPLEMENT THE CWA.

Section 402 of the CWA prohibits the discharge of pollutants into "navigable waters," from "any point source" unless in compliance with the CWA through issuance of a valid NPDES permit. 33 U.S.C. §§ 1311(a); 1342. Navigable waters are defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). "Waters of the United States" (WOTUS) covers a variety of interstate and intrastate waters susceptible to use in interstate commerce, recreation, or aquaculture. 40 C.F.R. § 122.2. The EPA has purposefully limited the scope of permitting requirements through exceptions to this definition. These exceptions include "waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." *Id.* EPA acknowledges that the definition of WOTUS and the scope of federal authority over certain isolated waters and wetlands has been a topic of debate among regulators,

environmental advocates, and industry groups in recent years. *See generally Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion) (failing to reach a majority consensus on the definition of "navigable waters" and the scope of federal authority over isolated wetlands); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (holding in a 5-4 decision that an Army Corps of Engineers rule extending scope of "navigable waters" to intrastate ponds used by migratory birds was not authorized under the CWA).

In this case, however, the plain language of the CWA and implementing regulations are unambiguous: the EPA is not required to regulate discharges into waste treatment systems designed to meet the requirements of the CWA because these systems are specifically exempted from WOTUS under 40 C.F.R. § 122.2. The MEGS coal ash pond clearly falls into this category: the pond acts as a settling basin for transport waters containing coal combustion residuals, where such waters can be treated prior to discharge into the Moutard Reservoir. These external discharges from the MEGS coal ash pond *into* the Moutard Reservoir at Outfall 002 are subject to effluent limitations and monitoring requirements, and are incorporated in the NPDES permit. *EnerProg*, slip op. at 7–8. As a waste treatment system designed to meet the objectives of the CWA, discharges into the pond do not require an NPDES permit. *See* 40 C.F.R. § 122.2.

The baseline WOTUS exemption for waste treatment systems was created by EPA rulemaking in 1980. *See* Consolidated Permit Regulations: RCRA; SDWA; CWA NPDES; CWA Section 404 Programs; and CAA Prevention of Significant Deterioration, 45 Fed. Reg. 33,290 (May 19, 1980) (codified at 40 C.F.R. pts. 122, 123, 124, 125). The original rulemaking included a final clause (hereinafter, "the exception") stating "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." This final clause was suspended by notice of the Administrator prior to the effective date of the rule. *See* Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980).

A. EPA's 1980 Suspension Is Proper and Sufficient to Exempt Internal Discharges from Section 402 Permitting Requirements.

FCW do not appear to contest the substance of the pond's function as a waste treatment system. Instead, FCW invokes the suspended clause of 40 C.F.R. 122.2 to argue that the coal ash pond should be subject to the CWA's section 402 permitting requirements because the pond was created from an impoundment of Fossil Creek in 1978. *EnerProg*, slip op. at 7. According to FCW, the suspension of this clause (and by implication, the decisions of subsequent administrations to continue the suspension) is invalid. Following this logic, the MEGS coal ash pond is *not* an exempt waste treatment system under the regulations, and therefore EPA should be required to set effluent limits for discharges *into* the pond. For the reasons stated below, this argument is not persuasive.

1. EPA's Decision to Suspend the Exception Was an Interpretive Rule Not Subject to Notice-And-Comment Requirements of APA Section 553(b).

FCW alleges that the suspension lacks statutory authorization and violates notice-and-comment requirements of the APA. 5 U.S.C. § 553. Setting aside the fact that Congress clearly entrusted EPA with authority to administer the NPDES permitting system and define the scope of waters subject to permitting requirements, no relevant precedent exists to suggest that EPA's suspension of a single clause within a rule prior to the rule's effective date is sufficient to constitute a formal rulemaking under the APA. *See* 33 U.S.C. §§ 1361(a) (authorizing the Administrator to promulgate regulations necessary to carry out functions of the CWA), 1342 (requiring the Administrator set conditions of NPDES permits to ensure compliance with all relevant CWA pollution limits).

Assuming—without conceding—that the EPA's long-term suspension of the clause qualifies as a *de facto* rulemaking, it would be properly classified as an interpretive rule and thus exempt from notice-and-comment requirements of the APA. 5 U.S.C. § 553(b)(A). A rule is interpretive rather than legislative if the agency intends the rule to be no more than an expression of its

construction of a statute or rule. *See Chamber of Commerce of U.S. v. Occupat'l Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980). In distinguishing legislative from interpretative rules, courts analyze whether the rule creates any new rights or duties for regulated entities. *See Air Transp. Ass'n of America, Inc. v. FAA*, 291 F.3d 49 (D.C. Cir. 2002) (holding that FAA's interpretation of a regulation did not represent a departure from any definitive prior FAA interpretation such that it should have required notice-and-comment). Courts have even granted deference to interpretive rulemakings when such rulemakings affect the substantive rights of parties. *See Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001).

Recognizing that the exception was overbroad, the EPA attempted to correct their mistake and suspended the clause containing the exception. EPA's actions were intended to ensure the continued viability of wastewater treatment systems designed to meet the requirements of the CWA and avoid unintended consequences that would have resulted upon the effective date; namely, forcing the immediate closure of a broad class of coal ash ponds created from impounding surface waters. *See* Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980). The suspension did not create any new rights or obligations in regulated parties; instead, it merely reaffirmed the status quo. As such, it should not be considered a substantive rulemaking subject to notice-and-comment requirements.

2. Even If Notice-And-Comment Is Required, EPA's Action to Suspend the Exception Is Neither Arbitrary nor Capricious and Warrants Judicial Deference.

EPA's decision to suspend the exception, if held to the same standards of review as a rescission of a regulation, is neither arbitrary nor capricious. *See Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 30 (holding that a rescission of an occupant crash protection standard is subject to an arbitrary and capricious standard of judicial review). Instead, EPA's decision in 1980 to suspend the exception—and the decisions of subsequent administrations to continue the suspension—reflect a well-reasoned policy determination made within the scope of the agency's authority delegated under the CWA.

On May 19, 1980, the EPA issued an expansive final rule intended to consolidate permitting procedures for waste management programs under several different laws, including the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), and the NPDES and section 404 fill programs under the CWA. *See* Consolidated Permit Regulations: RCRA; SDWA; CWA NPDES; CWA Section 404 Programs; and CAA Prevention of Significant Deterioration, 45 Fed. Reg. 33,290 (May 19, 1980) (codified at 40 C.F.R. pts. 122, 123, 124, 125). On July 16, 1980, EPA decided to suspend the final clause containing the exception pending further rulemaking. *See* Consolidated Permit Regulations, 45 Fed. Reg. 48,620 (July 21, 1980). EPA explained this decision in the Federal Register, noting that the rule was potentially overbroad in subjecting existing coal ash surface impoundments to new permitting requirements. *Id.*

EPA's explanation here was likely understated. The exclusion would have required the shutdown of existing coal ash ponds created from the impoundment of waterways, including those in existence prior to the CWA. Coal ash ponds are already subject to end-of-pipe pollution controls for discharges. Under the exclusion, the ponds themselves would be considered WOTUS, requiring the same effluent limits for waters *entering* the ash ponds. 33 U.S.C. § 1311(a). Subjecting an enclosed pond to pollution controls for waters both entering *and* exiting the pond is not only burdensome—it defeats the purpose of coal ash surface impoundments. To do so would render the pond useless as a mechanism to remove pollutants from waters prior to their discharge back into circulation. Clearly, FCW is cognizant of this fact and intends to force the immediate closure of the coal ash pond. However, invalidating an otherwise viable mechanism for wastewater treatment is antithetical to the intent of the CWA. *See* Congressional declaration of goals and policy, 33 U.S.C. § 1251.

B. Defining WOTUS Is Within EPA's Mandate Under the CWA, and EPA's Definition Thus Warrants Deference.

Ultimately, the authority to define the scope of WOTUS begins and ends with the EPA.

> When Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

United States v. Mead Corp., 533 U.S. 218, 227 (2001) (quoting *Chevron,* 467 U.S. at 837 (internal punctuation omitted)). Congress did not provide a definition of WOTUS in the text of the CWA nor did it speak to the types of impoundments that should be regulated. Instead, Congress entrusted EPA with authority to define the scope of WOTUS in furtherance of the stated objectives of the Act. Thus, EPA's decision to suspend the exclusion warrants judicial deference.

VI. A FILL PERMIT IS NOT REQUIRED FOR CLOSURE OF MEGS ASH POND, BECAUSE THE POND IS NEITHER A WOTUS NOR DO SUCH CLOSURES FALL WITHIN SCOPE OF SECTION 404 PERMITTING.

Section 404 of the Act provides the U.S. Army Corps of Engineers with authority to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). As defined, fill material means "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 (emphasis added). The Army Corps and the EPA rely on an almost-identical definition of WOTUS, although codified separately. The operative Army Corps definition—promulgated in 1993—never included the wastewater treatment exclusion discussed in Section IV, obviating the need for discussion here. *See* Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,036 (Aug. 25, 1993) (codified at 33 C.F.R. pts. 323, 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 401).

A. Neither the Act nor Implementing Regulations Include a Recapture Provision That Would Convert

the Coal Ash Pond to a WOTUS upon Commencement of Closure.

The argument that the closure of the pond requires a section 404 fill permit rests on the assumption that a coal ash settling pond situated on a former creek bed will revert back to a WOTUS after it has stopped accepting coal ash transport waters. This assumption lacks foundation in the text of the law, nor is it supported by any relevant precedent. Courts have only in limited circumstances addressed the question of whether a body of water can be "removed" from federal oversight through manmade impoundments or diversions. These cases do not hold sway in the present case, however, as they did not involve diversion of a stream for purposes of constructing a waste treatment system used in compliance with the CWA. *See United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007) (holding defendant's actions to reroute and reshape an intermittent stream did not deprive it of status as a WOTUS subject to the CWA). *See also George v. Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir. 1968) (holding that a river once deemed navigable before construction of a dam remains a navigable stream and thus subject to federal jurisdiction). It is unclear if *any* court has found an unregulated body can become a federal water because of a historical connection to a former creek bed.

Ultimately, EPA's decision *not* to subject the MEGS coal ash pond to Section 404 fill requirements in reissuance of the NPDES permit reflects the agency's judgment that doing so is not required by the CWA. In the absence of precedent or a clear directive from Congress, this Court must defer to the EPA's reasonable interpretation of both the CWA and the EPA's own regulations. *See Chevron*, 467 U.S. at 843 ("If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). Likewise, the EPA is owed substantial deference in the interpretation of its own duly promulgated regulations. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.").

B. Section 404 Is Not Intended to Cover Closure of Coal Ash Ponds.

In the absence of informative jurisprudence, the physical characteristics of the MEGS pond clearly place it outside the scope of "navigable waters" requiring a fill permit. 33 U.S.C. 1344(a), 1362(7). This is consistent with EPA and the Army Corps' interpretation of the purpose of the 404 permitting provisions and the Act itself: the legislative history of the CWA and the formulation of section 404 reveals congressional intent to protect wetlands, bays, estuaries, and river deltas from practices that threaten fish and other wildlife. S. REP. NO. 95-370, at 9 (1977). This emphasis on protecting aquatic ecosystems is echoed in Army Corps regulations promulgated pursuant to section 404. *See* Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,036 (Aug. 25, 1993) (codified at 33 C.F.R. pts. 323, 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 401) ("The underlying focus of Section 404 is on evaluating, and, where possible, reducing and avoiding adverse effects to the aquatic environment.").

The MEGS coal ash pond is not an aquatic environment. It does not serve as a spawning ground for shellfish or a nesting area for birds or other wildlife, and there is no evidence that it will serve as one upon closure. It functions purely as a waste treatment system designed to meet the aims of the CWA by separating coal ash waste from transport waters. A cursory examination of the facts makes this clear. *EnerProg*, slip op. at 7–8. Once the pond completes closure as required by the NPDES permit, it can no longer be considered a "water" based on any regulatory construction of the term. Indeed, the NPDES permit's cap-in-place requirement entails a complete *dewatering* of the MEGS pond—leaving behind nothing but a contained mass of solid coal ash. FCW's implicit argument that the coal ash pond will revert back to a WOTUS does not comport with any reasonable conception of federal authority over waters.

C. Even If This Court Finds the Coal Ash Pond Has Reverted to a WOTUS, the Coal Ash Pond Would Remain a Waste Treatment System Exempt from Section 404 Dredge and Fill Permitting Requirements upon Closure.

FCW relies on an overly-strict interpretation of 33 C.F.R. § 328.3(b)(1) to argue that the scheduled cap-in-place of the MEGS coal ash pond precludes reliance on the wastewater treatment exemption during the closure process. For many of the same reasons discussed previously, this argument lacks support in the text of the Act and implementing regulations, and is inconsistent with EPA and the Corps' reasonable interpretations of their own regulations, which deserve judicial deference. *See* 33 U.S.C. § 1344; 33 C.F.R. § 328.3; *Udall*, 380 U.S. at 16. The Corps' definition of WOTUS, like the EPA's, specifically exempts "waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." 33 C.F.R. § 328.3. FCW argues that the coal ash pond will no longer be a waste treatment system when it stops accepting coal ash transport waters and begins closure.

Following FCW's reading of the section 404 process, EnerProg's good faith efforts to comply with the legal requirements of its NPDES permit—issued in accordance with the CWA—would itself constitute a violation of the CWA. FCW's strict interpretation of the regulations implementing section 404 is at cross-purposes with the objectives of the CWA and is without merit. Neither the EPA nor the Army Corps reads the wastewater treatment exemption's language "*including* treatment ponds or lagoons designed to meet the requirements of the Clean Water Act" to limit the types of wastewater treatment systems to *only* ponds or lagoons in operation. 33 C.F.R. § 328.3(b)(1) (emphasis added). *See Ohio Valley Envtl. Coal.*, 556 F.3d at 213 (finding that stream segments linking strip mining operations to downstream sediment ponds fall under the waste treatment system exemption). Dewatering and capping an abandoned coal ash surface impoundment in compliance with the NPDES permit and existing EPA regulations for disposal of coal combustion residuals can be reasonably viewed as a final step in the treatment process. *See generally* 42 U.S.C. § 6901; 40 C.F.R. § 257 ("Criteria for conducting the closure or retrofit of CCR units"). Again, where Congress has provided EPA with the authority to promulgate regulations implementing pollution control and solid waste laws, EPA's reasonable interpretations of these statutes—and of its own

duly promulgated regulations— warrant deference. *Chevron*, 467 U.S. at 843; *Udall*, 380 U.S. at 16.

CONCLUSION

In re-issuing the NPDES permit for the MEGS facility, the EPA acted as the final arbiter in the permitting process, and appropriately exercised its authority to review permit conditions proposed by the State of Progress pursuant to the Section 401 Certification process. In doing so, the EPA found that the capping and closure requirements of the MEGS coal ash pond were appropriate requirements of state law under section 401(d), as they are consistent with state water quality standards and effluent limitations under the CWA. EPA is not compelled to reject otherwise valid requirements proposed by the State of Progress simply because the federal law does not impose such requirements.

With respect to the permit requirement of zero discharge of coal ash transport waters, EPA's April 25 Stay Notice—issued under the authority granted to the agency under the APA— is effective to postpone compliance deadlines of the 2015 ELGs. EAB's holding to the contrary is based on a misreading of section 705 that artificially limits the agency authority to suspend compliance deadlines when "justice so requires." Notwithstanding the validity of the Stay Notice, EnerProg remains bound by the zero discharge requirement, as EPA Region XII can alternatively rely on BPJ to require the same. As a matter of policy, the EPA seeks to avoid second guessing the determinations of agency staff made in accordance with their expertise and professional judgment within the bounds of the CWA.

Finally, the EPA is not required to regulate internal discharges into the MEGS coal ash pond, nor does closure of the pond require a section 404 fill permit. Regardless of any historical connection to Fossil Creek, the pond is a waste treatment system designed to meet the objectives of the CWA and is therefore not subject to effluent limits on incoming waters. Likewise, the argument that the pond will become a WOTUS subject to 404 permitting requirements upon retirement has no legal footing. Ultimately, the NPDES permit requirements were valid under federal law when the permit was re-issued, and they remain valid.

For the foregoing reasons, this Court should reject petitioners' claims and uphold the NPDES permit as re-issued.