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Measuring Brief (Fossil Creek Watchers, Inc.)

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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 FOSSIL CREEK WATCHERS, INC.,
Petitioner

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

STATEMENT OF JURISDICTION

This is a petition for review of a NPDES permit issued under the Clean Water Act by the EPA Region XII. Petitioners Fossil Creek Watchers, Inc., and Enerprog, L.L.C., filed timely petitions for review of the permit with the Environmental Appeals Board (EAB) pursuant to 40 C.F.R. section 124. Upon the EAB issuing its order, both petitioners filed timely petitions to this Court. This Court has jurisdiction over this appeal pursuant to 33 U.S.C. section 1369(b).

STATEMENT OF THE ISSUES

I. Whether, where Congress expressly intended for independent state authority over water pollution discharge, the Clean Water Act's state certification provision allows for a state to certify a NPDES permit on the condition that the polluter close and remediate a substandard coal ash pond as required by state law.

II. Whether the April 25, 2017 EPA Notice, suspending future compliance deadlines for a properly promulgated rule (2015 Final Effluent Limitation Guidelines) without an opportunity for public comment is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water.

III. Whether the EPA could rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash transport wastes, when the applicable effluent limitation guideline did not apply to pollutants addressed by the zero discharge requirement.

IV. Whether National Pollution Discharge Elimination System permit requirements apply to discharges into a waste containment system located in a water of the United States, where:

A. An agency action exempting such waste systems from the definition of waters of the United States was promulgated in violation of the Administrative Procedure Act; and
B. The waste treatment system is substandard presenting a heightened risk of pollution discharges into a navigable in-fact river.

V. Whether the Clean Water Act requires a dredge and fill permit for the closure and capping of an ash pond, where the existing ash will remain in place and the waterbody, before the dam and pond were built, was a perennial tributary to a nearby navigable in-fact river.

STATEMENT OF THE CASE

This is a petition for judicial review of an Environmental Appeals Board (EAB) decision denying review of a Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) permit renewal issued by Environmental Protection Agency (EPA) Region XII. R. at 2. In addition to authorizing EnerProg, L.L.C. (EnerProg) to continue its water pollution discharges at its Moutard Electric Generating Station (MEGS), a coal-fired steam electric plant located in Fossil, Progress, the permit included limitations that would update the MEGS facility to 21st century standards. *Id*. However, as required by the CWA, prior to the EPA issuing the NPDES permit, the State of Progress provided a water quality certification, which contained certain permit approval conditions. *Id*. Progress certified the permit on the condition that EnerProg close and remediate its coal ash pond in compliance with Progress' Coal Ash Cleanup Act (CACA). *Id*. The petitioners, Fossil Creek Watchers (FCW) and EnerProg, appealed the EPA's issuance of the NPDES permit on separate grounds. R. at 2-3. In addition to Progress' conditions, in accordance with the EPA's 2015 Effluent Limitation Guidelines (ELGs), the NPDES permit required that the plant implement a zero-discharge requirement for coal ash disposal. R at 9.

However, EnerProg, objected to the NPDES permit's inclusion of the conditions claiming: 1) The inclusion of Progress' CACA certification conditions as permit requirements are not sufficiently

related to achieving water quality standards and require EPA review; 2) that the EPA's April 25, 2017 notice that purports to extend compliance deadlines for the 2015 Steam Electric Power Generating Point Source ELGs, relieves it from complying with the permit's November 1, 2018 zero discharge compliance deadline; and 3) that the EPA may not rely on best professional judgment (BPJ) as an alternative ground for zero discharge of ash pollution. R. at 11. Conversely, FCW opposes EnerProg's arguments and additionally alleges that since the ash pond is in the former streambed of Fossil Creek, a perennial tributary to a navigable in-fact river, it is a water of the United States (WOTUS) and discharge into the ash pond is subject to section 402 requirements. R. at 12. Further, FCW argues that the plan to close and cap the coal ash pond necessitates a section 404 fill permit. *Id.*

A. STATEMENT OF THE FACTS

The MEGS facility is a coal power plant in Fossil, Progress, that has one unit with a maximum capacity of 745 megawatts. R. at 7. The coal plant relies on the Moutard Reservoir for its operational and drinking water needs, withdrawing nearly 125 million gallons a day, as well as its final point of pollution discharge. R. at 8. In 1978, EnerProg dammed the upper reach of the then free-flowing Fossil Creek, a perennial tributary to the navigable-in-fact Progress River to create the ash pond for the MEGS facility. R. at 7. The upper reach of Fossil Creek's streambed is now filled with toxic coal ash byproducts such as mercury, arsenic, and selenium. *Id.* Due to an EPA action in 1980 that suspended waste treatment ponds located in a WOTUS from being defined as a WOTUS, Fossil Creek's WOTUS status was effectively stripped away. R. at 12; Consolidated Permit Regulations, 45 Fed. Reg. 48620-01 (July 21, 1980).

The MEGS ash pond is the pollution receptacle for the MEGS facility. R. at 8-9. The pond receives pollutants from several outfalls, including: two internal outfalls (Outfall 008 and

and various low volume sources, with Outfall 008 containing bottom ash and fly ash transport water, and the cooling tower blowdown; Outfall 009, with flue gas desulfurization (FGD) wastewater and heavy concentrations of metals and chloride that's treated by the vapor compression evaporator before entering the

ash pond; and other pollutant sources, such as coal pile runoff, stormwater runoff, and 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 water, groundwater, yard sump overflows, occasional piping leakage from limestone slurry and the FGD system, and treated domestic wastewater. *Id.*

MEGS uses the ash pond to treat the above waste streams by sedimentation before discharging directly into Moutard Reservoir through Outfall 002. R. at 7-8. MEGS also discharges water used in the coal plant's cooling tower system into the Moutard Reservoir about once per year. R. at 8. While heavier sediments are settled out in the ash pond before entering Moutard Reservoir, many toxic pollutants cannot be treated by sedimentation alone. R. at 9. Thus, the ash pond effluent discharged into the Moutard Reservoir contains elevated levels of toxic pollutants such as mercury, arsenic, and selenium. *Id.*

To continue its pollution discharges into the Moutard Reservoir, EnerProg applied for renewal of its federal NPDES permit under the requirements of the CWA section 402. R. at 6. Prior to the EPA issuing renewal of a NPDES permit, the CWA requires the State of Progress to issue a certification and that NPDES permit include Effluent Limitation Guidelines (ELGs) - Steam Electric Power Generating Point Source Category, per 40 C.F.R. section 423. R. at 8. Incorporating these requirements, on January 18, 2017, under section 402 of the CWA, the EPA issued a NPDES permit to EnerProg authorizing continued water pollution discharges into the Moutard Reservoir, on the condition that EnerProg close and remediate its substandard coal ash pond and institute zero discharge methods for coal ash disposal. R. at 6.

The state of Progress issued its certification contingent on the closure and remediation of EnerProg's ash pond. R at 8. Clean-up of EnerProg's ash pond is necessary to comply with the CACA, a state-enacted law that requires assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress. R. at 8. CACA has a specific purpose to prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from treatment ponds into ground and surface waters. R. at 8-9. In its NPDES certification

process, Progress deemed EnerProg's ash pond substandard and found that closure and remediation was necessary to comply with CACA. R. at 8. To comply with CACA, Progress imposed the following conditions on EnerProg: 1) by November 1, 2018 EnerProg must cease operation of its ash pond; 2) complete dewatering of its ash pond by September 1, 2019; and 3) cover the ash pond with an impermeable cap by September 1, 2020. R. at 10.

The EPA relied on the applicable 2015 ELG issued by EPA to require the zero discharge of coal ash transport waters. R. at 9. In the 2015 Steam Electric Power Generating Point Source Category ELGs (2015 ELGs), EPA determined that the best available technology (BAT) for toxic discharges associated with bottom ash and fly ash is zero discharge. *Id.*; Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67837 (Nov. 3, 2015). The EPA determined EnerProg was capable of meeting the zero-discharge requirement by the earliest compliance deadline of November 1, 2018. R. at 9. However, three months after EPA issued EnerProg the NPDES permit, on April 25, 2017, the EPA Administrator, Scott Pruitt, postponed the compliance dates of the 2015 ELGs in a postponement notice. R. at 11; 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 postponement notice relied on section 705 to of the Administrative Procedure Act (APA), which allows an agency to "postpone the effective date of an action taken by it, pending judicial review." R at 11; 82 Fed. Reg. at 19005; 5 U.S.C. § 705 (2012). The 2015 ELGs are part of ongoing litigation in the Fifth Circuit. However, the postponement was issued after the "effective date" of the 2015 ELGs, without notice and comment, and without referencing the impact of the ongoing litigation on the ELGs. R. at 12.

Regardless of the status of the 2015 ELGs, the EPA determined that independent from the 2015 ELGs, the permit must contain limits for toxic pollutants based on the BAT. R at 9. EPA determined that zero discharge via dry handling of bottom ash and fly ash has been in use by many plants in the industry for years, and that EnerProg is sufficiently profitable to transition by November 1, 2018. Moreover, EnerProg would likely pass its costs to consumers "with no more than twelve cents per month increase

in the average consumer's electric bill." R. at 9. Therefore, under the agency's BPJ zero discharge should be required. R. at 9.

The final NPDES permit forbid EnerProg from discharging bottom ash or fly ash transport water into the ash pond by November 1, 2018, in order to comply with CACA, the 2015 ELG, and, if necessary, the EPA's BPJ. R. at 10. EnerProg was also required by CACA to stop using the ash pond, remediate it, and create a new retention basin with a liner to deter pollution leaking into groundwater. R. at 8. The new retention basin would function as a modern waste treatment pond accepting the same pollutants minus bottom and fly ash. *Id*. To ensure that the MEGS facility complies with CACA and that adequate safeguards are in place to protect the citizens of Progress from public hazards and water pollution, these updates to the MEGS outdated coal ash pollution treatment methods are necessary. R. at 8-9.

B. PROCEDURAL HISTORY

On January 18, 2017, pursuant to section 402 of the CWA, the EPA issued a NPDES permit containing Progress' certification conditions to EnerProg. R. at 6. The EAB extended the appeal filing deadline for both parties, and timely petitions were filed on April 1, 2017, with supplemental briefs filed subsequent to the April 25, 2017 Notice of the suspension of the 2015 ELG compliance deadline. *Id*. EnerProg challenged the NPDES permit conditions on several grounds, while FCW challenged that the ash pond and the closure plan was subject to additional CWA permitting requirements. R. at 11-12.

The EAB denied both appeals and affirmed the NPDES permit holding that: 1) Ash pond remediation is sufficiently related to water quality and, therefore, Progress' certification conditions are properly included in the NPDES permit, and regardless, EPA has no discretion to reject a condition included in a State's 401 certification; 2) the Administrative Procedure Act does not authorize the extension of compliance dates, only the effective date of the rule, and that since the effective date of the 2015 ELGs had already passed, the April 25, 2017 suspension notice had no effect on the 2015 ELG; 3) the EPA's reliance on BPJ is appropriate, regardless of the status of 2015 ELGs, was justified because the types of pollutants in the ash pond are not subject to ELG

regulations; 4) that the ash pond was not a WOTUS since a 1980 EPA action suspending ash ponds in streambeds from within the definition of a WOTUS applies; and 5) that a section 404 permit was not required for the coal ash pond closure and capping because the ash pond is not a WOTUS and a recapture provision is not included in the EPA's 1980 action.

SUMMARY OF THE ARGUMENT

Under the Clean Water Act (CWA), the EPA lacks the authority to review state National Pollution Discharge Elimination System (NPDES) permit certification conditions that are necessary to comply with "appropriate" state law. A large majority of circuit courts where this issue has been presented have ruled that the EPA lacks review authority over state NPDES certification conditions that are similar to Progress'. *See infra* Part I(A). Additionally, Progress' conditions required under the Coal Ash Cleanup Act (CACA), are "appropriate" state law because as the Supreme Court ruled and circuit courts clarified, conditions certifying compliance with "state water protection laws" are at a minimum considered "appropriate." *S.D. Warren Co. v. Maine Bd. of Envtl. Protec.*, 547 U.S. 370, 373 (2006). Therefore, the EAB was correct in holding that the EPA lacks review authority over Progress' appropriate conditions.

The EPA may independently rely on EPA's 2015 Effluent Limitation Guidelines (ELGs) to require zero discharge of coal ash. EPA's postponement action of the 2015 ELGs compliance dates, that was after the effective date of the regulation had passed, was constructively a repeal requiring notice and comment under the APA. 5 U.S.C. 551(5) (2012). Under the Administrative Procedures Act (APA), the EPA may postpone the effective date of a rule, not the compliance date, and section 705 does not allow the suspension of already promulgate rules. *Safety–Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS, *2 (D.C. Cir. Jan. 19, 1996). In failing to provide notice and comment in its postponement, the EPA was in direct contrast with the APA's policy to ensure that "an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment. . . ." *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d

425, 446, (D.C. Cir. 1982). Thus, the EAB ruled correctly that the EPA violated the APA in issuing its postponement action.

The EPA may also independently rely on best professional judgment (BPJ) to require zero discharge when the applicable ELG fails to control all pollutants of concern. EPA regulations specifically allow for a permit writer to regulate pollutants on a case-by-case basis, if those pollutants were not controlled by an ELG. 40 C.F.R. section 125.3(c)(1)-(2); 47 Fed. Reg. 52,290. Here, the 1982 ELG fails to control specific pollutants such as mercury, arsenic, and selenium. Not allowing the EPA to use BPJ to determine the appropriate controls would be contrary to the objectives of the CWA and facially in violation of EPA's promulgated regulations. Therefore, the court should find that EPA may alternatively rely on BPJ to require zero discharge of bottom ash and fly ash.

Additionally, EnerProg should be required to obtain a NPDES permit for all discharges into the MEGS ash pond because the EPA violated the APA in suspending CWA jurisdiction from such ponds and the pond should independently be considered a point source. The EPA's action in 45 Federal Register 46820 (1980 Suspension), is contrary to the APA because the APA requires notice and comment where an agency action effectively rewrites a rule. *Nat'l. Retired Teachers Ass'n v. U. S. Postal Serv.*, 593 F.2d 1360, 1363 (D.C. Cir. 1979). The EPA's suspension changes the legal consequences of industry action and changes the explicit language of the properly promulgated rule. EPA also failed to have good cause when it effectively rewrote the regulation because the industry would not be unduly harmed. The regulation was properly promulgated with notice and comment, so, the industry had a chance to object to obligations before the obligations were applied. Furthermore, EnerProg's MEGS ash pond should independently be considered a point source to the Progress River because of its hydrologic connection to the river. Therefore, any pollutants discharged into the pond are subject to NPDES permitting requirements under EPA regulations and the definition of point source.

EnerProg's closure and capping plan also requires a section 404 permit because EPA's 1980 Suspension would not exclude the ash pond from coverage under the CWA after it was no longer being used as a "waste containment system." Once the pond ceases to

receive discharges from the MEGS facility, the pond can no longer be considered a "waste treatment system," thus, in accordance with the CWA's objectives to protect and restore the Nation's waters, Fossil Creek's status as a WOTUS must be restored. Additionally, in past jurisdictional determinations, the USACE has determined that similar coal ash disposal pond closures implicated section 404 of the CWA. Therefore, the EPA failed to identify the coal ash dewatering as an action requiring a section 404 permit. EAB incorrectly held that section 404 does not apply, and this Court should rule that the EPA was arbitrary and capricious in failing to require a section 404 permit.

STANDARD OF REVIEW

Judicial review of EPA agency actions has several components. First, to obtain judicial review of NPDES permits, the petitioner must first appeal the final agency action to the EAB. 40 C.F.R. § 124.19(l)(1) (2017). Second, under APA section 706, where the agency made factual findings and conclusions, the reviewing Court shall: "(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706 (2012). Third, where issues of interpretation of laws arise, the court must determine whether the agency action complies with the *Chevron* test. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 847, 842-43 (1984). If it is shown that congress delegated the issue to the agency, then the *Chevron* test requires the reviewing court to determine: (1) whether congress, in writing the law, unambiguously expressed its intentions; and (2) if ambiguity exists, "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 842-43.

ARGUMENT

I. UNDER THE CWA SECTION 401, FEDERAL AGENCIES LACK REVIEW AUTHORITY OVER A STATE'S CERTIFICATION CONDITIONS WHEN THOSE CONDITIONS ARE NECESSARY TO COMPLY WITH A STATE LAW AND ARE RELATED TO WATER QUALITY.

The EAB correctly found that under the CWA, the EPA lacks discretion to reject a condition included in a CWA section 401 state certification, and that CACA's requirements are within the scope of section 401(d) since they are related to water quality. The CWA requires polluters to obtain a state certification that a proposed discharge will comply with the CWA and any other appropriate requirement of state law. Appropriate requirements of state law are those that relate to water quality. States are authorized to impose certification conditions on permits to provide reasonable assurance that the activity will comply with CWA provisions or the state's water protection laws. Progress' conditions were not only required by CACA, but also necessary for Progress to have reasonable assurance that the MEGS facility would comply with water quality standards throughout the NPDES permit period because the MEGS ash pond was substandard and presents a heightened risk to water quality. The CWA, Congress' intent, EPA documents, and case law dictate that the EPA lacks discretionary authority to review or exclude Progress' certification conditions. Therefore, this Court should uphold the EABs ruling that the EPA lacks review authority and the Progress' conditions are appropriate.

A. The EPA Lacks Review Authority of Progress' Permit Conditions Because They Are a Necessary Compliance Requirement of Progress' Coal Ash Cleanup Act.

EPA's lack of discretionary authority over a state's certification conditions is supported by the plain language of the CWA, Congressional intent, EPA's promulgated regulations and

guidance documents, and a wealth of case law. The CWA requires polluters to obtain a NPDES permit prior to discharging pollutants into a navigable water. 33 U.S.C. § 1342 (2012). The NPDES permit must include state certification that "any applicant. . . will comply with any applicable [CWA provisions]. . . and with *any* other appropriate requirement of State law. 33 U.S.C. §§ 1341-1342 (2012) (emphasis added). Any state certification condition "*shall become a condition* on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d) (2012) (emphasis added). Furthermore, section 511(c)(2) of the CWA which precludes federal review of state certifications under the National Environmental Policy Act, implies that federal review of state conditions is precluded throughout the CWA, as well as NEPA: "Nothing in NEPA. . . shall be deemed to authorize any federal agency. . . to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under [section 401]." 33 U.S.C. § 1371(c)(2)(A) (2012). EPA lacks review authority over Progress' certification conditions because the CWA does not directly give the EPA that authority, and sections of the CWA imply that no federal review authority exists.

The CWA was designed so that federal and state environmental requirements could coexist, and if the EPA had review authority over state requirements, this system of cooperative federalism would not work. In drafting the CWA, Congress was explicit that the purpose of the law and section 401 was to grant the states independent authority over any pollution discharge in its waters. The goal and policy of the CWA is to "recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b)(2012). In drafting section 401 to allow for state certification of discharge permits, Senator Muskie stated: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]." 116 Cong. Rec. 8984 (1970). This reasoning is why Congress included section 401 in the CWA to allow states to allowed states to "play a major part in the fight against pollution. . ." and provided states with a mechanism to impose more stringent water quality requirements on activities that may result in discharge. *S.D. Warren Co. v. Maine Bd. of Envtl. Protec.*, 547 U.S. 370, 386 (2006) (citing 116

Cong. Rec. 8984 (1970)). Giving the EPA discretionary authority over Progress' certification conditions, would upset the purpose of the CWA and negatively impact the CWA's policy of cooperative federalism.

In addition to the congressional intent of the CWA, the EPA's rules and guidance documents, prevent the agency from reviewing state conditions. EPA explicitly states in rules promulgated by the agency that "[r]eview and appeals of. . . [State certification conditions] shall be made through the applicable procedures of the State. . . ." 40 C.F.R. § 124.55(e) (2017). The EPA has concluded in legal guidance to the regulated community that the "EPA has *no authority to ignore* State certification *or to determine* whether limitations certified by the State are more stringent than required to meet the requirements of State law." EPA, Decision of the General Counsel No. 58 (March 29, 1977) (emphasis added). The EPA may not review Progress' conditions because promulgated regulations prevent it from doing so, and EPA itself has determined that it lacks the authority to review state certification conditions in NPDES permits.

Progress' certifying conditions are required in order to comply with CACA, a state law; therefore, as indicated by caselaw, the power to review these conditions lies solely in the Progress State Court. Several Circuit Courts have held that federal agencies and courts lack review authority over a state's certification condition when the condition was based on state law. *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963 (D.C. Cir. 2011) (holding certification conditions are generally only reviewable in state court, but if the CWA floor is implicated, review by a federal court is proper); *Roosevelt Campobello Intern. Park Commn. v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982) (holding that proper review of state law issues is in state court); *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2d Cir. 1997) (holding that the permit issuer did not have the authority to reject state certification conditions); *Lake Erie All. for Protec. of Coastal Corridor v. U.S. Army Corps of Engineers*, 707 F.2d 1392 (3d Cir. 1983) (holding same); *Ackels v. U.S. E.P.A.,* 7 F.3d 862 (9th Cir. 1993) (same); Progress relied on its state law, CACA, to impose ash pond conditions. Therefore, the EPA and the federal court lack the authority to review the conditions, and proper jurisdiction is in the state court for review.

The lone decision that allowed the EPA review of a state recommendation is consistent with caselaw that does not allow federal review of certification conditions applying state law. In *Consolidation Coal Co., Inc. v. E.P.A.*, the state agency recommended a two-year permit in order to apply more stringent effluent limitations required by the CWA. *Consolidation Coal Co., Inc. v. E.P.A.*, 537 F.2d 1236, 1237 (4th Cir. 1976). This was not a certification condition based on the application of state law. So, the Fourth Circuit allowed agency review of the condition, where no state review procedures existed to determine the appropriateness of a two-year durational limitation on a NPDES permit. *Id.* Further, the Fourth Circuit's decision in *Consolidation Coal*, was expressly declined to follow by the Seventh Circuit, holding that where no review procedures exist, a federal question of due process is implicated allowing federal courts and not the EPA to review. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 836 (7th Cir. 1977). Neither circuit decision allows the EPA to review state certification conditions that are based on state laws, as Progress has done in the current case.

If this Court were to rule that EPA has review authority over state section 401 certification conditions, it would render Congress' intent in reserving state authority over water pollution permitting meaningless, go against the grain of Supreme Court and Circuit Court precedent, and invalidate longstanding EPA regulations. Therefore, this court should uphold the EAB's ruling that the EPA lacks review authority over Progress' certification conditions.

B. Regardless, Progress' Permit Conditions are "Appropriate Requirements of State Law" Because Closure and Remediation of the Ash Pond Is a Necessary Condition for Progress to Have Reasonable Assurance that Enerprog Would Meet Water Quality Standards.

Regardless of this court's conclusion on the EPA's review authority, the CWA, EPA regulations, and case law indicates that Progress' certification conditions were "*appropriate requirements* of state law," authorized by section 401 of the CWA. 33 U.S.C. § 1341(d) (2012) (emphasis added). Section 510 of the CWA prohibits the EPA from denying the right of the state to enforce

pollution control stating: "Nothing in this Act shall (1) preclude or deny the right of any State . . . to adopt or enforce . . . any requirement respecting *control or abatement of pollution*. . . ." 33 U.S.C. § 1370 (2012) (emphasis added). Because Progress's requirements are more stringent and do not implicate the floor of the CWA, the relevant question is whether the certification conditions under CACA were "appropriate requirements of state law," which is a term defined through EPA regulations and caselaw. 33 U.S.C.1341(d) (2012).

EPA's regulations interpret "appropriate requirements of state law" broadly enough to include any state requirement that is related to water quality and not inconsistent with the CWA. The EPA interprets the CWA to require that the state's conditions find 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) (2017) (emphasis added). Additionally, EPA promulgated regulations authorize the state certifying agency to include a "statement of any conditions which the certifying agency deems necessary or *desirable with respect to the discharge* of the activity." *Id*. at § 121.2(a)(4) (Emphasis added). It cannot be argued that the requirements under CACA were not "desirable with respect to the discharge," and that Progress had reasonable assurance that the continued substandard ash pond would not result in a water quality violation. The closure and capping of MEGS ash pond directly relates to the current and historic discharge of coal ash (bottom and fly ash) directly into the pond and provides reasonable assurance that water quality standards will not be violated.

CACA's purpose fits within the Supreme Court's narrow construction of "appropriate requirements of state law." The Supreme Court in *Pud No. 1 v. Wash. Dep't of Ecology* held that "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to 303 are 'appropriate' requirements of state law." *Pud No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 713 (1994). The Court declined to cap the definition of "appropriate" narrowly to only include state law that encompasses water quality by determining that appropriate conditions can also include minimum streamflow requirements for a dam operator. *Id.* The Court determined that a minimum flow condition was related to water quality enough to be considered "appropriate." Further,

under *S.D. Warren*, the Supreme Court expanded its definition of appropriate conditions holding that the CWA requires that the state certify that its "*water protection laws* will not be violated." 547 U.S. at 373 (emphasis added).

In addition to the Supreme Court, Circuit Courts have also read "appropriate requirements of state law" broadly. In *American Rivers, Inc.*, the Second Circuit Court concluded that "Section 401(d), reasonably read in light of its purpose, restricts [state] conditions. . . to those affecting water quality in one manner or another." *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2d Cir. 1997). Additionally, the Second Court in *Roosevelt Campobello* held that, where conditions were based a state law was "designed to primarily reduce the risk of oil spills" form a refinery, those were appropriate conditions. 684 F.2d at 1044. The Progress CACA is directly aimed at water quality and water protection with the express purpose of preventing "public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters." R. at 8-9. Because Progress' conditions and the purpose of CACA directly relate to water quality, the certification condition that closes EnerProg's substandard ash pond fits the narrow definition of "appropriate" as defined by the courts.

Progress' conditions constitute as "appropriate" requirements of state law under the broad interpretation that EPA imposes and the narrow interpretation that the courts adopt. Therefore, in accordance with EPA regulations, and Supreme Court decisions the Court should uphold the EAB's decision to reject EnerProg's objections to Progress' conditions requiring closure and remediation of the substandard coal ash pond.

II. EPA'S POSTPONEMENT OF THE 2015 EFFLUENT LIMITATION GUIDELINES SHOULD BE VACATEDBECAUSE THE POSTPONEMENT NOTICEOCCURRED AFTER THE EFFECTIVE DATE OF THE2015 ELG RULE AND DID NOT COMPLY WITH APA REQUIREMENTS.

The EAB was correct to reject arguments that "effective date" also means "compliance date." R. at 11-12. Section 705 of the APA

authorizes agencies to "postpone the effective date of action taken by it, pending judicial review," and effectively maintain the status quo. 5 U.S.C. § 705 (2012). While "effective date" is not defined in the statute, it has a distinct meaning from "compliance date." Section 705 does not on its face authorize the postponement of compliance dates, and the phrase "effective date" has been interpreted by other jurisdictions, and by the EPA itself, to not include compliance dates. Furthermore, the postponement of the 2015 ELG was effectively a repeal, which is subject to notice and comment requirements of section 551 of the APA. Allowing postponement would also be contrary to the APA policy of providing predictability and consistency to the public. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012). Moreover, the EPA's delay notice does not meet the APA's judicial review requirement because the postponement was not sufficiently related to pending litigation. Therefore, this Court should affirm the EAB's ruling on this issue and hold that the EPA acted arbitrary and capricious because its postponement failed to adhere to APA requirements.

A. Reading "Compliance Date" Into the Meaning of "Effective Date" Under Section 705 Of the APA Is Contrary To Congress' Intent.

Congressional intent, an abundance of case law in other jurisdictions, and EPA's own use of "effective date" in rule promulgation establish the distinction between "effective date" and "compliance date." EPA's argument that the "compliance date" is within the definition of "effective date" is not consistent with congressional intent. The EPA's interpretation is not entitled to *Chevron* deference because the agency has not been delegated authority by Congress to promulgate rules though 5 USC 705. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). When reviewing an agency's interpretation of a statute, "the court must first give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842 (1984). The plain language of section 705 authorizes postponement of the "effective date," not the "compliance date." Although the EPA would like this court to read "compliance date" into the statute, the court should resist "reading words into a

statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

Case law indicates that compliance dates and effective dates have different meanings. In a recent case where this question was presented the court held that "Effective [dates] and compliance dates have distinct meanings." *Becerra v. United States DOI*, 17-CV-02376-EDL, ___F.3d___, 2017 WL 3891678, *9 (N.D. Cal. Aug. 30, 2017). The Third Circuit has ruled that "mandatory compliance date should not be misconstrued as the effective date. . . ." *Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995). The D.C. Circuit Court has also ruled on this issue finding that section 705 only "permits an agency to postpone the effective date of a *not yet effective rule*. . . not. . . suspend without notice and comment a promulgated rule." *Safety–Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS, *2 (D.C. Cir. Jan. 19, 1996). In *Becerra*, a federal agency sought to postpone compliance dates after the effective date of the rule had passed because the rule was the subject of ongoing litigation. However, the court found the agency's argument that the court should read compliance dates into section 705 language unpersuasive since it would effectively "allow the agency broad latitude to delay implementation long after a rule was formally noticed to the public as taking effect." *Becerra*, 17-CV-02376-EDL, ___F.3d___, 2017 WL 3891678, at *9. The fear described in Becerra, is a reality in the current case. The EPA's postponement in this case is well beyond the agency's actions in *Becerra*. The EPA is seeking to postpone compliance dates in a rule that has been published since November 3, 2015, and effective since January 4, 2016. 80 Fed. Reg. 67,837.

Even if the EPA was entitled to deference, the agency's own use of "effective date" in the rulemaking process suggests that there is a difference between "effective date" and "compliance date." In the 2015 ELG, the EPA specifically prescribes the "effective date" separately from enforcement dates in the final rule. 80 Fed. Reg. 67837, 67838 (Nov. 3, 2015). There would be no point for EPA to have a stated "effective date" if each compliance date within the 2015 ELG was independently considered an "effective date." This shows that even EPA had interpreted the "effective date" unique from "compliance date" in the 2015 ELGs.

The plain language of section 705, case law in other jurisdictions, and the EPA's own interpretation of "effective date"

does not allow this Court to read "compliance date" into the definition of "effective date."

B. The EPA's Notice Postponing the 2015 ELG Violates Formal Rulemaking Procedures and Arbitrarily Changes the EPA's Interpretation of Section 705 of the APA.

The EPA's suspension of the 2015 ELG after promulgation was effectively a repeal of a rule, which is subject to notice and comment. 5 U.S.C. § 555 (2012). The APA "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. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446, (D.C. Cir. 1982). In *Becerra*, where a federal agency tried to postpone the compliance dates of a rule, the court found that "after nearly five years" of preparation leading up to the rule's effective date, the suspension of the rule nearly two months after its effective date "did not merely 'maintain the status quo,' but instead prematurely restored a prior regulatory regime." *Becerra*, 17-CV-02376-EDL, ___F.3d___, 2017 WL 3891678, at *1, *9. Much like *Becerra*, the EPA's suspension of the compliance dates in the 2015 ELG is a repeal in all but name. The time between the effective date and the compliance dates in the 2015 rule was established to allow the permitted community time to "raise capital, plan and design systems, procure equipment, and construct and then test systems." 80 Fed. Reg. at 67854. Since the effective date of the regulation has passed, the industry has already been subject to the pressure of preparing for compliance. So, a suspension of the 2015 ELG would jolt the industry into the previous regulatory regime rather than maintain the status quo. Even the EPA's stated intentions in the notice of postponement indicate that the EPA intended to repeal the 2015 ELG. 82 Fed. Reg. 19005 (Apr. 25, 2017) (stating "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."). Postponement in this case is effectively a repeal. The EPA is asking this Court for the authority to repeal rules outside of the normal notice and comment requirements. It would undo all the agency has accomplished

through rulemaking without providing the public with proper notice or its statutory right to comment.

Other jurisdictions have recognized postponement of promulgated rules as a repeal. The APA does not allow the EPA to; "guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date. The APA specifically provides that the repeal of a rule is "rulemaking subject to rulemaking procedures." *Nat. Res. Def. Council, Inc. v. U.S.E.P.A.*, 683 F.2d 752, 762 (3d. Cir. 1982). In *NRDC, Inc.*, the EPA promulgated rules, and then postponed them indefinitely after a change in the presidential administration. The Court found that this postponement failed to meet the requirements of the APA because it effectively repealed the rule without notice and comment. *Id*. at 755-56. In Safety-Kleen Corp. v. EPA, the court found 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. In this case, the 2015 ELG has been promulgated and the effective date has passed. Section 705 does not permit the EPA to postpone an already promulgated rule as the agency does in the current case.

Furthermore, the EPA's postponement of the 2015 ELG is contrary to the policy of the APA to provide regulatory predictability and consistency. The purpose of formal rulemaking under the APA is to provide "notice and predictability." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). As explained in previous subsections, the EPA's current interpretation of section 705 is at odds with its own historic use of "effective dates." In addition, as explained previously, suspension of the 2015 ELG would restore the previous regulatory regime rather than maintain the status quo. Allowing the EPA to arbitrarily change its interpretation and effectively repeal the ELG without notice and comment would negate any predictability the APA is supposed to provide. Therefore, the EPA's notice suspending the 2015 ELGs is arbitrary and capricious, contrary to law, and fails to observe procedure required by law, and the Court must declare the notice null and void.

III. REGARDLESS OF THE VALIDITY OF THE EPA'S ELG POSTPONEMENT, UNDER THE

CWA, THE EPAHAS THE AUTHORITY TO INDEPENDENTLY RELYON BPJ TO REQUIRE ZERO DISCHARGE OF COALASH AND FLY ASH, WHEN A CURRENT ELG DOESNOT APPLY TO ALL POLLUTANTS OF CONCERN.

Regardless of this Court's ruling on the postponement of compliance dates of the ELG, the EAB correctly ruled that under 40 C.F.R. section 125.3(c)(3), the EPA has the authority to set effluent limitations on a case-by-case basis for pollutants not covered by the ELGs for an industry category. EPA regulations specifically allow for a permit writer to regulate pollutants on a case-by-case basis, if those pollutants were not controlled by an ELG. 40 C.F.R. § 125.3(c)(1)-(2). If the EPA's 2015 ELG postponement is deemed valid, then the EPA must rely on the 1982 ELG or BPJ on a case-by-case basis where the 1982 ELG does not apply to certain pollutants. Because the 1982 ELG does not regulate toxic pollutants such as mercury, arsenic, and selenium, which are pollutants being discharged by the MEGS facility, the EPA may rely on BPJ to require the control of these pollutants by requiring zero discharge for bottom ash and fly ash. Therefore, this Court should uphold the EAB's finding that the EPA permit writer's reliance on BPJ was justified.

The EPA's regulations are designed specifically to address permitting sources, like the MEGS facility, where the applicable ELG does not control certain pollutants in the MEGS effluent. While the 1982 ELG obligates the EPA to include the control of certain pollutants in a NPDES permit, it eschews the control of other toxic pollutants such as mercury, arsenic, and selenium. Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52,290 (Nov. 19, 1982). Without 40 C.F.R. section 125.3(c)(3), the EPA would have to abstain from requiring the control of these toxic pollutants not addressed by the 1982 ELG. 40 C.F.R. section 125.3(c)(2). However, relying on the authority granted to the EPA by the CWA, 40 C.F.R. section 125.3(c)(3) specifically allows the application of case-by-case BPJ to pollutants not covered in the ELG: "where promulgated [ELGs] only *apply to*. . . certain pollutants. . . other aspects. . .are subject to regulation on a case-by-case basis." 33

U.S.C. § 1251 (2012) et seq.; 40 C.F.R. S 125.3(c)(3) (emphasis added). In addition to the EPA's BPJ authority in 40 C.F.R. 125.3, authority also lies in the EPA's 1982 ELG. The 1982 ELG explicitly states, "even if this regulation does not *control a particular pollutant*, the permit issuer *may still limit such pollutant on a case-by-case basis* when limitations are necessary to carry out the purposes of the [CWA]." 47 Fed. Reg. at 52,302 (emphasis added). Therefore, since the 1982 ELG did not control pollutants of concern to the MEGS NPDES permit writer, such as mercury, arsenic, and selenium, the EPA appropriately relied on BPJ to establish the zero discharge requirement.

Removing the EPA's ability to rely on BPJ to establish zero discharge requirements would render 40 C.F.R. section 125.3(c)(3) meaningless. EPA is required by the CWA to identify and consider all pollutants from a source when promulgating source category ELGs. 33 U.S.C. 1314(b) (2012). If this court interpreted "apply to" in 40 C.F.R. S 125.3(c)(3), to include any pollutant considered in an ELG, ELGs would automatically "apply to," but not control, all pollutants for a source category. This would render the situation contemplated by 40 C.F.R. section 125.3(c)(3) that allows regulation on a case-by-case basis, "where promulgated [ELGs] only *apply to*. . . certain pollutants," meaningless because the ELG would "apply to" all pollutants. 40 C.F.R. section 125.3(c)(3) implies that the EPA has discretion when promulgating ELGs to create industry standards for some pollutants, and maintain the authority to address other pollutants on a case-by-case basis. 40 C.F.R. section 125.3(c)(3) serves no purpose if the EPA is not allowed to rely on BPJ where the 1982 ELG did not set controls for specific pollutants.

"Apply to" must mean control to fulfill the purpose of the CWA. An interpretation otherwise would create regulatory gaps where pollutants could not be regulated if they were considered by the ELG but not controlled. The purpose of ELGs is to carry-out the CWA's objective of "restor[ing] and maint[aining] [the] chemical, physical and biological integrity of [the] Nation's waters," by limiting "the discharge of pollutants into navigable waters. . . ." 47 Fed. Reg. 52,290. Not allowing the EPA permit writer to control pollutants of concern that the current ELG does not control, would undermine the objectives of the CWA. ELGs are not national standards for precluding control of toxic pollutants. 47 Fed. Reg. at

52,302 (stating that pollutants not controlled under the ELG may be controlled on a case-by-case basis by the regulating body).

While the EPA's regulatory language explicitly allows for BPJ when pollutants are not covered by an ELG, an EPA manual erroneously misinterprets the regulation. The EPA's NPDES Permit Writer's Manual (Permit Manual) states that "[t]he permit writer should make sure that the pollutant of concern is not already controlled by the effluent guidelines. . . ," which is consistent with EPA regulations. U.S. Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual, § 5.2.3.2, at 5-45-5-46 (Sept. 2010) However, the Permit Manual then adds "*and was not considered* by EPA when the Agency developed the effluent guidelines." *Id.* (emphasis added). The Permit Manual adds the phrase "and was not considered" into the regulation, despite the direct conflict with the express intention of the 1982 ELG and 40 C.F.R. section 125.3. 47 Fed. Reg. at 52,302; 40 C.F.R. § 125.3(c)(3).

Where courts that have construed 40 C.F.R. section 125.3(c)(3) to prohibit the EPA from exercising BPJ where the 1982 ELG does not control specific pollutants, they have relied on the EPA's erroneous interpretation in the Permit Manual, not on established regulations. The Supreme Court of Kentucky and an Illinois district court both relied on the EPA's Permit Manual to decide when the permitting agency had the authority to issue case-by-case effluent limitation. *Louisville Gas & Elec. Co. v. Ky. Waterways Alliance*, 517 S.W.3d 479, 489; *NRDC v. Pollution Control Bd.*, 37 N.E.3d 407, 414. Both state courts concluded that because the EPA considered the toxic pollutant at issue and "addressed it (even if the agency had not set limits)," the permit writer was "required 'to refrain from imposing [BPJ] limitations and [must] instead use the applicable [1982] ELG.'" *Louisville Gas & Elec. Co. v. Ky. Waterways Alliance*, 517 S.W.3d 479, 489 (quoting *NRDC v. Pollution Control Bd.*, 37 N.E.3d 407, 414).

Based on regulatory language, the purpose of ELGs, and the objectives of the CWA, an EPA permit writer may rely on BPJ in issuing a NPDES permit that covers pollutants that are not controlled in an ELG. Therefore, this Court should uphold the EAB's decision.

IV. NPDES PERMITTING REQUIREMENTS APPLY TO AN ASH POND LOCATED IN A WOTUS WHEN THE EPA VIOLATED THE APA IN EXEMPTING SUCH PONDS, AND WHEN THE POND IS A POINT SOURCE POLLUTANT.

In determining that the MEGS ash pond is not a WOTUS, the EAB incorrectly relied on an EPA action that violated the APA and also failed to understand that the ash pond is a point source pollutant to the Progress River. Under the APA, an agency action that has legal consequences requires public notice and opportunity for comment on the action before it is final, except in cases where the action is an agency interpretation or good cause exists. Here, the EPA failed to comply with the APA because, without notice and comment, the EPA effectively rewrote a portion of a rule, which does not constitute as an interpretation or meet the good cause exception. Therefore, according to APA requirements, this Court must invalidate the EPA's suspension, and any continuations of the suspension, and hold that the MEGS ash pond is a WOTUS subject to NPDES permitting requirements.

However, if this Court does not find the EPA violated the APA, this Court should independently find that the ash pond is a point source pollutant because of its hydrologic connection to the Progress River. Because Fossil Creek is a perennial stream contributing flow indirectly to the Progress River via groundwater, any leaks into the groundwater are unpermitted discharges with the groundwater acting as a conduit. Therefore, regardless of the EPA's APA violation, the Court must rule that the MEGS ash pond is subject to NPDES permitting requirements.

A. The EPA failed to comply with the APA Section 553 when it suspended a portion of the established WOTUS definition in its 1980 action.

The language of section 553 of the APA and the CWA, Congress' intent, and case law dictate that the EPA failed to comply with the APA in the 1980 Suspension. 45 Red. Reg. at 48620-01. When the EPA revised the definition section of 40 C.F.R § 122.2 to exclude ash ponds, without providing notice or comment, it violated the APA and the CWA. The CWA explicitly states that

public participation is required in the "*revision*. . . of any regulation" and "shall be provided for. . ." 33 U.S.C. § 1251(e) (2012) (emphasis added). Yet, public participation did not occur when the EPA revised 40 C.F.R. § 122.2.

Under 40 C.F.R. § 122.2 a manmade impoundment which "resulted from the impoundment of the waters of the United States" is considered a WOTUS, thus the MEGS ash pond would have been considered a WOTUS subject to NPDES permitting requirements. 40 C.F.R. § 122.2 (2017). However, the two months later, the EPA published an action effective immediately that suspended the enforcement of this definition. 45 Fed. Reg. 48620-01 (July 21, 1980). Much like a mother bird who abandons her chicks after human touch, the EPA has abandoned the protection of the nation's waters that have been "touched" by human-caused waste. However, as is the case with the chick which is still a bird after its mother leaves, here the WOTUS is still a WOTUS even after being subject to pollution. This indefinite suspension of the rule did not provide notice and comment required by the APA and the CWA. However, legal consequences flowed from this action because polluters who chose to dispose of pollutants in an impounded WOTUS no longer had to obtain a NPDES permit.

Furthermore, the 1980 Suspension relied on improper authority to suspend the WOTUS rule. The suspension relies on 33 U.S.C. § 1251 as its authority. *Id.* However, nothing in this section allows the EPA to change the rule without notice and comment. 33 U.S.C. § 1251(e). In fact, the CWA explicitly disallows the actions that the EPA sanctions with this suspension. Allowing unpermitted pollution discharges into a WOTUS simply because an impoundment was built in a WOTUS is contrary to law because the CWA policy is to protect the nation's waters and govern discharges into any WOTUS. 33 U.S.C. §§ 1251, 1342 (2012). Therefore, the EPA violated the APA and the CWA in its 1980 Suspension by reversing the effect of a regulation without providing for public participation.

The EPA's 1980 Suspension fails to meet the APA's interpretation exception because the 1980 Suspension was substantive not interpretive. A modification of a rule must fulfill notice and comment requirements because it has a substantial impact on the rights and obligations of the public. *Nat'l. Retired Teachers Ass'n v. U. S. Postal Serv.*, 593 F.2d 1360, 1363 (D.C. Cir.

1979). The 1980 Suspension was effectively a modification because it changed the requirements of the rule and had a substantial impact on the rights and obligations of specific industries. An agency is not allowed to use interpretation to "constructively rewrite the regulation." *Nat'l Family Planning and Reproductive Health Association. v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992). In *Sullivan*, an agency directive conflicted with the explicit language of a rule, resulting in a rewriting the rule, which the court was an action requiring APA compliance. *Id.*; See also *Natural Resources Defense Council v. E.P.A.*, 643 F.3d 311, 320 (D.C. Cir. 2011) (where the EPA issued a guidance document that effectively "changed the law," thus requiring notice and comment).

Here, the EPA's 1980 Suspension directly invalidates portions of the rule. Like the agency's directives in *Nat'l Family Planning and Reproductive Health Association, Inc. v. Sullivan*, EPA's 1980 Suspension directly conflicts with the regulations on their face. The suspension changed the regulatory definition of a WOTUS. The EPA constructively rewrote 40 C.F.R. § 122.2 when it issued the 1980 Suspension. The result of the action was that instead of having to obtain a NPDES permits for its pollution discharges into a WOTUS, Fossil Creek, EnerProg could continue polluting Fossil Creek freely. Therefore, this Court should find that the EPA's 1980 suspension is a violation of the APA because it constructively changed the regulation without providing the required notice and comment.

In addition to failing to meet the interpretation exception, the EPA's 1980 Suspension also fails to meet the APA's good cause exception. To meet the APA's good cause exception, the EPA must determine that compliance is "either impracticable, unnecessary or contrary to public interests." 5 U.S.C. § 553(b)(B) (2012). In writing this section, Congress warned that this is not to be construed as an "escape clause" and that the agency does not have "discretion to disregard its terms." S.Doc. No. 248, 79th Cong., 2d Sess. 200 (1946). In accordance with Congress' intent, the D.C. Circuit Court held that APA exceptions will be "narrowly construed and only reluctantly countenanced." *State of N. J., Dept. of Envtl. Protec. v. U.S. Envtl. Protec. Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Similarly, in the Fifth Circuit, where the EPA made Clean Air Act nonattainment designations without notice and comment, the court found this did not meet the good cause exception because it

should only be used where "delay would do real harm [and not] to circumvent the notice and comment requirements whenever an agency finds it inconvenient. . . ." *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979).

The EPA's 1980 Suspension does not mention any of the requirements for good cause under 5 U.S.C. § 553(b)(B). Nor does the suspension give any other reason why notice and comment requirements should not be observed. 45 Fed. Reg. 48620-01. In taking such an action without notice and comment, the EPA is in direct contrast with good cause requirements because suspending language that would have required polluters to obtain a NPDES permit is contrary to the public interest. Furthermore, undue harm was not present because the WOTUS polluters were already aware of their obligations under the EPA rule that was promulgated two months before the 1980 Suspension. 45 FR 48620-01. Given the narrow construction of section 553 of the APA, the EPA cannot have fulfilled the good cause exception of the section 553 of the APA and in issuing its 1980 Suspension, the agency violated the APA.

B. The Court Should Alternatively Find That the Connection Between Fossil Creek and Progress River Makes Discharge into the MEGS Ash Pond a Point Source to the Progress River Requiring a NPDES Permit.

EnerProg's substandard coal ash pond is likely still hydrologically connected to the Progress River. Dumping pollution into the unlined pond is equivalent to a point source directly discharging into the Progress river. A point source is defined as "any discernible, confined and discrete conveyance. . . from which pollutants. . . may be discharged." 33 U.S.C. § 1362(14) (2012). If the substandard ash pond is connected hydrologically to the Progress River, the connection would serve as a "conduit" by which pollutants are discharged into the Progress River. Therefore, the ash pond should be considered a point source to the Progress River, and pollutants discharged into the pond must be subject to NPDES permitting requirements.

Coal ash ponds leaking pollutants into groundwater are confined and discrete conveyances discharging pollutants into navigable waters subject to NPDES permitting requirements. In a

North Carolina district court, where allegedly unlined and leaking coal ash lagoons located at a coal-fired power plant were conveying pollutants into a nearby river via groundwater, the court held that "such coal ash lagoons appear to be confined and discrete. . . [and] [a]s confined and discrete conveyances, the lagoons fall within the CWA's definition of a 'point source.'" *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 443-44 (M.D.N.C. 2015), *motion to certify appeal denied*, 1:14-CV-753, 2016 WL 6783918 (M.D.N.C. Jan. 29, 2016). In doing so, the court was in concurrence with six other district courts who have ruled similarly that the CWA has jurisdiction "over the discharge of pollutants to navigable surface waters via hydrologically connected groundwater, which serves as a conduit between the point source and the navigable waters." *Id.*; see *Hawai'i Wildlife Fund v. Cty. of Maui,* 24 F.Supp.3d 980, 995 (D.Haw.2014); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.,* No. CV–08–548–ST, 2009 WL 3672895, at *11 (D.Or. Oct. 30, 2009); *Hernandez v. Esso Standard Oil Co. (P.R.),* 599 F.Supp.2d 175, 181 (D.P.R.2009); *Idaho Rural Council v. Bosma,* 143 F.Supp.2d 1169, 1180 (D.Idaho 2001); *Williams Pipe Line Co. v. Bayer Corp.,* 964 F.Supp. 1300, 1319 (S.D.Iowa 1997); *Wash. Wilderness Coal. v. Hecla Mining Co.,* 870 F.Supp. 983, 990 (E.D.Wash.1994).

Furthermore, CWA policy supports the court finding that NPDES permitting is required for discharges to groundwater hydrologically connected to navigable waters. As one court stated: "[I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe. . . to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater." *N. Cal. River Watch v. Mercer Fraser Co.,* No. C–04–4620 SC, 2005 WL 2122052, at *2 (N.D.Cal. Sept. 1, 2005). Additionally, EPA regulations dictate that NPDES permits are required for groundwater discharges "where there is a direct hydrological connection between groundwaters and surface waters." 56 Fed.Reg. 64,876, 64,892 (Dec. 12, 1991).

Here, EnerProg has created the coal ash pond in the streambed of a perennial tributary to the Progress River. A substandard ash pond presents a heightened risk for toxic leaks into nearby ground and surface water. The groundwater naturally

connects the MEGS ash pond to the Progress River, and not holding EnerProg accountable for this discharge would allow the polluter to violate the CWA without having to get a permit. This Court should stand with the policy of the CWA of protecting the biological integrity of our surface waters, and find that pollution discharges into the MEGS ash pond are subject to NPDES permit requirements.

V. UNDER THE CWA, SECTION 404 REQUIRES A PERMIT FOR THE DISCHARGE OF FILL MATERIAL INTO A PERENNIAL CREEK THAT HAS BEEN USED AS A COAL ASH POND, WHEN THE DISCHARGE OF FILL MATERIAL WILL OCCUR AFTER THE CLOSURE OF THE POND.

Regardless of this Court's ruling on the WOTUS status of the ash pond, the EAB incorrectly held that a section 404 permit is not required for the closure and capping plan. The CWA's objective is to protect and restore the Nation's waters and in line with that objective, restoring CWA protections to a WOTUS that was subjected to pollution from a coal power plant is proper. Allowing coal ash pollution to remain in a perennial tributary to a navigable in-fact water, after that stream is no longer used as a dumping ground, is contrary to the CWA. Furthermore, the experience of the U.S. Army Corps of Engineers (USACE) with similarly situated coal ash pond closures indicates a section 404 permit is required. Thus, this Court must rule that the MEGS ash pond closure plan necessitates a section 404 permit and the EPA was arbitrary and capricious in failing to require a section 404 permit.

A. Once the MEGS Ash Pond Ceases to be Used as a Waste Treatment System, EPA's 1980 Suspension No Longer Applies, therefore the Pond Is a WOTUS subject to section 404 requirements.

The EPA's 1980 Suspension excludes waste treatment systems created in a WOTUS from the definition of a WOTUS. The MEGS ash ponds would under this definition be exempt from the definition of a WOTUS. However, once the MEGS ash pond ceases to be used as a waste treatment system, the exemption to WOTUS

status no longer applies. Thus, under the CACA requirement that the ash pond be closed, and in order to fulfill the primary objective of the CWA to "*restore* and maintain the chemical, physical, and biological integrity of the Nation's waters," the ash pond should no longer be exempt from WOTUS status. 33 U.S.C.A. § 1251 (2012) (emphasis added). Because the CWA has a specific objective of protecting and restoring the Nation's waters, the presumption of the statute is in favor of regulating pollution, not allowing pollution to continue without a permit.

The EAB's conclusion that the coal ash pond in Fossil Creek is not subject to 404 requirements is contrary to the CWA objectives and goals and the EPA's regulations. Nothing in the EPA's 1980 Suspension dictates that Fossil Creek would not be a WOTUS after retirement of the waste treatment system is closed. In fact, the EPA's Clean Water Rule specifically confirms that "Tributary streams, including perennial. . . streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters." 80 Fed. Reg. 37054-01, 37056 (June 29, 2015). The rule defines WOTUS tributaries as those that "contribute flow directly *or indirectly* to a traditional navigable water. . . [and whose] waters that science tells us provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard." 80 Fed. Reg. at 37058 (emphasis added).

The EPA's Clean Water Rule and caselaw dictate that Fossil Creek is included in the definition of a WOTUS because it has a significant nexus to downstream waters. Here, the spring that feeds Fossil Creek above the dam has not been blocked or diverted, which means that Fossil Creek continues to flow above the MEGS ash pond dam, and will continue to flow after the closure of the pond. While it may appear that Fossil Creek's flow has disappeared, hydrologic science tells us otherwise. *See Tennessee Clean Water Network v. Tennessee Valley Auth.*, 3:15-CV-00424, 2017 WL 3476069, at *2-*3 (M.D. Tenn. Aug. 4, 2017) (discussing the general principles of hydrology and finding that if "the water passes through an area filled with pollutants—for example, a large impoundment of coal ash waste—it may pick up some of those pollutants and then convey them to nearby surface waters"). Fossil Creek's flow will continue after the closure of the dam, and will directly contribute pollutants to the Progress River after it passes

through the filled in pond. Therefore, once the ash pond is closed, the impoundment in the bed of Fossil Creek still has a significant nexus to the Progress River and, alternatively, the EPA's Suspension will be inapplicable because the pond will no longer be a waste treatment system. Therefore, the MEGS ash pond must be considered a WOTUS subject to section 404 permitting requirements after the pond is no longer used as a waste treatment system.

B. Regardless, USACE's Actions in Similar Cases Indicates that a Plan to Discharge Fill Material into the Fossil Creek Streambed is Subject to Section 404 Permit Requirements.

The closure of the MEGS coal ash pond would be considered a dredge and fill action under EPA regulations. The CWA requires that any proposal to discharge fill material into a WOTUS be permitted under section 404. 33 U.S.C. § 1311(2012); 33 U.S.C. §1344 (2012). Section 404 of the CWA requires that operations such as dredge and fill of a WOTUS be subject to USACE permitting. *Id*. Fill is defined as "material placed in [a WOTUS]" that effectively replaces the WOTUS with "dry land" or changes the "bottom elevation of any portion of the [WOTUS]." 33 C.F.R. § 323.2 (2017). In this case, EnerProg's closure plan includes the dewatering and capping of a coal ash pond that was created in a perennial tributary to a WOTUS. R. at 6. Because the tributary must be considered a WOTUS as well, the dewatering of the MEGS ash pond would be an action that replaces the WOTUS with "dry land" which is directly covered under the 33 C.F.R. § 323.2. Therefore, under EPA regulations, the dewatering of the MEGS ash pond would be an action that is subject to section 404 of the CWA.

Past decisions by the USACE with similar plans to close coal ash ponds located in a former perennial streambed indicate that a section 404 permit is required. In Kentucky, the USACE required a 404 permit for Kentucky Power's proposal that closed a coal ash disposal pond located in an area that impacted perennial stream channels. Public Notice of Section 404 Permit, U.S. Army Corps of Engineers, ID No. LRL – 2014- 417-mdh (May 23, 2016). Kentucky Power proposed to close the pond by capping the ash in place,

which would have resulted in covering portions of two nearby perennial streams. *Id.* Due to the unavoidable impact that closure and filling had on nearby streams, the USACE determined that the water in question was a WOTUS that required a section 404 permit. Proposed AEP Proposed AEP Big Sandy Fly Ash Pond Closure - Agency Interest #2610 (April 2015). Here, EnerProg's closure of the MEGS ash pond has an even greater impact on a WOTUS, than the ash pond in Kentucky, because the MEGS pond is located in a perennial stream, Fossil Creek. Similar to Kentucky Power's proposal, EnerProg proposes to leave its coal ash in place, dewater it, and cap it. The USACE's determination in Kentucky indicates that EnerProg's proposal necessitates an application for a section 404 permit. EnerProg's proposal will result in a changed elevation of the bottom of Fossil Creek's streambed, and ultimately will replace a portion of the stream with dry land. The USACE failure to apply 404 permitting requirements on EnerProg's ash pond closure plan is not in accordance with past decisions, which is arbitrary and capricious. Therefore, because the EPA's 1980 Suspension exclusion does not apply and EnerProg's proposed action effectively replaces Fossil Creek with dry land, a section 404 permit is required.

CONCLUSION

EnerProg requests to avoid compliance with Progress state law requirements and EPA regulations should not be granted by this Court. This Court should affirm the EAB's rulings on issues one, two, and three. Progress has the authority to certify a NPDES permit, without federal review, on the condition that EnerProg comply with its water protection laws. Additionally, EnerProg cannot avoid compliance with the 2015 ELGs mandating zero discharge of coal ash because the EPA's notice violates the APA, therefore the Court should vacate EPA's action. Further, regardless of the EPA's APA violation, the EPA has the authority to rely on BPJ because the 1983 ELG fails to control pollutants of concern. However, the Court should find that the EPA acted arbitrary and capricious in issues four and five. The Court should declare the EPA's 1980 Suspension null and void because the EPA's action exempting the MEGS pond from CWA requirements violates APA procedure, and, further, the ash pond is likely a point

source pollutant to the Progress River. Lastly, due to relevant USACE experience with similar ash ponds, the Court should shape an equitable remedy that leaves the requirement that EnerProg close and dewater its ash pond in place, however, remand the specific issue of whether a section 404 permit applies to EnerProg's capping plan to the EPA and USACE.