

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60821

SOUTHWESTERN ELECTRIC POWER COMPANY, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

**RESPONDENTS' MOTION TO GOVERN FURTHER
PROCEEDINGS**

Respondents United States Environmental Protection Agency and E. Scott Pruitt, in his official capacity as Administrator (collectively “EPA” or the “Agency”), file this Motion to Govern Further Proceedings to inform the Court how the Agency believes this matter should now proceed. Pursuant to Fifth Circuit Rule 27.4, undersigned counsel has conferred with counsel for Petitioners, whose positions are set forth *infra*, in Paragraph 12.

In support of this motion, EPA states as follows:

1. These consolidated petitions for review challenge an EPA final rule entitled “Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category” (hereinafter “Rule” or the “2015 Rule”), 80 Fed. Reg. 67,838 (Nov. 3, 2015). The Rule contained limitations and standards on various wastestreams at steam electric power plants: fly ash transport water, bottom ash transport water, flue gas mercury control wastewater, flue gas desulfurization (“FGD”) wastewater, gasification wastewater, and combustion residual leachate.

2. Pursuant to this Court’s scheduling order, dated September 28, 2016 (Doc. No. 00513695163), Petitioners filed three opening briefs on December 5, 2016. EPA’s responsive brief was due, under one 30-day extension of time, on May 4, 2017. See Doc. No. 00513919648. The intervenor briefs were scheduled to be filed 30 days after EPA’s brief is filed, and the reply briefs were scheduled to be filed 30 days after the intervenor briefs were filed. *See* Doc. No. 00513695163.

3. On March 24, 2017, the Utility Water Act Group (“UWAG”), a Petitioner in these proceedings, submitted to EPA an administrative petition for reconsideration of the Rule and requested that EPA suspend the Rule’s approaching compliance deadlines. By letter dated April 5, 2017, the Small

Business Administration Office of Advocacy also petitioned EPA for reconsideration of the Rule.

4. By letter dated April 12, 2017, Administrator Pruitt announced that EPA intended to reconsider the Rule. See Attachment A hereto. Also on April 12, 2017, Administrator Pruitt signed a notice for publication in the Federal Register announcing EPA's decision to grant UWAG's request for an administrative stay of the rule pending judicial review under 5 U.S.C. § 705. *See* 82 Fed. Reg. 19,005 (Apr. 25, 2017) (hereinafter "April 12, 2017 Notice").

5. As EPA explained in the April 12, 2017 Notice, the two administrative petitions "raise wide-ranging and sweeping objections to the Rule, some of which overlap with the claims in ongoing litigation challenging the Rule" in this Court. In the Notice, EPA advised that it planned to undertake a careful and considerate review of the Rule in view of the issues raised in the two administrative petitions, and, if warranted, to conduct further rulemaking to revise the Rule. EPA also advised that it intended to undertake notice-and-comment rulemaking to stay or extend the Rule's compliance dates. On June 6, 2017, EPA published notice of its proposal to postpone those compliance dates "as a stopgap measure to prevent the unnecessary expenditure of resources until EPA completes reconsideration of the 2015 Rule." *See* 82 Fed. Reg. 26,017-018.

6. On April 14, 2017, EPA moved this Court (Doc. No. 00513952863) to hold all proceedings in this case, including the May 4, 2017 deadline for EPA’s brief and all subsequent briefing deadlines, in abeyance for 120 days (until August 14, 2017).

a.) EPA explained that agencies have inherent authority to reconsider their past decisions and to revise, replace or repeal decisions to the extent permitted by law and supported by a reasoned explanation. *See id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010)). EPA further stated that its interpretations of statutes it administers are not “carved in stone” but must be evaluated “on a continuing basis,” for example, “in response to . . . a change in administrations.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). *See also Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency’s discretion,” and “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and

benefits of its programs and regulations’”) (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

b.) EPA added that given its pending reconsideration of the Rule, an abeyance of litigation in this Court was warranted, as an abeyance of the litigation would preserve the resources of the parties and the Court because briefing had not yet been completed and oral argument not yet scheduled. EPA further explained that it was possible that its reconsideration of the Rule could result in further rulemaking that would revise or rescind the Rule at issue in these proceedings and thereby obviate the need for judicial resolution of some or all of the issues raised in the parties’ briefs.

c.) EPA’s motion also stated that EPA would advise the Court promptly following any abeyance period if the Administrator determines during such period that further rulemaking is warranted. Thus, EPA requested that, at the conclusion of the requested 120-day abeyance period, EPA be permitted to file a motion to govern further proceedings to inform this Court of EPA’s intentions regarding further rulemaking or other agency action in light of the administrative petitions and to recommend to the Court how the Agency believes this case might proceed efficiently to resolution.

7. On April 24, 2017, this Court granted EPA’s motion to hold these proceedings in abeyance. *See* Doc. No. 00513964356

8. As reflected in the attached letter dated August 11, 2017 (Attachment B) Administrator Pruitt has now advised that after carefully considering the two administrative petitions, he has decided that it is appropriate and in the public interest to conduct a rulemaking to potentially revise the new more stringent Best Available Technology Economically Achievable (“BAT”) effluent limitations and Pretreatment Standards for Existing Sources (“PSES”) in the 2015 Rule that apply to two of the six relevant wastestreams (*see* Paragraph 1, *supra*): (1) bottom ash transport water and (2) flue gas desulfurization (FGD) wastewater.

9. EPA also informs the Court that, in April 2016, Petitioner Duke Energy submitted a Fundamentally Different Factors (“FDF”) variance application for its Edwardsport Integrated Gasification Combined Cycle (“IGCC”) Station for certain effluent limitations applicable to its gasification wastewater. As described in an August 7, 2017 letter to Duke Energy (Attachment C), EPA has proposed to grant a variance from certain limits applicable to Edwardsport’s gasification wastewater. EPA is seeking comment on its Tentative Decision document. *See* <https://www.epa.gov/npdes-permits/epas-tentative-decision-duke-energys-fundamentally-different-factors-fdf-variance> (“Public Notice: EPA’s Tentative Decision on Duke Energy’s Fundamentally Different Factors (FDF) Variance NPDES Permit IN0002780”).

10. In light of all of the foregoing developments and administrative undertakings, EPA respectfully requests that this Court sever and hold in abeyance all judicial proceedings as to all issues relating to the portions of the 2015 Rule concerning the new, more stringent BAT limitations and PSES applicable to (1) bottom ash transport water, (2) FGD wastewater, and (3) gasification wastewater. EPA proposes to file status reports every 90 days and promptly upon the completion of its further rulemaking.

11. With respect to the issues in these petitions pertaining to portions of the 2015 Rule for which EPA does not intend to conduct a rulemaking to potentially revise, EPA believes that litigation on those issues may proceed if Petitioners continue to press their claims. EPA therefore requests that the Court direct the parties to confer and, within 21 days after the court's resolution of this Motion, file a joint motion or separate motions setting forth a proposed revised briefing schedule for those issues that have not been severed and held in abeyance by the Court.

12. Undersigned counsel for EPA has shared this Motion to Govern and conferred thereon with counsel for all Petitioners and has been advised as follows:

a.) Petitioner/Intervenor Utility Water Act Group, and Petitioners Southwestern Electric Power Co. and Union Electric Company, doing business as Ameren Missouri consent to the requested severance/abeyance;

b.) Petitioner City of Springfield, Missouri, by and through the Board of Public Utilities (“City Utilities of Springfield”) consents to the requested severance/abeyance;

c.) Petitioner Duke Energy Indiana, Inc. (“Duke Energy”) consents to the requested severance/abeyance;

d.) Petitioners American Water Works Association (“AWWA”) and National Association of Water Companies (“NAWC”) take no position the motion as of the time of filing and reserved the right to file a response;

e.) Petitioners/Intervenors Sierra Club, Waterkeeper Alliance, Inc., Environmental Integrity Project and Intervenor Clean Water Action oppose the motion to govern and intend to file a response.

WHEREFORE, EPA respectfully requests that the Court issue an order:

(i) granting EPA’s request to sever and hold in abeyance all proceedings in these cases (including merits briefing) concerning portions of the 2015 Rule relating to the new, more stringent BAT effluent limitations and PSES in the Rule applicable to (1) bottom ash transport water, (2) FGD wastewater, and (3) gasification wastewater, pending EPA’s completion of further agency action;

(ii) directing EPA to file status reports at 90-day intervals and promptly upon the completion of further rulemaking; and

(iii) directing the parties to confer and, within 21 days after the Court's resolution of this Motion, file a joint motion or separate motions setting forth a proposed revised briefing schedule for those issues that have not been severed and held in abeyance by the Court.

Respectfully submitted this 14th day of August, 2017, by:
JEFFREY H. WOOD
Acting Assistant Attorney General
/s/ Jessica O'Donnell
MARTIN F. McDERMOTT
JESSICA O'DONNELL
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
601 D Street, N.W., Suite 8000
Washington, D.C. 20004
202-305-0851 (tel.)
jessica.o'donnell@usdoj.gov
Counsel for Respondent EPA

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains 1619 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. 32(a)(5) and 32(a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Jessica O'Donnell
Jessica O'Donnell
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that on August 14, 2017, a true and correct copy of the foregoing motion was filed through the Court's ECF system, and thereby served on all counsel of record in this case.

/s/ Jessica O'Donnell
Jessica O'Donnell
Attorney for Respondents

ATTACHMENT "A"



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

April 12, 2017

THE ADMINISTRATOR

Mr. Harry M. Johnson
Hunton & Williams, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23129-4074

Mr. Major Clark
Mr. Kevin Bromberg
U.S. Small Business Administration
Office of Advocacy
409 3rd Street, SW, 7th Floor
Washington, D.C. 20416

Re: Petitions for Agency Reconsideration and Stay of Effluent Guidelines for the Steam Electric Point Source Category

Dear Mr. Johnson, Mr. Clark and Mr. Bromberg:

This letter concerns petitions from the Utility Water Action Group dated March 24, 2017, and the U.S. Small Business Administration dated April 5, 2017, to the U.S. Environmental Protection Agency requesting reconsideration and an administrative stay of provisions of the EPA's final rule titled "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category," 80 FR 67838 (November 3, 2015).

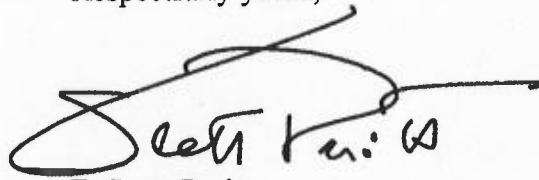
After considering your petitions, I have decided that it is appropriate and in the public interest to reconsider the rule. The EPA is acting promptly to issue an administrative stay of the compliance dates in the rule that have not yet passed pending judicial review, pursuant to Section 705 of the Administrative Procedure Act. This stay will be effective upon publication in the Federal Register. The EPA also intends to request that the U.S. Court of Appeals for the Fifth Circuit stay the pending litigation on the rule for 120 days (until September 12, 2017), by which time the agency intends to inform the Court of the portions of the rule, if any, that it seeks to have remanded to the agency for further rulemaking, after careful consideration of the merits in your petitions. Also, because an administrative stay lasts only during the pendency of judicial review, the EPA intends to conduct notice and comment rulemaking during the reconsideration period to stay or

amend the compliance deadlines for the rule. This letter does not address the merits of, or suggest a concession of error on, any issue raised in the petitions.

As part of the reconsideration process, should the EPA conduct a rulemaking to amend the rule or any part of it, the EPA expects to provide an opportunity for notice and comment.

If you have questions regarding the reconsideration process, please contact Sarah Greenwalt at (202) 564-1722. If you have any questions or wish to discuss the litigation, please have your counsel direct inquiries to Jessica O'Donnell at (202) 305-0851.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Scott Pruitt", with a large, stylized loop at the beginning and a horizontal line extending to the right.

E. Scott Pruitt

ATTACHMENT "B"



E. SCOTT PRUITT
ADMINISTRATOR

August 11, 2017

Mr. Harry M. Johnson
Hunton & Williams, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23129-4074

Mr. Major Clark
Mr. Kevin Bromberg
U.S. Small Business Administration
Office of Advocacy
409 3rd Street, SW, 7th Floor
Washington, D.C. 20416

Re: Petitions for Agency Reconsideration and Stay of Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category

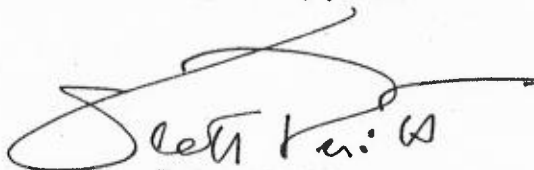
Dear Mr. Johnson, Mr. Clark and Mr. Bromberg:

This letter concerns petitions from the Utility Water Act Group dated March 24, 2017, and the U.S. Small Business Administration dated April 5, 2017, to the U.S. Environmental Protection Agency requesting reconsideration and an administrative stay of provisions of the EPA's final rule titled "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category," 80 FR 67838 (November 3, 2015). As you know, in a letter dated April 12, 2017, I announced that the EPA would be reconsidering the 2015 rule in light of the petitions.

After carefully considering your petitions, I have decided that it is appropriate and in the public interest to conduct a rulemaking to potentially revise the new, more stringent Best Available Technology Economically Achievable effluent limitations and Pretreatment Standards for Existing Sources in the 2015 rule that apply to bottom ash transport water and flue gas desulfurization wastewater. As part of the rulemaking process, the EPA will provide notice and an opportunity for public comment on any proposed revisions to the 2015 final rule. The EPA also intends to inform the U.S. Court of Appeals for the Fifth Circuit that it seeks to have challenges to those portions of the 2015 rule severed and held in abeyance pending completion of further rulemaking.

If you have questions regarding the reconsideration process, please contact Mike Shapiro at (202) 564-5700. If you have any questions or wish to discuss the litigation, please have your counsel direct inquiries to litigation counsel at the Department of Justice, Martin McDermott at (202) 514-4122.

Respectfully yours,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt", with a large, sweeping flourish extending to the right.

E. Scott Pruitt

ATTACHMENT “C”



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

AUG 07 2017

REPLY TO THE ATTENTION OF:

VIA E-MAIL AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Patrick Coyle
Environmental Services
Duke Energy
139 East Fourth Street, EM740
Cincinnati, Ohio 45202

Re: Fundamentally Different Factors Variance Application for the Duke Energy Indiana, LLC
Edwardsport IGCC Station

Dear Mr. Coyle:

The U.S. Environmental Protection Agency has concluded our review of the Duke Energy Indiana, LLC (Duke Energy) Edwardsport Integrated Gasification Combined Cycle Station Fundamentally Different Factors (FDF) Variance Application for effluent limitations specified for certain parameters in Title 40 of the Code of Federal Regulations (40 C.F.R.) § 423.13(j)(1)(i) for gasification wastewater.

EPA is proposing to grant a variance establishing alternative effluent limitations for mercury and total dissolved solids (TDS) for gasification wastewater at Edwardsport because Duke Energy's request satisfies the criteria in Clean Water Act § 301(n) and 40 C.F.R. § 125.31. Specifically, EPA finds that the operation of vapor scrubbers and a barometric condenser at the Edwardsport IGCC plant is a fundamentally different factor not accounted for during the development of the effluent guidelines. EPA is proposing the following alternative effluent limitations for mercury and TDS in discharges of gasification wastewater:

Mercury, total:

Daily Maximum Effluent Limitation:	28 ng/L
Monthly Average Effluent Limitation:	11 ng/L

TDS:

Daily Maximum Effluent Limitation:	82 mg/L
Monthly Average Effluent Limitation:	38 mg/L

Based on a thorough evaluation of Duke Energy's application and effluent data collected by Edwardsport since commencing operation, EPA is proposing not to establish alternative effluent limitations for arsenic as requested by Duke Energy, because all applicable data reflecting

normal operation of the gasification system demonstrate compliance with the ELG limitations for arsenic at 40 C.F.R. § 423.13(j)(1)(i).

EPA has enclosed a Tentative Decision document that summarizes the statutory requirements and federal regulations with respect to FDF variances, describes the purported basis for Duke Energy's request, describes the data and analyses supporting EPA's tentative decision to establish alternative effluent limitations for mercury and TDS, and explains EPA's tentative decision not to establish alternative effluent limitations for arsenic. EPA will make this document and the administrative record available to the public on its website at <https://www.epa.gov/npdes-permits/indiana-npdes-permits> and those documents may be reviewed by appointment at the Region V Office by contacting Mark Ackerman at R5NPDES@epa.gov or calling (312) 353-4145.

EPA will public notice the Tentative Decision to grant a variance for mercury and TDS and deny a variance for arsenic in the Vincennes Sun. The public comment period will be 30 days. Duke Energy may submit any comments electronically to the R5NPDES@epa.gov email address or send them in hard copy to Mark Ackerman at the Regional Office. If comments are received during the comment period, EPA will evaluate and respond to the comments before issuing the final decision.

Prior to issuing a final decision, EPA will obtain concurrence on the FDF variance approval from the Indiana Department of Environmental Management pursuant to Section 301(n) of the Clean Water Act.

If you have any questions concerning this matter, please contact Kevin Pierard of my staff at (312) 886-4448, or your counsel may contact Mark Koller in the Office of Regional Counsel, at (312) 353-2591.

Sincerely,



Robert A. Kaplan
Acting Regional Administrator

Enclosure

cc: Martha Clark Mettler, IDEM w/enclosure via email
Paul Higginbotham, IDEM w/enclosure via email