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SUPREME COURT OF KENTUCKY
2015-SC-000462-D
COURT OF APPEALS CASE NOS.
2013-CA-001695-MR AND 20013-CA-001742-MR
APPEAL FROM THE FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 11-CI-01613

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COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET APPELLANT

v.

KENTUCKY WATERWAYS ALLIANCE, ET AL. APPELLEES

BRIEF FOR APPELLEES KENTUCKY WATERWAYS ALLIANCE, SIERRA CLUB, VALLEY WATCH, AND SAVE THE VALLEY

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CERTIFICATE OF SERVICE

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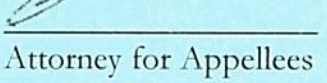

Attorney for Appellees

STATEMENT CONCERNING ORAL ARGUMENT

Appellees Kentucky Waterways Alliance, Sierra Club, Valley Watch, and Save the Valley agree with Appellants that oral argument on the issues presented would be helpful to this Court.

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COUNTERSTATEMENT OF THE CASE

More than five years ago, the Kentucky Energy and Environment Cabinet (Cabinet) issued a Clean Water Act discharge permit to the Louisville Gas & Electric Company (LG&E) Trimble coal-fired power plant that does not limit the amount of toxic pollutants such as mercury, arsenic, and selenium that the plant can release into the Ohio River. That permit expired over a year ago on April 30, 2015, but the Cabinet's custom is not to renew expired water discharge permits on time, and it has not yet renewed or updated the Trimble permit.[1] Each day for the last six years, the plant has been allowed to discharge up to 1.55 million gallons of wastewater containing dissolved metals into the Ohio River.[2]

At Trimble, a highly concentrated mix of dissolved, toxic metals from the air pollution control device called a scrubber (sometimes referred to as flue gas desulfurization or FGD) flows untreated through a "settling" pond before discharging directly into the Ohio River. At the time it issued the permit, the Cabinet knew that Trimble's scrubber wastewater contained dissolved metals, including mercury and arsenic, that are exceptionally harmful to human health and aquatic life, that settling ponds were not designed to minimize the discharge of dissolved metals, and that more effective technologies were widely available and used by other plants in the industry. Despite having all of these facts, and despite its mandatory duty under

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[1] Administrative Record [hereinafter "AR"] Dkt. No. 30, Permit Fact Sheet at 1 [hereinafter "Permit Fact Sheet"], excerpts attached as App. 1; *see* Kentucky Dep't for Envtl. Protection, *Search Online - Pending Approvals, Permit Applications*, Agency Interest ID 4054, available at https://dep.gateway.ky.gov/eSearch/default.aspx (last accessed June 9, 2016); *see* 33 U.S.C. § 1342(b)(1)(B) (NPDES permits have fixed terms up to five years).

[2] Permit Fact Sheet at 6 (App. 1).

the Clean Water Act and its regulations to set limits for toxic pollutants that reflect the best available pollution controls, the Cabinet did not impose any limits on the discharge of these toxic pollutants in Trimble's wastewater.

While disavowing any obligation to conduct a case-by-case analysis to set permit limits at Trimble, throughout the course of more than five years of litigation, both the Cabinet and LG&E (together, Appellants) strained to assert that the Cabinet nonetheless did conduct a best professional judgment evaluation before setting permit limits consistent with a "settling pond" – the least effective means of controlling scrubber wastewater used in 2010. Both the Circuit Court and Court of Appeals found it abundantly clear that the Cabinet did not conduct a proper case-by-case analysis because it failed to give consideration to the mandatory regulatory factors. Appellants have not appealed that issue to this Court.

The well-reasoned decisions of the Court of Appeals and the Franklin Circuit Court agree with Appellees Kentucky Waterways Alliance, Sierra Club, Valley Watch, and Save the Valley (Conservation Groups) that the Cabinet had a mandatory legal duty to set "best available technology" limits for toxic pollutants in Trimble's wastewater using its "best professional judgment," and it failed to perform that duty. Given Appellants have not appealed the latter issue, the more specific question presented here, as articulated by the Court of Appeals, is "[w]hether the 1982 ELG, in briefly discussing but ultimately excluding arsenic, mercury, and selenium, *et al.* from regulation, sufficiently established an effluent limit the [Cabinet] was merely required to apply pursuant to 40 C.F.R. 125.3(c)(1); or whether the exclusion of those

metals required the [Cabinet] to undertake a case-by-case analysis under subsections (c)(2) or (c)(3) of the same regulation."[3]

A. Legal Background

Congress passed the Clean Water Act in 1972 to "restor[e] and maint[ain]" the "chemical, physical, and biological integrity of the Nation's waters."[4] To achieve this goal, the Clean Water Act prohibits the discharge of any pollutant by any person into waters of the United States from a point source, unless the discharge is authorized by and in compliance with a permit.[5] The Act further establishes a National Pollution Discharge Elimination System (NPDES or discharge) permitting program, administered by the U.S. Environmental Protection Agency (EPA) or states with delegated authority from the U.S. EPA.[6] Kentucky administers a delegated Kentucky Pollutant Discharge Elimination System (KPDES) program and its regulations directly incorporate federal Clean Water Act regulations.[7]

The Clean Water Act requires state permitting agencies such as the Cabinet to set technology-based effluent limits that reflect the ability of the best available technologies to reduce or eliminate the discharge of pollutants.[8] The Act imposes the most stringent limits on the discharge of toxic pollutants, which includes the

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[3] May 29, 2015 Court of Appeals Opinion [hereinafter "Court of Appeals Op."] at 12-13, attached to Cabinet Supreme Court Brief [hereinafter "Cabinet Br."] as Appendix1.
[4] 33 U.S.C. § 1251(a).
[5] 33 U.S.C. §§ 1311(a), 1342.
[6] 33 U.S.C. § 1342.
[7] KRS 224.16-050; 401 KAR 5:080.
[8] 33 U.S.C. §§ 1311, 1342.

dissolved metals such as mercury, arsenic, and selenium at issue in this case.[9] Toxic pollutants must be controlled by the best available technology economically achievable (BAT), which "shall require the elimination of discharges of all pollutants if … such elimination is technologically and economically achievable."[10] The U.S. Supreme Court confirmed that BAT should represent "a commitment of the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges,"[11] and the Fifth Circuit recognized: "Congress intended these [BAT] limitations to be based on the performance of the single best-performing plant in an industrial field."[12] In contrast, conventional pollutants (such as oil and grease) are subject to less protective effluent limits that reflect the best practicable control technology currently available or the best conventional pollutant control technology.[13]

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[9] Toxic, conventional, and nonconventional pollutants are regulated separately under the Act. *See, e.g.*, 33 U.S.C. §§ 1311, 1314; 40 C.F.R. §§ 125.3(a), 401.15-.16 The conventional pollutants are biochemical oxygen demand, total suspended solids, oil and grease, pH, and fecal coliform. Toxic pollutants are those identified in 33 U.S.C. § 1317(a)(1) and listed at 40 C.F.R. § 401.15. Nonconventional pollutants are those that are neither toxic nor conventional.

[10] 33 U.S.C. § 1311(b)(2)(A). *See NRDC v. EPA*, 822 F.2d 104, 110 (D.C. Cir. 1987) ("Toxic pollutants, whether from new or existing sources, are subject to effluent limitations based on application of the BAT standard." (citing 33 U.S.C. § 1317(a)(2))). New source performance standards (NSPS) applicable to new sources must be at least as stringent as BAT and may be more stringent. *Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1058 (3d Cir. 1975), *amended by* 560 F.2d 589 (3d Cir. 1977).

[11] *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 74 (1980). A technology is available where it is in use in a given industry. *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 636 (2d Cir. 1976). Technology is "economically achievable" where it is affordable for some plants in an industry. *NRDC v. EPA*, 863 F.2d 1420, 1426 (9th Cir. 1988).

[12] *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 226 (5th Cir. 1989), *decision clarified on reh'g*, 885 F.2d 253 (5th Cir. 1989).

[13] 33 U.S.C. §§ 1311(b), 1314(b).

Technology-based effluent limits in state-issued discharge permits can come from one of two places: national effluent limit guidelines (ELGs or Guidelines) promulgated by EPA that apply to categories of industrial sources, or a permitting agency's case-by-case determination based on the agency's best professional judgment (BPJ).[14] Where there is no applicable national guideline, or where national guidelines "only apply to certain aspects of the discharger's operation, *or to certain pollutants*, other aspects or activities are subject to regulation on a case-by-case basis."[15] When permitting agencies "determine on a case-by-case basis what effluent limitations represent BAT . . . . Individual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same."[16] In developing BAT limits,[17] EPA and states must consider a number of factors set out in the statute and regulations, including the age of equipment and facilities, the process employed, engineering aspects of various control technologies, process changes, the cost of

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[14] 40 C.F.R. § 125.3. *See* 33 U.S.C. § 1342(a)(1) (permits must include "such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."); *NRDC v. EPA*, 859 F.2d 156, 183 (D.C. Cir. 1988) ("Section 1342(a)(1) requires EPA, in approving permits in the absence of formally promulgated effluent limitations guidelines, to exercise its best professional judgment (BPJ) as to proper effluent limits.").

[15] 40 C.F.R. § 125.3(c)(3), 401 KAR 5:080 § 2(3) (emphasis added).

[16] *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 929 (5th Cir. 1998).

[17] Technology-based limits do not require the use of any specific pollution control technology (such as the settling pond used at Trimble); instead, the limits are expressed as maximum concentrations that apply to specific pollutants and reflect the level of pollution reduction that can be achieved by the required performance standard (*i.e.*, BAT for toxic pollutants).

achieving the pollution reduction, non-water quality environmental impact, and other appropriate factors.[18]

If the mandatory technology-based limits are insufficient to protect a particular water body, additional water-quality standards may be required.[19] As LG&E recognizes, "this appeal concerns only technology-based limits."[20]

B. EPA's 1982 and 2015 Effluent Limit Guidelines For Power Plants

At the time the Trimble permit was issued in 2010, the national effluent limit guidelines for coal-fired power plants such as Trimble had not been updated in more than thirty years and did not set BAT limits on the toxic pollutants in scrubber wastewater. As the Franklin Circuit Court recognized:

> The current effluent guidelines and standards for the steam electric power industry, which were last updated in 1982, *do not adequately address the associated toxic metals discharged to surface waters from facilities in this industry*. The current effluent limitations guidelines and standards are focused on settling out particulates rather than treating dissolved particulates.[21]

EPA updated the guidelines in 2015 to include such limits. However, as discussed further below, since the new rule became effective January 4, 2016, it has no bearing on the failure of the Cabinet in 2010 to set the proper limits in Trimble's permit.

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[18] 33 U.S.C. § 1314(b)(2)(B); 40 C.F.R. § 125.3(d)(3). The regulations reiterate the statutory factors and further direct states to consider the appropriate technology for the category of point sources at issue and unique factors specific to the applicant. 40 C.F.R. § 125.3(c)(2).

[19] 33 U.S.C. § 1312.

[20] LG&E Supreme Court Brief [hereinafter "LG&E Br."] at 3. The Cabinet makes a vague assertion that the Court of Appeals should have recognized its review of water quality, which is addressed in section II(B) of this brief.

[21] *Kentucky Waterways Alliance v. Energy and Environment Cabinet*, No. 11-CI-1613 WL 10924155, at *10-11 (Ky. Cir. Ct. Sept. 10, 2013) [hereinafter "Franklin Circuit Court Op."], attached to Cabinet Br. as Appendix 3 (citing EPA, *Fact Sheet for the Proposed Effluent Limitation Guidelines & Standards for Steam Electric Power Generating Industry* (April 2013) [hereinafter "EPA Fact Sheet"] attached to this brief as App. 2); *accord* Court of Appeals Op. at 13.

The 1982 guidelines explicitly did not set any limits for metals or other toxic pollutants—the major components of scrubber waste that raise public health concerns. Since scrubbers were not in widespread use at the time, EPA excluded the pollutants from the 1982 guidelines because it lacked sufficient data and technologies to control these pollutants were not available. As EPA stated at the time, "[t]*oxic pollutants are excluded from national regulation* because they are present in amounts too small to be effectively reduced by technologies known to the Administrator."[22] EPA signaled its intent to set BAT limits on scrubber wastewater at a later date: "EPA *is reserving effluent limitations* for four types of wastewaters *for future rulemaking*" including "flue gas desulfurization waters."[23] The 1982 guidelines only impose limits on the conventional pollutants pH, total suspended solids, and oil and grease in scrubber wastewater, along with other power plant waste streams in the catch-all "low volume waste" category.[24]

Though EPA is required to review the national guidelines every five years and revise them as appropriate to reflect advancements in technology,[25] when the Trimble permit was issued in 2010, the guidelines were over thirty years old. EPA was in the process of conducting studies and updating the 1982 guidelines to set BAT for scrubber wastes and other discharge streams from coal-fired power plants, and it issued its rulemaking studies and guidance documents to assist states in setting

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[22] 47 Fed. Reg. 52,290, 52,303 (Nov. 19, 1982) (emphasis added).
[23] *Id.* at 52,290-291 (emphasis added).
[24] 40 C.F.R. § 423.12-.15.
[25] 33 U.S.C. §§ 1311(d), 1314(m).

appropriate case-by-case BAT limits in the interim period until the new guidelines were finalized. Notably, EPA's 2009 Final Study of wastewater discharges from the power plant industry identified the toxic pollutants of concern in scrubber wastewater and gave permitting agencies ample background information to conduct a thorough BPJ analysis on scrubber wastewater.[26] Additionally, in 2010, in the aftermath of the release of 5.4 million cubic yards of coal ash from the impoundment failure at the Tennessee Kingston plant and a subsequent release in Alabama, EPA recognized "the need to better protect water quality and human health from impoundments" and reminded permitting authorities that the 1982 guidelines did not establish BAT limits for scrubber wastewater, and that states must set such limits through case-by-case determinations.[27]

EPA published proposed revised guidelines in 2013,[28] and on November 3, 2015, EPA published the final revised guidelines, which became effective January 4,

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[26] AR Dkt. No. 34, U.S. EPA, *Steam Electric Power Generating Point Source Category: Final Detailed Study Report* (EPA 821-R-09-008), Chapter 6 (Oct. 2009) [hereinafter "EPA 2009 Final Study"], available at https://www.epa.gov/sites/production/files/2015-06/documents/steam-electric_detailed_study_report_2009.pdf, and excerpts attached as App. 3.

[27] AR Dkt. No. 50, EPA Memorandum, the "Hanlon Memo" (June 7, 2010) at 2 [hereinafter "Hanlon Memo"], excerpts attached as App. 4. Although the Appellants continue to argue vehemently that the Hanlon Memo cannot be considered because it was non-binding and issued after the Trimble permit, the Circuit Court appropriately found "the law to be clear, and further corroborated by the EPA's 2010 Guidance Memo." Franklin Circuit Court Op. at 8 ("[T]he 2010 Memo's directions are wholly consistent with the plain meaning and reasonable interpretation of the statutes and regulations."). Appellants' argument is discredited by the fact that they also cite to non-binding guidance (EPA's Permit Writer's Manual) and subsequent developments to support their arguments (updated version of EPA's Permit Writer's Manual and the 2015 ELGs).

[28] 78 Fed. Reg. 34,432 (June 7, 2013). The Franklin Circuit Court order was entered after the proposed guidelines were issued, on September 10, 2013.

2016. The 2015 guidelines set BAT limits on arsenic, mercury, selenium, and nitrate/nitrite for scrubber wastewater, which reflects the use of chemical precipitation and biological treatment.[29] The 2015 guidelines require dischargers like Trimble to meet the new limits "as soon as possible" after November 1, 2018.[30]

C. Trimble's KPDES Permit and the Settling Pond

The Cabinet issued Trimble a KPDES permit on April 1, 2010 authorizing the plant to discharge wastewater with toxic pollutants from its scrubber system into a settling pond; that pond then discharges up to 1.55 million gallons of wastewater into the Ohio River each day.[31] Although the Cabinet was aware from Conservation Groups' public comments and EPA's 2009 Final Study that scrubber wastewater streams include dangerous bioaccumulative[32] metals such as arsenic, mercury, and selenium,[33] the permit does not limit these pollutants. To this point, the permit writer agreed and testified "[t]here are no limits for metals on the scrubber discharge" in the Trimble permit.[34] The permit includes limits on only two metals: chromium and zinc.[35]

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[29] 80 Fed. Reg. 67,850 (Nov. 3, 2015).
[30] *Id.* at 67,854.
[31] Permit Fact Sheet at 6 (App. 1).
[32] Bioaccumulation occurs when pollutant levels in fish and aquatic organisms increase over time, such that pollutant concentrations in fish tissue exceed those in the surrounding waters. EPA 2009 Final Study at 6-10 to 6-11 (App. 3). Bioaccumulative pollutants such as selenium build up in the food chain to levels that can threaten human health, and they are associated with a wide range of environmental harms including fish kills. *Id.* at 6-10 to 6-18.
[33] *Id.* at 4-26.
[34] AR Dkt. No. 56, Deposition of Sara J. Beard (Aug. 31, 2010) at 111, excerpts attached as App. 5.
[35] Permit Fact Sheet at 1-6 (App. 1).

Settling ponds do not provide effective treatment for scrubber waste. The Cabinet was well informed of this fact when it issued Trimble's permit because the Conservation Groups raised this issue in comments, and submitted EPA's 2009 Final Study of wastewater discharges from the power plant industry.[36] Settling pond treatment occurs essentially through gravity—that is, the solids settle to the bottom of the pond over time. The problem with using a settling pond to treat scrubber waste is that pollutants such as selenium, boron, and magnesium are usually present in scrubber waste in a dissolved form and do not sink to the bottom of a pond.[37] These metals, which are the toxic pollutants that pose the greatest threat to rivers and streams, are discharged untreated from settling ponds. As EPA explained in its 2009 Final Study:

> *[S]ettling ponds are not designed to reduce the amount of dissolved metals in the wastewater.* The FGD wastewater entering a treatment system contains significant amounts of several pollutants in the dissolved phase, including boron, manganese, and selenium. These *dissolved metals are likely discharged largely untreated* from FGD wastewater settling ponds.[38]

At the time the Cabinet issued the Trimble permit, several wastewater treatment options were available that control scrubber waste far more effectively than settling ponds, including chemical and biological treatments, and zero discharge systems that use design and operating practices to eliminate water discharges completely.[39] These technologies are highly effective at controlling scrubber waste at

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[36] EPA 2009 Final Study at 4-26 (App. 3).
[37] *Id.*
[38] *Id.* at 4-26 (emphasis added).
[39] *Id.* at 4-26 to 4-40.

other coal-fired power plants, particularly when used in combination with one another. EPA's 2009 Final Study concluded that a plant with a chemical treatment system emitted ten times less mercury, selenium, and arsenic than a plant with only a settling pond.[40] Trimble's own expert, William Kennedy, confirmed that chemical treatment options for scrubber wastes have been employed at other coal plants for several years and that there is no reason that this technology could not be used at Trimble.[41] Despite the availability of highly effective treatment options for controlling dissolved metals, the Cabinet did not impose any technology-based effluent limits on the discharge of the most harmful heavy metals from Trimble's scrubber waste into the Ohio River.

The 2010 Trimble permit that is the subject of this appeal expired over a year ago on April 30, 2015.[42] Though LG&E acknowledges in its opening brief that "NDPES permits must be renewed at least every five years," the 2010 Trimble permit has not been updated. More coal-fired power plants in Kentucky operate under expired KDPES permits than under current permits.[43] Because water discharge permits in Kentucky are so rarely renewed and available for public comment, a

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[40] *Id.* at 4-51.

[41] AR Dkt. No. 65, Deposition of William M. Kennedy (Aug. 27, 2010) at 173-174, excerpts attached as App. 6.

[42] Permit Fact Sheet at 1 (App. 1); *see* 33 U.S.C. § 1342(b)(1)(B) (NPDES permits have fixed terms up to five years).

[43] The Cabinet maintains a searchable database of pending and current discharge permits, which can be accessed on its website. Kentucky Dep't for Envtl. Protection, *Search Online - Issued Approvals, Pending Approvals, Permit Applications, Permits Issued*, available at https://dep.gateway.ky.gov/eSearch/default.aspx (last accessed June 9, 2016). Three of those permits are over fifteen years old, and have been expired for ten years. *Id.*

permitting decision is a crucial juncture where judicial review is available to ensure that the Cabinet is adhering to the law and mandating the legally required limits.[44]

D. Administrative and Judicial Review

Conservation Groups challenged the Trimble discharge permit administratively, and on December 1, 2010, the Secretary of the Cabinet issued the final order upholding the permit.[45] Without citation to any statute, regulation, or case, the Secretary concluded, as a matter of law, that the Cabinet did not need to conduct a case-by-case analysis because the wastewater was subject to the 1982 national guideline. The Secretary further concluded that, even though the Cabinet disclaimed any obligation to do so, the agency voluntarily conducted a BPJ analysis and its analysis was appropriately thorough.[46]

Conservation Groups appealed the Secretary's decision to circuit court.[47] After transfer from Trimble Circuit Court, the Franklin Circuit Court rejected Appellants'

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[44] The Kentucky federal district court recently recognized the Cabinet's failure to act on renewal permits for wastewater discharges in a case regarding LG&E's Mill Creek coal-fired plant, declining to give the Cabinet's interpretation of a permit term deference since "it has for over seven years been unable to advance LG&E's permit renewal request." *Sierra Club v. Louisville Gas & Elec. Co.*, No. 3:14-CV-391-DJH, 2015 WL 5105216 (W.D. Ky. Aug. 31, 2015), attached as App. 7.

[45] AR Dkt. No. 73, December 1, 2010 Secretary's Order at 1, attached to Cabinet Br. as Appendix 4.

[46] AR Dkt. No. 52, September 23, 2010 Hearing Officer's Order at 1-7 (incorporated "as if set forth verbatim" in the Secretary's Order), attached to Cabinet Br. as Appendix 5; Secretary's Order at 1.

[47] Neither the Cabinet nor LG&E challenged Conservation Groups' standing before this Court, the Court of Appeals, or in Circuit Court. Conservation Groups each have members who use the Ohio River downstream of the Trimble plant to kayak (Kimberley Hillerich Dec. ¶ 4-8), fish (Tim Guilfoyle Dec. ¶ 2-6), boat (John Blair Dec. ¶ 2-4), and take photographs (Richard Hill Dec. ¶ 4-6) and whose enjoyment of the river is diminished as a result of pollution from the Trimble plant. *Id.* These declarations were included as part of

motions to dismiss for lack of jurisdiction.[48] Following briefing on the merits and oral argument, the Franklin Circuit Court reversed the Cabinet Secretary's order, concluding—based on the plain language of the Kentucky statute and regulations—that the Cabinet had a mandatory duty to conduct a BPJ analysis to determine the limits on dissolved metals in Trimble's wastewater.[49] The court further concluded that the Cabinet's selection of a settling pond as the best available technology for treating these discharges was not supported by substantial evidence.[50] The Cabinet and LG&E appealed the decision to the Kentucky Court of Appeals, which affirmed the Franklin Circuit Court's decision on all fronts.[51] Appellants have appealed only the legal issues of whether the Cabinet was required to conduct a BPJ analysis as a matter of law, and jurisdiction. They have not appealed the decision of the Court of Appeals finding that the record does not contain substantial evidence to support the conclusion that the Cabinet conducted a proper best professional judgment analysis.

E. Standard of Review

When reviewing an agency decision, courts focus on the question of arbitrariness—whether the agency acted within the scope of its statutory authority, whether it applied the correct rule of law, and whether its decision is supported by

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Conservation Groups' Opening Brief on the Merits in Franklin Circuit Court, and are attached to this brief as App. 8.

[48] R. 278-281, July 5, 2012 Franklin Circuit Court Order Den. Mot. to Dismiss at 3-4, attached to this brief as App. 9.

[49] Franklin Circuit Court Op. at 1, 7-8.

[50] *Id.* at 6-7, 12-14.

[51] Court of Appeals Op. at 1, 6-21.

substantial evidence in the record.[52] Administrative decisions must be overturned where an agency's decision is based on an incorrect interpretation of the law,[53] or where its findings of fact are not supported by substantial evidence in the record before the agency.[54] "Substantial evidence" is evidence that "has sufficient probative value to induce conviction in the mind of a reasonable person."[55]

ARGUMENT

I. SUMMARY OF ARGUMENT

The Court of Appeals properly found that the Cabinet was required, as a matter of law, to set technology-based limits for dissolved metals in Trimble's scrubber wastewater, and it failed to do so. The Clean Water Act requires permits to contain technology-based limits for each pollutant discharged. These limits must be derived from one of two places: national effluent limit guidelines promulgated by EPA, or an agency's case-by-case determination based on its best professional judgment.[56] Because the 1982 guidelines for power plants do not set technology-based limits for metals in scrubber wastes,[57] the Cabinet had a clear mandatory duty to exercise its BPJ for Trimble's scrubber wastewater.

The Court of Appeals applied the clear language of the governing statute and regulation, and properly rejected all of the same arguments that Appellants present

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[52] *Lindall v. Ky. Ret. Sys.*, 112 S.W.3d 391, 394 (Ky. App. 2003).
[53] *Ky. Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky. App. 1994).
[54] *500 Assocs., v. Natural Res. & Envtl. Prot. Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006).
[55] *Bd. of Comm'rs of Danville v. Davis*, 238 S.W.3d 132, 135 (Ky. App. 2007) (quoting *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App.1994)).
[56] 40 C.F.R. § 125.3(c)(1)-(3).
[57] 40 C.F.R. § 423.15.

again here. The crux of all of Appellants' arguments is that the Court of Appeals should have ignored the plain language and purpose of the Clean Water Act and the governing regulations, and instead granted deference to the Cabinet's flawed interpretation of the non-binding EPA Permit Writer's Manual. But no amount of deference can reconcile the Cabinet's flawed interpretation with the clear language in the regulations and the goals of the Act.

Appellants' Permit Writer's Manual argument also fails on its own account. Appellants contend the Cabinet cannot regulate pollutants that EPA considered regulating in national guidelines but determined that a limit was not necessary. Here, Appellants cannot point to any EPA statement that limits for toxic pollutants in scrubber wastewater are not necessary, because EPA has never stated anything of the sort. To the contrary, at the time EPA issued the 1982 ELGs, EPA explicitly stated that it excluded scrubber wastewater from regulation because it lacked data, and that it intended to establish BAT limits on this waste stream in the future. Moreover, EPA has repeatedly and consistently confirmed that the 1982 ELGs do not set limits on toxic pollutants from scrubber wastewater, and advised that states should set case-by-case limits in the interim until the new guidelines were issued.

Without legal support for their position, Appellants and amici rely heavily on policy arguments. Appellants posit that the Clean Water Act and caselaw value permit uniformity above other values, however, the principal purpose of the Clean Water Act is "the elimination of all pollutant discharges," and uniformity is a "lesser

value."[58] Appellants and amici's argument that the Court's ruling would impose an impossible burden and destroy Kentucky's economy is disingenuous since the Cabinet has been arguing for the last five years (although it did not appeal the issue to this Court) that it did in fact conduct a BPJ analysis for Trimble. Finally, the Court of Appeals' ruling applies only in the limited facts of this case and does not set a bright line rule for every discharge permit the Cabinet issues or renews.

Over the last six years since the Cabinet issued the Trimble permit, EPA has moved forward in proposing and finalizing new national guidelines that set limits on the toxic pollutants in scrubber wastewater. The new ELGs support Conservation Groups' position that the Trimble plant should have been doing much more to limit its toxic water discharges, and nothing in the new rule retroactively cures the Cabinet's legal failures. The new guidelines do however make fixing the unlawful Trimble permit easy; the Cabinet should incorporate the new limits into the permit immediately with a compliance date that is as soon as possible.

II. THE CABINET WAS REQUIRED TO USE ITS BEST PROFESSIONAL JUDGMENT TO SET CASE-BY-CASE LIMITS FOR TOXIC POLLUTANTS IN TRIMBLE'S SCRUBBER WASTEWATER.

The Court of Appeals and Franklin Circuit Court relied on the plain language of the statute and controlling regulations to conclude that the Cabinet had a mandatory duty to conduct a BPJ analysis for the dissolved toxic metals in Trimble's scrubber wastewater. The Clean Water Act mandates that NPDES permits include

[58] *NRDC v. EPA*, 859 F.2d 156, 198-201 (D.C. Cir. 1988) (citing *American Frozen Food Inst. v. Train*, 539 F.2d 107, 124 (D.C.Cir.1976) ("The principal purpose of the Act is to achieve the complete elimination of all discharges of pollutants into the nation's waters. . .").

technology-based effluent limits for each pollutant discharged under a permit.[59] As succinctly stated by the D.C. Circuit, "the statute sets forth an absolute prohibition on the discharge of any pollutants" unless authorized by permits that incorporate appropriate technology-based limits.[60]

The Clean Water Act regulations require permitting authorities to set technology-based limits under one of three possible methods: 1) application of EPA's national guidelines; 2) to the extent the guidelines are inapplicable, on a case-by-case basis by the permitting agency; 3) "[w]here promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, *or to certain pollutants*, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act."[61] Thus, as the Court of Appeals correctly found, because the 1982 guidelines apply only "to certain pollutants" in scrubber wastewater, "[t]he Act expressly instructs that…a case-by-case review is required in order 'to carry out the provisions of the Act.'"[62]

A. Appellants' Arguments Ignore the Controlling Clean Water Act Regulation.

Appellants contention that BPJ permitting is an interim measure that can be imposed only "prior to" EPA's promulgation of guidelines for a particular category of point sources confuses the issue at hand, and entirely ignores the governing

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[59] 33 U.S.C. §§ 1311(a), 1342.
[60] *NRDC v. EPA*, 859 F.2d 156, 185 (D.C. Cir. 1988) (citing 33 U.S.C. § 1311(a)-(b)).
[61] 40 C.F.R. § 125.3(c)(1)-(3) (emphasis added).
[62] Court of Appeals Op. at 14 (quoting 40 C.F.R. § 125.3(c)(3)); Franklin Circuit Court Op. at 8 ("[W]here the EPA has not established an ELG, the Cabinet is required to set effluent limits using BPJ analysis.").

regulations. There is no dispute that the 1982 ELG does not contain limits for dissolved metals in scrubber wastewater. The question at hand, as the Court of Appeals recognized, is whether the Cabinet was required to undertake a case-by-case analysis under 40 C.F.R. § 125.3(c)(2) or (3) for the toxic pollutants not regulated by the 1982 ELG, including arsenic, mercury, and selenium.[63] Appellants' argument that BPJ cannot be applied once an ELG is established effectively asks this Court to render an interpretation of the Clean Water Act that is contrary to the governing regulations, as well as EPA's interpretation.

Appellants' argument that BPJ cannot apply if a guideline exists for the source category ignores the plain language of the governing regulations at 40 C.F.R. § 125.3(c)(2) & (3), which explicitly state that the permitting authority must set case-by-case limits where the guidelines are inapplicable, and where the guidelines do not apply to all aspects of the discharge or to all pollutants. Appellants' contention that the "the overwhelming weight of federal case law" supports the Cabinet's interpretation is belied by the fact that none of the cases provided involve the governing regulation at 40 C.F.R. § 125.3(c)(2) & (3).[64]

The two opinions Appellants cite from the D.C. Circuit in the *NRDC v. EPA* case do not support their view of BPJ.[65] That case involves challenges to certain provisions of the 1984 update to the NPDES regulations, which did not include any challenge to the provisions of 40 C.F.R. § 125.3(c)(2) or (3) that require permitting

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[63] Court of Appeals Op. at 12-13.
[64] LG&E Br. at 19.
[65] LG&E Br. at 16-19, 28, 38; Cabinet Br. at 16.

authorities to impose technology-based limits using BPJ in certain circumstances.[66] Nor do the cases hold what Appellants claim. Appellants contend that the 1987 case holds that BPJ limits *only* apply if no national guidelines have been promulgated,[67] but the D.C. Circuit's decision does not make any such blanket pronouncement. Instead, the passage cited by Appellants laying out background information on the NDPES permitting program states in full:

> Permits are issued only so long as the point source meets all applicable effluent limitations. *Id.* § 1342(a)(1). If no national standards have been promulgated for a particular category of point sources, the permit writer is authorized to use, on a case-by-case basis, "best professional judgment" to impose "such conditions as the permit writer determines are necessary to carry out the provisions of [the Clean Water Act.]" *Id.* Thus, compliance with a permit is generally deemed to constitute compliance with the Act's requirements. *Id.* § 1342(k).[68]

The 1988 *NRDC v. EPA* opinion also does not address the regulation's requirement in 40 C.F.R. § 125.3(c) to conduct BPJ where necessary. In fact, contrary to Appellants' representation, the D.C. Circuit rejected a similar argument to the one Appellants present here in addressing Industry's challenge to BPJ in the regulation's anti-backsliding provision in 40 C.F.R. § 122.44(l). In general, this provision prohibits discharge permits from "backsliding" into more lax limits if new national guidelines are promulgated that are less stringent than existing BPJ limits. Industry argued, like here, based on statutory language and legislature history, that EPA's promulgation of national guidelines must invalidate BPJ limits established prior to national guidelines

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[66] *NRDC v. EPA.*, 822 F.2d 104, 109 (D.C. Cir. 1987) (listing issues); *NRDC v. EPA*, 859 F.2d 156, 165 (D.C. Cir. 1988) (same).
[67] *See* LG&E Br. at 16.
[68] *NRDC*, 822 F.2d at 111.

because BPJ limits "are simply temporary measures designed to fill the gap until nationally uniform effluent limitations guidelines have been developed."[69] The court rejected that argument, finding the anti-backsliding provision to be a reasonable interpretation of the statute, "in conformity with the overriding goal of the CWA….to achieve the complete elimination of all discharges of pollutants into the nation's waters."[70]

Appellants also leave out critical context in citing to yet another *NRDC v. EPA* case from a federal district court in California,[71] where the question at issue was whether EPA has a mandatory duty to promulgate national guidelines for storm water discharges from the construction industry. The district court held that EPA does in fact have a mandatory duty to establish national guidelines for toxic and nonconventional pollutant discharges, and cannot rely on states setting case-by-case limits in individual permits.[72] Under the Clean Water Act, EPA has a mandatory duty to establish and update the national guidelines, *and* state permitting agencies have a mandatory duty to take a close look at the particular application and set case-by-case limits for pollutants and processes that are not covered by existing guidelines under 40 C.F.R. § 125.3. Establishing and updating guidelines, and setting case-by-case limits are complementary duties that serve the Act's purpose, and are not mutually exclusive.

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[69] *NRDC*, 859 F.3d at 197 (1988).
[70] *Id.* at 201 (citing to *American Frozen Food Inst. v. Train*, 539 F.2d 107, 124 (D.C.Cir.1976)) (internal citations omitted).
[71] LG&E Br. at 15-16 (quoting *NRDC v. EPA*, 437 F. Supp. 2d 1137, 1160 (C.D. Cal. 2006)).
[72] *NRDC*, 437 F. Supp. 2d at 1157-63.

Finally, although some states have found otherwise, contrary to Appellants' contention, other states have recognized that permitting authorities have a mandatory duty to use BPJ to set permit limits for metals in scrubber wastewater. For example, the Indiana Office of Environmental Adjudication affirmed that the Indiana permitting authority had a mandatory duty to use its BPJ to set permit limits for metals in scrubber wastewater at the Clifty Creek coal-fired power plant that discharges into the Ohio River.[73] The Indiana decision is entirely consistent with the Circuit Court's Order here.[74]

B. The Court of Appeals Decision Properly Applied the Plain Language of the Controlling Regulation.

The Court of Appeals affirmed the Circuit Court's holding that the plain language of the Act and the regulations require a case-by-case review "to carry out the provisions of the Act," when the ELG applies only to "certain pollutants" in a discharger stream.[75]

The Cabinet's new interpretation of the term "applicable" in 40 C.F.R. § 125.3 is illogical. Subsection (c)(2) states case-by-case limits apply "to the extent that EPA-promulgated effluent limitations are inapplicable," meaning, where guidelines do not

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[73] *See In the Matter of: Objection to the Issuance of NPDES Permit No. IN0001759 to Indiana Kentucky Electric Corp. Clifty Creek Plant*, Cause No. 12-W-J-4541, *Findings of Fact, Conclusions of Law and Order Denying Summary Judgment* (May 1, 2014) at 13, ¶ 14, attached as App. 10. Subsequent to that decision and the issuance of the final ELGs, the parties agreed to stay the hearing because expenditure of resources for such hearing "is unlikely to be necessary if. . . [the agency and discharger] take timely steps to properly implement the revised ELGs in the next NPDES permit." *See* Cause No. 12-W-J-4541, *Petitioners' Unopposed Motion for Stay of Proceeding* (Oct. 30, 2015) at 4, attached as App. 11.

[73] Franklin Circuit Court Op. at 8.

[75] Court of Appeals Op. at 14.

apply. The Cabinet claims that the term "applicable" in 125.3(c)(2) is limited to mean guidelines that have not been remanded or withdrawn because subsection (c)(1) states "these effluent limitations are not applicable to the extent that they have been remanded or withdrawn."[76] While that statement describes *one* reason a guideline could be inapplicable, nowhere does the regulation state that the very limited situations of remand and withdraw are the *only* ways that a guideline could be inapplicable. Further, the Cabinet failed to reference the definition in the regulations for "applicable standards and limitations," which are defined as: "all State, interstate, and federal standards and limitations to which a 'discharge,' … is subject under the CWA, including 'effluent limitations,' water quality standards, standards of performance, toxic effluent standards or prohibitions…[etc]."[77] Thus, logically, an "applicable" standard is a standard that applies to the discharge, not simply one that has not been withdrawn as the Cabinet asserts. In any event, as the Cabinet recognizes, the Court of Appeals based its decision on 125.3(c)(3).

Appellants' vague assertion that that the Court of Appeals failed to consider separate portions of the Clean Water Act regarding water quality standards, which are not at issue in this case, and the obligation to monitor (but not limit) whole effluent toxicity, evinces a misunderstanding of the fundamental structure of the Clean Water Act. The Cabinet asserts that the Circuit Court held an "impression" that the Trimble permit left metals in the discharge unregulated, whereas LG&E speculates as to what

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[76] Cabinet Br. at 5-6.
[77] The "Definitions" in 40 C.F.R. § 125.2 refer to 122, 123 and 124. *See* 40 C.F.R. § 122.2.

it thinks may have "animated" both the Circuit Court and Court of Appeals with regard to pollutants such as mercury, arsenic, and selenium that are "not subject to specific limits in the ELGs."[78] Appellants appear to suggest that by complying with one part of a statute the Cabinet can comply with a completely different section of the same statute. They are wrong. Nothing in the framework of the Act nor in any caselaw even remotely suggests that the Cabinet can comply with the Act's requirement to impose technology-based limits in wastewater discharge permits merely by satisfying water quality standards. Permitting authorities are always required to set technology-based limits on discharges.[79] Whether or not water-quality based limitations are required is an entirely separate analysis; therefore whether or not the Cabinet conducted a water quality analysis has nothing to do with the question in this case of whether it applied the appropriate technology-based limits.[80]

C. The 1982 Effluent Guidelines Do Not Excuse the Cabinet's Failure to Use its Best Professional Judgment to Set Limits on Toxic Pollutants in Trimble's Scrubber Wastewater.

The Court of Appeals properly rejected Appellants' arguments that the Cabinet did not have to set limits on Trimble's toxic discharges because the 1982 ELGs apply. The court recognized that EPA explicitly excluded scrubber wastes from the rulemaking:

> The 1982 ELG did not set effluent limits for arsenic, mercury, or selenium. Rather, the EPA's final rule stated that thirty-four toxic pollutants, including these three

[78] Cabinet Br. at 12, LG&E Br. at 33.
[79] 33 U.S.C. §§ 1311, 1342.
[80] *Id.* § 1312(a); *accord* LG&E Br. at 3.

> metals, were "*excluded* from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator."[81]

The catch-all "low volume waste" category of the 1982 Guidelines set technology-based limits only for pH, total suspended solids, and oil and grease,[82] and indisputably do not set any limits for metals – the major component of scrubber waste that raises public health concerns.[83] In fact, in 1982 EPA explicitly reserved scrubber waste for a future rulemaking.[84] EPA more recently explained "the 1982 rulemaking did not establish best available technology economically achievable (BAT) limits for FGD wastewaters because EPA lacked the data necessary to characterize pollutant loadings from these systems."[85]

Appellants continue to base the bulk of their case on a statement in the non-binding Permit Writer's Manual that provides, "BPJ-based limits are not required for pollutants that were *considered* by EPA for regulation under ELGs, but for which EPA determined that no ELG was *necessary*."[86] The Court of Appeals properly rejected this

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[81] Court of Appeals Op. at 12 (emphasis added) (quoting Order Approving Proposed Changes to Effluent Limitations Guidelines for the Steam Electric Power Generating Point Source Category, 47 Fed. Reg. 52,290, 52,303 (Nov. 19, 1982) (codified at 40 C.F.R. pts. 125 and 423)); *accord* Franklin Circuit Court Op. at 9 ("The dissolved metals at issue here are plainly not 'subject to' the 1982 ELG – they were *excluded from* the ELG.")
[82] 40 C.F.R. § 423.12.
[83] *See* Franklin Circuit Court Op. at 9 ("[N]o standards are established for any of the scrubber wastewater pollutants of concern to Petitioners.").
[84] 47 Fed. Reg. 52,290-291 (Nov. 19, 1982) ("EPA *is reserving effluent limitations* for four types of wastewaters *for future rulemaking*" including "flue gas desulfurization waters.") (emphasis added).
[85] Hanlon Memo at 3 (App. 4).
[86] LG&E Br. at 23-4 (emphasis added) (quoting EPA, *NPDES Permit Writers Manual* (December 1996) at 69 (available at http://nepis.epa.gov/Exe/ZyPDF.cgi/20004BM3.PDF?Dockey=20004BM3.PDF). *See also*

argument because EPA never determined that an ELG was "unnecessary" for toxic pollutants in scrubber wastewater.

> The Cabinet improperly relied upon the 1996 Permit Writer's Manual as a basis for forgoing a review which would likely have required LG&E to update clearly obsolete and ineffective pollution control technology....[s]uch reliance is in clear contravention of the Act's purpose, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in part through the development of "technology necessary to eliminate the discharge of pollutants into the navigable waters" of the United States.[87]

Quite to the contrary, as detailed above, at the time EPA issued the 1982 ELGs, EPA explicitly stated that it did not set such limits because it lacked data and it intended to establish BAT limits on these waste streams in the future.[88] Additionally, the Cabinet ignores directly contrary language in the Permit Writer's Manual, which provides, "case-by-case TBELS [technology-based effluent limits] are established in situations where EPA promulgated effluent guidelines are inapplicable" including where "effluent guidelines are available for the industrial category, but no effluent guidelines requirements are available for the pollutant."[89]

Relying on the dissenting opinion at the Court of Appeals, Appellants make much ado over the Circuit Court's use of the word "undetectable" to explain why

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Cabinet Br. at 7-8 (citing EPA, *NPDES Permit Writers Manual* (Sept. 2010) at 5-18 (available at https://www.epa.gov/sites/production/files/2015-09/documents/pwm 201 O.pdf). Appellees cite to two versions of the Permit Writer's Manual. The later version was issued after the Trimble Permit.

[87] Court of Appeals Op. at 13-14.

[88] 47 Fed. Reg. 52,290-291 (Nov. 19, 1982). The Manual explicitly states that it is non-binding, and a guidance manual could never overrule the plain language of a statute or regulation.

[89] *See* EPA, *NPDES Permit Writers Manual* (Sept. 2010), *supra*, at 5-45.

EPA excluded dissolved metals from the 1982 guidelines.[90] Whether or not the Circuit Court employed the most suitable word choice, however, has zero implication on the legal issues in this case. The Circuit Court decision is abundantly clear. The court recited the language that toxic metals were "excluded from national regulation" from the 1982 ELGs, and explained that recent EPA documents confirm that in 1982, EPA did not have adequate data on toxic discharges or adequate information on treatment technologies to set limits on dissolved metals in scrubber wastewater.[91] EPA *never* determined that regulation of toxic discharges in scrubber wastewater is unnecessary.

In fact, EPA issued guidance in 2010 confirming that, despite the 1982 ELGs, states must use their "best professional judgment" to set case-by-case technology-based effluent limits on scrubber waste until the new ELGs are finalized.[92] EPA repeatedly confirmed this position in subsequent letters to state permitting agencies.[93]

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[90] Cabinet Br. at 7-8; LG&E Br. at 24.

[91] Franklin Circuit Court Op. at 10-11.

[92] Hanlon Memo at 2 ("[A]n authorized state must include technology-based effluent limitations in its permits for pollutants not addressed by the effluent guidelines for that industry.").

[93] *See, e.g.*, EPA Region 4 letter to Tennessee Valley Authority (Mar. 21, 2012) at 1 ("Your letter expresses the view that the establishment of BPJ technology limits in a permit in the absence of an applicable [ELG] is discretionary and not required by the CWA. The EPA does not agree."); EPA Region 4 letter to Tennessee Department of Environment and Conservation (Aug. 8, 2011) at 2 ("Where technology-based effluent guidelines do not address all waste streams or pollutants discharged . . . the permitting authority must establish TBELs on a case-by-case basis in individual NPDES permits, based on its best professional judgment."); EPA Region 2 letter to New York Department of Environmental Conservation (Oct. 28, 2011) at 2 ("Appropriate technology-based limits are needed for these discharges to comply with CWA § 301(a)(1) and applicable federal regulations at 40 CFR § 125.3")(Exs. 7-9 to Conservation Groups' Franklin Circuit Court Opening Brief), attached as App. 12.

D. The Cabinet Is Not Entitled to Unbridled Deference in Interpreting Clean Water Act Regulations.

Appellants contend that the Court of Appeals should have ignored the purpose and the plain language of the Clean Water Act and the governing regulations, and instead grant deference to the Cabinet's interpretation of the non-binding Permit Manual.[94] Putting aside the fact that the Court found no ambiguity in the governing law, while an agency is entitled to some deference in interpreting its own regulations, that deference cannot support an interpretation that contradicts the clear language of the regulations and the goals of the Act. Moreover, the Cabinet is not entitled to great deference in construing EPA regulations that are merely parroted into state law in a manner that is contrary to EPA's interpretation.

An agency's interpretation should be upheld if it is "compatible and consistent with the statute under which it was promulgated."[95] Even if there were some ambiguity in the controlling law, the Cabinet's position here is neither compatible with the governing regulations nor consistent with the purpose of Clean Water Act. Instead, as the Court of Appeals found, the Cabinet's reliance on the Permit Writer's Manual is "in clear contravention of the Act's purpose."[96] And, as aptly articulated by the Circuit Court, it is "contradictory that the EPA, aiming to eliminate the discharge of pollutants by 1985, would in 1982 establish a guideline recognizing the many toxic

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[94] LG&E Br. at 26; Cabinet Br. at 12-16.

[95] *Com. v. Family Home Care, Inc.*, 98 S.W.3d 524, 527 (Ky. Ct. App. 2003); *see also Morgan v. Natural Res. & Envtl. Prot. Cabinet*, 6 S.W.3d 833, 841 (Ky. Ct. App. 1999) ("[S]tatutory provisions should be interpreted to serve the purpose of the legislation.")

[96] Court of Appeals Op. at 13-14.

pollutants found in scrubber wastewater but intending to freeze all efforts to reduce discharge or these pollutants indefinitely, pending new regulations."[97]

Appellants also claim that the Court of Appeal's decision "contradicts the language of the regulation" while the Cabinet's interpretation "reads the regulation as a whole and harmonizes the paragraphs."[98] In fact, the opposite is true. Appellants' reading of the regulation would not give any effect to 40 C.F.R. § 125.3(c)(3), which requires the Cabinet apply a combination of the national guideline and a case-by-case determination "[w]here promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act." LG&E's contention that state permitting agencies should never conduct a BPJ analysis because that duty is in the province of EPA, not the states, entirely ignores this section.[99] And, as explained in section II.B above, the Cabinet's new interpretation that this section only applies if the guideline is "not remanded or withdrawn" is implausible and unreasonable. The Court's reading properly gives effect to all three clauses according to their plain reading: the Cabinet should have applied Sections 125.3(c)(2)-(3) because the 1982 guideline applies to some pollutants, but not the toxic pollutants in scrubber wastewater.

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[97] Franklin Circuit Court Op. at 12.
[98] Cabinet Br. at 15; *see also* LG&E Br. at 30
[99] LG&E Br. at 33-34.

Also, the Cabinet asks for deference in its interpretation of federal regulations that are simply incorporated into state law.[100] When a state merely parrots a federal statute or regulation, courts will look to the federal authority for guidance. As the U.S. Supreme Court held:

> [T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation, but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.[101]

The Supreme Court has also held that where a state agency's interpretation of the Clean Air Act conflicts with EPA's interpretation, deference must go to EPA rather than the state agency.[102] If there is any question about deference here, it should appropriately go to EPA, which has consistently stated that its 1982 guidelines did not set effluent limits for metals in scrubber wastes, and as such states must use their "best professional judgment" to set technology-based limits for those pollutants in discharge permits.[103]

Finally, the Court must reject LG&E's overly formalistic argument that the Court of Appeals' decision should be vacated for supposedly not following the two-step Chevron framework.[104] In fact, the Court of Appeals decision found that the Clean Water Act plainly requires the Cabinet to set technology-based limits based on best available technology, and that federal uniform standards are the minimum

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[100] *See* KAR 5:080 § 2 (incorporating 40 C.F.R. § 125.3 in full).
[101] *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006).
[102] *Alaska Dep't. of Envtl. Conservation v. EPA*, 540 U.S. 461, 485, 490 (2004).
[103] 47 Fed. Reg. at 52,291; 40 C.F.R. § 125.3; Hanlon Memo at 1-2 (App. 4).
[104] LG&E Br. at 35-39.

standard that must apply to a state-issued permit.[105] Finding no ambiguity, the Court moved on to the federal regulation and again found the regulation to be clear that "a case-by-case review is required in order to 'carry out the provisions of the Act'" when the guideline only applies to "certain pollutants" in a wastestream.[106]

III. APPELLANTS' POLICY ARGUMENTS CANNOT OVERCOME THE CABINET'S LEGAL FAILURES.

The Clean Water Act and its implementing regulations are clear: where EPA's national guidelines do not set the required technology-based limits for all pollutants in an industry's waste stream, states must use their BPJ to impose those limits in discharge permits. In the absence of any law to support their untenable position, Appellants and amici make several misplaced policy arguments as to why they ought to prevail that have no connection to the facts of this case. Appellants and amici incorrectly assert that the Court of Appeal's order: 1) undercuts the framework Congress intended by placing pollution prevention above national uniformity; 2) places undue burdens on the Cabinet to conduct a BPJ analysis on every discharge permit; 3) imposes burdens on companies in Kentucky that do not exist in any other states and will wreak unspecified business upheaval; and 4) fails to recognize that the permit complies with the law simply because EPA did not veto it.[107]

First, courts have rejected similar industry efforts to place the goal of uniformity under the Act above pollution prevention. As the D.C. Circuit has bluntly

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[105] Court of Appeals Op. at 10.
[106] *Id.* at 14.
[107] Cabinet Br. at 8-9, 15-18; LG&E Br. at i, 13, 16-19, 27-35; Amicus Curiae Kentucky Chamber of Commerce Supreme Court Brief [hereinafter "Amicus Br."] at 2-3, 8-14.

stated, the Clean Water Act "simply does not *require* uniformity in all circumstances."[108] In *NRDC v. EPA*, industry plaintiffs challenged EPA's anti-backsliding regulation on the ground that requiring individual dischargers to comply with case-by-base effluent limits where EPA subsequently issues more lenient national standards would undermine the Act's goal of uniformity.[109] The D.C. Circuit swiftly rejected this argument, concluding that the "overriding goal of the Act" is "the *elimination* of all pollutant discharges," and that "principal purpose" can override the "lesser value" of uniformity.[110] The court explained that since the factors a state considers in case-by-case determinations are the same factors that EPA considers in establishing a national guideline, the standard remains the same whether it is set based on a national guideline or on a case-by-case exercise of the state's BPJ.[111]

Second, the Court must reject Appellants' and amici's hyperbolic argument that the Court of Appeals decision would require the Cabinet to conduct a BPJ analysis for every pollutant in a waste stream where a recent ELG applies.[112] The Court's decision would require the Cabinet to conduct a BPJ analysis to set best available technology limits on toxic pollutants on the limited facts presented to the Cabinet when it considered Trimble's draft permit: where a major discharger is proposing to dump millions of gallons of toxic wastewater into the Ohio every day;

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[108] *NRDC v. EPA*, 859 F.2d 156, 201 (D.C. Cir. 1988).
[109] *Id.* at 198-99.
[110] *Id.* (citing *American Frozen Food Inst. v. Train*, 539 F.2d 107, 124 (D.C.Cir.1976) ("The principal purpose of the Act is to achieve the complete elimination of all discharges of pollutants into the nation's waters. . .").
[111] *Id.* at 200.
[112] Cabinet Br. at 16-17, LG&E Br. at 27-30; Amicus Br. at 8, 10-11.

where the agency has clear evidence that toxic pollutants are prevalent in the discharge; EPA guidelines are severely outdated and do not set limits on the toxic dissolved metals like selenium and mercury; and due to the passage of time since EPA established the operative guideline, there are far more effective treatment options in use in the industry. Instead of imposing an "impossible" burden,[113] in this case, because litigation has delayed this permit for so many years, all the Cabinet needs to do when it reissues the permit is to require Trimble comply with the 2015 ELG as soon as possible.

It does not follow from the Court's decision that the Cabinet must conduct a BPJ analysis for every pollutant for every minor discharger in the state with no regard to how recently a national guideline had been issued. As the Cabinet states, it must apply "its considerable expertise and experience to the difficult balancing required in issuing permits."[114] As a delegated permitting agency, the Cabinet must keep up-to-date with EPA developments and guidance, and discern when a BPJ analysis is required and how extensive that analysis must be in order to fulfill its statutory duty is to protect the waters of the United States on the behalf of the Commonwealth, as well as the nation as a whole.

Moreover, the Cabinet's assertion that the Court of Appeals' opinion requiring the Cabinet to conduct a case-by-case BPJ analysis in the limited circumstances presented here would be "extraordinarily problematic" or amici's claim that it would

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[113] Cabinet Br. at 16.
[114] *Id.* at 14-15.

cause "serious economic repercussions to the Commonwealth,"[115] flies in the face of the argument it advanced for more than five years of litigation that it actually conducted a BPJ analysis here.[116] At the administrative level and lower courts, Appellants repeatedly cited to Cabinet permit writer Sarah Beard's signed declaration testifying that she did in fact conduct a BPJ analysis for Trimble's scrubber wastewater before issuing this permit.[117] Regardless, under no stretch of the imagination is the Cabinet required to perform an additional BPJ analysis to set additional numeric limits for pollutants not covered in EPA's recent and thorough analysis of the best available technology for treatment, as suggested by Appellants.

Appellants quote various cases for the point that it can be difficult to identify every compound in a discharge, and that is why EPA focuses on regulation of chief pollutants in establishing guidelines.[118] It is true that in certain instances EPA regulates indicator pollutants as surrogates to control other pollutants because the treatment technology, which is the basis for effluent guidelines, will control both.[119] But that is not the case with the 1982 guidelines for power plants, which did not limit the discharge of any toxic pollutants in scrubber wastewater. In this case, at the time the Cabinet issued the Trimble permit in 2010 it was not impossible to identify the

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[115] Cabinet Br. at 16, Amicus Br. at 14.
[116] *Cf.* Cabinet Br. at 16 with LG&E Court of Appeals Brief at 22-24; Cabinet Court of Appeals Brief at 22-25; Joint Cabinet and LG&E Franklin Circuit Court Brief at 20-27.
[117] Beard Aff. at ¶ 14, attached as App. 13. *See also* LG&E Court of Appeals Brief at 22; Cabinet Court of Appeals Brief at 23; Joint Cabinet and LG&E Franklin Circuit Court Brief at 23 (all citing to Beard's affidavit and Beard's deposition (App. 5)).
[118] LG&E Br. at 28 (quoting *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), *Sierra Club v. IGC Hazard*, 2012 WL 4601012 at *8 (E.D. Ky. Sept. 28, 2012), and *NRDC v. EPA*, 822 F.2d at 125 (1987)).
[119] *See e.g.*, *NRDC v. EPA*, 822 F.2d at 125 (1987).

toxic pollutants in scrubber wastewater. EPA's 2009 Final Study, which Conservation Groups submitted to the Cabinet in comments on the draft permit, identified the toxic pollutants of concern and gave the Cabinet the necessary information to conduct a thorough BPJ analysis for Trimble – among other analyses, it described the available pollution control technologies, evaluated their effectiveness at controlling toxic pollutants in scrubber wastes, and analyzed the usage of each in the industry.[120]

Third, the Court of Appeals' and Circuit Court's decisions do not place Kentucky "apart from all other states" in the interpretation of the legal requirements of the Clean Water Act.[121] Before the 2015 guidelines were finalized, EPA repeatedly advised states that the 1982 ELGs do not set limits on toxic pollutants in scrubber wastes, and that states must use their BPJ to impose limits on those pollutants in the interim.[122] Moreover, other states like Indiana have affirmed their permitting authority's obligation to use BPJ to set permit limits on scrubber waste from coal-fired power plants, stating: "until such time as the U.S. EPA promulgates rules that establish BAT for steam electric power generating sources, the [agency] must use its best professional judgment to determine whether a specific technology-based

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[120] EPA 2009 Final Study at 4-26 to 4-71 (App. 3). Moreover, in 2009, 2010, and again in 2013 EPA affirmatively stated that its existing guidelines for power plants are inadequate at limiting the discharge of toxic pollutants in scrubber wastes. The Circuit Court quotes an EPA Fact Sheet that accompanies the proposal for the updated guideline, which states, "[t]he current effluent guidelines . . . do not adequately address the associated toxic metals discharged to surface waters from facilities in this industry." Franklin Circuit Court Op. at 10-11 (quoting EPA Fact Sheet (App. 2)).

[121] Amicus Br. at 13.

[122] Franklin Circuit Court Op. at 10-11 (quoting EPA Fact Sheet (App. 2)).

treatment is the appropriate BAT for a facility."[123] The Court of Appeals' ruling is entirely consistent with the requirements that neighboring Indiana places on the same type of facility, discharging the same type of waste, into the same iconic river.

Finally, Appellants seem to place great weight on the idea that, if EPA declines to veto a state-issued permit, then the permit must necessarily meet all regulatory requirements.[124] But EPA has no obligation to veto state-issued discharge permits that fail to comply with the law, and federal courts have confirmed that EPA has discretion to decline to veto a permit even where it finds the permit violates applicable guidelines.[125]

IV. THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE 2015 GUIDELINES.

EPA's 2015 guideline that applies to power plant wastewater discharge permits starting on January 4, 2016 does not retroactively cure the Cabinet's legal failures from six and a half years ago that has allowed up to 1.55 million gallons of untreated toxic waste to flow directly into the Ohio River every day since.[126] The 2015 guideline sets limits on toxic metals in scrubber wastewater and applies to

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[123] *In the Matter of: Objection to the Issuance of NPDES Permit No. IN0001759 to Indiana Kentucky Electric Corp. Clifty Creek Plant,* Cause No.12-W-J-4541 , *Findings of Fact, Conclusions of Law and Order Denying Summary Judgment* at 13, ¶ 14 (App. 10).

[124] Cabinet Br. at 3; LG&E Br. at i, 9, 18.

[125] *Save the Bay v. EPA*, 556 F.2d 1282, 1291-95 (5th Cir. 1977); *see* 40 C.F.R. § 123.44. EPA Region 4, which includes Kentucky, oversees eight states that have more than 100 coal-fired power plants and its decision not to veto this permit could reflect a variety of factors, including staff resources or prioritization of broader programmatic concerns. *See* EPA Region 4 Letters (App. 12).

[126] *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

permits issued after the rule's effective date. EPA's decision not to set new limits for legacy scrubber wastewater in the 2015 rule is based on specific considerations about how the rule regulates scrubber wastewater and other wastewater streams going *forward*. The rule does not reach back in time to change the requirement that state permitting agencies like the Cabinet were required to use BPJ to set limits for scrubber wastewater prior to the rule's enactment.

EPA's decision not to establish new limits for legacy wastewater in the 2015 rule has no relation to the Cabinet's failure in 2010 to conduct a BPJ analysis for the Trimble Permit. EPA decided not to establish new limits for so-called "legacy wastewater" that was created before the compliance date of the rule because doing so "could encourage plants to alter their operations prior to the date that the final limitations apply in order to avoid the new requirements."[127] For example, a plant could avoid the new requirements by commingling other process wastewater with the legacy scrubber wastewater or worse, rapidly pumping out the toxic legacy scrubber wastewater instead of allowing for more settling of pollutants in the ponds and dilution in receiving waters.[128]

EPA's decision to set uniform standards on scrubber wastewater, and rejection of the alternative of continuing to require permitting agencies determine scrubber requirements on a case-by-case basis, does not mitigate the Cabinet's failure to conduct a BPJ analysis when it issued the Trimble permit in 2010. The 2015

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[127] 80 Fed. Reg. 67,837, 67,855 (Nov. 3, 2015).
[128] *Id.*

guidelines establish uniform limitations for toxic metals in scrubber wastewater that will be effective beginning November 1, 2018.[129] Nothing in the rule changes the law, as EPA recognizes in the rule, that "[i]n the absence of nationally applicable BAT requirements, as appropriate, permitting authorities must establish technology-based effluent limitations using BPJ to establish site-specific requirements based on information submitted by the discharger."[130] Prior to the 2015 rule, as EPA repeatedly advised, permitting authorities were required to establish technology-based effluent limitations on a case-by-case basis in individual permits, based on its best professional judgment or 'BPJ'.[131]

In fact, nothing in the rule would disturb the BPJ limitations that the Cabinet was required to set when it issued the Trimble permit in 2010 until after November 1, 2018, and then only if the BPJ limits determined by the Cabinet were less stringent than the new guidelines. For permits issued after the effective date of the 2015 guideline, but before November 1, 2018, the rule states that "the permitting authority should apply limitations based on the previously promulgated BPT limitations *or the plant's other applicable permit limitations* until at least November 1, 2018."[132] If the Cabinet had set BPJ limitations that were lower than the newly-established scrubber effluent limitation guidelines, Trimble would find itself in exactly the same position as many other sources needing to upgrade controls. More stringent limits would not be

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[129] 80 Fed. Reg. 67,852.
[130] 80 Fed. Reg. 67,888; *see also* 80 Fed. Reg. 67,842.
[131] 40 C.F.R. § 125.3(c); *see* Hanlon Memo at 1-2 (App. 4); 78 Fed. Reg. 34,431, 34,526 (June 7, 2013) (excerpts attached as App. 14).
[132] 80 Fed. Reg. at 67,883 (emphasis added).

a problem because, under the Clean Water Act, the ELGs are "a floor or a minimum level of control."[133]

Appellants spend a great deal of time on the unremarkable notion that installation of treatment systems can take several years.[134] It is no surprise that the 2015 guideline does not apply the day after it was issued; many dischargers will need time to install new technologies in order to comply with the new limitations. Given that neither the Cabinet nor LG&E have taken any steps to limit toxic pollution flowing in the Ohio River since the proposed rule was issued in 2013, the point of this argument is unclear.

LG&E's conclusion that "state permitting authorities have a mandatory duty to postpone the compliance date for the new FGD effluent limits to provide time for implementation" is misleading and inconsequential to the Cabinet's legal failure that is the subject of this case. In truth, the rule requires dischargers to meet the final effluent limitations for FGD wastewater "as soon as possible" after November 1, 2018 *unless* the discharger submits detailed information to the permitting authority demonstrating its need for additional time.[135] Section 423.11(t) of the rule states: "The phrase 'as soon as possible' means November 1, 2018, *unless* the permitting authority establishes a later date, after receiving information from the discharger,

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[133] 80 Fed. Reg. 67,882; *American Petroleum Inst. v. EPA*, 661 F.2d 340, 344 (5th Cir. 1981); *see* Court of Appeals Op. at 10 ("[A] federal ELG is the minimum standard with which a state-issued permit must comply.")
[134] LG&E Br. at 7-9, 39-41; Cabinet Br. at 17-18.
[135] 40 C.F.R. § 423.13(g)(1)(i), 80 Fed. Reg. 67,895.

which reflects a consideration of [several] factors…"[136] Moreover, "if the permitting authority determines a date later than November 1, 2018," it should "provide a well-documented justification . . . [explaining] why the discharger cannot meet the final effluent limitations as of November 1, 2018."[137] LG&E's interpretation that the rule requires delay does not square with its plain language: "Regardless of when a plant's NPDES permit is ready for renewal, *the plant should immediately begin evaluating how it intends to comply with the requirements of the final ELGs.*"[138]

Appellants' argument boils down to the contention that the Cabinet appropriately did not set limits for toxic pollutants in Trimble's permit because it was waiting for EPA to issue the new guidelines, and now that litigation has stretched on for over five years, Appellants argue that they should be subject to the same timeframe in the 2015 Guidelines as other sources. Putting aside the fact that the 2015 guidelines do not in any way excuse the Cabinet's failure to meet its past legal duty, an important practical point that the Court should also consider is that the guidelines only apply to a facility through incorporation in a permit,[139] and the limits will only be incorporated when the Cabinet issues a renewal permit. Given that most facilities in Kentucky operate under expired permits, and the agency does not typically issue renewal permits within the required five-year timeframe, there is a significant risk that the Cabinet would not impose the 2015 guidelines into Trimble's

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[136] 40 C.F.R. § 423.11(t) (emphasis added).
[137] 80 Fed. Reg. 67,883.
[138] 80 Fed. Reg. 67,882-83 (emphasis added).
[139] 80 Fed. Reg. 67,882.

permit for many more years, causing more harm to the Ohio and more risk to public health in the meanwhile.

V. APPELLANTS HAVE NOT APPEALED THE COURT OF APPEALS' DECISION THAT THE CABINET DID NOT CONDUCT A PROPER BEST PROFESSIONAL JUDGMENT ANALYSIS.

Although neither Appellant has raised the issue here, at the lower courts, the Cabinet asserted that it undertook a BPJ analysis to set "best available technology" (BAT) limits on Trimble's wastewater. Because Appellants do not appeal the ruling of the Court of Appeals on this issue, the court's decision on this issue stands that "it is abundantly clear that the Cabinet's permit writer failed to consider vital elements of that regulation [40 C.F.R. § 125.3(c)]....[and] the record does not support the hearing officer's conclusion that the Cabinet conducted a proper case-by-case, best professional judgment analysis pursuant to the Act."[140] In setting BAT, the Cabinet must consider specified factors in the regulation to determine what is the best technology that is both technologically available and economically achievable. Here, the Cabinet did not consider all available treatment options, did not review any documents or studies related to treatment options it did consider, and did not have or request cost information about any treatment option. Specifically,

> the [Cabinet] permit writer charged with drafting the permit in question stated in her testimony that she did not consider any other control technology, nor did she consider the "practicality of expense" of that technology. Furthermore, the permit writer's testimony was conflicted on the subject of her consideration of the reduction in pollutants LG&E's gypsum ponds had

[140] Court of Appeals Op. at 16.

> achieved over time. This is a vital element to be considered pursuant to 40 C.F.R. § 125.3(c).[141]

The Cabinet's limited analysis here does not even come close to measuring up to the careful, searching inquires upheld by other courts.[142]

VI. THE COURTS PROPERLY REJECTED APPELLANTS' JURISDICTIONAL ARGUMENTS.

The Court of Appeals, the Franklin Circuit Court, and the Trimble Circuit Court have repeatedly considered and rejected the same jurisdictional arguments Appellants rehash again here. The Trimble Court properly transferred the case to Franklin Court under KRS 452.105, pursuant to this Court's direction in *Dollar General Stores, Ltd. v. Smith*.[143] "KRS 425.105 and our decisions construing it firmly establish that where venue is improper, the remedy is transfer rather than dismissal."[144]

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[141] *Id.*

[142] In *In re: Dominion Energy Brayton Point*, the Environmental Appeals Board, which hears administrative appeals under all statutes administered by EPA, conducted a searching review of EPA's exercise of its BPJ in setting BAT limits in the NPDES permit for the Brayton Point coal-fired power plant. The Board upheld the permit's BAT limits from an industry challenge because the record contained "a thorough analysis" as to the technological availability of the treatment controls referenced as BAT, the feasibility for use of the technology at the plant, and the fact that other coal-fired power plants were already using the technology. The Board further noted that in setting BAT permit limits, EPA "extensively considered the costs of various technological options," including the economic impacts on the facility, consumers, and the reasonableness of these costs in light of the Clean Water Act's statutory goals. 12 E.A.D. 490 (EPA 2006) (unpublished), 2006 WL 3361084 at *39. In *BP Exploration*, after a careful review the Sixth Circuit upheld EPA's BAT analysis for offshore oil and gas facilities because the agency relied on "empirical data in the rulemaking record," presented in studies showing the effectiveness of the selected treatment technology at removing dissolved oil from wastewater. *BP Exploration & Oil v. EPA*, 66 F.3d 784, 793-94 (6th Cir. 1995).

[143] Court of Appeals Op. at 7-8 (relying on *Dollar Gen. Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007).

[144] *Dollar Gen. Stores* at 165.

The relevant provision of KRS 224.10-470(1) establishes the proper venue for appeal of the Cabinet's final orders in Franklin Circuit Court, and does not, as Appellants urge, vest exclusive jurisdiction in that court.[145] The Kentucky Constitution and this Court's decision in *Thompson* and related cases compel against Appellants' insistence that the words "exclusive jurisdiction" should be read into the statute, as well as Appellants' reliance on irrelevant out-of-state cases. KRS 224.10-470(1) states only that "Appeals may be taken from all final orders of the Energy and Environment Cabinet. Except as provided in subsection (3) of this section, the appeal shall be taken to the Franklin Circuit Court within thirty (30) days from entry of the final order."

As this Court has explained, "Section 109 of Kentucky's Constitution assures that Kentucky has a unitary court system… '[C]onstitutionally speaking, Kentucky has but one circuit court[;] and all circuit judges are members of that court and enjoy equal capacity to act throughout the state."[146] As the Court noted in *Thompson*, the General Assembly could have easily specified in the statute, as it has done elsewhere, that the Franklin Circuit Court has exclusive jurisdiction if that is what was intended.[147] Given Kentucky's unified court system, the Court of Appeals

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[145] Court of Appeals Op. at 8.

[146] *Id.* at 8 (quoting *Com. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162-163 (Ky. 2009), and *Baze v. Com.*, 276 S.W. 3d 761, 767 (Ky. 2008)).

[147] 300 S.W. 3d at 163, n. 27 (citing KRS 44.020(2) (providing that the Franklin Circuit Court has "exclusive jurisdiction of all actions against the Governor's Office for Local Development to compel the payment of claims against the State Treasury.")).

appropriately declined to accept Appellants' argument that KRS 224.10-470(1) is jurisdictional.

Moreover, as the Franklin Circuit Court noted, even if the Trimble Court had dismissed the case, or even if this Court dismisses the case, Appellees would be entitled to re-file before the Franklin Circuit Court under Kentucky's savings statute, KRS 413.270, which provides that an action filed in good faith in the wrong court may be re-filed within 90 days of dismissal.[148] Therefore, even if Appellants are correct, which they are not, the Trimble Court's failure to dismiss the case should be held harmless error under CR61.01.

CONCLUSION

Based on the foregoing, the Court of Appeals decision should be AFFIRMED. Appellees request this Court remand the permit to the Cabinet with instructions to issue a renewal permit requiring compliance with the 2015 ELG as soon as possible.

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[148] R 278-281, Franklin Circuit Court Order Den. Mot. to Dismiss at 3-4 (citing *Jent v. Natural Resources and Environmental Protection Cabinet*, 862 S.W.2d 318 (Ky 1993)).

Respectfully submitted,

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