COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2013-CA-001695

APPEAL FROM THE FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 11-CI-01613

LOUISVILLE GAS AND ELECTRIC COMPANY — APPELLANT

v.

KENTUCKY WATERWAYS ALLIANCE,
SIERRA CLUB, VALLEY WATCH,
SAVE THE VALLEY, AND
ENERGY AND ENVIRONMENT CABINET — APPELLEES

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BRIEF FOR AMICUS CURIAE KENTUCKY CHAMBER OF COMMERCE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amicus Brief was mailed via United States Mail, postage prepaid to: Joe F. Childers, Joe F. Childers & Associates, The Lexington Building, 201 West Short Street, Suite 300, Lexington Kentucky 40507; Nathanial Shoaff, Andrea Issod, Sierra Club, 85 Second Street, Second Floor, San Francisco, CA 94105; Mary A. Stephens, Energy and Environment Cabinet, Office of General Counsel, 200 Fair Oakes Lane, Frankfort, KY 40601, Counsel for Appellees; John C. Bender, R. Clay Larkin, Bingham Greenebaum Doll LLP, 300 W. Vine Street, Suite 1100, Lexington, KY 40507; Sheryl G. Snyder, Jason P. Renzelmann, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor , Louisville, Kentucky 40202-3363, Counsel for Appellant; and Honorable Phillip Shepherd, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair Street, P.O. Box 678, Frankfort, KY 40602-0678 this 14 day of March, 2014. The undersigned also certifies that it did not withdraw the record on appeal from the Clerk's office.

Counsel for Amici Curiae

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The Kentucky Chamber of Commerce (the "Kentucky Chamber") is a business trade organization located in Frankfort, Kentucky. It represents the interests of over 90,000 Kentucky businesses.

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country including Kentucky. The U.S. Chamber regularly advocates on issues of vital concern to the business community, including issues relating to the integrity and the implementation of the Clean Water Act, 33 U.S.C. § 1251 et seq., and it frequently participates as *amicus curiae* in federal and State courts.

In this case, the Franklin Circuit Court erroneously held that the Clean Water Act requires the Kentucky Energy and Environment Cabinet (the "Cabinet") to set "Best Professional Judgment" ("BPJ") limits in the Kentucky Pollutant Discharge Elimination System discharge wastewater permit ("KPDES permit") for Louisville Gas and Electric Company's ("LG&E") coal-fired Trimble County Generation Station ("Trimble"). *Kentucky Waterways Alliance, et al, v. Energy and Environment Cabinet, et al,* C.A. 11-CI-1613 (Shepherd, J.) (Sept. 10, 2013) ("Op.") at 12, 14. Trimble's pollution control system wastewater is subject to the national steam electric generating effluent limitation guidelines ("ELGs") and the KPDES permit was drafted accordingly. But the court below decided differently, asserting that the national ELG was not adequate and holding that the Cabinet "was required to conduct a BPJ analysis" and set facility-specific

numeric discharge criteria based upon an in-depth analysis of treatment technologies, their effectiveness, and costs. Op. at 10.

Amici together represent a broad spectrum of U.S. and Kentucky businesses that could be adversely affected by the decision below. Many of their members are regulated under the Clean Water Act, in Kentucky and elsewhere, and have a strong interest in the consistent, efficient, and predictable implementation of the law and in the integrity of existing permits. Yet, if the holding below that the Clean Water Act's "technology forcing framework" requires the Cabinet to set BPJ limits for all pollutants that are not otherwise subject to a specific numeric ELG stands, *see* Op. at 11, then, among other things, thousands of existing wastewater discharge permits in the Commonwealth are at risk. Because the Cabinet will be forced to set ad hoc limits on a permit-by-permit basis going forward, regulatory consistency, efficiency, and predictability will be lost. New or modified discharge permits will be extensively delayed, retarding economic growth and employment.

The decision below upends a well-established national regulatory scheme and is contrary to decades of settled law. It will, if allowed to stand, cost Kentucky jobs. Therefore, *amici* request that the Franklin Circuit Court be reversed and that the Secretary's final order be affirmed.

BACKGROUND

When Congress established the National Pollutant Discharge Elimination System ("NPDES") permitting program to regulate wastewater discharges, *see* 33 U.S.C. §1342, it delegated to state entities authority over wastewater permits. *See* Approval of Kentucky's NPDES Program, 48 Fed. Reg. 45,597 (October 6, 1983). Under this scheme, the Cabinet's Division of Water ("DOW") implements the KPDES permit

program, *see* KRS 224.16-050 and 401 KAR 5:050, *et seq*, and Kentucky law prohibits DOW from issuing KPDES permits with effluent limitations that are more stringent than the applicable federal limits. KRS 224.16-050(4).

The Trimble permit, KPDES Permit No. KY0041971, was reviewed by the United States Environmental Protection Agency ("EPA") in 2009, and issued by DOW, effective April 1, 2010. Shortly thereafter, Appellees, all vocal critics of coal mining, *see, e.g.,* Sierra Club, "Beyond Coal," available at https://content.sierraclub.org/coal/environmentallaw/plant/trimble (accessed March 9, 2014), sued to block the permit.

The heart of this matter is whether the national steam electric power generating ELG for low volume waste set the effluent limits for the wastewater discharged from the Trimble plant's flue gas desulfurization emission control units. The Cabinet believed that it did and wrote the permit accordingly. *See generally* 40 CFR 423.11(b); 40 CFR 423.15; 40 CFR 123.44; Op. at 9. The court below, however, disagreed, rejecting the national standard because the low volume waste ELG does not contain numeric standards for all pollutants in the waste stream, such as arsenic, mercury and selenium.

Since 1982, EPA and state regulators have applied the low volume waste ELG to the wastewater discharged from flue gas desulfurization emission control units such as those in use at Trimble.[1] After extensive study, EPA concluded that the pollutants of concern in this case were present in amounts too small to be effectively reduced by technologies known to the Agency. *See* Steam Electric Power Generating Point Sources Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source

[1]*See generally,* EPA, "Steam Electric Power Generating Point Source Category: Final Detailed Study Report", at 1-1, 4-1 (Oct. 2009) available at http://water.epa.gov/scitech/wastetech/guide/steam-electric/upload/Steam-Electric_Detailed-Study-Report_2009.pdf (accessed Mar. 11, 2014).

Performance Standards, 47 Fed. Reg. 52,290, 303-4 (Nov. 19, 1982). Nevertheless, the court below called the hearing officer's determination that Trimble's wastewater was "subject to" the ELG "arbitrary" and Appellants' logic "deficient." Op. at 9.

Citing an EPA guidance memorandum issued more than a year after EPA had reviewed the Trimble permit (and a month after it had been granted by DOW), an EPA "fact sheet" published three years after the guidance, and non-specific dicta from 1976 stating the Clean Water Act "establishes a series of steps which impose progressively stricter standards until final elimination of all pollutant discharges is achieved," the court below held that the Cabinet was required to conduct a BPJ analysis for "wastewater at the Trimble Station" before issuing LG&E a permit. Op. at 10-12, 14.[2] It emphasized that the steam electric power generating ELGs had been in effect since 1982. Without citing any relevant authority, it ruled that the mere passage of time necessarily required the Commonwealth and other states to add BPJ limits. *Id.* at 10, 12.

Yet, neither EPA nor the courts have ever interpreted the law in this way, for the Clean Water Act does not allow EPA to issue ELGs and walk away. Instead, Congress

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[2]The ruling below is not a paradigm of clarity. On the one hand:

> The Court finds that the EPA did not consider the scrubber waste pollutants at issue here, determining that no ELG was necessary....it is clear to this Court that in 1982, some *thirty* years ago, these pollutants were not detectable with then-existing technologies and the EPA was thus forced to "exclude" them from the ELG.

Op. at 11. But on the other hand:

> While EPA's efforts to establish ELGs for scrubber wastewater pollutants are recent, the deleterious effects of scrubber wastewater pollutants are old news...the Court finds it implausible that in 1982 the EPA concluded that setting technology based limits for these toxic pollutants was unnecessary and, by the relevant language published in the Federal Register, meant to totally suspend all efforts to decrease discharge of these pollutants.

Id. So, according to the Franklin Circuit Court, EPA first "did not consider" the pollutants at issue in this case; then determined that "no ELG was necessary"; then was "forced to 'exclude' them from the ELG" because they were "not detectable" although these supposedly undetectable pollutants' "deleterious effects...are old news" and therefore would not have established a guideline "recognizing the many toxic pollutants found in scrubber wastewater" while freezing "all efforts to reduce discharge...indefinitely, pending new regulation." *Id.* at 9, 11-12.

requires EPA to publish a biennial plan establishing a schedule for ELG review and revision, as appropriate. 33 U.S.C. §§ 1314(b), (m).

EPA followed the law in this case. In 2005, it identified the steam electric power generating ELGs for study and possible revision. It completed its review in October, 2009. *See* EPA, "Steam Electric Power Generating Point Source Category: Final Detailed Study Report", at 1-1 (Oct. 2009) available at http://water.epa.gov/scitech/wastetech/guide/steam-electric/upload/Steam-Electric_Detailed-Study-Report_2009.pdf (accessed Mar. 11, 2014). On June 7, 2013, EPA proposed new ELGs effective the first permit cycle after July 1, 2017. *See* Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 78 Fed. Reg. 34,432 (June 7, 2013).

At all times relevant, the Cabinet was aware of and accounted for EPA's actions with respect to the possible revision of the relevant ELGs. It submitted the draft Trimble permit for EPA review in 2009. And, among other things, the final Trimble permit included provisions ensuring compliance with any new ELG EPA might issue during the permit term.[3]

[3]The Trimble permit states at pg. III-1 "This permit shall be modified, or alternatively revoked and reissued, to comply with any applicable effluent standard or limitation issued or approved under 401 KAR 5:050 through 5:085, if the effluent standard or limitation so issued or approved: 1. Contains different conditions or is otherwise more stringent than any effluent limitation in the permit; or 2. Controls any pollutant not limited in the permit. The permit as modified or reissued under this paragraph shall also contain any other requirements of KRS Chapter 224 when applicable." Administrative Record Dkt. # 30, Ex. A, Attachment 12.

ARGUMENT

I. THE FRANKLIN CIRCUIT COURT ERRED IN HOLDING THE CLEAN WATER ACT REQUIRED THE CABINET TO CONDUCT A BPJ ANALYSIS IN THIS CASE.

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251. To that end, and to ensure that the Clean Water Act operates effectively and efficiently, it directed EPA to promulgate, review, and periodically revise uniform ELGs prescribing technology-based limitations using standards uniformly applicable within defined industrial categories. *See* 33 U.S.C. §§ 1314(m), 1311(d). ELGs ensure consistent and predictable regulation at similarly-situated facilities and serve as the "controlling standards" for discharge permits nationwide, *see American Frozen Food Inst. v. Train*, 539 F.2d 107, 127 (D.C. Cir. 1976), sparing both businesses and regulators from a patchwork morass of regulatory uncertainty.

Courts have long held that ELGs must not "vary from plant to plant," *United States Steel Corp. v. Train*, 556 F.2d 822, 844 (7th Cir. 1977) and are to be "based primarily on classes and categories." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977). BPJ limits, on the other hand, are created on an ad hoc basis and apply only in very narrow and particular circumstances as an interim measure, a "gap filler," until EPA promulgates an ELG for a given industry. *See* 33 U.S.C. § 1342(a)(1);[4] 40

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[4]The statute states:

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after the opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1318, and 1343 of this title, or (B) *prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.*

33 U.S.C. §1342(a)(1) (emphasis added).