

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF:

**SOUTHWESTERN ELECTRIC POWER
COMPANY, FLINT CREEK POWER
PLANT, AUTHORIZATION TO
DISCHARGE WASTEWATER UNDER
THE NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM
AND THE ARKANSAS WATER AND
POLLUTION ACT; PERMIT NO.
AR0037842**

Docket No. _____

**SIERRA CLUB'S
REQUEST FOR COMMISSION REVIEW AND ADJUDICATORY HEARING**

Under Regulation 8 of the Arkansas Pollution Control and Ecology Commission (“APC&EC”), and Arkansas Code § 8-4-205, Sierra Club respectfully submits this Request for Commission Review and Adjudicatory Hearing of the Arkansas Department of Environmental Quality’s (“ADEQ”) final August 18, 2020 permit authorizing the discharge of wastewater under the National Pollutant Discharge Elimination System (“NPDES”) from Southwestern Electric Power Company’s (“SWEPCO”) Flint Creek Power Plant.¹ In support, Sierra Club asserts:

INTRODUCTION

1. SWEPCO’s coal-burning Flint Creek power plant dumps millions of gallons of wastewater containing a slew of toxic pollutants like arsenic, mercury, lead, boron, cadmium, chromium, copper, nickel, and selenium daily into waters of the United States that Arkansas citizens use

¹ Ex. 1, Final Flint Creek NPDES Permit, No. AR0037842 (Aug. 18, 2020), available at: <https://www.adeq.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/Permits/AR0037842.pdf>.

for recreation, fishing, agriculture, and municipal water supply. The discharges include significant amounts of coal combustion wastewater, which contain numerous highly toxic and bioaccumulative pollutants and heavy metals that cause serious health problems, ranging from reduced cognitive function to cancer. Coal-burning power plant water pollution, particularly selenium, is also toxic to fish and other aquatic life.

2. This Request concerns ADEQ’s failure to fully protect Arkansas residents and the environment from toxic water pollution as required by the Clean Water Act. Specifically, ADEQ’s final NPDES permit for Flint Creek arbitrarily and unlawfully authorizes SWEPCO to continue discharging harmful bottom ash wastewater into waters of the United States until December 31, 2023—the very latest possible date for compliance with the U.S. Environmental Protection Agency’s (“EPA”) Effluent Limitation Guidelines (the “ELG Rule”). *See* Ex. 1, Final Flint Creek NPDES Permit.

3. As explained below, EPA’s ELG Rule requires all wastewater permits issued after January 4, 2016 to eliminate bottom ash wastewater discharges from electric generating units (“EGUs”), such as SWEPCO’s Flint Creek coal-burning power plant, “as soon as possible beginning November 1, 2020, and no later than December 31, 2023.” 40 C.F.R. §§ 423.11(t); 423.13(k)(1)(i). The presumptive compliance date (or “as soon as possible” date) is defined by regulation as November 1, 2020, 40 C.F.R. § 423.11(t); and the permitting authority may determine a later compliance date “*only if* it receives information from the discharger justifying the later date.” Ex. 2, Sierra Club Comments to ADEQ, Exhibit 3 (Aug. 3, 2020).² In either event, the permitting authority must establish the soonest possible compliance date based on a consideration of mandatory regulatory factors, such as the

² Available at: https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/AR0037842_Comments%20by%20Sierra%20Club_20200803.pdf.

time and technical upgrades needed for compliance. 80 Fed. Reg. 67,838, 67,883 (Nov. 3, 2015); 40 C.F.R. § 423.11(t).

4. In issuing the Final Flint Creek NPDES permit, ADEQ failed to evaluate—let alone mention—the ELG Rule’s mandatory regulatory factors, or include a rational explanation for the agency’s decision allowing SWEPCO to continue discharging bottom ash transport water until the latest possible deadline for compliance. Moreover, in its permit application, SWEPCO affirmatively and explicitly refused to include any evaluation of the costs, technical feasibility, or timing for complying with EPA’s ELG Rule. As a result, ADEQ’s final permit for the Flint Creek power plant is arbitrary, capricious, and unlawful, and the Commission must vacate and remand the permit. Ark. Admin. Code § 014.08.1-8.603(C)(1)(a)-(e).

FACTUAL AND LEGAL BACKGROUND

A. The Flint Creek Coal-Burning Power Plant

5. Each day across the United States, coal-burning power plants like Flint Creek discharge millions of gallons of industrial wastewater contaminated with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, copper, nickel, and selenium into the rivers, lakes, and streams of the United States. This pollution is discharged directly from plants, flows from old, unlined surface impoundments that many plants use to store toxic slurries of coal ash and sludge, and seeps from unlined ponds and landfills into ground and surface waters.

6. EPA estimates that at least 5.5 billion pounds of pollution are released into the environment by coal-fired power plants every year.³ These power plants are responsible for at least 50 to 60 percent of the toxic pollutants discharged in waters of the United States.⁴ In its final 2015 ELG

³ U.S. EPA, Environmental Assessment of the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14, Docket No. EPA-HQ-OW-2009-0819-2260 (Apr. 2013).

⁴ *Id.* at 3-13.

rule, EPA estimated that timely implementation of the rule's wastewater limits for EGUs would reduce the amount of toxic pollution in the nation's waters by approximately 1.4 billion pounds, avoiding more than a half billion dollars in social costs associated with those pollutant streams.⁵

7. Flint Creek is a 558 MW coal-burning power plant that burns coal mined out-of-state. The plant discharges more than 5 million gallons per day of contaminated wastewater to Lake SWEPCO, which is designated for use for primary and secondary contact recreation, fish and wildlife propagation, and agriculture.⁶ The reservoir then discharges more than 7 million gallons per day to Flint Creek, which drains into the Illinois and Arkansas River basins, which are classified for primary and secondary contact recreation, raw water source for domestic (public and private), industrial, and agricultural water supplies, propagation of desirable species of fish and other aquatic life, and other compatible uses.⁷ Notably, Flint Creek's discharges are within 5 miles of the City of Gentry's municipal water supply.⁸

8. The wastewater discharged by the Flint Creek power plant includes wastewater effluent and runoff from cooling tower chemical storage area drains; bottom ash overflow and handling system; fly ash overflow; demineralizer regeneration wastewaters; boiler and cooling water blowdown; blowdown, condensate; metal cleaning wastewater; bottom ash hopper overflow; stormwater runoff from the oil storage area; coal pile runoff; process area runoff; and hydrostatic test wastewater.⁹ The

⁵ 80 Fed. Reg. 67,838 (Nov. 3, 2015).

⁶ SWEPCO, NPDES Permit Renewal Application for Flint Creek, Permit No. AR0037842 ("Flint Creek Application"), Attachment C at 10 (June 27, 2017), available at: https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/AR0037842_Complete%20Renewal%20Application_20170627.pdf.

⁷ ADEQ, Flint Creek NPDES Draft Permit Renewal Fact Sheet ("ADEQ Fact Sheet") at 4 (July 3, 2020), available at: https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PN/AR0037842_PN%20of%20Renewal_20200703.pdf.

⁸ Flint Creek Application, Attachment C at 7.

⁹ Flint Creek Application, Attachment D at 1-2, Attachment Q; ADEQ Fact Sheet at 6.

facility discharges coal pile runoff, treated combustion residual leachate (ash landfill leachate) and bottom ash transport water through Outfall 101 and then 001.¹⁰ These coal combustion wastes contain numerous highly toxic and bioaccumulative pollutants, such as arsenic, boron, cadmium, chromium, lead, mercury, copper, nickel, and selenium, among others.¹¹ Moreover, these pollutants are often not fully removed using sedimentation or settling methods similar to those employed at Flint Creek.

B. The Clean Water Act

9. The Clean Water Act sets a national goal of eliminating water pollution. 33 U.S.C. § 1251(a)(1). To achieve the national goal, the Clean Water Act requires facilities to meet a series of increasingly stringent, technology-based effluent limitations, which are the centerpiece of the Act. *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 927 (5th Cir. 1998) (noting that the Clean Water Act was designed to eliminate water pollution “through a system of effluent limitations guidelines”); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988) (“[T]he primary purpose of the CWA is the *elimination* of all pollutant discharges ... The central mechanism for achieving this goal is promulgation and imposition of increasingly stringent effluent limits”).

10. For pollutants that the Clean Water Act classifies as either toxic (such as heavy metals) or “nonconventional” (such as nitrogen), the first standards to be met were best practicable control technology, which Congress intended to apply to all pollutant dischargers by 1977, 33 U.S.C. § 1311(b)(1)(A), followed by the more stringent best available technology, which Congress intended to apply to all pollutant dischargers by 1989, *id.* § 1311(b)(2). These effluent limitations must be based on effluent limitation guidelines, or ELGs, promulgated by EPA, which are nation-wide, minimum standards for categories of sources. *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 127, 129

¹⁰ Flint Creek Application, Attachment D at 1-2; ADEQ Fact Sheet at 6.

¹¹ Flint Creek Application, Attachment D at V1 through V-9, Attachment O.

(1977). These national standards set a federal floor for environmental protection, based on application of wastewater treatment technology. *See Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1974).

11. The Clean Water Act requires all pollutants to be controlled by technology-based limits, set to achieve reductions commensurate with those of the “best technology economically achievable” (“BAT”). 33 U.S.C. § 1311(b)(2). Generally, EPA promulgates BAT requirements as fixed numerical “effluent limitations.” In the absence of nationwide best available technology limits, power plants do not get a free pass to indiscriminately discharge all other toxic and heavy metals. Instead, permit writers are to impose “such conditions as [they] determine[] are necessary to carry out the provisions” of the CWA, as a matter of “best professional judgment,” or “BPJ.” *See* 33 U.S.C. §1342(a)(1)(B). Thus, regardless of any nationwide BAT limitations, ADEQ still has an obligation to include in the final permit technology-based effluent limits, based on best professional judgment, for any pollutants beyond the bare minimum federal effluent limitation guidelines for this industry.

C. EPA’s ELG Rule for Steam Electric Generation

12. In September 2015, the U.S. EPA promulgated updated ELGs for steam electric generating units like Flint Creek, the agency’s first update to these standards since 1982.¹² The ELGs establish technology-based effluent limits that must be included in all NPDES permits, based on EPA’s determination of the best available technology for treating particular waste streams.

13. Relevant to Flint Creek, the EPA required power plants achieve zero discharge of bottom ash transport water, based on its determination that dry bottom ash handling or a closed-loop wet-handling system is the best available technology.¹³ As EPA notes, these technologies “have been

¹² *See* U.S. EPA, Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838 (Nov. 3, 2015).

¹³ *Id.* at 67,852.

in operation at power plants for more than 20 years and are amply demonstrated by the record supporting the final rule.”¹⁴

14. EPA found that “more than 80 percent of coal-fired generating units built in the last 20 years have installed dry bottom ash handling systems,” and that over half of existing facilities “are already employing zero discharge technologies (dry handling or closed-loop wet ash handling) or planning to do so in the near future.”¹⁵

15. The ELGs became effective January 4, 2016, and all permits issued after that date must include a compliance date. EPA delegated determination of the actual compliance date for each waste stream to permitting authorities, with the instruction that compliance be achieved “as soon as possible.” 40 C.F.R. § 423.11(t). The rule established November 1, 2018 as the default date for compliance, noting that “*the ‘as soon as possible’ date determined by the permitting authority is November 1, 2018, unless the permitting authority determines another date after receiving information submitted by the discharger.*”¹⁶ EPA further stated that the permitting authority may determine that November 1, 2018, is “as soon as possible” for a discharger, even if it has received a request by the discharger for a later compliance date.¹⁷

16. In determining a compliance deadline that is “as soon as possible,” the permitting authority *must* consider the factors “after receiving information from the discharger”¹⁸:

(a) Time to expeditiously plan (including to raise capital), design, procure, and install equipment to comply with the requirements of the final rule;

(b) Changes being made or planned at the plant in response to greenhouse gas regulations for new or existing fossil fuel-fired power plants under the Clean Air Act, as well as regulations for the disposal of coal combustion residuals under subtitle D of the Resource Conservation and Recovery Act;

¹⁴ *Id.* at 67,845.

¹⁵ *Id.* at 67,852.

¹⁶ *Id.* at 67,883 (emphasis added).

¹⁷ *Id.* at 67,883 n.57.

¹⁸ *Id.*; *see also* 40 C.F.R. § 423.11(t).

(c) For FGD wastewater requirements only, an initial commissioning period to optimize the installed equipment; and

(d) Other factors as appropriate.

17. In the final rule, EPA explained how the permitting authority must support its determination:

EPA recommends that the permitting authority provide a well-documented justification of how it determined the “as soon as possible” date in the fact sheet or administrative record for the permit. If the permitting authority determines a date later than November 1, 2018, the justification should explain why allowing additional time to meet the limitations is appropriate, and why the discharger cannot meet the final effluent limitations as of November 1, 2018.¹⁹

18. Discharges from Flint Creek are subject to these requirements of the ELG Rule because the power plant discharges bottom ash transport water (Outfalls 001 and 101).²⁰

19. On September 12, 2017, EPA promulgated a rule that delayed the *beginning* of the compliance period for bottom ash effluent limitations by two years, from November 1, 2018 to November 1, 2020. *See* Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494 (Sept. 18, 2017) (“Delay Rule”). As a result of the Delay Rule, the ELG Rule requires permitting authorities to establish compliance dates for bottom ash effluent limitations that are “as soon as possible beginning November 1, 2020, and no later than December 31, 2023.” 40 C.F.R. § 423.13(g)(1)(i), (k)(1)(i).

20. In issuing the Delay Rule, however, EPA emphasized that the standards for which it delayed the compliance deadlines remain in effect, despite the agency’s ongoing reconsideration process.²¹ Specifically, the Delay Rule did not in any way change the factors set forth in 40 C.F.R. §

¹⁹ *Id.* at 67,883.

²⁰ Flint Creek Application, Attachment D at 1-2, Attachment Q; Fact Sheet at 6.

²¹ 82 Fed. Reg. at 43,496 (“This maintains the 2015 Rule as a whole at this time, with the only change being to postpone specific compliance deadlines for two wastestreams.”); *see also* U.S.

423.11(t) that ADEQ must consider when establishing an “as soon as possible” date for compliance. The only change that EPA made to 40 C.F.R. Part 423 in the Delay Rule is the two-year postponement of the beginning of the compliance period, so that compliance with bottom ash must now occur “as soon as possible” between 2020 and 2023, instead of the 2018-2023 compliance period that EPA had previously established in the 2015 ELG Rule.²²

PROCEDURAL BACKGROUND

21. Sierra Club submits this Request for Commission Review and for Adjudicator Hearing under Arkansas Code § 8-4-205 and APC&EC Regulation 8.

22. This petition concerns ADEQ’s final August 18, 2020 permit authorizing the discharge of wastewater under the National Pollutant Discharge Elimination System from SWEPCO’s Flint Creek Power Plant.

23. During the public comment period, Sierra Club timely submitted written comments to ADEQ on August 3, 2020. All issues raised in this Petition have been previously raised in timely filed comments to ADEQ. *See* Ex. 2, Sierra Club Comments to ADEQ, August 3, 2020. Accordingly, because Sierra Club submitted comments on the draft permit Sierra Club has standing to request a hearing under Arkansas Code § 8-4-205. *See also* Regs. 8.214, 8.601(C).

EPA, Response to Comment Document, EPA-HQ-OW-2009-0819, SE06669, at 8 (The only thing the Postponement Rule does is revise the 2015 ELG Rule’s new, more stringent compliance dates for two wastestreams discharged from existing sources (bottom ash transport water and flue gas desulfurization wastewater). Otherwise, it leaves the Rule unchanged.”); *id.* at 12 (“EPA’s action to postpone certain compliance dates in the 2015 rule . . . does not otherwise amend the effluent limitations guidelines and standards for the steam electric power generating point source category.”).

²² Shortly after ADEQ issued the final Flint Creek permit on August 18, 2020, EPA revised, on August 31, 2020, certain aspects of the ELG rule and extends the final compliance deadline for eliminating bottom ash discharges until the end of 2025. The revision also includes a provision that allows sources to avoid complying with the ELGs if the operator commits to the cessation of coal combustion by 2028. EPA has not, however, published that rule in the Federal Register, and the rule is not effective until 60 days after publication. Thus, the revised rule is not directly relevant to, and does not support, ADEQ’s final 2023 compliance date.

24. This Request for Commission Review and Adjudicatory Hearing is filed with the Secretary of the Commission within the thirty (30) day period provided in Regulation 8, § 2.114. Sierra Club request Commission review and an adjudicatory hearing as to the issues described below.

25. Under Arkansas Code § 8-4-205(c)(6)(B) and APC&EC Regulation 8, section 8.612, the issuance of the Permit at issue is automatically stayed. As demonstrated by the legal issues raised in this pleading, and in Sierra Club's comments during the public comment periods, neither ADEQ's final Permit nor the supporting permit file include any evaluation of the ELG Rule's mandatory regulatory factors, or a rational explanation for the agency's decision allowing SWEPCO to continue discharging bottom ash transport water until the latest possible deadline for compliance. Accordingly, final Flint Creek NPDES permit is deficient as a matter of law, and must be stayed in its entirety.

26. A copy of the Request for Hearing has been served on all appropriate parties identified in Regulation 8. *See* Reg. 8.601, 8.607.

STATEMENT OF INTERESTS

27. Sierra Club is a not-for-profit corporation organized and existing under the laws of California, with its principal place of business located in San Francisco, California. Sierra Club has more than 784,000 members throughout the United States, including approximately 3,400 in Arkansas. Sierra Club's mission is to protect and enhance the quality of the natural and human environment. Its activities include public education, advocacy, and litigation to enforce environmental laws. Sierra Club and its members are greatly concerned about water pollution caused by large coal-burning power plants like Flint Creek, and have a long history of involvement in activities related to water pollution caused by coal combustion.

28. For many years, Sierra Club has advocated for effective and timely implementation of Clean Water Act requirements in Arkansas, including by submitting public comments on proposed

state and EPA actions relevant to implementation of clean water standards in Arkansas, including NPDES permits like the wastewater permit for Flint Creek.

29. Sierra Club members use and enjoy for recreational, fishing, and drinking water the downstream waters of the United States into which Flint Creek discharges bottom ash wastewater. Sierra Club's members' use and enjoyment of those waters for recreational, fishing, aesthetic, and potable water is diminished and impaired by ADEQ's issuance of a final NPDES permit that authorizes Flint Creek to continue discharging bottom ash wastewater until the latest possible date for compliance with EPA's national, public-health based effluent standards. Sierra Club members' protected procedural interests are likewise impaired because the agency failed to follow the law by considering the relevant regulatory factors and explaining the basis for its decision.

30. If ADEQ were required to evaluate, based on a consideration of the mandatory regulatory factors, an earlier deadline by which Flint Creek must cease discharges of bottom ash wastewater, those harms to Sierra Club members' protected interests would be redressed in at least two ways. First, the agency would be required to consider the regulatory factors and provide a rational explanation for its final decision, and provide a rational response to Sierra Club's legal and technical comments demonstrating that Flint Creek can, in fact, comply with the rule before 2023. Second, after reconsideration of those regulatory factors, ADEQ could require Flint Creek to eliminate bottom ash discharges in advance of the latest permissible compliance date at the end of 2023.

31. In addition, as noted, shortly after ADEQ issued the final Flint Creek permit, EPA revised certain aspects of the ELG rule including the final compliance deadline. That revision includes a provision that allows sources to avoid complying with the ELGs if the operator commits to the cessation of coal combustion by 2028. Requiring ADEQ to reconsider the Flint Creek permit could result in the permanent cessation of coal burning at Flint Creek, which would protect Sierra Club

members' interests in eliminating coal ash discharges to waters of the United States, including Lake SWEPCO and downstream rivers.

LEGAL AND FACTUAL ISSUES

A. ADEQ's Final Permit for Flint Creek Fails to Evaluate the Relevant Regulatory Factors or Include a Rational Explanation for Authorizing SWEPCO to Continue Bottom Ash Discharges Until the Latest Possible Date.

32. As noted, the ELGs became effective January 4, 2016, and all permits issued after that date must include a compliance date for the elimination of bottom ash wastewater discharges. The rule in effect at the time ADEQ issued the Flint Creek Permit requires permitting authorities to establish compliance dates for bottom ash effluent limitations that are "as soon as possible beginning November 1, 2020, and no later than December 31, 2023." 40 C.F.R. § 423.13(k)(1)(i). Thus, the default, "*as soon as possible*" date for compliance is November 2020, unless, "after receiving information from the discharger"²³ justifying a later date and after consideration of the mandatory regulatory factors, the permitting agency determines that a later date is the soonest possible date for compliance.

33. Discharges from Flint Creek are subject to the requirements of the ELG Rule because the power plant discharges bottom ash transport water (Outfalls 001 and 101).²⁴

34. As discussed in the report of Dr. Ranajit (Ron) Sahu, Ph.D, QEP, CEM, attached to Sierra Club's comments, plants across the country have already started complying with the ELG Rule.

35. As noted, in issuing the Flint Creek NPDES permit, ADEQ failed to evaluate or even mention the ELG Rule's mandatory regulatory factors, or include a rational explanation

²³ *Id.*; see also 40 C.F.R. § 423.11(t).

²⁴ Flint Creek Application, Attachment D at 1-2, Attachment Q; Fact Sheet at 6.

for the agency's decision allowing SWEPCO to continue discharging bottom ash transport water until the latest possible deadline for compliance.

36. Moreover, in its permit application, SWEPCO affirmatively and explicitly refused to include any evaluation of the costs, technical feasibility, or timing for complying with EPA's ELG Rule. In fact, SWEPCO's Application states that the Company "does not plan to perform any work to modify the bottom ash transport system until" EPA revises and publishes a modified ELG Rule. That explanation does not substitute for the required regulatory analysis in place on the date of issuance of the final Permit.

37. In response to Sierra Club's comments on this issue, ADEQ refused to evaluate the regulatory factors, stating only that 2023 is a "valid compliance date for the elimination" of bottom ash discharges, that EPA reviewed the Flint Creek permit and did not object, and that Sierra Club did not comment on other, unidentified facilities' permits that purportedly include the same compliance date.

38. None of those explanations have merit. First, although 2023 is a potentially valid compliance date, the regulations unambiguously impose a default 2020 deadline and require ADEQ to consider the regulatory factors to justify a later date. Second, EPA's failure to object to a permit does not insulate ADEQ from compliance with the law and the obligation to engage in reasoned decisionmaking and provide a rational connection between the facts found and the agency's conclusion. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Finally, whether Sierra Club commented on some other, unidentified permit is irrelevant to whether the Flint Creek permit complies with the law.

39. ADEQ's final permit for the Flint Creek power plant is arbitrary, capricious, and unlawful, and the Commission must vacate and remand the permit. Ark. Admin. Code §§ 014.08.1-8.603(C)(1)(a)-(e).

B. SWEPSCO's Apparent Reliance on EPA's Intent to Revise the ELG Rule Does Not Provide a Lawful Basis for Adopting the Latest Possible Compliance Date.

40. EPA's September 12, 2017 revision to the ELG Rule delayed only the *beginning* of the compliance period for bottom ash effluent limitations by two years, from November 1, 2018 to November 1, 2020. 82 Fed. Reg. 43,494 (Sept. 18, 2017). As a result, the relevant provisions in the Steam Electric ELGs require permitting authorities to establish compliance dates for bottom ash effluent limitations that are "as soon as possible beginning November 1, 2020, and no later than December 31, 2023." 40 C.F.R. § 423.13(g)(1)(i), (k)(1)(i). In issuing the Delay Rule, EPA emphasized that the standards for which it delayed the compliance deadlines remain in effect, despite the agency's ongoing reconsideration process.²⁵

41. Thus, the Delay Rule does not in any way change the factors set forth in 40 C.F.R. § 423.11(t) that ADEQ is required to consider when establishing an "as soon as possible" date for compliance. The only change that EPA made to 40 C.F.R. Part 423 in the Delay Rule is the two-year postponement of the beginning of the compliance period, so that compliance with bottom ash effluent limitations must now occur "as soon as possible" between 2020 and 2023, instead of the 2018-2023 compliance period that EPA had previously established in the 2015 ELG Rule.

42. Moreover, as noted, EPA's recent revision of the ELG Rule—and its extension of the permissible bottom ash compliance date to 2025—is not directly relevant to, and

²⁵ 82 Fed. Reg. at 43,496 ("This maintains the 2015 Rule as a whole at this time, with the only change being to postpone specific compliance deadlines for two wastestreams."); *see also* U.S. EPA, Response to Comment Document, EPA-HQ-OW-2009-0819, SE06669, at 8 (The only thing the Postponement Rule does is revise the 2015 ELG Rule's new, more stringent compliance dates for two wastestreams discharged from existing sources (bottom ash transport water and flue gas desulfurization wastewater). Otherwise, it leaves the Rule unchanged."); *id.* at 12 ("EPA's action to postpone certain compliance dates in the 2015 rule . . . does not otherwise amend the effluent limitations guidelines and standards for the steam electric power generating point source category.").

does not support, ADEQ's final 2023 compliance date. EPA has not, however, published that rule in the Federal Register, and the rule is not effective until 60 days after publication.

43. Moreover, the Commission must review ADEQ's decision on the basis of the record and the law in existence at the time ADEQ issued the permit. Any reliance on EPA's yet-to-be published ELG revision would be an impermissible, post hoc rationalization.

44. Even if EPA's August 2020 rule were relevant (and it is not), ADEQ still has an obligation to consider the regulatory factors and provide a rational explanation for its compliance deadline.

45. Additionally, other permitting authorities have concluded that the mere fact that EPA has announced an intention to reconsider the ELG does *not* provide a basis for delaying compliance. Specifically, after first proposing to delay compliance with the ELG rule because of uncertainty surrounding EPA's potential reconsideration, the Michigan Department of Environmental Quality modified its proposed permit for the Belle River power plant to reflect a December 31, 2021 compliance date, concluding that the initial 2021 dates should be reinstated. Accordingly, there is no valid basis to assume that EPA will make any changes to the Steam Electric ELGs in the future.

C. SWEPCO has not shown that it cannot comply with the ELG Rule before 2023, and its Application does not reflect the “expeditious planning” required by EPA.

46. SWEPCO's Application states that due to the “considerable expense of potential modifications,” the company “does not plan to perform any work to modify” the facility to comply with EPA's ELG Rule until a final rule is published in the Federal Register.²⁶ Aside from its perfunctory adoption of a December 2023 compliance date, the Draft Permit does

²⁶ Flint Creek Application, Cover Letter at 2.

not provide any explanation for its proposed compliance deadline, let alone a rational evaluation of EPA's mandatory factors for extending the compliance timeframe. The Draft Permit is therefore legally and factually deficient, for several reasons.

47. First, as discussed, there is a final rule in place. On September 12, 2017, three months after SWEPCO submitted its Application, EPA issued a final rule delaying only the *beginning* of the compliance period for bottom ash and FGD wastewater effluent limitations by two years, from November 1, 2018 to November 1, 2020. 82 Fed. Reg. 43,494. EPA's rule delaying the beginning of the compliance period provides no lawful basis for state permitting agencies to require compliance by the latest possible date of December 23, 2023. And a regulated entity may not avoid compliance with a final and effective rule simply because an agency might someday revise the regulation. Such an approach would insulate regulated entities from compliance with any regulation.

48. Second, SWEPCO provided absolutely no technical information or analysis excusing it from complying with the ELG Rule before the December 31, 2023 deadline. As an initial matter, the Company's conclusory complaint that environmental compliance is "too expensive" is not a valid basis for excusing Flint Creek from complying with the same rule that other utilities around the country have proactively planned for, and complied with. In fact, utilities like SWEPCO have spent years preparing for the ELGs. Indeed, the Utility Wa-

ter Act Group (“UWAG”), a nationwide industry consortium of which SWEPCO is a member,²⁷ submitted case studies showing conversion to dry bottom ash handling is feasible within 27-33 months.²⁸

49. Third, in its cover letter to ADEQ, SWEPCO fails to provide any date for commencement of its ELG compliance activities and fails to explain why it could not have commenced *planning* activities five years ago when the ELG Rule was finalized. As noted technical comments of Dr. Sahu attached to Sierra Club comments on the draft permit, technical solutions to comply with the ELG Rule readily available and can be implemented in 3 years or sooner. Even assuming that SWEPCO has done absolutely nothing to plan for implementation of the ELGs in the five years since the rule became final, it should not take any longer than late 2022, for Flint Creek to come into compliance. And there is *nothing* in the record to show that there are any unique technical issues at Flint Creek that would prevent SWEPCO from implementing currently available technologies that have been successfully adopted across the country. In fact, many coal-fired power plants, which face the same regulatory uncertainties as Flint Creek have already achieved zero discharge for bottom ash wastewater.²⁹

²⁷ As UWAG’s comments note, “UWAG is a voluntary, *ad hoc*, non-profit, unincorporated group of 198 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers.” Utility Water Act Group Comments on EPA’s Proposed Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, at 1 n.1.

²⁸ See Utility Water Act Group Comments on EPA’s Proposed Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category at 1 n.1, EPA Docket EPA-HQ-OW-2009-0819-6232, available at: <https://www.regulations.gov>.

²⁹ *Id.*

50. Finally, the record is not only devoid of any technical explanation for allowing SWEPCO to defer ELG compliance indefinitely, but the record makes clear that SWEPCO has not even attempted to satisfy the ELG Rule’s mandatory regulatory factors for postponing any compliance date. Nor does proposed permit reflect the “expeditious” planning and compliance required under the rule. The ELG Rule requires compliance *as soon as possible* beginning November 1, 2020 and no later than December 31, 2023. As EPA has recognized, the 2015 Rule set out the basic procedure for permitting authorities in determining that compliance date:

First, the presumptive compliance date (or “as soon as possible” date) is November 1, 2018. Next, the permitting authority may determine a later compliance date, but no later than December 31, 2023, and *only if it receives information from the discharger justifying the later date*. Finally, after receipt of such justification, the permitting authority may set a compliance date later than the presumptive date *only after considering the factors . . .*³⁰

51. SWEPCO has entirely failed to submit *any* technical information or support related to those mandatory factors. The regulation, on its face, requires the discharger to provide that information—the permitting authority cannot do it for them. Because SWEPCO did not provide any information related to the ELG’s compliance factors, ADEQ cannot rationally evaluate the soonest “possible” compliance date.

52. ADEQ’s adoption of the very latest compliance deadline is arbitrary and capricious because SWEPCO failed to provide sufficient evidence related to any of the factors that the ELG Rule requires permitting authorities to consider. The first factor enumerated in the above list

³⁰ EPA, Statement of Substantial New Questions for Public Comment (Discussion of Substantial New Questions and Possible New Conditions for the Merrimack Station Draft NPDES Permit that are Now Subject to Public Comment During the Comment Period Reopened by EPA under 40 C.F.R. § 124.14(b)) at 58, available at: <https://www3.epa.gov/region1/npdes/merrimackstation/pdfs/2017-statement-snqpc.pdf>.

requires consideration of “*expeditious*” planning in all aspects of compliance with the ELGs, underscoring EPA’s directive to achieve compliance “as soon as possible.” Here, SWEPCO’s Application does not contemplate any compliance with the ELG Rule, let alone an “expeditious” one.

53. Second, as explained, the ELG Rule requires zero discharge of bottom ash transport water “as soon as possible,” unless a careful consideration of the factors in 40 C.F.R. § 423.11(t) demonstrates that a later date is appropriate. Here, ADEQ failed to evaluate any compliance date earlier than December 2023, let alone provide a rational explanation, based on EPA’s mandatory factors, for extending compliance to the latest possible date. The Permit fails to comply with the unambiguous requirements of 40 C.F.R. § 423.11(t), and is therefore arbitrary unlawful.³¹

54. The ELG Rule’s reference to “other factors as appropriate” cannot save ADEQ’s facially deficient Permit. Regulations, like statutes, must be interpreted as a whole, to arrive at the interpretation that “best comports with the overall regulatory scheme.” *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 496 (5th Cir. 2014) (“We believe that looking at the full text of the statute, rather than one isolated clause, along with the statute’s structure and its public safety purpose shows that the comma-which clause was not intended to preclude the CSB from investigating all incidents involving marine oil spills.”); *see also Abramski v. United States*, 134 S. Ct. 2259, 2267 (“[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, ‘structure, history, and purpose.’”) (quoting *Maracich v. Spears*, 133 S.Ct. 2191, 2209 (2013)). Even if SWEPCO had relied on the ELG Rule’s “other factors” prong (which it did not), the Permit is unlawful because it renders the remaining factors meaningless, and conflicts

³¹ An agency rule is arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

with the Clean Water Act's statutory goal that *all* water pollution from point sources "be eliminated by 1985." 33 U.S.C. § 1251(a)(1); *see also Texas Oil & Gas Ass'n*, 161 F.3d at 927.³²

D. Aside from ELG Compliance, The Permit Must Include Technology-Based Effluent Limits for Toxic Metals in Coal Combustion Wastewaters.

55. Even if Flint Creek was complying with the ELG Rule (it isn't), SWEPCO does not get a free pass to indiscriminately discharge all other toxic and heavy metals. Instead, permit writers are to impose "such conditions as [they] determine[] are necessary to carry out the provisions" of the CWA, as a matter of "best professional judgment," or "BPJ." *See* 33 U.S.C. §1342(a)(1)(B).

56. ADEQ still has an obligation to include in the final permit TBELs, based on best professional judgment, for any pollutants beyond the bare minimum federal effluent limitation guidelines for this industry. SWEPCO's application makes clear that Flint Creek discharges numerous heavy metals and other toxins, including mercury, cooper, nickel, lead, aluminum, boron, and others from Outfalls 101 and 001.³³ Accordingly, ADEQ must employ its best professional judgment to determine BAT for toxic pollutants in these waste streams. The agency cannot simply wait until EPA has developed or reissued effluent limitation guidelines.

CONCLUSION

In sum, Sierra Club respectfully requests Commission Review and Adjudicatory Hearing of ADEQ's final NPDES permit for the Flint Creek Power Plant and for the relief requested herein.

Dated: September 17, 2020

Respectfully submitted,

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³² *U.S. v. Mead Corp.*, 533 U.S. 218, 251 (U.S. 2001) (statutes and regulations must not be interpreted in a manner that would render any provision meaningless or redundant).

³³ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 17th day of September, 2020, served copies of the foregoing document via U.S. Certified Mail, Return Receipt Requested or electronic mail to the following:

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