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).

CFR 125.3(c)(2); *NRDC v. EPA,* 859 F.2d 156, 200 (D.C. Cir. 1988)(BPJ "permits are no longer to be created once national guidelines are in place"); *NRDC v. EPA*, 437 F.Supp. 2d 1137, 1159-61 (C.D. Cal. 2006) (permits issued with BPJ limits are only an interim measure pending the promulgation of ELGs and new source performance standards).[5] Therefore, the court below erred in holding that the Clean Water Act required the Cabinet to conduct a BPJ analysis in this case. *See* Op. at 14 ("The Cabinet was required, and failed, to conduct a BJP (sic) analysis...at the Trimble Station.")

A. The Franklin Circuit Court Erroneously Upended The Clean Water Act's National Regulatory System.

Substituting its own judgment for that of the Cabinet, EPA, and the relevant judicial authorities, the Franklin Circuit Court erroneously upended the Clean Water Act's ELG-based national regulatory system. Disregarding the law and long-settled regulatory practice, it ruled that pollutants lacking specific numeric criteria were "plainly not 'subject to'" the low volume ELG. Op. at 9. Consequently, it held that the Cabinet was required to conduct a BPJ analysis and set numeric criteria for all pollutants in the waste stream before issuing a Trimble permit. *Id.* at 12, 14.

The ruling below said "The Court finds it contradictory that the EPA, aiming to eliminate discharge of pollutants by 1985, would in 1982 establish a guideline recognizing the many toxic pollutants found in scrubber wastewater but intending to

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[5]*See also Shenango Inc. v. Dept. of Envtl. Prot.*, 934 A.2d 135, 141, n. 14 (Pa. Comm. Ct. 2007) ("a facility-specific inquiry is only necessary prior to the application of a technology-based effluent limitation when no ELGs exist for the industry at issue."); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006); *Citizens Coal Council v. EPA*, 447 F.3d 879, 891, n. 11 (6th Cir. 2006) (Best Professional Judgment applies where "the EPA has not promulgated an applicable guideline"); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 762, n.3 (9th Cir. 1992); *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928-929 (5th Cir. 1998) (Best Professional Judgment limits apply where "EPA has not yet promulgated ELGs for the point source category"); and *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 203 (2d Cir. 2004) ("once EPA promulgates applicable standards, regulation of a facility...on a best professional judgment basis must cease.").

freeze all efforts to reduce discharge...indefinitely, pending new regulation." *See* Op. at 12. But this approach is exactly what Congress has mandated in the Clean Water Act. Under the law, EPA is supposed to promulgate, review, and periodically revise uniform ELGs prescribing standards that apply throughout defined industrial categories. *See* 33 U.S.C. §§ 1314(m), 1311(d); *NRDC,* 859 F.2d at 200. And this is exactly what happened here.

That the relevant ELG did not set standards for all pollutants of concern to the Appellees is of no moment. *See* Op. at 9-10. Long ago, EPA determined that it was not necessary to identify and limit each and every chemical or compound present in a waste stream. *See Atlantic States Legal Found. v. Eastman Kodak Co.,* 12 F.3d 353, 357 (2d Cir. 1993). Instead, EPA found that the goals of the Clean Water Act are more effectively achieved by focusing on certain pollutants as "indicators" and regulating those directly because the treatment technology used to create ELGs removes both "regulated" and "unregulated" pollutants. *NRDC v. EPA,* 822 F.2d 104, 125 (D.C. Cir. 1987).

At all times relevant, EPA was aware that flue gas desulfurization wastewater contained toxic metals. Yet EPA determined that ELGs for these metals, apparently the pollutants of concern in this case, were not necessary. BPJ 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." *See* EPA, NPDES Permit Writers Manual, September 2010 Chapter 5 Technology-Based Effluent Limitations at p. 5-18 available at http://cfpub.epa.gov/npdes/writermanual.cfm?program_id=45 (accessed Mar. 11, 2014).

The Clean Water Act's national regulatory system depends on the consistent interpretation and application of ELGs throughout each industrial sector. The rule has

always been that industry sector ELGs control. The Cabinet properly applied this rule when writing the Trimble permit, and the court below erred in imposing a BPJ obligation contrary to the Clean Water Act's plain language; in overturning a functioning and long-established *national* regulatory system; in contradicting an extensive body of well-reasoned case law; and in disregarding three decades of regulatory practice.

B. The Court Below Erroneously Relied On The Hanlon Memo.

The court below erroneously relied on an EPA guidance document - the "Hanlon Memo"- to justify its finding that the pollutants of concern in this case were not "subject to" the ELG and that the Cabinet was required to conduct a BPJ analysis before it could issue the Trimble permit. *See* Op. at 10 *citing* EPA, Memorandum: National Pollutant Discharge Elimination System (NPDES) Permitting of Wastewater Discharges from Flue Gas Desulfurization (FGD) and Coal Combustion Residuals (CCR) Impoundments at Steam Electric Power Plants dated June 7, 2010 *available at* http://www.epa.gov/region1/npdes/merrimackstation/pdfs/ar/AR-44.pdf (accessed Mar. 10, 2014). It also erroneously relied on an EPA "fact sheet" to prove this point. *Id.* at 11 *citing* EPA, *Proposed Effluent Limitation Guidelines & Standards for the Steam Electric Power Generating Industry* (April 2013) available at http://water.epa.gov/scitech/wastetech/guide/steamelectric/upload/proposed_factsheet.pdf (accessed Mar. 12, 2014).[6]

To begin with, by its own terms the Hanlon Memo was "not legally enforceable" and did "not confer legal rights or impose legal obligations upon any member of the public, EPA, states or any other agency." Hanlon Memo Appendix at p. 6. Therefore, it

[6]The Hanlon Memo was issued more than a year after EPA had reviewed the Trimble permit pursuant to 40 CFR 123.44, and the fact sheet three years after that.

should not have been used to justify a BPJ analysis. Even assuming *arguendo* that the Hanlon Memo had binding legal effect or force - which it did not - it still could not justify BPJ limits for sources subject to an ELG, and especially for waste streams or pollutants that were considered by EPA in promulgating the ELG, such as is the case here, for it would then offend the plain language of the Clean Water Act. 33 U.S.C. § 1342(a)(1); *NRDC,* 859 F.2d at 200.

The Franklin Circuit Court's heavy reliance on the Hanlon Memo exposes the significant Catch-22 that is intrinsic to its ruling: Either the Hanlon Memo is, as it claims to be, "not legally enforceable" and does not "impose legal obligations," in which case, it cannot form the basis for imposing BPJ. Or, the Hanlon Memo creates new and substantively different legal obligations (requiring BPJ for discharges historically regulated under the steam electric power generating ELG) – after the Trimble permit was issued, no less – in which case it is unlawful "regulation-by-guidance." *See, e.g.,* KRS 13A.130(1) (agency cannot regulate through guidance); *Kerr v. Kentucky State Bd. of Registration for Professional Engineers and Land Surveyors*, 797 S.W.2d 714, 717 (Ky. App. 1990) (agency decision based on guidance is denial of due process); *Iowa League of Cities v. EPA,* 711 F.3d 844 (8th Cir. 2013); *Appalachian Power v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (recognizing that agencies engage in regulation-by-guidance to "immuniz[e their] lawmaking from judicial review"); *NMA v. Jackson*, 880 F. Supp. 2d 119 (D.D.C. 2012) (appeal pending).

Regulation-by-guidance is unlawful for good reason. By substituting guidance for regulations, agencies deny stakeholders regulatory certainty, circumvent public notice and comment and complicate judicial review. The result is a lack of transparency,

accountability and excessive agency discretion, the "central problem of the regulatory state." *See* Cass Sunstein, *Is the Clean Air Act Constitutional?* 98 Mich. L. Rev. 303, 341 (1999). Regulation-by-guidance circumvents the public notice and comment rulemaking provisions of the Administrative Procedure Act, 5 U.S.C § 553 *et seq.*, creating an opaque regulatory process that leads to economically damaging rules and the erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government.[7]

The court below wrongly relied on guidance to fundamentally reorder settled relationships between regulators and stakeholders and to disrupt an on-going administrative rulemaking. Upholding its ruling will therefore result in precisely the sort of corrosive "backdoor" regulation that courts have repeatedly rejected.

For its part, the "fact sheet" is also entirely lacking in legal force or effect and should not have been used by the court below for any purpose. Moreover, it simply does not support the proposition for which it is cited. The portion quoted in the ruling below simply says that the relevant existing ELGs are being updated because they do not adequately address toxic metals and focus on "settling out particulates rather than treating dissolved pollutants." Op. at 10-11. Yet from this, the "Court finds that the EPA *did not consider* the...pollutants at issue here, determining that no ELG was necessary. From the language quoted *supra*, it is clear to this Court that in 1982...*these pollutants were not detectable*...and the EPA was thus forced to 'exclude' them from the ELG." *Id.* at 11

[7]*See generally,* U.S. Chamber of Commerce, "The Views of the Administration on Regulatory Reform: An Update," House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations (June 3, 2011) available at http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Kovacs-OI-Administration-Views-Regulatory-Reform-Update-2011-6-3.pdf (accessed Mar. 10, 2014).

(emphasis added). Based on even the most cursory fair reading of the fact sheet itself, these findings cannot stand.[8]

C. The Decision Below Contravenes KRS 224.16-050(4) Because BPJ Limits Will Be More Stringent Than Those Required By EPA.

The Cabinet's authorization from the Kentucky General Assembly to issue Clean Water Act permits is located in KRS 224.16-050. There, the Kentucky General Assembly made it abundantly clear that such permits could contain limits no more stringent than a permit issued pursuant to federal regulations.[9] In a recent wastewater discharge permitting case, this Court reversed the Franklin Circuit Court stating:

> KRS 224.16-050(4) is unquestionably specific in its mandate, providing that no KPDES permit shall impose limitations, requirements or other conditions more stringent than would have been imposed under a federally issued NPDES permit. The KPDES program is, in fact, expressly constrained by the federal NPDES permit program and, thus, cannot be implemented in a manner that is more stringent than federal law.

Commonwealth v. Sharp, 2012 Ky. App LEXIS 189, *37 (Ky. App. May 25, 2012). As set forth above, the Franklin Circuit Court's ruling requiring the Trimble permit to include BPJ limits is more than the Clean Water Act allows and therefore contravenes KRS 224.16-050.

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[8]The fact sheet never says that "toxic metals" were not considered by EPA under, or are not "subject to," the relevant existing ELG. Consequently, even if the court below could have properly relied on this document for facts or law, which of course it could not, the fact of the matter is that it could not have used it as grounds for overthrowing the national regulatory system. *See* 33 U.S.C. § 1342(a)(1); *NRDC,* 859 F.2d at 200.

[9]The statute provides:

> The Cabinet shall not impose under any permit issued pursuant to this section any effluent limitation, monitoring requirement, or other condition which is more stringent than the effluent limitation, monitoring requirement, or other condition which would have been applicable under federal regulation if the permit were issued by the federal government.

KRS 224.16-050(4).

D. Even If BPJ Limits Can Be Applied Here, The Cabinet Had The Discretion Not To Do So.

Even if the Franklin Circuit Court correctly held that BPJ limits could be written into the Trimble permit, it nonetheless erred by holding that the Cabinet must do so. Op. at 13. 40 CFR 125.3 states technology-based permit limits "may" be imposed through several methods, including, but not only, BJP. Under Kentucky law, the use of the term "may" usually means that the action is discretionary. *See Stringer v. Realty Unlimited, Inc.*, 97 S.W.3d 446, 448 (Ky. 2002); KRS 446.010(26)("may" is permissive); *United Sign Ltd. v. Commonwealth*, 44 S.W.3d 794, 800 n. 8 (Ky. App. 2000) ("When utilized in an administrative regulation, the term 'may' denotes a discretionary and not a mandatory action."); KRS 13A.222(4)(b) (when drafting regulations, "[a] discretionary power shall be expressed by 'may.'"). Nothing in the ruling below demonstrates that the Cabinet unreasonably or irrationally determined that it had the discretion to choose whether or not to use BPJ limits in the Trimble permit. Absent such a finding, the Trimble Permit should be upheld.

II. Upholding The Franklin Circuit Court Will Significantly Impair Economic Growth And Job Creation In The Commonwealth.

Upholding the decision below will cause serious economic and employment repercussions in the Commonwealth. The Clean Water Act's wastewater discharge permitting program uses technology-based ELGs to ensure national uniformity, efficiency, and effectiveness; however, the Franklin Circuit Court has set Kentucky apart from all other states. If the decision below stands, then only in Kentucky would ELGs be discarded for the facility-specific, idiosyncratic permit conditions that the court below, alone, believes the Clean Water Act to require.

A. The Ruling Below Needlessly Creates Regulatory Uncertainty And Undermines Congressional Goals.

Congress mandated ELGs to provide regulators and stakeholders with certainty and predictability. The ruling below, however, creates unique and extreme regulatory uncertainty. For example, EPA has recently reviewed and proposed a new steam electric power generating ELG. *See* 78 Fed. Reg. 34,432 (June 7, 2013). EPA proposes that existing sources will have up to eight years to meet the new standard. *Id.* at 34,479-80. If the proposed ELG were to go into effect, this eight-year compliance schedule would apply to all facilities within the industry class, including Trimble. However, if the ruling below stands then Kentucky facilities will be treated differently under the BPJ regime than facilities in other states where the ELGs control. There will be no phase-in period, nor any guarantee of substantive permit term equivalence.

The ruling below means that state lines – not industry sector or waste stream – will drive permit decisions. For example, the Tennessee Board of Water Quality, Oil, and Gas rejected the ruling below in a discharge permit appeal. *See Tennessee Clean Water Network, et al. v. Tennessee Dept. of Environment and Conservation*, Case No. WPC10-0116 (Final Order Dec. 17, 2013)(appeal pending). Consequently, in Tennessee the ELG still applies, but in Kentucky the ELG does not. This is irrational, inefficient, and ineffective, and not what Congress intended.

B. The Franklin Circuit Court's Ruling Will Drive Businesses Out Of Kentucky.

Regulatory consistency and the relative balance of anti-competitive requirements in any given State are key factors in every company's investment, growth, and employment calculus. *See generally,* "The Impact of Regulation and Litigation on Small Business and

Entrepreneurship," Rand Working Paper (Feb. 2006) available at http://www.rand.org/content/dam/rand/pubs/working_papers/2006/RAND_WR317.pdf (accessed Mar. 10, 2014). The Franklin Circuit Court's ruling denies manufacturers and producers in the Commonwealth this consistency and the level playing field that the Clean Water Act was intended to provide. Thus, until and unless the court below is reversed, jobs will be driven out of the Commonwealth.

CONCLUSION

For the foregoing reasons, *amici* request that the ruling of the Franklin Circuit Court be reversed and that the Secretary's final order be affirmed.

Respectfully Submitted,

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