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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001695-MR

LOUISVILLE GAS AND
ELECTRIC COMPANY — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-01613

KENTUCKY WATERWAYS ALLIANCE;
SIERRA CLUB;VALLEY WATCH;
SAVE THE VALLEY; AND
COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENTAL CABINET — APPELLEES

AND NO. 2013-CA-001742-MR

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AND ELECTRIC COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: These consolidated appeals concern the issuance of a permit by the Kentucky Energy and Environment Cabinet (hereinafter, "the Cabinet") regulating the handling of wastewater from the air pollution control systems employed at a Trimble County coal-burning facility operated by Louisville Gas and Electric Company ("LG&E"). The Cabinet and LG&E appeal following the Franklin Circuit Court's ruling reversing the Cabinet's Secretary and finding in favor of the Kentucky Waterways Alliance, the Sierra Club, Valley Watch, and Save the Valley (collectively "the Appellees"). These environmental protection organizations challenged the permit in question on the grounds that it violated the Clean Water Act (hereinafter "the Act").

We agree with the circuit court that the Cabinet failed to comply with the Act in issuing the permit. In doing so, the Cabinet misapplied the law and made at least one conclusion for which the record contains no substantial factual support. Accordingly, we affirm the order of the Franklin Circuit Court.

Background

I. Factual History

Since 1990, LG&E has operated a coal-fired electric power-generating facility in Trimble County, Kentucky. In compliance with air pollution regulations, LG&E employs flue gas desulphurization (FGD) systems, also referred to as "wet scrubbers," at its facility. These wet scrubbers create wastewaters which contain pollutants removed from the flue gas. To limit the pollutants in these wastewaters prior to discharge into the Ohio River, LG&E employs a process known as surface impoundment, during which wastewaters from the wet scrubbers are retained in a Gypsum Storage Basin where pollutants, through the force of gravity, settle to the bottom.

Under the Act, LG&E must seek and receive a permit to discharge its wastewaters into the Ohio River. The Cabinet, along with its Department of Water (DOW), is the Kentucky agency to which the Environmental Protection Agency (EPA) has delegated its permitting authority under the Act. LG&E submitted an application for the renewal of its permit to the DOW on April 9, 2007. Consistent with permitting procedure, the DOW submitted a proposed permit for the Trimble County facility to the EPA for its review prior to issuance. Following no objection to the proposed permit from the EPA, and after a notice and comment period and public hearing, the DOW issued LG&E a permit on April 1, 2010. The permit limited the levels of pH, oil, grease, and total suspended solids (TSS) that could be discharged in the wastewaters of LG&E's two units. However, the permit did not place a limit on certain toxic pollutants, including arsenic, mercury, and selenium,

which are toxic heavy metals found in wet scrubber wastewater; nor did the permit require LG&E to employ treatment methods other than surface impoundment which could limit or eliminate the discharge of such pollutants.

Two months after the DOW issued LG&E's permit, the EPA's Office of Wastewater Management issued a memorandum written by James Hanlon (hereinafter referred to as "the Hanlon Memo"). The Hanlon Memo discussed pending changes in national technology-based standards for the treatment of FGD wastewaters and provided guidance for agencies issuing permits ahead of those changes. Specifically, the Hanlon Memo directed state permitting authorities to employ a case-by-case review of the necessity for alternative methods of limiting or eliminating the discharge of toxic pollutants. The memo expressly stated that its directive was to be applied to new permits issued between June 7, 2010, and the effective date of the proposed changes to national standards.

II. Procedural History

Soon after the DOW issued the permit for LG&E's Trimble County facility, the Appellees challenged issuance of the permit. The Appellees disputed the permit on several grounds, including that the DOW was required, but failed, to conduct a case-by-case or best professional judgment analysis concerning the imposition of technology-based limits on LG&E's discharge of toxic pollutants like arsenic, mercury, and selenium.[1]

[1] Toxic pollutants such as these heavy metals prove largely unresponsive under the surface impoundment method because they do not exist as particulates which would settle to the bottom of a coal ash pond. Rather, these pollutants dissolve and remain in wastewater which is eventually discharged. *See* Effluent Limitations Guidelines and Standards for the Steam Power

In an order dated September 23, 2010, the hearing officer granted LG&E summary disposition on most of the Appellees' claims. The hearing officer held that the Appellees "failed to demonstrate the presence of a material issue of fact supporting their claim that DOW failed to comply with all applicable legal requirements in establishing the … limitations for [LG&E]'s FGD wastewater discharge." After the hearing officer filed his Report and Recommended Secretary's Order, the Cabinet's Secretary entered an order adopting the findings and recommendations in that document.

The Appellees petitioned the Trimble Circuit Court for judicial review of the decision of the Cabinet's Secretary. LG&E and the Cabinet moved that the case in Trimble County be dismissed on the grounds that the Trimble Circuit Court lacked jurisdiction. On November 2, 2011, the Trimble Circuit Court denied these motions and instead granted the Appellees' motion to transfer the case to Franklin

Circuit Court, the appropriate venue pursuant to KRS[2] 224.10-470. The Franklin Circuit Court (hereinafter referred to as "the circuit court") subsequently denied LG&E's and the Cabinet's renewed motions regarding jurisdiction.

The case proceeded on the merits, and on September 10, 2013, the circuit court entered an order reversing the order of the Cabinet's Secretary and remanding the matter to the Cabinet for further consideration. The circuit court

Generating Point Source Category, Volume 78 of the Federal Register (Fed. Reg.) at page 34,432 (proposed June 7, 2013) (to be codified at Title 40 of the Code of Federal Regulations (C.F.R.) part 423).

[2] Kentucky Revised Statutes.

agreed with Appellees that the language of the Act and the lack of a nationwide limit on the discharge of certain toxic pollutants in FGD wastewater required the Cabinet to conduct a case-by-case, best professional judgment analysis prior to issuing LG&E's permit. The circuit court held that the hearing officer's conclusion to the contrary was arbitrary. Additionally, the circuit court found that the record did not support the hearing officer's conclusion that, notwithstanding whether it was required to do so, the Cabinet properly conducted a case-by-case, best professional judgment review. LG&E and the Cabinet now appeal from this order and the order denying their motions to dismiss on jurisdictional grounds.

Standard of Review

Like the circuit court, which acted in its appellate capacity, we are reviewing a decision of an administrative agency. Hence, our role is not to reinterpret or reconsider the merits of the parties' claims. *Kentucky Unemployment Ins. Comm'n v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983). Rather, we will only overturn an agency's decision if the agency acted arbitrarily or outside the scope of its authority, applied an incorrect rule of law, or if the decision was unsupported by substantial evidence in the record. *Lindall v. Kentucky Retirement Systems*, 112 S.W.3d 391, 394 (Ky. App. 2003), *citing Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972).

Upon concluding that the record supported the agency's decision, we must also determine whether the agency applied the correct rule of law. While we do so *de novo*, we remember that "[a]gencies are entitled to great deference in

interpreting their own statutes and regulations, at least where those interpretations do not contravene the law." *Morgan v. Natural Resources and Environmental Protection Cabinet*, 6 S.W.3d 833, 842 (Ky. App. 1999).

Analysis

I. Jurisdiction and Venue

On appeal, the Cabinet and LG&E raise what they deem to be a jurisdictional issue. As such, we discuss that issue first.

Arguing that the circuit court wrongfully denied their respective motions to dismiss on the same grounds, the Cabinet and LG&E contend that the Trimble Circuit Court lacked subject matter jurisdiction over the Appellees' initial action; and as a result, all future orders from both the Trimble and Franklin Circuit Courts, were void *ab initio*. As we disagree with the characterization of this issue as one of jurisdiction, we conclude that the Trimble Circuit Court properly transferred the case and that the Franklin Circuit Court properly heard the matters in controversy.

For their jurisdictional claims, the Cabinet and LG&E primarily rely upon KRS 224.10-470(1), the pertinent part of which states, "[a]ppeals 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." However, as our Supreme Court has said, "there are fundamental distinctions between the concepts of jurisdiction and venue, the former relating to the power of courts to

adjudicate and the latter relating to the proper place for the claim to be heard[.]" *Dollar General Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007). "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.'" *Commonwealth, ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162-163 (Ky. 2009), *quoting Baze v. Commonwealth*, 276 S.W.3d 761, 767 (Ky. 2008). Hence, subject matter jurisdiction was not an issue in this case.

Rather, KRS 224.10-270(1) concerns the proper place for an appeal, and we interpret the issue raised in this case as one merely of improper venue. This invokes KRS 452.105, which reads, "[i]n civil actions, when the judge of the court in which the case was filed determines that the court lacks venue to try the case due to an improper venue, the judge, upon motion of a party, shall transfer the case to the court with the proper venue." In applying this statute, the Supreme Court has stated that "where venue is improper, the remedy is transfer rather than dismissal." *Dollar General*, 237 S.W.3d at 166.

Transfer of the case to Franklin County was appropriate. The Trimble Circuit Court did exactly as KRS 452.105 and the above authority directed it to do in transferring, rather than dismissing, the case from the improper venue of Trimble County to the proper venue of Franklin County. On this basis, the circuit court properly denied the Cabinet's and LG&E's respective motions to dismiss, and we proceed to the more substantive issues they each raise on appeal.

II. The Cabinet's Review Prior to Issuance of the Permit

The essential question in this case is whether the Act required the Cabinet, and more specifically the DOW, to perform a case-by-case, best professional judgment review of LG&E's wet scrubber wastewater treatment technology prior to issuing a permit concerning the discharge of that wastewater. To understand the nuanced and acronym-rich authority that guides this case, it is first necessary to comprehend the legal and regulatory framework within which we are operating. However, we fear that "[t]he terminology required to describe the present controversy suggests that the 'alphabet soup' of the New Deal era was, by comparison, a clear broth." *Chrysler Corp. v. Brown*, 441 U.S. 281, 286 n. 4, 99 S.Ct. 1705, 1710, 60 L.Ed.2d 208 (1979). Nevertheless, we will do our best to abide by the words of Justice Jackson who, when confronted with the equally daunting United States Tax Code, stated, "[i]t can never be made simple, but we can try to avoid making it needlessly complex." *Dobson v. Comm'r of Internal Revenue*, 320 U.S. 489, 495, 64 S.Ct. 239, 243, 88 L.Ed. 248 (1943).

A. Federal and State Regulatory Background

The Act requires the establishment of limits on the discharge of pollutants based upon the technology available to companies, or "industrial dischargers." To this end, the Act authorizes the EPA to set nationwide effluent limitation guidelines (ELGs) for various pollutants and for the various categories of facilities that discharge them. Establishment of these ELGs is based, in part, upon the EPA's consideration of the "Best Available Technology Economically

Achievable" (BAT) for a given category of dischargers. *See* 33 U.S.C.[3] § 1311(b)(2)(A). Once set, ELGs constitute a limit on pollutants which a state agency's permit cannot allow a discharger to exceed. In simpler terms, a federal ELG is the minimum standard with which a state-issued permit must comply.

Federal regulations provide state permitting authorities with several possible "[m]ethods of imposing technology-based treatment requirements" in their permits. 40 C.F.R. § 125.3(c). These methods are:

> (1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under § 122.21 and subpart D of this part.
> (2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in § 125.3(d) and shall consider:
> (i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and
> (ii) Any unique factors relating to the applicant.
> [Comment: These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]
> (3) Through a combination of the methods in paragraphs (d)(1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other

[3] United States Code.

> aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

Id. The same regulation goes on to state that,

> In setting case-by-case limitations pursuant to § 125.3(c), the permit writer must consider the following factors:
>
> ….
>
> (3) For BAT requirements:
> (i) The age of equipment and facilities involved;
> (ii) The process employed;
> (iii) The engineering aspects of the application of various types of control techniques;
> (iv) Process changes;
> (v) The cost of achieving such effluent reduction; and
> (vi) Non-water quality environmental impact (including energy requirements).

40 C.F.R. § 125.3(d). In Kentucky, the Cabinet issues permits like the one in this case through its Kentucky Pollutant Discharge Elimination System (KPDES) program which adheres to and adopts the provisions of the Act and related federal regulations. *See* 33 U.S.C. § 1342(b); 401 K.A.R.[4] 5:065; 401 K.A.R. 5:080.

At the time the Cabinet issued its permit to LG&E, the EPA's most recent ELG regulating "low volume waste"[5] from wet scrubbers had been promulgated in 1982.[6] For a "new source," which LG&E's facility was under the Act, the 1982 ELG established performance standards and limits on the levels of

[4] Kentucky Administrative Regulations.

[5] "Low volume waste sources" are specifically defined to include "wastewaters from wet scrubber air pollution control systems[.]" 40 C.F.R. § 423.11(b).

[6] The EPA has since proposed a new ELG. *See* Effluent Limitations Guidelines and Standards for the Steam Power Generating Point Source Category, 78 Fed. Reg. 34,432 (proposed June 7, 2013) (to be codified at 40 C.F.R. pt. 423).

pH, TSS, oil, and grease in discharged wastewater. 40 C.F.R. § 423.15. 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 metals, were "excluded from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator." 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).

B. Applicability of the 1982 ELG to LG&E's Operations

Based upon the 1982 ELG's exclusion of certain toxic pollutants, the Appellees contend, and the circuit court agreed, that the 1982 ELG did not apply to the toxic pollutants their petition specifically concerned. Therefore, Appellees argue, and the trial court concluded, that prior to issuing a permit, the DOW was required under 40 C.F.R. § 125.3(c), to undergo a case-by-case, "best professional judgment" analysis concerning LG&E's wastewater treatment technology. LG&E and the Cabinet counter that an ELG concerning the "low volume waste" category sufficiently addressed the treatment of wet scrubber wastewater, and that the Cabinet correctly applied that ELG consistent with 40 C.F.R. § 125.3(c)(1).

It is uncontested among the parties that a case-by-case, best professional judgment analysis is not required under the Act when a nationwide ELG sets limits for a category of dischargers. The issue at hand is whether the 1982 ELG, in briefly discussing but ultimately excluding arsenic, mercury, and

selenium, *et al*. from regulation, sufficiently established an effluent limit the DOW was merely required to apply pursuant to 40 C.F.R. § 125.3(c)(1); or whether the exclusion of those metals required the DOW to undertake a case-by-case analysis under subsections (c)(2) or (c)(3) of the same regulation.

In reversing and remanding the order of the Cabinet's Secretary, the circuit court ruled the hearing officer erred when he relied upon the EPA Permit Writer's Manual, which instructs that "[best professional judgment]-based limits are not required for pollutants that were considered by EPA for regulation under the effluent guidelines, but for which EPA determined that no ELG was necessary." The circuit court based its conclusion primarily upon the language of the 1982 ELG: "[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." 47 Fed. Reg. 52,290, 52,303 (Nov. 19, 1982) (codified at 40 C.F.R. pts. 125 and 423). The circuit court reasoned that "this language indicates only that those pollutants named … were undetectable to the Administrator at that time, more than *thirty* years ago." (Emphasis in original). We agree with LG&E and the Cabinet that this reading of the ELG is strained; however, we agree with the circuit court that the hearing officer attached a disproportionate amount of weight to the Permit Writer's Manual.

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. Such 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. 33 U.S.C. § 1251(a). In overriding this authoritative and clear legal intent, the Cabinet's Secretary committed reversible error.

The circuit court appropriately placed legal emphasis on the fact that, in the present case, the 1982 ELG applied to the category of "low volume waste," but only applied "to certain pollutants" in that waste. The Act expressly instructs that when this is the case, a case-by-case review is required in order "to carry out the provisions of the Act." 40 C.F.R. § 125.3(c)(3). We agree with the circuit court that this instruction is clear and it applies to the present situation.

The Cabinet and LG&E further argue that the language of 40 C.F.R. § 125.3(c) rendered application of its three possible methods discretionary and not mandatory. We cannot agree.

The regulation states that "[t]echnology-based treatment requirements *may* be imposed" through one of the three methods we listed *supra*. 40 C.F.R. § 125.3(c) (emphasis added). The Cabinet and LG&E read the term "may" to mean that the Cabinet has the discretion to employ one of the three methods or none of them. However, this reading of the regulation is untenable. Though inclusion of the word "may" is indeed permissive, LG&E provides no alternative method the Cabinet could have undertaken had it elected not to employ one of the three in the

regulation. Reading the regulation to instruct the Cabinet to apply one of the three methods or to employ no method at all is both strained and contrary to the purpose of the Act – to establish technology-based treatment requirements for the abatement of pollutants. Rather, we agree with the circuit court that application of the methods in 40 C.F.R. § 125.3(c) was mandatory.

Having established that the Act required the Cabinet to conduct a case-by-case, best professional judgment review, we turn to the question of whether the record supported the hearing officer's conclusion that the Cabinet did, in fact, conduct such a review though it was not required to do so. We answer this question in the negative.

As we state *supra*, when conducting a case-by-case, best professional judgment review pursuant to 40 C.F.R. § 125.3(c), a permitting authority "shall apply" the following appropriate factors:

> (3) For BAT requirements:
> (i) The age of equipment and facilities involved;
> (ii) The process employed;
> (iii) The engineering aspects of the application of various types of control techniques;
> (iv) Process changes;
> (v) The cost of achieving such effluent reduction; and
> (vi) Non-water quality environmental impact (including energy requirements).

40 C.F.R. § 125.3(d). In addition, the permit writer "shall consider: (i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and (ii) Any unique factors relating to the applicant." 40 C.F.R. § 125.3(c)(2).

Testimony of record demonstrates that the Cabinet failed to consider or review certain vital elements and factors related to LG&E's treatment of FGD wastewater. As the circuit court noted, the DOW 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 achieved over time. This is a vital element to be considered pursuant to 40 C.F.R. § 125.3(c).

While LG&E and the Cabinet may be correct that regulations fail to provide additional guidance in how a permit writer is to "consider" or "apply" these factors,[7] and while authority exists granting permit writers "considerable flexibility" in doing so, it is abundantly clear from the language of 40 C.F.R. § 125.3(c) that consideration and application of the factors therein is mandatory. Likewise, it is abundantly clear that the Cabinet's permit writer failed to consider vital elements of that regulation. This being the case, we agree with the circuit court that 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.

Conclusion

[7] LG&E cites to *Catskill Mountains Chap. Of Trout Unltd., Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006).

The 1982 ELG was expressly inapplicable to thirty-four toxic pollutants. The Act provided for such a situation, requiring the Cabinet to undertake a case-by-case, best professional judgment review of LG&E's treatment technology and evaluating the necessity for improvement. The Cabinet failed to conduct such a review. Based upon this, we agree with the circuit court that the Cabinet's Secretary acted arbitrarily and without support from the record before him; and we hold that the matter must be remanded to the Cabinet to conduct such a review. The judgment of the Franklin Circuit Court is therefore affirmed.

NICKELL, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING IN PART: I agree with my colleagues that the circuit court properly handled the issue of venue LG&E raises on appeal. However, I part company with my colleagues on the central question of which of the three methods listed in 40 C.F.R. § 125.3(c) the Cabinet was required to employ in the current case. Therefore, I must respectfully dissent, as I would affirm in part and reverse in part.

My colleagues focus exclusively upon the language of the Act which provides for the case-by-case, best professional judgment review, 40 C.F.R. § 125.3(c)(3). Such focus is perilously premised upon the supposition that the 1982 effluent limitation guideline "only appl[ied] to certain aspects of [LG&E's] operation, or to certain pollutants[.]" However, an exacting review of the 1982

effluent limitation guideline and its promulgation reveals this not to be the case - and this subsection to be inapplicable.

In promulgating the 1982 effluent limitation guideline, the EPA clearly evaluated whether the discharge of toxics like arsenic, mercury, and selenium should be, or could be, limited with then-existing technology. The EPA eventually concluded that such materials must be "excluded from national regulation because they are present in amounts too small to be effectively reduced by technologies known to the Administrator." 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). The circuit court reasoned that "this language indicates only that those pollutants named … were undetectable to the Administrator at that time[.]" This reasoning was flawed.

The circuit court's conclusion seemingly equated the terms "present in amounts too small to be effectively reduced" and "undetectable." With all due respect to the circuit court, these terms are not equivalent. The effluent limitation guideline did not state that the EPA did not know whether flue gas desulpherization wastewater contained the excluded pollutants, or that the technology of 1982 could not "detect" them. Rather, the plain language of the 1982 effluent limitation guideline demonstrates that, consistent with the technology-based considerations which are emphasized throughout the Act, the EPA evaluated the technology capable of reducing or eliminating the discharge of

known toxic pollutants such as arsenic, mercury, and selenium; and it concluded that such technology did not then exist. In other words, the EPA "considered" whether to regulate the excluded toxic pollutants it knew existed in wet scrubber wastewater, but elected not to do so.

That the EPA "considered" whether to regulate these toxic pollutants is important because it has since instructed state permit writers that a case-by-case, best professional judgment review is unnecessary under such circumstances. While my colleagues are correct that such a directive is nonbinding upon this, or any, court, I believe, as the Cabinet asserted at oral argument, that it can and should inform our analysis. At the very least, this directive constitutes the EPA's and the Cabinet's interpretation of their own regulations – an interpretation to which we must show deference. *See Summit Petroleum Corp. v. U.S. E.P.A.*, 690 F.3d 733, 746 (6th Cir. 2012); *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet*, 689 S.W.2d 14 (Ky. 1985).

In affirming the circuit court, my colleagues reference the Cabinet's improper reliance upon the 1996 Permit Writer's Manual; however, it must be pointed out that the circuit court relied just as much upon a document of arguably less import – the Hanlon Memo. As even the Appellees concede, this document was released after the issuance of LG&E's permit and expressly intended to have only prospective effect. For these reasons, the majority is correct not to rely on the Hanlon Memo. However, I would be remiss if I did not point out that though the Hanlon Memo is helpful to the goal of possibly achieving stopgap limits on toxic

substances, it nonetheless could have no bearing on the drafting of *this* permit; and the circuit court's reliance upon it was therefore misplaced.

The Cabinet was correct to apply the 1982 effluent limitation guideline pursuant to 40 C.F.R. § 125.3(c)(1) instead of employing a case-by-case analysis under the other subsections of the same regulation. The 1982 effluent limitation guideline was neither "inapplicable" nor did it "only apply to certain aspects … or to certain pollutants" involved in LG&E's operation. Effluent limitation guidelines are to be applied "to dischargers by category or subcategory" and the 1982 effluent limitation guideline, which expressly applied to "low volume waste" including flue gas desulpherization wastewater, is no exception. Hence, the 1982 effluent limitation guideline applied to those pollutants found in flue gas desulpherization wastewater which technology could limit; and it applied to those pollutants which the EPA considered for regulation but ultimately excluded because technology could *not* effectively limit them. Despite the circuit court's understandable frustration at the EPA's three decades of inaction in failing to advance technology-based limits on toxic substances, the Cabinet was not required to employ a case-by-case analysis under 40 C.F.R. § 125.3(c)(2) or (3) when an effluent limitation applicable to LGE's "low volume waste" existed. I must insist that my colleague's conclusion to the contrary is in contravention of the regulatory scheme present in the Act which is essential to the Clean Water Act's clear goal of national uniformity in application of its provisions.

Let there be no mistake: I am profoundly sympathetic to the fact that this case involves toxic substances which have proven ill effects for our environment and public health. I am equally aghast that for more than thirty years, the EPA has failed to promulgate new technology-based limits on the discharge of these substances into the Commonwealth's and the nation's streams and rivers. Nevertheless, as a former Governor of this Commonwealth was fond of saying, I believe we must lead with our heads and not with our hearts.

Accordingly, while my heart urges me to change the fact that current regulations place no limit on the discharge of arsenic, mercury, and selenium in wet scrubber wastewater, my head compels me to conclude that it is not the province of the judiciary to fill such a regulatory void. Rather, it is for the executive to remedy this issue, and the executive is in the process of doing so. With the seemingly imminent promulgation of new effluent limitation guidelines, I am hopeful that the EPA will finally provide the protection from these pollutants that three decades of technological advancements can provide. Prior to the implementation of new effluent limitation guidelines, however, I cannot agree that it is the job of this, or any court, to impose technology-based limitations upon dischargers, let alone those which are both legally untenable and fiscally redundant.

Accordingly, I would affirm in part, reverse in part, and remand for reinstatement of the decision of the Cabinet's Secretary.

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