

Steam Electric Power Plant/Clean Water Act: U.S. EPA Environmental Appeals Board Addresses Challenge to NPDES Permit



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The United States Environmental Protection Agency (“EPA”) Environmental Appeals Board (“EAB”) addressed in a September 30th Opinion a challenge to a Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permit renewal issued by Region 9 of EPA to the Arizona Public Service Company (“APS”).

The NPDES permit renewal would authorize the discharge of wastewater effluent from a steam electric power plant operated by APS.

The steam electric power plant is denominated the Four Corners Power Plant (“Four Corners”). Four Corners is located on the Navajo Nation. It is adjacent to a waterbody denominated Morgan Lake, which is used for circulating the plant’s cooling water. Wastewater discharges from Morgan Lake to a tributary to the Chaco River which flows into the San Juan River.

Four Corners is described as requiring a continuous supply of cooling water that is drawn from Morgan Lake. Morgan Lake is described as a 1,200-acre artificially constructed cooling pond. It is replenished by water piped three miles from the San Juan River at an average rate of 14.3 million gallons per day.

Wastewater is periodically released into Morgan Lake and water from Morgan Lake into No Name Wash at an average annual rate of 4.2 million gallons per day.

Four Corners was operating under a NPDES permit issued by EPA Region 9 in 2001. The permit expired in 2006 but was administratively extended by the company’s submission of a permit renewal application.

APS submitted a revised permit renewal application reflecting certain operating changes in 2013.

EPA issued a revised NPDES permit in June 2018. However, it was withdrawn after it was challenged before the EAB. A revised permit was finalized by EPA on September 30, 2019.

The following organizations filed a petition with the Board challenging certain aspects of the NPDES permit. They include:

- Dine’ Citizens Against Ruining the Environment
- San Juan Citizens Alliance
- Amigos Bravos
- Center for Biological Diversity
- Sierra Club (collectively “Sierra Club”)

The Opinion describes 12 issues raised by the Sierra Club in its Petition for Review. However, several of the issues were not substantively addressed by the Board for procedural reasons.

The Board first holds that the Sierra Club did not demonstrate that EPA clearly erred in concluding that Morgan Lake qualified for the exclusion from the regulatory definition of “waters of the United States” (“WOTUS”) for waste treatment system. This exclusion is deemed to include cooling ponds. Morgan Lake is held to be encompassed by this definition because it provides treatment and is incorporated into the NPDES permit.

Note that the Board deems the applicable definition of WOTUS for the Petition for Review as the one promulgated by EPA in 2015 during the Obama Administration. This is the definition in force when EPA issued its permit decision. Nevertheless, EPA repealed the 2015 definition and reinstated the one in place prior to 2015.

The Board holds that reinstatement had no substantive effect on the scope of the waste treatment system exclusion. The 2020 revision to the WOTUS waste treatment system exclusion was not substantively changed.

Second, the Board held that EPA had not clearly erred in its incorporation of requirements from the Clean Water Act’s (“CWA”) effluent limit guidelines for steam electric power plants into the NPDES permit. The Sierra Club was deemed to have failed to show that EPA clearly erred in setting a deadline for compliance with the guidelines’ zero-discharge requirement for bottom ash transport water.

Similarly, the Sierra Club is held to have failed to show that EPA clearly erred in setting effluent limits on legacy bottom ash transport water. The federal agency was held to have appropriately taken into account applicable effluent limitation guidelines.

Also considered was the site-specific cost and feasibility concerns arising due to what is described as APS’s:

. . . ongoing modifications of the Plant to comply with the zero-discharge requirement for bottom ash transport water and the requirements of the Coal Combustion Residuals rule.

EPA was determined to have had a focus on accomplishing the CWA’s goal of eliminating discharges to navigable waters. Cited was the timely achievement of the zero-discharge effluent limit for bottom ash transport water. The Board held this approach consistent with the statutory requirement that determinations on best available technology economically achievable result in “reasonable further progress toward the national goal of eliminating the discharge of all pollutants.”

The remaining issues were not procedurally addressed for reasons such as:

- Improper forum
- Failure to explain why EPA’s response to comments was erroneous or warrants review

A copy of the Opinion can be downloaded [here](#).