

**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In Re:)	
)	
Four Corners Power Plant)	
NPDES Renewal Permit: NN0000019)	
Arizona Public Service Company (Applicant))	NPDES Appeal No. 18-02
)	
)	

**ARIZONA PUBLIC SERVICE COMPANY’S RESPONSE TO
ORDER DIRECTING PARTIES TO PROVIDE FURTHER CLARIFICATION**

Arizona Public Service Company (“APS”) provides this Response to the Environmental Appeals Board’s (“EAB” or “Board”) Order Directing Parties to Provide Further Clarification (October 23, 2018), Docket Index # 21. The Board directed the parties to file supplemental briefs to answer four questions to provide further clarification. APS answers each of the Board’s questions in turn:

(1) Which of the Petitioners’ nine issues (listed in the Petition at pages 16-17) do the parties believe are mooted, in whole or in part, by the Region’s notice of withdrawal of the two permit provisions (Sections I.A.5 and I.B.3)?

Issue 6 (“EPA erred by not imposing requirements of the new [Effluent Limitation Guidelines (“ELGs”)] into the Permit”) raised in in the Petition for Review By Dine’ Citizens, et al. (“Petition”), Docket Index #1, at 17, is mooted in its entirety with the United States Environmental Protection Agency (“EPA”) Region IX (“Region”) notice of withdrawal of Section I.A.5 of Permit NN0000019 (“Permit”) for the Four Corners Power Plant (“FCPP”). The withdrawn Section I.A.5 is the provision of the Permit that sets forth the effluent limits for

Internal Outfall 01E, which is the only outfall at FCPP that would be affected by EPA’s 2015 Effluent Limitation Guidelines for Coal Fired Power Plants (“2015 ELG Rule”).¹

Petitioner’s Issue 9 (“EPA erred by failing to properly regulate the cooling water intake structure and also violated the Endangered Species Act”), Petition at 17, is mooted at least in part with the Region’s notice of withdrawal of Permit Section I.B.3. Issue 9 involves several sub-arguments, some of which are specific to the Permit’s cooling water intake structure requirements, Petition 41-46, and some of which are more general arguments regarding compliance with the Endangered Species Act (“ESA”) that are related to the cooling water structure requirements, *id.* at 46-54. The withdrawn Permit Section I.B.3 addresses cooling water intake requirements. Accordingly, at a minimum, the following sub-arguments of Issue 9, which are based on the Permit’s cooling water intake requirements, are mooted in light of the Region’s commitment to re-evaluate Permit Section I.B.3: 9(i) (“EPA failed to properly regulate the cooling water intake structure”) and 9(ii) (“To reduce impingement and entrainment losses, the NPDES permit should place a cap on water intake from the San Juan River to reflect the applicant’s retirement of three units.”). Although Petitioners’ more general ESA arguments may not be moot at this stage, as discussed in more detail below, the general ESA arguments will likely be affected by modifications to Permit Section I.B.3, and it would be premature for the Board to consider them prior to the Region’s modification of the cooling water intake structure requirements.

¹ The 2015 ELG Rule established new effluent limits for six wastestreams: fly ash transport water, bottom ash transport water, combustion residual leachate, flue gas desulfurization wastewater, flue gas mercury control wastewater, and gasification wastewater. 80 Fed. Reg. 67,838, 67,841-42 (Nov. 3, 2015). In a subsequent rulemaking, EPA set new compliance deadlines for two wastestreams (bottom ash transport water and flue gas desulfurization water). 82 Fed. Reg. 19,005 (Apr. 25, 2017) (“ELG Postponement Rule”). The discharge from FCPP’s combined waste treatment pond, which discharges through Internal Outfall 01E, currently includes bottom ash transport water. The other two discharge points regulated in the Permit—Outfall 001 and Internal Outfall 01A—do not include wastestreams affected by the 2015 ELG Rule or the ELG Postponement Rule.

(2) To what extent, if at all, do the parties anticipate that modification of Permit Sections I.A.5 and I.B.3 would moot, narrow, or impact how the Board would decide the remaining issues Petitioners raise on appeal?

There is substantial uncertainty as to how the Region will modify the withdrawn provisions, and APS is not in a position to speculate as to how those revised provisions would affect the remaining issues Petitioners have raised. APS can tell the Board that the issues relevant to the withdrawn Permit provisions and Petitioners' remaining claims should be resolved collectively, rather than piecemeal, so that APS can commence a comprehensive planning process to make adjustments at FCPP, if needed, to address the results of this entire appeal process. It would be difficult for APS to have to make adjustments to meet changing Permit requirements at multiple different junctures over the next several months to ensure compliance at FCPP.

For example, in addition to the Petitioners' now-mooted claim concerning the applicable ELGs for Outfall 01E, Petitioners also make several other arguments concerning predicate issues that could directly affect the applicable discharge limits and other requirements for Outfall 01E (e.g., whether Morgan Lake was properly designated as a non-“water of the United States,” whether Total Dissolved Solids (“TDS”) or other limits need to be applied to Outfall 01E, the applicable water quality standards for Morgan Lake). For each of these issues, there is a direct, “upstream” relationship between the Board's ruling as to the propriety of the Region's permitting decisions and the ultimate discharge limitations, monitoring requirements, and other Clean Water Act (“CWA”) obligations that eventually apply to Outfall 01E. On top of the uncertainty it creates, deciding these claims independently of one another presents serious compliance challenges for the FCPP.

In addition to the need for operational certainty for the permittee, as discussed in APS's Reply In Support of Region IX's Motion to Partially Dismiss Petition for Review; Motion to Establish Revised Briefing Schedule, Docket Index # 18, consistent with principles of judicial economy and the efficient resolution of this matter, the Board should wait to review the remaining issues until EPA has modified the withdrawn provisions.

(3) To what extent, if at all, do the parties anticipate that a Board decision on the remaining issues Petitioners raise on appeal would moot, narrow, or impact how the Region would address issues relating to Permit Sections I.A.5 and I.B.3?

APS anticipates that a Board decision on many of the remaining issues raised by Petitioners could significantly impact how the Region would modify Permit Sections I.A.5 and I.B.3. While Petitioners' different claims are based on various duties and requirements outlined in the CWA and related regulations, the crux of their appeal is Petitioners' argument that the Region should have imposed more stringent effluent limits and monitoring requirements in the Permit, including for Outfall 01E. The issues Petitioners raise regarding the jurisdictional status of Morgan Lake, effluent limitations, water quality standards, water quality certification, the "reasonable potential" analysis, and impairment analysis are all interrelated, and they all tie back to Petitioners' central claim that the Region should have imposed different limits in the Permit.

As such, an EAB decision on the following issues could impact how the Region would address the effluent limits for Outfall 01E (Section I.A.5) in the Permit:

- a) Issue 1 ("EPA erred by concluding that Morgan Lake is not a 'water of the United States' subject to the requirements of the CWA"): If the Board finds that the Region erred on its determination that Morgan Lake is not a "water of the United States," among other changes to the Permit, EPA would need to evaluate whether changes would be required for the effluent limits for Internal Outfall 01E. If Morgan Lake is determined to be a

“water of the United States,” Outfall 01E would no longer be considered an internal outfall, but would be the “end of pipe” discharge point. EPA would need to consider whether the Permit would have to be modified to set effluent limits for Outfall 01E to ensure compliance with applicable water quality standards for Morgan Lake. Indeed, Petitioners argue that the Region’s conclusion with respect to Morgan Lake “implicates virtually all conditions of the Permit, including but not limited to the failure to regulate discharges into the lake, as well as discharges from the so-called ‘Internal Outfalls’ into the lake.” Petition at 18. We agree that the Board’s review of the jurisdictional status of Morgan Lake implicates the limits for the discharges from Outfall 01E that the Region will address in Permit Section I.A.5.

- b) Issue 2 (“EPA erred by not imposing effluent limitations on the discharge of pollutants into Morgan Lake”): Likewise, if the Board agrees with Petitioners that the Region is required to impose TDS effluent limits and monitoring requirements at the point of release of the discharge from FCPP into Morgan Lake, the Region would have to modify Permit Section I.A.5 to make changes to the effluent limits and monitoring requirements for Outfall 01E, which discharges to Morgan Lake.
- c) Issue 3 (“EPA erred by failing to promulgate water quality standards for Morgan Lake and No Name Wash”): Similarly, if the Board agrees with Petitioners that EPA was required to promulgate water quality standards for Morgan Lake, the Region would likely have to adjust the effluent limits for Outfall 01E to comply with applicable water quality standards. The Petition argues that EPA’s failure to set water quality standards for Morgan Lake “implicates virtually all aspects of its 2018 Permit, including; including [sic] its ‘reasonable potential’ analysis, its waiver of a Section 401 water quality

certifications [sic]; and its failure [to] conduct an impairment analysis under Section 303(d) of the CWA.” Petition at 25. APS agrees that the issue of water quality standards for Morgan Lake and the related issues of the “reasonable potential” analysis, section 401 water quality certification, and impairment analysis are all interrelated. The Board’s findings on all of these interrelated issues could affect how the Region addresses the effluent limits and monitoring requirements for Outfall 01E in Permit Section I.A.5.

- d) Issue 4 (“EPA erred in finding the discharges did not present a ‘reasonable potential’ for violation of a water quality standard”): If the Board agrees that EPA should have concluded that the discharges from FCPP present a “reasonable potential” to cause or contribute to an exceedance of water quality standards for Morgan Lake, changes would likely be needed for the effluent limits for Outfall 01E for pollutants that are found to have reasonable potential. The Petition suggests mercury and selenium are of particular concern for Outfall 01E. Petition at 28-29. If the Board agrees, EPA could have to revise Section I.A.5 to add effluent limits for those constituents.
- e) Issue 5 (“EPA’s Section 401 water quality certification waiver violated substantive and procedural requirements”): Here, under CWA § 401 and its implementing regulations, EPA must either certify that that the Permit complies with all applicable water quality standards, limitations, and restrictions, or waive the § 401 certification requirement. 33 U.S.C. § 1341(a); 40 C.F.R. § 124.53. It would be premature to evaluate whether EPA adequately complied with § 401 water quality certification requirements prior to a final permit that sets forth effluent limits for one of the facility’s outfalls. And, as explained above, these issues are all interconnected. If the Board were to find, as Petitioners urge, that EPA erred by failing to promulgate water quality standards for Morgan Lake or that

EPA erred by not imposing effluent limits on the discharge of pollutants into Morgan Lake, the Region may have to make changes to the effluent limits for Outfall 01E in order for EPA to certify compliance under § 401 for such water quality standards.

- f) Issue 8 (“EPA erred by failing to undertake an impairment analysis required by Section 303(d) of the CWA”): Petitioners argue that the Permit “fails to determine whether the FCPP discharges impact any impaired waters and whether more stringent effluent limitations should be placed in the permit as part of a Total Maximum Daily Load.” Petition at 41. If the Board agrees, more stringent effluent limits could be required for Outfall 01E.

Petitioners’ other arguments are claims that EPA and the U.S. Fish and Wildlife Service did not comply with the ESA and related requirements when issuing the Permit. As discussed above, Petitioners’ general ESA arguments are interrelated with Petitioners’ arguments regarding the Permit’s cooling water intake structure requirements. Petitioner’s general ESA arguments include:

- a) Issue 9(iii) (“EPA also failed to comply with the ESA”);
- b) Issue 9(iv) (“Impingement and entrainment will jeopardize Colorado Pikeminnow and Razorback Sucker and adversely modify critical habitat”); and
- c) Issue 9(v) (“EPA/FWS must require closed-cycle or dry cooling technology in a reasonable and prudent alternative(s)”).

A Board decision on the general ESA issues could impact how the Region would address cooling water intake structure requirements in Permit Section I.B.3. If the Board agrees that the Region did not comply with the ESA or impose sufficient requirements on the cooling water intake structure to minimize adverse effects to listed species caused by impingement or

entrainment, the Region could determine that changes are needed to Permit Section I.B.3 to impose additional cooling water intake structure requirements to minimize adverse effects to listed species.

In sum, a Board decision on virtually any of Petitioners' remaining issues² could impact how the Region would address issues relating to Permit Sections I.A.5 and I.B.3.

(4) What reasonably expeditious briefing schedule would the parties propose for the remaining issues should the Board decline to defer briefing and instead require briefing now on the remaining issues in this appeal?

APS urges the Board to defer briefing to allow the parties to address all of Petitioners' issues together rather than in a piecemeal fashion. Petitioners have not demonstrated that any prejudice would result from the requested delay in briefing to allow for all issues to be addressed by the Board at the same time.

If, however, the Board declines to defer briefing and instead requires briefing now on the remaining issues in this appeal, the schedule that we understand EPA intends to propose—EPA and APS Response Briefs to be filed by December 21, 2018, and Petitioners' Reply Brief, if any, to be filed by January 22, 2019—is acceptable to APS.

Respectfully submitted,

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² Although Petitioners' Issue 7 ("EPA erred by not properly regulating discharges into the Chaco River watershed from the coal ash ponds") has a more tenuous connection to the withdrawn Permit Sections I.B.3 and I.A.5, judicial economy favors briefing all of these issues together.

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Dated: November 2, 2018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ARIZONA PUBLIC SERVICE COMPANY'S RESPONSE TO ORDER DIRECTING PARTIES TO PROVIDE FURTHER CLARIFICATION was served via e-mail this 2nd day of November, 2018, upon the persons listed below:

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