

**UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

September Term, 2017

Docket Nos. 17-000123 and 17-000124

ENERPROG, L.L.C.,

Petitioner,

and

FOSSIL CREEK WATCHERS, INC.,

Petitioner

- v. -

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Consolidated Petitions for Review of a

Final Permit Issued Under Section 402 of the Clean Water Act

ORDER

EnerProg, L.L.C., and Fossil Creek Watchers, Inc. (FCW), have filed timely petitions pursuant to section 509(b) of the Clean Water Act (CWA), 33 U.S.C. § 1369(b) (2012), seeking judicial review of the final decision of the Environmental Appeals Board (EAB) of the United States Environmental Protection Agency (EPA), affirming the issuance of a final National Pollutant Discharge Elimination System (NPDES) Permit to EnerProg, L.L.C., for pollutant discharges associated with the continued operation of the Moutard Electric Generating Station (MEGS), a coal-fired steam electric power plant located in Fossil, Progress. The petitions are preceded by an order of the Environmental Appeals Board denying petitions for review filed by EnerProg and FCW pursuant to 40 C.F.R. part 124 (2017). This Court has consolidated the petitions for the purpose of its review.

EnerProg takes issue with the NPDES permit as issued by EPA Region XII and affirmed by the EAB. In particular, EnerProg takes issue with the EAB's refusal to extend the deadline for compliance with zero discharge requirements for coal ash transport waters as contemplated by a Notice issued by EPA Administrator Scott Pruitt on April 12, 2017, *see* 82 Fed. Reg. 19005 (Apr. 25, 2017), with the permit's inclusion of certain requirements for the closure of its coal ash treatment pond mandated by the State of Progress as conditions to the state certification issued pursuant to section 401 of the CWA, 33 U.S.C. § 1341, and with Region XII's reliance on Best Professional Judgment (BPJ) as an alternative ground for requiring zero discharge of ash transport pollutants, 40 C.F.R. § 125.3(c)(3).

FCW challenges the NPDES permit on the grounds that abandonment and capping of the remaining coal ash pond as contemplated by the closure plan are illegal without a dredge or fill permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. FCW also asserts that the interim discharge of untreated coal ash wastes into the ash pond, an impoundment that was historically part of Fossil Creek, is itself a violation of the Clean Water Act section 301 provisions requiring technology and water quality based effluent limits for all discharges to waters of the United States, 33 U.S.C. § 1311.

The Court has determined that both petitioners have standing to pursue their petitions for review, that jurisdiction properly lies in this court pursuant to 33 U.S.C. section 509(b), and that all issues raised in the petitions were properly preserved for appeal.

The Court requests briefing and argument on the following issues:

- 1) Whether the Final Permit properly included conditions requiring closure and remediation of the coal ash pond as provided by the State of Progress in the CWA section 401 certification, including the questions:

- a. Whether EPA was required to include all such Progress certification conditions without regard to their consistency with CWA section 401(d); and
- b. Assuming the question of the consistency of the conditions with CWA section 401(d) is open to EPA and to this reviewing court, whether the ash pond closure and remediation conditions constitute “appropriate requirements of State law” as required by CWA section 401(d).

(EnerProg argues that EPA must review the permissibility of the conditions and that the closure conditions are not appropriate. EPA argues that it does have jurisdiction to consider the permissibility of conditions, but that these conditions are appropriate. FCW argues that EPA has no jurisdiction to determine the appropriateness of the conditions of State CWA section 401 certifications, and that while these conditions are “appropriate requirements of State law,” they independently violate the requirement for a CWA section 404 permit.)

- 2) Whether the April 25, 2017 EPA Notice suspending certain future compliance deadlines for the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry is effective to require the suspension of the permit compliance deadlines for achieving zero discharge of coal ash transport water.

(EnerProg and EPA argue that the April 25, 2017 Notice is effective to require suspension of the compliance deadlines. FCW argues that it is not.)

- 3) Whether EPA Region XII could rely on Best Professional Judgment as an alternative ground to require zero discharge of coal ash transport wastes, independent of the applicability or effectiveness of the 2015 Steam Electric Power Generating Industry Effluent Limitation Guidelines.

(EnerProg argues that EPA could not rely on Best Professional Judgment. EPA and FCW argue that the agency could rely on Best Professional Judgment as an alternative ground for requiring zero discharge of coal ash transport wastes.)

- 4) Whether NPDES permitting requirements apply to EnerProg’s pollutant discharges into the MEGS ash pond, in light of EPA’s July 21, 1980 suspension of the provision of 40 C.F.R. section 122.2 that originally included waste treatment systems formed by impounding pre-existing waters of the United States within the regulatory definition of waters of the United States.

(EnerProg and EPA argue that discharges into the ash pond are not subject to effluent limits. FCW argues that they are.)

- 5) Whether the ash pond closure and capping plan requires a permit for the discharge of fill material pursuant to section 404 of the CWA.

(EnerProg and EPA argue that it does not. FCW argues that it does.)

SO ORDERED.

Entered 1st day of September 2017

[NOTE: No decisions decided or documents dated after September 1, 2017 may be cited either in the briefs or in oral argument.]

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

In re:)
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)
EnerProg, L.L.C.) **NPDES Appeal No. 17-0123**
)
Permit No. PG000123)
)

[Decided Spring Term, 2017]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Wink, Blinc, and Knod.

IN RE: ENERPROG, L.L.C.

NPDES Appeal No. 17-0123

ORDER DENYING REVIEW

Decided Spring Term, 2017

Before Environmental Appeals Judges Wink, Blinc, and Knod.

Opinion of the Board by Judge Knod:

I. STATEMENT OF THE CASE

On January 18, 2017, EPA Region XII issued a federal National Pollutant Discharge Elimination System (NPDES) permit to EnerProg, L.L.C., pursuant to section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342 (2012). The permit authorizes EnerProg to continue water pollution discharges associated with the continued operation of the Moutard Electric Generating Station (MEGS), a coal-fired steam electric power plant located in Fossil, Progress. On April 1, 2017, both EnerProg and Fossil Creek Watchers, Inc. (FCW), filed petitions for review of this NPDES permit pursuant to 40 C.F.R. part 124, requesting on a number of grounds that the permit be remanded to Region XII for further consideration. For the reasons set forth below, the Environmental Appeals Board (EAB) denies both petitions for review.

Both the permittee, EnerProg, L.L.C., and an environmental group, Fossil Creek Watchers, Inc., appeal from the re-issuance of a NPDES permit for the Moutard Electric Generating Station. EnerProg challenges the inclusion in the final permit of a condition in the Clean Water Act Section 401 Certification issued by the State of Progress requiring EnerProg to terminate its use of the coal ash settling pond at MEGS by November 1, 2018, dewater the ash pond by September 1, 2019, and cap the remaining coal combustion residuals by September 1, 2020. EnerProg also challenges the inclusion of the zero discharge requirements for coal ash transport waters from the 2015 revised Effluent Limitation Guidelines (ELGs) for the Steam Electric Power Generating Point Source Category, despite the Notice issued by EPA Administrator Scott Pruitt on April 12, 2017 suspending the compliance date for these ELGs.

EnerProg also challenges the permit writer's reliance on Best Professional Judgment as an alternative ground for requiring MEGS to implement dry handling of bottom and fly ash wastes in order to achieve zero discharge of toxic pollutants associated with these wastes by November 1, 2018.

FCW challenges the permit provisions authorizing coal ash solids to remain in the Ash Pond after it is closed, on the grounds that it is unlawful to dewater the pond and leave the coal ash solids in place where a stream once flowed without first obtaining a fill permit under Section 404 of the Clean Water Act. In addition, FCW contends that the permit illegally authorizes discharges of bottom ash and fly ash pollutants into the coal ash pond without subjecting the discharges to Clean Water Act effluent limitations, because the MEGS ash pond itself is a water of the United States. For the reasons stated below the appeals of both EnerProg and FCW are denied.

The underlying factual background for this permit renewal is adequately stated in the following excerpts from the Fact Sheet for the permit:

1. Summary and Background

This is a renewal for the Moutard Electric Generating Station (MEGS). The facility is a coal-fired electric generating plant with one unit rated at a maximum dependable capacity of 745 megawatts (MW). Water for plant uses is withdrawn from the Moutard Reservoir as required to make up for evaporative losses from the cooling tower, boiler water, ash transport water, and drinking water needs. This facility is subject to EPA effluent limitation guidelines per 40 C.F.R. section 423 - Steam Electric Power Generating Point Source Category. The facility has a closed-cycle cooling system (cooling tower), with an actual intake flow and design intake flow of less than 125 million gallons per day (MGD). The facility has a wet fly ash handling system and a wet bottom ash handling system, which use water to sluice ash solids through pipes to one ash pond, where the transport water undergoes treatment by sedimentation before it is discharged to the Moutard Reservoir. The ash pond was created in June, 1978 by damming the then free-flowing upper reach of Fossil Creek. Fossil Creek does not discharge to the Moutard Reservoir, but is a perennial tributary to the Progress River, a navigable-in-fact interstate body of water.

The facility operates the following outfalls:

- *Outfall 001.* Cooling Tower System. Less than once per year the cooling towers and circulating water system are drained by gravity and discharged directly to Moutard Reservoir.
- *Outfall 002.* Ash Pond Treatment System. Outfall 002 discharges directly to Moutard Reservoir via a riser structure. The ash pond receives ash transport water containing bottom

ash and fly ash, coal pile runoff, stormwater runoff, cooling tower blowdown, flue gas desulfurization (FGD) wastewater, and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis (RO) wastewater, plant area wash down water, landfill leachate, monofill leachate, equipment heat exchanger water, groundwater, yard sump overflows, occasional piping leakage from limestone slurry and the FGD system, and treated domestic wastewater.

- *Internal Outfall 008.* Fly ash and bottom ash transport water system, and cooling tower blowdown. Cooling tower blowdown is mixed with ash sluice water prior to discharging into the ash pond. These waste streams and ash transport water are directly discharged to the ash pond. Cooling tower blowdown is usually indirectly discharged to Moutard Reservoir via the ash pond treatment system (Outfall 002). Ash transport flows will be eliminated from this outfall upon completion of conversion to dry ash transport handling, whereby fly ash and bottom ash will be disposed of into a dry landfill.

- *Internal Outfall 009.* Discharge from the FGD blowdown treatment system to the ash pond. FGD blowdown is indirectly discharged to Moutard Reservoir via the ash pond treatment system (Outfall 002).

- *Outfall 002A.* Upon completion of construction, discharge from the new lined retention basin. The flows from the ash pond will be re-directed to the retention basin when the construction of the retention basin is completed. At that point, the ash pond will no longer accept any wastewater. Retention basin will accept wastes from the holding cell (vacuumed sediments and solids), monofill leachate (coal ash), coal pile runoff, stormwater runoff, cooling tower blowdown, FGD wastewater, and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis (RO) wastewater, plant area wash down water, landfill leachate, equipment heat exchanger water, groundwater, occasional piping leakage from limestone slurry and FGD system, chemical metal cleaning waste, and treated domestic wastewater. The wastewater from this outfall discharges to Moutard Reservoir via Outfall 002.

* * *

2. Permit Limits and Conditions Development

The State of Progress has issued a certification pursuant to section 401 of the Clean Water Act for the renewal of the MEGS NPDES permit. One of the conditions of the Progress Section 401 certification is that, in order to comply with the Progress Coal Ash Cleanup Act (CACA), EnerProg must cease operation of its ash pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020. CACA is a state-enacted law requiring assessment, closure, and remediation of substandard coal ash disposal facilities in the State of Progress. The CACA legislation recites that its purpose is to prevent public hazards

associated with the failures of ash treatment pond containment systems, as well as leaks from these treatment ponds into ground and surface waters. Pursuant to Clean Water Act section 401(d), these Progress requirements are incorporated as additional conditions to the permit.

Pursuant to the 2015 revised Effluent Limitation Guidelines for the Steam Electric Power Generating Point Source Category, 40 C.F.R. part 423, Best Available Technology (BAT) for toxic discharges associated with bottom ash and fly ash is zero discharge, based on the available technology of dry handling of these wastes. Based on the requirements of the Progress 401 certification, it is determined that the MEGS is capable of meeting this zero discharge standard by the initial compliance deadline of November 1, 2018. The 2015 Steam Electric Power Generating Point Source Category ELGs are the subject of an industry challenge that is pending in the Fifth Circuit. The discharge from the MEGS coal ash pond contains elevated levels of mercury, arsenic, and selenium, which are all toxic pollutants.

It is determined that, independent of the 2015 ELGs, this permit must contain limits for toxic pollutants actually present in the discharge based on the BAT. EPA staff have determined (as evident in the 2015 ELGs) that dry handling of bottom ash and fly ash has been in use at existing plants in the industry for many years. MEGS is sufficiently profitable to adopt dry handling of these wastes with zero liquid discharges, with no more than a twelve cents per month increase in the average consumer's electric bill. Accordingly, the permit writer has determined, in the exercise of his best professional judgment, that zero discharge of ash handling wastes by November 1, 2018 constitutes BAT for discharges associated with coal ash wastes.

In response to Progress's Clean Air Act State Implementation Plan, which requires the reduction of SO_x and NO_x from air emissions, the company installed a Flue Gas Desulfurization (FGD) system. FGD is essentially a scrubber system to remove SO_x by mixing flue gas with a limestone slurry.

The FGD blowdown generates a flow of approximately 0.254 MGD, with relatively elevated concentrations of metals and chloride. EnerProg treats the FGD blowdown via a vapor compression evaporator (VCE) whose purpose is to evaporate the majority of the waste water produced from the FGD scrubber system. The VCE became operational in February, 2015. It produces two waste streams, and both are utilized in the plant processes. The concentrated wastewater is used for moisture conditioning of fly ash prior to sending to the landfill. The second stream is a clean distillate that is utilized to partially replace water withdrawal from Moutard Reservoir. The VCE system eliminates the FGD blowdown stream from Outfall 002, except for severe rain events.

The facility will be required to build a new Retention Basin to reroute all waste streams that are currently discharged to the ash pond. This change is necessary to decommission the existing ash pond and meet the requirements of the Progress Coal Ash Cleanup Act. The Retention Basin will have a cell where various vacuumed sediments and

solids can be decanted prior to disposal. The Basin will also accept the monofill leachate. The monofill contains coal ash.

The facility is also constructing a new FGD settling basin, the waste from the basin will be treated by VCE. In case of the severe storms, overflow from the basin may be routed to Outfall 002. Appropriate TBEL limits are applied to Outfall 002 to accommodate such overflows.

The final permit contained the following conditions relevant to this appeal:

By November 1, 2018 there shall be no discharge of pollutants in fly ash transport water. This requirement only applies to fly ash transport water generated after November 1, 2018.

By November 1, 2018 there shall be no discharge of pollutants in bottom ash transport water. This requirement only applies to bottom ash transport water generated after November 1, 2018.

* * *

Special Condition A:

EnerProg must cease operation of its ash pond by November 1, 2018, complete dewatering of its ash pond by September 1, 2019, and cover the dewatered ash pond with an impermeable cap by September 1, 2020.

In addition, the final permit authorized the continued use of internal outfall 008 to transport bottom and fly ash to the coal ash pond without any effluent limits on an interim basis until closure of the coal ash treatment pond on November 1, 2018.

II. RESOLUTION OF CLAIMS ASSERTED

EnerProg and FCW both properly preserved their respective claims by filing comments on the draft permit. We resolve their respective claims as follows.

1. Inclusion of State of Progress Conditions Requiring Ash Pond Closure and Capping Complies with CWA Section 401(d).

EnerProg objects to the inclusion of the ash pond closure and capping provisions as permit requirements, asserting that such requirements are not “appropriate requirements of State law” as contemplated by Clean Water Act section 401(d), 33 U.S.C. § 1341(d). EnerProg asserts that the CACA requirements are not requirements that are based on achieving State water quality standards established under CWA section 303, 33 U.S.C. § 1313, nor are they related to achieving effluent limitations. EnerProg also points out that there is no procedure available under the Laws of Progress for it to obtain judicial review of its challenge to the conditions established

in the Progress CWA section 401 certification, as Progress law does not provide for review of such certifications in the state's courts.

We reject EnerProg's objections to the inclusion of the ash pond closure and capping conditions. The Supreme Court has taken a broad view of what sorts of conditions may be considered "appropriate[ly]" related to water quality under section 401(d), *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), and we cannot say that ash pond remediation is so completely unrelated to surface water quality as to be beyond the scope of section 401(d). In any event, EPA has no discretion to reject a condition included in a State section 401 certification: such conditions "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d); see *American Rivers, Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99 (2d Cir. 1997).

2. Reliance on Best Professional Judgment as Alternative Ground for Zero Discharge for Ash Transport and Treatment Wastes is Justified.

We note that because the zero discharge requirement for bottom ash and fly ash is an element of the 2015 ELGs for the Steam Electric Power Generating Industry Category, 40 C.F.R. part 423, EPA Staff's alternative reliance on Best Professional Judgment as supporting this requirement does not currently have any practical effect on the permit requirements. In any event, we find the reliance on BPJ justified even in the event that the 2015 ELGs were eliminated or vacated. 40 C.F.R. section 125.3(c)(3) specifically provides for use of BPJ for pollutants not covered by the ELGs for an industry category: "[w]here promulgated effluent limitation guidelines only apply to certain aspects of a discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis." There is no dispute that the effluent from the MEGS coal ash pond contains toxic pollutants such as mercury, arsenic, and selenium that are not regulated by the 1982 ELGs. These pollutants are appropriately subject to BPJ limits.

3. Effect of April 25, 2017 Postponement of Compliance Deadlines for 2015 ELGs.

Subsequent to the filing of this appeal, on April 12, 2017, EPA Administrator Scott Pruitt issued a Notice that purports to postpone the compliance deadlines for the 2015 Steam Electric Power Generating Point Source Categories ELGs. 82 Fed. Reg. 19005 (Apr. 25, 2017). This postponement relies on section 705 of the Administrative Procedure Act (APA), which authorizes an agency to "postpone the effective date of an action taken by it, pending judicial review." 5 U.S.C. § 705. EnerProg has not demonstrated that the November 1, 2018 compliance deadline in the permit is infeasible. However, in a supplemental letter brief, EnerProg asserts that the effect of this suspension notice is to relieve it from compliance with the November 1, 2018 deadline for achieving zero discharge of coal ash related effluents. As established in the previous section, however, this deadline is required by BPJ and the Progress certification, independently of the 2015 ELGs. In any event, section 705 of the APA does not authorize the extension of compliance dates, only of the effective date. The effective date of the 2015 ELGs was January 4,

2016, which had long passed before the April 12 rule postponing compliance. The administrator, without undergoing notice and comment rulemaking, may not postpone the compliance dates of a rule that has already become effective.

4. Outfall 008 is an “Internal” Discharge and Does Not Require a Section 402 Permit.

FCW asserts that the discharges from outfall 008 to the coal ash pond should not be considered internal discharges, but rather should be treated as a direct discharge to waters of the United States that requires implementation of effluent limits under CWA sections 301(b) and 402. 33 U.S.C. §§ 1311, 1342. FCW cites 40 C.F.R. section 122.2, the regulations defining “waters of the United States” to include “all impoundments of waters otherwise identified as waters of the United States.” FCW acknowledges that subsection (2) of that definition specifically exempts “waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act.” 40 C.F.R. § 122.2. But FCW argues that the last sentence of the exemption precludes reliance on the exemption where, as here, the coal ash pond was created by damming a water body (Fossil Creek) which is itself a water of the United States subject to Clean Water Act jurisdiction. This sentence provides: “This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.” *Id.* However, Note 1 to that section states that the application of this sentence has been stayed indefinitely since July 21, 1980:

The sentence beginning with “This exclusion applies . . .” appearing in § 122.2 within the definition of “Waters of the United States” was stayed by the Environmental Protection Agency at 45 FR 48620, July 21, 1980 and continued at 48 FR 14153, April 1, 1983. The amendment published at 80 FR 37114, June 29, 2015 continues and reaffirms the indefinite stay.

FCW argues that the July 21, 1980 suspension should not be given effect, because it lacked statutory authorization, and failed to comply with the requirements of section 553 of the APA. 5 U.S.C. § 553.

The July 21, 1980 suspension of this language has been in effect for over 35 years. We decline to disturb this longstanding policy judgment of successive EPA administrations, which has been reincorporated in two subsequent reconsiderations of the definitions section of section 122.2. Accordingly, no effluent limitations are required for internal outfall 008, as it does not discharge into a “Water of the United States” as that term is defined in the regulations.

5. Section 404 Permit is Not Required for the Coal Ash Pond Closure and Capping.

FCW makes the related claim that, even if the section 122.2 exclusion from the definition of “Waters of the United States” applies for the purpose of a section 402 permit for the discharge

of pollutants, once the coal ash pond is closed, it no longer qualifies as a waste treatment system, and both the abandonment of the remaining coal ash and the placement of an impermeable cap constitute the discharge of fill material requiring a permit under Clean Water Act section 404. 33 U.S.C. § 1344. FCW cites the regulatory definition of “fill” in 33 C.F.R. section 323.2, which provides:

the term fill material means material placed in waters of the United States where the material has the effect of:

- (i) Replacing any portion of a water of the United States with dry land; or
- (ii) Changing the bottom elevation of any portion of a water of the United States.

FCW argues that the abandoned coal ash and the cap material both change the bottom elevation of the coal ash pond (which is the former bed of Fossil Creek) and replace the pond (and former creek) with dry land, bringing these activities within the permitting requirements of CWA sections 301 and 404. 33 U.S.C. §§ 1311, 1344. However, the 40 C.F.R. section 122.2 exemption for waste treatment systems does not contain any recapture provision that would convert these features back into waters of the United States upon their retirement. Since discharges to the ash pond do not require a section 402 permit, and since the jurisdictional definition of waters of the United States is the same for section 402 and 404 permitting, no section 404 permit is required for the ash pond closure and capping activities.

III. CONCLUSION AND ORDER

For the foregoing reasons, the appeals of both EnerProg and FCW are denied, and NPDES Permit PG000123 is affirmed and effective as of the date of this decision.

So ordered.