Date: October 25, 2017

NELMCC 2018 - Problem Questions and Answers

Q. 1. My team has a question about the order in the problem. Under the resolution of claims asserted when it says "enerprog asserts that the CACA requirements are not requirements... under CWA section 303, 33 USC 1331" it should be 33 USC 1313? Is this meant to be there as a citation to the next part of that sentence where it says "nor are they related to achieving effluent limitations" because 33 USC 1311 is Section 301 of the CWA which covers effluent limitations. Every other section of the CWA that is mentioned has the USC citation behind it, so does it all go together?

A. 1. The correct citation here is 33 U.S.C. 1313.

Q. 2. Also, under issue two of the problem, is the phrase "Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry" meant to refer to the 2015 Final Effluent Limitation Guidelines for the Steam Electric Power Generating Industry or a different version of the Effluent Limitation Guidelines? If so, which one?

A. 2. This phrase refers to the 2015 Effluent Limitation Guidelines for the Steam Electric Power Generating Industry.

Q. 3 When referring to the facts in the problem, should the problem be referred to as the "record" or the "order"? Unlike the document we referred to in Lawyering II, there are no page numbers in this document. Should they refer to specific parts of the document instead of using a general term?

A. 3. Page numbers have been added to the problem. Teams may cite to the record or the specific document.

Q. 4. The team is also concerned that there may be some significant changes to the law/standards during the time between turning in the brief and competing in oral arguments. Do these competitions expect teams to be on top of these changes/developments in the law after turning in the brief and to be prepared to address them in oral arguments?

A. 4. As stated on page 4 of the problem: “NOTE: No decisions decided or documents dated after September 1, 2017 may be cited either in the briefs or in oral argument.”

Q. 5. In what way is the FCW claiming that the EPA Federal Regulation 45 FR 48620 failed to comply with section 553 of the APA? Is it just the lack of statutory authorization, or something more specific?

A. 5. The record will not be supplemented on this issue.

Q.6. Has the state of Progress created any other "water quality standards" to which a state certification is measured against other than CACA?

A. 6. The record will not be supplemented on this issue.

Q. 7. In addition, are there limitations placed on the brief regarding citation to outside non-legal materials, for example a peer reviewed article or scientific study discussing the threats posed to water quality due to coal ash ponds?

In the problem, EPA Region XII issued the NPDES permit. I interpret this to mean that Progress does not have delegated authority under the CWA, is this assumption correct?

A. 7. This is correct.

Q. 8. Are we supposed to only deal with the 1982 ELGs because of how the new administration has dealt with the 2015 ELGs? (Insofar as looking to statutory guidance for ELGs)

A. 8. The record will not be supplemented on this issue.

Q. 9. Did the ash pond in the problem used to be connected to a tributary to the Progress River?

A. 9. Please refer to the record.

Q. 10. Is the MEGS ash pond lined?

A. 10. The record will not be supplemented on this issue.

Q. 11. For Issue 3, does "coal ash transport wastes" (used throughout) refer to both fly ash and bottom ash?

A. 11. Yes.

Q. 12. The problem sometimes refers to “ash basin,” is that the same as the “ash pond”?

A. 12. All references to the “ash basin” refer to the “ash pond” – the problem has been amended to reflect this.

Q. 13. When describing Outfall 2A, the problem says that the wastewater discharges to Moutard Reservoir via Outfall 2. Did the Board mean to say via Outfall 2A or via Outfall 2?

A. 13. The problem is correct – the wastewater from internal outfall 002A discharges to the Moutard Reservoir via Outfall 002.

Q. 14. Is ash waste from Internal Outfall 008 also indirectly discharged into Outfall 2? The description of Internal Outfall 8 only mentions cooling tower blowdown.

A. 14. Please refer to the problem. No further information will be provided.

Q. 15. Is Outfall 2A part of the closure and capping plan in Progress’s state water quality certification, or is it part of a separate plan that EnerProg has in order to comply with the condition?

A. 15. The record will not be supplemented on this issue.

Q. 16. In the “Order,” paragraphs two and three refer to “coal ash transport waters,” “ash transport pollutants,” and “coal ash wastes.” Are these all the same thing, and, if so, how should we refer to them?

A. 16. These are all terms that should be read in the context of the claims within which they are referenced.

Q. 17. When the opinion is describing the permit in section I.2, it states “special condition A.” Should the two conditions above “special condition A” also be labeled as special conditions? How should we refer to/label those conditions?

A. 17. The record will not be amended regarding the labeling of these conditions. You may refer to these conditions in any way you see fit that provides sufficient clarity.

Q. 18. Issue 2 of the problem states “Whether the April 12, 2017 EPA Notice….” But the Notice is dated April 25, 2017. Is the issue referring to that April 25, 2017 Notice, or the April 12, 2017 letter in which Scott Pruitt announced EPA’s decision to reconsider the final rule?

A. 18. The issue is referring to the April 25, 2017 Notice that references the April 12, 2017 letter – the problem has been amended to reflect this.

Q. 19. On what date and year was Enerprog’s first permit issued?

A. 19. The record will not be supplemented on this issue.

Q. 20. If possible we would like some clarification regarding issue # 3 (EPA region XII reliance on BPJ). The Order states to address this issue independent of the 2015 industry ELG's. Does this mean we are to apply the 1982 ELG's to the question? The 1982 ELG's are mentioned in the EAB's Order Denying review, however, they are not mentioned within the 12th Cir. Order.

A. 20. The record will not be supplemented on this issue.

Q. 21. On page ten of the problem, it says "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."

Our interpretation of this is that this is included as an indication that the review of the appropriateness or consistency with the CWA would be subject to federal law, namely the federal Administrative Procedure Act. Is this the case?

A. 21. The record will not be supplemented on this issue.

Q. 22. Are we to assume that the State of Progress does not have approval from the EPA to issue NPDES permits, thus EPA Region XII is issuing the NPDES permit to Enerprog?

A. 22. Correct. The State of Progress has not been authorized to issue NPDES permits.

Q. 23. Did the EPA give public notice of this NPDES permit issued to Enerprog?

A. 23. Yes.

Q. 24. Was there public comment given on this NPDES permit issued to Enerprog?

A. 24. Yes.

Q. 25. The distance between the ash pond and Fossil Creek?

A. 25. The record will not be supplemented on this issue.

Q. 26. The distance between the ash pond and Progress River?

A. 26. The record will not be supplemented on this issue.

Q. 27. The distance between the ash pond and Moutard Reservoir?

A. 27. The record will not be supplemented on this issue.

Q. 28. The distance between Fossil Creek and Moutard Reservoir?

A. 28. The record will not be supplemented on this issue.

Q. 29. Reading your answer to Q #7, if we are to assume that Progress does not have the delegated authority, can we assume that the CACA provisions are a full and complete description of the program--and that the CACA program was submitted to the Administrator? 33 U.S.C. § 1342.

A. 29. The record will not be supplemented on this issue.

Q. 30. We are given an Order Denying Review from the Environmental Appeals Board (NPDES Appeal No. 17-0123). Appeals from the Environmental Appeals Board generally first go to a federal district court. The prompt does not mention a ruling from a federal district court. We only have an order requesting briefing from the Twelfth Circuit Court of Appeals (Docket Nos. 17-000123 and 17-000124), essentially skipping the district court level. This order requesting briefing does not discuss any ruling from a district court. Does this mean this case never went through a federal district court? What assumptions should we make regarding a district court ruling? Should we assume that the case was never heard by a district court?

A. 30. The record will not be supplemented on this issue.

Q. 31. I noticed that there are two questions under Q.7. One question is about whether we can cite outside non-legal materials and the other question is about delegated authority. The answer addresses the delegated authority question, but not the non-legal materials question.

Thus, I have the same question about whether we are permitted to use secondary, "non-legal" sources.

A. 31. Yes.

Q. 32. On page 8: "The flows from the ash basin will be re-directed to the retention basin when the construction of the retention basin is completed" Our question is whether the ash basin here means the same thing as the ash pond, or if there are two different structures.

A. 32. All references to the "ash basin" refer to the "ash pond" – the problem has been amended to reflect this.

Q. 33. Are we allowed to bring a diagram of the water plants as a demonstration to oral arguments?

A. 33. Please refer to the rules questions for this answer.