

From: [Gidiere, Stephen](#)
To: [Stein, Mark](#); [Eckhardt, Cayleigh](#)
Cc: [DeLawrence, Tom](#)
Subject: MK ELG issue
Date: Friday, June 14, 2019 2:53:53 PM
Attachments: [2016.12.05 - EIP, Sierra Club, and Waterkeeper Alliance Brief \(Provision....pdf\)](#)

Dear Mark and Cayleigh: I wanted to follow up on our discussions about the Merrimack permit and the recent legal developments surrounding the ELGs for FGD wastewater. As we discussed, we (Granite Shore) do not think that the recent Fifth Circuit decision impacts the direction of the Merrimack permit or requires an assessment using BPJ for FGD. As you know, the prior permit holder elected to participate in or “opt-in” to the voluntary incentives program under 40 CFR 423.13(g)(3) for the pending permit, and Granite Shore has not changed that election. That provision (40 CFR 423.13(g)(3)) was not challenged by Petitioners in the Fifth Circuit case and was not vacated by the court in its decision. I have attached a copy of the petitioners’ brief in the case, which makes very clear that the provisions challenged did not include (g)(3). Thus, there is an existing ELG for Merrimack’s new permit—both starting after December 31, 2023 ((g)(3)(i)), and prior to that period ((g)(3)(ii)). We think EPA is obligated to apply those provisions to Merrimack and is not authorized to conduct a BPJ analysis for FGD.

We are happy to discuss further or provide additional information in support of this. We hope this streamlines one aspect of the process so that EPA can finalize the pending permit.

As always, thanks for your help in working through these issues. I hope you both have a nice weekend.

Stephen



P. Stephen Gidiere III, Partner, Balch & Bingham LLP
1901 Sixth Avenue North • Suite 1500 • Birmingham, AL 35203-4642
t: (205) 226-8735 f: (205) 488-5694 e: sgidiere@balch.com
www.balch.com

CONFIDENTIALITY: This email and any attachments may be confidential and/or privileged and are therefore protected against copying, use, disclosure or distribution. If you are not the intended recipient, please notify us immediately by replying to the sender and double deleting this copy and the reply from your system.