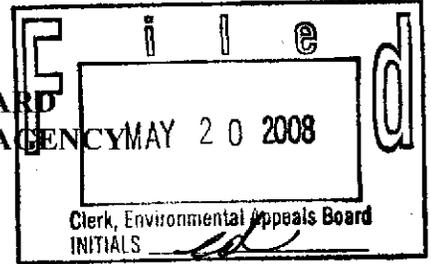


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Deseret Power Electric Cooperative)

PSD Permit No. PSD-OU-0002-04.00)

PSD Appeal No. 07-03

ORDER GRANTING MOTION TO STRIKE

Before the Board at this time is a Motion to Strike and Alternative Motion for Leave to File Surreply submitted jointly by United States Environmental Protection Agency Region 8 as Respondent and EPA's Office of Air and Radiation as amicus (collectively "EPA"). By the motion to strike,¹ EPA objects to arguments made by Sierra Club and Physicians for Social Responsibility for the first time in their reply briefs. Specifically, EPA objects that Sierra Club and Physicians for Social Responsibility argue for the first time in their separate reply briefs that carbon dioxide (CO₂) is subject to regulation under the Clean Air Act by virtue of the landfill emission regulations promulgated under section 111 of the Clean Air Act. Motion to Strike at 1 (citing Petitioner's Reply Brief at 19-21; Reply of Physicians for Social Responsibility to Briefs of Respondents and Supporting Amici at 3 n.7). EPA also objects to the Physicians for Social Responsibility's reference to methane as an additional pollutant subject to regulation by virtue of

¹ The Board has also received statements in support of EPA's motion from the Utility Air Regulatory Group and from the permittee, Deseret Power Electric Cooperative.

the landfill emissions regulations. *Id.* EPA notes that neither of these parties made these arguments in their initial briefs filed after the Board granted review. *Id.* at 2. Moreover, these issues and arguments were not raised in any of the public comments on the draft permit and were not raised in Sierra Club's petition for review.

Sierra Club has filed an opposition to EPA's motion to strike, in which Sierra Club argues that the discussion in its reply brief regarding the Agency's landfill emissions regulations allegedly "goes directly to the issue on which the Board granted review" and that the Board should consider all pertinent information. Petitioner's Opposition to Motion to Strike at 1-2. Sierra Club also contends that it is not attempting to raise new facts or interject new issues. *Id.* However, Sierra Club apparently recognizes that its reply brief seeks to introduce a new argument – Sierra Club states that it has cited "the agency's own regulations to point out *another* way in which CO₂ is already regulated under the Act." *Id.* at 2 (emphasis added). Sierra Club also asserts without elaboration that consideration of the information Sierra Club seeks to introduce by its reply brief "serves the interests of judicial economy." *Id.*

The Board has long held that new arguments and new issues may not be raised in reply briefs submitted after the permitting authority has responded to a petition for review. *See e.g., In re BP Cherry Point*, 12 E.A.D. 209, 216 n.18 (EAB 2005) (rejecting new legal argument petitioner sought to introduce for the first time in a reply brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). We explained in *Knauf* that "[n]ew issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be

denied on the basis of timeliness.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999).²

In a case where the Board granted review and received supplemental briefing from the parties and from supporting and opposing amici after the grant of review, the Board explained that this timeliness requirement also limits the arguments and issues that may be raised for the first time in supplemental briefing filed after the Board’s decision granting review. *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 (EAB 2006). In *Dominion*, we dismissed a number of issues and arguments on the grounds that they were “beyond the scope of the Petition and thus untimely raised.” *Id.*; *see also id.* at 626 n.215, 652 n.264; 653 n.266; 661-62 n.286; 667-68 n.295. We observed that the issues and arguments dismissed as untimely in *Dominion* could have been raised in a timely petition and that the Board’s order granting review “specifically instructed participants to limit their arguments to those issues contained within the Petition.” *Id.* at 595.

Dominion did recognize that the Board has discretionary authority to consider arguments raised for the first time in the initial briefing after a grant of review where the new arguments pertain directly to the issues raised in the petition and over which the Board has granted review and requested supplemental briefing. *Id.* at 612.³ However, as we held in *Dominion*, a grant of

² A petition seeking appellate review of a permit must be filed within 30 days of the permitting authority’s decision. 40 C.F.R. § 124.19(a). The petition must include the petitioner’s reasons for its contention that the decision was based on a clearly erroneous finding of fact or conclusion of law or an exercise of discretion that the Board should review. *Id.*

³ Indeed, the regulation’s requirement for notice and opportunity for interested persons to submit amicus briefs after the Board has granted review, 40 C.F.R. § 124.19(c), invites the Board to consider additional perspective on the issues raised in the petition and over which review has been granted.

review does not provide an opportunity for the petitioner or amici to raise new issues that should have been timely raised in a petition for review. *Id.* at 595. Further, a grant of review certainly does not eviscerate the long-standing prohibition against reply briefs raising new arguments that are not fairly directed at the specific arguments presented in the response briefs.

In the present case, the Board's order granting review specifically limited supplemental briefing to the one issue that was raised in Sierra Club's petition on which we granted review. We also specifically limited reply briefs to the arguments presented in the response briefs. *See* Order Granting Review at 3-4 ("Replies * * * are limited to arguments presented in the responses * * *"). The landfill emissions regulations were not mentioned in Sierra Club's petition or, after the Board granted review, in either the opening briefs filed by Sierra Club and supporting amici or the response briefs filed by EPA, Deseret, and amici opposing Sierra Club's petition. Sierra Club and Physicians for Social Responsibility have not provided any explanation or justification for raising arguments concerning the landfill emissions regulations for the first time in their reply briefs. Moreover, there is no apparent direct connection between these new arguments and the arguments presented in EPA's response brief or response briefs submitted by amici;⁴ nor is there any apparent reason why Sierra Club and Physicians for Social Responsibility could not have

⁴ Sierra Club asserts without elaboration that its discussion of the landfill gas regulations relates to the issue on which the Board granted review and "addresses arguments raised by Respondents and their amici." Petitioner's Opposition to Motion to Strike at 2-3. Although Sierra Club's discussion of the landfill gas regulations do arguably relate to the CO₂ BACT issue on which the Board granted review, it is not apparent, however, how that discussion relates directly to arguments raised in the response briefs or why that discussion should be allowed for the first time in a reply brief, rather than having been incumbent upon Sierra Club to raise in its petition or at the latest in its initial briefing after the Board granted relief. In this regard, Sierra Club's late introduction of this new argument in its reply brief does not serve judicial economy, but rather wastes it.

raised these arguments in their initial briefs submitted after the Board invited supplemental briefing. Indeed, it appears that Sierra Club and Physicians for Social Responsibility could have raised these arguments much earlier in a timely petition for review. The landfill emissions regulations were promulgated more than a decade ago. 61 Fed. Reg. 9905 (Mar. 12, 1996).

Accordingly, arguments raised for the first time in Sierra Club's and Physicians for Social Responsibility's reply briefs concerning the landfill emissions regulations are untimely and will not be considered further by the Board and EPA's Motion to Strike is granted. Moreover, to the extent that Physicians for Social Responsibility may have been intending to raise an issue concerning methane, that issue is barred as an untimely appeal of an issue that should have been, but was not, raised in a timely petition for review.

So ordered.

Dated: 5/20/08

ENVIRONMENTAL APPEALS BOARD

By: 
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Motion to Strike in the matter of Deseret Power Electric Cooperative, PSD Appeal No. 07-03, were sent to the following persons in the manner indicated:

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