

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re: ESSROC Cement Corporation)
RCRA Permit No. 005 081 542) RCRA Appeal No. 13-03

**PETITIONER'S RESPONSE IN OPPOSITION TO THE REGION'S MOTION FOR
LEAVE TO FILE SURREPLY BRIEF**

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ARGUMENT

I. The Board should not grant leave to file a surreply because ESSROC did not present “new arguments or issues” in its reply that would warrant a surreply.

As the United States Environmental Protection Agency Region 5 (“the Region”) states in its motion for leave, the rules governing the Board make no mention of the appropriateness of surreplies. Motion for Leave to File Surreply Brief (“Motion”) at pp. 2; see 40 C.F.R. § 124.19. However, the Board’s Practice Manual states that “[i]f a reply brief has been filed, the EAB may similarly, upon motion, allow the filing of a surreply brief.” Environmental Appeals Board Practice Manual, August 2013, p. 49. While the Board has allowed surreplies in the past, it has also limited surreplies to address newly raised issues or arguments. See, e.g., *In re: City of Keene Wastewater Treatment Facility*, Order Granting Motion for Leave to File a Reply (E.A.B. Jan. 31, 2008) (“We similarly GRANT the Region’s request to file a surreply to the City’s reply, but, again, with the caveat that we will only entertain the substance of any such surreply to the extent that it responds to new arguments identified by the City in its reply brief.”).

The Region challenges the sum of ESSROC’s reply as a “new issue or argument,” seemingly arguing that any portion of a reply that is not cut-and-paste from the original petition justifies a surreply. See Motion at pp. 1-2 (citing 40 C.F.R. § 124.19(c)(2)). This is wrong. ESSROC’s reply maintained the *same* challenges to the Region’s permitting decisions, which go all the way back to the public comment period, but merely tailored the arguments and issues to address the Region’s response. This is conceded by the Region’s proposed surreply, which cites its own response brief throughout. See Proposed Surreply at pp. 6 and 9. In short, the Region did not identify any new issues or arguments in ESSROC’s reply that would entitle it to file a surreply.

First, the Region argues that ESSROC has advanced a “new issue or argument” in its discussion of whether a second site-specific risk assessment (SSRA) was appropriate by relying on the D.C. Circuit’s decision in *Cement Kiln Recycling Coalition v. EPA*, 393 F.3d 207 (D.C. Cir. 2007). Motion at p. 2. This is not true. ESSROC’s argument regarding this particular action of the Region remains the same, that a second SSRA was not legally appropriate under 40 C.F.R. § 270.10(l), as clarified by EPA’s statements in the Federal Register. See Petition at pp. 9-11; Reply at pp. 2-5. The *Cement Kiln Recycling Coalition* case provides additional support construing the plain language of the rules consistently with ESSROC’s position, in response to the Region’s discussion of that language. See Reply at pp. 2-5. In addition, ESSROC discussed the *Cement Kiln Recycling Coalition* decision in its Petition. See Petition at pp. 3, 4, and 9. Thus, the Region has not identified a new issue or argument that warrants further discussion on the threshold legal issue in this appeal.

Second, the Region argues that ESSROC has raised new arguments concerning the applicable burdens of persuasion at issue in this case. Motion at p. 2. Again, this is not true. ESSROC discussed the appropriate standard of review in its Petition. See Petition at pp. 8-9. The Reply simply responds to the Region’s incorrect assertion that ESSROC’s burden in this appeal was “at an even higher level. . .” See Resp. at p. 8; Reply at pp. 1-2 (The Region’s discussion of the burdens “is contradicted squarely by EPA’s statements in the preamble regarding the Region’s exact task in this permitting action.”). The Reply therefore did not raise a new issue or argument that justifies a response from the Region.

Third, the Region alleges that ESSROC has mischaracterized EPA’s actions in the risk assessment process. Motion at pp. 2-3. As an initial matter, arguing a supposed “mischaracterization” is not normally sufficient to warrant a surreply. See *In re: City of Keene*

Wastewater Treatment Facility, supra. But more importantly, the proposed surreply unnecessarily adds further discussion of issues that have been thoroughly briefed before. These discussions show that 1) the Region clung to an outdated distinction between lakes and rivers to apply an unreasonably high bioaccumulation factor for mercury for the lakes near ESSROC's facility, Reply at pp. 6-8; and 2) the Region chose to apply a one-size-fits-all default value instead of regional, site-specific information regarding fish consumption, which resulted in an unrealistic assumption factored into the second SSRA, *id.* at pp. 8-11. Thus, the Board should decline to consider the Region's further arguments on this point.

II. The Region's surreply is inappropriate to the extent that it addresses the amicus brief filed by the Cement Kiln Recycling Coalition.


ESSROC additionally objects to the filing of the Region's proposed surreply to the extent that it addresses the amicus brief filed by the Cement Kiln Recycling Coalition. While the guidance provides that the Board may allow a surreply in response to a Petitioner's reply, neither the guidance nor rules provide that responses to amicus briefs are allowable. 40 C.F.R. § 124.19. Here, however, the Region is attempting to bootstrap a response to the amicus brief into the record of this appeal. See Proposed Surreply at p. 1, 2, 4, and 5. This is clearly not allowed under the Board's practice and procedures and should not be considered by the Board.

CONCLUSION

For the foregoing reasons, ESSROC respectfully requests that the Board deny the Region's motion for leave to file a surreply brief.

Dated: September 17, 2013

Respectfully submitted,




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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Response Brief, including all relevant portions, contains less than 7,000 words.

Dated: September 17, 2013



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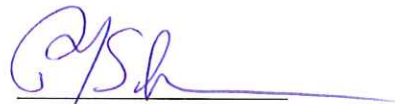
CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that I caused to be electronically filed the foregoing Corrected Reply with the Environmental Appeals Board via Central Data Exchange, and caused to be mailed a true and accurate copy to the following:

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