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

In re: Arizona Public Service Company Ocotillo Power Plant PSD Permit No. PSD16-01	)	Appeal No. PSD 16-01

Maricopa County Air Quality Department

SURREPLY BRIEF

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I. INTRODUCTION

Petitioner asserts "MCAQD failed to adequately notify Sierra Club that it had opened a second public comment period in December 2015." Reply at 2. This is simply incorrect.

These are the facts: MCAQD issued a draft PSD permit and TSD for the Ocotillo Project on March 4, 2015. After holding a public hearing and receiving comments from Petitioner and others, MCAQD requested additional information from the applicant, specifically to address some of these comments. Based on this information, and a revised permit application, MCAQD issued on December 11, 2015, a revised draft permit and a new TSD specifically addressing Petitioner's comments, and again held a public hearing and solicited public comment in the same way it did for the initial draft permit. In fact, MCAQD went further and sent the notice to EPA Region IX's mailing list for PSD permits, which included Petitioner. Petitioner failed to comment on that revised draft permit and new TSD, and MCAQD finalized that permit.

The record shows that Sierra Club, through various means, was informed of the second public comment period and its opportunity to supplement the record during that period. By neglecting to submit comments on the revised draft permit, Petitioner failed to advise MCAQD as to *whether* and *how* it believes the revised draft permit and its underlying record insufficiently accounted for Petitioner's comments on a previous draft permit. As the Board observed, such behavior is "more likely to catch the permit issuer off guard than to alert the permit issuer to issues legitimately pertaining to the most recent draft permit." *In re City of Phoenix*, 9 E.A.D. 515, 527-28 (EAB 2000). That is precisely what Sierra Club seeks to do here. That the detailed facts here are not exactly the same as in *City of Phoenix* is irrelevant: the principles are the same. Petitioner plainly failed "to put the permit issuer on formal notice of any continuing objections to

the terms of a draft permit." *Id.* at 529 n.21. A denial of Sierra Club's Petition is therefore appropriate.

II. MCAQD PROVIDED ADEQUATE NOTICE TO PETITIONER OF THE EXTENDED COMMENT AND NOTICE PERIOD.

The factual scenario above should have been the end of this issue. But in the Reply, Petitioner's counsel makes excuses for why the Board "should waive that requirement in this instance," accusing MCAQD of failing to adequately provide notice to Petitioner and even going as far as calling MCAQD "disingenuous." Those allegations require a more detailed response.

MCAQD provided adequate notice to Petitioner (as well as any other interested party) of the comment period for the revised draft permit ("second comment period"). While Petitioner asserts "MCAQD failed to adequately notify Sierra Club that it had opened a second public comment period in December 2015," Reply at 2, Petitioner notably does not allege MCAQD violated any procedural requirement. Rather, Petitioner's grievance appears to be that its counsel, Mr. Ritchie, did not receive an email addressed to him personally. *Id*. at 8. However, a lack of a personal email to Mr. Ritchie does not render inadequate the notice MCAQD provided to Petitioner.

MCAQD did all that was required of it by the relevant PSD permitting regulations, and Petitioner does not allege otherwise. First, per standard practice, MCAQD published notice in three different news publications: The Arizona Republic, the Record Reporter, and the Arizona Business Gazette. *See* MCAQD-Ex. 7 at 14-21. Collectively, MCAQD published the notices for one-week periods starting on the following dates: December 16, 17, 18, 23, 24, and 25, 2015. *Id*.

Second, MCAQD also published notice on its website, where it maintains a section dedicated to public notices. MCAQD-SUR-Ex. 2 ("Public Notice Table").

Third, MCAQD emailed the notice to all recipients on its Title V listserv. MCAQD-Ex. 7 at 1. Additionally, because MCAQD was operating under the newly revised Delegation Agreement and wanted to ensure continuity with EPA Region 9, *see* PET-Ex. 3, MCAQD contacted the Region to obtain its list of those who had requested notification of draft PSD permits, and EPA Region 9 provided a list of those recipients. MCAQD Surreply Exhibit (hereinafter "MCAQD-SUR-Ex.") 1 ("MCAQD-EPA Region 9 Correspondence Re: Part 124 Public Notice Contacts"). The Sierra Club representatives included on that list were Bruce Nilles and Derek Nelson. *Id*. at 8. Mr. Ritchie was not on EPA Region 9's email list. *See id*. This answers Petitioner's question regarding why MCAQD included Messrs. Nilles and Nelson on the notice. Reply at 8. MCAQD included them because it believed they were the "proper" recipients due to their presence on Region 9's PSD email list.

These measures were more than adequate to give Sierra Club notice of the second comment period. Notably, Mr. Ritchie was familiar with MCAQD's online notice procedure leading up to the period in question, and appears to have frequently checked the website for postings. For instance, on March 10, 2015, Mr. Ritchie wrote via email to MCAQD: "I noticed that the Ocotillo draft permit was posted March 4." Reply Ex. 2 ("Sierra Club (Travis Ritchie) Email to MCAQD re: Ocotillo Power Plant Draft PSD Permit"). Again, on November 9, 2015, Mr. Ritchie wrote via email to MCAQD about an online notice posting regarding this matter: "I noticed online that a public notice has issued for the Ocotillo Power Plant Title V renewal…" Reply Ex. 3. This correspondence demonstrates Mr. Ritchie knew of the online posting procedures and proactively used it in his dealings with MCAQD, without prompting.

Further, *just weeks* before MCAQD announced the opening of the second comment period, MCAQD gave Petitioner advanced notification that a revised draft permit was

forthcoming. On November 9, 2015, MCAQD directly notified Mr. Ritchie of the impending second comment period. *See* Reply Ex. 3. Mr. Ritchie asked MCAQD when the *draft* permit for the modernization project might issue. *Id*. (emphasis added). MCAQD responded, "we will be ready to go with the modernization project late *November at the earliest and most likely sometime mid-December*." *Id*. (emphasis added). This email shows Mr. Ritchie did have notice of the forthcoming notice and comment period. Despite this notice, MCAQD heard nothing from Mr. Ritchie until February 18, 2016, approximately *two months later*. Reply Ex. 3.

Consistent with that advanced notice, on December 11, 2015, MCAQD noticed the Permit for a 30-day comment period starting December 16, 2015 and ending January 22, 2016. *See* MCAQD-Ex. 7. Petitioner did not contact MCAQD at any time during this period spanning roughly one month (i.e. 30 days). MCAQD also held a second public hearing on January 19, 2016. *Id*. MCAQD did not hear from Petitioner in written comments or at the hearing. Due to Mr. Ritchie's demonstrated knowledge and proactivity concerning MCAQD's online notice procedures, Mr. Ritchie was well equipped to check online in mid-December, when MCAQD had informed him the revised draft permit would be issued. Furthermore, Mr. Ritchie's "repeated inquiries" to MCAQD leading up to the draft permit's issuance make his decision not to reach out to MCAQD in December or January of the following year – when he knew the start of the notice and comment period was imminent – inexplicable.

The reasoning supporting Petitioner's allegation of lack of adequate notice, and Petitioner's allegation that MCAQD should have known it "remained anxious," Reply at 6, are tenuous, at best. In any event, Mr. Ritchie is not a party: Sierra Club is the party, and the record shows Sierra Club *was* on notice of the extended comment and notice period. Notably, MCAQD gave notice of the initial draft permit in substantially the same manner as for the revised draft

permit, but Petitioner does not argue notice was inadequate then. As such, it seems disingenuous for Petitioner to now argue that it was denied the opportunity to comment because MCAQD did not send Mr. Ritchie an email on December 11, 2015, given that MCAQD changed nothing in its processes from the time Mr. Ritchie submitted Petitioner's initial comments.

To find MCAQD's notice inadequate would render void all notice MCAQD provided, including a personal email to Mr. Ritchie mere weeks before the comment and notice period, online publication, and publication in three different news outlets.

III. CONCLUSION

Based on the foregoing, MCAQD's arguments in its Response still apply. MCAQD respectfully renews its request that the Board deny Sierra Club's Petition for Review.

Date: May 20, 2016

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Surreply, exclusive of the Table of Contents, this Statement of Compliance, and the Certificate of Service, contains 1,376 words, as calculated using the word count function in Microsoft Word word-processing software, and therefore complies with the 7,000 word limitation in 40 C.F.R. §§ 124.19(d)(1)(iv) and (3).

/s/ Robert C. Swan

Robert C. Swan

CERTIFICATE OF SERVICE

I hereby certify that MCAQD served copies of **MCAQD'S SURREPLY** in the matter of Arizona Public Service Company Ocotillo Power Plant, Appeal No. PSD 16-01, by email on the persons listed below.

Dated: May 20, 2016

/s/ Robert C. Swan

Robert C. Swan

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