

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

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

**MOTION FOR LEAVE TO FILE SURREPLY BRIEF**

Region 5 of U.S. Environmental Protection Agency (“Region 5”), by and through its attorneys, respectively moves for leave to file a surreply to the reply brief submitted in the above-captioned matter. On July 8, 2013, Petitioner in this matter, ESSROC Cement Corporation (“Petitioner”) filed its Petition for Review. Region 5 filed its Response to the Petition on August 7, 2013. On August 22, 2013, Petitioner filed its Reply Brief, and on August 26, 2013, Petitioner filed a Corrected Reply Brief.

In support of its motion EPA states that Petitioner’s Reply Brief raised new issues and arguments that the Region did not previously have the opportunity to address. Specifically, in its Reply Brief, Petitioner has argued for the first time that the D.C. Circuit Court of Appeals in *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207 (D.C. Cir. 2007), has adopted Petitioner’s interpretation of 40 C.F.R. § 270.10(l) that EPA is precluded from requiring a second Site-specific Risk Assessment (“SSRA”) at a Resource Conservation and Recovery Act (RCRA) permitted facility unless there has been a change in the physical conditions at the facility or surrounding area. The D.C. Circuit simply does not expressly adopt or imply endorsement of Petitioner’s interpretation of 40 C.F.R. § 270.10(l) in *Cement Kiln Recycling Coalition*. As the Board would likely have significant interest in whether there are any Federal Circuit Court of

Appeals opinions of relevance in this matter, the Region should be provided opportunity to respond to this newly-raised argument and address Petitioner's mischaracterization of what D.C. Circuit really said in the *Cement Kiln Recycling Coalition* decision.

In addition, Petitioner in its Reply Brief has raised new arguments concerning the relative burdens of persuasion between the Region and Petitioner in this matter, as well as EPA's consideration of information Petitioner submitted to challenge EPA's judgments with respect to applicability of bioaccumulation factors and fish consumption rates used in the Region's SSRA that supports the inclusion of the annual mercury feed rate limit in final permit for ESSROC. Petitioner makes incorrect characterizations of EPA's actions in the risk assessment process and selects passages in EPA's guidance to bolster its arguments that Petitioner did not previously identify as relevant in its Petition for Review. The Region should be allowed the opportunity to respond to these mischaracterizations and Petitioner's incorrect assertions that have been newly raised in this matter.

The regulations regarding the appeal of permits clearly state that Petitioner is precluded from raising "new issues or arguments in the reply." 40 C.F.R. § 124.19(c)(2). Moreover, Petitioner is precluded at any time in the appeals process from raising issues that were not previously raised during the permit public comment period. *See* 40 C.F.R. § 124.19(a)(4)(ii). If the Board is going to allow consideration of Petitioner's Reply Brief notwithstanding the fact it raises arguments not previously raised in its comments on the draft permit or its Petition for Review, equity requires that the Region should be granted leave to file a surreply in address these newly raised arguments.

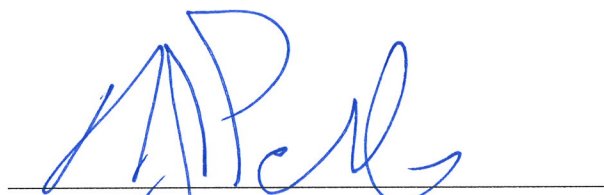
Although not specifically addressed in the regulations governing permit appeals under 40 C.F.R. Part 124, the August 2013 Environmental Appeals Board Practice Manual at page 49 does

provide that for permit appeals other than New Source Review permit appeals, if a reply brief has been filed, the Board may, upon motion, allow the filing of a surreply brief.

Region 5's proposed Surreply Brief is attached to this Motion. In accordance with 40 C.F.R. § 124.19(f)(2), the Region corresponded with Petitioner to ascertain whether it concurred with or objected to the granting of leave to file a surreply brief in this matter, and Petitioner responded that it does not concur and reserves its right to object pending receipt and review of the motion.

WHEREFORE, Region 5 respectfully requests that the Board grant leave to file the attached proposed Surreply Brief in this permit review matter.

Respectfully submitted this 07th day of September, 2013



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## CERTIFICATE OF SERVICE

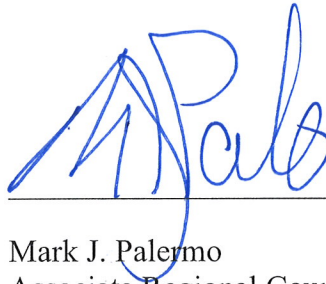
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I hereby certify that on this 6th day of September 2013, I caused to be electronically filed the foregoing "Motion for Leave to File Surreply Brief" and Attached Proposed "EPA Region 5's Surreply Brief", and caused to be mailed a true and correct copy of these documents to the Petitioner by overnight delivery addressed as follows:

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Dated: September 6, 2013



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