

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

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In re:	)	
	)	
Arizona Public Service Company	)	
	)	
Four Corners Power Plant	)	
	)	
NPDES Permit No. NN0000019	)	Appeal No. NPDES 18-02
	)	
	)	

**REGION IX's MOTION TO DISMISS**

The United States Environmental Protection Agency (“EPA”) Region 9 (“Region”) respectfully moves the Environmental Appeals Board (“EAB” or “Board”) to dismiss as moot the Petition for Review (NPDES Permit Appeal 18-02) filed by Dine’ Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club (collectively, “Petitioners”) in the above-captioned matter. The Petition for Review is moot because the Region has withdrawn the Permit pursuant to 40 C.F.R. § 124.19(j).

**BACKGROUND**

On June 12, 2018, the Region issued National Pollutant Discharge Elimination System (“NPDES”) Permit No. NN0000019 (“Permit”) to the Arizona Public Service Company (“APS”) for the Four Corners Power Plant.

On July 16, 2018, Petitioners filed a Petition for Review raising nine issues for review by the EAB.

On October 9, 2018, the Region filed a motion to partially dismiss the Petition for Review. *See Region IX's Motion to Partially Dismiss Petition for Review; Motion to Establish Revised Briefing Schedule* (Oct. 9, 2018). The Region explained that it had withdrawn two provisions of the contested permit (Section I.A.5 addressing Internal Outfall 01E, and Section I.B.3 addressing cooling water intake requirements) pursuant to its authority under 40 C.F.R. § 124.19(j) and would modify those provisions, as appropriate, in a new draft permit.

On November 13, 2018, the EAB dismissed the Petition for Review as to those two provisions and directed the Region to respond to the other claims in the Petition by December 21, 2018. *See Order Partially Dismissing Petition for Review and Establishing Briefing Schedule* (Nov. 13, 2018).

## **DISCUSSION**

At any time prior to thirty (30) days after filing the response to a petition, the Region may withdraw a permit and prepare a new draft permit addressing the portions so withdrawn pursuant to 40 C.F.R. § 124.19(j). *See In re Savoy Energy, L.P.*, 17 E.A.D. 200, 202–03 (EAB 2016) (“[B]efore the 30-day window closes under section 124.19(j), a Region may unilaterally withdraw a permit and re-issue a new draft permit, so long as it contemporaneously notifies the Board and interested parties of the withdrawal and reissuance.”). By letter dated December 19, 2018, and filed with the Board, the Region provided notice to the Board and interested parties that it is withdrawing the entire Permit and will prepare a new draft permit in accordance with 40 C.F.R. § 124.6.

The Region, in consultation with EPA’s Office of General Counsel and Office of Water, determined that it is appropriate to withdraw the entire Permit at this time to address additional issues raised by Petitioners, including but not limited to the status of Morgan Lake. The Region

will issue a single revised draft permit, along with an associated fact sheet and an updated administrative record, for public review and comment in accordance with 40 C.F.R. § 124.6. Within 30 days after the Regional Administrator serves notice of issuance of a final permit decision under 40 C.F.R. § 124.15, any person who filed comments on the draft permit or participated in a public hearing may file a petition for review pursuant to 40 C.F.R. § 124.19(a).

The Petition for Review is moot because the Region has withdrawn the Permit. Prior Board decisions support dismissing petitions as moot with respect to withdrawn permits or permit provisions. *In re City of Port St. Joe, Florida*, 5 E.A.D. 6, 8–9 (EAB 1994) (finding that the Region’s withdrawal of a permit “mooted any issue relative to the . . . permit” and removed the Board’s jurisdiction to review the permit on appeal); *In re City of Haverhill Wastewater Treatment Facility*, NPDES Appeal No. 08-01, slip. op. at 1–2 (EAB Feb. 28, 2008) (holding appeal mooted by Region’s withdrawal of the only contested permit conditions); *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip. op. at 2 (EAB Dec. 5, 2007) (dismissing as moot portions of petition challenging withdrawn permit limits after the permitting authority provided notice that it was withdrawing those limits and preparing a new draft permit addressing the limits so withdrawn).

The Region has discussed this motion with the parties. APS does not oppose the Region’s motion to dismiss. The Petitioners did not express a position at this time.

The Region has also discussed this motion with the EPA’s Office of General Counsel and Office of Water, and both offices concur in the Region’s motion to dismiss. Accordingly, the Region hereby respectfully requests that the EAB dismiss the Petition for Review as moot.

Date: December 19, 2018

Respectfully submitted,

*/S/Thomas M. Hagler*

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the attached **REGION IX'S MOTION TO DISMISS PETITION FOR REVIEW** to be served by electronic mail upon the persons listed below.

Dated: December 19, 2018

*/S/ Thomas M. Hagler*

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