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

In the Matter of: Arizona Public Service Company Ocotillo Power Plant	Appeal No. PSD 16-01 Maricopa County Air Quality Department PSD Permit No. PSD16-01

SURREPLY OF PERMITTEE ARIZONA PUBLIC SERVICE COMPANY

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Sierra Club concedes that participation in the public comment process is necessary for "[t]he effective, efficient and predictable administration of the permitting process," and that it is imperative "the permit issuer be given the opportunity to address potential problems with draft permits before they become final." Reply at 3 (quoting *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999)). But Sierra Club apparently believes the permit issuer should only be given that opportunity *once*, even if multiple draft permits are issued, and that it is somehow "effective, efficient and predictable" for a commenter to remain silent about its continuing objections on a revised draft permit. That view is incorrect and inconsistent with the Board's precedent.[1]

Sierra Club's Reply fails to demonstrate how Sierra Club's comments on an earlier draft permit could possibly put Maricopa County Air Quality Department ("MCAQD") on notice of its continued objections to the revised draft. The Reply also fails to distinguish this case from numerous other decisions by the Board finding that "to put the permit issuer on formal notice of any continuing objections to the terms of a draft permit, the person making the comments must register the objections . . . during the public comment period . . . ." *City of Phoenix*, 9 E.A.D. at 529 n.21.

In the alternative, Sierra Club simply begs to be excused from the Board's threshold requirements. Sierra Club candidly admits it failed to submit comments preserving its issues for appeal because it simply "assumed, incorrectly it turns out, that the County would alert Mr. Ritchie of any response to comments or revisions to the permit." Reply at 8. That is not the way

[1] *See, e.g.*, *In re New Eng. Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001) (recognizing EPA's "longstanding policy that most permit decisions should be resolved at the [permit issuer's] level"); *In re City of Phoenix*, 9 E.A.D. 515 (EAB 2000).

notice-and-comment proceedings work. The Board should not reward Sierra Club's lack of diligence with a second bite at the apple.[2] Accordingly, the Petition should be denied.

I. Sierra Club's Comments on an Earlier, Substantially Different Draft Permit Do Not Preserve the Issues Presented for Review Here.

Sierra Club's comments on the March 2015 draft permit ("Initial Draft Permit") do not preserve the issues Petitioner raises on appeal of the final Permit. That Permit is the product of additional notice-and-comment proceedings on a second, intervening draft permit published in December 2015 ("Revised Draft Permit"), which revised the BACT limit for the source and was based on substantial new additions to the record, including: (1) APS's letter regarding Sierra Club's comments; (2) a significantly updated permit application submitted by APS in September 2015 ("Revised Application"); and (3) a technical support document ("TSD") accompanying the Revised Draft Permit setting forth an updated GHG BACT analysis. Even if the issues Sierra Club raises in this Petition were presented in its comments on the *Initial* Draft Permit,[3] they did not address the provisions of the *Revised* Draft Permit (or the new record materials supporting them) that MCAQD eventually finalized and that Sierra Club is challenging here.

Sierra Club claims "a second round of comments in the revised public comment period was not required . . . to preserve the issues it already raised during the initial public comment

[2] Sierra Club's argument that MCAQD gave inadequate notice of the revised draft permit is meritless. Notably, Sierra Club does not allege MCAQD violated any statutory or regulatory requirement for notice and comment in PSD permit proceedings. Instead, it argues the notice was inadequate because MCAQD did not directly email Sierra Club's internally designated "point person" for this specific project. Reply at 8. Because this argument would require the Board to create and enforce new procedural obligations for MCAQD far beyond what the relevant rules require, it should be rejected. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 538 (1978) (finding nothing "permit[s] the court to review and overturn the … proceeding on the basis of the procedural devices employed (or not employed) by the [agency] so long as the [agency] employed at least the statutory *minima*").

[3] Although Sierra Club suggests otherwise, *see* Reply at 1, the parties dispute whether Sierra Club properly raised the issues presented in this Petition in its comments on the Initial Draft Permit. *See* APS Resp. 31-37.

period."[4] Reply at 1-2. But the Revised Draft Permit was an entirely different draft, necessitating *new* comments on its *new* provisions and basis. Sierra Club's prior comments were insufficient to alert MCAQD to any continuing objections to the Revised Draft Permit, particularly given that MCAQD made significant changes to address those very comments. Sierra Club had previously objected to "the GHG limit in condition 18 of the draft PSD permit" and complained MCAQD "failed to consider" energy storage in the GHG BACT analysis. Reply at 4. MCAQD responded by (1) reducing the GHG limit and (2) considering energy storage as a potential control technology for the Project before explaining the rationale for rejecting it at Steps 1 and 2 of the BACT analysis. *Compare* Initial Draft Permit TSD at 30, APS Ex. A; *with* Revised Draft Permit TSD at 34-41, Pet. Ex. 6. In addition, the Revised Application contained significant additional information about the Project's business purpose and design further demonstrating why energy storage would be inconsistent with that purpose. Revised App. at 12, Pet. Ex. 5. In the absence of new comments, MCAQD had no reason to assume Sierra Club's concerns had survived these changes. At a minimum, it was incumbent upon Sierra Club to reassert its objections. More properly, it should have filed comments explaining why the revised permit does not adequately address its objections, as it now does for the first time on appeal. [5]

[4] The cases Sierra Club cites to support its position are not on point. Reply at 2 (citing *Appalachian Power Co. v. EPA*, 135 F.3d 791 (D.C. Cir. 1998); *Nat. Res. Def. Council v. EPA*, 755 F.3d 1010 (D.C. Cir. 2014)). Those cases concerned the court's attempts to discern whether a specific issue raised on appeal was fairly within the scope of comments that were filed on a proposed action. Neither case involved a situation where the petitioner failed to comment on the proposed action *at all*, leaving the agency to discern whether a continuing objection from a previous proposal had been abandoned.

[5] To be clear, Sierra Club raises battery storage as its *only* substantive issue on appeal. But, the initial draft permit and TSD did not address battery storage at all. Rather, it was only the second draft permit and TSD – which Sierra Club never commented on – that explained MCAQD's determination about battery storage.

The regulations required that Sierra Club give MCAQD "the opportunity to address potential problems with" the Revised Draft Permit before it became final, just as it did with the Initial Draft Permit. Because Sierra Club did not do so, its Petition must be denied. To hold otherwise would only discourage permit issuers from addressing public comments in revised draft permits, since challengers could simply sit out the subsequent comment period and rely on their initial comments as a predicate for appellate review of any final permit.

II. Sierra Club Cannot Distinguish Board Precedent Showing that this Petition Should Be Dismissed.

The Board's precedent confirms that Sierra Club was required to "put [MCAQD] on formal notice of any continuing objections" to the terms of the Revised Draft Permit in order to "preserve the right to contest any decision by [MCAQD] not to implement" Sierra Club's comments on the Initial Draft Permit. *City of Phoenix*, 9 E.A.D. at 529 n.21. Sierra Club's attempt to distinguish *City of Phoenix* and the other cases cited by APS is unavailing.

The factual distinctions Sierra Club draws between *City of Phoenix* and this appeal,[6] *see* Reply at 5-6, are a distinction without a difference. Sierra Club argues that unlike in *City of Phoenix*, it "submitted comments during a formally noticed public comment period." *Id.* 6. It is true Sierra Club commented during "a" public comment period; but it did so during the *wrong* comment period. As in *City of Phoenix,* Sierra Club failed to raise its objections in comments on "the *particular draft permits* that, as proposed by the [agency], eventually *culminated in the final permit decisions* currently under consideration." 9 E.A.D. at 518 (emphases added).

Likewise, it is irrelevant that the *City of Phoenix* petitioners filed public comments stating the proposed permits were "acceptable," Reply at 5, because that fact was not determinative.

[6] Some are also incorrect. For example, contrary to Sierra Club's summary, the parties in *City of Phoenix* (like the parties here) disputed whether the issues raised on appeal had been presented in formal public comments. *City of Phoenix*, 9 E.A.D. at 526 n.17.

Rather, the Board was guided by its previous holding in *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997), a PSD permit appeal decision that Sierra Club ignores in its Reply. *See City of Phoenix*, 9 E.A.D. at 527. In *Kawaihae*, the Board also faced a situation in which the issue presented on appeal had been raised prior to the comment period but was never mentioned in formal public comments on the draft permit. 7 E.A.D. at 119. And as in this case, the petitioner never filed affirmative comments stating the challenged provisions were acceptable. *See id.* Thus, in both *Kawaihae* and *City of Phoenix*, it was the petitioners' failure to object to a condition in the draft permit that was ultimately finalized that waived their right to appeal it.

Indeed, the Reply only emphasizes how closely Sierra Club's conduct here mirrors that of the *City of Phoenix* petitioners. Like the draft permit published for comment in *City of Phoenix*, the Revised Draft Permit was the culmination of an iterative permit development process, in which MCAQD took input on early drafts from stakeholders and revised the permit in response to that input. In both cases, the petitioners provided comments and documentation to the permit issuer stating their position on the challenged issues, but did so only "*prior to* the formal solicitation of comments by the [permit issuer] from the Petitioner and the other interested persons on the *particular draft permits* that, as proposed by the [issuer], eventually *culminated in the final permit decisions* currently under consideration." 9 E.A.D. at 518 (emphases added) (quoted in Reply at 5). And in both cases, the petitioners raised no further objections to the challenged issues after publication of the draft permits that would ultimately be finalized.

Contrary to Sierra Club's claim, the approach it advocates in this appeal would, as in *City of Phoenix*, require MCAQD to "divine, by means unknown, whether or not the comments [on the Initial Draft Permit] were still being preserved or whether they had been resolved or abandoned by the commenter." *Id.* at 527; *see* Reply at 6. Sierra Club argues MCAQD should

have determined from its email inquiries that Sierra Club "remained anxious about the Ocotillo project and had not 'abandoned' its concerns." Reply at 6. But these are precisely the kind of informal contacts that the Board in *City of Phoenix* held are insufficient to alert a permit issuer to a commenter's continuing objections. *See* 9 E.A.D. at 527. Further, all of these email inquiries occurred *before* MCAQD published the Revised Draft Permit for public comment. There are myriad reasons why Sierra Club may have abandoned its earlier objections on energy storage after reviewing the specific provisions of the Revised Draft Permit and TSD. The burden Sierra Club would place on MCAQD is no different from that in *City of Phoenix*, where the Board held such an approach would be "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." *Id.* at 527-28.

Sierra Club fails to distinguish the other cases cited in APS's Response in any meaningful way. Sierra Club summarily states "[t]hose cases mostly involved instances where petitioners failed to raise comments during the public comment period or attempted to bring in new issues on appeal that were not raised with reasonable specificity during the public comment period." Reply at 7 n.1. But that is precisely what occurred here. Sierra Club's conclusory dismissal does not explain why its actions are not analogous to those other decisions. *See* APS Response 11 n.2.

In fact, these cases share a common theme with this appeal. In each, although the permit issuer was aware the challenged issue had been raised at some point during the permitting process, the petitioner failed to raise that issue during the appropriate public comment period for the draft permit that was ultimately finalized. *See In re Carlota Copper Co.*, 11 E.A.D. 692, 726-33 (EAB 2004) (issue raised during wrong formal comment period); *In re Avon Custom Mixing Svcs., Inc.*, 10 E.A.D. 700, 707 (EAB 2002) (issues raised during data gathering stage); *Kawaihae*, 7 E.A.D. at 119 (issue raised before and after formal comment period); *In re New*

England Plating Co., 9 E.A.D. 726, 734 (EAB 2001). These cases recognize the onus is on the commenter to "prompt[] focused consideration of the issue by raising it *during* the public comment period; it is not sufficient for the issue to have been raised *before or after* the public comment period." *Carlota Copper*, 11 E.A.D. at 728. Sierra Club failed to meet that burden.

CONCLUSION

For the reasons stated above and in APS's Response, the Board should deny Sierra Club's petition for review of the Ocotillo Project's PSD permit.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing SURREPLY OF PERMITTEE ARIZONA PUBLIC SERVICE COMPANY were served through the Environmental Appeal Board's electronic filing system and by electronic mail to the following, this 20th day of May, 2016:

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STATEMENT OF COMPLIANCE

I hereby certify that the foregoing **SURREPLY OF PERMITTEE ARIZONA PUBLIC SERVICE COMPANY** complies with the requirements of 40 C.F.R. § 124.19(d). The word count is 2,270 using the word count function in Microsoft Word.

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