BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Anadarko Uintah Midstream, LLC, Archie Bench Compressor Station, Permit No. SMNSR-UO-000817-2016.001 Bitter Creek Compressor Station, Permit No. SMNSR-UO-000818-2016.001 East Bench Compressor Station, Permit No. SMNSR-UO-000824-2016.001 North Compressor Station, Permit No. SMNSR-UO-000071-2016.001 North East Compressor Station, Permit No. SMNSR-UO-001874-2016.001 Sage Grouse Compressor Station, Permit No. SMNSR-UO-001875-2016.001	Appeal No. NSR 18-01

EPA Region 8's Response in Opposition to Petitioner's Motion for Leave to File Reply

Introduction

Petitioner WildEarth Guardians (Guardians) has requested leave to file a reply brief to respond to Environmental Protection Agency (EPA) Region 8's argument that Guardians failed to previously raise the claim that the permittee failed to comply with the permit application deadline in 40 C.F.R. § 49.158(c)(3), and is therefore barred from raising that issue for the first time in its petition for review. In its request Guardians fails to make any showing that it should

be granted leave to reply to the Region's argument, much less any showing sufficient to overcome the Board's well-established presumption against reply briefs. Accordingly, the Board should deny the motion for leave to file a reply.

Argument

As Guardians acknowledges, the Board presumes there will be no reply briefing in this permit appeal:

> In PSD and other new source permit appeals, the Environmental Appeals Board will apply a presumption against the filing of a reply brief. By motion, petitioner may seek leave of the Environmental Appeals Board to file a reply to the response, which the Environmental Appeals Board, in its discretion, may grant…. In its motion, petitioner must specify those arguments in the response to which petitioner seeks to reply and the reasons petitioner believes it is necessary to file a reply to those arguments.

40 C.F.R. § 124.19(c)(1); *see* Motion for Leave to File Reply at 2.[1] The Board considers the presumption a "high threshold," to overcome which a party must state "with particularity" the arguments it seeks to respond to, the reasons a reply is necessary, and "how those reasons overcome the presumption." *In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 70-71 (EAB 2013) (internal quotation marks and citation omitted). A stated reason may suffice to overcome the presumption "if the reply responds to arguments made in response briefs to which the party has not previously had the opportunity to respond." *In re Energy Answers Arecibo*, 16 E.A.D. at 305. Guardians must demonstrate not simply that it desires to reply, but that "it is *necessary* to file a reply." 40 C.F.R. § 124.19(c)(1) (emphasis added).

[1] This presumption is established in applicable regulations, in the Board's standing orders and practices, and in its decisions. *See* 40 C.F.R. § 124.19(c)(1); Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits (EAB March 27, 2013); EAB Practice Manual at 49 (Aug. 2013); *see, e.g., In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 305 (EAB 2014), *review dismissed sub nom. Sierra Club de P.R. v. EPA*, 815 F.3d 22 (D.C. Cir. 2016). In addition, the July 13, 2018 Scheduling Order issued in this matter makes no provision for a reply brief.

Here, neither of the two reasons Guardians offers in support of its request for leave to reply satisfies the Board's standards or is sufficient to overcome the presumption against replies.[2] First, Guardians requests "a fair opportunity to respond" to the contention that it failed to preserve for review its argument concerning 40 C.F.R. § 49.158(c)(3), because Region 8 raised that issue "for the first time in this proceeding." Motion for Leave to File Reply at 3. But Guardians had ample opportunity to raise its § 49.158(c)(3) arguments in its comments in response to the proposed permits, and it failed to do so. Guardians cannot reasonably argue that *before Guardians filed its petition* Region 8 should have asserted that Guardians was barred from raising its as-yet-unmentioned § 49.158(c)(3) argument. By its very nature — like other arguments based on failures to satisfy threshold or procedural matters — the Region's argument could only be raised in response to a petition.[3]

Guardians' second purported reason that a reply is "necessary" and that the presumption against replies should be rebutted is, put simply, that it disagrees with the argument raised by Region 8. In particular, Guardians asserts that Region 8 has "injected unnecessary confusion" by arguing that Guardians should be foreclosed from raising an issue it failed to raise in the earlier permit proceedings, and states that it should get a "fair opportunity" to "set the record straight." Motion for Leave to File Reply at 3. If there were any "confusion," though, it would not be the responsibility of Region 8, but of Guardians, which is apparently seeking to argue that its

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[2] Guardians has also failed to satisfy an important procedural requirement, in that its motion for leave to file a reply brief does not include the required representation that Guardians sought the Region's position before filing. *See* 40 C.F.R. § 124.19(f)(2); EAB Practice Manual at 27 ("A motion shall state whether the opposing party concurs or objects to granting the request set forth in the motion."). The Region received no such notice or inquiry from Guardians before the motion was filed. This failure is an additional basis for denying Guardians' motion.

[3] Region 8 argued the issue in its response to Guardians' petition, but relied on information in the existing record and did not offer new information in support of its argument.

comments sufficed to raise the 40 C.F.R. § 49.158(c)(3) issue even though the comments did not mention that provision or its requirements. No further briefing is necessary or appropriate, as Guardians has had ample opportunity to avoid or clarify any perceived confusion, both during the permit proceedings and in its petition.[4]

Nor is there any need to "set the record straight," because the record exists and is clear, needing no embellishment or "straightening." Including Guardians' comments, the record was addressed by Region 8 in its response to the petition. *See* EPA Region 8 Response to Petition for Review at 7, 11-14. As explained there, the record demonstrates that Guardians failed to raise in its comments the claim that the permittee failed to comply with § 49.158(c)(3), and that Guardians should accordingly be barred from attempting to raise the claim for the first time on review. In its proffered reply brief — its proposed effort to "set the record straight" — Guardians includes a lengthy quotation from its comments. Guardians' [Proposed] Reply Brief at 4. Although the quoted comment language specifically cites to and discusses 40 C.F.R. § 51.166(b)(8), it does not cite § 49.158(c)(3) or otherwise refer to the requirements of that provision. As Region 8 previously asserted, the "'Board frequently has emphasized that, to preserve an issue for review, comments made during the comment period must be sufficiently specific.'" EPA Region 8 Response to Petition for Review at 12 (quoting *In Re City of Attleboro, MA Wastewater Treatment Plant*, 14 E.A.D. 398, 406 (EAB 2009)). For all Guardians' strained

[4] Guardians also states that the Region and Anadarko "misconstrue the basis" for Guardians' raising "this specific issue." Motion for Leave at 2–3. To the extent Guardians is seeking to argue that its comments sufficiently raised the § 49.158(c)(3) issue, even though the comments did not mention that provision or allude to any of its requirements, Guardians is merely seeking to avoid its responsibility to explain in its petition specifically how it preserved the issues for review. *See* 40 C.F.R. 49.159(d)(3) (requiring that petition contain "a demonstration that any issues being raised were raised during the public comment period"); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006) ("to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised *with reasonable specificity* during the public comment period") (emphasis added).

effort to improve its position under the guise of seeking a "fair opportunity" to "set the record straight," Guardians has failed to demonstrate that a reply brief is likely to be helpful in resolving the argument in question, much less that one is "necessary." Therefore, Guardians has not rebutted the presumption against the filing of reply briefs.

The purpose of the Board's presumption against replies is "'to facilitate [the] expeditious resolution of NSR appeals, while simultaneously giving fair consideration to the issues raised in any given matter.'" *In re Energy Answers Arecibo*, 16 E.A.D. at 305 (quoting Final Rule, Revisions to Procedural Rules To Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281, 5283 (Jan. 25, 2013)). As demonstrated above, allowing Guardians' requested leave to reply would not aid in fair consideration of the issues raised, and it could delay the expeditious resolution of this matter. Moreover, granting leave to file a reply in this matter, where there has been no real showing of necessity, would make reply briefing a matter of course in virtually all appeals where a reply is requested, frustrating the purpose of the presumption against reply briefs.

Conclusion

Guardians has failed to demonstrate that it should be granted leave to file a reply brief. Admitting that it did not raise the 40 C.F.R. 49.158(c)(3) issue in its comments, Guardians seeks to show that its general statements about a different regulatory provision were sufficient to preserve the issue. These efforts are unpersuasive, and would undermine the requirements that this Board has established to ensure fairness and expeditious resolution of proceedings. The Board should deny Guardians' motion.

Date: August 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that EPA Region 8's Response in Opposition to Petitioner's Motion for Leave to File Reply was served by email today to:

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