

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

In Re:)	
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)	
Four Corners Power Plant)	NPDES Appeal No. 19-06
NPDES Renewal Permit: NN0000019)	
Arizona Public Service Company (Permittee))	
)	
)	

**ARIZONA PUBLIC SERVICE COMPANY’S MOTION FOR LEAVE TO FILE A
SURREPLY, OR, IN THE ALTERNATIVE, TO STRIKE ALL NEW ISSUES AND
ARGUMENTS IN PETITIONERS’ REPLY**

The Arizona Public Service Company (“APS”), permittee for NPDES Permit No. NN0000019 (“Permit”) for the Four Corners Power Plant (“FCPP” or “Plant”), moves for leave to file a surreply to Petitioners’ Consolidated Reply Brief to EPA and APS’ Response Briefs (“Reply”), Docket Index 24. In the alternative, if the Environmental Appeals Board (“EAB” or “Board”) finds that a surreply is not warranted, APS moves to strike all new issues and arguments in Petitioners’ Reply.¹

On November 1, 2019, Petitioners filed a Petition for Review of the Permit, which was, as the Board noted, more than double the Board’s 30-page limit and well exceeded the 14,000-word limit. Docket Index 1, 2. Petitioners then requested, and were granted, leave to exceed the word limit. Docket Index 3, 4. On December 18, 2019, EPA filed a response, with the Board’s approval, that was within 15,000 words, Docket Index 10, 11, 15, and APS filed a response that adhered to the Board’s 14,000-word limit, Docket Index 8. On January 2, 2020, NTEC filed an

¹ APS contacted the parties to ascertain their position on this filing. The Navajo Transitional Energy Company LLC (“NTEC”) supports the motion. EPA takes no position. Petitioners have indicated that they object to the motion in its entirety.

amicus curiae brief that adhered to the Board’s 7,000-word limit. Docket Index 22. The EAB Rules do not provide for a reply to an *amicus curiae* brief, which is typically due on the same date as Petitioners’ reply. See 40 C.F.R. §§ 124.19(c)(2), (e).

On January 13, 2020, Petitioners filed their 27-page Reply, which is nearly double the Board’s 15-page limit and well exceeds the 7,000-word limit for replies. Docket Index 24; see 40 C.F.R. §§ 124.19(c)(2), (d)(3); *In re City of Taunton, Dep’t of Pub. Works Permit No. MA0100897*, NPDES Appeal No. 15-08, 2015 WL 6756665, at *2 (EAB Oct. 30, 2015) (“[A] party may not file a reply brief exceeding 7,000 words (or, alternatively, 15 pages), unless it can demonstrate a compelling and documented need to exceed the limit and receives leave of the Board to file a longer brief.”); EPA, *The Environmental Appeals Board Practice Manual* at 49 (Aug. 2013) (“EAB Practice Manual”) (“[A] petitioner may file a reply within 15 days after service of the response.” (emphasis added)). Petitioners’ Reply not only exceeds the Board’s word limit for a reply, 40 C.F.R. § 124.19(d)(3), but raises new issues and arguments, inconsistent with 40 C.F.R. § 124.19(c)(2).

I. APS Moves For Leave to File a Surreply

APS requests leave to file a surreply to Petitioners’ Reply. “[T]he Board has discretion to grant requests to file surreply briefs and typically does so in cases where new arguments are raised in opposing reply briefs or where further briefing would assist the Board in resolving disputed claims.” *In re Essroc Cement Corp.*, RCRA Permit No. Ind 005-081-541, 2013 WL 5443067, at *2 (EAB Sept. 25, 2013) (citing *In re ArcelorMittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (EAB Dec. 9, 2011) (Order Granting in Part EPA’s Motion to File Surreply, Denying Petitioner's Request to Provide Additional Information, and Granting Oral Argument) and *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10 to 12, at 1-2 (EAB Aug.

3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing)); *see* EAB Practice Manual at 49 (“If a reply brief has been filed, the EAB may similarly, upon motion, allow the filing of a surreply brief.”).

As EPA and APS demonstrated in their responses, the Region’s Permit conditions and determinations were based on clear, straightforward analysis. Petitioners’ lengthy Reply seeks to muddy the waters by including a number of new issues and baseless arguments that are not properly before the Board. To address these new issues and arguments and assist the Board in resolving the disputed claims, APS requests leave to file a surreply.

II. In the Alternative, APS Moves to Strike All New Issues and Arguments in Petitioners’ Reply

Pursuant to 40 C.F.R. § 124.19(c)(2), “Petitioner may not raise new issues or arguments in the reply.” The Board has held that “[n]ew issues raised for the first time at the reply stage...are equivalent to late filed appeals and must be denied on the basis of timeliness.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). If the Board finds that a surreply is not warranted, APS requests that the Board ensure an “efficient, fair, and impartial adjudication of issues arising in [the] appeal,” 40 C.F.R. § 124.19(n), by striking all of the new issues and arguments raised in Petitioners’ Reply and issuing any other remedies as it deems appropriate.

Petitioners’ Reply raises a number of new issues and arguments that run afoul of the § 124.19(c)(2) restriction, including the following:

- Petitioners argue, for the first time, that Morgan Lake is not a waste treatment system because it “provides no treatment.” Reply at 9-11 (emphasis omitted). Petitioners also incorrectly suggest, for the first time, that dissipating heat is not “treatment.” *Id.* at 10.
- Petitioners mischaracterize EPA’s finding that Morgan Lake was constructed in uplands as an “invocation of the ‘uplands’ exemption,” and then argue, for the

first time, that “EPA’s finding did not follow an accepted methodology (lack of hydric soil investigation)” for evaluating uplands. Reply at 12 n.31. Petitioners also argue, for the first time, that EPA failed “to undertake a jurisdictional determination using the approved methodology” without specifying an “approved methodology.” *Id.* at 13.

- Petitioners suggest, for the first time, that the fact that there were no applicable federally approved water quality standards for Morgan Lake, in and of itself, “render[s] EPA’s findings in support of the Final Permit clearly erroneous.” Reply at 5 n.7.
- Petitioners argue, for the first time, that FCPP does not operate a “‘closed-cycle’ [recirculating] system” because “[t]he majority of total diverted water must be lost to causes other than evaporation.” Reply at 28, 29. In an attempt to blur the closed-cycle system inquiry, Petitioners’ new argument relies on baseless assertions on the Plant’s water use and loss and speculative new calculations on the percentage of the total diverted water that is “likely to be accounted for by evaporative losses.” *Id.* at 29-30.

These new issues and arguments, which are not properly before the Board, are rife with factual and legal inaccuracies, and serve only to obfuscate EPA’s clear, straightforward determinations. If the Board does not allow APS the opportunity to respond to these issues in a surreply, the Board should strike all new issues and arguments presented in Petitioners’ Reply Brief and issue any other remedies it deems appropriate.

Respectfully submitted,

/s/ Kerry L. McGrath

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Dated: January 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ARIZONA PUBLIC SERVICE COMPANY’S MOTION FOR LEAVE TO FILE A SURREPLY, OR, IN THE ALTERNATIVE, TO STRIKE ALL NEW ISSUES AND ARGUMENTS IN PETITIONERS’ REPLY was served via U.S. Postal Service, first class mail, and e-mail this 17th day of January, 2020, upon the persons listed below:

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