

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

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

**ARIZONA PUBLIC SERVICE COMPANY’S REPLY TO PETITIONERS’  
OPPOSITION TO 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 for the Four Corners Power Plant (“Plant”), files this reply to Petitioners’ Response in Opposition to APS’s Motion for Leave to File a Surreply, Or, In the Alternative, To Strike the Reply Brief (“Petitioners’ Response to the APS Motion”), Docket Index #27.

APS moved for leave to file a surreply or, in the alternative, to strike all new issues and arguments in Petitioners’ Consolidated Reply Brief to EPA and APS’s Response Briefs (“Petitioners’ Reply”), Docket Index #26, #24, to ensure that APS has an opportunity to respond to each argument raised by Petitioners and to assist the Board in resolving the disputed claims, not merely “to get ‘the last word’ in this appeal.” The Board has discretion to grant a surreply to provide APS that opportunity, and typically does so where, as here, new arguments are raised in opposing reply briefs. *See In re Essroc Cement Corp.*, RCRA Permit No. IND 005-081-541, 2013 WL 5443067, at \*2 (EAB Sept. 25, 2013). A surreply would have particular value in this

context, where, as here, Petitioners filed a 27-page reply, which is nearly double the Board's 15-page limit.

If the Board finds that a surreply is not warranted, it should strike all of the new issues and arguments raised in Petitioners' Reply, which are not properly before the Board under 40 C.F.R. § 124.19(c)(2). Petitioners' Response to the APS Motion essentially argues that Petitioners are free to raise any new substantive argument in their reply as long as the general subjects to which those new arguments relate were raised in the Petition and/or addressed in EPA's and APS's Responses. That is not the case. The Board has held that when "[reply] arguments raise substantive nuances that are not set forth in the petition..., they constitute, in essence, 'late-filled appeals' because they could have been raised in the petition but were not so raised." *In re Keene Wastewater Treatment Plant*, NPDES Appeal 07-18, 2008 WL 782613, at \*10 (EAB Mar. 19, 2008); see *In re City of Attleboro, MA Wastewater Treatment Plan*, 14 E.A.D. 398, 454 (EAB 2009) (rejecting as untimely the Petitioner's new argument raised in its reply regarding "phosphorus removed by attenuation" and "low flow data," even though the broader issue of "phosphorus removed by attenuation" was timely raised in the Petition). While the new arguments raised in Petitioners' Reply may have been related to general subject matters in the Petition (*e.g.*, whether Morgan Lake is a "waste treatment system" or whether the Plant has a "closed-cycle" recirculating system), they introduce new substantive theories that were not preserved in the Petition and to which APS has not had an opportunity to respond. In particular, given the opportunity to respond to the new arguments APS identified in its Motion, Docket Index #26, APS would address factual and legal inaccuracies within those new arguments (*e.g.*, the incorrect assertion that heat dissipation is not "treatment" or mischaracterization of

“evaporative losses” from the plant’s closed-cycle cooling system) to clarify those issues for the Board.

Accordingly, APS requests leave to file a surreply or, in the alternative, that the Board strike all new arguments presented in Petitioners’ Reply and issue any other remedies it deems appropriate.

Respectfully submitted,

/s/ Kerry L. McGrath

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Dated: January 28, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing ARIZONA PUBLIC SERVICE COMPANY’S REPLY TO PETITIONERS’ OPPOSITION TO 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 28th day of January, 2020, upon the persons listed below:

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