

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

In re:
Salt River Project Agricultural Improvement
and Power District –
Navajo Generating Station

NSR Appeal No. 16-01

Tribal NSR Permit No. T-0004-NN

**MOTION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT TO STRIKE PETITIONER’S SUPPLEMENTAL BRIEF,
OR, ALTERNATIVELY, MOTION FOR LEAVE TO FILE A SUR-REPLY**

On July 7, 2016, Petitioner in NSR Appeal No. 16-01 filed a second brief in these proceedings.¹ Because the brief was improperly submitted to the Environmental Appeals Board (“EAB” or the “Board”), Salt River Project Agricultural Improvement and Power District (“SRP”) hereby moves to strike the brief. In the alternative, should the Board decide to consider the brief, SRP moves for leave to file a sur-reply.

Pursuant to 40 C.F.R. § 124.19(f)(2), counsel for SRP has contacted the other parties to these proceedings. Petitioner has authorized counsel for SRP to represent that Petitioner opposes this motion. Counsel for Respondent U.S. Environmental Protection Agency (“EPA”) has authorized counsel for SRP to represent that EPA does not oppose this motion.

In support of its motion, SRP states the following:

¹ Although the July 7, 2016 filing is styled as a “Summary of Environmental Justice Policy,” Petitioner refers to the filing as a “brief” in the July 7, 2016 email that served the filing on the parties. The filing also purports to provide legal arguments to support the Petitioner’s challenge to the permit and should therefore be deemed a reply or supplemental brief.

I. The Brief Violates the Board's May 27, 2016 Scheduling Order.

The Board's May 27, 2016 Scheduling Order provides only for the filing of three briefs in these proceedings: (1) Petitioner's May 23, 2016 brief; (2) EPA's June 13, 2016 response brief;² and (3) SRP's June 16, 2016 response brief. *See* Scheduling Order at 1-2. The Order goes further and states that "[b]ecause of the time-sensitive nature of this NSR matter, the Board will apply a presumption against oral argument as well as the filing of reply briefs and sur-replies." *Id.* at 2-3. This is consistent with EAB's Standing Order Governing Petitions for Review of Clean Air Act New Source Review Permits, at 3, and the EAB rules, which state that, when the presumption against reply briefs is in effect, the Petitioner must, as a threshold matter, (1) file a motion seeking leave to file a reply with a proposed reply; and (2) submit both of those filings within 10 days after service of the response. 40 C.F.R. § 124.19(c). Petitioner violated the Board's Scheduling Order by filing a reply brief and has not attempted to comply with the EAB's procedural rules for seeking an amendment to that Order. The brief was also submitted 10 days after the June 27, 2016 deadline for a motion for leave to file a reply. The brief should therefore be stricken as impermissible.

Further, as explained in SRP's June 16, 2016 response brief, the delay occasioned by this permit appeal jeopardizes the emission reduction project that is the subject of the permit revision. *See* SRP Response at 16-17. For that reason, SRP respectfully requests that the Board expedite its review of this matter and, in granting this motion, that the Board make clear that the July 7, 2016 filing and any additional filings are not permitted.

² The Scheduling Order allowed EPA until June 16, 2016 to file its response, but EPA chose to file its brief earlier on June 13, 2016.

II. The Brief Improperly Raises New Arguments.

The arguments presented in the July 7, 2016 brief were, contrary to Petitioner's assertion, Reply Br. at 1, never preserved for review. Even if those issues were properly preserved, they cannot be addressed for the first time on reply.

The Petitioner is precluded from presenting issues to the Board if they were reasonably ascertainable during the comment period but were not raised by the close of the public comment period. 40 C.F.R. § 49.159(d)(3); 40 C.F.R. § 49.157(c)(1); *see also In re Christian Cty. Generation, LLC*, 13 E.A.D. 449, 457 (EAB 2008) (discussing analogous provisions 40 C.F.R. § 124.13 and § 124.19(a) and stating the Board regularly denies review of issues if they were reasonably ascertainable but not raised by the end of the public comment period). Here, neither the Petitioner nor any other public commenter raised the issue addressed in the July 7, 2016 brief, which is whether EPA's 2014 Environmental Justice Strategic Plan or other environmental justice considerations should have compelled the use of alternative monitoring methods at Navajo Generating Station ("NGS"). Reply Br. at 1. None of the comments discussed whether environmental justice concerns or policies recommended or required any particular monitoring method. None of the comments discussed the depth or adequacy of EPA's environmental justice analysis, which was extensive and satisfied all applicable requirements,³ let alone in the context

³ EPA included several documents describing its evaluation of environmental justice issues, including a memorandum demonstrating that the permit would not have adverse environmental justice impacts. Memorandum from Larry Maurin, Air Permits Office, to Navajo Generating Station Tribal NSR file, Tribal NSR Permit T-NN-0004 (Nov. 24, 2015), Administrative Record Index Document No. 5.1. That memorandum is supported by two technical assessment documents: (1) an "EJSCREEN" Report that included an environmental justice index for several pollutants, Administrative Record Index Document No. 5.2, and (2) an EJSCREEN Census 2010 Summary Report that evaluates the population in a nine-mile radius around NGS, EPA-R09-OAR-2016-0026-0007, Administrative Record Index Document No. 5.3. The memorandum and its supporting documents are all available as attachments to EPA-R09-OAR-2016-0026-0007.

of what monitoring requirements EPA should include in the permit.

The only comment even remotely related to environmental justice was submitted by Mr. Vincent Yazzie, who argued that the NGS flue stacks should be higher. Comment, Vincent Yazzie, Doc. ID. EPA-R09-OAR-2016-0026-0012. In making this argument, Mr. Yazzie briefly observed that “[m]inority populations are closer to flue stacks than the people of Page, AZ in terms of elevation.” Comment, Vincent Yazzie, Doc. ID. EPA-R09-OAR-2016-0026-0012.⁴ Mr. Yazzie did not discuss monitoring in the context of this comment and did not critique EPA’s environmental justice analysis.

The requirements of EPA’s environmental justice policies were reasonably ascertainable issues that had to be addressed in public comments to be preserved for review. They were not, and, for that reason, the July 7, 2016 brief should be stricken.

Even if the comments did adequately preserve environmental justice issues for review, those issues cannot be presented for the first time in a reply brief. 40 C.F.R. § 124.19(c) (a petitioner “may not raise new issues or arguments in the motion [seeking leave to file a reply brief] or in the reply”). On the contrary, to support a case for filing a reply brief, a petitioner is required to affirmatively identify the arguments in the response brief(s) to which the petitioner seeks to reply and then to provide the reasons the petitioner believes a reply to those arguments is necessary. *Id.* The EAB describes these obligations as “a high threshold.” *In re Pio Pico*

⁴ EPA specifically responded to Mr. Yazzie’s argument regarding the height of the flue stacks in its Response to Comments document, stating that the project would not exceed the National Ambient Air Quality Standards or Coarse Particulate Matter Significant Impact Limits outside the facility fence line. Further, EPA explained that most of the emissions from the project would not come from the stacks and that the existing controls on the flue stacks continue to be the most effective control technology for minimizing those particulate matter emissions from flue gas. Response to Comments at 9, Administrative Record Index Document No. 7.2.

Energy Center, PSD Appeal Nos. 12-04, 12-05, & 12-06, slip op. at 18 (EAB Aug. 2, 2013), 16 E.A.D. _____. Petitioner has not attempted to make such a showing here and, indeed, could not do so. None of the arguments presented in the July 7, 2016 brief is remotely related to arguments previously presented to the Board in these proceedings. For that reason, the brief must be stricken for presenting arguments that are beyond the scope of what is permissible on reply. *In re Russell City Energy Center, LLC*, 15 E.A.D. 1, 53 (EAB 2010); *see also In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying petitioner’s request to file a supplementary brief where the supplementary brief raised a “distinct” new issue).

III. In the Alternative, SRP Respectfully Requests Leave To File a Sur-Reply.

If the Board does not grant SRP’s motion to strike the July 7, 2016 brief and instead determines that it will consider the Petitioner’s new arguments, SRP alternatively requests that it be granted leave to file a sur-reply.⁵ Unlike the rules governing reply briefs, there are no strict requirements for demonstrating the need for a sur-reply. Indeed, it appears that when the Board grants a party leave to file a reply, it also directs the filing of sur-replies as a matter of routine. *See, e.g.*, Order Granting Motion to File Reply, *In re Ocotillo Power Plant*, PSD Appeal No. 16-01 at 2 (EAB May 16, 2016).

Assuming for the sake of argument that demonstration requirements like those applicable to reply briefs also apply to sur-replies, those requirements would easily be met here. As stated above, the arguments presented in the July 7, 2016 brief are entirely new to these proceedings. No one, including Petitioner, raised issues related to environmental justice during the permit proceeding comment period, and those issues were not addressed in any brief prior to

⁵ An opportunity for SRP to address Petitioner’s new arguments in a sur-reply does not cure the untimeliness of Petitioner’s arguments. Even if the Board grants SRP leave to file a sur-reply, the arguments presented in the July 7, 2016 brief must still be dismissed as untimely.

Petitioner's July 7, 2016 brief. If the Board chooses to address these arguments—although it should not—a sur-reply is needed to fully explain why those arguments lack merit.

WHEREFORE, for the reasons stated above, SRP moves to strike Petitioner's July 7, 2016 brief. If the Board denies SRP's motion to strike, SRP, in the alternative, moves for leave to file a sur-reply.

Respectfully submitted,

s/ Aaron M. Flynn

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT TO STRIKE PETITIONER'S SUPPLEMENTAL BRIEF, OR, ALTERNATIVELY, MOTION FOR LEAVE TO FILE A SUR-REPLY were served through the Environmental Appeal Board's electronic filing system and by electronic mail to the following, this 15th day of July, 2016:

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