

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

)	
In re:)	
)	NPDES Appeal No. 18-02
Arizona Public Service Co.)	
)	
NPDES Permit No. NN0000019)	
)	

**ORDER PARTIALLY DISMISSING PETITION FOR REVIEW AND ESTABLISHING
 BRIEFING SCHEDULE**

On October 9, 2018, the U.S. Environmental Protection Agency (“EPA” or “Agency”) Region 9 (“Region”) filed a motion to partially dismiss the Petition for Review filed by Dine’ Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club (collectively, “Petitioners”). *See* Region IX’s Motion to Partially Dismiss Petition for Review; Motion to Establish Revised Briefing Schedule (Oct. 9, 2018). The Region explained that it had withdrawn two provisions of the contested permit (Sections I.A.5 addressing Internal Outfall 01E and Section I.B.3 addressing cooling water requirements) pursuant to its authority under 40 C.F.R. § 124.19(j), and would revise them, as appropriate, in a new draft permit. The Region moved for the Board to dismiss “Petitioners’ claims as to those [withdrawn] provisions” as moot, and revise the briefing schedule so that the Region could issue the new draft permit and then respond, along with permittee Arizona Public Service Company (“APS”), to the remaining issues and Petitioners’ challenges, if any, to a modified permit in a single proceeding by April 19, 2019, with a May 20, 2019 deadline for Petitioners to file any reply. *Id.* at 4.

Pursuant to the Board's subsequent order on October 11, 2018, Petitioners filed their response to the Region's motion on October 17, 2018, opposing the requested relief, and the Region and Permittee filed their replies on October 22, 2018. The Board issued a further order on October 25, 2018, directing the parties to file supplemental briefs no later than November 2, 2018, to clarify: (1) which of the nine issues raised in the Petition for Review should be dismissed as moot based on the notice of withdrawal of Permit Sections I.A.5 and I.B.3; (2) how, if at all, the withdrawal of Permit Sections I.A.5 and I.B.3 could affect the Board's consideration on the merits of the remaining issues; (3) how, if at all, a Board decision on the merits of the remaining issues could affect the Region's consideration of Permit Sections I.A.5 and I.B.3; and, (4) what reasonably expeditious briefing schedule the parties would propose if the Board declined to defer briefing and instead required briefing now on the remaining issues in this appeal. Order Directing Parties to Provide Further Clarification (Oct. 25, 2018), at 2-3 (dkt. #21).

As to the first question, the Region and APS responded that the withdrawal of Permit Section I.A.5 (addressing Internal Outfall 01E) moots the sixth issue raised in the Petition for Review regarding application of new effluent limitation guidelines for bottom ash transport water at Internal Outfall 01E ("Issue 6"). *See* Region IX's Response to Order Directing Parties to Provide Further Clarification (Nov. 2, 2018), at 3 (dkt. #23) ("Region's Response"); Arizona Public Service Company's Response to Order Directing Parties to Provide Further Clarification (Nov. 2, 2018), at 2 (dkt. #22) ("APS Response"); *see also* Petition for Review (July 16, 2018), at 36 (dkt. #1) ("Petition"). Petitioners responded that they "do not believe that the Region's withdrawal of [Section] I.A.5 * * * moots any claim in their petition for review" because the "[v]oluntary cessation of the allegedly unlawful conduct," here the Region's withdrawal of

Section I.A.5, “does not moot a case absent a compelling showing (absent here) that the conduct will not recur.” *See* Appellant’s Response to Order for Clarification (Nov. 2, 2018) (citing cases), at 1 (dkt. #24) (“Petitioners’ Response”). Petitioners continue that “[i]n any event, the Region’s withdrawal of [Section I.A.5] bears only on [Issue 6] regarding new effluent limitation guidelines (ELGs).” *Id.* at 2.

The Region and APS further responded that withdrawal of Permit Section I.B.3 moots the ninth issue raised in the Petition for Review regarding cooling water requirements (“Issue 9”), but they differ as to what extent. *Cf.* Petition at 17 (“EPA erred by failing to properly regulate the cooling water intake structure and also violated the Endangered Species Act.”). The Region states that withdrawal of Section I.B.3 moots Issue 9 in its entirety because the current permit “does not contain terms regarding the cooling water intake structure” and the Region intends to reevaluate the Permit’s regulation of the facility’s cooling water intake structures and propose revisions to Section I.B.3, as appropriate, and the administrative record. Region’s Response at 3-4. APS states that Issue 9 is “mooted at least in part” and that while Petitioners’ “more general ESA arguments may not be moot at this stage, * * * it would be premature for the Board to consider them prior to the Region’s modification” of Section I.B.3. APS Response at 2. Petitioners’ position is that Issue 9 is not moot, again because the Region’s action, namely withdrawal of permit provisions, is capable of repetition, yet evading review. Petitioners further state that in any event, withdrawal of Section I.B.3 would only moot their Issue 9 claim concerning Clean Water Act (“CWA”) compliance, and that their Endangered Species Act (“ESA”) argument raised in Issue 9 is not mooted because it is uncertain the extent to which further action will be taken that would address Petitioners’ ESA concerns. Petitioners’ Response at 1, 2.

As to the second question, the Region states (and Petitioners appear to agree) that modification of Sections I.A.5 and I.B.3 would not impact a Board decision on the other issues raised in the Petition (Issues 1-5, 7 & 8), and APS takes no position. Region's Response at 4; Petitioners' Response at 2; APS Response at 3.

As to the third question, the parties differ as to whether, or to what extent, a Board decision on the merits of these other issues could affect the Region's consideration of the withdrawn permit provisions. The Region states that a Board decision on the merits of these other issues could have a significant impact, particularly on Permit Section I.A.5. Region's Response at 4. APS "anticipates that a Board decision on many of the remaining issues raised by Petitioners could significantly impact how the Region would modify Permit Sections I.A.5 and I.B.3." APS Response at 4; *id.* at 4-8 (specifying several issues and sub-issues – depending on how the Board decides them – that APS believes could impact how the Region would address, and potentially modify, the withdrawn permit sections). Petitioners state that a Board decision on the other issues would not impact the Region's modification of Permit Section I.A.5, and that a Board decision would only affect how the Region addresses Permit Section I.B.3 if the Board were to rule on Petitioners' ESA arguments in Issue 9. Petitioners' Response at 3.

Lastly, as to the fourth question, Petitioners state that "[f]urther delay * * * is untenable," and request that the Board require briefing to be completed by the end of 2018. Petitioners' Response at 3. The Region contends that it would be "more efficient" to consider the remaining issues "and Petitioners' challenges, if any, to a modified permit in a single proceeding," and that to defer briefing of the remaining issues "will provide certainty and finality more promptly than a potentially bifurcated approach." Region's Response at 5, 6. APS concurs with the request to defer briefing. APS Response at 8. The Region proposes, and APS agrees, that if the Board

should decline the Region's request to defer briefing and instead require the parties to continue briefing the remaining issues in this matter, the Region and APS file responses to the Petition for Review no later than December 21, 2018, and Petitioners file any reply brief no later than January 22, 2019. *See* Region's Response at 5; APS Response at 8.

The Board has carefully reviewed the parties' arguments and concludes that the withdrawal of Sections I.A.5 and I.B.3 moots Petitioners' Issues 6 and 9, in their entirety. As to Petitioners' argument that the Board should decide Issues 6 and 9 because they are capable of repetition, yet evading review, we disagree. The Region will be proposing revisions to Sections I.A.5 and I.B.3 – at least partly in response to Petitioners' claims – and seeking comment on the proposed revisions. And once the Region issues a final permit modification as to these two provisions, Petitioners may file a petition for review with the Board challenging them, and there is no reason to believe that such a challenge would not proceed in the ordinary course. We also disagree with Petitioners' argument that Issue 9 is not moot because it is uncertain the extent to which the modification of cooling water requirements in Permit Section I.B.3 would address Petitioners' ESA concerns. Regardless, the ESA issue relating to cooling water requirements is inextricably intertwined with Permit Section I.B.3, and the Board's review of the ESA issue must await the Region's permit modification as to that withdrawn provision. In sum, as Sections I.A.5 and I.B.3 have been withdrawn, a decision by the Board on Issues 6 and 9 would in effect be an advisory opinion, which the Board does not issue. *See In re W. Bay Expl. Co.*, UIC Appeal Nos. 13-01 & 13-02, at 3 n.3 (EAB May 29, 2013) (Order Denying Reconsideration) (citing cases) (stating that “the Board, following the traditional practice of United States federal courts, does not issue advisory opinions”).

The Board further concludes that briefing on the remaining seven issues (Issues 1-5, 7 & 8) should proceed now. As to the Region's argument that to defer briefing on these other issues is "more efficient" and "will provide certainty and finality more promptly than a potentially bifurcated approach," again we disagree. Region's Response at 5, 6. The Region acknowledges that modification of the two withdrawn provisions will not impact how the Board decides these other issues, but rather, that a ruling on these other issues could have a significant impact on the anticipated permit modification, particularly with respect to Section I.A.5. Given that, briefing on these other issues can proceed now and is likely to result in a Board decision on those issues – and certainty and finality for the parties as to those issues – sooner than if briefing on all issues were not completed until May 2019. Moreover, as a Board decision on these other issues could impact how the Region addresses Section I.A.5 in particular, resolving these issues sooner by briefing them now is more efficient than waiting as the Region and APS propose.

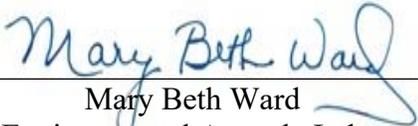
Accordingly, upon consideration of the parties' responses, and for good cause shown, the Board DISMISSES the entirety of Issues 6 and 9 in the Petition for Review. Dismissal of Issues 6 and 9 has no effect on the Petitioners' right to submit comments on subsequent draft permit revisions or modifications pursuant to 40 C.F.R. § 124.11, or to petition the Board for review pursuant to 40 C.F.R. § 124.19 of any future EPA action with respect to NPDES Permit No. NN0000019, including challenges to the Region's compliance with the ESA as it relates to cooling water requirements. The Region and APS must file their responses to all remaining issues (Issues 1-5, 7 & 8) raised in the Petition for Review, and the Region must submit a

certified index to the administrative record and relevant portions thereof, no later than **Friday, December 21, 2018**. Petitioners must file any reply no later than **Tuesday, January 22, 2019**.

So ordered.¹

ENVIRONMENTAL APPEALS BOARD

Dated: November 13, 2018

By: 
Mary Beth Ward
Environmental Appeals Judge

¹ The three-member panel deciding this matter is composed of Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Partially Dismissing Petition for Review and Establishing Briefing Schedule* in the matter of Arizona Public Service Co., NPDES Appeal No. 18-02, were sent to the following persons in the manner indicated:

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Dated: November 13, 2018



Eurika Durr
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