

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

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

**REGION IX’S REPLY TO PETITIONERS’ RESPONSE IN OPPOSITION TO MOTION
TO PARTIALLY DISMISS PETITION AND ESTABLISH REVISED BRIEFING
SCHEDULE**

The United States Environmental Protection Agency (“EPA”) Region 9 (“Region”) respectfully files this Reply to the Response in Opposition to EPA’s Motion to Partially Dismiss Petition for Review and Motion to Establish Revised Briefing Schedule (“Response in Opposition”) filed by Dine’ Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club (collectively, “Petitioners”) in the above-captioned matter. The Environmental Appeals Board (“EAB”), by its Order dated October 11, 2018, provided that any replies to the Response in Opposition be filed on or before October 22, 2018.

The Response in Opposition appears to ask the EAB to act on decisions about permit withdrawal and stays of permit terms that are wholly within the Region’s discretion. Further, the Response in Opposition opposes a briefing schedule that would allow the EAB to most efficiently and conclusively address the concerns raised in the Petitioners’ appeal. Finally, the

Response in Opposition raises concerns about a separate proceeding that are not relevant to this appeal.

BACKGROUND

On June 12, 2018, the Region issued National Pollutant Discharge Elimination System (“NPDES”) Permit No. NN0000019 (“Permit”) to the Arizona Public Service Company (“APS”) for the Four Corners Power Plant (“FCPP”).

On July 16, 2018, Petitioners filed a Petition for Review raising nine issues for review by the EAB.

On August 10, 2018, the EAB issued an order granting EPA’s unopposed motion for an extension of time to file EPA’s and APS’s responses no later than October 19, 2018.

On August 28, 2018, EPA provided notice to the EAB and APS of the Region’s decision to stay the entire Permit pursuant to 40 C.F.R. § 124.16(a) (“Notice of Stay”).

By letter dated October 5, 2018, the Region notified the EAB and APS that the Region was withdrawing two provisions of the Permit and will prepare a new draft permit revising those provisions, as appropriate, in accordance with 40 C.F.R. § 124.6.¹ In addition, the Region revised its Notice of Stay, finding that, with the exception of the withdrawn provisions, the remaining specific conditions are uncontested and will become effective 30 days after the date of the Revised Notice of Stay.

¹ The Response in Opposition, at page 9, incorrectly suggests that EPA has filed a motion for the EAB to approve its partial withdrawal of the Permit. Instead, EPA’s October 9, 2018 motion requested that the EAB partially dismiss the Petition for Review as to the withdrawn provisions, since Petitioners’ challenges to those provisions are now moot. Consistent with 40 C.F.R. § 124.19(j), the Regional Administrator may unilaterally withdraw some or all of a permit at this stage of an appeal. *See In re West Bay Exploration Co.*, UIC Appeal Nos. 13-01 & 13-02, slip. op. at 2 (EAB May 29, 2013) (“[A] Region may withdraw a permit unilaterally prior to a fixed date in the course of a permit appeal . . . and by motion subsequent to that date. . . . Section 124.19(j) designates the period for unilateral withdrawal as ‘any time prior to 30 days after the Regional Administrator files its response to the petition for review.’”)

On October 9, 2018, the Region filed a motion requesting that the EAB (1) partially dismiss the Petition for Review as to the two withdrawn provisions; and (2) issue a revised briefing schedule that a) accounts for the process of revising the withdrawn provisions and issuing a modified permit, and b) would allow for consideration of the issues in the Petition for Review and Petitioners' challenges, if any, to a modified permit in a single action.

Petitioners filed their Response in Opposition to the Region's motion on October 17, 2018. EPA has reviewed the Response in Opposition and respectfully submits this reply to address a number of issues raised therein.

1. The Region acknowledges that it discussed with Petitioners' counsel its initial conclusion that it would withdraw the entire permit. Further discussion within EPA (notably, with the Office of General Counsel, the Office of Water, and at least two other Regions) suggested other approaches. At issue were (a) how to move the appeal process forward expeditiously and efficiently; (b) how to effectuate some of the updated provisions contained in the reissued permit; and (c) how to address certain provisions in the reissued permit identified during the broader EPA review of the Petition for Review as warranting review and modification, as appropriate.² The ultimate, as opposed to preliminary, decision as to how to proceed was to withdraw two provisions of the reissued permit, leaving the remainder intact. That decision is reflected in the Region's letter dated October 5, 2018. Consistent with 40 C.F.R. § 124.19(j), the Regional Administrator has authority to unilaterally withdraw some or all of the Permit at this stage of the proceedings.

² Contrary to the contention in the Response in Opposition at the bottom of page 6, EPA has used the initial extension period to evaluate the many varied issues raised, directly or indirectly, in the Petition for Review. Region 9's review has involved both EPA's Office of General Counsel and the Office of Water, as well as outreach to other Regions involved in particular issues. As a result of this review, the Region decided to partially withdraw the Permit.

2. Although Region 9 issued a Revised Notice of Stay, the Region’s finding that the entire Permit—absent the withdrawn provisions—should go into effect is consistent with the regulations at 40 C.F.R. part 124 and, as discussed below, EPA’s prior determinations at other facilities. For facilities such as APS that hold an existing permit, the Regional Administrator must “identify the stayed provisions” of the reissued permit; i.e., the “contested permit conditions” and “uncontested conditions which are not severable from those contested.” 40 C.F.R. § 124.16(a); *see also id.* § 124.60. “To the extent conditions of [the reissued] permit are stayed,” the facility must generally “comply with the conditions of the existing permit which correspond to the stayed conditions.” *Id.* § 124.16(c).

Here, the Petition for Review raises two kinds of issues. First, the Petition raises “global” issues that challenge the permit as a whole, such as compliance with the consultation requirements under the Endangered Species Act, 16 U.S.C. § 1536, or water quality certification requirements under Clean Water Act section 401, 33 U.S.C. § 1341. Second, the Petition for Review raises several issues that are specific, but the “correction” of those issues would result in an additional permit term rather than the removal or revision of an existing permit term. In permit appeals involving these kinds of issues, EPA has found that the specific conditions of a permit are uncontested and are severable from the “global” or “additional” issues raised in the petition. *See, e.g.,* Notice of Contested and Uncontested Conditions, *In re City of Cambridge*, NPDES Appeal No. 09-17 (Dec. 28, 2009) (finding that entire permit would go into effect where the petition for review contested the “absence” of conditions); Notice of Contested and Uncontested Conditions, *In re City of Portsmouth*, NPDES Appeal No. 07-13 (July 3, 2007) (same); Notice of Uncontested and Severable Conditions, *In re Boston & Maine Corp.*, NPDES Appeal No. 05-17 (June 5, 2006) (finding that petition for review, which included an Endangered

Species Act claim, did not “contest any specific conditions” where the petition did not “request that any of the specific conditions in the Permit be modified or deleted”) (Notices Attached). This approach is also consistent with the discussion of “uncontested permit conditions” found at 40 C.F.R. § 124.60(b)(6)(ii), which provides that uncontested permit conditions include “[p]ermit conditions which will have to be met regardless of the outcome of the appeal.”

With the Region’s withdrawal of the two provisions by letter dated October 5, 2018, the remaining permit conditions meet this regulatory definition of “uncontested permit conditions,” as the remaining permit conditions would be met regardless of the outcome of the appeal. The Response in Opposition (p. 5, paras. 9(a)-(f)) offers up six examples of specific terms that are allegedly “contested,” but those examples are unavailing.

- Two of the cited provisions (paras. 9(d) and (e)) involve permit terms that were withdrawn by EPA in the October 5, 2018 letter. These include the cooling water intake provision at Permit Section I.B.3 and Permit Section I.A.5, which provides effluent limits and monitoring requirements for Outfall 01E.³
- Two of the cited provisions (paras. 9(c) and (f)) address seeps that allegedly discharge into the Chaco River. Were Petitioners to prevail in having the seeps treated as regulated point sources (para. 9(c)), the result would be *additional* permit terms to regulate those point sources. Petitioners’ paragraph 9(f) (citing Part III.A of the Permit) is perplexing. Petitioners explicitly asked that Part III.A, the Seepage

³ Petitioners suggest that the new effluent limitations guidelines (ELGs) would apply to all outfalls at the FCPP. *See* Response in Opposition at p. 5, para. 9(e). However, the ELGs would affect only Outfall 01E, which regulates discharge from the Combined Waste Treatment Pond. The discharge from the Combined Waste Treatment Pond currently includes bottom ash transport water. Pursuant to new 40 C.F.R. § 423.13(k)(1)(i), discharge of bottom ash transport water must be prohibited as soon as possible beginning November 1, 2020, but no later than December 31, 2023. EPA intends to address this requirement in the revised permit.

Management and Monitoring Plan, be left intact. *See* Petition for Review at p. 54 (“The only provisions of the Permit we request remain in effect are conditions Part I, B.2 & B.3 *and Part III A.*” (emphasis added)). Interpreted charitably, it seems Petitioners would like to see the Seepage Management and Monitoring Plan go into effect, but would like to add additional permit terms addressing perceived deficiencies in the plan.

- Petitioners’ paragraph 9(b) asserts that the “reasonable potential analysis” in the Permit was inadequate. However, assuming that is true and assuming further that a “corrected” reasonable potential analysis would identify additional constituents that need to be addressed in the permit limits (*see* 40 C.F.R. § 122.44(d)(1)), the remedy would again be *additional* permit terms.
- Finally, Petitioners claim at paragraph 9(a) that EPA failed to impose effluent limitations on the discharge of pollutants into Morgan Lake, which Petitioners claim is a “water of the United States.” If Petitioners were to prevail on this claim, it might require some changes to the Permit. However, most, if not all, of those changes would involve additions to the Permit instead of modifications to existing terms. The possibility that some existing terms might need conforming or other incidental revisions if Petitioners prevail on this issue does not turn an uncontested provision into a contested provision, and does not justify delaying the benefits of allowing the uncontested provisions of the Permit to go forward at this time.

The Revised Notice of Stay, in addition to being consistent with the Agency’s regulations and practice, constitutes a better balance of the various interests involved in this Petition. As noted, the Petition for Review explicitly asked for certain Permit terms to be retained. The

regulations express a clear preference for retaining permit provisions that would be retained under any scenario. *See* 40 C.F.R. § 124.60(b)(6)(ii) (describing “uncontested conditions”). The Region’s programmatic preference would be to achieve the environmental benefits of the reissued permit—mainly, in this case, the benefit of additional monitoring and seep management. And, the permittee has previously expressed its agreement with the proposed approach. *See* Arizona Public Service Company’s Response to Region IX’s Motion to Partially Dismiss Petition for Review, Motion to Establish Revised Briefing Schedule at pp. 1-2 (Oct. 10, 2018). Petitioners’ present opposition to this approach is misguided.⁴

3. The Region’s request for a six-month extension of the briefing schedule reasonably reflects the time needed for the required activities to take place before the parties can present a complete, modified permit and complete permit appeal before the EAB. Those tasks include:

- Working with offices in EPA’s Headquarters, including the Office of General Counsel and Office of Water, to conclude on how best to reflect the new effluent limitations guidelines in this permit in light of the Agency’s ongoing reconsideration of the 2015 final rule. *See* 80 Fed. Reg. 67,838 (Nov. 3, 2015) (final rule); 82 Fed. Reg. 43,494 (Sept. 18, 2017) (postponing certain compliance dates and discussing administrative reconsideration process). In addition to working with Headquarters to assure consistency with this regulatory review, the

⁴ We note that the Response in Opposition seems to suggest that the Revised Notice of Stay is related to the Region’s motion for a revised briefing schedule and states that the EAB should “reject” the Region’s Revised Notice of Stay. *See* Response in Opposition at pp. 6-7. This is incorrect. The Revised Notice of Stay is an independent action pursuant to 40 C.F.R. §§ 124.16 and 124.60. The Region is moving for a revised briefing schedule to allow the Agency to address the withdrawn Permit provisions. Addressing those provisions now—under a revised briefing schedule—will result in a more expeditious resolution of all claims about the Permit, and will allow the appeal to proceed in a single action.

Region will need to work with the permittee to develop a record to support any decisions on compliance dates.

- Working with Headquarters to develop permit language reflecting the 2014 regulation of cooling water intake structures. *See* 79 Fed. Reg. 48,300 (Aug. 15, 2014).
- Publishing revised permit provisions for public comment.
- Reviewing and responding to any public comments.
- Developing and finalizing new permit provisions.
- Providing a reasonable opportunity for Petitioners and other eligible parties to appeal the new permit provisions.

Rather than constituting an unacceptable delay, this process will expedite consideration of all issues involving the complete, modified permit, and will allow the EAB and the parties to do so in a single hearing process, thereby obviating the necessity and expense of multiple appeals.

4. Petitioners' requested relief, which appears to be rejection of the motion for a revised briefing schedule and a resultant requirement that the parties and the EAB carry out multiple, sequential appeals of the existing Permit and revised Permit terms, does not promote judicial and regulatory efficiency.⁵ Moreover, absent a revised briefing schedule, the parties will be required to divert resources from the permit modification process to litigation before the Board. Since the Region has withdrawn two Permit provisions, the Region maintains that the most efficient path forward is to expeditiously make any necessary revisions to the withdrawn provisions, finalize

⁵ The Petitioners' Response in Opposition actually asserts, at page 9, a broader "claim for relief" ("EPA's motions to withdraw, motion for extension, and attempt to revise the August 28, 2018 stay should be denied."). As noted above, however, this claim for relief goes beyond EPA's motions. EPA has full discretion at this point in time to unilaterally withdraw some or all of the permit provisions, in addition to the authority to determine which permit conditions are stayed on appeal. *See* 40 C.F.R. §§ 124.16, 124.19(j), 124.60.

the provisions after appropriate public review, and provide an opportunity for the Petitioners to pursue their claims as to the complete, revised Permit in a single action before the EAB.

Accordingly, the Region requests that the EAB grant the motions to partially dismiss the Petition for Review and establish a revised briefing schedule.

5. The Response in Opposition makes numerous assertions and allegations regarding the Ninth Circuit case brought by the Petitioners seeking a mandamus order requiring EPA to take final action on APS's NPDES renewal permit application. *See, e.g.*, Response in Opposition at p. 3, para. 6; *id.* at pp. 6-7. The matter before the EAB is limited to the issues raised in Petitioners' Petition for Review of the June 12, 2018 NPDES Permit and the rules and standards of review articulated in 40 C.F.R. part 124. The issues Petitioners may raise in the Ninth Circuit have no bearing on this proceeding before the EAB.

The Region has consulted with the EPA's Office of General Counsel and the Office of Water, and both offices concur in this reply.

This Reply complies with the requirement that it not exceed 7,000 words, excluding caption, table of contents, table of authorities, statement of compliance with word limitations, table of attachments, and certificate of service.

Date: October 22, 2018

Respectfully submitted,

/s/Thomas M. Hagler

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of REGION IX'S REPLY TO PETITIONERS' RESPONSE IN OPPOSITION TO MOTION TO PARTIALLY DISMISS PETITION AND ESTABLISH REVISED BRIEFING SCHEDULE to be served by electronic mail upon the persons listed below.

Dated: October 22, 2018

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