

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

<b>In Re:</b>	)	
	)	
	)	
<b>Four Corners Power Plant</b>	)	<b>NPDES Appeal No. 18-02</b>
<b>NPDES Renewal Permit: NN0000019</b>	)	
<b>Arizona Public Service Company (Applicant)</b>	)	
	)	
	)	

**ARIZONA PUBLIC SERVICE COMPANY’S REPLY IN SUPPORT OF REGION IX’S  
MOTION TO PARTIALLY DISMISS PETITION FOR REVIEW; MOTION TO  
ESTABLISH REVISED BRIEFING SCHEDULE**

On June 12, 2018, the United States Environmental Protection Agency (“EPA”) Region IX (“the Region”) issued the National Pollutant Discharge Elimination System (“NPDES”) Permit No. NN0000019 (“Permit”) to the Arizona Public Service Company (“APS”) for the Four Corners Power Plant (“FCPP”). Petitioners filed with the Environmental Appeals Board (“EAB” or “Board”) a petition for review of the Permit that presented nine issues for review, including claims that: “EPA erred by not imposing requirements of the new [Effluent Limitation Guidelines (“ELGs”)] into the Permit” and “EPA erred by failing to properly regulate the cooling water intake structure ....” Petition for Review By Dine’ Citizens, et al. (“Petition”), Docket Index #1, at 17. Petitioners asked the Board to “rescind and remand the Permit to EPA for revision” and requested that certain provisions of the Permit (Sections I.B.2 (surface seepage intercept systems), I.B.3 (cooling water intake requirements), and III.A (Seepage Management and Monitoring Plan)) remain in effect. *Id.* at 54.

Initially, the Region stayed the entire permit. EPA Notice of Stay (Aug. 28, 2018), Docket Index # 8. Pursuant to its authority under 40 C.F.R. § 124.19(j) to withdraw portions of

the permit “at any time prior to 30 days after the Regional Administrator files its response,” on October 5, 2018, the Region withdrew two of the Permit’s provisions addressing issues raised by Petitioners: Permit Sections I.A.5 (addressing ELGs) and I.B.3 (addressing cooling water intake requirements). EPA Notice of Partial Withdrawal and Revised Notice of Stayed Provisions (October 5, 2018), Docket Index # 9. The Region stated its intent to modify those provisions as appropriate.

Along with the partial withdrawal, pursuant to its authority under 40 C.F.R. § 124.16(a), the Region issued a Revised Notice of Stay, finding that the Permit (aside from the withdrawn conditions) will become effective within 30 days. *Id.* As APS noted in its Response to Region IX’s Motion to Partially Dismiss Petition for Review; Motion to Establish Revised Briefing Schedule, Docket Index #12, APS is prepared to implement the remaining permit terms by November 5, 2018. The effect of the Region’s Partial Withdrawal and Revised Notice of Stayed Provisions is that the Region will reconsider two of the provisions for which the Petitioners sought reconsideration, and the remainder of Permit’s standards and conditions, including the two provisions regarding seepage management that Petitioners specifically requested remain in effect, will become effective. Implementation of the Permit will provide for greater environmental protection during the pendency of these proceedings.

In their Response in Opposition to Motion to Partially Dismiss Petition for Review, Motion to Establish Revised Briefing Schedule, and Revised Notice of Stay, Docket Index # 16, Petitioners spend several pages seeking to re-litigate issues that were before the Ninth Circuit in Petitioners’ mandamus action. *In re: Dine’ Citizens Against Ruining the Environment, et al.*, No. 18-71481 (9th Cir. filed on May 23, 2018). The Ninth Circuit has ordered Petitioners, by October 23, 2018, to show cause why the mandamus petition should not be dismissed as moot

now that “petitioners informed this court that they received the relief requested in this petition for a writ of mandamus.” *See In re: Dine’ Citizens Against Ruining the Environment, et al.*, No. 18-71481 (9th Cir. order issued October 2, 2018). But the Ninth Circuit mandamus action, through which Petitioners sought to force the Region to issue a final NPDES permit for FCPP, is separate and distinct from the issues that are before the Board now that the Permit has been issued.

Indeed, at this stage, the two issues that are before the Board are: (1) whether, in light of EPA’s partial withdrawal, it should dismiss Petitioners’ claims related to those withdrawn provisions, and (2) whether it should grant EPA’s request to establish a revised briefing schedule. The Board “typically grants a motion where the movant shows good cause for its request and/or granting the motion makes sense from an administrative or judicial efficiency standpoint.” *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05, & 08-06, 14 E.A.D. 484, 497 (EAB Sept. 24, 2009). The Region has shown good cause for each of its requests, and, as APS discusses further below, granting both of the Region’s motions would advance administrative and judicial efficiency in these proceedings.

**I. The Region’s Motion to Partially Dismiss Petition for Review Should Be Granted**

Judicial economy, the EAB regulations, and EAB precedent all favor dismissal of the withdrawn provisions. The EAB regulations were designed and have been revised to “simplify the review process” and “make the appeals process more efficient by avoiding unnecessary filings and Board orders.” 78 Fed. Reg. 5281, 5281 (Jan. 25, 2013). In particular, 40 C.F.R. § 124.19 was designed to “allow the Regional Administrator to *unilaterally* withdraw the permit at any time prior to 30 days after the Regional Administrator files its response to the petition.” *Id.* at 5282 (emphasis added); *see also In re Desert Rock Energy Co., LLC*, 14 E.A.D. at 495 (“Agency policy favors allowing the [R]egion to make permit condition decisions rather than

Board.”). Section 124.19 was formulated “to ensure that unilateral withdrawal of a permit will occur before the Board has devoted significant resources to the substantive consideration of the appeal.” 78 Fed. Reg. at 5282; *see also, e.g., In re Peabody Western Coal Co.*, CAA Appeal No. 10-01, 14 E.A.D. 712, 720 (EAB Aug. 13, 2010) (permit issuer’s right to withdraw permit provisions during early stages of litigation avoids expending unnecessary Board and litigant resources). Here, the Region seeks to avoid wasting judicial resources by addressing the two withdrawn provisions early in the litigation.

Consistent with the goal of conserving judicial resources, the Board has typically dismissed withdrawn provisions as moot. *See, e.g. In re City of Keene Wastewater Treatment Facility*, NPDES Permit No. NH0100790, NPDES Appeal No. 07-18, Order Noticing Partial Withdrawal of Permit and Dismissing Portion of Petition for Review As Moot (EAB Dec. 5, 2007). Petitioners have provided no reason why the Board should depart from its longstanding practice and precedent with respect to the withdrawn provisions here.

## **II. The Region’s Motion to Establish a Revised Briefing Schedule Should Be Granted**

Likewise, judicial economy, EAB precedent, and practical considerations favor revising the briefing schedule to allow for the Board to consider the issues in the Petition and Petitioners’ challenges to a modified permit, if any, in a single proceeding. The Board has held that “it would be highly inefficient for the Board to issue a final ruling on a permit when the Agency is contemplating changes to that permit.” *In re Desert Rock Energy Co.*, 14 E.A.D. at 497; *see also In re Peabody Western Coal Co.*, 14 E.A.D. at 719 (For the Board to “press forward” while the permit issuer reconsiders certain issues would be “premature” and “would be, in essence, to ‘exercise [the Board’s] appellate jurisdiction before the permitting authority has finished evaluating the underlying permit decision.’”). Again, Petitioners have not provided any support

for the notion that the Board should go against its prior precedent and provide appellate review before the Region issues a modified, more final permit.

Moreover, all of Petitioners' challenges to the final Permit, including challenges (if any) to the provisions the Region intends to modify, must be addressed together to produce an outcome that provides a definitive, final result for the permittee. The requirements that EPA withdrew for modification—the ELG compliance timeline and cooling water intake requirements—are significant, and could require changes to the FCPP to comply. Having the two withdrawn issues, which are interrelated to many of the other aspects of the Permit that Petitioners challenged, resolved separately from the remainder of the Permit raises serious concerns for the permittee. For example, in their Petition, Petitioners argued that “EPA erred by not properly regulating the cooling water intake structure and violated the ESA.” Petition at 41. Petitioners make multiple arguments under this umbrella, including “EPA failed to properly regulate the cooling water intake structure” and “operation of [water] intake structures will jeopardize the continued existence of listed species.” Petition at 41, 49. It would be premature for the Board to adjudicate Petitioners' ESA challenges with respect to the water intake structures' impacts before the Region is finished evaluating the Permit requirements addressing cooling water intake requirements. Likewise, adjudication of Petitioners' claims with respect to water quality standards and related analyses (*e.g.*, “reasonable potential” analysis, impairment analysis), Petition at 24-34, 40-41, before the Region completes its review of the applicable ELGs could produce inconsistent results. APS has a significant interest in avoiding a bifurcated process in which permit issues and facility requirements are addressed in two separate rounds of briefing.

For all of these reasons, the Board should grant the Region's Motion to Partially Dismiss the Petition for Review and Motion to Establish a Revised Briefing Schedule.

Respectfully submitted,

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Dated: October 22, 2018

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ARIZONA PUBLIC SERVICE COMPANY'S REPLY IN SUPPORT OF REGION IX'S MOTION TO PARTIALLY DISMISS PETITION FOR REVIEW; MOTION TO ESTABLISH REVISED BRIEFING SCHEDULE was served via e-mail this 22nd day of October, 2018, upon the persons listed below:

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