

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

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In re:	)	
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Arizona Public Service Company	)	
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NPDES Permit No. NN0000019	)	NPDES Appeal No. 18-02
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**REGION IX’S RESPONSE TO ORDER DIRECTING PARTIES TO PROVIDE  
FURTHER CLARIFICATION**

The United States Environmental Protection Agency (“EPA”) Region 9 (“Region”) respectfully files this supplemental brief in response to the October 25, 2018 order from the Environmental Appeals Board (“EAB” or “Board”) directing the parties to provide further clarification. As discussed in the order, the EAB seeks clarification from the parties before it can rule on the Region’s Motion to Partially Dismiss Petition for Review and Motion to Establish Revised Briefing Schedule regarding the Petition for Review (“Petition”) filed by Dine’ Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club (collectively, “Petitioners”). The Board directs the parties to file supplemental briefs responding to four questions before it rules on the Region’s motions.

As explained below, the Board should hear all of the issues raised by the Petitioners in a single proceeding given the relationship between the withdrawn provisions and the issues raised in the Petition for Review.

## **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 the Region’s unopposed motion for an extension of time to file the Region’s and APS’s responses no later than October 19, 2018.

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.

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9, 2018, the Region filed a motion requesting that the EAB (1) partially dismiss the Petition for Review as to the two withdrawn provisions; and (2) issue a revised briefing schedule that a) accounts for the process of revising the withdrawn provisions and issuing a modified permit, and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 raised in the Petition for Review and Petitioners’ challenges to a modified permit, if any, in a single proceeding.

Petitioners filed a response in opposition to the Region’s motions on October 17, 2018. Region 9 and APS filed their replies on October 22, 2018.

On October 25, 2018, the EAB directed the parties to answer four questions before the Board rules on the Region’s motions. The first three questions address the interrelationship between the two withdrawn Permit provisions and the issues raised in the Petition. The fourth

question asks for a proposed briefing schedule if the Board declines to defer briefing and instead decides to require briefing now on the remaining issues raised in the Petition.

## **DISCUSSION**

### **I. Question 1: Which of Petitioners' Nine Issues Are Mooted by the Notice of Withdrawal of Permit Sections I.A.5 and I.B.3?**

The Region's withdrawal of Permit Sections I.A.5 and I.B.3 renders Petition Issues 6 and 9 moot, respectively.

Petition Issue 6 is mooted by the withdrawal of Permit Section I.A.5. In Petition Issue 6, Petitioners assert that the Region failed to impose requirements of the effluent limitations guidelines (ELGs) for the steam electric power generating point source category. Pursuant to 40 C.F.R. § 423.13(k)(1)(i) and the steam electric ELGs, discharge of bottom ash transport water must be prohibited as soon as possible beginning November 1, 2020, but no later than December 31, 2023. At the FCPP, Internal Outfall 01E is the only outfall that contains bottom ash transport water. The Region has withdrawn Permit Section I.A.5, which provides the effluent limits for Internal Outfall 01E, and intends to address the requirements of the steam electric ELGs in the modified permit. The withdrawal of Permit Section I.A.5 thus moots Petition Issue 6.

Petition Issue 9, which raises claims related to the FCPP's cooling water intake structure, is mooted by the withdrawal of Permit Section I.B.3 because this provision contains the Permit's only discussion of the cooling water intake structure. Petition Issue 9 challenges the adequacy of the Permit as it pertains to the cooling water intake structure on two separate grounds.

Specifically, Petitioners allege that the Permit does not comply with Clean Water Act (CWA) section 316(b) or the Endangered Species Act (ESA). Since the Permit currently does not contain terms regarding the cooling water intake structure, it would be premature for the EAB to

hear Petition Issue 9 until the Region issues a modified permit. The Region intends to reevaluate the Permit's regulation of the facility's cooling water intake structure and propose revisions, as appropriate, to the Permit and the Administrative Record.

**II. Question 2: To What Extent Would Modifications to Permit Sections I.A.5 and I.B.3 Moot, Narrow, or Impact How the EAB Would Decide the Remaining Issues in the Petition?**

The Region does not anticipate that modifications to the withdrawn provisions will impact how the Board would decide the remaining seven issues raised in the Petition. However, as explained below, the Board's ruling on some of the remaining issues could significantly impact one of the withdrawn provisions.

**III. Question 3: To What Extent Would an EAB Decision on the Remaining Issues in the Petition Moot, Narrow, or Impact How the Region Would Address Issues Involving Permit Sections I.A.5 and I.B.3?**

In contrast to the Region's response to Question 2, above, an EAB decision on the remaining issues raised by the Petitioners could have a significant impact on Permit Section I.A.5 in particular. For example, a finding that Morgan Lake is a water of the United States (Petition Issue 1) would require modifications to the provisions relating to the internal outfalls to Morgan Lake, including withdrawn Section I.A.5. A ruling in favor of Petitioners on Petition Issue 1 would also impact Issue 2 (effluent limits on the discharge of pollutants to Morgan Lake) and Issue 4 (reasonable potential analysis for Morgan Lake), which would have additional impacts on withdrawn Section I.A.5.

The Board's disposition of the remaining issues is unlikely to impact the withdrawn provisions. For example, a ruling by the Board on Issue 5 (CWA section 401 certification) and

Issue 7 (alleged discharges from the coal ash ponds) could require additional action by the Region, but such action should not impact the withdrawn provisions.

**IV. Question 4: What is a Reasonably Expedient Briefing Schedule Should the Board Require Briefing Now on the Remaining Issues?**

Should the Board decline to defer briefing and instead require briefing now on the remaining issues in this appeal, the Region proposes that the Region and APS file responses to the Petition for Review by December 21, 2018, and that Petitioners file any reply brief by January 22, 2019.

At this time, the Region anticipates proposing revisions to the withdrawn Permit provisions in late November to mid-December 2018. Taking into account the steps required to finalize the proposed revisions, including providing time for soliciting and responding to public comment, the Region anticipates issuing a complete modified Permit in early 2019. If the Board were to rule on the remaining issues while the Region is in the midst of the permit modification process, the Region may have to withdraw proposed revisions and restart the permit modification process. Given the relationship between the remaining issues raised in the Petition and at least one of the withdrawn provisions, the Region maintains that it would be more efficient to consider the issues raised in the Petition and Petitioners' challenges, if any, to a modified permit in a single proceeding. The Region believes that its original proposal for a revised briefing schedule would allow the parties and the EAB to consider the complete, modified Permit in a single proceeding without unduly delaying resolution of the issues raised by Petitioners.

The Region has discussed the proposed briefing schedule with the parties and informed them of the Region's position that all of the issues should be heard at the same time.

APS supports the Region's position that all of the issues should be heard at once, as this would provide them with more finality with respect to the Permit requirements. Petitioners are evaluating the issues raised by the Region and will indicate Petitioners' preferred briefing schedule in its supplemental brief by November 2, 2018.

### CONCLUSION

In conclusion, the Region asserts that it is in the interest of all of the parties to hear all of the issues simultaneously. This will provide certainty and finality more promptly than a potentially bifurcated approach. If the Board defers briefing to hear all of the issues at once, the Board can either 1) determine that the Permit does not warrant review and allow the Region to finalize the Permit, and the Petitioner could then seek judicial review; or 2) remand the Permit to the Region to make all of the changes the Board determines are necessary, taking into account the interrelationship of the Permit terms.

The Region has consulted with the EPA's Office of General Counsel and the Office of Water, and both offices have approved this supplemental brief.

This supplemental brief 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: November 2, 2018

Respectfully submitted,

*/S/Thomas M. Hagler*

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Thomas M. Hagler  
Office of Regional Counsel  
EPA Region 9 (MC ORC-2)  
75 Hawthorne St.  
San Francisco, California 94105  
Telephone: (415)972-3945

Email: [hagler.tom@epa.gov](mailto:hagler.tom@epa.gov)

Of Counsel:

Elise O'Dea  
Water Law Office  
EPA Office of General Counsel  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460  
Telephone: (202) 564-4201

## CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of REGION IX'S RESPONSE TO ORDER DIRECTING PARTIES TO PROVIDE FURTHER CLARIFICATION to be served by electronic mail upon the persons listed below.

Dated: November 2, 2018

*/S/ Thomas M. Hagler*

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Thomas M. Hagler

Office of Regional Counsel  
EPA Region 9 (MC ORC-2)  
75 Hawthorne St.  
San Francisco, CA 94105  
Telephone: (415) 972-3945  
Facsimile: (415) 947-3570  
Email: [hagler.tom@epa.gov](mailto:hagler.tom@epa.gov)

John Barth  
Attorney at Law  
P.O. Box 409  
Hygiene, CO 80533  
(303)774-8868  
[barthlawoffice@gmail.com](mailto:barthlawoffice@gmail.com)  
*Attorney for Petitioners*

Andrew Hawley  
Western Environmental Law Center  
103 Reeder's Alley  
Helena, MT 59601  
(406) 204-4861  
[hawley@westernlaw.org](mailto:hawley@westernlaw.org)  
*Attorney for Petitioners*

Shiloh Hernandez  
Western Environmental Law Center  
103 Reeder's Alley  
Helena, MT 59601  
(406) 204-4861  
[hernandez@westernlaw.org](mailto:hernandez@westernlaw.org)  
*Attorney for Petitioners*

Kerry McGrath  
Hunton Andrews Kurth LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037  
[KMcGrath@HuntonAK.com](mailto:KMcGrath@HuntonAK.com)  
(202)955-1519  
*Attorney for Arizona Public Service Company*