

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

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

**Petitioners’ Response in Opposition to Motion to Partially
Dismiss Petition for Review, Motion to Establish Revised Briefing
Schedule, and Revised Notice of Stay**

EPA is not acting in good faith to promptly and properly resolve the numerous issues surrounding the long-delayed re-issuance of the Four Corner Power Plant NPDES Permit No. NN0000019 (“Permit”). Instead of complying with its mandatory legislative and regulatory duties to issue a timely and legal NPDES permit, as is required under the Clean Water Act (“CWA”) and its duly promulgated regulations, EPA has misguidedly prioritized compliance with an un-promulgated EPA “directive” over CWA compliance. EPA is also manipulating this EAB permit appeal to manufacture legal defenses in a separate court proceeding. For these reasons stated herein, EPA’s Motions should be denied and the agency should be directed to file its response to Petitioners’ Petition for Review forthwith.

STATEMENT OF FACTS

1. On May 23, 2018, Petitioners filed a Petition for Writ of Mandamus pursuant to 28 U.S.C. § 1651, 33 U.S.C. §1369(B)(1)(F), seeking an order from the Ninth Circuit Court of Appeals directing EPA Region 9 (“EPA”) to take final action on a National Pollutant Discharge Elimination System (“NPDES”) renewal permit application for water pollution discharges from the Four Corners Power Plant (“FCPP”) located on the Navajo Nation in northwest New Mexico (“Ninth Circuit Case”). At the time of the filing of the Ninth Circuit Case, EPA had not re-examined the FCPP NPDES Permit since 2001 despite Congressional direction that such permits are to be re-examined every 5 years.

2. On June 12, 2018, EPA took action on the pending permit application by formally issuing a NPDES renewal permit.

3. On July 16, 2018 Petitioners filed a Petition for Review before the EPA’s Environmental Appeals Board (“EAB”) challenging the permit as a whole, as well as numerous specific provisions of the Permit, as legally and technically deficient.

4. On August 28, 2018 EPA filed a notification with the EAB that the agency had unilaterally entered a stay of the entire 2018 permit and re-instated the previous 2001 NPDES permit. EPA’s August 28, 2018 Notice of Stay. In doing so, EPA found that “[s]everal of the issues raised in the Petition question the viability of the Permit as a whole.” EPA Notice dated August 28, 2018, p. 1. EPA also recognized that “[w]hile a permit

appeal is pending, the contested permit conditions are stayed.” *Id.* EPA then found, “based on our review of the Petition, EPA has determined that...**there are no severable uncontested conditions**” of the Permit. The **entire** Permit is therefore stayed pursuant to 40 C.F.R. §124.16(a).” *Id.* at p. 2 (emphasis added). EPA also ordered that the entire 2001 NPDES Permit for the FCPP would remain in effect. *Id.*

5. On September 19, 2018, EPA Region 9’s Regional Counsel’s Office consulted with Petitioners’ counsel regarding a unilateral motion to withdraw the entire 2018 Permit that EPA planned to file in the EAB appeal. Exhibit 1 hereto (Barth Declaration). EPA informed Mr. Barth that the agency planned to file a unilateral motion to withdraw the entire 2018 Permit sometime during the week of September 24, 2018.

6. EPA’s actions staying, and planned withdrawal, of the entire 2018 Permit restored the *status quo ante* at the time of the filing of the Ninth Circuit Case—in other words the 2001 Permit would remain in effect with no schedule for re-issuing the 2018 Permit.

7. In October 2017 EPA adopted a policy directive prohibiting the agency from resolving “deadline” lawsuits with environmental organizations, such as Petitioners’ Ninth Circuit Case. Exhibit 2 hereto. The EPA “directive” prevents EPA from resolving the Ninth Circuit Case by prohibiting the agency from entering into a court enforceable agreement setting a schedule for final EPA action on the 2001 Permit. Instead of

promptly and properly processing the 2018 Permit, EPA is trying to resolve its predicament through this EAB appeal.

8. On October 5, 2018, EPA filed a “Revised Notice of Stayed Provisions” with the EAB arbitrarily abandoning its previous finding that there were “no severable uncontested conditions” and that the entire 2018 Permit must be stayed. October 5, 2018 Revised Notice of Stay. EPA’s October 5, 2018 Revised Notice now illogically finds that “the Petition challenges the validity of the Permit as a whole...” but somehow the “Permit terms are uncontested...” and “does not contest any specific conditions of the Permit” *Id.* at p. 2. In a complete reversal of its previous position, EPA now says that the 2018 Permit “will become fully effective” with the exception of 2018 Permit Sections I.A.5. and I.B.3. EPA’s August 28, 2018 and October 5, 2018 positions are arbitrary, capricious, and do not serve as a good faith basis for its current motions. EPA’s contradictory findings that “[s]everal of the issues raised in the Petition question the viability of the Permit as a whole” and “there are no severable uncontested conditions” [August 28, 2018 Stay] cannot be reconciled with its October 5, 2018 finding that “the specific conditions of the Permit are uncontested and will become fully effective.” EPA’s Revised Notice of Stay and pending motions fail to explain why a Petition for Review that challenges a permit *as a whole* does not challenge all provisions of the permit—including all *specific* provisions of the permit. In fact, EPA’s August 28, 2018 stay found that the Petition for Review challenged the entire permit and thus specific provisions could not

be severed. The only rational explanation for EPA illogical, arbitrary, and capricious reversal of position EPA's can be its illegal prioritizing the EPA "directive" over its statutory and regulatory NPDES permitting requirements.

9. EPA's October 5, 2018 finding that "the Petition does not contest any specific conditions of the Permit" is also factually wrong. The Petition for Review challenges the issuance of the 2018 Permit as a whole, as well as *specific conditions* of the Permit, including but not limited to:

a) Part I.A. of the 2018 Permit for EPA's failure to impose effluent limitations on the discharge of pollutants into Morgan Lake (see Petition, pp. 23-24);

b) Part I.A. of the 2018 Permit for effluent limits in Outfalls 001, 001A, and 01E and EPA's reliance on its faulty "reasonable potential analysis" for these Outfalls (see Petition pp. 28-34)

c) Part B. 2. of the 2018 Permit for failing to regulate seepage discharges from the coal ash ponds into the Chaco River watershed (see Petition pp. 37-40);

d) Part B.3. of the 2018 Permit failing to impose cooling water intake structure requirements (see Petition pp. 41-54);

e) Part I.A. of the Permit for EPA's failure to impose the new effluent limitation guidelines for all Outfall discharges (see Petition pp. 36-37);

f) Part III.A. of the 2018 Permit regarding the defective Seepage Management and Monitoring Plan (see Petition pp. 38-40).

ARGUMENT

a. EPA has not established good cause for its motions.

As established above, EPA has not established good cause for its Revised Stay and motions. Because the Petition for Review challenges both the permit as a whole, as well as specific conditions of the permit, EPA must stay the effectiveness of the entire permit. EPA's Revised Stay and motions fail to explain how a Petition for Review that challenges the entire permit does not also challenge the specific provisions contained therein. EPA's August 28, 2018 and October 5, 2018 positions are arbitrary, capricious, and do not serve as a good faith basis for its Revised Stay and pending motions. As such, the EAB should deny the motions and reject the Revised Stay.

b. EPA's actions prejudice Petitioners.

EPA's actions also prejudice Petitioners by causing undue delay in resolving the NPDES permitting issues at the FCPP.

On August 1, 2018 EPA requested an extension of time until October 19, 2018 "to file a comprehensive response to the Petition for Review." Petitioners did not oppose that extension request with the understanding that the agency would comprehensively respond by that date. EPA is now renegeing on that promise. EPA seeks an additional 6 months to file its response. Instead of diligently preparing its response, EPA has spent the initial extension period manipulating this EAB proceeding to manufacture defenses to present in the Ninth Circuit Case. EPA's motion for another

extension unfairly prejudices Petitioners by both delaying resolution of this permit appeal and by allowing EPA to use the initial extension period to prejudice Petitioners in both proceedings. EPA's Revised Stay and pending motions should be denied and EPA should be ordered to file its response forthwith.

c. EPA's actions are contrary to statutory and regulatory requirements.

EPA is now seeking an additional 6 months until April 2019 to re-assess the 2018 Permit and file its response to the Petition for Review. Until Petitioners filed their Ninth Circuit Case, EPA had not re-assessed the FCPP NPDES permit since 2001. Section 402(b)(1)(B) of the CWA specifies that NPDES permits are to be issued for fixed terms not to exceed five years. 33 U.S.C. § 1342(b)(1)(B). The five-year limit on a NPDES permit's maximum duration establishes a mandatory expiration date at which the permit must be reviewed and updated to reflect changes in the law, the conditions of discharge and receiving waters, or the requirements applicable to the permittees. The 2001 Permit has remained in effect for over 3 permit cycles without being re-assessed by the agency.

EPA also unduly delayed in finalizing its 2018 Permit decision after close of public comment on the draft permit. EPA regulations state that, “[a]fter the close of the public comment period under §124.10 on a draft permit, the Regional Administrator *shall issue a final permit decision...*” 40 C.F.R. §124.15(a)(emphasis added). In this case, there was a multi-year

delay between the close of the public comment period on the draft permit and issuance of the final permit. Further, EPA did not issue the final permit until Petitioners filed their Ninth Circuit Case forcing EPA to do so.

EPA's actions to date in processing the FCPP NPDES permit and in this EAB appeal reveal a blatant pattern of delay and obfuscation. The EAB should not perpetuate these delays by granting EPA's current motions for further delay.

d. EPA's motions may lead to further delay.

In its October 5, 2018 Notice of Revised Stay, EPA argues "at any time prior to thirty (30) days after filing the response to a petition, EPA may withdraw some or all of a permit and prepare a new draft permit addressing the portions so withdrawn. *See* 40 C.F.R. § 124.19(j)." October 5, 2018 Revised Notice of Stay, p. 2. EPA now seeks a delay until April 19, 2019 to file its response. Under EPA's view of its unlimited discretion, the agency could again withdraw additional portions of the 2018 Permit as late as May 18, 2019 and seek a third extension of time, thus placing Petitioners in a "permitting purgatory" where resolution of this matter is forever out of reach. Given EPA's lack of good faith to date and its previous finding that the entire 2018 permit has been challenged, such a scenario is reasonably likely.

e. EPA has not established good cause for a 6-month delay.

EPA seeks an additional 6 months to re-assess Condition I.A.5. setting effluent limits for the single outfall Outfall 01E and to re-assess Condition I.B.3. of the 2018 Permit which states the following:

3. Cooling Water Requirements The Permittee shall submit all the material required under 40 CFR 122.21 (r) (1)-(8) upon submittal of their next renewal application.

EPA's motions for withdrawal and extension fail to establish good cause for an additional 6 months to address these limited provisions of the 2018 Permit. EPA's motions provide no guidance on why they need to review these provisions, what deficiencies may exist in these provisions, or why it would take 6 months to do so. For example, Condition I.B.3. is composed of a single sentence of 17 words. It should not take the agency EPA 6 months to re-assess this provision. Likewise, reviewing the effluent limits for Outfall 01E should not take 6 months when EPA purportedly has already fully evaluated the Outfall in preparation of its 2018 Permit. The rationale for EPA's proposed withdraw of these provisions and time frame needed for review is vague, unsupported, and should be denied.

CONCLUSION

For the reasons stated herein, EPA's motions to withdraw, motion for extension, and attempt to revise the August 28, 2018 stay should be denied.

Respectfully submitted,

10/17/18

s/ John Barth
John Barth
Attorney at Law
P.O. Box 409
Hygiene, Colorado 80533
(303) 774-8868 phone and fax
barthlawoffice@gmail.com

Shiloh Hernandez
Western Environmental Law Center

103 Reeder's Alley
Helena, MT 59601
406.204.4861
hernandez@westernlaw.org

Andrew Hawley
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
406.204.4861
hawley@westernlaw.org

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioners Response in Opposition was served, by the EAB's e-filing system and U.S. Mail to the EAB and by email on the following persons:

Kerry McGrath
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
KMcGrath@HuntonAK.com
(202) 955-1519

Brent A. Rosser
HUNTON ANDREWS KURTH LLP
Bank of America Plaza, Suite 3500
101 South Tryon Street
Charlotte, NC 28280
phone: (704) 378-4707
fax: (704) 331-5146
brosser@HuntonAK.com

Attorneys for Arizona Public Service Company

Tom Hagler
U.S. EPA Region 9
Regional Counsel's Office
75 Hawthorne St.
San Francisco, CA 94105

Hagler.tom@epa.gov

DATE: 10/17/2018

s/ John M. Barth