

**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

Appellants' Response to Order for Clarification

Appellants respectfully respond to the Board's four requests for clarification as follows:

- (1) Appellants do not believe that the Region's withdrawal of permit provisions I.A.5 or I.B.3 moots any claim raised in their petition for review. Voluntary cessation of allegedly unlawful conduct by a defendant, such the Region's withdrawal of the provisions, does not moot a case absent a compelling showing (absent here) that the conduct will not recur. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189 (2000); *see also Armster v. U.S. Dist. Court for Cent. Dist. of California*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon

a recognition of the initial illegality of that conduct.”). In any event, the Region’s withdrawal of the two provisions bears only on the sixth claim, regarding new effluent limitation guidelines (ELGs), and ninth claim (in part), regarding regulation of the cooling water intake structures, raised in the petition. The withdrawal of provision I.B.3, relating to regulation of the cooling water intakes, would, at most, only partially moot Appellants’ ninth claim, to the extent that the claim concerns the Region’s compliance with Clean Water Act (CWA) regulations. It would not moot Appellants’ arguments that the Region violated the Endangered Species Act (ESA). (*See* Petition at 17, 46-54.)

(2) Modification of permit provision I.A.5, related to ELGs for outfall O1E would not moot, narrow, or otherwise impact Appellants’ remaining claims. The provision is analytically distinct from Appellants’ remaining claims. Moreover, given that the Region has not withdrawn any other provisions (other than I.B.3), Appellants do not understand that the Region’s modification of the provision could affect any other provisions that are the subject of the remaining claims. Modification of permit provision I.B.3 would not moot Appellants’ remaining Endangered Species Act argument in claim 9, unless the Region intends to initiate the consultation process (but the Region has not, to the knowledge of undersigned counsel, indicated that

it will initiate consultation). Depending on whether the Region ever issues a another final decision related to regulation of the cooling water intakes under the CWA and depending on what decision the Region may make, the decision has the potential to moot, narrow, or otherwise impact Appellants' CWA arguments in claim 9.

(3) Appellants do not believe that a merits ruling by the Board on the remaining contested issues would affect how the Region would address provision I.A.5, which is analytically distinct. A ruling on Appellants' ESA arguments in claim 9, related to the cooling water intakes, would likely affect how the Region addresses provision I.B.3, which relates to CWA regulation of the cooling water intakes. Ruling on the remaining claims would not, in Appellants' estimation, affect how the Region will address provision I.B.3.

(4) Undersigned counsel does not believe that staying briefing on the remaining claims until April 2019 is reasonably expeditious. Prior to EPA's recent action to issue a new permit for this facility, EPA had last updated this permit in 2001. Further delay in ensuring that this plant is operating under a complete, final, and effective permit is untenable. As a result, Appellant's respectfully request the Board set a briefing schedule that completes briefing of this matter by the end of 2018.

Respectfully submitted this 2nd day of November, 2018.

/s/ Shiloh Hernandez

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

1402 3rd Ave., Ste. 1022

Seattle, WA 98101

(206) 487-7250

Hawley@westernlaw.org

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2018, copies of the foregoing **Appellants' Response to Order for Clarification** were served by the EAB's e-filing system and by email on the following persons:

Kerry McGrath
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
KMcGrath@HuntonAK.com

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

/s/ Shiloh Hernandez
Shiloh Hernandez