

**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 MOTION TO PARTIALLY DISMISS PETITION FOR REVIEW;
MOTION TO ESTABLISH REVISED BRIEFING SCHEDULE**

The United States Environmental Protection Agency (“EPA”) Region 9 (“Region”) respectfully moves the Environmental Appeals Board (“EAB”) to partially dismiss the Petition for Review 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. As explained more fully below, the Region is withdrawing specific permit provisions and will be revising those provisions, as appropriate, in a new draft permit. To accommodate the permit modification process and to conserve judicial resources, the Region respectfully requests a revised briefing schedule that 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. Specifically, the Region requests an extension of time to April 19, 2019, for the Region to file a comprehensive response to the Petition for Review. The Region also respectfully requests an extension of time for the permittee to file its notice of appearance

and response to April 19, 2019, and an extension of time for the Petitioners to file any reply brief to May 20, 2019. The Region believes that this proposed briefing schedule would provide sufficient time to complete the permit modification process and would lead to a more expeditious and efficient resolution of Petitioners' challenges.

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 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 responses and replies. Pursuant to that order, EPA's response is due October 19, 2018.

By letter dated August 28, 2018, EPA provided notice of the Region's decision to stay the entire Permit pursuant to 40 C.F.R. § 124.16(a) ("Notice of Stay"). Upon further evaluation of the Petition, EPA finds that the Petition does not contest any specific conditions of the Permit. Instead, the Petition challenges the validity of the Permit as a whole or requests additional terms. As such, the Region has determined that the specific conditions of the Permit are uncontested.¹ EPA issued a Revised Notice of Stay dated October 5, 2018, to clarify that the Permit terms that have not been withdrawn will not be stayed and will become effective 30 days after the date of that Revised Notice of Stay.

¹ Cf. Notice of Contested and Uncontested Conditions, 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, NPDES Appeal No. 07-13 (June 28, 2007) (same); Notice of Uncontested and Severable Conditions, NPDES Appeal No. 05-17 (June 1, 2006) (finding that "all of the specific conditions of the Permit are uncontested" and thus all conditions would become fully effective).

DISCUSSION

I. Partial Dismissal

At any time prior to thirty (30) days after filing the response to a petition, the Region may withdraw some or all of a permit and prepare a new draft permit addressing the portions so withdrawn. 40 C.F.R. § 124.19(j). By letter dated October 5, 2018 and filed with the Board (Attachment 1), the Region provided notice that it is 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. Specifically, the Region is withdrawing Permit Section I.A.5 (addressing certain effluent limitations for Internal Outfall 01E) and Permit Section I.B.3 (addressing certain cooling water intake provisions). The Region will modify these provisions, as appropriate, and the new draft permit will be subject to notice and comment, after which the Region shall issue a final permit decision. 40 C.F.R. § 124.15(a). Within 30 days after the final permit decision, “[a]ny person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review.” 40 C.F.R. § 124.19(a)(2) and (3).

With the withdrawal of those two Permit provisions, Petitioners’ claims as to those provisions are moot. *See In re City of Keene Wastewater Treatment Facility*, NPDES Appeal No. 07-18, Order (EAB, Dec. 05, 2007) (dismissing as moot portions of petition challenging withdrawn provisions). Accordingly, the Region hereby respectfully requests that the EAB dismiss Petitioners’ claims as to these withdrawn provisions.

II. Motion to Revise Briefing Schedule

In an effort to conserve resources, encourage efficiency and promote judicial economy, the Region respectfully requests that the EAB order a revised briefing schedule in this matter, as follows:

- (1) The Region's response to the remaining issues in the Petition, including a response to any filed amendment to the Petition, will be due on or before April 19, 2019.
- (2) APS's notice of appearance and response will be due on or before April 19, 2019.
- (3) Petitioners' reply, if any, will be filed on or before May 20, 2019.

This proposed briefing schedule would allow sufficient time for the Region to complete activities related to the permit modification process and would allow the Board to review the entire Permit at the same time. As discussed above, the Region will revise the Permit as appropriate to address the withdrawn provisions, solicit public review and comment on the proposed revisions, and issue a revised Permit and response to comments addressing the new provisions. If Petitioners comment on the revised Permit terms, Petitioners could file an amended Petition seeking review of the revised provisions. As the Region will ultimately defend the Permit in its modified form, and because of the interrelation between a modified permit and the issues raised in the Petition, the Region respectfully submits that the interests of judicial economy and administrative efficiency would not be served by responding to the Petition prior to the conclusion of the permit modification process. The Region's proposed briefing schedule would conserve EAB resources by allowing for consideration of all remaining issues in the Petition and any appeals of the modified permit in a single EAB action.

The Region has discussed this motion with the parties. APS does not object to the proposed briefing schedule. The Petitioners have indicated that they are opposed to the proposed briefing schedule. The Region has also consulted with the EPA's Office of General Counsel and the Office of Water, and both offices concur in the proposed briefing schedule.

Date: October 9, 2018

Respectfully submitted,

/S/Thomas M. Hagler

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached **REGION IX'S MOTION TO PARTIALLY DISMISS PETITION FOR REVIEW AND MOTION TO ESTABLISH REVISED BRIEFING SCHEDULE** to be served by electronic mail upon the persons listed below.

Dated: October 9, 2018

/s/ Thomas M. Hagler

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