

**ENVIRONMENTAL APPEALS BOARD  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

---

**In Re:**

**Four Corners Power Plant**

**NPDES Renewal Permit: NN0000019**

**Arizona Public Service Company (Applicant)**

---

)  
)  
)  
) **NPDES Appeal No. 19-06**  
)  
)  
)

---

**Petitioners' Response in Opposition to APS's Motion for Leave to File a Surreply, Or, In the Alternative, To Strike the Reply Brief**

---

Petitioners oppose APS's Motion for Leave to File a Surreply, or, in the Alternative, to Strike the Reply Brief ("Motion"). EPA did not join in APS' Motion and takes no position on the Motion. For the reasons stated herein, APS's Motion should be denied in its entirety.

In an attempt to get "the last word" in this appeal, APS mischaracterizes Petitioners' Reply Brief ("Reply") as raising issues and arguments for the first time. A review of the briefing in this case proves otherwise. Petitioners' Reply properly responds to issues and arguments *raised in EPA and APS' Response Briefs*. These same issues were also raised in EPA's Response to Comments. Exhibit 4 to Petition and AR #26.d.

APS's Motion alleges five areas where Petitioners allegedly raised new issues in the Reply. Each of these will be addressed below.

- A. The Morgan Lake *treatment* issue is not a new issue or an argument raised for the first time in the Reply.

In the Response Briefs, EPA and APS specifically argued that Morgan Lake is a “waste treatment system” purportedly “*designed to meet the requirements of the CWA.*” APS Response at p. 14; EPA Response at p. 20. Petitioners replied by noting that APS’s own NPDES application *for this permit* admits under oath that Morgan Lake does not provide any treatment. Reply at p. 9. This sworn admission completely undercuts APS’s claim that Morgan Lake was “designed to meet the requirements of the CWA”—namely compliance with downstream water quality standards.

Petitioners did not raise the issue/argument for the first time in Reply. Instead, it was raised by the Respondents in their Response Briefs. This issue was also addressed in EPA’s Response to Comments. Exhibit 4 to Petition for Review, pp. 40-42; AR # 26.d., pp. 40-42. Petitioners must be allowed to reply to arguments in a Response Brief. In fact, that is the entire purpose of a reply brief. As such, Petitioners’ Reply was appropriate. APS’s motion to surreply to, or strike, Petitioners’ Reply Brief on this issue should be denied.

B. The Morgan Lake *uplands* issue is not a new issue or argument raised for the first time in the reply brief.

In the Response Briefs, EPA and APS specifically argued that Morgan Lake was constructed in “uplands” and is therefore not a “water of the United States.” APS Response at p. 18, fn. 10; EPA Response at p. 44. Petitioners replied to this argument by noting that the “uplands” exception invoked by EPA and APS does not apply to waters with a significant nexus to “navigable waters.” Reply at pp. 12-13. Again, Petitioners did not raise the issue/argument for the first time in the Reply. It was raised in the Response Briefs. This issue was also addressed in EPA’s Response to Comments and thus was not a “new issue or argument.” Exhibit 4, pp. 41-43. AR #26.d., pp. 41-43.

Petitioners must be allowed to reply to arguments in a Response Brief. As noted, that is the entire purpose of a reply brief. As such, Petitioners' Reply was appropriate. APS's motion to surreply to or strike Petitioners' Reply Brief on this issue should be denied.

- C. The ***lack of water quality standards for Morgan Lake*** is not a new issue or argument raised for the first time in reply.

APS next argues that Plaintiffs raised the lack of water quality standards for Morgan Lake for the first time in Reply. APS's argument ignores that fact that this issue was raised multiple times in the Petition. Petition, pp. 5, 6, 19, 31-35. APS's argument to the contrary has no merit. Petitioners' properly replied to Respondents' Response Briefs on this issue and APS' Motion should be denied.

- D. The ***evaporative loss from Morgan Lake*** is not a new issue or argument raised for the first time in reply.

In the Response Briefs, EPA and APS specifically argued that Morgan Lake was a "closed cycle" system because any make-up water drawn from the San Juan River was limited only losses associated with evaporation, blowdown, and/or drift. APS Response at pp. 2 and 38-39; EPA Response at p. 11. Petitioners replied to this argument by noting that the evaporative losses and blowdown do not account for the amount of water withdrawn from the San Juan River. Reply at pp. 29-30. Petitioners did not raise the issue/argument for the first time in reply. It was raised in the Response Briefs. This issue was also addressed in EPA's Response to Comments and thus was not a "new issue or argument." Exhibit 4, p. 46; AR #26.d., p. 46. Again, Petitioners must be allowed to reply to arguments in a Response Brief. As noted, that is the entire purpose of a reply brief. As such, Petitioners' Reply was appropriate. APS's motion to surreply or strike Petitioners' Reply Brief on this issue should be denied.

1/24/2020

Respectfully submitted,

s/ John Barth

John Barth

Attorney at Law

P.O. Box 409

Hygiene, Colorado 80533

(303) 774-8868 phone and fax

[barthlawoffice@gmail.com](mailto:barthlawoffice@gmail.com)

ATTORNEY FOR PETITIONERS

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing **Petitioners' Response in Opposition to APS' Motion for Leave to File a Surreply, or Strike Reply Brief** was served, by the method indicated, on the following persons this 24th day of January 2020:

By electronic filing and U.S. Mail:

Clerk of the Board

U.S. EPA

Environmental Appeals Board

1200 Pennsylvania Avenue, NW

Mail Code 1103M

Washington, D.C. 20460-0001

By electronic filing and email

Hagler.Tom@epa.gov

Tom Hagler

Office of Regional Counsel

U.S. Environmental Protection Agency

Region 9

75 Hawthorne Street

San Francisco, CA 94105-3901

By electronic filing and email

Kerry McGrath

Hunton Andrews Kurth LLP

2200 Pennsylvania Avenue, NW

Washington, DC 20037

KMcGrath@HuntonAK.com

(202) 955-1519

DATE: 1/24/2020

s/ John M. Barth