

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN’S EARTH)
FOUNDATION and ECOLOGICAL RIGHTS)
FOUNDATION)

Appellants-Petitioners,

v.

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY and MICHAEL)
LEAVITT, as Administrator of the United)
States Environmental Protection Agency, et al.)
Appellees-Respondents.)

) **APPELLANTS’ REPLY IN**
) **SUPPORT OF SECOND**
) **MOTION TO FILE REPLY**
) **BRIEF EXCEEDING THE**
) **TYPE VOLUME LIMIT**

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Appellant-Petitioners Our Children’s Earth Foundation and Ecological Rights Foundation (collectively “OCE”) submit this Reply in response to the Federal Appellees’ (“EPA”) Opposition to OCE’s Second Motion to file a Reply Brief that exceeds the 8,400 word count limit established in Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 28-4. OCE’s Second Motion was filed in response to the Court’s Order dated February 13, 2006, which allowed OCE to file a second motion with a new revised Reply Brief for consideration.¹

A. The Court Should Grant OCE’s Motion to File its Revised Reply Brief

In response to the Court’s Order, OCE has undertaken significant revisions to its Reply Brief, reducing the word count from 17,433 words to 11,835 words, a reduction of 5,598 words or almost one third of the initially filed brief. In support of its Second Motion, OCE reiterates that it is responding to three different opposition briefs totaling over 28,000 words and that the issues raised in this Appeal are complex and have national significance. OCE has exercised considerable diligence attempting to minimize the length of its briefing in this action.

¹OCE characterized its Second Motion as one for “Reconsideration of Court’s January 25, 2006 Order re Appellants’ Motion for Oversized Brief and was filed on February 21, 2006.” EPA has instead characterized Plaintiffs’ Second Motion as one brought under Fed. R. App. P. 32-2 and has filed an opposition, which would otherwise not be permitted to a Second Motion for Reconsideration. In light of EPA’s Opposition, OCE files this Reply.

EPA's opposition argues that entire sections of OCE's Reply Brief could easily be deleted since it should have been in the Opening Brief. EPA Opposition, pp. 2-3. OCE disagrees. A three page Introduction and Summary is hardly "excessive" to respond to the points raised by EPA and Intevenors in their over 70 pages of briefing. Further, Section II.A is not simply a recital of statutory background as set forth in the Opening Brief, but rather an overview explanation of why the arguments raised by EPA's and Intervenors' Opposition briefs are contrary the structure of the Clean Water Act ("CWA").²

EPA argues once again that this case is not complex but rather presents a straightforward mandatory duty claim, EPA Opposition, p. 4:4-5, which EPA's briefing argues the Court has no jurisdiction to hear. OCE disagrees strongly with this characterization. The CWA *is* a complex statute. The jurisdictional issues alone occupy a good portion of the briefing. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313-1314 (9th Cir. 1992) (CWA § 509(b) creates a "complex and difficult" jurisdictional scheme). The interconnected manner in which CWA provisions regulate point source discharges based on best available technology is complex and detailed.

In sum, it is in EPA's and Intevenors' interest not to have the Court consider the

²Besides these core sections of OCE's Reply Brief, EPA does not cite to any other sections that illustrate the "substantial excesses" claimed by EPA.

manner in which the CWA implements the technology based regulatory approach. Instead, EPA benefits from eliminating sections from OCE's Reply Brief that address this issue, while arguing instead that each CWA section may be interpreted in isolation and without regard to legislative history, which the EPA refers to as "irrelevant." In sum, OCE's current Reply brief is not excessive and has been reduced to the point where further word elimination will compromise OCE's argument.³

B. EPA Does Not Require a Sur-Reply

EPA argues in the alternative that it should be granted a Sur-reply to address OCE's revised Reply Brief. EPA does not identify new issues to which EPA has not had a chance to brief. EPA's should not be allowed an entirely new briefing – which Intervenors would presumably also request – simply because OCE's Reply Brief contains a limited amount of extra words.

Dated: March 1, 2006

By: _____
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³EPA further argues that OCE does not need to file a larger brief because OCE has not separated out individual responses to each of the points raised by EPA's and Intervenors' three briefs. EPA Opposition, pp. 3-4. OCE has generally streamlined its Reply to respond to all arguments raised by the three parties and thus has not delineated how each section responds to the different arguments raised.

CERTIFICATE OF SERVICE

I hereby certify that a copy of APPELLANTS' REPLY IN SUPPORT OF MOTION TO FILE REPLY BRIEF EXCEEDING THE TYPE VOLUME LIMIT (LOCAL CIRCUIT RULE 32-2) has been served according to the parties' agreement via email this 1st day of March January 2006 upon the following counsel of record.

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