

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

In Re:

Four Corners Power Plant  
NPDES Renewal Permit: NN0000019  
Arizona Public Service Company (Permitee)

NPDES Appeal No. 19-06

**NAVAJO TRANSITIONAL ENERGY COMPANY, LLC'S AMICUS BRIEF**

SCHWABE, WILLIAMSON & WYATT, P.C.

By: s/ Ryen L. Godwin  
Ryen L. Godwin, WSBA #40806  
Email: [rgodwin@schwabe.com](mailto:rgodwin@schwabe.com)  
Telephone: 206.622.1711  
Brien J. Flanagan  
Email: [bflanagan@schwabe.com](mailto:bflanagan@schwabe.com)  
Telephone: 503.222.9981  
1420 5<sup>th</sup> Avenue, Suite 3400  
Seattle, Washington 98101  
Tel: 206-622-1711  
Fax: 206-292-0460  
*Attorneys for Navajo Transitional Energy  
Company, LLC*

## TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. STATEMENT OF INTEREST IN APPEAL .....	1
III. ISSUES.....	3
A. Whether Petitioners can meet their burden under 40 CFR § 124.19(a)(4)(ii) where Petitioners failed to raise NTEC’s sovereign immunity during the comment period. ....	3
B. Whether EPA has authority to require NTEC to further waive its sovereign immunity when Congress has already abrogated sovereign immunity under the Clean Water Act. ....	3
C. Whether the Region properly exercised its discretion to decide that Morgan Lake is not a WOTUS. ....	3
IV. ANALYSIS .....	3
A. Petitioners failed to properly preserve their objection to NTEC’s sovereign immunity because it was not raised during the comment period.....	3
B. Congress provided EPA adequate authority to enforce the Clean Water Act by abrogating sovereign immunity in the statute.....	6
C. The Region appropriately exercised its discretion to determine Morgan Lake is not a WOTUS and maintain consistency between NTEC’s and FCPP’s NPDES Permits.....	8
V. CONCLUSION .....	9
STATEMENT OF COMPLIANCE WITH WORD LIMITATION .....	10
TABLE OF ATTACHMENTS.....	11
CERTIFICATE OF SERVICE .....	12

## TABLE OF AUTHORITIES

### Cases

<i>Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.</i> , 827 F. Supp. 608, 609-10 (D. Ariz. 1993) .....	6
<i>Deschutes River Alliance v. Portland Gen. Elec. Co.</i> , 323 F.Supp. 3d 1171, 1185 (D.Or. 2018).....	6
<i>Dine C.A.R.E. et al v. BIA et al.</i> , CV-16-08077-PCT-SPL (D. Ariz. 2017) .....	5
<i>Dine Citizens Against Ruining Our Environment et al. v. BIA et al.</i> , 932 F.3d 843 (9th Cir. 2019).....	3, 5
<i>In re BP W. Coast Products, LLC, Cherry Point Co-generation Facility</i> , 12 E.A.D. 209, 218-20 (EAB June 21, 2005) .....	4
<i>In re Christian County Generation, LLC</i> , 13 E.A.D. 449 (2008).....	5
<i>In re Encogen Cogeneration Facility</i> , 8 E.A.D. 244, 249-250 (EAB 1999).....	4
<i>In re Haw. Elec. Light Co.</i> , 10 E.A.D. 219, 227 (EAB 2001).....	4
<i>In re Kendall New Century Development</i> , 11 E.A.D. 40, 55 (EAB 2003).....	4
<i>In the Matter of: Borden, Inc./Colonial Sugars</i> , 1 E.A.D. 895, 907 n.26 (1984).....	8
<i>Los Angeles Waterkeeper v. Pruitt</i> , 320 F.Supp. 3d 1115 (C.D. Cal 2018).....	7
<i>Michigan Dept. of Environmental Quality v. U.S. EPA</i> , 318 F.3d 705, 707 (6th Cir. 2003).....	4
<i>Pakootas v. Teck Cominco</i> , 632 F.Supp.2d 1029, 1034 (E.D. Wash. 2009) .....	7
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49, 67, 98 S.Ct. 1670 (1978).....	7
<i>U.S. v. Red Lake Band of Chippewa Indians</i> , 827 F.2d 380 (8 <sup>th</sup> Cir. 1987).....	7
<i>U.S. v. White Mountain Apache Tribe</i> , 784 F.2d 917 (9 <sup>th</sup> Cir. 1986).....	7
<i>Wilderness Society v. U.S. Fish &amp; Wildlife Service</i> , 353 F.3d 1051 (2003).....	7

## Statutes

33 U.S.C. § 1342(a) .....	7
33 U.S.C. § 1365(a)(1).....	6, 7

## Regulations

40 C.F.R. § 124.10 .....	3
40 C.F.R. § 122.2 .....	8
40 C.F.R. § 124.13 .....	3, 4
40 C.F.R. § 124.19(a)(4)(ii).....	3, 4, 6
40 C.F.R. § 124.19(e).....	1

## **I. INTRODUCTION**

The Navajo Transitional Energy Company, LLC (“NTEC”) submits the enclosed amicus brief as an interested party pursuant to 40 C.F.R. § 124.19(e). NTEC supports the decision of U.S. EPA Region 9 (the “Region”) to issue the Four Corners Power Plant’s (“FCPP”) NPDES Permit No. NN000019 (the “Permit”) in its current form. The purpose of this amicus brief is to address two issues that uniquely affect NTEC.

First, Petitioners assert that the Region must require NTEC to waive its sovereign immunity in order to issue a NPDES permit for the FCPP. This request is not properly before the Board because it was not preserved during public comment period so it should be denied. Notwithstanding, Petitioners assertion is incorrect. Congress provided EPA adequate authority to enforce the NPDES program by abrogating sovereign immunity in the Clean Water Act. The Region does not have authority to compel NTEC to agree to a broader, or narrower, waiver than Congress already provided in the CWA.

Second, Petitioners contend Morgan Lake is a Water of the United States. It is not, because it is either a steam electric cooling pond or an isolated, man-made pond with no relationship to interstate commerce. In either event, it is not subject to EPA’s Clean Water Act authority.

## **II. STATEMENT OF INTEREST IN APPEAL**

The EAB’s rules provide: “Any interested person may file an amicus brief in any appeal pending before the Environmental Appeals Board under this section.” 40 C.F.R. § 124.19(e). NTEC is an interested person for purposes of this appeal for the reasons stated below.

NTEC is a limited liability company formed under the laws of the Navajo Nation. (Declaration of Clark Moseley, ¶ 2.) The Navajo Nation expressly extended its sovereign immunity to NTEC in NTEC’s Formation Resolution. (Decl. Moseley, ¶ 4.) NTEC owns and

operates the Navajo Mine on land held in trust by the federal government for the benefit of the Navajo Nation, leased with the consent of the Nation, and located entirely within the boundaries of the Nation. *Id.* On July 2, 2018 NTEC acquired a seven percent (7%) interest in Units 4 and 5 of the FCPP. (Decl. Moseley, ¶ 6.) An adverse decision from the Board may create uncertainty about FCPP's NPDES permit because NTEC has no obligation to voluntarily waive its sovereign immunity.

The Navajo Mine supplies coal exclusively to the FCPP. (Decl. Moseley, ¶ 5.) Since FCPP is the Navajo Mine's only buyer of coal, NTEC relies upon the ongoing, permitted operations of the FCPP. (Decl. Moseley, ¶ 5.) The Navajo Mine's economic viability is directly affected by the FCPP's ability to purchase NTEC's coal. (Decl. Moseley, ¶ 5.) An adverse permitting decision may affect FCPP's ability to buy NTEC's coal. (Decl. Moseley, ¶ 5.)

Due to the close proximity and economic relationship between FCPP and NTEC, many federal permitting decisions are analyzed jointly for purposes of the applicable consultations under the National Environmental Policy Act ("NEPA") and Endangered Species Act ("ESA"). In fact, the Biological Opinion ("BO") challenged by Petitioners in this Permit appeal was the product of a cumulative review of all impacts from both the FCPP and Navajo Mine for NEPA and the ESA. (AR # 7.1). An adverse decision from the Board on the legal and factual determinations in the BO creates uncertainty for NTEC's future permitting actions relying on the same BO.

In addition, and particularly relevant here, FCPP's and NTEC's NPDES Permits exclude discharges to Morgan Lake because Morgan Lake is not a Water of the United States. (AR # 2.2.g). NTEC's NPDES Permit was issued in 2018; it was not appealed so it is final. Petitioners specifically challenge the same WOTUS analysis here as in NTEC's Permit. An adverse decision from this Board could create inconsistencies between the two similarly situated permits.

Clearly, NTEC is an interested party entitled to submit an amicus brief in this proceeding. By submitting an amicus brief in this appeal, however, NTEC does not waive and specifically reserves any and all defenses it may have in subsequent litigation regarding the FCPP NPDES permit including but not limited to sovereign immunity and failure to join an indispensable party. *See e.g., Dine Citizens Against Ruining Our Environment et al. v. BIA et al.*, 932 F.3d 843 (9th Cir. 2019).

### III. ISSUES

- A. Whether Petitioners can meet their burden under 40 C.F.R. § 124.19(a)(4)(ii) where Petitioners failed to raise NTEC's sovereign immunity during the comment period.
- B. Whether EPA has authority to require NTEC to further waive its sovereign immunity when Congress has already abrogated sovereign immunity under the Clean Water Act.
- C. Whether the Region properly exercised its discretion to decide that Morgan Lake is not a WOTUS.

### IV. ANALYSIS

- A. Petitioners failed to properly preserve their objection to NTEC's sovereign immunity because it was not raised during the comment period.

In development of a NPDES Permit, the EPA must make the draft Permit available for public comment. 40 C.F.R. § 124.10. Any person who believes that a condition of the Permit is inappropriate “must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by close of the public comment period[.]” 40 C.F.R. § 124.13. In a Petition for Review to the Board, the rules provide “that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by § 124.13.” 40 C.F.R. § 124.19(a)(4)(ii).

The Board has broad discretion to “enforce rules of procedural regularity in cases before it” such as the obligation to preserve issues during public comment. *Michigan Dept. of Environmental Quality v. U.S. EPA*, 318 F.3d 705, 707 (6th Cir. 2003). In fact, the Board routinely denies review of issues that are not properly preserved during public comment. *See e.g., In re BP W. Coast Products, LLC, Cherry Point Co-generation Facility*, 12 E.A.D. 209, 218-20 (EAB June 21, 2005); *In re Kendall New Century Development*, 11 E.A.D. 40, 55 (EAB 2003); *In re Haw. Elec. Light Co.*, 10 E.A.D. 219, 227 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-250 (EAB 1999). Petitioners’ argument that NTEC must waive its sovereign immunity must be denied because it was not preserved during the comment period.

Petitioners cite to a single sentence in the Response to Comments to support their contention that the sovereign immunity argument was preserved. The Response to Comments state:

Page 2 – El Paso Electric Company is no longer an FCPP co-owner. Instead, as of July 2008, NTEC acquired an ownership share of the FCPP equivalent to the shares previously owned by El Paso Electric Company.

(AR 17.c, p. 100).

This comment fails to preserve any argument regarding NTEC’s sovereign immunity. In fact, the term “sovereign immunity” is never used anywhere in Petitioners’ comments or EPA’s response to comments. There was nothing submitted during the comment period that gives EPA the first opportunity to address Petitioners’ objection on NTEC’s sovereign immunity. As a result, this comment is entirely inadequate to meet Petitioners’ burden in this appeal. 40 C.F.R. § 124.19(a)(4)(ii).

Petitioners may contend in their reply that NTEC’s acquisition was not reasonably ascertainable during the comment period but this argument ignores the facts. *See* 40 C.F.R. §



124.13. NTEC closed on the acquisition on July 2, 2018, over a year before the public comment period. NTEC further announced the closing publicly through its press release on July 9, 2018. This information was well-within the public domain and reasonably ascertainable at the time of public comment on the Permit.

Petitioners may also contend that NTEC's sovereign immunity was not reasonably ascertainable, but this argument would be disingenuous. Petitioners were parties to litigation specifically about NTEC's sovereign immunity in *Dine Citizens Against Ruining Our Environment et al. v. BIA et al.*, 932 F.3d 843 (9th Cir. 2019) ("Dine CARE"). In *Dine CARE*, the same Petitioners challenged several related federal actions including NTEC's SMCRA permit renewal. On September 11, 2017, two years before the FCPP NPDES public comment period, the District Court dismissed Petitioners' claims because NTEC was an indispensable party that could not be joined due to sovereign immunity. *Dine C.A.R.E. et al v. BIA et al.*, Order on Motion to Dismiss, CV-16-08077-PCT-SPL (D. Ariz. 2017). The anticipated outcome of litigation is "reasonably ascertainable" for purposes of public comment. *In re Christian County Generation, LLC*, 13 E.A.D. 449 (2008). The *Dine CARE* decision was subsequently affirmed by the Ninth Circuit on July 29, 2019; again, before the comment period. 932 F.3d 843 (9th Cir. 2019). NTEC's sovereign immunity was known to Petitioners years before the comment period.

All facts necessary to raise Petitioners' current contention in this appeal were reasonably ascertainable and, frankly, known to Petitioners before the public comment period, yet the public comments are silent. Petitioners' failed to raise a reasonably ascertainable argument during the public comment period so the Petition in this regard must be denied.

Further, NTEC is uniquely harmed by Petitioners' dilatory conduct because NTEC was deprived any opportunity to address the issue before the appeal. EPA routinely provides the public

comments to the permittee during permit development stages to ensure the permitting process is transparent to the permittee. As a partial owner of the FCPP, NTEC would have received such comments and had the opportunity to respond to EPA and FCPP as necessary. Petitioners' failure to raise the issue in comments eliminated any opportunity for this dialogue. Consequently, Petitioners' failure to identify the issue in a comment, to NTEC's detriment, is dispositive on this issue before the Board. 40 C.F.R. § 124.19(a)(4)(ii).

B. Congress provided EPA adequate authority to enforce the Clean Water Act by abrogating sovereign immunity in the statute.

Even if the Board decides to consider Petitioners' sovereign immunity argument, the Board should still deny Petitioners' request. Petitioners demand the EPA obtain a waiver of sovereign immunity from NTEC as an owner of Units 4 and 5 of FCPP because, as Petitioners' contend, a waiver is necessary to enforce the Clean Water Act against an owner of the FCPP. This contention is simply wrong.

The Clean Water Act applies to the discharge of a pollutant from a point source to Waters of the United States ("WOTUS"). The EPA may enforce the standards of the Clean Water Act against any "person." A "person" includes "municipality," which expressly includes "an Indian tribe or an authorized Indian tribal organization." 33 U.S.C. § 1365(a)(1). At least two federal district courts have concluded that the Clean Water Act's definition of "person" is a congressional abrogation of sovereign immunity. *See e.g., Deschutes River Alliance v. Portland Gen. Elec. Co.*, 323 F.Supp. 3d 1171, 1185 (D.Or. 2018); *Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608, 609-10 (D. Ariz. 1993).<sup>1</sup>

---

<sup>1</sup> NTEC takes no position on whether the congressional waiver applies to citizen suits as held in *Deschutes River Alliance v. Portland Gen. Elec. Co.* and *Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty* since the holding in *Deschutes River Alliance* is currently before the Ninth Circuit Court of Appeals. In any event, a tribe and an authorized tribal organization are persons under the Clean Water Act for purposes of EPA enforcement.

EPA does not have discretion to create a different waiver of sovereign immunity than the congressional abrogation contained in the Clean Water Act. The EPA Administrator has delegated authority to implement the NPDES program of the Clean Water Act. 33 U.S.C. § 1342(a). If the Administrator conditioned the Permit here on NTEC's waiver of sovereign immunity, then the decision must be grounded in the text of the statute. *Los Angeles Waterkeeper v. Pruitt*, 320 F.Supp. 3d 1115 (C.D. Cal 2018). EPA's decision is entitled to deference unless Congress' intent is unambiguous on the issue. "Where the text of the statute is clear" as it is here, "that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id.* (citing *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051 (2003)). Here, the statute is clear, the definition of person includes an "Indian tribe or an authorized Indian tribal organization." 33 U.S.C. § 1365(a)(1). EPA does not have discretion to condition the permit on any form of waiver different than clearly expressed by Congress. If EPA had such discretion, then it would render the waiver contained in the statute meaningless.

The Region argues that it is a superior sovereign so sovereign immunity is inapplicable as to the federal government in all cases citing *U.S. v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8<sup>th</sup> Cir. 1987) (federal court has jurisdiction over Federal Records Act claim by United States against tribal court), and *U.S. v. White Mountain Apache Tribe*, 784 F.2d 917 (9<sup>th</sup> Cir. 1986) (tribal court cannot enjoin federal employees from conducting federal action on reservation). The superior sovereign doctrine does not apply in the face of clear congressional action on sovereign immunity. *See e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67, 98 S.Ct. 1670 (1978) (The Indian Civil Rights Act provides habeas corpus as sole federal enforcement mechanism); *see also Pakootas v. Teck Cominco*, 632 F.Supp.2d 1029, 1034 (E.D. Wash. 2009) ("There may be some very compelling policy reasons why Indian tribes should not be exempt from CERCLA liability, but

that is something Congress needs to address, not this court.”). Accordingly, the text of the Clean Water Act controls the scope of NTEC’s sovereign immunity, not the superior sovereign doctrine.

Regardless of the analysis, Petitioners’ request for relief – a waiver of sovereign immunity from NTEC – must be denied.

C. The Region appropriately exercised its discretion to determine Morgan Lake is not a WOTUS and maintain consistency between NTEC’s and FCPP’s NPDES Permits.

As noted by Petitioners, the 2008 NPDES permit for the Navajo Mine provides that Outfall 002 discharges to Morgan Lake. (Pet. Ex. 18, p. 3). NTEC’s 2018 NPDES Permit does not identify Morgan Lake because Morgan Lake is not a Water of the United States. (AR # 2.2.g). NTEC’s 2018 NPDES Permit was not appealed and it is final. As a result, the current versions of both FCPP and NTEC NPDES Permits treats Morgan Lake consistently.

NTEC agrees with FCPP and the Region that Morgan Lake is either a Waste Treatment System or fails the commerce clause test. Morgan Lake is a waste treatment system because it operates as a steam electric cooling pond. *See* 40 C.F.R. § 122.2 (2019); *see also* 1993 Perciasepe Memo (“you have the option, given the deletion of the steam electric cooling pond definition, of interpreting the waste treatment system exclusion as encompassing all steam electric cooling ponds[.]”). Alternatively, Morgan Lake is not a WOTUS because occasional recreational activity alone is not sufficient for jurisdiction under the commerce clause. *In the Matter of: Borden, Inc./Colonial Sugars*, 1 E.A.D. 895, 907 n.26 (1984) (“evidence of an occasional interstate traveler who engages in recreational fishing or hunting on the wetlands, would an insufficient basis standing alone, to establish commerce clause jurisdiction.”). In either case, the proper characterization of Morgan Lake is a highly technical determination and the Region applied a reasonable construction of its own regulations. Accordingly, the Region’s discretionary determination should be affirmed by the Board.

## V. CONCLUSION

Amicus NTEC respectfully requests the Board to deny the Petition for Review and affirm the Permit in all respects.

Dated this 2nd day of January, 2020.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: s/ Ryen L. Godwin  
Ryen L. Godwin, WSBA #40806  
Email: [rgodwin@schwabe.com](mailto:rgodwin@schwabe.com)  
Telephone: 206.622.1711  
Brien J. Flanagan  
Email: [bflanagan@schwabe.com](mailto:bflanagan@schwabe.com)  
Telephone: 503.222.9981  
1420 5<sup>th</sup> Avenue, Suite 3400  
Seattle, Washington 98101  
Tel: 206-622-1711  
Fax: 206-292-0460  
*Attorneys for Navajo Transitional Energy  
Company, LLC*

## STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This brief complies with the 7,000 word limitation found at 40 C.F.R. § 124.19(d)(3).

Dated this 2nd day of January, 2020.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: s/ Ryen L. Godwin  
Ryen L. Godwin, WSBA #40806  
Email: [rgodwin@schwabe.com](mailto:rgodwin@schwabe.com)  
Telephone: 206.622.1711  
Brien J. Flanagan  
Email: [bflanagan@schwabe.com](mailto:bflanagan@schwabe.com)  
Telephone: 503.222.9981  
1420 5<sup>th</sup> Avenue, Suite 3400  
Seattle, Washington 98101  
Tel: 206-622-1711  
Fax: 206-292-0460  
*Attorneys for Navajo Transitional Energy  
Company, LLC*

## TABLE OF ATTACHMENTS

<b>Attachment</b>	<b>Document</b>
1.	Declaration of Clark Moseley

## CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Navajo Transitional Energy Company, LLC's Amicus Brief* IN THE MATTER OF Four Corners Power Plant - Arizona Public Service Co., NPDES Appeal No. 19-06, were sent to the following persons in the manner indicated on this 2nd day of January, 2020:

### BY E-MAIL:

John Barth  
Attorney at Law  
P.O. Box 409  
Hygiene, CO 80533  
Tel: 303.774.8868  
[barthlawoffice@gmail.com](mailto:barthlawoffice@gmail.com)  
*Attorney for Petitioners*

Thomas M. Hagler  
Office of Regional Counsel  
EPA Region 9 (MC ORC-2)  
75 Hawthorne Street  
San Francisco, CA 94105  
Tel: 415.972.3945  
[Hagler.tom@epa.gov](mailto:Hagler.tom@epa.gov)  
*Attorney for EPA Region 9*

Elisa O'Dea  
Water Law Office  
EPA Office of General Counsel  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Tel: 202.564.4201  
[Odea.elise@epa.gov](mailto:Odea.elise@epa.gov)  
*Of Counsel for EPA Region 9*

Kerry McGrath  
Hunton Andrews Kurth LLP  
2200 Pennsylvania Avenue, NW  
Washington, D.C. 20037  
Tel: 202.955.1519  
[KMcGrath@HuntonAK.com](mailto:KMcGrath@HuntonAK.com)  
*Attorneys for Arizona Public Service Co.*

Brent A. Rosser  
Hunton Andrews Kurth LLP  
Bank of America Plaza, Suite 3500  
101 South Tryon Street  
Charlotte, NC 28280  
Tel: 704.378.4707  
[BRosser@HuntonAK.com](mailto:BRosser@HuntonAK.com)  
*Attorneys for Arizona Public Service Co.*

Shiloh Hernandez  
Andrew Hawley  
Western Environmental Law Center  
103 Reeder's Alley  
Helena, MT 59601  
Tel: 406.204.4861  
[hernandez@westernlaw.org](mailto:hernandez@westernlaw.org)  
[hawley@westernlaw.org](mailto:hawley@westernlaw.org)  
*Attorneys for Petitioners*

s/ Ryen L. Godwin

Ryen L. Godwin, WSBA No. 40806