IN RE PEABODY WESTERN COAL COMPANY

NPDES Appeal Nos. 10-15 & 10-16

ORDER DENYING REVIEW

Decided August 31, 2011

Syllabus

The Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity, and Sierra Club (collectively, "BMWC Petitioners") and the CAlifornians for Renewable Energy and former Hopi Tribal Chairman Ben Nuvamsa (jointly, "Nuvamsa Petitioners") both petitioned the Environmental Appeals Board ("Board") to review a final National Pollutant Discharge Elimination System ("NPDES") renewal permit ("Permit") that Region 9 ("Region") of the United States Environmental Protection Agency ("EPA") issued to Peabody Western Coal Company ("Peabody") pursuant to the Clean Water Act ("CWA"). The Permit reauthorizes Peabody to discharge from its Black Mesa Complex ("Site") into several nearby washes and tributaries located within the boundaries of the Hopi and Navajo Indian Reservations.

Both Petitioners challenge the Permit on several grounds. BMWC Petitioners claim the Region violated the CWA, the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA") in issuing the Permit. Nuvamsa Petitioners similarly raise challenges under NEPA and the CWA. In addition, Nuvamsa Petitioners appear to argue that the Region erred in issuing a single NPDES permit for the "Black Mesa Complex" because the Site is actually two mines and mining operations.

Held: The Board denies review of the Permit. Neither BMWC Petitioners nor Nuvamsa Petitioners have met their burden of demonstrating that review is warranted on any of the grounds presented.

(1) CWA Issues

(a) Claim That the Region Should Not Have Issued a Permit for a "New Source" Where No Water Quality Limited Segments ("WQLSs") or Total Daily Maximum Loads ("TMDLs") Exist

Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion in issuing the Permit where neither the Region nor the tribes have identified WQLSs or established TMDLs for the receiving water bodies. None of the authorities upon which Petitioners base their arguments apply here. The regulation BMWC Petitioners cite and Nuvamsa Petitioners rely on, 40 C.F.R. § 122.4(i), does not govern because neither the Site nor the outfalls are "new sources" within the meaning of the

regulation. BMWC Petitioners' reliance upon the remedy ordered by the U.S. District Court for the District of Montana in *Friends of the Wild Swan v. U.S. EPA*, which was affirmed by the Ninth Circuit, only applies to "new sources" – and only to those within Montana – and, thus, is equally inapposite.

(b) Claim That the Permit Will Cause or Contribute to Exceedances of WQSs

BMWC Petitioners have failed to demonstrate that the Region clearly erred in issuing the Permit where certain seeps have been shown to have concentrations above WQSs. The seeps BMWC Petitioners claim to be the source of exceedances of WQSs are not regulated discharges or outfalls. BMWC Petitioners fail to identify any term or condition in the Permit that authorizes discharges from the seeps. They also fail to point to any provision that suggests the Region did, in fact, grant the variances BMWC Petitioners allege were issued. BMWC Petitioners also have not explained *why* the Region's response to their comments during the comment period on this same issue is clearly erroneous or otherwise warrants consideration.

(c) Claim That the Region Failed to Impose Adequate Effluent Limits

BMWC Petitioners have not shown that the Region failed to impose adequate effluent limits. BMWC Petitioners make no attempt to explain, or even address, why the Region's responses to comments – comments that are the same or very similar to those raised in the petition – are clearly erroneous or otherwise warrant review.

(d) Claim That the Region Granted Inappropriate Monitoring Waivers

BMWC Petitioners misread the Permit's terms and conditions in alleging that the Region improperly granted Peabody monitoring waivers for 89 of 111 outfalls. The Region maintains that it has not granted a waiver, the Board does not see any indication in the Permit that a waiver was granted, and BMWC Petitioners have failed to cite any Permit provision that constitutes a waiver. BMWC Petitioners have, therefore, failed to demonstrate that the Region clearly erred in establishing the Permit's monitoring requirements.

(e) Claim Concerning the Office of Surface Mining Reclamation and Enforcement ("OSM") Technical Review

BMWC Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion in relying on OSM's technical review. They make no attempt to explain, or even address, why the Region's responses to the same comments are clearly erroneous or otherwise warrant review. They also fail to explain why the Region's reliance on OSM's expertise was clearly erroneous or an abuse of discretion in light of EPA's regulations and the Memorandum of Understanding between the two agencies.

(f) Claims Concerning CWA Section 404 Permits

Neither Petitioner has shown that the Region clearly erred by failing to ensure that the U.S. Army Corps of Engineers issued any necessary CWA section 404 permits before or at the same time the Region issued the NPDES permit under section 402. Not only have Petitioners failed to address the Region's responses to these same comments as is required on appeal, neither group has provided any statutory or regulatory basis for their contention that section 402 and section 404 permits must be issued jointly or concurrently.

(2) NEPA Issue

Both Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion in relying on the CWA section 511(c)(1) exemption from NEPA. Petitioners' arguments are based on the same underlying "new source" theories the Board found unpersuasive in CWA issue 1(a).

(3) ESA Issue

BMWC Petitioners have failed to demonstrate that the Region's ESA analysis was clearly erroneous. Not only have BMWC Petitioners failed to meet their burden of explaining why the Region's response to their comments is clearly erroneous, but their claim is also contradicted by the administrative record.

(4) Issue Concerning Appropriate Number of Permits

Nuvamsa Petitioners have failed to demonstrate that the Region clearly erred in issuing one NPDES permit for the Black Mesa Complex. Nuvamsa Petitioners fail to explain why the Region's response to this same comment is clearly erroneous or otherwise warrant review. By failing to rebut the Region's explanation, Nuvamsa Petitioners leave an uncontested record supportive of the Region's approach.

(5) Alleged Violations of 40 C.F.R. Part 124 Procedures

BMWC Petitioners have failed to demonstrate that the Region violated the procedural requirements of 40 C.F.R. part 124. BMWC Petitioners have not shown that the Region failed to make monitoring data publicly available nor have they shown that the Region failed to hold meaningful public hearings.

Before Environmental Appeals Judges Kathie A. Stein and Anna L. Wolgast.[1]

Opinion of the Board by Judge Wolgast:

I. *STATEMENT OF THE CASE*

The Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity, and Sierra Club (collectively, "BMWC Petitioners") petitioned the Environmental Appeals Board ("Board") to review a final National Pollutant Discharge Elimination System ("NPDES") renewal permit ("Permit") that Region 9 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") issued to Peabody Western Coal Company ("Peabody") pursuant to section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. Another group of petitioners – the CAlifornians for Renewable Energy ("CARE") and former Hopi Tribal Chairman Ben Nuvamsa (jointly, "Nuvamsa Petitioners") – also petitioned the Board to review the same permit.[2] The Permit reauthorizes Peabody to discharge from its Black Mesa Complex ("Site") into several nearby washes and tributaries located within the boundaries of the Hopi and Navajo Indian Reservations. *See* NPDES Permit No. NN 0022179 at 1 (Sept. 16, 2010) (A.R. at 1). Both Peabody and the Region filed responses to the petitions. For the reasons discussed below, the Board denies review of the Permit.

II. *ISSUES ON APPEAL*

The petitions filed in this case present the following issues:

1. Have Petitioners demonstrated that the Region clearly erred or abused its discretion in issuing the Permit where neither the Region nor the tribes have identified impaired waters known as water quality limited segments ("WQLSs") or established total maximum daily loads ("TMDLs") for the receiving water bodies?

2. Have BMWC Petitioners demonstrated that the Region clearly erred in issuing a permit when certain seeps have been shown to have concentrations above water quality standards ("WQSs")?

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[1] Environmental Appeals Judge Charles J. Sheehan did not participate in this decision.

[2] The Board designated BMWC's petition as NPDES Appeal No. 10-15 and Mr. Nuvamsa and CARE's joint petition as NPDES Appeal No. 10-16.

3. Have BMWC Petitioners demonstrated that the Region failed to impose adequate effluent limits?

4. Have BMWC Petitioners demonstrated that the Region clearly erred in establishing the Permit's monitoring requirements?

5. Have BMWC Petitioners demonstrated that the Region clearly erred or abused its discretion in relying on the Federal Office of Surface Mining Reclamation and Enforcement's ("OSM") technical review?

6. Have Petitioners demonstrated that the Region clearly erred by failing to ensure that the U.S. Army Corps of Engineers ("Corps") issued CWA section 404 permits before or at the same time the Region issued the Permit under CWA section 402?

7. Have Petitioners demonstrated that the Region clearly erred or abused its discretion in concluding that the newly identified outfalls in the Permit are not "new sources" within the meaning of the CWA and its implementing regulations and in thus relying on the CWA section 511(c)(1) exemption from the National Environmental Policy Act ("NEPA")?

8. Have BMWC Petitioners demonstrated that the Region's Endangered Species Act ("ESA") analysis was clearly erroneous?

9. Have Nuvamsa Petitioners demonstrated that the Region clearly erred in issuing one NPDES permit for the Black Mesa Complex?

10. Have BMWC Petitioners demonstrated that the Region violated the procedural requirements of 40 C.F.R. part 124?

III. *STANDARD OF REVIEW*

In determining whether to review a petition filed under 40 C.F.R. § 124.19(a), the Board first considers whether the petitioner has met threshold pleading requirements such as timeliness, standing, and issue preservation. *See* 40 C.F.R. § 124.19; *In re Beeland Group LLC*, 14 E.A.D. 189, 194-95 (EAB 2008); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-08 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). For example, a petitioner must demonstrate that any issues it appeals were either raised with reasonable specificity during the public comment period or were not reasonably ascertainable during that period. 40 C.F.R. §§ 124.13, 124.19(a); *see*, *e.g.*, *Indeck*, 13 E.A.D. at 143; *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 363 & n.7 (EAB

2004); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-50 & n.8 (EAB 1999).

Assuming that a petitioner satisfies its threshold pleading obligations, the Board then considers the petition to determine if review is warranted. *Indeck*, 13 E.A.D. at 143; *see also Beeland*, 14 E.A.D. at 195-96. Ordinarily, the Board will not review a petition filed under 40 C.F.R. § 124.19(a) unless it appears from the petition that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion or an important policy consideration that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *accord In re Chukchansi Gold Resort*, 14 E.A.D. 260, 264 (EAB 2009); *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 717 (EAB 2006); *In re Gov't D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. 323, 332-33 (EAB 2002); *In re New Eng. Plating Co.*, 9 E.A.D. 726, 729 (EAB 2001). In considering permit appeals, the Board is guided by the preamble to the part 124 regulations, which explains that review should be "only sparingly" exercised and that "most permit conditions should be finally determined at the Regional level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord Scituate*, 12 E.A.D. at 717; *In re City of Moscow*, 10 E.A.D. 135, 140-41 (EAB 2001).

For each issue raised in a petition, therefore, the burden of demonstrating that review is warranted rests with the petitioner, who must raise objections to the permit and *explain why* the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review.[3] *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001) (same), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). Consequently, the Board has consistently denied review of petitions which merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. *E.g., In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd,* 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) ("[P]etitioner may not

[3] Federal circuit courts of appeal have upheld this Board requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections. *City of Pittsfield v. U.S. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't Envtl. Quality v. U.S. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) ("[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review."), *aff'g In re Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, No. 08-3049, at 9 (6th Cir. Feb. 12, 2009) (concluding that Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances" without offering reasons why Region's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review).

simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations."); *City of Irving*, 10 E.A.D. at 129-30 (same); *In re Hadson Power 14*, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on draft permit and attached a copy of their comments without addressing permit issuer's responses to comments).

IV. *SUMMARY OF DECISION*

The Board concludes that neither BMWC Petitioners nor Nuvamsa Petitioners have demonstrated that their petitions warrant review on any of the grounds presented. Petitioners have not shown that, in establishing the permit conditions Petitioners challenge, the Region clearly erred or abused its discretion. The Board therefore denies review for the reasons explained in detail below.

V. *PROCEDURAL AND FACTUAL HISTORY*

On August 5, 2009, the Region issued a final permit renewal decision for the Site. Fact Sheet at 1 (A.R. at 23). That permit was appealed to the Board.[4] *Id.*; *see also In re Peabody W. Coal Co.*, NPDES Appeal No. 09-10, at 1 (EAB Dec. 3, 2009) (Order Dismissing Petition for Review with Prejudice). The Region withdrew the 2009 permit, reopened the comment period, and held two public hearings. Fact Sheet at 1. On September 16, 2010, the Region reissued a final permit renewal decision; this latter final permit is the subject of the current appeal. Permit at 1. At the same time it reissued the Permit, the Region also responded to comments it had received on the draft permit and during the second comment period.[5] *See generally* Comment Response Document, Peabody Western Coal Co. – Black Mesa Complex, NPDES Permit No. NN 0022179 (2010) (A.R. at 43-84) [hereinafter RTC].

On October 18, 2010, the Board received petitions for review of the Permit from both sets of petitioners. *See* BMWC Petition for Review and Motion for Extension of Time to File Supplemental Brief ("BMWC Pet."); Petition for Review Submitted by Former Hopi Tribal Chairman Ben Nuvamsa and by CARE

[4] Several of the BMWC Petitioners participated in the earlier petition for review.

[5] Peabody is currently discharging from the Site under an NPDES permit the Region issued to it on December 29, 2000, which has been administratively continued since its expiration. Fact Sheet at 1; *see also* 40 C.F.R. § 122.6(a) (extending NPDES permit where timely and complete renewal application submitted).

("Nuvamsa Pet.").[6] BMWC's petition included a motion for an extension of time to file a supplemental brief, which the Region opposed. *See* BMWC Pet. at 3; Region Response to Petitioners' Motion for Extension of Time to File Supplemental Brief at 1. While its motion was pending, BMWC Petitioners filed a supplemental brief. *See generally* BMWC's Supplemental Brief in Support of Petition for Review ("BMWC Br."). Shortly thereafter, based on several factors, the Board granted BMWC Petitioners' request, accepted their supplemental brief for filing, and also granted Peabody's motion for leave to respond to the petitions.[7] *See* Order of Nov. 4, 2010. On January 14, 2011, the Region filed its response to the petitions and a certified index of the administrative record. *See generally* EPA Region 9 Response to Petitioners' Petition for Review ("Reg. Resp."); EPA Region 9 Certification of the Index to the Administrative Record for the Black Mesa Permit (dated Jan. 12, 2011); Administrative Record (Index). Peabody also filed a response to the petitions on this date. Peabody Western Coal Company's Response to Petitions for Review ("Peabody Resp.").

[6] The Board notes that the Nuvamsa Petitioners did not number the pages in their petition. In referring to page numbers, the Board has not counted the petition's cover page; instead, the Board considers page one to be the first page containing the substance of their arguments.

[7] In their supplemental brief, BMWC Petitioners claimed that the Region had not provided the complete administrative record to them, presumably as of the date of the filing of that document. BMWC Br. at 3. They "reserve[d] the right" to raise additional issues and further address their arguments once the Region "has certified the administrative record." The Board has not received any further supplemental motion, briefs, or filings from BMWC Petitioners, and as noted above, the Region certified the administrative record on January 14, 2011. Accordingly, the Board finds that BMWC Petitioners effectively have waived this request. Moreover, insofar as BMWC Petitioners may be alleging that the Region erred by not providing an electronic copy of the entire administrative record, the Board denies any such claim. As the Board explained in *In re Russell City Energy Center, LLC*, "[t]he regulations only require the administrative record be available for review," not that it be electronically available. 15 E.A.D. 1, 97 (EAB 2010) (citing 40 C.F.R. §§ 124.9, .18); *accord In re Cape Wind Assocs., LLC*, 15 E.A.D. 327, 334 (EAB 2011).

VI. *ANALYSIS*

A. *CWA Issues*

1. *Petitioners Have Not Demonstrated That the Region Clearly Erred or Abused Its Discretion in Issuing the Permit Where Neither the Region Nor the Tribes Have Identified Impaired Waters Known as WQLSs or Established TMDLs for the Receiving Water Bodies*

BMWC Petitioners argue that the Region "unlawfully" issued the Permit to cover "new sources"[8] without first identifying whether the water bodies into which the discharges would flow were WQLSs, and, if they are, without ensuring that TMDLs were established for the tribal portions of the water bodies.[9] BMWC Br. at 5, 8-9; BMWC Pet. at 6. They claim that neither tribe has submitted "a list of water bodies on tribal lands that do *not* meet [WQSs]" to EPA for approval (i.e., a "303(d) list"[10]) and that the State of Arizona has identified other segments in this same watershed as impaired or not attaining TMDLs for copper, silver, and suspended sediments. BMWC Br. at 8. BMWC Petitioners more particularly assert that the Region's issuance of an NPDES permit "covering new sources where

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[8] BMWC Petitioners claim that the Region erred in issuing a permit "for new sources or *increase[d] permitted discharges.*" BMWC Br. at 8. Because the title of this section of their brief and the remainder of their argument, however, focus solely on "new sources," including the discussion rebutting the Region's responses to comments, the Board reads their argument to only address "new sources." *Compare id*. at 8 *with id.* at 9, 10.

[9] In setting an NPDES permit's discharge limits, the permit issuer must apply the more stringent of the applicable technology-based or the applicable WQS-based standards. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); *In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 626 (EAB 2006). States or tribes establish WQSs for all waters within their boundaries pursuant to section 303. CWA §§ 303(a)(3)(A), 518(e), 33 U.S.C. §§ 1313(a)(3)(A), 1377(e). Section 303 also requires each state or tribe to identify waters where point source controls under the NPDES permitting system are insufficient by themselves to meet the WQSs applicable to those waters. CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A); *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002); *Kingman Park Civic Ass'n v. U.S. EPA*, 84 F. Supp. 2d 1, 3 (D.D.C. 1999); *In re City of Moscow*, 10 E.A.D. 135, 139 (EAB 2001). These impaired waters are referred to as "water quality limited segments" or "WQLSs." *Kingman Park*, 84 F. Supp. 2d at 3. A list of these WQLSs are then submitted to EPA for approval in what is commonly known as a "303(d) list." CWA § 303(d)(1)(D)(2), 33 U.S.C. § 1313(d)(1)(D)(2); *accord Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007, 1011 (9th Cir. 2007); *Kingman Park*, 84 F. Supp. 2d at 3. For those waters it identifies in its 303(d) list, a state or tribe must establish the "total maximum daily load" ("TMDL") for pollutants identified by EPA as suitable for TMDL calculation. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). A TMDL is a measure of the total amount of a pollutant from point sources, nonpoint sources, and natural background, which a water quality limited segment can tolerate without violating the applicable water quality standards. *See* 40 C.F.R. § 130.2(i).

[10] For a more detailed discussion of the development of 303(d) lists under the CWA, *see supra* note 9.

no WQLS and TMDLs have been established" was "unlawful" because it conflicted with an EPA regulation, 40 C.F.R. § 122.4(i), and a federal district court case, *Friends of the Wild Swan, Inc., v. U.S. EPA*, 130 F. Supp. 2d 1199 (D. Mont.), *amended by* 130 F. Supp. 2d. 1204 (D. Mont. 2000), *aff'd in part*, *rev'd in part*, *and remanded*, 74 Fed. App'x 718 (9th Cir. 2003).[11] BMWC Br. at 6, 8-9, 10. BMWC Petitioners also appear to argue that, in applying the new Western Alkaline Coal Mining Subcategory regulations[12] to certain outfalls, the Region converted those new outfalls to "new sources."[13] *See id*. at 16-17, 19.

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[11] The BMWC petition does not request Board review of either the failure of the tribes to submit a 303(d) list and associated TMDLs to EPA or the failure of EPA to step into the shoes of the tribes and develop a 303(d) list or prescribe its own TMDL calculations. If BMWC Petitioners had brought such a challenge, however, the Board would lack jurisdiction to review it. Cases challenging the "constructive submission of no TMDLs" or the "constructive submission of no 303(d) lists" are properly brought in federal district court. *See*, *e.g.*, *Scott v. City of Hammond*, 741 F.2d 992, 996-98 (7th Cir. 1984) (reversing the district court's dismissal of plaintiff's claim that EPA unlawfully failed to promulgate TMDLs where the states made a "constructive submission of no TMDLs"); *Kingman Park Civic Ass'n v. U.S. EPA*, 84 F. Supp. 2d 1, 4-9 (D.D.C. 1999) (citizen suit alleging constructive submission of no TMDLs proper under CWA); *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1426-29 (W.D. Wash. 1991) (citizen suit alleging constructive submission of no 303(d) list or TMDLs proper under the CWA), *aff'd*, 20 F.3rd 981 (9th Cir. 1994); *Moscow*, 10 E.A.D. at 160. Furthermore, as the Board has explained in many contexts, while the regulations authorize it to review challenges to permit conditions, the Board's review "does not ordinarily extend to considerations of the validity of prior, predicate regulatory decisions that are reviewable in other fora." *Moscow*, 10 E.A.D. at 160-61; *accord In re USGen New Eng., Inc.*, 11 E.A.D. 525, 555-56 (EAB 2004); *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 484 (EAB 2004); *In re City of Irving*, 10 E.A.D. 111, 124 (EAB 2001); *In re City of Hollywood*, 5 E.A.D. 157, 175-76 (EAB 1994) (declining to review challenges to EPA's approval of state WQSs and explaining that "threshold issues pertaining to whether the Agency may have erred in approving the standard in the first instance are necessarily beyond our jurisdiction"); *see also U.S. Steel Corp. v. Train*, 556 F.2d 822, 835 (7th Cir. 1977) (EPA "had no authority to consider challenges to the validity of * * * state water quality standards" in the context of a permit proceeding). In any event, to the extent BMWC Petitioners may be claiming that the Region must await the development of TMDLs before processing Peabody's permit renewal application, the Board has previously rejected such claims. *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 605 (EAB 2010) ("There [] is no clear error in the Region's conclusion that the statute does not contemplate a delay in processing applications for permit renewal to wait for development of a wasteload allocation or TMDL."); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 107-08 (1992) (finding nothing in the CWA to support a categorical ban on issuing permits for discharges into waters already in violation of the WQSs).

[12] In 2002, the Agency established two additional subcategories within the Coal Mining Point Source category – the Western Alkaline Coal Mining Subcategory and the Coal Remining Subcategory – and issued effluent limitations guidelines ("ELGs") and new source performance standards ("NSPSs") for them. *See* Coal Mining Point Source Category; Amendments to ELGs and NSPSs, 67 Fed. Reg. 3370 (Jan. 23, 2002).

[13] In their supplemental brief, BMWC Petitioners only make arguments concerning the new subcategory rule in connection with their NEPA claim. *See* BMWC Br. at 16-17. Their NEPA claim also raises the question of whether the Permit covers "new sources" and, in fact, ultimately hinges on that issue as well. *See* discussion of NEPA claim *infra* Part VI.B. Because BMWC Petitioners' argument concerning the 2002 rulemaking relates to the "new source" issue, and because the Board consid-

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Along similar lines, Nuvamsa Petitioners argue that Peabody's 2005 permit application includes changes that should be categorized as "major alterations," and thus, the mine should be treated as a "new source" under 40 C.F.R. § 122.4(i).[14] Nuvamsa Pet. at 4-5. All of the Petitioners' arguments, therefore, hinge on whether or not the Site is a new source.[15]

In its Comment Response Document, the Region addressed comments similar to those Petitioners now raise. RTC at 9-12; *see also* BMWC Pet. Ex. 1 at 3-6 (Comments on Proposed NPDES Permit No. NN0022179 (Jan. 2010)) [hereinafter BMWC Comments]. The Region emphasized that "comments related to restrictions on discharges from new sources * * * are not applicable" to the Permit because the Region was "not issuing a permit for a new source." RTC at 12; *see also id*. at 3-4. The Region explained that, for this reason, 40 C.F.R. § 122.4(i), which only applies to "new dischargers" and "new sources," did not apply. *Id.* at 12. Although the Region did not explicitly mention the *Wild Swan* case in the Comment Response Document, in its response to the petition, the Region contends that the case is inapposite because it also involved 40 C.F.R. § 122.4(i).[16]

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ers the "new source" issue in this part of the decision, the Board addresses BMWC Petitioners' argument in this section.

[14] Nuvamsa Petitioners raise this issue in connection with their NEPA claim. It, too, is relevant to this "new source" issue and thus is included in this section of the decision. *See supra* note 13.

[15] BMWC Petititoners also claim that EPA failed to "identify which outfalls have been added or eliminated from the NPDES" permit. BMWC Br. at 5. The Region, in its responses to comments, addressed a similar comment, replying:

> The draft permit identified each outfall in Appendices A, B, and C of the permit, along with the subcategorization, the latitude, longitude and receiving water associated with each outfall. The previous permit listed each outfall under the applicable regulatory subcategory. While EPA did not present a detailed description in the Fact Sheet of each of the more than 100 outfalls, a comparison of the two permits provides a list of the outfall[s] eliminated or added.

RTC at 23. BMWC Petitioners do not point to any statutory or regulatory provision that requires the Region to do more than it did. Moreover, under the NPDES procedural regulations, permit issuers are only required to "*[b]riefly* describe and respond to all significant comments on the draft permit." 40 C.F.R. § 124.17(a)(2) (emphasis added); *accord In re Circle T Feedlot, Inc.*, 14 E.A.D. 653, 674 (EAB 2010); *In re Kendall New Century Dev.*, 11 E.A.D. 40, 50 (EAB 2003); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 583 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3rd Cir. 1999).

[16] In its Comment Response Document, the Region also stated that, as a factual matter, none of the waterbodies receiving discharges from the Site "have been identified as impaired" by the Hopi Tribe or Navajo Nation or included on a 303(d) list. RTC at 11. The Region also noted that the drainage from the Site did not have any hydrological connection to the two segments in the watershed that the State of Arizona previously had identified as impaired; those segments were located over
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Reg. Resp. at 22; *see also* RTC at 12 (referring to all comments relying on 40 C.F.R. § 122.4(i)).

In light of these arguments, the Board must determine (1) whether the Region permitted a "new source," and in so doing, failed to properly apply 40 C.F.R. § 122.4(i) to that new source, and (2) whether a remedy fashioned by the U.S. District Court for the District of Montana to address deficiencies with Montana's TMDLs is applicable here. In addressing these questions, the Board considers whether the "new outfalls" are "new sources" within the meaning of the regulations.

a. *40 C.F.R. § 122.4(i) Does Not Apply Because There is No "New Source"*

Turning first to the regulation upon which BMWC Petitioners rely, as the Region has correctly pointed out, section 122.4(i) only applies, by its own terms, to "new sources" or "new dischargers." 40 C.F.R. § 122.4(i). Specifically, the regulations prohibit the issuance of an NPDES permit "[t]o a *new source* or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of [WQSs]."[17] *Id.* (emphasis added); *accord Pinto Creek*, 504 F.3d at 1012.

The CWA defines the terms "new source" and "source." CWA § 306(a)(2)-(3), 33 U.S.C. § 1316(a)(2)-(3). A "new source" is "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance [under section 306]." CWA § 306(a)(2), 33 U.S.C. § 1316(a)(2). Notably, a "source" is defined as "any building, structure, facility, or installation from which there is or may be the discharge of pollutants." CWA § 306(a)(3), 33 U.S.C. § 1316(a)(3). EPA's implementing regulations similarly define these terms.[18] *See* 40 C.F.R. §§ 122.2, .29(a). EPA regulations further

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100 miles from the Site. *Id.* at 12. The Region did not specify, in either its response to comments or its response to the petition, whether either tribe had developed or submitted a 303(d) list. Peabody, however, in its response, essentially admits that no list has been submitted. *See* Peabody Resp. at 8-9 & n.6. For purposes of this case, therefore, the Board assumes that neither tribe has developed or submitted a 303(d) list. Ultimately, however, this particular point is not material to the disposition of the overarching issue because, as explained in the text, the critical questions the Board addresses here are whether the permitted outfalls are new sources, thereby triggering 40 C.F.R. § 122.4(i), and whether the U.S. District Court for the District of Montana's *Wild Swan* decision is controlling here.

[17] Neither Petitioner claims that Peabody is a "new discharger." Consequently, the Board will not include this term in the remainder of this discussion.

[18] While the regulatory definition of "source" is identical to that in the statute, the applicable regulations define "new source" as "any building, structure, facility, or installation from which there is
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provide, however, that, when a new source performance standard ("NSPS") is promulgated for a source category and it defines a "new source" for that category, this more specific definition applies. *See* 40 C.F.R. § 122.29(b)(1); *see also* Reg. Resp. at 18-19 (discussing regulations). *See generally* Coal Mining Point Source Category, 50 Fed. Reg. 41,296 (Oct. 9, 1985).

The NSPS for the "coal mining" point source category does define a "new source" for that category; such a definition therefore applies to the Permit. *See* 40 C.F.R. § 434.11(j)(1). The coal mining regulations provide that, "[n]otwithstanding any other provision of this Chapter * * * the term 'new source coal mine' means a coal mine * * * (i) [t]he construction of which is commenced after May 4, 1984; or (ii) [w]hich is determined by the EPA Regional Administrator to constitute a 'major alteration.'" *Id.* § 434.11(j)(1)(i)-(ii). The regulations instruct the Regional Administrator, in determining whether there is a "major alteration," to take into account whether certain events "resulting in a new, altered or increased discharge of pollutants has occurred after May 4, 1984 in connection with the mine." *Id.* § 434.11(j)(1)(ii). These events are: "(A) [e]xtraction of a coal seam not previously extracted by that mine; (B) [d]ischarge into a drainage area not previously affected by wastewater discharge from the mine; (C) [e]xtensive new surface disruption at the mining operation; (D) [a] construction of a new shaft, slope, or drift; and (E) [s]uch other factors as the Regional Administrator deems relevant." *Id.* § 434.11(j)(1)(ii)(A)-(E).

Applying this definition to these facts, nothing in the record suggests that the Peabody mine site, including the new outfalls, qualifies as a "new source." According to the administrative record, the mine began operations in the early 1970s. Fact Sheet at 2 (A.R. at 24). The construction of the mine, therefore, clearly began before the regulatory cutoff date of May 4, 1984; thus, the Site cannot be defined as a "new source" under section 434.11(j)(1)(i). The Region made the same observation in its Comment Response Document. *See* RTC at 3. The Region also determined that "a major alteration in connection with the mine has not occurred," noting that the addition of a "new outfall" is not one of the listed events that would generally be considered a "major alteration." *See id.* In light of the Region's determination that there was no "major alteration," the Site cannot be defined as a "new source" under section 434.11(j)(1)(ii). *See id.* Furthermore, nowhere do the regulations define a "new outfall" to be a "new source." Thus, neither the Site nor any of the new outfalls qualify as a "new source coal mine" under either of the regulatory criteria.

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or may be a 'discharge of pollutants,' the construction of which commenced" after proposal or promulgation of standards of performance. 40 C.F.R. §§ 122.2, .29(a).

Petitioners have not provided any persuasive evidence or argument that demonstrates that the Region erred in concluding that the Peabody mine site is not a "new source." Neither set of Petitioners have provided any evidence that contradict the Region's determination that construction of the mine occurred before the May 4, 1984, cutoff date. Nor have BMWC Petitioners pointed to anything in section 434.11(j)(1)(ii) that would *require* a permit issuer to consider a "new outfall" to be a "new source." At best, Nuvamsa Petitioners' arguments can be construed as a claim that the Region abused its discretion by not finding that a "major alteration" had occurred. Their argument, however, which relies on OSM's determination concerning a different permit and different permit application, has little bearing on the issue. They do not attempt to identify any significant or major changes between the NPDES permit renewal application and the former NPDES permit.[19] Nor do they cite to any changes in the NPDES permit renewal application that constitute a "major alteration" within the meaning of the criteria set forth in 40 C.F.R. § 434.11(j)(1)(ii). BMWC Petitioners' contention that the Region's application of the new Western Alkaline Coal Mining Subcategory regulatory requirements to several new outfalls in the Permit in and of itself converts an existing source to a new source is similarly unconvincing. This argument ignores the fact that the NPDES regulations require a permit issuer to apply such new requirements to both existing and new sources. *See, e.g.*, 40 C.F.R. §§ 122.43(b)(2), 122.44(a)(1) (requiring all currently applicable requirements to be incorporated into new or *reissued* permits). Thus, applying a new requirement to an existing source does not automatically convert the existing source into a new one.

b. *The Wild Swan Case Does Not Apply*

The Board turns next to BMWC Petitioners' contention that the *Wild Swan* case somehow precludes the Region's issuance of an NPDES permit for discharges into waters within the Hopi and Navajo Indian Reservations. For the following reasons, the Board concludes that it does not.

In *Wild Swan*, the U.S. District Court for the District of Montana concluded that, where the State of Montana had identified WQLSs for all of its waters but had only submitted 130 out of 3,000 TMDLs for those segments, EPA acted arbitrarily and capriciously in failing to disapprove the State's inadequate submission of TMDLs. 130 F. Supp. 2d at 1200; *accord* 74 Fed. App'x at 722. As part of its remedy, the district court prohibited both EPA and the State of Montana from "issu[ing] any new permits or increas[ing the] permitted discharge for any permittee" under the NPDES or the Montana Pollutant Discharge Elimination System

[19] Nor can they. In the Fact Sheet, the Region explained that "[t]his permit is substantially similar to the previous (2000) permit." Fact Sheet at 2. The Region noted only three minor changes: (1) application of the new Western Alkaline Coal Mining Subcategory requirements, (2) several changes to outfall locations, and (3) revision of the Seep Monitoring and Management Plan. *Id.*

permitting programs "[u]ntil all necessary TMDLs are established for a particular WQLS." 130 F. Supp. 2d at 1206. On appeal, the Ninth Circuit upheld this remedy, noting first that the district court had broad discretion in fashioning an equitable remedy and second that the remedy generally comported with 40 C.F.R. § 122.4(i)'s prohibition of new permit issuances for new sources that will cause or contribute to a violation of WQSs.[20] 74 Fed. App'x at 724.

As an initial matter, the district court's remedy only applies to the issuance of permits to "new sources," and the Board has already determined in the previous section that the Permit is not for a "new source."[21] *See supra* Part VI.A.1.a. But more important, BMWC Petitioners have not explained how or why a remedy fashioned by the U.S. District Court for the District of Montana to address deficiencies in *Montana's* NPDES program would apply to the NPDES programs in other jurisdictions. Not only does the case specifically target the Montana WQLSs and TMDLs, *see* 130 F. Supp. 2d at 1200-03, but BMWC Petitioners have provided no theory, persuasive or otherwise, to explain how a federal district court in Montana would have jurisdiction (or binding authority) over the implementation of the NPDES programs of either the Navajo Nation or the Hopi Tribe, neither of which is located in Montana. Nor does the Board believe they can. As the Supreme Court has explained, "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 James Wm. Moore et al., Moore's Federal Practice § 134.02[1][d] (3d ed. 2011)); *accord Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court."); *Hart v. Massanari*, 266 F.3d 1155, 1163, 1174 (9th Cir. 2001) (explaining that decisions of a federal district court are not viewed as

[20] The Ninth Circuit also pointed out that it had previously approved another district court's "imposition of specific steps to bring EPA and Alaska into compliance with TMDL requirements" in that state. 74 Fed. Appx. at 723 (referring to its decision in *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994)). Significantly, the remedy the district court imposed in *Alaska Center for the Environment* was different than the one the Montana district court imposed in *Wild Swan* and did not contain any restrictions on the issuance of new permits. *Compare id.* at 723 (discussing remedy imposed to address Alaska's failure to establish TMDLs) *with id.* at 720 (summarizing Montana district court remedy); *see also Alaska Ctr. for the Env't*, 20 F.3d at 984 (summarizing remedy); *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1381-82 (W.D. Wash. 1992) (imposing remedy), *aff'd*, 20 F.3d 981 (9th Cir. 1994).

[21] The remedy also applies to increased permitted discharges, but as already noted, Petitioners have not raised that issue. *See supra* note 8.

binding precedent on other district judges); *Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (same).

c. *Summary*

In sum, none of the authorities upon which Petitioners base their arguments apply to the current matter. The regulation BMWC Petitioners cite and Nuvamsa Petitioners rely on, 40 C.F.R. § 122.4(i), does not govern here because neither the Site nor the outfalls are "new sources" within the meaning of the regulation. BMWC Petitioners' reliance upon the remedy ordered by the Montana district court in the *Wild Swan* case, and affirmed by the Ninth Circuit, which only applies within Montana, is equally unavailing. Thus, BMWC Petitioners have not identified any statutory or regulatory provision that precludes the Region from issuing a permit where no WQLSs have been identified and no TMDLs have been developed or submitted as yet. Accordingly, Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion in issuing the Permit where WQLSs and TMDLs had not been established.

2. *Petitioners Have Not Demonstrated That the Region Clearly Erred in Issuing the Permit Where Certain Seeps Have Been Shown to Have Concentrations Above WQSs*

BMWC Petitioners claim that the Permit will cause or contribute to exceedances of WQSs and thus the Region erred in issuing it. BMWC Br. at 10; BMWC Pet. at 6. More particularly, they assert that "[a]t least 21 discharges from Peabody's impoundments are already exceeding WQS." BMWC Br. at 11 (citing Fact Sheet at 10-12). They further allege that the Region, in its Comment Response Document, acknowledged the ongoing WQS violations but "provide[d] no legal authority for its proposed use of variances." *Id.* at 11 (citing RTC at 17-18).

Importantly, the alleged "21 discharges" to which BMWC Petitioners refer are not associated with regulated discharges or outfalls, but instead are associated with seeps located at the Site. *See* Fact Sheet at 10-12 (containing a chart entitled "Seep Characterization" and listing twenty-one seeps). In the administrative record, a "seep" is defined as "an area *not related to the outfall location*, which may exhibit moisture or flow, generally at the toe of an impoundment where stormwater has filtered into the soil and then re-appears at an area hydrologically downgradient of the impoundment." *Id.* at 8 (emphasis added).

The Region, in its Comment Response Document, responded to concerns similar to those BMWC Petitioners now raise. *See* RTC at 13-18. The Region first noted that it agreed with commenters that "it cannot issue a permit for discharges that cause or contribute to an exceedance of [WQSs]." *Id.* at 14. The Region then explained that, to ensure that it met this requirement, it had conducted a "reasonable potential analysis" under 40 C.F.R. § 122.44(d)(1)(ii) in which it had "con-

cluded that the discharges regulated under the NPDES permit do not have a reasonable potential to cause or contribute to exceedances of [WQSs]." *Id.*; *see also id.* at 12-13 (discussing the Region's reasonable potential analysis); Fact Sheet at 6-7 (same).

Significantly, the Region emphasized in its Comment Response Document that "the permit does not authorize discharges to waters of the United States from any seeps at the mine site." RTC at 16; *accord id.* at 17. The Region also stated that "[t]he reissued permit does not allow for, nor does it authorize any variances at the Black Mesa Mine Site."[22] *Id.* at 18.

The Region also explained in its Comment Response Document that, because it had observed seeps at a number of impoundments at the site during a compliance inspection, it had required Peabody to monitor and characterize the seeps. RTC at 16. According to the Region, Peabody's seep identification and characterization analysis had "demonstrate[d] that several seeps have shown concentrations of pollutants above water quality standards."[23] *Id.* at 17. Consequently, in the Permit, the Region has required Peabody to implement a Seep Management Plan at all impoundments. *Id.* This plan requires "monitoring, corrective actions, and the installation of Best Management Practices at those seeps which have been identified with the potential to cause water quality problems." *Id.*

In their petition, BMWC Petitioners fail to address, in any meaningful way, the Region's responses to comments on this issue.[24] In particular, they do not point to any term or condition in the Permit that authorizes discharges from seeps nor do they point to any provision that suggests the Region did, in fact, grant variances as they have alleged. BMWC Petitioners merely make conclusory statements about the Permit's provisions that appear to be contradicted by the administrative record and the Permit itself.

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[22] It appears that BMWC Petitioners may have misread the Fact Sheet. The Fact Sheet indicates that Peabody intended to *pursue* variances for several seeps, not that the Region *granted* such requests. *Compare* Fact Sheet at 10-11 (noting that Peabody's planned approach was to pursue variances for seeps where the seep characterization did not meet WQSs) *with id.* at 12 (explicitly stating that the Region "is not considering a variance as an option at this time").

[23] The seeps identified and characterized in Peabody's analysis appear to be the "21 discharges" to which BMWC Petitioners refer in their Petition. *See* BMWC Br. at 11 (relying on data in the Fact Sheet which is, in fact, a list of the seeps Peabody characterized).

[24] BMWC Petitioners' only statement referring to the Region's response to comments is their claim that "[i]n its response to comments, EPA, [] while acknowledging the ongoing violations of WQS, provides no legal authority for its proposed use of variances." BMWC Br. at 11 (citing RTC at 17-18). This single, conclusory statement fails to address the Region's discussion of this issue in its response to comments, in particular, the Region's avowal that it had not issued a variance.

As noted above in Part IV, petitioners must describe with specificity each objection they are raising and explain *why* the permit issuer's response to Petitioners' comments during the comment period is clearly erroneous or otherwise warrants consideration. As the Board has observed in the past, "absent a meaningful rebuttal" of a permit issuer's explanation in the response to comments document, the Board is "left with a record that is generally supportive" of the permit issuer. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 670 (EAB 2001). Thus, the Board has noted on a number of occasions that "mere allegations of error are insufficient to support review, and [the Board] will not entertain vague and unsubstantiated arguments." *In re Westborough*, 10 E.A.D. 297, 311 (EAB 2002) (internal quotes omitted); *see also In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004) (denying review of issue where petitioner set forth in one sentence and one citation its argument without responding to the permit issuer's extensive response to public comments on the issue); *Town of Ashland*, 9 E.A.D. at 670. Here, not only do BMWC Petitioners fail to meet their burden, but also the administrative record flatly contradicts their assertions. Accordingly, review on these grounds is denied.[25]

3. *BMWC Petitioners Have Not Demonstrated That the Region Failed to Impose Adequate Effluent Limits*

Along lines similar to that of the previous issue, BMWC Petitioners claim that the Permit "fails to provide adequate effluent limits." BMWC Br. at 13. More particularly, they note that the Permit only provides effluent limits for suspended solids, iron, and pH, and that "additional limits are critical where, as here, the limited monitoring data * * * indicates ongoing WQS violations for nitrates, aluminum, chloride, selenium, sulfates, and cadmium." *Id*. at 13 (citing Permit at 9-11); *see also* BMWC Pet. at 6. In referring to the "limited monitoring data," BMWC Petitioners cite pages nine through eleven of the Permit. BMWC Br. at 13. These pages, however, do not contain monitoring data of any kind. *See* Permit at 9-11. The Board believes BMWC Petitioners may have been intending to refer instead to pages nine through eleven of the Fact Sheet. Those pages do discuss pollutant levels, albeit pollutants measured at the seeps, not at the outfalls, and do mention all of the pollutants listed by BMWC Petitioners. *See* Fact Sheet

[25] In their Petition, BMWC Petitioners also claim that the Region "fail[ed] to properly determine that discharges from Peabody's 111 outfalls and 230 impoundments do not present a 'reasonable potential' to cause or contribute to an exceedence of water quality standards based on actual monitoring data from all outfalls and impoundments." BMWC Pet. at 7 (issue number 6). BMWC Petitioners do not, however, address this issue in their supplemental brief. Thus, this one sentence comprises their entire argument challenging the Region's reasonable potential analysis. As discussed above in the text, the Region responded to comments that questioned the Region's reasonable potential analysis. *See* RTC at 14-15. BMWC Petitioners, in failing to address – or even mention – the Region's responses to comments on this issue, have not met their burden of demonstrating that review on this point is warranted.

at 10-11. Thus, the Board considers BMWC Petitioners' effluent limits argument to be premised on the seep monitoring data. Considered in this light, BMWC Petitioners' argument on this point is essentially that the Region clearly erred by failing to impose effluent limits for those pollutants found in concentrations above WQSs at some of the seeps at the site.[26]

As discussed in the previous section, the Region emphasized in its Comment Response Document that the Permit does not authorize discharges from any of the seeps at the site. RTC at 16-18. The Region also stated that "EPA has found no evidence that heavy metals * * * are present in the untreated runoff or that dissolved heavy metals are present in the water discharged from the impoundments, and the commenters have provided no evidence that contradicts EPA's findings." *Id*. at 15. Based on this determination, among other things, the Region concluded that it did not "believe there is a reasonable potential for the discharge to contribute to an exceedance of [WQSs]." *Id*.; *see also id*. at 12-13 (containing additional bases for reasonable potential analysis). The Region further noted that "it had included monitoring in the permit for several additional parameters in order to further verify these conclusions." *Id*. at 13. In considering the seep data and "comparing the water quality of the seeps to that of mine drainage stormwater collected in the impoundments," the Region concluded:

> [M]any pollutant levels found at the seep locations were caused by the seepage activity itself (during which stormwater infiltrates certain soil layers below the impoundment ponds and leaches pollutants found in the soil layers) and not by mining activities themselves. Therefore, the water characterization of the seeps must be considered separately from both the water quality of the stormwater contained in the ponds and the water quality of the discharges from authorized outfalls.

Id. at 17. Finally, the Region outlined its strategy for dealing with the seeps. *Id*. at 16-18; *see also* discussion Part VI.A.2 *supra*.

BMWC Petitioners make no attempt to explain, or even address, why the Region's responses to comments – comments that are the same or very similar to

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[26] The Region argues that, as a threshold matter, the Board should deny review of this issue because "BMWC Petitioners' abbreviated contention lacks any specificity concerning what additional pollutants should be controlled or the bases for including any such additional limitations in the permit." Region Resp. at 31. While Petitioners' allegations should be more specific, the Board disagrees that Petitioners have failed to provide *any* specifics on what pollutants should be controlled. As noted in the text, the Board reads Petitioners' argument to be a challenge to the lack of a permit condition containing limits for the specifically-listed pollutants, i.e., nitrates, aluminum, chloride, selenium, sulfates, and cadmium.

those raised in the BMWC petition – are clearly erroneous or otherwise warrant review. BMWC Petitioners have therefore failed to satisfy their burden of explaining why the Region's response to comments on this issue is clearly erroneous and have failed to demonstrate that the Region failed to impose adequate effluent limits. Review is accordingly denied.

4. *Petitioners Have Not Shown That the Region Clearly Erred in Establishing the Permit's Monitoring Requirements*

BMWC Petitioners also challenge the monitoring requirements in the Permit. They claim that "EPA has granted Peabody a monitoring waiver for 89 of the 111 outfalls covered by the NPDES permit," BMWC Br. at 11, and that such a waiver is inconsistent with the CWA regulations governing waivers, *id*. at 12 (citing 40 C.F.R. § 122.44(a)(2)(iii)-(iv)).[27] Their argument is premised on language in the Permit authorizing Peabody "to monitor only '20% of the outfalls'" Peabody selects. *Id*. at 11 (referring to Permit at 6).

Although they did not explicitly mention monitoring waivers in the comments they submitted on the draft permit, BMWC Petitioners did raise general concerns about the draft permit's monitoring requirements, contending that "all outlets covered by the NPDES must be monitored." BMWC Comments at 6-7; *see also* RTC at 19-20. The Region, in responding to this comment, stated that, in general, "[d]uring discharge, the permit requires daily monitoring for a number of parameters" for all 111 outfalls. RTC at 19. The Region explained, however, that for discharges that occur as a result of precipitation events, "samples may be collected from a sampling point representative of the type of discharge, rather than from each point of discharge. At no time shall less than 20% of discharges be sampled." *Id*. The Region noted that the CWA regulations authorize representative sampling. *Id*. at 20 (citing 40 C.F.R. § 122.41(j)(1)). Because the waiver question had not specifically been raised, the Region did not address it per se in its Comment Response Document. *See* RTC at 19-20; Comments at 6-7. In its response brief, the Region states that it is clear from the record that it did *not* grant a monitoring waiver under 40 C.F.R. § 122.44(a). Region Resp. at 33 n.19, 35.

Upon consideration of this issue, the Board concludes that BMWC Petitioners have failed to demonstrate clear error and, in fact, appear to have misread the Permit's terms and conditions and erroneously concluded that the Region granted a monitoring waiver.[28] As the Region stated in its Comment Response Document

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[27] Petitioners refer to 40 C.F.R. § 124.44(a)(2)(iii)-(iv), but this appears to be a typographical error.

[28] The Board notes that BMWC Petitioners also appear to generally misconstrue the monitoring waiver regulation. The regulation governs waivers for a specific pollutant and is not a wholesale
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and in its response brief, the Permit's terms and conditions authorize representative sampling during precipitation events only; for all other discharges, Peabody must comply with daily monitoring requirements for all outfalls. RTC at 19-20; Region Resp. at 34-35; s*ee also* Permit at 6. The Region maintains that it has not granted a waiver, *see* Region Resp. at 33 n.19, 35, the Board does not see any indication in the Permit that a waiver was granted, and Petitioners have failed to cite any Permit provision that constitutes a waiver. Accordingly, the Board denies review of this issue.[29]

5. *Petitioners Have Not Demonstrated that the Region Clearly Erred or Abused Its Discretion in Relying on the OSM's Technical Review*

BMWC Petitioners contend that the Region's reliance "in whole or in part" on OSM's technical review of Peabody's Sediment Control Plan was an abuse of discretion. BMWC Pet. at 7; *accord* BMWC Br. at 13 (asserting that it was "unlawful" for the Region to continue relying on OSM's technical review). They assert that, when Administrative Law Judge ("ALJ") Holt vacated the life-of-mine permit revision issued by OSM under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201-1328, "by extension" he also vacated OSM's "'minor revision' approving technical review of Peabody's sediment plan." BMWC Br. at 14 (referring to *In re Black Mesa Permit Revision*, DV-2009-1-PR through -8-PR (DOI Office of Hearings and Appeals Jan. 7, 2010) (A.R. at 1348-76)). They also claim that the Region abused its discretion in "fail[ing] to address *vacatur* of OSM's 'technical review' of Peabody's Sediment Control Plan."[30] *Id.* at 13.

The Region addressed a nearly identical comment in its Comment Response Document. *See* RTC at 21; *compare* BMWC Br. at 13-14 *with* BMWC Comments at 10. The Region first explained that, in accordance with a Memorandum of Understanding ("MOU") between it and OSM, it had relied on OSM's technical expertise in reviewing a sediment control plan Peabody had submitted pursuant to

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waiver from all monitoring requirements as BMWC Petitioners seem to suggest. *See* 40 C.F.R. § 122.44(a)(2) (entitled "Monitoring waivers for certain guideline-listed pollutants").

[29] BMWC Petitioners did not raise any other monitoring issues, such as the Region's reliance on the representative sampling regulation at 40 C.F.R. § 122.41(j)(1). Thus, not only have BMWC Petitioners failed to demonstrate that a monitoring waiver was granted, but they also have failed to show that the Region clearly erred in the monitoring requirements it did establish in the Permit.

[30] BMWC Petitioners' challenge to OSM's technical review is of a procedural nature only. They do not challenge either the substance of OSM's review or the Region's determination that the Sediment Control Plan met the requirements of the regulations.

subpart H of EPA's Coal Mining Point Source Category regulations.[31] RTC at 21; *see also* Fact Sheet at 5-6; 40 C.F.R. § 434.80-.85. The Region noted that "[i]t is entirely appropriate for EPA to solicit comments and review from another federal agency with expertise in the subject matter." RTC at 21. The Region emphasized, however, that "EPA is the permitting authority responsible for the approval of [Peabody]'s sediment control plan, not OSM[]." *Id.*; *see also* Fact Sheet at 5-6 (explaining the two agencies' concurrent review process for sediment control plans more fully); OSM Technical Evaluation of Permit at 2 (A.R. at 1276) (stating the two agencies jointly reviewed the plan). The Region did, in fact, make the final approval decision on the plan. *See* Fact Sheet at 5 (stating that the Region had "determined that [Peabody] has met the basic requirements of Subpart H"); *see also id*. at 6 ("The permit approves the Sediment Control Plan as being consistent with the requirements of Subpart H.").

In its Comment Response Document, the Region also specifically addressed the extent to which the ALJ's SMCRA permit decision impacted the Region's NPDES permit decision, including OSM's technical review.[32] The Region first pointed out that the ALJ's decision to vacate the life-of-mine permit was related to NEPA concerns.[33] RTC at 21; *see also* Fact Sheet at 2. Thus, the Region concluded that the decision was "not related to EPA's reissuance of the NDPES permit, nor does it affect OSM[]'s technical review of the sediment control plan."

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[31] The two agencies entered into the MOU following EPA's 2002 revision to the Coal Mining Point Source Category regulations, 40 C.F.R. part 434, in which the Agency added a new subcategory, Western Alkaline Coal Mining, at subpart H. *See* Memorandum of Understanding between EPA Region IX and the Office of Surface Mining Reclamation and Enforcement (OSMRE), Process for Obtaining a NPDES Permit Under Subpart H – Western Alkaline Mine Drainage Category, at 1 (Dec. 19, 2003) (A.R. at 1139) ("MOU"); *see also* Coal Mining Point Source Category Amendments, 67 Fed. Reg. 3370 (Jan. 23, 2002) (codified at 40 C.F.R. §§ 434.80-.85). In the MOU, the agencies explained that, because "[s]ubpart H establishes standards of performance for which there is a considerable overlap of requirements with the Surface Mining Control and Reclamation Act," which OSM administers, they "believe that a sediment control plan for a mine site should be incorporated into one document that is satisfactory to both the CWA and SMCRA permitting authorities." MOU at 1; *see also* 67 Fed. Reg. at 3383 (explaining that EPA believed "sediment control plans developed to comply with SMCRA requirements will usually fulfill [EPA's Western Alkaline Coal Mining] requirements").

[32] Notably, therefore, one of BMWC Petitioners' contentions – that the Region "fail[ed] to address *vacatur*" of the OSM permit – is entirely belied by the administrative record.

[33] In particular, the Region stated that the ALJ vacated the life-of-mine permit decision primarily because "the final [Environmental Impact Statement ("EIS")] alternatives analysis did not reflect the fact that the Black Mesa mine had closed" since the issuance of the draft EIS. RTC at 21; *see also* Peabody Resp. at 14-15 (stating that ALJ Holt vacated OSM's approval of Peabody's SMCRA permit application based on a NEPA procedural error). A review of the decision shows that the Region is correct. *See generally In re Black Mesa Permit Revision*, DV-2009-1-PR through -8-PR (DOI Office of Hearings and Appeals Jan. 7, 2010). ALJ Holt specifically states that he is vacating OSM's permit decision on NEPA grounds and that his decision on this point renders all other motions moot or unnecessary to decide. *Id.* at 6 (A.R. at 1356).

BMWC Petitioners make no attempt to explain, or even address, why the Region's responses to these comments are clearly erroneous or otherwise warrant review. In particular, Petitioners fail to explain why the Region's conclusion – that *vacatur* of OSM's SMCRA permit on NEPA grounds would not impact the technical review of a sediment control plan OSM performed to assist the Region in the separate NPDES permitting decision – was either an abuse of discretion or unlawful as BMWC Petitioners allege. They also fail to explain why the Region's reliance on OSM's expertise was clearly erroneous or an abuse of discretion in light of the subpart H regulation and the MOU. Instead, BMWC Petitioners appear to have simply copied verbatim their comments on the draft permit into their petition. As discussed above, when the permit issuer responds to a comment, a petitioner must do more than reiterate those earlier comments. It must confront the responses to comments.[34] The Board concludes that BMWC Petitioners have failed to satisfy this requirement and thus have failed to demonstrate clear error or an abuse of discretion on the part of the Region. Review is accordingly denied.

6. *Petitioners Have Not Demonstrated That the Region Clearly Erred by Failing to Ensure the Corps Issued CWA Section 404 Permits Before or at the Same Time the Region Issued the NPDES Permit Under Section 402*

BMWC Petitioners also claim that the Region erred in "fail[ing] to ensure that the permitted discharges or outfalls from earthen impoundments have been or will be properly permitted in the first instance by the [Corps] under section 404 of the CWA," 33 U.S.C. § 1344. BMWC Pet. at 7; BMWC Br. at 14. They argue that this task is particularly important here, where the Region's permit covers and "addresses the construction of new impoundments." BMWC Pet. at 7 (citing Permit at 8); BMWC Br. at 14. Nuvamsa Petitioners also bring a CWA section 404 challenge, arguing that the "NPDES [Permit] lacks the proper section 404 permits." Nuvamsa Pet. at 7. Nuvamsa Petitioners allege that, "based on Peabody's compliance record[,] the EPA (in conjunction with the U.S. Army Corps of Engineers) should establish design parameters and any necessary wastewater treatment processes as part of the NPDES permit and section 404 permitting process for mine impounds concurrently."[35] *Id.* at 7.

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[34] Moreover, as noted above in Part III, the Board has consistently denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit, and federal courts have upheld the Board's decision in these cases. *E.g.*, *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd,* 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Wastewater Treatment Facility of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review), *aff'd sub nom. Mich. Dep't Envtl. Quality v. U.S. EPA*, 318 F.3d 705, 708 (6th Cir. 2003).

[35] In this section of their petition, Nuvamsa Petitioners include a lengthy discussion in which they raise concerns about Peabody's CWA compliance at the site and contend that the Region should
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The Region responded to similar comments in its Comment Response Document, explaining that the two permitting programs govern two different types of activities and are issued by two different agencies. More specifically, the Region stated:

> The NPDES permit does not address, nor authorize, any activity which results in the discharge of dredged or fill material to a water of the United States. The NPDES permit renewal is issued under Section 402 of the CWA for the discharge of pollutants through a point source to a water of the United States. A separate CWA Section 404 permit, issued by the U.S. Army Corps of Engineers, is required for any activity at the mine site which results in the discharge of dredged or fill material to a water of the United States.

RTC at 41.

Not only have Petitioners failed to address the Region's responses as is required on appeal, neither group has provided any statutory or regulatory basis for their contention that section 402 and section 404 permits must be issued jointly or concurrently. Assuming that a section 404 permit is even required here, which neither Petitioner has established, Petitioners fail to explain the basis for their claim that EPA, in issuing a section 402 permit, is required to "ensure" that another agency, the *Corps*, is issuing a separate section 404 permit concurrently for a different set of activities at the Site. Moreover, as the Region explained, the Corps is responsible for issuing a section 404 permit if one is needed, not EPA. RTC at 41; Reg. Resp. at 43. For these reasons, the Board denies review of this issue.[36]

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have issued a Compliance Order for several ponds they allege are out of compliance with WQSs. Nuvamsa Pet. at 7-10. To the extent that Nuvamsa Petitioners are arguing that the Board should review the Permit based on compliance concerns, the Board denies this request. As the Board has explained on several occasions, "fear of lax enforcement by the permit issuer is not grounds for review of the permit." *In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 85 (EAB 2010); *accord In re EcoEléctrica, LP*, 7 E.A.D. 56, 70-71 (EAB 1997); *In re Federated Oil & Gas*, 6 E.A.D. 722, 730 (EAB 1997); *In re Brine Disposal Well*, 4 E.A.D. 736, 746 (EAB 1993) (explaining that the Board "cannot undertake to review th[e] permit decision on the basis of [petitioner's] assertion that EPA's inspection (i.e., enforcement) capabilities are inadequate").

[36] In this section of their brief, which is entitled "The NPDES Lacks The Proper Section 404 Permits," Nuvamsa Petitioners raise several arguments whose relevance to their CWA section 404 claim is unclear. For example, they mention enforcement/compliance issues, water allotment rights, and takings claims under the Fifth Amendment to the U.S. Constitution. Nuvamsa Pet. at 7-19. With the exception of the compliance argument, which the Board has addressed above in note 35, to the
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B. *NEPA Issue: Petitioners Have Not Demonstrated That the Region Clearly Erred or Abused Its Discretion in Relying on the CWA Section 511(c)(1) Exemption from NEPA*

The Region did not perform a NEPA analysis in connection with this permitting action because it had concluded that CWA section 511(c), 33 U.S.C. § 1371(c), exempted the permitting action from NEPA requirements. *See* RTC at 3. Both sets of Petitioners challenge the Region's failure to perform a NEPA analysis. BMWC Pet. at 7-8; BMWC Br. at 14-19; Nuvamsa Pet. at 4-7.

NEPA requires all federal agencies, before taking "major Federal actions significantly affecting the quality of the human environment," to prepare a "detailed statement" discussing the environmental impacts of, and the alternatives to, the proposed actions. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). Section 511(c)(1) of the CWA, however, exempts most of EPA's actions under the CWA from this requirement. 33 U.S.C. § 1371(c)(1). It states that, with two exceptions, "no action of the [EPA] taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]." *Id.*; *accord In re Dos Republicas Res. Co.*, 6 E.A.D. 643, 647 (EAB 1996). One of the exceptions is for the issuance of an NPDES permit for "a new source as defined in section [306]." CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1); *see also* 40 C.F.R. § 122.29(c) (discussing potential Environmental Impact Statement requirement).

In its Comment Response Document, in addressing NEPA-related concerns similar to those raised by Petitioners, the Region explained that "EPA actions taken under the authority of the CWA generally do not trigger NEPA." RTC at 3 (citing CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1)). The Region further explained that the 511(c) exceptions did not apply to this action because "EPA is not issuing a NPDES permit for a new source." *Id.* In objecting to the Region's conclusion,

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extent these arguments are, in fact, intended to raise additional issues, they are so vague as to make it difficult to ascertain what precise issue Petitioners are attempting to raise or which, if any, conditions of the Permit they are trying to challenge. Moreover, it is not clear whether Petitioners even preserved these unsubstantiated, vague "issues" for review. Consequently, rather than trying to construe these arguments as separate issues (with the exception of the compliance issue), the Board reads these arguments to have been advanced in support of the overarching issue raised in that section of their brief, i.e., to support the section 404 argument. As such, these arguments have failed to persuade the Board that review is warranted. *See, e.g., In re City of Attleboro*, 14 E.A.D. 398, 443 (EAB 2009) (explaining that, because petitioner bears the burden of demonstrating review is warranted, the Board "will not entertain vague or unsubstantiated claims"); *In re City of Moscow*, 10 E.A.D. 135, 172 (EAB 2001) (same); *In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992) (denying review where petitioner raised vague and unsubstantiated concerns and failed to point to any clearly erroneous findings of fact or conclusions of law in the Region's permitting decision or to identify any specific permit conditions that gave rise to those concerns).

BMWC Petitioners essentially dispute EPA's determination that the permit is not for a "new source." BMWC Br. at 16 (arguing that section 511(c)(1) specifically requires EPA to perform NEPA analyses when it issues NPDES permits to "new sources"); *see also id.* at 18 (referring to "new outfalls" as "new sources"). Nuvamsa Petitioners essentially dispute the Region's determination that the Permit did not involve a "major alteration." Nuvamsa Pet. at 4-5 (arguing that, because OSM had concluded that Peabody's 2004 proposed life-of-mine permit revision was significant and had prepared an Environmental Impact Statement for it, EPA should have similarly concluded that Peabody's 2005 NPDES permit renewal application was a "major alteration," which would have triggered NEPA requirements).

The Board has already considered these same arguments in Part VI.A.1. There, the Board concluded that Petitioners had not shown that the Region clearly erred or abused its discretion in determining that the Permit did not involve a "new source" or a "major alteration" under the new source definition for coal mining. Because Petitioners' arguments are based on these same underlying "new source" and "major alteration" theories, Petitioners' NEPA claim must similarly fail. Accordingly, Petitioners have not demonstrated that the Region clearly erred or abused its discretion in relying on the CWA section 511(c)(1) exemption from NEPA.[37] Review of the Permit on this ground is therefore denied.

C. *ESA Issue: BMWC Petitioners Have Not Demonstrated That the Region's ESA Analysis Was Clearly Erroneous*

BMWC Petitioners assert that the Region failed to meet its ESA section 7 duties, "choosing to skip consultation with [the U.S. Fish and Wildlife Service (FWS)]" and relying instead upon "the analysis contained in an ESA document prepared by a separate federal agency, [OSM]." BMWC Br. at 22; *accord* BMWC Pet. at 8 (referring to ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2)). They claim this was erroneous because OSM's ESA analysis was "for a different agency action" – OSM's issuance of a life-of-mine permit revision for the Black Mesa and Kayenta coal mines – that was subsequently invalidated. BMWC Br. at 22. They further allege that the OSM's Biological Assessment is flawed for numerous reasons. *Id.* at 23-28. Finally, Petitioners argue that the Region also failed to meet its section 7(a)(1) duty. BMWC Br. at 29 (referring to ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1)).

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[37] Much of Petitioners' remaining NEPA arguments concern the policy reasons NEPA analyses are important. *See*, *e.g.*, BMWC Br. at 16, 17-18 mentioning the importance of meaningful public evaluation of a project); Nuvamsa Pet. at 6 (mentioning the importance of NEPA's requirement to take a "hard look"). While the Board agrees with Petitioners that there are many benefits to a NEPA analysis, these policy considerations do not change the fact that this action is exempted by statute from the NEPA requirement.

These assertions are identical to BMWC Petitioners' comments on the draft permit. The Region responded at length to these same comments in its Comment Response Document. *See* RTC at 30-34. The Region first explained that, pursuant to the ESA, it had made a "no effect" determination: "EPA has evaluated the potential effect the discharge authorized by this permit may have on threatened and endangered species * * * [and] has determined that this action will have no effect on threatened and endangered species." *Id*. at 30 (citing Fact Sheet, Section VIII). The Region provided a lengthy explanation for the basis of its "no effect" determination. *Id*. at 30-33. The Region also explained that, when a "no effect" determination is made, "no consultation is required."[38] *Id*. at 30. The Region further noted that, although not required, it had sent a copy of the draft permit and Fact Sheet to FWS "for review and comment during the public comment period" and that "FWS did not send comments objecting to EPA's analysis or determination." *Id*. at 32.

In response to comments alleging the Region inappropriately relied upon OSM's Biological Assessment ("BA"), the Region stated the following:

> *While EPA has made its own assessment relative to the NPDES permitting action*, EPA's conclusion is consistent with the determinations made by [OSM] and FWS for the [BA] for the Life of Mine Permit. Additionally, EPA's limited use of [OSM's] BA (to produce a list of potentially affected species) to make its determination was appropriate. The regulations, 50 C.F.R. § 402.12(g), allow agencies to utilize other biological assessments prepared for similar actions. Commenter makes several claims that the [OSM's] BA was insufficient, and thus, EPA's reliance on the BA was faulty. However, the alleged faults that the commenter points to in [OSM's] BA do not implicate EPA's analysis because *EPA did not rely on any part of the BA which the commenter found to be insufficient*.

Id. at 33 (emphasis added).

Significantly, BMWC Petitioners have not addressed any of the Region's responses to their comments or attempted to explain why the Region's responses to these comments are clearly erroneous or otherwise warrant review. Moreover, BMWC Petitioners' claim – which is primarily based on the Region's alleged reliance on OSM's BA – is misplaced because the Region made its own determina-

[38] For a discussion of "no effect" determinations, see *In re Desert Rock Energy Co.*, 14 E.A.D. 484, 510 n.34 (EAB 2009), and *In re Phelps Doge Corp*., 10 E.A.D. 460, 486 (EAB 2002).

tion, a "no effect" determination.[39] RTC at 32-33; *see also* Fact Sheet at 14. Thus, not only have BMWC Petitioners failed to meet their burden of explaining why the Region's response to their comments is clearly erroneous, but the administrative record also contradicts their claim.[40] Review is accordingly denied.

D. *Nuvamsa Petitioners Have Not Demonstrated That the Region Clearly Erred in Issuing One NPDES Permit for the Black Mesa Complex*

Although not altogether clear, Nuvamsa Petitioners also appear to argue that the Region erred in issuing an NPDES permit for the "Black Mesa Complex." *See* Nuvamsa Pet. at 2-4. They assert that the Black Mesa Complex does not exist as such and that the Site is, in reality, two separate mines and mining operations. *Id.* at 3-4. They claim that each mine has "its own mine plans, coal supply agreements, budgets, physical facilities, operational permits, resources, and employees," and that "[e]ven Peabody and OSM consider them independent." *Id.* at 3. Along these lines, they further assert that, in 1990, U.S. Department of the Interior issued a "permanent-program permit" for a section known as the Kayenta portion, but delayed the "life-of-mine decision" for the Black Mesa portion. *Id.* at 3. Nuvamsa Petitioners seem to be suggesting that EPA should have issued two NPDES permits rather than one. *See id.*; *see also* RTC at 4 (arguing in comments on the draft permit that "EPA must withdraw and republish the proposed permit for two mines"). According to Nuvamsa Petitioners, this "name flim flam" is "misleading and confusing," "prevents meaningful public comment and review" of the draft permit, and allows for "a discharge permit for a mine plan that does not exist." *Id.* at 3-4.

The Region responded to a very similar comment in its Comment Response Document. *See* RTC at 4-5. The Region first explained that it has historically permitted the two mines as one facility under the CWA[41] and that, even though OSM did not issue one operational permit for the site, "EPA's permitting process is not dependent upon [OSM's] decision." *Id.* at 4. Thus, the Region decided to renew the permit consistent with its previously issued NPDES permits for the site. *Id.* The Region further explained that, although Peabody is no longer extracting coal from the Black Mesa Mine, the Region continues to permit the area because "discharges from the site are still possible." *Id.* Among other things, the Region additionally pointed out that the CWA "is applicable to the discharge of all pollu-

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[39] Notably, BMWC Petitioners do not challenge the "no effect" determination.

[40] In fact, for this particular issue, BMWC Petitioners appear again to have simply copied the comments they submitted on the draft permit in their entirety and resubmitted them on appeal without any further argument or discussion. As already discussed in this decision, the Board typically denies review of petitions that only repeat previously submitted comments. *See supra* note 34.

[41] The Region explains in its response that the Site "consists of one contiguous property engaged in coal mining operations under the control of one entity." Region Resp. at 55.

tants from a mine site until the performance bond issued to the facility by the appropriate Surface Mining Control and Reclamation Act (SMCRA) authority has been released." *Id.* at 4-5 (citing 40 C.F.R. §§ 434.52(a), .81(c)).

Significantly, in their petition, the Nuvamsa Petitioners fail to address any of these responses to comments, nor do they allege that the Region's response was clearly erroneous, an abuse of discretion, or otherwise warrants Board review. In fact, the Nuvamsa Petitioners do not even acknowledge that the Region responded to this issue. As the Board has reiterated several times in this decision, a petitioner must describe each objection it is raising and explain *why* the permit issuer's response to the petitioner's comments during the comment period is clearly erroneous or otherwise warrants consideration. Here, the Nuvamsa Petitioners have failed to do so. By failing to rebut the Region's explanation, Nuvamsa Petitioners leave an uncontested record supportive of the Region's approach. Thus, because Nuvamsa Petitioners have failed to demonstrate that the Region clearly erred in issuing one NPDES permit for the Black Mesa Complex, the Board denies review of the Permit on this ground.

E. *Procedural Issue: BMWC Petitioners Have Not Demonstrated That the Region Violated the Procedural Requirements of 40 C.F.R. Part 124*

BMWC Petitioners claim that the Region failed to comply with several procedural requirements. They request the Board remand the Permit so that the Region can correct the alleged procedural violations. BMWC Pet. at 3. The Board considers each alleged error in turn.

1. *BMWC Petitioners Have Not Shown That the Region Failed to Make Monitoring Data Publicly Available*

In their petition, BMWC Petitioners allege that the Region committed procedural error by failing to make certain monitoring data publicly available, presumably in violation of the part 124 procedural regulations governing the contents of the administrative record. BMWC Pet. at 8-9; *see* 40 C.F.R. § 124.9, .18 (containing administrative record requirements). Notably, BMWC Petitioners did not address these assertions further in their supplemental brief. The Region responded to a very similar comment in its Comment Response Document, specifically pointing to locations in the administrative record that seemingly contained the data the commenter sought. *See* RTC at 35-37. In its response brief, the Region again recites numerous locations in the administrative record that appear to contain the data BMWC Petitioners allege was not included. Region Resp. at 50-52. BMWC Petitioners have failed to explain why this cited data is insufficient or what additional monitoring data might be missing. Without such a rebuttal, the administrative record supports the Region's position that it made public all relevant monitoring data. Because BMWC Petitioners have failed to demonstrate that

the Region violated the procedural regulations, the Board denies review of this issue.

2. *BMWC Petitioners Have Not Shown That the Region Failed to Hold Meaningful Public Hearings*

BMWC Petitioners also assert that the Region failed to hold meaningful public hearings, presumably in violation of the part 124 regulations authorizing public hearings. BMWC Pet. at 13; *see* 40 C.F.R. § 124.12 (section governing public hearings). BMWC Petitioners claim that the hearing was held during inclement weather and during the month when Hopis traditionally undertake their religious ceremonies. BMWC Pet. at 9. BMWC Petitioners also claim error because government officials from the Corps, OSM, and FWS did not attend. *Id.*

The Region responded to similar concerns in its responses to comments. With respect to the timing of the meeting, the Region explained that it had "followed advice from Navajo EPA and Hopi Water Resources Department about when and where to hold the meetings." RTC at 7. The Region noted that "[b]oth Navajo and Hopi language interpreters were available at the meetings to ensure non-English speakers could participate." *Id.* at 6. Regarding the weather, the Region stated that it did "not believe the weather was a significant barrier to attending the hearings. * * * While there was light dusting of snow on the evening of February 24, 2010, the roads were clear and EPA officials from San Francisco drove without difficulty on both paved and dirt roads in the vicinity of the hearings." *Id.* at 7. The Region also noted that over 100 people attended the hearings. *Id.* The Region further stated that, "[r]egarding ceremonial commitments, [the Region] understands from conversations at the hearings that no specific ceremonial activities conflicted with the hearing dates but that Hopi objected to holding any hearings during the ceremonial season, which [the Region] understands is based on the lunar cycle during the winter months and encompasses February, March, and April." *Id.* The Region also noted that it had "offered formal government-to-government consultations on the permits in letters dated January 20, 2010 to both the Navajo Nation and the Hopi Tribe." *Id.* at 6. The Region also extended the comment period twice, until April 30, 2010, to accommodate requests for an extension of the comment period. *Id.* Finally, the Region explained that "[t]he decision of other agencies to attend the hearings is at the discretion of the other agencies." *Id.* at 8.

Significantly, BMWC Petitioners have not addressed the Region's responses to comments nor have they explained why the Region's responses are clearly erroneous or otherwise warrant review. BMWC Petitioners have also failed to point to

any specific regulatory provisions that the Region has violated.[42] *See Russell City*, 15 E.A.D. at 97 (requiring petitioner to provide more than allegations of procedural violations). Petitioners have therefore failed to demonstrate that the Region violated the part 124 procedural regulations; thus, review of this issue is denied.

VII. *CONCLUSION AND ORDER*

For the foregoing reasons, the Board concludes that neither BMWC Petitioners nor Nuvamsa Petitioners have demonstrated that review of NPDES Permit No. NN 0022179 is warranted on any of the grounds presented. The Board therefore denies review.

So ordered.

[42] For example, while it may be preferable for other agencies to attend EPA's public hearing, Petitioners do not point to any provision of the part 124 regulations that includes such a requirement.