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

In re: Salt River Project Agricultural Improvement and Power District – Navajo Generating Station Tribal NSR Permit No. T-0004-NN	NSR Appeal No. 16-01

RESPONSE OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT TO PETITION FOR REVIEW OF TRIBAL MINOR NEW SOURCE REVIEW PERMIT FOR THE NAVAJO GENERATING STATION

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INTRODUCTION

Salt River Project Agricultural Improvement and Power District ("SRP") submits this response to the Petition filed by Mr. Shawn Dolan ("Petitioner") appealing the compliance monitoring conditions in a minor New Source Review ("NSR") permit issued by the U.S. Environmental Protection Agency ("EPA" or the "Agency"). That permit grants SRP conditional approval to construct a refined coal treatment system ("RCTS") at the Navajo Generating Station ("NGS").

SRP respectfully requests that the Environmental Appeals Board ("EAB" or the "Board") deny review. Petitioner has not properly preserved the issues and arguments raised in this appeal and has not otherwise met his burden of proof. Indeed, Petitioner's comments in this permitting proceeding amounted to less than one page of conclusory statements to which EPA adequately responded. Further, the arguments Petitioner now seeks to present for the first time in these proceedings lack merit. Petitioner also improperly raises issues over which the Board has no jurisdiction. For all of these reasons, review should be expedited, and the Petition should be dismissed.

STATEMENT OF THE CASE

SRP is an owner and the operator of NGS, a coal-fired power plant composed of three 750 megawatt generating units. Petitioner has challenged a permit authorizing SRP to construct an RCTS at that facility. The RCTS would allow SRP to treat the coal used at NGS to reduce emissions of nitrogen oxides ("NOx") and mercury. Technical Support Document at 3 ("TSD"), EPA-R09-OAR-2016-0026-0001, Attachment 2 to EPA Response. SRP sought a permit for the project pursuant to EPA's Tribal Minor NSR rule because the RCTS project would result in a small increase in particulate matter ("PM") emissions. To control this minimal increase, the permit requires the installation and operation of dust collectors and baghouses at key equipment

for the RCTS. *Id.* The permit also imposes controls to mitigate the impacts of the additional truck deliveries that will be needed to supply the RCTS with the cement kiln dust and calcium bromide additives used to refine the coal. *Id.* at 6.

These are the core provisions of EPA's permit, but Petitioner does not challenge any of them. Instead, Petitioner seeks to require the use of what he describes as "US EPA Alternative Method 082" ("ALT 082") to monitor opacity at "all sources listed in the NSR filing,"[1] rather than the methods EPA required. Pet. at 1. Only one provision of the permit being appealed—permit condition X.B.4—addresses opacity monitoring requirements. That provision requires a weekly survey of visible emissions to be conducted by someone trained in Method 22 for the newly permitted RCTS equipment using a baghouse or dust collector to control PM. If any visible emissions are detected, the provision requires a 6-minute observation using EPA Method 9 to determine the opacity of the emissions. The other opacity monitoring requirements applicable at NGS, which Petitioner also appears to want revised, preexisted the Tribal Minor NSR Permit[2] and were not at issue in the permit proceeding. *See* Summary of Responses to Public Comments on Proposed Tribal Minor New Source Review Permit at 8 (Apr. 2016) ("RTC"), EPA-R09-OAR-2016-0026-0021, Attachment 3 to EPA Response. The only other provisions of the permit Petitioner identified in his comments—permit conditions X.A.4 and 5 and X.B.5 and 8—address other types of inspection or control, not opacity monitoring.

[1] Although the request is vague, Petitioner most likely refers to the equipment (both existing and new) listed in the "Equipment Description" Table on page 4 of the permit.

[2] The existing visible emissions and opacity monitoring requirements for NGS are set out in the Federal Implementation Plan ("FIP") for Navajo Generating Station, Navajo Nation. That rule, which was not at issue in the permit proceeding, specifies the use of Method 9 to quantify any visible emissions from dust from the coal handling and storage facilities and use of "continuous opacity monitoring systems" or "COMS" to monitor opacity of emissions inside the stacks of the generating unit. 40 C.F.R. § 49.5513(d)(3) and (e)(1) and (8).

Opacity is not itself a pollutant. Rather, opacity is "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." *See, e.g.*, 40 C.F.R. § 49.123(a). Method 9 is the EPA promulgated method for the "Visual Determination of the Opacity of Emissions From Stationary Sources." 40 C.F.R. pt. 60, app. A-4. Method 9 uses a certified human observer to quantify and record 15-second observations of plume opacity under specified conditions. *Id.* ¶ 2. Under Method 9, opacity is expressed in intervals of 5 percent. Consecutive observations are averaged over a specified period—in most cases, 6 minutes. *Id.* Because Method 9 was designed to measure plumes, *id.*, it generally is not specified for fugitive emissions. Method 22—Visual Determination Of Fugitive Emissions From Material Sources—is the EPA promulgated method for fugitive emissions from material processing, handling, and transfer operations. 40 C.F.R. pt. 60, app. A-7, Method 22 ¶ 2.1 Because Method 22 requires only the determination of whether visible emissions occur, and does not require the determination of opacity levels, it does not require use of a certified observer. In the Tribal Minor NSR Permit, EPA specified visible emission surveys be performed by an individual trained in Method 22 to determine the existence of visible emissions and the use of Method 9 to quantify those emissions if any are observed.

Petitioner argues that Methods 9 and 22 are inadequate and that EPA should have specified use of ALT 082. ALT 082 is an example of what EPA calls a "broadly applicable alternative test method." According to EPA, these are methods that EPA has determined "[s]ource owners and operators may voluntarily use . . . subject to their specific applicability . . . to comply with requirements under 40 CFR parts 60, 61, and 63." *See, e.g.,* 77 Fed. Reg. 8865, 8866 (Feb. 15, 2012) (approving ALT 082). Because EPA approves these alternatives based on specific authority found in parts 60, 61, and 63 of the federal code, EPA limits their applicability

to those parts. *Id.* When adopting such alternatives, EPA also makes clear that they "are not mandatory but permissive," and that sources are not required to employ them. *Id.*

ALT 082 is EPA's designation for the Agency's limited approval for use in Parts 60, 61, and 63 of a method adopted by the American Society for Testing and Materials ("ASTM") for the determination of opacity in lieu of Method 9. That method—ASTM D7520-09 Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere[3]—establishes procedures for the certification of a digital still camera, analysis software, and method to determine the opacity of plumes, collectively referred to as a "Digital Camera Opacity Technique" ("DCOT"). DCOT relies on a certified human operator to record digital still images and a human analyst to define the portion of a plume image and background to be analyzed by the software. ASTM D7520-09 ¶¶ 1.2, 3.2.4, 4, 9. The criteria for certifying DCOT and the DCOT operator, and the conditions specified for valid observations, are the same as Method 9. *Id.* ¶ 9. In other words, the ASTM method does not require the use of individuals or technology that are any more accurate at quantifying plume opacity than Method 9. On its face, the method also is not applicable to fugitive emissions, like those that might occur as a result of truck traffic on dirt roads.[4]

Although EPA often relies on consensus standards adopted by ASTM and other organizations in rules and in permits—and in some cases is required to consider their appropriateness—ASTM D7520-09 differs from many other such standards in one very significant respect: there is only one commercially available DCOT. That product—called

[3] The method EPA approved is not the current version of the ASTM method. The version EPA approved as ALT 082 is only applicable to stacks with a diameter less than 7 feet.

[4] Although the ASTM committee that adopted ASTM D7520 has in the past considered a similar method for determining the opacity of fugitive emissions, that method has not been approved.

DOCS II Software as a Service—was developed by and is available only under license from a company called Virtual Technology LLC, the President and Chief Financial Officer of which is Petitioner in this appeal—Mr. Shawn Dolan.[5]

In his comments and appeal, Petitioner describes himself only as a "long time resident of Arizona, a proponent of the coal fired utility industry, an avid outdoors man and frequent user of the National Park System." Pet. at 5. Although he may be those things, he also is a person who stands to benefit financially from each and every use of ALT 082. Although it is conceivable that other DCOT products may be certified under the current version of ASTM D7520 in the future, that appears unlikely any time soon. Petitioner's product is proprietary and is not available for purchase. Virtual Technology only licenses its certified DCOT analysis software as a "service." Each digital image taken with DOCS II must be uploaded to a cloud service where it then is accessed and analyzed by a Virtual Technology employee (or someone licensed by the company to perform that analysis with its proprietary software) for a fee. *See* DOCS II GSA Pricing at http://www.virtuallc.com/docs.asp.

Petitioner clearly is sensitive to the impact his self-interest may have on the credibility of his comments and permit appeal. He not only failed to disclose in his comments on the permit his relationship to the technology he seeks to have imposed, he initially submitted his comments without any attribution. *See* Administrative Record Index at 3, Items 6.6, 6.8, and 6.9. Then, when filing the Petition, Mr. Dolan styled his appeal as a petition on behalf of himself and the "General Public." Of course, the "General Public"—whatever that means—did not comment on the permit or participate in the submission of this appeal. The only comment submitted in the

[5] *See, e.g.,* Virtual Technology LLC Company History, *http://www.virtuallc.com/aboutus.asp*.

permit proceeding regarding the specified visible emissions monitoring methods was the one-page document submitted by Mr. Dolan that is attached to the Petition at Attachment 5.

STANDARD OF REVIEW

Petitioner bears the burden of showing that the permit conditions in question are based on "[a] finding of fact or conclusion of law which is clearly erroneous," or represent "[a]n exercise of discretion or an important policy consideration that the Board should, in its discretion, review." 40 C.F.R. § 49.159(d)(3); *see also In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007).[6] Generally, only issues and reasonably available arguments raised with reasonable specificity and clarity during the comment period are preserved for appeal. 40 C.F.R. § 49.159(d)(3). As with the Prevention of Significant Deterioration ("PSD") appeal process, the Board's power to review Tribal Minor NSR permits should be only sparingly exercised with most permit conditions being finally decided by the permitting authority. *Prairie State*, 13 E.A.D. at 10 (quoting the preamble to the Part 124 regulations at 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)); *see also Revisions to Procedural Rules Applicable in Permit Appeals*, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013).

"In reviewing an exercise of discretion by the permitting authority, the Board applies an abuse of discretion standard." *In re Pio Pico Energy Center*, PSD Appeal Nos. 12-04 through 12-06, slip op. at 10 (EAB Aug. 2, 2013) (citations omitted). "The Board will uphold a permitting authority's reasonable exercise of discretion if that decision is cogently explained and supported in the record." *Id.*

[6] Although this is an appeal of a minor NSR permit pursuant to 40 C.F.R. § 49.159(d) and not a PSD appeal under 40 C.F.R. § 124, the Board's PSD appeal procedures and decisions are relevant and informative as EPA made clear the reviews should be similar when it delegated Tribal Minor NSR permit review authority for sources located in Indian Country to the Board. 76 Fed. Reg. 38,748, 38,766 (Jul. 1, 2011) ("review of minor NSR permits will be similar to review of major PSD permits"); 71 Fed. Reg. 48,696, 48,717 (Aug. 21, 2006) ("review process for the minor NSR program parallels the process for PSD permits").

Moreover, the Board will "accord broad deference to permitting authorities with respect to issues requiring the exercise of technical judgment and expertise." *Prairie State*, 13 E.A.D. at 72; *Pio Pico*, slip op. at 10 ("On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record."); *In re Ash Grove Cement Co*., 7 E.A.D. 387, 403 (EAB 1997) ("The Board traditionally assigns a heavy burden to persons seeking review of issues that are quintessentially technical."); *In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996) ("absent compelling circumstances, the Board will defer to a Region's determination of issues that depend heavily upon the Region's technical expertise and experience").

Petitioner must do more than merely present an alternative to the agency's approach:

> Of course, a petitioner cannot gain review of a permit merely by presenting an alternative theory regarding a technical matter. If the Board is presented with conflicting expert opinions, as is the case here, we will "look to see if the record demonstrates that the [permitting agency] duly considered the issues raised in the comments and if the approach ultimately selected * * * is rational in light of all the information in the record, including the conflicting opinions." *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).

In re Steel Dynamics, Inc., 9 E.A.D. 165, 180 n.16 (EAB 2000); *In re Cardinal FG Co.*, 12 E.A.D. 153, 167 (EAB 2005). Petitioner also cannot simply repeat comments but must demonstrate that the permitting agency's response to those comments is deficient. *See, e.g., Pio Pico*, slip op. at 10; *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review."); *In re Newmont Nevada Energy Investment, LLC, TA Power Plant*, 12 E.A.D. 429, 486-88 (EAB 2005)

(denying review where, in objecting to the adequacy of visible emission testing requirements, the petitioner failed to cite any legal authority to support its positions, or provide any plausible basis in fact or law to question the permitting agency's treatment in its response to comments); *In re Hadson Power*, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on draft permit).

ARGUMENT

I. Petitioner Fails To Demonstrate How EPA's Response to Petitioner's Comments Was Inadequate.

The Board should deny review of this petition because Petitioner fails to meet his burden to show that EPA's response to his comments was clearly erroneous or an abuse of discretion. 40 C.F.R. § 49.159(d)(3); *see also In re Desert Rock Energy Co., LLC,* 14 E.A.D. 484, 519-20 (EAB 2009) ("As a preliminary procedural matter, the Board requires that a petitioner 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 (e.g., is an abuse of discretion."). Absent such showing, the Petition must be denied.

Petitioner commented that EPA should require ALT 082 for "all opacity limits with [sic] the permit and facility," specifically referring to draft permit conditions "X-A.4 and 5" and "[X]-B.4 and 5 and 8." Comment at 1, EPA Doc. No. EPA-R09-OAR-2016-0026-0009, Pet. at 17, Attachment 5. He supported this comment with a brief statement contending that ALT 082 is superior to Method 9 and that use of ALT 082 is justified here because he has personally observed emissions from NGS in excess of various opacity limits. *Id.* He claimed that EPA has determined that ALT 082 (1) is the best available control technology ("BACT") for opacity

monitoring in the "Ferro Alloy"[7] NESHAP final rule, (2) is "less expensive, more reliable and repeatable than Method 9,"[8] and (3) would be beneficial because its camera images could be used for "community relations improvements." *Id.* He did not present any data, information, or further explanation to support his conclusory claims.

EPA considered and properly addressed Petitioner's brief comments, rejecting the use of ALT 082 and explaining the reasons that Methods 9 and 22 are adequate and appropriate for the RCTS project. RTC at 8. EPA noted that the increases in PM from the NGS RCTS Project are expected to be minor, as that term is defined in 40 C.F.R. § 49.152. Because other existing emission points at NGS require the use of Method 9, EPA decided it was not justifiable or reasonable to require SRP to use a different measurement method, i.e., ALT 082, for the few minor emissions points authorized by this permit action. In response to Petitioner's unsubstantiated comment that ALT 082 should be required because he had personally observed opacity violations, EPA explained that any such emissions would have been from existing emission points that are outside the scope of this permit action:

> With respect to secondary formations from NGS that significantly exceed the stack exit opacity, the stack opacity limits or the method by which stack exit opacity is measured is not up for review under this minor NSR permit action. Coal dust emissions

[7] Petitioner's citation to the Ferroalloy NESHAP is misleading and not controlling. That NESHAP resulted from rulemaking under Clean Air Act § 112—not a BACT proceeding. And, EPA does not make BACT determinations, or any other such determination, with respect to emissions monitoring. Although the cited rule does require the use of ALT 082 for some major emission sources starting in June 2017, that requirement is not binding on, or even persuasive with respect to, EPA's technical determinations in unrelated proceedings, especially those that involve different activities and levels of emissions. The Ferroalloys NESHAP also is currently subject to both a judicial challenge in the U.S. Court of Appeals for the D.C. Circuit and an outstanding petition for administrative reconsideration of the very requirement to use ALT 082 cited by Petitioner. *See* May 31, 2016 Status Report, *Felman Production, LLC, v. EPA*, No. 15-1296 (D.C. Cir.), ECF No. 1615477.

[8] There is nothing in the Agency's designation of ALT 082 as an alternative test method to support Petitioner's assertion that the method is better.

> from existing coal handling and storage facilities, fly ash and storage, road sweeping activities, crushers, grinding mills, screening operations, belt conveyors, truck loading or unloading operations, or railcar unloading stations are also outside the project scope of this minor NSR permit action.

Id. EPA emphasized that although NGS has an obligation to meet the opacity limits and control measures in the 2010 FIP,[9] allegations of opacity violations from the existing emission points do not justify requiring a different compliance method for the minor RCTS emission points authorized by the permit.

Instead of refuting EPA's responses to his comments as required, Petitioner merely expands on his comments with information and arguments that are not supported by any discernable documentation, let alone material in the administrative record.[10] Pet. at 6-11. Specifically, Petitioner provides no support for his assertions that his technology is "less expensive, more reliable and repeatable than Method 9." Comment at 1, Pet. at 17, Attachment 5. Instead, despite acknowledging that the existing emission points are covered under a different permit issued in 2008, Pet. at 7, Petitioner attempts to critique EPA's response by providing images of alleged opacity exceedances, such as Figure 1 depicting what he claims is "the 'coal dust cloud' generated from the process NGS uses for coal loading and handling operations,"[11] and images of smoke plumes generated at a Method 9 observer certification facility that have no relationship at all to NGS. Pet. at 6. As discussed above, this "new" information does nothing to rebut EPA's conclusion that Methods 22 and 9 are adequate and appropriate for the minor emission sources that are the subject of the permit and this appeal. In short, Petitioner's concern

[9] *See* 40 C.F.R. § 49.5513(d) and (e).

[10] Petitioner raises multiple arguments that could have been included in his comments in the first instance. For the reasons discussed below in Section II, those unpreserved issues and arguments should not be considered.

[11] Figures 4-6 similarly pertain to operations that were not at issue in the permit proceeding.

seems to be with the existing major emission points at NGS, and he provides nothing to demonstrate why EPA was wrong not to specify ALT 082 for the few new minor emission points authorized by the permit.[12]

Petitioner's final arguments cite an unspecified EPA study—not in the administrative record or even adequately identified—that he represents concluded that Method 9 and ALT 082 results are "nearly identical." Pet. at 10. To the extent that is true, that conclusion hardly rebuts EPA's refusal to require the alternative method in lieu of Method 9.[13] He further represents that unidentified "studies" suggest that human observers are not capable of accurately recording observations longer than 6 minutes. *Id.* Again, even if that unsupported conclusion is true, it also does not rebut EPA's conclusion that Method 9 is adequate for the 6-minute observation required under permit condition X.B.4.

Monitoring is a fundamentally technical matter requiring the exercise of technical expertise and judgment. EPA exercised its technical expertise and judgment in deeming Methods 22 and 9 adequate (and therefore rejecting ALT 082) and adequately explained its reasons for doing so. Absent compelling circumstances, the Board defers to EPA's technical determinations and should do so in this case, as Petitioner has offered none. *In re Envotech, L.P.*, 6 E.A.D. at 284. He has done nothing more than present an alternative to EPA's monitoring approach, which EPA duly considered. That is insufficient to gain review of the permit. *In re Steel Dynamics, Inc.*, 9 E.A.D. at 180 n.16.

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[12] To the extent Petitioner seeks application of ALT 082 to monitor dust emissions on site roadways under permit condition X.A.4, that application is beyond the scope of the method, which does not apply to fugitive emissions.

[13] EPA's refusal to require, or to authorize, use of ALT 082 also is completely consistent with the Agency's designation of the method as nothing more than an option for sources owners and operators under Parts 60, 61, and 63 that choose to use it. SRP has not asked for, and does not support, that option.

In sum, Petitioner has failed to argue, let alone support the argument, that EPA's response to comments was clearly erroneous or otherwise warrants consideration. Thus, review should be denied.

II. Petitioner Asks the Board To Address Issues and Arguments That Were Not Preserved for Review and That Are Unsupported.

The Board also should deny review of the Petition because it raises issues that were not presented during the public comment period. To gain review, Petitioner must show that "any issues being raised were raised during the public comment period . . . to the extent required" by the regulations. 40 C.F.R. § 49.159(d)(3). The regulations require that public comments "must raise *any reasonably ascertainable issue with supporting arguments* by the close of the public comment period (including any public hearing)." 40 C.F.R. § 49.157(c)(1) (emphasis added).[14] Failing to raise issues during the public comment period precludes them from being presented before the Board. *See, e.g.*, *In re Christian Cty. Generation, LLC*, 13 E.A.D. 449, 457 (EAB 2008) ("In applying [40 C.F.R. § 124.13 and § 124.19(a)], the Board has routinely denied review where the issue was reasonably ascertainable but was not raised during the comment period on the draft permit.") (internal citation and quotations marks omitted).

Requiring that all reasonably ascertainable issues and supporting arguments be raised during the comment period "is not an arbitrary hurdle . . . rather, it serves an important function related to the efficiency and integrity of the overall administrative scheme." *Prairie State*, 13 E.A.D. at 59 (quoting *In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005)). As the Board has previously stated, the "'effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems

[14] This is nearly identical to the requirement in 40 C.F.R. § 124.13 that a person dissatisfied with any permit condition "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10."

with draft permits before they become final.'" *In Re Pio Pico Energy Ctr.*, slip op. at 36 (quoting *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999) in discussion of requirements of 40 C.F.R. §§ 124.13, 124.17(a)(2)).

Here, Petitioner seeks to raise for the first time issues or supporting arguments that were reasonably ascertainable during the comment period. He offers no explanation or justification as to why they could not have been raised during the comment period. Therefore, the Board must deny review of these new issues and arguments, which lack any support in the record. Specifically, the Board must disregard the following arguments:

- That various EPA offices have "essentially retire[d]" Method 9 and replaced it with ALT 082. Pet. at 5-6;
- That the National Institute of Standards and Technology Act ("NISTA") requires the use of ALT 082 over Method 9. Pet. at 6, 10, 11;
- That ALT 082 does not change the stringency of monitoring. Pet. at 6;
- That Method 9 is subject to various uncertainties, including arguments regarding the inadequacy of Method 9 training with respect to selection of background. Pet. at 7-10;
- That Method 9 cannot be properly employed at NGS, including arguments regarding the availability of observers who meet the training, certification, and lack of bias required to employ Method 9 or the ability of observers to obtain proper space and positioning to perform the test within the boundaries of NGS. Pet. at 10;
- That EPA's Next Generation Compliance Strategic plan supports use of Alternative 082. Pet. at 11;
- That ALT 082 provides records that are more "auditable and verifiable" than Method 9. Pet. at 11; and
- That ALT 082 is more appropriate than Method 9 because of the effect of NGS emissions on regional haze, National Parks, and public health and tourism, Pet. at 10-11, and that it use would result in increased control of fugitive sources, *id.* at 11.

The issues and supporting arguments discussed above were all "reasonably available" during the public comment period. Petitioner has not argued otherwise. Therefore, these

arguments cannot be raised for the first time on appeal. Because they are not properly before the Board, they must be dismissed.

But even if the Board considered these arguments, they lack merit. All of the above arguments are presented in the Petition as assertions or opinion without any identifiable source of support. Petitioner's representation of the law also are in error. For example, although the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), which amended the NISTA (*see* 15 U.S.C. § 272 note), generally directs federal agencies to "use technical standards that are developed or adopted by voluntary consensus standards bodies," that directive does not apply here. The NTTAA consensus standards provisions have long been understood to apply only to two types of agency action: procurement activities and regulations. *See* 81 Fed. Reg. 4673 (Jan. 27, 2016), OMB Circular No. A-119 at 4 and § 5 (2016). EPA's issuance of a Tribal Minor NSR permit fits neither of these categories.

Additionally, the NTTAA directive, by its own terms, does not apply if use of the consensus standard would be "impractical." OMB Circular No. A-119 § 5(c). Although the NTTAA was not raised during the comment period, EPA has nevertheless explained why use of ALT 082 would be impractical at NGS, noting in particular that EPA Method 9 is currently in effect at most other emission points throughout NGS and that using a different monitoring methodology for the minimal emissions due to the RCTS project would therefore not be appropriate. RTC at 8. Moreover, EPA has previously explained that use of ALT 082 is impractical when monitoring is not required on a daily basis, as is the case with respect to NGS. *See* NESHAP for Brick and Structural Clay Products and Clay Ceramics Manufacturing, 80 Fed. Reg. 65,470, 65,519 (Oct. 26, 2015). Had this issue been raised in comments and preserved for review, EPA could have reiterated this point.

III. Petitioner Improperly Seeks To Impose Requirements That Go Far Beyond the Scope of the Permit.

Petitioner seeks to impose ALT 082 as the method for monitoring opacity at "*all sources listed in the NSR filing*." Pet. at 1 (emphasis added). To the extent Petitioner's request relates to sources not identified in permit condition X of the April 20, 2016 Tribal NSR Permit T-0004-NN, the appeal must be dismissed for lack of jurisdiction.

The Board's authority to review final minor NSR permits issued by EPA for sources in Indian Country is found in 40 C.F.R. § 49.159(d). Review, however, is not unlimited. It must be sought "[w]ithin 30 days after a final permit decision has been issued." 40 C.F.R. § 49.159(d)(2). Although Petitioner's appeal is timely with respect to sources identified in Permit condition X, to the extent he seeks to include other sources located at NGS, it is not.

EPA's issuance of the Tribal Minor NSR Permit for the RCTS did not affect the finality of previous permits, including PSD Permit No. AZ 08-01A. In issuing the new minor source permit, EPA clearly distinguished the PSD provisions from the minor NSR provisions and stated several times that the "PSD portion of this permit remains effective and is unchanged." *See* Final Permit at 1, Attachment 5 to EPA Response. Therefore, any challenge to sources not listed in permit condition X is not appropriately before the Board. In other words, the Board does not have jurisdiction to consider those challenges. *See* 40 C.F.R. § 49.159(d)(2); *In re Envotech, L.P.*, 6 E.A.D. at 266 (dismissing as untimely an appeal received after the filing deadline); *In re Gateway Generating Station*, PSD Appeal No. 09-02 (EAB Sept. 15, 2009) (Order) (dismissing as untimely petition for review of a permit issued in 2001 where petitioner set forth no special circumstances to justify the eight year delay).

IV. Expedited Consideration of This Appeal Is Warranted.

Given the obvious flaws in the petition, as discussed above, and the substantial harm to the NGS owners caused by delay of the effectiveness of the Tribal Minor NSR Permit, SRP respectfully requests that the Board expedite review and act immediately to dismiss the Petition.

As explained above, the permit at issue authorizes the installation of an RCTS. Construction and operation of the RCTS will allow SRP to reduce NOx and mercury emissions from NGS, and it will allow the facility to indirectly take advantage of a federal tax credit through a reduced coal price. Both outcomes are of significant importance to SRP. But before SRP can secure those benefits, the RCTS vendor must construct two new coal feed conveyor belts to divert coal from the facility's existing conveyor system to two mixing pugmills, where the coal will be mixed with calcium bromide and cement kiln dust additives, and two new return belt conveyors to return the coal to existing conveyor system. TSD at 3. The RCTS will also require storage facilities for the calcium bromide and cement kiln dust, including three 150 ton storage silos, two 20 ton day bins, an 8,700 gallon storage tank, and two 450 gallon day tanks. *Id*. Further, the permit requires the vendor to outfit the RCTS and its associated equipment with emission controls. Final Permit at 3. The conveyors will be equipped with two high efficiency dust collectors. *Id*. The silos and day bins will be controlled by baghouses. *Id*.

Coordinating and completing this work will take a significant amount of time, resources, and effort. The completion of the project is only made viable by the availability of a federal tax credit that incentivizes production of refined coal to reduce NOx and mercury emissions. *See* TSD at 5. The availability of that tax credit is time limited: based on a December 2009 certification date of the RCTS that will be installed at NGS, the credit is only available until December 2019. Construction of the project itself will likely take approximately 6 months.

Further delay will render the project increasingly cost-ineffective and could jeopardize it and the emission reductions it will achieve.

Moreover, the subject of this Petition—the methodology used to assess visible emissions from NGS—is not one of the core matters the permit addresses. As explained above, the authorization of the RCTS is the reason SRP sought the permit and the permit's primary focus. As an ancillary matter, the permit also includes a requirement that visible emissions from the dust collectors and baghouses that will be constructed as part of the RCTS be monitored in accordance with EPA Method 9, the only relevant provision of this permit to which Petitioner objects.[15] Resolution of this collateral issue should not be allowed to delay and potentially jeopardize construction of the project. Indeed, the rules that govern this proceeding specifically provide that when EAB review of a final permit is requested, only "the specific terms and conditions of the permit that are the subject of the request for review must be stayed." 40 C.F.R. § 49.159(a)(2).[16] The Petition only addresses opacity monitoring, an issue that is severable from the other permit conditions, and only the opacity monitoring provision should be stayed pending EAB review. Accordingly, to the extent the Board believes it must address any argument raised by Petitioner, SRP requests that the EAB issue an order clarifying that only the opacity monitoring provisions of the permit are stayed pending review and that construction of the RCTS may begin.

[15] As explained in Section III of this Response, it appears that Petitioner seeks relief that would go far beyond the scope of the new provisions added during proceedings to authorize the construction of the RCTS project. The Board has no jurisdiction to consider Petitioner's apparent request that the permit be amended to require or authorize use of ALT 082 to monitor opacity at any equipment other than that associated with the RCTS project.

[16] In this respect the regulations governing EAB review of Tribal Minor NSR permits differ from those applicable to other PSD appeals and are akin to the provisions found in 40 C.F.R. §124.16.

CONCLUSION

SRP respectfully requests that the Board deny the Petition for Review. SRP further requests that the Board rule immediately in order to ensure timely resolution of the challenge to the Tribal Minor NSR Permit, which is necessary to allow for timely construction of the RCTS project.

Date: June 16, 2016

Respectfully submitted,

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STATEMENT OF COMPLIANCE

I hereby certify that the foregoing RESPONSE OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT TO PETITION FOR REVIEW OF TRIBAL MINOR NEW SOURCE REVIEW PERMIT FOR THE NAVAJO GENERATING STATION complies with the requirements of 40 C.F.R. § 124.19(d) and the Board's May 27, 2016 Scheduling Order. The word count is 6,694 using the word count function in Microsoft Word.

Date: June 16, 2016 */s/ Aaron M. Flynn*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT TO PETITION FOR REVIEW OF TRIBAL MINOR NEW SOURCE REVIEW PERMIT FOR THE NAVAJO GENERATING STATION were served through the Environmental Appeal Board's electronic filing system and by electronic mail to the following, this 16th day of June, 2016:

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