

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

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In re: )  
)  
)  
Navajo Generating Station ) Appeal No. NSR 16-01  
)  
Tribal Minor New Source Review )  
#T-0004-NN )  

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**EPA REGION 9'S RESPONSE TO  
PETITION FOR REVIEW**

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## INTRODUCTION

The EPA Environmental Appeals Board (“EAB” or “Board”) should deny Shawn Dolan’s (“Petitioner”) Petition for Review challenging the final Minor New Source Review permit issued by EPA Region 9 pursuant to the Federal Minor New Source Review Program in Indian Country (the Tribal Minor NSR Rule) at 40 CFR 49.151–49.161 on April 20, 2016 (“Minor NSR Permit”). Region 9 issued the Minor NSR Permit to Salt River Project Agricultural Improvement and Power District (“SRP” or “Permittee”) authorizing the construction and operation of the Refined Coal Treatment System (“RCTS”) at the Navajo Generating Station (“NGS”), which is a project involving the installation of additional equipment at an existing coal-fired power plant. The additional equipment will be used to treat coal so as to reduce emissions of nitrogen oxides (NO<sub>x</sub>) and mercury during combustion. Region 9’s Minor NSR Permit authorizing construction of the RCTS is fully supported by the administrative record, including the proposed permit, Technical Support Document (“TSD”), Response to Comments document (“RTC”) and final permit.<sup>1</sup>

Petitioner’s sole argument on appeal is that Region 9 should have included an additional method for monitoring visible emissions, known as Alternative Method 082, which incorporates the Digital Camera Opacity Technique (“DCOT”), in the Minor NSR Permit for the RCTS. Petitioner submitted a comment to the Region during the public comment period asserting that the proposed Minor NSR Permit for the RCTS should be amended to include this method. The Region appropriately considered and responded to that comment, explaining its finding that EPA-approved Methods 9 and 22 were sufficient for monitoring visible emissions for purposes of the Minor NSR Permit for the RCTS project, particularly as those methods were consistent

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<sup>1</sup> These documents are labeled Exhibits 1-3 and 5, respectively.

with those already in use at the larger NGS facility. In exercising its technical judgment, EPA reasonably determined, in light of the limited information provided in the comment, and other information in the record, that EPA-approved Methods 9 and 22 were sufficient for monitoring visible emissions for the RCTS project, and that it did not need to include Alternative Method 082. Petitioner has failed to confront the Region's response by explaining why the Region's response to comments was clearly erroneous, and has failed to demonstrate that EPA's determination not to include Alternative Method 082 in the Minor NSR Permit was clearly erroneous or otherwise warrants Board review. Therefore, the Petition should be denied.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On February 2, 2016, Region 9 proposed to issue the Minor NSR Permit to SRP to allow construction of the RCTS as part of its coal treatment process at NGS. *See* proposed Minor NSR Permit, Exhibit (hereinafter "Ex.") 1.<sup>2</sup> NGS consists of three existing 750 megawatt ("MW") coal-fired electric generating units located on the Navajo Reservation, near Page, Arizona, with a total generating capacity of 2250 MW. Ex. 2 (TSD) at 7. Before Region 9 proposed the Minor NSR Permit at issue in this case, NGS had already been regulated under the CAA by a Prevention of Significant Deterioration ("PSD") Permit that was issued in 2008<sup>3</sup>, as well as Federal Implementation Plans ("FIPs") promulgated by Region 9 in 2010 and 2014, among other CAA requirements. *See* Ex. 2 at 7-8.

In general terms, the RCTS project will allow for the treatment of coal with cement kiln dust and calcium bromide to further reduce NO<sub>x</sub> and mercury emissions. *See* Ex. 2 at 3. The

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<sup>2</sup> While Petitioner provided substantial additional material as attachments to his Petition for Review, none of these was designated as an Excerpt of Record. As discussed below, many of the attachments to the Petition are not in the administrative record and should be disregarded on that basis. Region 9 is providing Excerpts of Record as Exhibits to this Response.

<sup>3</sup> EPA issued an Administrative Amendment to the PSD Permit in a separate action on 08/26/2015. *See* Ex. 2 at 7.

Region's proposed Minor NSR Permit and TSD described the RCTS project in detail. The TSD also discussed the basis for the Region's authorization of the RCTS project through issuance of a tribal minor NSR permit consistent with the Tribal Minor NSR Rule. *See* Ex. 1 at 10 (Special Conditions Pursuant to 40 CFR 49.151-49.161 – Minor NSR in Indian Country)<sup>4</sup>; Ex. 2 at 3-7.

As part of its analysis, Region 9 carefully analyzed the emissions increases that would result from construction and operation of the RCTS project. EPA determined that the emissions from the project would not exceed the thresholds for a major modification that would trigger PSD review, and determined that most of the emissions associated with the RCTS would not exceed the Tribal Minor NSR Rule's minor source permitting thresholds at 40 CFR 49.153(a) and Table 1. Ex. 2 at 10 (Table 5).

Region 9's analysis of the RCTS project determined, however, that the project would result in increases in particulate matter (PM) and particulate matter less than or equal to 10 micrometers in diameter (PM<sub>10</sub>) (hereinafter collectively referred to as "PM" or "particulate matter") above the minor NSR permitting thresholds in the Tribal Minor NSR Rule. Ex. 2 at 13 (Table 5).<sup>5</sup> Our TSD stated:

The RCTS will result in emissions increases in PM, PM<sub>10</sub>, and PM<sub>2.5</sub>. The emissions increases are primarily from increased truck delivery traffic on existing unpaved roads at NGS, and to a lesser extent from the new dust collectors to be installed on the belt conveyors and new baghouses associated with CKD storage silos and day bins.

Ex. 2 at 4. To minimize particulate matter emissions, the proposed Minor NSR Permit established Operating Requirements that imposed limits on Vehicle Miles Traveled ("VMT") and established work practice standards for the unpaved roads. Ex. 1, Conditions X.A.(1) – (6).

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<sup>4</sup> The Minor NSR Permit was attached as an addition to the PSD permit for administrative convenience. The RCTS project did not trigger PSD review, and, accordingly, the Region did not modify the conditions of the PSD permit for NGS as part of this minor Tribal NSR permitting action. *See* Ex. 2 at 7.

<sup>5</sup> EPA determined that emissions of particulate matter with a diameter less than or equal to 2.5 micrometers (PM<sub>2.5</sub>) from the RCTS project would be less than the minor NSR permitting thresholds. Ex. 2 at 4, 13 (Table 5).

The RCTS project design incorporated dust collectors and baghouses for material handling and storage during the application of cement kiln dust and calcium bromide to the coal, which serve to control PM emissions. See, e.g., Ex. 1 at 3-4; Ex. 2 at 3, 5, 17-18. The proposed permit also included Monitoring and Recordkeeping Requirements for the unpaved roads, as well as for the dust collectors and baghouses that control emissions from material storage and handling operations as part of the RCTS. Ex. 1, Conditions X.B.(1) – (8).

The only permit condition that appears to be at issue in this Petition for Review is Condition X.B.4 of the Minor NSR Permit. See Petition (“Pet”), NSR Appeal No. 16-01, Docket #1, at 18. Condition X.B.4 of the proposed Minor NSR Permit required a weekly visible emissions survey for the RCTS equipment that will have particulate matter emissions, specifying:

The [visible emissions] survey shall be performed during daylight hours by an individual trained in EPA Method 22 while the equipment is in operation. If visible emissions are detected during the survey, the permittee shall take corrective action so that within 24 hours no visible emissions are detected.

Ex. 1, Condition X.B.4.<sup>6</sup>

The public comment period for the proposed Minor NSR Permit for the RCTS began on February 2, 2016 and closed on March 7, 2016. Region 9 provided an opportunity for a public hearing, but no one requested one. Ex. 3 (RTC) at 2.

Region 9 received seven sets of comments on the proposed Minor NSR Permit, including the comment from Petitioner. Ex. 3 at 3. Petitioner originally submitted his comment to Region 9 anonymously through the regulations.gov system, but sent an email after the close of the comment period identifying himself as the author of the anonymously submitted comment. Ex. 4

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<sup>6</sup> Condition X.A.4 of the proposed permit also required SRP to limit visible fugitive dust emissions on site roadways to below 20% opacity. Ex. 1.

(Email to Larry Maurin from Shawn Dolan dated April 6, 2016). Significantly, Petitioner's comment did not include any attachments or other supporting materials. Attachment ("Att.") 5 to Petition. The only issue raised by Petitioner in the comment concerned the proposed Minor NSR Permit's method for monitoring and measuring visible emissions. *Id.* The comment recommended that the Minor NSR Permit include Alternative Method 082 for the measurement of visible emissions. *Id.*

After careful consideration of all public comments regarding the proposed Minor NSR Permit, including Petitioner's comment, Region 9 issued the final Minor NSR Permit for the RCTS project on April 20, 2016, Ex. 5 (Final Permit), and issued a public notice announcing its final permit decision on April 25, 2016, as indicated on pages 2-3 of the Petition. Along with the final permit, the Region issued its RTC responding to each of the comments, including the comment from Petitioner. See Ex. 3. The final Minor NSR Permit included a few changes compared to the proposed permit, and relevant to this appeal, Region 9 revised X.B.4, the condition concerning visible emissions monitoring, to read as follows:

The [visible emissions] survey shall be performed during daylight hours by an individual trained in EPA Method 22 while the equipment is in operation. If visible emissions are detected during the survey, the permittee shall perform a 6-minute EPA Method 9 observation. If visible emissions during the 6-minute EPA Method 9 observation exceed 7 percent opacity, the Permittee shall take corrective action so that within 24 hours no visible emissions are detected.

Ex. 5 at 11. The proposed permit had specified a weekly EPA Method 22 visible emissions survey for the RCTS equipment. Ex. 1 at 10, Condition X.B.4. Region 9 added the provisions requiring Method 9 opacity readings to the final permit in response to comments from SRP. Ex. 3 (RTC) at 11-12 (Response 9).

The EAB notified Region 9 of the filing of the Petition for Review of the Minor NSR Permit for the RCTS at NGS, and ordered the Region and SRP to file any response on or before June 16, 2016. EAB Scheduling Order, May 27, 2016, NSR Appeal No. 16-01, Docket #3.

### **STANDING AND STANDARD AND SCOPE OF REVIEW**

This Petition challenges Region 9's issuance of a tribal minor NSR permit under EPA's Tribal Minor NSR Rule. EPA's regulations governing the issuance and review of such tribal minor NSR permits are at 40 CFR 49.151-49.161. 40 CFR 49.159(d)(1) establishes the basis for administrative review of these permits by the Board.

The threshold pleading requirements for administrative review of a tribal minor NSR permit are set forth in 40 CFR 49.159(d)(3), and provide among other things that a "petition must include a statement of the reasons supporting the review, including a demonstration that any issues being raised were raised during the public comment period . . . ." <sup>7</sup> The petition must also demonstrate that a region's decision in issuing the permit was clearly erroneous or otherwise merited review. *Id.* Because the regulations for administrative review of tribal minor NSR permits are substantially identical to those governing review of PSD permits in 40 CFR section 124.19, it is reasonable to infer that the Board will apply the same standard of review and look to its Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits (March 27, 2013). *See, e.g.*, 40 CFR 124.19(b)-(c), (e), (h) (referring to PSD permit and/or other new source review permit appeals); *In re Campo Landfill Project*, 6 E.A.D. 505, 512 (EAB 1996) (noting Board would apply the standard of review and otherwise exercise its authority

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<sup>7</sup> The Tribal Minor NSR Rule provides that public comments made during the public comment period "must raise any reasonably ascertainable issue with supporting arguments by the close of the public comment period (including any public hearing)." 40 CFR 49.157(c)(1).

consistent with 40 CFR part 124 in considering petition for review of major non-attainment NSR permit, pursuant to special delegation of authority).

Thus, when considering a petition for review of a PSD permit, the Board

first considers whether the petitioner has met key threshold pleading requirements such as timeliness, standing, and issue preservation. . . . [I]n order to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised with reasonable specificity during the public comment period.

*In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006) (internal citations and footnotes omitted). The burden of establishing that issues have been preserved for review rests squarely with the petitioner. *In re Encogen Cogeneration Facility* (“*Encogen*”), 8 E.A.D. 244, 250 (EAB 1999).

In addition to preserving the issues for appeal, it is the petitioner’s burden to specify objections to the final permit and *explain why* the permit issuer's response to those objections is clearly erroneous or otherwise warrants review. *In re Energy Answers Arecibo, LLC v. EPA*, PSD Appeal Nos. 13-05 through 13-09, slip op. at 11 (EAB March 25, 2014) (“*Energy Answers*”), *petition for review dismissed, Sierra Club De P.R. v. EPA*, 815 F.3d 22 (D.C. Cir. 2016), *rehearing en banc denied by Sierra Club De P.R. v. EPA*, 2016 U.S. App. LEXIS 10133 (D.C. Cir., June 2, 2016) (“The Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit.” (citations omitted)); *see also, e.g., In re: City of Palmdale* (“*Palmdale*”), 15 E.A.D. 700, 722 (EAB 2012) (“a petitioner must, as a threshold matter, explain why the permit issuer’s previous response to its objections is clearly erroneous or otherwise deserves review and may not simply reiterate comments it submitted on the draft permit”); Revised Order Governing Petitions for Review of CAA NSR Permits at 4-5 (petitioner must demonstrate that issue raised in comments and explain why response to comments is inadequate). Alternatively, a petitioner may

demonstrate that an issue or argument was not reasonably ascertainable during the public comment period. 40 CFR 124.13; *see Encogen*, 8 E.A.D. at 250 n.8.

Even where these threshold pleading requirements have been met, the EAB's review of a tribal minor NSR permit is discretionary. 40 CFR 49.159(d)(3). For discretionary review of PSD permits, the Board has stated:

Ordinarily, the Board will not review a PSD permit unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review ... [using] an abuse of discretion standard. . . . The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. . . .

*Palmdale*, 15 E.A.D. at 704-05 (citations, quotation marks, parentheticals and brackets omitted).

The Board defers to EPA's expertise in matters concerning scientific or technical judgment. *Id.* at 705 ("On matters that are fundamentally technical or scientific in nature, the Board will typically 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.")

## **ARGUMENT**

Petitioner has failed to meet his burden of confronting Region 9's response to his comment by explaining why that response was clearly erroneous. In addition, Petitioner has failed to show that Region 9's technical determination, based on the record before it, that Methods 9 and 22 were sufficient for visible emissions monitoring in the Minor NSR Permit for the RCTS project was clearly erroneous or otherwise warrants Board review. For both of these reasons, the Petition for Review should be denied.

**I. Petitioner Has Failed to Confront Region 9’s Response to His Comment by Explaining Why the Response Was Clearly Erroneous**

**A. Petitioner Has Failed to Meet His Burden of Explaining Why Region 9’s Response to His Comment Was Clearly Erroneous**

On March 7, 2016, during the public comment period, Petitioner submitted a comment as reflected in Attachment 5 to the Petition. (“Att. 5”) The comment asserted that Region 9 should revise several conditions of the proposed Minor NSR Permit<sup>8</sup> to “include the use of EPA Alternative Method 082 (Digital Camera Opacity Technique (DCOT)) for the monitoring of visible emissions.” *Id.* Petitioner’s comment also included one paragraph under the heading “Rational” [sic] and one paragraph under the heading “Experience.” The first paragraph stated that EPA Alternative Method 082 had been determined “in the Ferro Alloy NESHAP final rule as BACT for opacity measurement . . . .” *Id.* The comment also stated that the Region’s Minor NSR Permit “is a BACT driven permit and thus should include BACT for all monitoring requirements unless BACT is cost prohibitive.” *Id.* The comment then asserted that Alternative Method 082 “would be less expensive, more reliable and repeatable than Method 9[.]” and that the results could be posted to a public website “for community relations improvement.” *Id.* The comment also stated that Methods 22 and 9 are “very subjective” legacy methods and that camera based technology is cost effective. *Id.*

The comment concluded by providing the commenter’s personal observations concerning coal dust, road dust and other emissions from the NGS facility. *Id.* Petitioner indicated that he had personally “witnessed secondary formations from NGS that significantly exceed the stack exit opacity (measured beyond the condensed water vapor).” *Id.* Additionally, the comment

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<sup>8</sup> Of the five cited permit conditions (X.A.(4) and (5) and X.B.(4), (5) and (8)), only two have any relevance to visible emissions, or opacity: X.A.(4) and X.B.(4). As stated above, only Condition X.B.4 appears to be at issue in the Petition. Pet. at 18.

stated: “I have witnessed coal dust emissions at opacities greater than 60% hundreds of feet in the air and at water level in the lake Powell main channel just north of Antelope Point marina.”

*Id.* Petitioner’s comment did not include or attach any additional materials or information to support its assertions, including those concerning cost-effectiveness, expense, reliability or replication.

EPA considered Petitioner’s comment, and in response, Region 9 stated:

EPA has determined that Methods 9 and 22 are adequate for monitoring the increases in emissions of particulate matter from the NGS RCTS Project. . . . EPA Method 9 is currently in use at NGS for most of the other emission points at the facility that release any amount of particulate matter, including the main stacks, coal handling operations, fly ash and soda ash storage, and lime storage silos. The opacity limits and method of opacity measurements for these other operations at NGS are not up for review in this proposed minor NSR permit. For these reasons, EPA does not consider Alternative Method 082 –Digital Camera Opacity Technique (DCOT) – to be appropriate for implementation at the NGS facility solely for the particulate matter emission increases due to the RCTS project.

Ex. 3 at 8. The Region, therefore, explained that the visible emission monitoring methods included in the RCTS permit, Methods 9 and 22, were the same methods used in the existing operations at the NGS facility, and that it found those methods to be adequate for visible emissions monitoring for the RCTS project. With regard to the portion of the Petitioner’s comment in which he relayed his personal observations concerning the NGS facility, Region 9 further responded by explaining:

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 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. NGS is expected to comply with all opacity limits and control measures in the 2010 source-specific FIP codified at 40 CFR 49.5513(d).

Ex. 3 at 8.<sup>9</sup> We note that where an issue is raised only generically during the public comment period, the permit issuer is not required to provide more than a generic justification for its decision. *Encogen*, 8 E.A.D. at 251 n.12 (citing *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 148 (EAB 1999)). Here, the Region's response to Petitioner's comment was appropriate, given the nature of the comment, which generally promoted Alternative Method 082 but did not provide detail or evidence to support its assertions and provided little if any explanation as to why Methods 9 and 22 would not be sufficient.

In support of Petitioner's argument that Condition X.B.4 of the Minor NSR Permit for the RCTS should be revised to include Alternative Method 082, the Petition for Review states that Petitioner disagrees with the Region's response to his comment, Pet. at 6, but Petitioner does not *explain why* the Region's response was incorrect, based on the information in the administrative record at the time of the Region's final permit decision. For instance, Petitioner does not specifically dispute the Region's determination that it would be appropriate to impose a visible emissions monitoring approach for the RCTS project that is consistent with the approach already being taken for the NGS facility as a whole pursuant to previous CAA permit actions, nor does he explain why it would be appropriate to include an additional and/or different visible emissions monitoring method for one small portion of the NGS operation when the remainder of the operation, which uses a different, long-established approach, is not up for review in this minor NSR permitting action. Likewise, Petitioner does not point to any information submitted in his comment or elsewhere in the administrative record before the Region when it made its final permit decision that demonstrates clear error in the Region's determination that Methods 9 and

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<sup>9</sup> The Minor NSR Permit addresses only the RCTS project, and thus the FIPs EPA has promulgated and the PSD permit that Region 9 issued for NGS, and any issues determined therein, were not re-opened as part of this minor NSR permit action. See generally Ex. 2 at 7-8.

22 were adequate and it need not include Alternative Method 082 in the Minor NSR Permit. This failure by Petitioner to confront EPA's response to comments should result in denial of Board review. *Energy Answers*, slip op. at 11 ("The Board has consistently denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit") (citations omitted); *Palmdale* 15 E.A.D. at 722 (petitioner must explain why permit issuer's previous response to its objections is clearly erroneous or otherwise deserves review and may not simply reiterate comments on draft permit).

**B. Information and Arguments Presented in the Petition for Review But Not Presented to Region 9 During the Comment Period Are Not Part of the Record for Review and Therefore Cannot Be Introduced on Appeal**

We note that rather than confronting the rationale in the Region's response to comments and explaining why Petitioner believes the Region's response was clearly erroneous based on the record before it, the Petition filed with the Board instead attempts to introduce new information and additional arguments that were not included in or with the comment that was submitted to Region 9 during the public comment period, starting with some general statements on page 5, which are followed by a lengthy section entitled "Findings of Facts," including information, arguments, and copies of numerous photographs, none of which was included in Petitioner's comment. Pet. at 5-11. Petitioner's brief also includes an additional section entitled "Findings of Discretion" that is also composed almost entirely of information that was not included in Petitioner's comment. *Id.* at 11-12. Finally, the Petition includes numerous references and attachments. *Id.* at 13-18. With the exception of the information provided in Attachment 5 (Petitioner's comment), this material was not included in Petitioner's comment or presented to the Region during the public comment period, when the Region could have considered it before making its final permit decision, nor does the Petition suggest otherwise.

This new information and these additional arguments should not be considered in this appeal, because they were not provided to the Region during the public comment period, and are not part of the record for the Region's decision. All reasonably ascertainable issues and all reasonably available arguments supporting a commenter's position must be submitted by the close of the public comment period on a draft permit. 40 CFR 49.157(c)(1). "The Board frequently has emphasized that, to preserve an issue for review, *comments made during the comment period must be sufficiently specific*. . . On this basis, we have often denied review of issues raised on appeal that the commenter did not raise with the requisite specificity during the public comment period." *In re City of Attleboro, MA Wastewater Treatment Plant*, 14 E.A.D. 398, 406 (EAB 2009) (and cases cited therein) (emphasis added; internal citations omitted); *see also In re Maui Electric Company ("Maui Electric")*, 8 E.A.D. 1, 8-12 (EAB 1998) (declining to consider issue where petitioner generally referred to document in comments but did not raise specific issue related to the document in comments). As the Board has clearly explained, "[t]he purpose of these regulations is to ensure that all matters are first raised with the permit issuer. In this manner the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *Maui Electric* at 9. Moreover,

[w]hile it is appropriate to hold permitting authorities accountable for a full and meaningful response to concerns fairly raised in public comments, *such authorities are not expected to be prescient in their understanding of vague or imprecise comments.... "At a minimum, commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issues being raised. Absent such specificity, the permit issuer cannot meaningfully respond to comments."*

*In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999) (quoting *In re Rockgen Energy Center*, 8 E.A.D. 536, 547-48 (EAB 1999)) (emphasis added). Further, where an issue is raised only generically during the public comment period, the permit issuer is not required to provide more

than a generic justification for its decision, and the petitioners cannot raise more specific concerns for the first time on appeal. *Encogen*, 8 E.A.D. at 251 n.12 (citing *Knauf*, 8 E.A.D. at 148). In this case, with the exception of the information and arguments included in Attachment 5, Petitioner simply did not meet his obligation to raise all reasonably ascertainable issues in his comments, and did not raise the specific issues discussed in his Petition in his comments, thus he cannot raise this information and these arguments in this appeal.<sup>10</sup>

**II. Petitioner Fails to Demonstrate Clear Error in Region 9’s Determination That Methods 9 and 22 Were Sufficient for Monitoring Visible Emissions in the Minor NSR Permit and That the Addition of an Alternative Method Was Unnecessary**

The Board should also deny review because Petitioner fails to demonstrate clear error in Region 9’s technical determination, based on the information in the record at the time of the Region’s final permit decision, that the use of Methods 9 and 22 for visible emissions monitoring in Condition X.B.4, without the addition of Alternative Method 082, was sufficient to assure compliance for the RCTS project.

As noted above, Petitioner’s only challenge to the Minor NSR Permit is Region 9’s choice of the compliance monitoring method for visible emissions in the Minor NSR Permit. Specifically, Petitioner asserts that Region 9 should have included Alternative Method 082 in addition to Methods 9 and 22 in Condition X.B.4 of the Minor NSR Permit. Pet. at 18. The standard for establishing compliance monitoring in the tribal new source review regulations is found at 40 CFR 49.155(a)(3), which provides:

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<sup>10</sup> As mentioned above, alternatively, a petitioner may demonstrate that an issue or argument was not reasonably ascertainable during the public comment period, *see* 40 CFR 49.159(d)(3); *Encogen*, 8 E.A.D. at 250 n.8. However, Petitioner here has not argued that this is the case, nor does the Petition specifically object to the changes to Condition X.B.4 between the Region’s proposed and final permit decisions, including the Region’s addition of Method 9 to that condition as described *supra* at 5-6. In fact, the Petition specifically proposes that Condition X.B.4 include the Alternative Method 082 that Petitioner advocates as an addition to Method 9. Pet. at 18. Thus, Petitioner has not made the necessary demonstration that any issues or arguments he raises for the first time in his Petition were not reasonably ascertainable during the public comment period.

The permit must include monitoring requirements sufficient to assure compliance with the emission limitations and annual allowable emissions limits that apply to the affected emission units at your source. The reviewing authority may require, as appropriate, any of the requirements in paragraphs (a)(3)(i) and (ii) of this section.

(i) Any emissions monitoring, including analysis procedures, test methods, periodic testing, instrumental monitoring and non-instrumental monitoring. Such monitoring requirements shall assure use of test methods, units averaging periods and other statistical conventions consistent with the required emission limitations.

Thus, the applicable regulations required that Region 9 include in the Minor NSR Permit monitoring requirements “sufficient” to ensure compliance.

For the new material handling and storage emission units associated with the RCTS, the proposed and final Minor NSR Permits incorporated the fabric filter dust collectors and baghouses proposed as part of the RCTS project’s design to minimize particulate matter emissions from the RCTS equipment. See Ex. 2 at 17-18; Ex. 5 at 3-4. As discussed above, in the final Minor NSR Permit, Region 9 revised X.B.4, the condition requiring visible emissions monitoring for this equipment to ensure its proper operation, to read as follows:

The [visible emissions] survey shall be performed during daylight hours by an individual trained in EPA Method 22 while the equipment is in operation. If visible emissions are detected during the survey, the permittee shall perform a 6-minute EPA Method 9 observation. If visible emissions during the 6-minute EPA Method 9 observation exceed 7 percent opacity, the Permittee shall take corrective action so that within 24 hours no visible emissions are detected.

Ex. 5 at 11.<sup>11</sup>

The sole issue to be resolved by the Board is straightforward. Has Petitioner demonstrated clear error in Region 9’s technical decision that the use of Methods 22 and 9, without Alternative Method 082, would be sufficient to measure visible emissions from the RCTS equipment, based on the information in the record at the time of the Region’s decision?

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<sup>11</sup> As noted above, Region 9 added the provisions requiring Method 9 opacity readings to the final permit in response to comments from SRP. Ex. 3 (RTC) at 11-12 (Response 9).

Petitioner did not submit any evidence during the public comment period to indicate that visible emissions monitoring using only Methods 9 and 22 would not be sufficient to ensure compliance, or that clearly demonstrated that Alternative Method 082 would be necessary to include to ensure compliance. Petitioner's comment provided only conclusory statements about Alternative Method 082, and his personal observations about emissions from NGS, and did not include additional materials or information to support the comment's assertions, including those assertions concerning cost-effectiveness, expense, reliability or replication. The comment also did not address why it would be necessary or appropriate to include Petitioner's proposed monitoring method for the RCTS project, which is a small component of the much larger NGS facility that uses other visible emissions monitoring methods. That Petitioner favors an additional method of compliance monitoring does not satisfy his burden to demonstrate that Region 9's decision in this regard with respect to the Minor NSR Permit is clearly erroneous.

It is well settled in challenges to PSD permits that the permitting authority's technical decision in designating a method for measuring visible emissions is entitled to substantial deference. *See In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 231-233 (EAB 2000), *motions for reconsideration and clarification denied, In re Steel Dynamics, Inc., PSD Appeal Nos. 99-4 & 99-5* (July 13, 2000 and Aug. 2, 2000); *Cf. In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 144 (EAB 1994) (stating: "[W]here an alternative control option has been evaluated and rejected, those favoring the option must show that the evidence 'for' the control option clearly outweighs the evidence 'against' its application."). Here, Petitioner fails to demonstrate clear error in Region 9's determination, based on the record before it, that measuring visible emissions by Methods 9 and 22 in Condition X.B.4 would be appropriate or that his desired method was unnecessary.

The Region's proposed permit required only Method 22 for the RCTS equipment.

Petitioner commented:

Given that camera based technology exists, is certified as BACT for opacity, and is cost effective, I do not believe that any permit should be promulgated without its requirement. Methods 22 and 9 are very subjective legacy methods and COMS are not representative of the exit opacity values.

Att. 5. Region 9 responded to this comment, stating:

"EPA has determined that Methods 9 and 22 are adequate for monitoring the increases in emissions of particulate matter from the NGS RCTS Project . . . Method 9 is currently in use at NGS for most of the other emission points at the facility that release any amount of particulate matter, including the main stacks, coal handling operations, fly ash and soda ash storage, and lime storage silos.

Ex. 3 at 8. Region 9's response thus concluded that it would not be appropriate to require an additional or different method for the relatively few and small emission points permitted in the RCTS project. *Id.* Accordingly, Region 9's technical determination that the use of Methods 9 and 22 was "sufficient" for measuring visible emissions for the equipment at the RCTS project without the addition of the alternative method proposed by the commenter comported with the applicable provisions under the Tribal Minor NSR regulations in 40 CFR 49.155(a)(3), and was reasonable for the Minor NSR Permit. And, as discussed above, Petitioner has not explained why the Region's rationale concerning the consistency of visible emissions monitoring methods for the NGS facility as a whole is clearly erroneous.

In sum, Region 9 reasonably concluded, based on the information in the record, that requiring the use of Methods 9 and 22 to monitor visible emissions from the RCTS project, the same visible emissions monitoring approach used elsewhere for the NGS facility to ensure compliance with other CAA requirements, would be sufficient to assure compliance with the emission limits for the dust collectors and fabric filter baghouses in Condition X.B.4 of the Minor NSR Permit, and that the addition of Alternative Method 082 was not necessary for this

particular project. Petitioner has failed to show that this determination was clearly erroneous or otherwise warrants Board review.

### CONCLUSION

For all of the reasons stated above, Region 9 respectfully requests that the Board deny review of Region 9's final Minor NSR permit for the RCTS project at NGS.

Date: June 13, 2016

Respectfully submitted,

*/s/ Julie Walters*

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**STATEMENT OF COMPLIANCE WITH WORD COUNT LIMITATION**

I hereby certify that this Response to Petition for Review submitted by EPA Region 9, exclusive of the Table of Contents, the Table of Authorities, the Exhibits attached to this Response, this Statement of Compliance, and the attached Certificate of Service, contains 5998 words, as calculated using Microsoft Word word-processing software.

*/S/ Julie Walters*

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Julie Walters

## CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of **EPA REGION 9'S RESPONSE TO PETITION FOR REVIEW, including the attached Exhibits**, in the matter of Navajo Generating Station, EAB Appeal No. NSR 16-01, to be served by electronic mail upon the persons listed below.

Dated: June 13, 2016

*/S/ Julie Walters*

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