IN RE CHUKCHANSI GOLD RESORT AND CASINO WASTE WATER TREATMENT PLANT

NPDES Appeal Nos. 08-02, 08-03, 08-04 & 08-05

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided January 14, 2009

Syllabus

Caroline Rodely, Alan Rodely on behalf of himself and other downstream residents ("the Downstreamers"), Madera Irrigation District, and Jo Anne Kipps (collectively "Petitioners") each petitioned the Environmental Appeals Board ("Board") to review the final National Pollutant Discharge Elimination System ("NPDES") permit that Region 9 (the "Region") of the United States Environmental Protection Agency issued under the Clean Water Act, 33 U.S.C. § 1342, to the Chukchansi Gold Resort and Casino Waste Water Treatment Plant ("Facility") on December 4, 2007 ("Permit"). The Permit authorizes the existing Facility to discharge treated effluent from its wastewater treatment plant into an unnamed creek on tribal land.

In their collective appeals, Petitioners argue that the Region's permit decision is deficient in several respects. First, Ms. Rodely and the Downstreamers assert that the Region erred in allowing discharge into a dry creek bed. Second, Ms. Rodely asserts that the Region failed to conduct an Environmental Impact Report under California law and failed to adequately assess effects on wildlife. Third, the Downstreamers allege that the Region failed to properly identify and explain changes made to the final Permit as required by 40 C.F.R. § 124.17(a)(1). Fourth, Madera Irrigation District challenges the Region's determination not to include in the Permit an effluent limitation for phosphorus. Finally, Jo Anne Kipps raises three issues: (1) the failure to include Appendix A to the Region's response to comments document with the notice of the permit decision that she received; (2) the sufficiency of monitoring for trihalomethanes; and (3) the sufficiency of investigation and monitoring for total coliform organisms ("TCO") and turbidity.

Held: Ms. Rodely and the Downstreamers have not identified any factual or legal error in the Region's determination to allow the permitted discharges; nor have they explained why the Region's responses to previous and related objections were clearly erroneous, an abuse of discretion, or otherwise warrant Board review as required by 40 C.F.R. § 124.19(a).

The Region was not required to do an Environmental Impact Report, a requirement of California rather than federal law, and the Region complied with the federal Endangered Species Act. Thus, the Board concludes that the Region did not fail to assess potential effects on wildlife.

The Downstreamers' bald assertion that the Region failed to properly identify and explain changes made to the final Permit as required by 40 C.F.R. § 124.17(a)(1), without any specific example, is not enough to satisfy their burden under 40 C.F.R. § 124.19(a) to demonstrate that review is warranted.

Madera Irrigation District did not explain with sufficient specificity why the Region's finding that the permitted discharge would not result in a degradation of water quality, and its determination that no specific phosphorus effluent limitation was necessary, were clearly erroneous, an abuse of discretion, or otherwise warrant review. *See* 40 C.F.R. § 124.19(a).

Finally, the Board holds that, under 40 C.F.R. §§ 124.15, -.17(a), Jo Anne Kipps was entitled to receive, and did receive, notice of the Region's permit decision. The Region was not required to include the Region's response to comments document, including Appendix A, with the notice of the permit decision. Moreover, Ms. Kipps did not dispute that Appendix A was otherwise made "available" in accordance with the regulations. Further, Ms. Kipps did not articulate any basis for review of the Region's determinations with respect to trihalomethane monitoring. However, with respect to the effluent investigation and monitoring of TCO and turbity, the Board finds that the Region's explanations for the monitoring frequencies imposed in the Permit are inconsistent and substantively lacking. As such, the record does not provide a sufficient basis for review of the Region's monitoring determinations. Accordingly, we remand the NPDES Permit issued to the Chukchansi Gold Resort and Casino to the Region for further consideration of the TCO and turbidity investigation and monitoring requirements imposed. Review of all other issues is denied.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

Caroline Rodely (NPDES Appeal No. 08-02), Alan Rodely on behalf of himself and other downstream residents ("the Downstreamers")[1] (NPDES Appeal No. 08-03), Madera Irrigation District (NPDES Appeal No. 08-04), and Jo Anne Kipps (NPDES Appeal No. 08-05) (collectively, "Petitioners") each petitioned the Environmental Appeals Board ("Board") to review the final National Pollutant Discharge Elimination System ("NPDES") permit that Region 9 (the "Region") of the United States Environmental Protection Agency ("EPA" or "Agency") issued under the Clean Water Act ("CWA"), 33 U.S.C. § 1342, to the Chukchansi Gold Resort and Casino Waste Water Treatment Plant ("Chukchansi Water Treatment Plant" or "Facility") on December 4, 2007 ("Permit").[2] *See* Administrative Record

[1] Alan Rodely filed his petition, pro se, on behalf of the "Downstreamers," a number of residents who live less than a mile downstream from the Chukchansi Gold Casino and who signed a statement supporting Mr. Rodely's petition. *See* Alan Rodely's Petition at 1, & Ex. A. For the purpose of this decision, this petition shall be referred to as the "Downstreamers" petition.

[2] EPA Region 9 issued the Permit pursuant to 40 C.F.R. § 123.1(h), which provides that "EPA will administer the [NPDES] program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands."

("A.R.") 1-36.[3] The Permit authorizes an existing facility (that currently land applies and/or recycles all wastewater on-site) to discharge treated effluent from its wastewater treatment plant into an unnamed creek on tribal land.[4] The creek flows (and therefore the effluent would flow) through private property into Coarsegold Creek (which is dry for a portion of the year), a tributary to the Fresno River and San Joaquin River, which are both waters of the United States. Petitioners primarily are downstream land occupants, and three of the four are petitioning pro se. For the reasons discussed below, we remand the NPDES Permit for further consideration of the applicability of California Code of Regulations Title 22 criteria for recycled water to the Permit's total coliform organisms and turbidity investigation and monitoring requirements. We deny review of all other issues raised in these petitions.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

The CWA prohibits the discharge of any pollutant from a point source into waters of the United States, except as authorized by permit. CWA § 301(a), 33 U.S.C. § 1311(a). The NPDES program is one of the principal permitting programs under the CWA. *See* CWA § 402, 33 U.S.C. § 1342. Regulations specifically governing the process of issuing an NPDES permit are found in 40 C.F.R. part 122. Permits may not be issued unless the conditions imposed in the permit ensure compliance with the applicable water quality requirements of all affected states. *See* 40 C.F.R. § 122.4(d). Water quality standards generally have three components: (1) one or more "designated uses" for each specific water body or water body segment located within the boundaries of a state; (2) "water quality criteria" (expressed in either numerical concentration levels or narrative statements) which specify the quantity of pollutants that may be present without impairing the designated uses; and (3) an "anti-degradation" provision, which prohibits discharges that would degrade water quality below that which is necessary to maintain the "existing uses" (as opposed to "designated uses") of a water body. *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10 to -.12. NPDES permits generally contain either technology-based or water quality-based effluent discharge limitations and related monitoring and reporting requirements. CWA § 402(a)(1)-(2), 33 U.S.C. 1342(a)(1)-(2). NPDES permits are

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[3] The administrative record for this case is numbered EPA-1, EPA-2, EPA-3, and so forth. For the sake of simplicity, we reference pages and documents of the record by their number only: *e.g.*, A.R. 1, A.R. 2, A.R. 3, and so forth.

[4] This Permit was sought in anticipation of the expansion of the Facility. EPA Region IX's Response to Petitions for Review ("Region's Response Br.") at 3.

also required to comply with certain other federal statutes, such as the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1599. 40 C.F.R. § 122.49.

Permitting authorities are obligated to prepare a document containing the agency responses to public comments received. 40 C.F.R. § 124.17. In that document, permitting authorities are required to "specify [in the required response to comments document] which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change." *Id.* § 124.17(c). The permitting authority must "issue" a response to comment document "at the time" that any final permit decision is issued, and that document must be made "available" to the public. *Id.* §§ 124.17(a), (c).

B. *Factual and Procedural Background*

The Chukchansi Water Treatment Plant is an existing facility co-located with a casino on the Picayune Rancheria of the Chukchansi Indian Community. U.S. EPA Region 9, *[NPDES] Permit Fact Sheet*, Permit No. CA0004009, at 1 (Dec. 4, 2007) (A.R. 37 to 57) ("Final Fact Sheet"). The tribally-owned Facility located near Madera County, California, currently serves a total population of 15,000 residents and visitors and has a design capacity to treat 170,000 gallons per day (GPD) of wastewater, though it actually treats around 104,000 GPD. *Id.* The existing operations are not currently regulated under the CWA because no discharge to surface water occurs. *Id.* Treated wastewater is instead either re-used by the casino for toilet flushing and land irrigation or disposed of via subsurface leach fields or spray fields. *Id.* at 1-2.

On January 20, 2006, the permittee applied for an NPDES permit in anticipation of the expansion of its Facility. NPDES Permit Application submitted by the Chukchansi Water Treatment Plant (Jan. 2006) (A.R. 234). The expansion of the Chukchansi Water Treatment Plant allows for a maximum design capacity of 350,000 GPD, with an designed average flow of 235,000 GPD. Final Fact Sheet at 2. The planned facility will produce a much higher-quality effluent on a consistent basis. *Id.* Wastewater generated will continue to be recycled and re-used on-site to the maximum extent practical; however, the permittee seeks to discharge the wastewater that cannot be recycled, re-used, or discharged via spray or leach fields. *Id.* In fact, the Permit provides that the permittee will "minimize the discharge of advanced treated wastewater to surface waters at all times by maximizing recycling and re-use of treated wastewater." Permit at 1-2 (A.R. 2-3). Under the Permit, the treated effluent will be discharged to an unnamed creek or drainage course on tribal land, which passes south, ultimately feeding into Coarsegold Creek, a tributary to the Fresno River and the San Joaquin River, both waters of the United States. *See* Final Fact Sheet at 1.

On December 15, 2006, the Region issued a proposed permit and invited the public to comment. U.S. EPA Region 9, *Authorization to Discharge Under*

[NPDES], Permit No. CA 0004009 (Draft Dec. 15, 2006) (A.R. 152) ("Draft Permit"). After the close of the first public comment period, the Region made several changes to the permit as proposed and reissued the draft permit on March 20, 2007, and re-opened the public comment period. U.S. EPA Region 9, *Authorization to Discharge Under* [*NPDES*], Permit No. CA 0004009 (Draft Mar. 20, 2007) (A.R. 188) ("Revised Draft Permit"). Following the second public comment period, which closed on May 8, 2007, the Region made several more revisions to the permit and issued the final Permit with its Responses to Comment document on December 4, 2007.

II. *STANDARD OF REVIEW*

The Board will generally not grant review of petitions filed under 40 C.F.R. § 124.19(a) unless it appears from the petition that the permit conditions at issue are based on clearly erroneous findings of fact or conclusions of law, or involve important policy considerations that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *see also In re ConocoPhillips Co.*, 13 E.A.D. 768, 775 (EAB 2008) (citations omitted); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002); *In re City of Irving, Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 122 (EAB 2001). The Board's analysis of NPDES permits is guided by the preamble to the permitting regulations, which states that the Board's power of review "should be only sparingly exercised." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 472 (EAB 2004). In addition, EPA policy favors final adjudication of most permits at the regional level. 45 Fed. Reg. at 33,412; *ConocoPhillips*, 13 E.A.D. at 775 (citations omitted); *Teck Cominco*, 11 E.A.D. at 472.

In order to preserve an issue for appeal, the regulations require any petitioner who believes that a permit condition is inappropriate to have first raised "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [petitioner's] position" during the public comment period on the draft permit. 40 C.F.R. § 124.13, .19; *In re Christian County Generation, LLC*, 13 E.A.D. 449, 457 (EAB 2008). Assuming the issues have been preserved, the petitioner must then explain with sufficient specificity why a permit issuer's previous responses to those objections were clearly erroneous, an abuse of discretion, or otherwise warrant Board review. 40 C.F.R. § 124.19(a); *ConocoPhillips*, 13 E.A.D. at 775-76 (citations omitted). The petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1)-(2).

Nevertheless, as we have stated before, the Board generally endeavors to construe liberally objections presented by pro se litigants, those unrepresented by counsel, so as to fairly identify the substance of the arguments being raised. *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 292 n.26 (EAB 2005); *In re Beckman Prod. Servs., Inc.*, 5 E.A.D. 10, 19 (EAB 1994); *see also In re New Eng.*

Plating Co., 9 E.A.D. 726, 730 (EAB 2001); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). "While the Board does not expect or demand that such petitions will necessarily conform to the exacting and technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the [r]egion erred in the permit decision in order for the petitioner's concerns to be meaningfully addressed by the Board." *Beckman*, 5 E.A.D. at 19.

III. *DISCUSSION*

Four petitions for review were filed challenging the Region's issuance of the final Permit in this matter. With one exception, none of the issues raised in these petitions overlap. We address each issue in each petition in turn below.

A. *Caroline Rodely's Petition for Review*

Caroline Rodely petitions for review, pro se, on two principal grounds. First, Ms. Rodely submits that the Region erred in authorizing effluent discharge into a dry creek bed. Second, Ms. Rodely argues that the Region failed to do an "EIR"[5] or otherwise assess effects on wildlife. For the reasons discussed below, we deny review of both issues.

1. *The Region's Decision to Allow Discharge into a Dry Creek Bed*

Ms. Rodely first appears to question the Region's decision to allow discharge of treated water into a dry creek. C. Rodely Pet. at 1. Her petition states that "the Coarsegold Creek is dry up to five months of the year" and that "any discharge during that time will change the ecology of the creek." *Id.* Without reference to any Permit provision, citation to any legal authority, or any substantive argument whatsoever, Ms. Rodely questions how the Region could have concluded that there would be no degradation of water quality in critical periods when the effluent is being added to a dry creek. *Id.*

The Downstreamers similarly seem to challenge the Region's decision to allow discharge into a dry creek bed. Downstreamers Pet. at 2, 3-4. The Downstreamers more fully describe the seasonal changes in the flow of Coarsegold Creek, but ultimately are concerned about discharge flowing into the creek bed when it is dry. *Id.* at 3-4. The Downstreamers add that "upsets" or "exceedances"

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[5] As noted below, we presume that "EIR" references the Environmental Impact Report provided for under the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000-21177. *See* Cal. Pub. Res. Code § 21002.1 (describing use of environmental impact reports).

may occur such that the permitted discharge is not representative of what will actually occur. *Id.*[6] The Downstreamers, however, set forth no technical basis for their argument, no reference to any allegedly erroneous Permit condition, and no citation to any legal authority.

As noted in Part II, *supra*, petitions for review are required to state the reasons supporting review, including a showing that the condition in question is based on: (a) a finding of fact or conclusion of law that is clearly erroneous, or (b) an exercise of discretion or an important policy consideration which the Board should, in its discretion, review. *See* 40 C.F.R. § 124.19(a). The Board has interpreted this requirement as mandating two things: "'(1) clear identification of the conditions in the permit at issue, and (2) argument that the conditions warrant review.'" *In re Envotech, L.P.*, 6 E.A.D. 260, 267-68 (EAB 1996) (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 14 (EAB 1994)). Although the Board will construe a pro se petition broadly, the petition nonetheless must clearly identify conditions at issue and state why those provisions warrant review. *See In re Knauf Fiber Glass GmBH*, 8 E.A.D. 121, 127 (EAB 1999); *see also, e.g., In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 and 08-03, at 4-5, 11 (EAB May 23, 2008) (Order Denying Review).

Neither Ms. Rodely nor the Downstreamers identify any legal error on the part of the Region, or assert any legal basis for a ban on discharging into a dry creek. At most, the Downstreamers imply that the Region failed to consider that the creek is dry for a portion of the year. Downstreamers Pet. at 3. Regardless of whether this general assertion is sufficient to clearly set forth a legal or factual error, as required by 40 C.F.R. § 124.19(a), the assertion alone does not demonstrate that review is warranted.

Specifically, the Region explained in its response to comments document ("Response to Comments") that it had considered seasonal variations in flow in developing the discharge limits imposed. Region's Response to Comments ("RTC") (A.R. 72) § 3-12, at 15; *see also id.* § 3-3, at 12. In particular, it cited to three reports,[7] each of which the Region made available in the administrative re-

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[6] The Downstreamers' argument consists of four short paragraphs. The first states that upsets and exceedances occur and suggests that the consequences can be great. Downstreamers Pet. at 3. The second and third suggest that neither the Fact Sheet nor the "Authorization to Discharge" adequately describe the dry season of the creek and that "continuous flow" during the dry season will "be a significant change" with "unknown consequences." *Id.* at 3-4. Finally, the Downstreamers suggest that if exceedances occur simultaneously with the dry season, a change in the environment would occur. *Id. at 4.*

[7] The three reports cited by the Region were: (1) Preliminary Drainage and Hydrology Report for the Chukchansi Hotel/Casino, February 2001 (A.R. 754); (2) Final On-Reservation Environmental Evaluation for the Chukchansi Gold Resort and Casino Expansion, Vols. I & II, June 2006 (A.R. 295, Continued

cord. *See* RTC § 3-12, at 15 (citing RTC §§ 3-4 and 3-5, at 12-13). Based on its review, the Region determined that, due to the very high level of treatment achieved, the absence of toxic pollutants, and the low volumes of wastewater likely to be discharged during critical periods, no degradation of water quality would result from the permitted discharge. RTC § 3-3, at 12. Neither of the petitioners specifically objected to any portion of the Region's response to comments, or addressed the Region's rationale in any way.[8] As the Board has explained on numerous occasions, "'it is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review.'" *Envotech*, 6 E.A.D. at 268 (quoting *In re LCP Chems. – N.Y.*, 4 E.A.D. 661, 664 (EAB 1993). Thus, even if the vague assertion that the Region failed to consider that the creek is dry for a portion of the year, without any further argument, were sufficient to satisfy the requisite for a petition for review pursuant to 40 C.F.R. § 124.19(a), petitioners have not addressed the Region's response to that issue and review would be denied.

Further, relevant NPDES regulations require the Region to include in permits conditions that ensure compliance with the applicable provisions of the CWA. Petitioners have cited no basis upon which the Region should have prohibited discharges into Coarsegold Creek or any other receiving waters into which the Facility may discharge under the Permit. The Region argues that it evaluated hydrologic information (including information about seasonal flows) for the receiving waters and used that information to determine existing flows and to assess the impact of additional flows at the maximum dry-weather discharge rate. Region's Response to Pet. at 27. These data formed the basis for the Region's determination of effluent limits and its conclusion that there would be no detrimental effect on designated beneficial uses. *Id.* Moreover, the Permit imposes conditions on the effluent that require limitations to be met at the point of discharge, *before* any dilution from downstream flows occurs. *Id.* at 8. In other words, the effluent limits of the Permit must be met at the point of discharge. By imposing effluent limitations to meet downstream standards at the point of discharge, the Region eliminated dilution as a factor and ensured that the effluent will meet downstream water quality standards regardless of flow. *Id.* at 31. Hav-

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397); and (3) Fresno River Nutrient Reduction Plan Final Report, December 2004 (A.R. 816); RTC § 3-5, at 13.

[8] Although Ms. Rodely alleged that the Region did not reference, in the Response to Comments section 3-3, the literature that it had reviewed in concluding that it would be safe to discharge treated water and, thus, readers have no way of knowing what that literature contained, *see* C. Rodely Pet. at 1, our review of the Response to Comments reveals that the Region did reference the water quality information relied upon (see reports cited in footnote 7, *supra*) and expressly stated that the literature was contained in the Administrative Record. A.R. 73-74 (RTC §§ 3-4 to 3-5, at 12-14).

ing reviewed the record, the Board has no reason to believe that the Region's conclusions are clearly erroneous. As such, and for the reasons previously explained, review of whether the Region erred in allowing discharge into a dry creek bed is denied.

2. *Alleged Failure to Conduct an EIR or to Assess Effects on Wildlife*

Ms. Rodely next argues that "[n]o E.I.R. was done on the Coarsegold Creek," and "[a]s a result the effect on the wildlife in the area cannot be assessed." C. Rodely Petition at 1. Her argument consists of two paragraphs, which essentially assert that two species of toads, one of which is listed as "near-threatened" by the World Wildlife Fund ("WWF"), and a species of turtle, the Western Pond Turtle, which is listed as "vulnerable" by the WWF, live in the Coarsegold creek area. Ms. Rodely provides no legal authority requiring the Region to do an "E.I.R." (presumably, Environmental Impact Report), and no legal authority requiring the Region to consider species listed by the WWF as either "near-threatened," or "vulnerable." For the reasons that follow, the Board does not believe such authority exists.

According to the Region, neither species of toad, nor the World Wildlife Fund list was raised during the public comment period. Region's Response Br. at 14. Ms. Rodely's Petition contains no demonstration that these specific issues were raised during the public comment period, as is required by 40 C.F.R. § 124.19(a). Thus, each of Ms. Rodely's arguments with respect to these specific issues is procedurally barred for not having been raised. 40 C.F.R. § 124.13, .19 (requiring petitioners to first raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [petitioner's] position" during the public comment period on the draft permit in order to preserve an issue for appeal); *see also In re ConocoPhillips Co.*, 13 E.A.D. 768, 803-05 (EAB 2008) (and cases cited therein). The Region acknowledges, however, that the issue of the Permit's potential impacts on federally-listed species was raised below, as was the presence of the Western Pond Turtle. Region's Response Br. at 14. We, therefore, address Ms. Rodely's arguments as applied to the Wester Pond Turtle and any federally listed species below.

Ms. Rodely first asserts that the failure to do an EIR prevented the Region from assessing the project's effects on wildlife. Although not specifically cited by Ms. Rodely, the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code §§ 21000, 21177, requires public agencies in California to identify the significant environmental effects of any proposed project, as well as alternatives to the project or potential mitigation efforts, through the use of an Environmental Impact Report, or EIR, prior to the consideration or approval of any public project. *See Id.* §§ 21002, 21002.1. On its face, these regulations apply only to projects that California state agencies are required by law to carry out or approve.

Cal. Pub. Res. Code § 21002.1. The Region explained in its Response to Comments that this requirement is not applicable to EPA Region 9 or this Permit because NPDES regulations do not require consideration of CEQA requirements in EPA's permitting process. *See* RTC § 3-1, at 11) (stating that "[t]his action is a federal action permitting a discharge of treated wastewater on Tribal land, and therefore is not subject to CEQA"). Ms. Rodely has not argued that the Region's previous response to this issue was clearly erroneous, an abuse of discretion, or otherwise warranted Board review, and thus review of this petition based on the alleged failure to conduct an EIR is denied. *See ConocoPhillips*, 13 E.A.D. at 775-76 (citations omitted); *see also In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71-72 (EAB 1998)).[9]

Moreover, to the extent that Ms. Rodely intended, by her reference to the Western Pond Turtle and the WWF list, to raise a claim under the ESA, review is denied as well. Although NPDES regulations require that permits comply with the ESA, *see* 40 C.F.R. § 122.49, the Western Pond Turtle identified by Ms. Rodely is not federally-listed as endangered or threatened under the ESA.[10] *See* Region's Response Br. at 23. Instead, Ms. Rodely argues that the turtle that she identifies is listed as "vulnerable" by the WWF. Again, Ms. Rodely does not identify any legal authority requiring consideration of species listed by the WWF, and the ESA does not require EPA to consider species listed on the WWF list, nor species listed as "vulnerable." *See* ESA § 7, 16 U.S.C. § 1536 (describing federal agency consultation requirement). Therefore, Ms. Rodely has not set forth any facts sufficient from which to conclude that the Region failed to comply with ESA requirements.

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[9] In its response to Ms. Rodely's petition, the Region defends its actions under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f, even though this act was not raised or cited by Ms. Rodely. *See* Region's Response Br. at 19-21. The Board does not believe it appropriate or necessary to construe this pro se petition quite so broadly. Nevertheless, to the extent that Ms. Rodely was intending to argue that the Region failed to do an Environmental Impact Statement ("EIS") as required under NEPA, as opposed to an EIR, review is also denied. The NPDES regulations do require that certain permits comply with NEPA. *See* 40 C.F.R. § 122.49. NEPA requires an EIS for any proposed major federal action significantly affecting the quality of the environment. NEPA § 102(c), 42 U.S.C. § 4332(C). Certain federal actions are exempted from NEPA requirements, however. For example, actions taken pursuant to the CWA are exempt from NEPA, with two exceptions, neither of which is relevant in this case. CWA § 511(c), 33 U.S.C. § 1371(c); *see also In re Phelps Dodge Corp.*, 10 E.A.D. 460, 474 (EAB 2002). During the permitting process, the Region concluded that this permitting action was exempt from NEPA requirements. A.R. at 72 (RTC § 3-1, at 11). Again, Ms. Rodely has not articulated any basis for determining that the Region's previous response to this issue was clearly erroneous, an abuse of discretion, or otherwise warranted Board review. Thus, to the extent that Ms. Rodely intended to challenge the Region's determination not to do an EIS under NEPA, review is denied. *See ConocoPhillips*, 13 E.A.D. at 775-76; *Town of Ashland*, 9 E.A.D. at 668.

[10] Species which are determined by the U.S. Department of Interior or the U.S. Department of Commerce to be endangered or threatened based upon any of several enumerated statutory factors are "listed," pursuant to 16 U.S.C. § 1533. Designations by the WWF are not made pursuant to, or subject to, federal law.

Additionally, the Region explained in its Response to Comments that it did comply with ESA requirements. A.R. at 89 (RTC § 8-5, at 28). The ESA requires consultation with the U.S. Fish & Wildlife Service ("USFWS") or the National Marine Fisheries Services ("NMFS"), whichever is appropriate, to ensure that federal agency actions, such as the Region's action here, are not likely to jeopardize the continued existence of any species listed as endangered or threatened.[11] ESA § 7, 16 U.S.C. § 1536(a)(2); *see also* ESA § 3, 16 U.S.C. § 1532(15). Prior to taking any final agency action, a federal agency must consider whether its action may affect any listed species or habitat designated as critical. 50 C.F.R. § 402.14(a). If the agency concludes that its action will have no effect on any listed species or any habitat designated as critical, then consultation with the USFWS or NMFS is not required. *Id*. In this case, the Region requested information from USFWS regarding the potential presence of threatened or endangered species.[12] Based on the information received, and from other information it reviewed, the Region determined that there would be no effect on any federally-listed species or on federally-designated habitat. A.R. at 1271-75 (Memo. from Gary Sheth, U.S. EPA, Region 9, to Record regarding Review of Information and Literature to Assess Impacts on Threatened and Endangered Species * * * Pursuant to ESA (Nov. 30, 2007) at 5). Because the Region determined that its proposed action would have no effect on any listed species, consultation with the USFWS or NMFS was not required. 50 C.F.R. § 402.14(a). Thus, the Region concluded, its obligations under the ESA were satisfied. Additionally, the draft permit and accompanying fact sheet were mailed to the USFWS at the time the Region provided public notice, *see* A.R. at 1016, 1019, and the Region received no comments from USFWS. RTC § 8-5, at 28. Ms. Rodely, again, has not articulated any clear error in the Region's determination that the project would have no effect on any federally-listed endangered or threatened species to justify Board review of this issue. Thus, to the extent that Ms. Rodely intended to challenge whether the Region had satisfied its obligation under the ESA, review is denied. *See ConocoPhillips*, 13 E.A.D. at 775; *Town of Ashland*, 9 E.A.D. at 668.

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[11] The ESA actually requires consultation with the Secretary of the U.S. Department of Interior, or the Secretary of the U.S. Department of Commerce, as appropriate. For the areas of responsibility that have been assigned to the Secretary of the Department of Interior, the Secretary has delegated such responsibilities to USFWS. U.S. Dept. of Interior, Departmental Manual, 209 DM 6, 6.1 (May 31, 2007) (delegating to the Assistant Secretary for Fish and Wildlife and Parks all authority of the Secretary) *available at http://elips.doi.gov/elips/DM_word/3745.doc*, and 242 DM 1, 1.1 (April 27, 1982) (delegating authority for matters relating to endangered and threatened species from the Assistant Secretary for Fish and Wildlife and Parks to the Director of USFWS) *available at http://elips.doi.gov/elips/DM_word/2410.doc*. Though not relevant here, *see* note 12, *infra*, the Secretary of Commerce similarly has delegated responsibilities to NMFS.

[12] According to the Region, because the discharges would be into waters where no anadromous or marine species are found, no similar request was made for information from NMFS. Region's Response Br. at 23.

Based on the foregoing, even having given Ms. Rodely's pro se petition a very broad reading, we deny review of the Permit based on any issues related to the failure to do an EIR, or related to the failure to assess negative effects on wildlife.

B. *Downstreamers' Petition for Review*

In addition to the issue of whether the Region erred in allowing discharge into a dry creek bed, the Downstreamers, also petitioning pro se, raise a second issue concerning whether the Region properly identified and explained changes made to the Permit as required by 40 C.F.R. § 124.17(a)(1). For the reasons discussed below, we find that the Downstreamers have not met their burden to show that review is warranted.

The Downstreamers are correct that the regulations governing permit appeals require the permitting authorities to "[s]pecify [in the required response to comments document] which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change." 40 C.F.R. § 124.17(a)(1). The Board recently explained that this requirement is of "critical importance," and that the failure to comply with this provision can and often does result in a remand. *See ConocoPhillips*, 13 E.A.D. 780, 783-85. Importantly, however, in every petition, the burden to establish that review is warranted belongs to the petitioner. *See* discussion in Parts II & III.A.1, *supra*. Thus, in the context of this issue, a petitioner must establish that the permitting authority failed to comply with 40 C.F.R. § 124.17 by identifying a changed provision in the final Permit that was not identified or explained by the Region.

The Downstreamers assert that the Region failed to specify which provisions, if any, of the draft permit have been changed in the final Permit decision, and the reason for the change. Downstreamers Pet. at 1. However, in making this assertion, the Downstreamers do not identify any changed provisions that were not specified and explained by the Region; nor do they challenge any unspecified changed provisions. Unlike the petitioner in *ConocoPhillips*, the Downstreamers have set forth nothing more than a bald assertion of procedural error. *Compare* Downstreamers Pet. at 1 *with ConocoPhillips*, 13 E.A.D. at 785 (discussing petitioner's challenge to the sufficiency of final control measures, which were different from those proposed in the draft permit and had neither been specifically identified nor adequately explained, and where the failure to identify and explain those changes constrained the Board's ability to review the permit decision). Therefore, in this case, the Downstreamers have not met their burden to demonstrate that review is warranted.

If accepted, the Downstreamers' bald assertion of procedural error could result in the Board having to undertake a comparison of the draft and final permits in an effort to identify all changes, ascertain whether those changes were specified

and explained appropriately in the Response to Comments, and then make a determination regarding whether the Region has satisfied 40 C.F.R. § 124.17(a)(1) or whether remand is warranted. Not only would such an approach impose an inappropriate burden on Board resources, but, in such a situation, where the petitioner has identified no substantive challenge to a change, the Board could conceivably remand a changed permit condition (to the permitting authority for further explanation) to which no party, including the Downstreamers, had any objections.[13] This would not only relieve the petitioner of the burden to demonstrate review is warranted, but would also constitute a needless waste of time and resources. For these reasons, we decline to grant review of the Permit on this ground.[14]

C. *Madera Irrigation District's Petition for Review*

Petitioner Madera Irrigation District ("Madera") seeks review of the Region's determination not to include an effluent limitation for phosphorus. Madera Br. at 3, 4-8. Madera argues that the exact flow volume to be discharged is unknown (and should have been determined), and the lack of a phosphorus effluent limitation *could* adversely affect organic farmers and "M&I"[15] users downstream. *Id.* at 3 (emphasis added). Further, Madera argues that the permitted discharges

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[13] This is not to say that petitioners must conduct an exhaustive review of the draft and final permits to identify changes that have not been adequately explained. Petitioners must, however, do more than simply assert, without example, that the permitting authority has failed to identify and explain changes.

[14] We note that, in response to the Downstreamer's Petition, the Region admitted to one change in the Permit that was neither specifically identified nor explained in the Response to Comments. That change involved an added requirement to conduct one additional screening test for priority pollutants within ninety days of the issuance of the final permit (in the draft permit, an initial screening was required *prior to the issuance of the final permit*). Because, as explained above, the burden to establish that review is warranted belongs to the petitioner, and shifting that burden could result in a needless waste of time and resources, we decline to grant review based on the Region's admitted failure to identify and explain, in the Response to Comments, the priority pollutant scan added to the final Permit.

We also note that, if we were to consider the Region's admitted failure to identify and explain the added priority pollutant scan, we would disagree with the Region's argument that its failure to comply with 40 C.F.R. § 124.17 in this regard was harmless because "the addition of this requirement cannot be said to have made the final Permit any less stringent than when it was proposed." *Id.* at 38. The obligation to identify and explain changes is not dependent upon whether the change makes the permit more or less stringent. As we have explained recently, "[the permitting authority] is not relieved of its obligation to provide its rationale for [changes made in] its final decision by virtue of the fact that the changes [made] were at the behest of [, or in favor of,] the petitioner." *ConocoPhillips*, 13 E.A.D. at 784. For the same reason, whether the change makes the permit more or less stringent is irrelevant to the requirement to identify and explain the change. Thus, the Region's argument is incorrect.

[15] Although not defined by Madera, the Board presumes that "M&I" is intended as an abbreviation for municipal and industrial.

will, or potentially will, violate California's antidegradation requirements. *Id.* at 4. "[A]t a minimum," Madera argues, "a narrative effluent limitation for phosphorus should have been included in the [P]ermit[,]" and "much more strict monitoring and investigation" should have been imposed. *Id.* at 6; *see also id.* at 1 (alleging insufficient investigation and monitoring requirements).

When issuing an NPDES permit, the Region is obligated to impose conditions that will ensure compliance with the applicable water quality requirements of all affected states. 40 C.F.R. § 122.4(d). As explained in Part I.A, *supra*, water quality standards generally have three components: (1) one or more "designated uses" for each specific water body or water body segment located within the boundaries of a state; (2) "water quality criteria" (expressed in either numerical concentration levels or narrative statements) that specify the quantity of pollutants that may be present without impairing the designated uses; and (3) an "anti-degradation" provision, which prohibits discharges that would degrade water quality below that which is necessary to maintain the "existing uses" (as opposed to "designated uses") of a water body. *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10 to -.12. In this case, the Region determined that there were no tribal water quality standards. Final Fact Sheet (A.R. 37) at 2. Therefore, consistent with 40 C.F.R. §§ 122.4 and 122.44(d), the Region imposed permit conditions that ensured compliance with water quality standards applicable downstream, namely the California Toxics Rule, codified at 40 C.F.R. § 131.38, and the water quality standards found in the Basin Plan for the Central Valley Regional Water Control Board ("RB5 Basin Plan"). Final Fact Sheet (A.R. 37) at 3. Madera does not contest the Region's application of these water standards or assert that the Region should have utilized any other applicable water quality standards. Thus, for purposes of this petition, we presume that the RB5 Basin Plan and California Toxics Rule contain the appropriate water quality standards to be considered by the Region in this Permit determination.

The issue of whether the Permit included adequate effluent limits for phosphorus was raised during the comment period and was specifically addressed by the Region in its Response to Comments. RTC § 3-2, at 11 and § 5-16, at 20. The Region noted that the RB5 Basin Plan does not have any effluent limitation (numeric or otherwise) for phosphorus in receiving waters. *Id.* § 5-16, at 20. The Region also noted that, consistent with the Fresno River Study,[16] a comprehensive study of nutrient loading in the river and in Hensley Lake downstream, there was an insufficient basis to include a specific effluent limitation for phosphorus, given that there is not enough specific information on the source of nutrients in the wa-

[16] The Fresno River Study refers to the Fresno Nutrient Reduction Plan Report (December 2004) (A.R. 816), which the Region described as one of the most comprehensive attempts to identify nutrient sources, model nutrient loading, and develop an implementation plan to reduce nutrient loading and algal problems in Hensley Lake. RTC § 5-16, at 20.

tershed. *Id.* Relying on its "best professional judgment," the Region decided not to include an effluent limit for phosphorus but instead required weekly monitoring for phosphorus and noted that, if future monitoring data suggest that phosphorus could be a problem, then EPA may re-open the Permit to address the issue at that time.[17] *Id.*[18] In addition, the Region concluded that all beneficial uses (including agricultural uses) would be protected taking into consideration the maximum average design flow. RTC §§ 3-2, 3-3, 3-10, 3-13, at 11-12, 14-15.[19] The Region similarly determined the Permit would not run afoul of any anti-degradation requirements. RTC § 3-3, at 12.

Although Madera acknowledges the Region's responses to various comments, Madera asserts, without articulating any particular legal or factual basis, that the Region's response is insufficient. For example, Madera asserts that the Region failed to consider the impacts of nutrient loading on organic farming and the impacts to other users of the receiving waters, but Madera does not explain why the Region's conclusion that the Permit provisions ensure the protection of *all* designated beneficial uses of downstream water, including the use of water for agricultural supply, is legally or factually insufficient. Similarly, where Madera also asserts that the Permit should contain a narrative effluent limit for phosphorus and stricter monitoring and investigation requirements, Madera does not articulate why the Region's explanation that there currently is an insufficient basis for including a narrative phosphorus limit in the Permit is legally or factually erroneous. In short, Madera provides no legal or factual basis for requiring either a narrative or a numerical phosphorus effluent limit.[20] Finally, Madera asserts that

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[17] In cases where no applicable effluent limitation exists, permit issuers must use their "best professional judgment" or "BPJ" to establish appropriate technology-based effluent limitations on a case-by-case basis. *See In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 712 n.1 (EAB 2006) (citing CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.44, 125.3)).

[18] Although the RB5 Basin Plan does not contain an effluent limit specific to phosphorus, it does contain a narrative limit to address nutrient loading, which the Region describes as a potential consequence of excessive phosphorus. RTC § 5-16, at 20. That narrative limit reads as follows: "Waters shall not contain biostimulatory substances which promote aquatic growth in concentrations that cause nuisance or adversely affect beneficial uses." RB5 Basin Plan at III.3.00 (A.R. at 1787). The Region included verbatim this narrative water quality criterion in the Permit. Permit at 5 (A.R. at 5); *see also* Region's Response Br. at 29.

[19] The Region based its conclusion that all beneficial uses would be protected and that no degradation would occur on its determination that if the maximum average design flow of the new treatment plant was released into the Fresno River, it would comprise no more than 1% of the total flow. RTC § 3-3, at 12. Further, the Region characterized this as a "very unlikely scenario" given that the treated effluent is required for re-use in the Permit and for irrigation during the dry time of the year. *Id.* During wetter times of the year, the flow of the effluent would be less than .01% of the flow of the river. *Id.*

[20] Madera also does not acknowledge or address the fact that, consistent with the RB5 Basin Plan, the Region did include a narrative limit to address nutrient loading. *See* n.18, *supra.*

the Region failed to determine the intended flow volume to be discharged into the receiving water, even as Madera acknowledges that the Region considered the *maximum* design flow and the average flow *at full capacity*. Madera insists that the Region should have calculated what the actual flow will be, without articulating why it was erroneous for the Region to consider maximum possible flows and to determine based on those findings that the flow of phosphorus effluent would be a tiny fraction of the overall flow into the Fresno river. In other words, Madera does not assert or explain why it was unreasonable for the Region to determine that even at a maximum flow of 350,000 GPD, the effluent's impact on the total flows into the river would be insignificant, and based on that determination to conclude that there would be no degradation of water quality.

As discussed previously, petitioners are required to explain with sufficient specificity why a permit issuer's previous response to an objection was clearly erroneous, an abuse of discretion, or otherwise warrants review. 40 C.F.R. § 124.19(a); *ConocoPhillips*, 13 E.A.D. at 775-76. The failure to do so is grounds for denial of review. *See, e.g.*, *Town of Ashland*, 9 E.A.D. at 670. Accordingly, we find that Madera has failed to explain with sufficient specificity why the Region's previous responses to Madera's objections were clearly erroneous, an abuse of discretion, or otherwise warrant Board review. For this reason, review of Madera's petition is denied.

Even if the Board were to consider on the merits whether the Region erred in determining not to include narrative effluent limitations for phosphorus, Madera's petition would fail. The Permit includes a narrative criterion regarding nutrient loading, which is consistent with the water quality standards in the RB5 Basin Plan. *See* Permit at 2-3; RB5 Basin Plan at III-3.00 (A.R. 1787). The Region concluded that the narrative limit was sufficient because there was no basis for a specific effluent limit for phosphorus and because the amount of the permitted discharge, even at maximum capacity, would not be a significant contributor of phosphorus. Region's Response Br. at 32-33; *see also* RTC §§ 3-2, 3-3 and 5-16, at 11-12, 16. Additionally, although the Region did not determine an "exact flow volume to be discharged," it used the maximum average design flow, an overestimate, to assess whether all beneficial uses would be adequately protected. Region's Response Br. at 32-33; RTC §§ 3-2 and 3-3, 11-12. The Region also required weekly monitoring of phosphorus and included a provision to reopen the Permit and reconsider its terms if monitoring data indicate the current terms are inappropriate. RTC § 5-16, at 20. Finally, whether to impose an effluent limit for phosphorus requires the exercise of technical judgment, and on such issues we generally defer to the Region's reasoned determinations. *ConocoPhillips*, 13 E.A.D. at 786 (citations omitted). In short, Madera has not overcome its heavy burden to show that the Region's technical determination not to include an effluent limit for phosphorus was clearly erroneous.

D. *Jo Anne Kipps' Petition for Review*

Petitioner Jo Anne Kipps raises three issues. One issue relates to the Region's alleged failure to include "Appendix A" to the Response to Comments with the Notice of Decision that it sent to interested parties such as Ms. Kipps. Another issue involves the sufficiency of the Permit's monitoring provisions for trihalomethanes. The final issue concerns the sufficiency of effluent monitoring for total coliform organisms ("TCO") and turbidity. For the reasons discussed below, we deny review of the first two issues. We remand the Permit to the Region, however, for further consideration of whether California's Code of Regulations, Title 22, is appropriately applied to Permit conditions, specifically with respect to TCO and turbidity investigation and monitoring.

1. *Failure to Include Appendix A with the Notice of Decision and Response to Comments*

Petitioner Kipps argues that Appendix A to the Response to Comments ("the Appendix") was not included with the Response to Comments that she received with the notice of the Permit decision (even though the Appendix is referenced in the Response to Comments). Without it, Ms. Kipps argues, it is impossible to assess the adequacy or reasonableness of the Region's analysis or the Region's determination not to include trihalomethanes ("THMs") as a priority pollutant of concern. Ms. Kipps asks that the Appendix be distributed to interested parties and the deadline for requesting EPA review be extended.

The Region admits that the Appendix was inadvertently not included with the copy of the Response to Comments that it sent with the notice of the final Permit decision. Region's Response Br. at 35. The Region argues, however, that it was not required to include the Response to Comments (irrespective of whether Appendix A was attached) with the notice of the Permit issuance. *Id.* Rather, the Region argued that it properly "issued" the Response to Comments, along with Appendix A, in accordance with 40 C.F.R. § 124.17 "at the time that [the] final permit decision [was] issued." *Id.* Further, the Region made the Response to Comments, including Appendix A, a part of the Administrative Record and available on the Region's website. *Id*. The Region points out that at no time did Ms. Kipps request a copy of the Appendix from the Region. *Id.*

As articulated by the Region, 40 C.F.R. § 124.17(a) requires the Region to issue a response to comment document at the time that any final permit decision is issued. Section 124.17(c) requires the Region to also make the response to comments document "available" to the public. Additionally, any documents cited in support of the permit decision in the response to comments document must be included in the administrative record. 40 C.F.R. § 124.18(b). We recently explained, however, that 40 C.F.R. sections 124.17 and 124.15(a) do not require that the response to comments document be mailed, in conjunction with the notice of

the final decision, to every person who submitted comments or requested notice. *See ConocoPhillips*, 13 E.A.D. at 779. As such, Ms. Kipps was not entitled under the regulations to receive the Response to Comments, including any appendices, with the notice of the permit decision. The Region was simply required to make the Response to Comments available to the public.

Additionally, Ms. Kipps has not alleged or argued that Appendix A was not "available" and the Region, in fact, states that the Response to Comments, including Appendix A, was available on its website.[21] Region's Response Br. at 35. Additionally, the notice sent to Ms. Kipps and other interested parties stated that any documents in the administrative record were available by request and that the Response to Comments (which included Appendix A), Permit and Fact Sheet were available online. *See* Notice of Issuance of Final Permit, E-mail from Gary Sheth, U.S. EPA Region 9 to Jo Ann Kipps, among others (Dec. 7, 2007) (A.R. 60-61). Thus, we have no basis from which to conclude that the Response to Comments (including Appendix A) was not made available, as required by 40 C.F.R. § 124.17(c). Because Ms. Kipps was not entitled under the rules to receive Appendix A with the notice of final decision, and because Ms. Kipps has not asserted that the Appendix was otherwise unavailable, we deny review of the Region's issuance of Appendix A.

2. *THMs as a Priority Pollutant of Concern.*

As an alternative to having Appendix A redistributed with an extended deadline for requesting EPA review, Ms. Kipps seeks to have the Permit revised to require monthly monitoring for THMs and to include a provision allowing the Permit to be reopened if future monitoring data demonstrates a reasonable potential for exceedances of the California Toxics Rule limits for THMs. Ms. Kipps provides no further argument and no legal or factual basis for this alternative request. As such, Ms. Kipps has failed to meet her burden to demonstrate that review is warranted. *See* discussion in Part II & III.A.1, *supra*, citing 40 C.F.R. § 124.19(a); *Envotech*, 6 E.A.D. at 267-68; *Beckman Prods. Servs.*, 5 E.A.D. at 14.

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[21] We note that in prior decisions, we have recognized that, in some circumstances, simply posting a document on a website may not constitute making the document "available" in accordance with 40 C.F.R. § 124.17(c). *See ConocoPhillips*, 13 E.A.D. at 777-78; *In re Hillman Power Co., L.L.C.*, PSD Appeal Nos. 02-04, 02-05 & 02-06 (EAB May 24, 2002) (Order Directing Service of PSD Permit Decisions on Parties that Filed Written Comments on Draft PSD Permit), *available at* http://www.epa.gov/eab/psd-int.loc.ords/ hillman.pdf. That determination must be made on a case-by-case basis. *ConocoPhillips*, 13 E.A.D. at 779. We need not determine whether simply posting on the internet would have been sufficient in this case, however, because Ms. Kipps has not alleged and the facts do not support a determination that the Response to Comments (including Appendix A) was not "available."

Moreover, as the Region explained in its Response to Comments, the results of the priority pollutant scan conducted prior to the issuance of the Permit indicated that THM constituents were below applicable water quality standards. RTC § 5-14, at 19. Ms. Kipps has not articulated any basis for finding the Region's determination erroneous. *See ConocoPhillips*, 13 E.A.D. at 775-76 (petitioner must explain why the permit issuer's previous response to petitioner's objections was clearly erroneous or otherwise deserving of review) (citing *In re Indeck-Elwood*, 13 E.A.D. 126, 143 (EAB 2006)) (some citations omitted). Thus, again, Ms. Kipps has failed to demonstrate that review is warranted.

Finally, the determination of whether to include an effluent limit for THMs requires the exercise of technical judgment, and on such matters we generally defer to the Region so long as the Region has articulated a reasonable basis for its conclusion. *ConocoPhillips*, 13 E.A.D. at 786 (citations omitted). Although not explained in the Response to Comments (see discussion in note 14, *supra*), the Region points out in its Response to the Petition that the Permit requires an additional priority scan to be conducted within 90 days of the issuance of the Permit, as well as annually for the life of the Permit, and included a condition that the Permit could be reopened to add appropriate limits based on the results of those priority scans. *See* Permit at 3 (A.R. at 3). Thus, even if it had been demonstrated that review of this Permit were warranted, in light of the Region's treatment of THMs, we would have no basis for concluding that the Region's technical determination with respect to THMs was clearly erroneous.

For all of the reasons above, review of the Region's determination with respect to THMs is denied.

3. *The Sufficiency of Effluent Monitoring for TCO and Turbidity*

Finally, Ms. Kipps argues that the Permit is flawed because it fails to require effluent monitoring for TCO and turbidity that is at least as stringent as that prescribed by California Code of Regulations Title 22 ("Title 22") for recycled water. Ms. Kipps notes that both the Permit and the Response to Comments indicate that the Permit establishes *effluent* limitations for TCO and turbidity that reflect the Title 22 requirements for recycled water. Kipps' Pet. at 1 (citing Cal. Code Regs. tit. 22 § 60301.230). The Permit does not, however, require the same frequency of *monitoring* for TCO and turbidity as Title 22 requires for recycled water.[22] *Id.* (citing Cal. Code Regs. tit. 22 § 60231). Ms. Kipps argues that monitoring at the frequency prescribed by Title 22 for recycled water is necessary

[22] Title 22 regulations for recycled water require monitoring continuously for turbidity and daily for TCO, to ensure that the effluent limitations are met. Cal. Code Regs. tit. 22 § 60321. The Permit, however, requires only daily monitoring for turbidity and weekly monitoring for TCO. Permit at 2.

"[b]ecause of the limited or non-existent dilution provided by the receiving water," and the need for the Tribe "to operate and maintain the casino's wastewater treatment facility in a manner that ensures effluent discharged to the receiving water meets the prescribed limitations at all times." *Id.*

This issue was first raised by Ms. Kipps in a comment on the December 2006 Proposed Permit. *See* Comments on Draft NPDES Permit No. CA0004009, E-mail from Jo Ann Kipps to Gary Sheth, U.S. EPA Region 9 (Jan. 21, 2007). That first draft of the Permit included effluent limitations and monthly monitoring for fecal coliform bacteria (a subset of coliform bacteria), but not for TCO or turbidity. In comments on that draft, Ms. Kipps urged the Region to set effluent and monitoring requirements for TCO and turbidity in accordance with Title 22's provisions for recycled water – i.e., daily monitoring for TCO and continuous monitoring for turbidity. *Id.* The Revised Proposed Permit was amended to require weekly monitoring for both TCO and turbidity.[23]Revised Proposed Permit No. CA 0004009, at 2 (Mar. 20, 2007) (A.R. 188). In response to the Revised Proposed Permit, Ms. Kipps again urged the Region to require daily monitoring for TCO and continuous monitoring for turbidity in accordance with Title 22's water recycling criteria. *See* Comments on Revised Proposed Draft NPDES Permit No. CA0004009, E-mail from Jo Ann Kipps to Gary Sheth, U.S. EPA Region 9 (May 8, 2007) (A.R. 1136). In the final Permit, the Region increased the monitoring frequency for turbidity from weekly to daily, but did not go so far as to require continuous monitoring for turbidity and did not alter the monitoring frequency for TCO. Permit at 1.

In explaining its determinations concerning Title 22 in the Response to Comments, the Region stated that it agreed with the comment that "effluent limits consistent with 'California Title 22, tertiary 2.2' recycled water criteria are appropriate given the downstream designated beneficial uses," and also stated that in the Region's "best professional judgment (BPJ)[,[24]] the Permitee can meet Title 22 * * * standards, and therefore [the Region] has included appropriate limits in the [P]ermit consistent with that goal." RTC § 5-1, at 16. The Region then explained that it "agree[d] that turbidity should be monitored, and * * * included turbidity requirements as both a monthly average and a daily maximum." *Id.* No further explanation for the selected monitoring frequency for turbidity or TCO was given. Nor was any explanation provided as to why the Title 22 limits for recycled water were appropriately applied to the Permit's effluent limitations, but were not appropriate for establishing monitoring requirements.

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[23] In the Response to Comments, the Region explained that it had changed the Permit to express the effluent limit as a total coliform limit, rather than a fecal coliform limit, to be consistent with Title 22 coliform criteria. RTC § 5-2, at 16-17.

[24] *See* note 17, *supra*.

In its response to Ms. Kipps' petition, the Region's view of California's Title 22 recycled water requirements is decidedly different from its view in the Response to Comments. In response to the petition, the Region asserts that Title 22 does not contain federally applicable water quality standards, and does not represent federally-approved state water quality standards. Region's Response Br. at 39. Thus, the Region argues, it is not required to impose conditions in the Permit to ensure that these standards are met. *Id.* at 39-40. The Region also now asserts that the provision of Title 22 cited by Ms. Kipps (section 60321, pertaining to the monitoring of recycled water) applies to reclaimed water to be used for direct irrigation, as opposed to discharges to surface waters, and is, therefore, not applicable. *Id.* Region's Response Br. at 39. The Region further argues that the monitoring frequencies it established are consistent with the CWA and EPA guidance. *Id.* at 40. Finally, the Region asserts that it is entitled to substantial deference on technical issues such as this. *Id.*

Notably, although the Region acknowledges that it "incorporated effluent standards * * * consistent with Title 22's provisions pertaining to recycled water to accommodate the proposed design and operation of the Facility to maximize reclamation of treated wastewater," it does not explain why it did not find it appropriate to apply Title 22's recycled water provisions when establishing the Permit's *monitoring* requirements. *See Id.*

The Region is correct that, "as a general matter, when issues on appeal challenge a permitting authority's technical judgments, the Board will defer to the permitting authority's technical expertise and experience." *ConocoPhillips*, 13 E.A.D. at 786 (citations omitted). The Board generally does not afford deference, however, where the permitting authority's rationale for its conclusions is weak or non-existent. *Id.*; *In re Ash Grove Cement*, 7 E.A.D. 387, 424-25 (EAB 1997). Additionally, where a permitting authority provides inconsistent or conflicting explanations for its actions, the Board frequently concludes that the Region's rationale is unclear and remands for further clarity. *See, e.g.*, *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) (remanding a permit where the permitting authority gave differing explanations for its determination, making its rationale unclear). Moreover, the record must demonstrate that the permitting authority "duly considered the issues raised in the comments and that the ultimate approach adopted by the permitting agency [was] rational in light of all the information in the record." *ConocoPhillips*, 13 E.A.D. at 786 (citations omitted); *see also In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). If the permitting authority does not articulate its analysis in the record, the Board "cannot conclude that [the analysis] meets the requirement of rationality." *Shell Offshore*, 13 E.A.D. at 386 (citing *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002)).

In this case, the Region's rationale for its determination of whether to include California's Title 22 monitoring requirements for recycled water in this Per-

mit is decidedly weak. The record reflects that, although the Region considered Ms. Kipps' comments urging the inclusion of monitoring requirements for TCO and turbidity that are reflective of Title 22's criteria for recycled water (i.e., daily monitoring for TCO and continuous monitoring for turbidity), the Region imposed less frequent monitoring provisions in the Permit. The Region neglected to explain its rationale for the frequency of monitoring imposed, notwithstanding its agreement that "effluent limits consistent with 'California Title 22, tertiary 2.2" recycled water criteria [would be] appropriate.'"[25] RTC § 5-1, at 16. An explanation is particularly warranted here, given that the monitoring provisions presumably were designed to ensure compliance with the effluent limits. Additionally, the rationale provided in the Region's response to Ms. Kipps' petition – that the Title 22 requirements for monitoring recycled water are not applicable to the Permit because it involves the discharge of treated effluent to surface water, rather than direct irrigation – is inconsistent with the Region's agreement in the Response to Comments that imposing Title 22 effluent requirements was appropriate, further clouding the Region's reasoning. Thus, the record does not provide a sufficient basis for review of the Region's monitoring determinations. *See, e.g.*, *Austin Powder*, 6 E.A.D. at 719-20.

Based on the foregoing, we remand the Permit to the Region for further consideration of whether the investigating and monitoring provisions for TCO and turbidity found in California Code of Regulations, Title 22, should apply to this NPDES permit. To the extent that the Region believes the effluent standards for TCO and turbidity are applicable, but the investigation and monitoring requirements for TCO and turbidity are not, the Region should articulate its rationale for so concluding.

IV. *CONCLUSION*

For the reasons discussed above, we remand to the Region the NPDES Permit issued to the Chukchansi Gold Resort and Casino for further consideration of the TCO and turbidity investigation and monitoring requirements imposed. The Region should supplement the record as necessary during the remand process. Additionally, the Region may reopen the record for additional public comment as necessary, in accordance with 40 C.F.R. § 124.14. If petitioners or other participants are not satisfied with the Region's explanation on remand, petitioners or other participants with standing may appeal the Region's determination to this

[25] In its Response Brief, the Region argues that the frequency of monitoring for TCO and turbidity effluent limitations is consistent with EPA guidance. Region's Response Br. at 40. Putting aside the question of whether the Region's reliance on the guidance would be sufficient, the Region is asserting the guidance as justification for the monitoring frequency for the first time on appeal. The Region's basis for its decision, however, must be asserted and explained in the record. *See Ash Grove Cement*, 7 E.A.D. at 424-25.

Board pursuant to 40 C.F.R. § 124.19.[26] Any appeal shall be limited to the issue being remanded and any issues that arise as a result of any modification the Region makes to its permit decision on remand. For the reasons stated above, we deny review of all other issues raised in these petitions.

So ordered.

[26] An appeal of the remand decision is required in accordance with 40 C.F.R. § 124.14(f)(13) to exhaust administrative remedies.