BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In Re NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No. NN0022179: Black Mesa Mine Complex	)	NPDES Appeal No. 09-10

APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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I. Background

Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, C-Aquifer for Diné, and Center for Biological Diversity (hereinafter "Appellants"), by and through the undersigned counsel, hereby submit this petition for review of the U.S. Environmental Protection Agency's ("EPA") NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES").[1]

Peabody's Black Mesa and Kayenta coal mines (hereinafter "Black Mesa Complex" or "Complex")) have operated on tribal lands since the early 1970s southwest of Kayenta, Arizona (since 1970 for the Black Mesa Mine, and since 1973 for the Kayenta Mine). The Complex is located on approximately 64,858 acres of land leased by Peabody Western Coal within the boundaries of Hopi and Navajo Nation lands. Approximately 25,000 acres of surface and mineral interest are held exclusively by the Navajo Nation, and approximately 40,000 acres are located in former Hopi and Navajo Joint Minerals Ownership Lease Area. The tribes have joint and equal interest in the minerals that underlie the Joint Lease Area; however, the surface has been partitioned and is within the exclusive jurisdiction of the tribe (approximately 6,000 acres partitioned to Hopi and 34,000 acres partitioned to the Navajo Nation).

Peabody's 44,000-acre Kayenta coal mine operation produces about 8.5 million tons of coal annually and, since 1973 has been supplying coal to the Navajo Generating Station by way of the Black Mesa and Lake Powell Railroad, across a distance of 83

[1] Available on EPA's website. *See* http://www.epa.gov/region09/water/npdes/permits.html (providing the permit, fact sheet and comment response document).

miles. The Kayenta mine is permitted by OSM to mine coal reserves through 2026 at current production rates.

The 19,000-acre Black Mesa mining operation supplied coal to the Mohave Generating Station from 1970 until December 2005, when mining operations ceased due to closure of the Mohave Generating Station. Currently, no mining operations are occurring at the Black Mesa mine.

In December 2008, the Federal Office of Surface Mining Reclamation and Enforcement ("OSM") issued a Life of Mine ("LOM") permit to Peabody which, among other things, consolidated the Kayenta and Black Mesa mining operations. On December 22, 2008, OSM issued a Record of Decision ("ROD") which included a LOM permit for Peabody and combined the Kayenta and Black Mesa mines into the Black Mesa Complex. The ROD was the result of a process required by the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), which included development of an Environmental Impact Statement ("EIS"), to evaluate the environmental impacts of Peabody's LOM permit. EPA was a cooperating agency in this process.[2] EPA's NPDES permit was *not* analyzed as part of the NEPA process for Peabody's Life-of-Mine permit. *See* EPA, *Fact Sheet (Final), Peabody Western Coal Company - Black Mesa Complex* (NPDES Permit No. NN0022179) (Aug. 2009) ("Fact Sheet") at 2 (describing the LOM as a "separate permitting activity from the NPDES permit"). In fact, EPA's NPDES permit was not publicly-noticed until February 19, 2009—*i.e.*, two months *after* the close of OSM's NEPA process on the LOM permit.

[2] OSM's decision is available at: http://www.wrcc.osmre.gov/WR/BlackMesaEIS.htm

EPA's NPDES permit authorizes new and continued discharges from active mine areas, coal preparation areas, and reclamation areas at the Black Mesa Complex. Receiving waters are comprised of two principal drainages within the Complex and include the Moenkopi Wash Drainage and Dinnebito Wash Drainage. According to the State of Arizona Department of Environmental Quality ("AZ DEQ") these are classified as "major streams" within the Little Colorado River/San Juan River Watershed. However, and according to AZ DEQ, neither of these drainages has been assessed by AZ DEQ or EPA to determine whether these watersheds are "attaining" Total Maximum Daily Load ("TMDLs") or are "impaired." *See* AZ DEQ, *2006/2008, Status of Ambient Surface Water Quality in Arizona: Arizona's Integrated 305(b) Assessment and 303(d) Listing Report* (Nov. 2008) ("AZ DEQ 2006-2008 Status") at 8.[3]

According to EPA, there are over 230 impoundments on the Black Mesa Complex. Fact Sheet at 7. These impoundments are essentially earthen embankments constructed by Peabody by digging key-ways into the sides and bottoms of drainages, and building dams on top of the key-ways from earthen materials.[4] At many of the impoundments, water and pollutants impounded by the discharges seep through the

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[3] The cited Chapter II of the report is available on AZ DEQ's website: http://www.azdeq.gov/environ/water/assessment/download/2008/ch1-2.pdf. Excerpts are attached as Exhibit ("Ex.") A.

[4] While acknowledging that these impoundments "require authorization under a separate permit under the authority of Section 404 of the CWA for the discharge of fill material to a water of the U.S.," EPA does not address these requirements in issuance of a NPDES permit to Peabody. *See* EPA, Comment Response Document, Peabody Western Coal Company - Black Mesa Complex NPDES Permit No. NN0022179 (Aug. 3, 2009) ("Comment Response Document") at 8. Upon information and belief, Peabody has not received any permits under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, for the construction of its impoundments.

bottom of the dam or through more permeable geologic formations near the embankment. Peabody refers to these discharges as "seeps."[5]

While the permit is vague on this issue, it appears that there are 111 outfall locations from the impoundments (EPA appears to use the terms "impoundments" and "ponds" interchangeably) that discharge to waters of the U.S. *See* Comment Response Document at 7-8.

According to EPA's response to comments on the draft permit, "several seeps [from impoundments] have shown concentrations of pollutants above water quality standards." *Id.* at 3. In particular, EPA concedes that discharges from impoundments BM-A1, J3-D, J-7A, J7-CD, J7-Dam, J7-JR, J16-A, J16-E, J19-D, J21-C, J27-A, J27-RC, N6-C, N6-F, N14-B, N14-H, N14-P, WW-9 are currently noncompliant with one or more Water Quality Standards. *Id.* at 5, 9-11.

EPA has classified Peabody's 111 outfalls into three broad categories of discharges: Alkaline Mine Drainage; Coal Preparation and Associated Areas; and Western Alkaline Reclamation Areas. The Alkaline Mine Drainage and Coal Preparation Outfalls are subject to effluent limitations for TSS, iron and pH. However, no effluent limitations are provided for arsenic, cadmium, chromium, lead, mercury or selenium; instead, EPA requires only monitoring for these pollutants. *See id.* at 2-3. With regard to the Western Alkaline Reclamation Areas, Peabody "is authorized to discharge runoff" from outfalls in these areas. EPA also requires that Peabody identify Best Management Practices in a "Sediment Control Plan." *Id.* at 4. No maps have been included in

[5] The word "seep" is disingenuous as many of these discharges flow persistently at several gallons per minute ("gpm").

materials made public by EPA to date, and thus the actual location of these outfalls is unknown.

According to EPA, both the Navajo Nation and Hopi Tribe have water quality standards and have received "Treatment as a State" status under the CWA.[6] EPA does not identify where the permitted outfalls occur on Navajo or Hopi lands or lands of joint use, *e.g.*, to identify which sources are subject to applicable Navajo or Hopi tribal standards. Moreover, EPA does not indicate whether the Navajo Nation or Hopi Tribe has established Total Maximum Daily Loads for Moenkopi Wash Drainage and Dinnebito Wash Drainage.[7]

II. Standard of Review

The standard of review for the Board in this matter is set forward in 40 C.F.R. §124.16. In reviewing a permit under part 124 for which it has granted review, the Board looks at whether the permit issuer based the permit on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 124.19(a)(1). In addition, and in its discretion, the Board may evaluate whether the permit issuer abused its discretion and may review important policy considerations. 40 C.F.R. § 124.19(a)(2). Lastly, the Board, within 30 days of notice of this action, may also decide on its own initiative to review any condition of the NPDES permit. 40 C.F.R. §124.19(b).

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[6] During public comment on the draft NDPES, EPA originally represented to the public that Hopi did not have "Treatment as a State" status.

[7] According to EPA, the Navajo Nation and Hopi Tribe have submitted "401 Water Quality Standards Certification" to EPA that presumably addressed this issue. These certifications were not and have not been made public.

III. The Administrative Record

EPA did not make public an administrative record upon issuance of the final permit. *See* 40 C.F.R. §124.18(c) (contents of the administrative record for NPDES permits and stating that "[t]he record shall be complete on the date the final permit is issued"). The only records available to the public at the time of this filing are the final permit, Fact Sheet, and Comment Response Document.[8]

Prior to filing of the present brief, EPA Regional Counsel informed counsel for Appellants that the administrative record was still under production. That said, Appellants respectfully assert that the administrative record in this matter is limited to records publicly available on EPA's website and, in the interest of equity and fairness, EPA should not be allowed to produce *post-hoc* a record which includes additional records which, to date, have never been made available to the public.

Appellants respectfully reserve the right to file a motion to strike any records not previously provided to the public—especially where, as here, EPA *denied* Appellants request for a public hearing on this matter so that the agency could provide "all relevant information" "in a culturally sensitive format and for public review and consumption." *See* Appellants' *Comments on Draft NPDES permit* (Apr. 3, 2009) ("Appellants' Comments") (Ex. B) at 1-2.

[8] Available on EPA's website at http://www.epa.gov/region09/water/npdes/permits.html.

IV. Argument

A. The Agency abused its discretion and violated principles of environmental justice by not providing a public hearing as requested by Appellants.

EPA abused its discretion in not provided a public hearing as requested by Appellants. As stated in Appellants' Comments:

> Pursuant to 40 C.F.R. §124.12, Commenters respectfully request a public hearing be held within sixty (60) days of receipt of this letter to address the very serious and substantial issues and concerns raised herein. The public hearing should be held in Kayenta, Arizona.
>
> Many of the people directly impacted by EPA's permit issuance are Navajo and Hopi tribal members who, if they speak English at all, speak English primarily as a second language. Many Native American communities in the Black Mesa area bear a disproportionate share of Peabody's ongoing discharge of numerous pollutants onto tribal lands. These communities often lack the political agency and economic leverage required for effective participation in environmental decision-making processes. Further, EPA owes a trust obligation to indigenous people and therefore needs to ensure that tribal people and lands are not being disproportionately impacted by Peabody's massive mining operation and ongoing discharge of pollutants.
>
> At the public hearing, we respectfully request that the agency make available in a culturally sensitive format and for public review and consumption: (1) copies of the proposed NPDES permit; (2) a 2-3 page fact sheet or executive summary; (3) Peabody's application and all other related material; (4) copies of any and all relevant National Environmental Policy Act ("NEPA") documentation for this proposal; (4) detailed – and large size – maps of the area and the discharges covered by the permit; (5) any other relevant information that, in particular, discusses Peabody's current violations of Water Quality Standards "(WQS") and any "compliance schedule" being proposed by EPA to rectify such violations. Commenters respectfully request that, in addition to allowing public comment, EPA provide a detailed presentation using an interpreter as well as answer any questions put to the agency by members of the public.
>
> Commenters also request a site visit of the outfalls (and in particular the J-7 dam and BMA-1) the day prior to the public hearing as well as the ability to conduct grab samples of any discharges.

> Notice of EPA's public hearing should be provided at least 30-days in advance and published in tribal newspapers and announced on tribal radio. Additionally, EPA should directly contact impacted tribal members including, but not limited to, tribal members who hold grazing permits in areas affected by Peabody's outfalls. The Administrative Record suggests that multiple sites (some of which are highly contaminated) are currently being used for livestock watering.
>
> Lastly, the U.S. Army Corp of Engineers, the Federal Office of Surface Mining Control and Enforcement and U.S. Fish and Wildlife Service staff should be present at the hearing to answer any related questions.

Appellants' Comments (Ex. B) at 1-2.

The sole reason provided by EPA for not holding such a hearing is that EPA was a cooperating agency on OSM's LOM permit and was "present" at the meetings on the LOM permit in "January 2005." *See* Comment Response Document at 2.

As stated above, however, EPA's draft NPDES permit was not publicly-noticed until February 19, 2009—*i.e.*, two months *after* the close of the NEPA process on OSM's LOM permit. Thus, EPA's draft permit simply could not have been reviewed by the public, let alone publicly discussed and commented on, during the LOM permit process. Thus, EPA's lament that the agency did not receive comments on the NPDES permit during public hearings on OSM's LOM permit in January of 2005 is unconvincing and should be rejected.

Here, the need for a public hearing on EPA's NPDES permit is underscored by the fact that the organizations who requested such a hearing consistent of tribal members, many of whom are *directly* impacted by Peabody's discharges, and who therefore have a substantial interest in this matter.

For example, Appellant Black Mesa Water Coalition ("BMWC") is a non-profit, non-governmental organization formed in 2001 by inter-tribal, inter-ethnic people and youth dedicated to addressing issues of water depletion, natural resource exploitation, and

promotion of health within Navajo and Hopi communities. BMWC's mission is to empower tribal people while building healthy and sustainable communities. BMWC's board consists mostly of Navajo citizens from the Black Mesa region. BMWC organizes Navajo and Hopi communities to advocate for the protection of tribal lands, water, and future generations from the Black Mesa/Kayenta coal mining operations.

Appellant Diné C.A.R.E., founded in 1988, is a nonprofit, environmental organization based on the Navajo Nation homeland, which rests between mountains in Colorado, New Mexico, and Arizona. Diné C.A.R.E. is comprised of all tribal members. Many Diné C.A.R.E. members live in the Black Mesa region that is the subject of this challenge. Many of these members have been or will be directly impacted by the continued discharge of pollutants from Peabody's mining operation.

Appellant Diné Hataalii Association ("DHA") has 24 board members, two from each of the six Navajo agencies. DHA comments on matters of Navajo custom and its renowned and prominent Diné (Navajo) men and women act and speak with authority and authenticity on matters of traditional healing and Navajo custom. DHA has attended and participated in the discussions surrounding the Black Mesa LOM issues, and raised concerns related to the interconnectedness of land, water, air, and global climate issues and the destruction and desecration of Navajo natural resources by outside corporate interests.

Appellant To' Nizhoni Ani ("TNA") was founded in 2001 and is comprised solely of Black Mesa residents—in particular, members who live in Pinion, Forest Lake, and Big Mountain. TNA provides community education on the Black Mesa mine and mobilizes the Black Mesa community in advocacy for sustainable economic

development. TNA's mission is consistent with the philosophy of traditional Diné and seeks a more sustainable future. TNA participated in public hearings OSM's Black Mesa project. TNA board members helped to translate EIS meetings with OSM and Navajo Nation government representatives on the Black Mesa Project. TNA submitted comments on the Black Mesa Project and a resolution with a list of names from Black Mesa on this issue. TNA also did public education with the communities of Black Mesa.

Appellant Diné Alliance is an organization of Diné (Navajo) people from the Black Mesa area that have been adversely impacted by Public Law 93-531, the Relocation Act, by which over 10,000 Diné have been relocated from their ancestral lands and homes to make way for Peabody's coal mining. For over 30 years, Diné Alliance has been working to elevate the voices of Diné impacted by relocation from the Black Mesa area. Diné Alliance has been appealing to federal agency offices and officials as well as to the United Nations. Members of Diné Alliance submitted comments to EPA and requested a hearing.

Appellant C-Aquifer for Diné is a grassroots organization from the directly-impacted community of Leupp, Arizona. C-Aquifer for Diné members are made up mostly of elderly grazing permit holders who are dedicated to preserving and protecting their water resources for their future generations. The C-Aquifer (*i.e.*, the Coconino Aquifer) has been and continues to be targeted to furnish pristine water to transport slurred coal to the now closed Mohave Generation Station, via a 273-mile long pipeline, without local resident's permission and support. C-Aquifer for Diné conducted public education about the Black Mesa Project. C-Aquifer for Diné did radio shows on KTNN Navajo radio station and organized with Hopi Traditionalists to make sure they

were at the public hearings throughout the Navajo Nation. C-Aquifer for Diné believes that allowing corporate interests to materially (and permanently) damage water is not the answer to economical growth and sustainability. C-Aquifer for Diné has been submitting and participating in the NEPA process to oppose the Black Mesa Project. C-Aquifer for Diné believe water is life and is very sacred, and that without water, there is no life.

EPA's refusal to hold a public hearing to inform tribal members and organizations about the activities permitted by the NPDES permit, as requested during the public comment period, violates Executive Order 12898 (Feb. 11, 1994) ("EO 12898"), which requires that "[t]o the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States ... ." 59 Fed. Reg. 7629 (Feb. 16, 1994).

Under EO 12898, each federal agency must: (1) identify and address the disproportionately high and adverse human health, environmental, social, and economic effects of agency programs and policies on communities of color and low-income; and (2) develop policies, programs, procedures, and activities to *ensure that these specific impacted communities are meaningfully involved in environmental decision-making. See id.* at §§ 1-101, 3-3, and 4-401 (emphasis supplied).

The EO's environmental justice requirements mirror NEPA's "hard look" and

mitigation requirements. *See* 40 C.F.R. § 1508.20. Moreover, guidance promulgated by the Council on Environmental Quality ("CEQ") clarify the responsibilities of federal agencies to comply with EO 12898 in the context of NEPA compliance, including the requirements that they: consider "the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action"; develop "effective public participation strategies"; assure "meaningful community representation in the process"; and assure "tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights." CEQ, *Environmental Justice: Guidance Under the NEPA* (1997) at 15-16 (emphasis supplied).

Where there was a significant degree interest in this matter from the public and tribal members and organizations affected by EPA's decisionmaking in connection with the NPDES permit and the Complex in general, EPA failed to comply with the public participation components of EO 12898 and CEQ regulations. Accordingly, the Board should remand this matter back to the agency with instructions that the agency provide for meaningful public participation, including a public hearing.

B. It is unlawful for EPA to issue an NPDES permit for new sources unless and until WQLS or TMDLs are established for the Moenkopi Wash Drainage and Dinnebito Wash Drainage.

As demonstrated below, it was unlawful for EPA to issue and NPDES permit for new sources unless and until Water Quality Limited Segments ("WQLS") and Total Maximum Daily Loads ("TMDLs") are established for Moenkopi Wash Drainage and Dinnebito Wash Drainage.

1. Relevant Statutory Background

Congress enacted the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." *Id.* at § 1251(a)(2). The primary means of accomplishing these goals include effluent limitations for point sources—implemented through NPDES permits—and TMDLs covering water bodies for which effluent limitations are not stringent enough to attain water quality standards. In achieving water quality restoration, EPA has ultimate responsible for the country's water quality. *Id.* at § 1251(d).

Specifically, Congress designed the NPDES and TMDL system to operate as follows:

1. Each state (or tribes who have received "Treatment as a State" status) has the responsibility in the first instance to identify waterbodies that are compromised despite permit-based limits on point-source pollutant discharges. 33 U.S.C. § 1313(d).

2. If a waterbody is not in violation of a water quality standard, NPDES permits may be issued so long as they do not violate effluent limits. 33 U.S.C. § 1342(a)(1).

3. If a waterbody is in violation of a water quality standard despite effluent limits, the State (or Tribe) must identify the waterbody as impaired on its § 303(d) list and establish a TMDL for it. 33 U.S.C. § 1313(d).

4. Where the State (or Tribe) has established a final TMDL, it may issue an NPDES permit so long as the applicant can show that the TMDL provides room for the additional discharge and establishes compliance schedules for current permit holders to meet the water quality standard. 40 C.F.R. § 122.4(i). Otherwise, no NPDES permits may be issued which allow new or additional discharges into the impaired waterbody. *Id.*

Section 303 of the CWA establishes three specific components that a state or tribe must adopt if it seeks to run its own water quality program. First, a state or tribe must designate the "beneficial uses" of its waters. 33 U.S.C. § 1313(c)(2)(A). Second, a state or tribe must establish "water quality criteria" to protect the beneficial uses. *Id.* Third, a state or tribe must adopt and implement an "antidegradation" policy to prevent any further degradation of water quality. *Id.* at § 1313(d)(4)(B); *see also* 40 C.F.R. § 131.12. These three components of a state or tribe's water quality program are independent and separately-enforceable requirements of federal law. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 705 (1994).

In addition, and particularly important with respect to the Black Mesa Complex, the CWA requires states (or tribes) to identify any degraded waterbodies within their borders, and to establish a systematic process to restore those waterbodies. States or tribes must periodically submit to the EPA for its approval a list of waterbodies that do not meet water quality standards—*i.e.*, the state's or tribe's Section 303(d) list. 33 U.S.C. § 1313(d). The designated waterbodies are called "water quality limited," 40 C.F.R. § 130.10(b)(2), which means they fail to meet water quality criteria for one or more "parameters"—including particular pollutants (such as selenium, aluminum or chloride) as well as stream characteristics such as temperature, flow, and habitat modification. The "water quality limited" designation also means that the waterbody is not expected to achieve water quality criteria even after technology-based or other required controls—such as NPDES discharge permits—are applied. 33 U.S.C. § 1313(d)(1); 40 C.F.R. § 130.7(b)(1).

For these degraded waterbodies, the state or tribe must develop and implement a "total maximum daily load" ("TMDL") to restore water quality. *See* 33 U.S.C. § 1313(d)(1)(C) (explaining TMDLs). The TMDL process includes identifying sources of pollution that have caused or contributed to the degraded water quality, then establishing waste load allocations (for point sources of pollution) and load allocations (for nonpoint sources of pollution), for those sources which have caused or contributed to the degraded water. 40 C.F.R. § 130.2(g) and (h). The final TMDL represents a "pie chart" of the pollution sources and their respective pollutant allocations which, if properly adhered to, is intended to result in restoration of the stream to water quality standards; it reflects an impaired waterbody's capacity to tolerate point source, nonpoint source, and natural background pollution, with a margin of error, while still meeting state or tribal water quality standards.

2. No WQLS and TMDLs are established for Moenkopi Wash Drainage or Dinnebito Wash Drainage.

Despite the fact that both the Navajo Nation and Hopi Tribe have received "Treatment as a State" status for purposes of Sections 106 and 303 of the CWA, 33 U.S.C. §§ 1256, 1313, neither the Tribes nor the State of Arizona have submitted to EPA for its approval a list of waterbodies in the tribal land portion of the Little Colorado River Watershed (and in particular Moenkopi Wash Drainage and Dinnebito Wash Drainage) that do not meet water quality standards—*i.e.*, the state or tribe's Section 303(d) list.[9] However, and as noted above, these drainages have not been assessed by AZ DEQ (nor,

[9] As previously noted, the Navajo Nation and Hopi Tribe have submitted "401 Water Quality Standards Certification" to EPA. These certifications were not and have not been made public, and it is not clear if these certifications address this issue. However, Appellants respectfully assert that if this issue had been addressed, it would have been noted by the State of Arizona.

apparently, EPA or the tribes) to determine whether they are "attaining" TMDLs or are "impaired." *See* AZ DEQ 2006-2008 Status at 8 (identifying the drainages as "Tribal Land—Not Assessed").[10]

In light of this, it was unlawful for EPA to issue a permit for new sources or increase permitted discharges without first identifying whether these waterbodies are compromised despite permit-based limits on point-source pollutant discharges, and if so, without first ensuring that TMDLs are established for the tribal land portion of the Little Colorado River Watershed, and in particular, Moenkopi Wash Drainage and Dinnebito Wash Drainage. *See, e.g., Friends of the Wild Swan v. U.S. Envtl. Protection Agency*, 130 F. Supp. 2d 1199, 1203 (D. Mo. 2000) (holding that "[u]ntil all necessary TMDLs are established for a particular WQLS, the EPA shall not issue any new permits or increase permitted discharge for any permit under the [NPDES] permitting program"), *aff'd in part, rev'd in part, remanded by, Friends of the Wild Swan v. U.S. EPA*, 2003 WL 31751849, 2003 U.S. App. LEXIS 15271 (9th Cir. Mont. 2003).

C. EPA may not issue a NPDES permit that contributes to ongoing violations.

Under the Clean Water Act ("CWA"), EPA may not issue NPDES permits for discharges that cause or contribute to an exceedence of water quality standards. 33 U.S.C. §1311(b)(1)(c); 40 C.F.R. §122.4(a) (no permit may be issued "[w]hen the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA"); 40 C.F.R. § 122.44(d) (no permit

[10] Available on AZ DEQ's website: http://www.azdeq.gov/environ/water/assessment/download/2008/lg.pdf. Excerpts are attached as Exhibit A.

may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States").

According to EPA's response to comments on the draft permit, "several seeps [from impoundments] have shown concentrations of pollutants above water quality standards." EPA's *Comment Response* at 3. In particular, EPA concedes that discharges from impoundments BM-A1, J3-D, J-7A, J7-CD, J7-Dam, J7-JR, J16-A, J16-E, J19-D, J21-C, J27-A, J27-RC, N6-C, N6-F, N14-B, N14-H, N14-P, WW-9 are currently noncompliant with one or more Water Quality Standards. *Id.* at 5, 9-11.

Here, it was incumbent upon the agency to ensure compliance with all applicable WQS prior to issuance of a NPDES permit. For this reason, the permit should be remanded to EPA with instructions that the agency undertake measures to ensure compliance with all applicable standards. Appellants reserve the right to supplement their argument as necessary and upon review of the entire administrative record.

D. EPA failed to consider the environmental impacts of activities contemplated by the NPDES Permit pursuant to the National Environmental Policy Act.

EPA's issuance of a NPDES permit also violates the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), because the impacts of authorizing (or exempting) certain discharges in the NPDES were not analyzed by an environmental assessment or environmental impact statement and as required by NEPA and its implementing regulations as promulgated by the CEQ. 40 C.F.R. Parts 1500-1508. In fact, no NEPA document has *ever* analyzed EPA's authorization of discharges at Peabody's Black Mesa Complex which were first issued on December 29, 2000.

The trigger for an agency to be subject to NEPA mandates and the use of the NEPA procedural requirements to "prevent or eliminate damage" to the environment is a "major federal action." 42 U.S.C. § 4332(2)(C); *Ross v. FHA*, 162 F.3d 1046, 1051 (10th Cir. 1998) ("major federal action" means that the federal government has "actual power" to control the project). The NEPA process must "analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of 'past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.'" *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001). Once a "federal action" triggers the NEPA process, an agency cannot define "the project's purpose in terms so unreasonably narrow as to make the [NEPA analysis] 'a foreordained formality.'" *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (*quoting Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991) (*citing Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997))).

There can be no dispute that the requirements of NEPA apply to EPA's decision to issue the first NPDES permit renewal for the Complex. *See* 33 U.S.C. § 1371(c)(1) (CWA section specifically making EPA "new source" permit approvals subject to NEPA); 40 C.F.R. § 6.101. New source means "any source" the construction of which is commenced after the promulgation of Clean Water Act standards applicable to the source. 33 U.S.C. §1316(a)(2). Additionally, as stated by EPA's *Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents*:

> EPA will prepare an EA or, if appropriate, an EIS on a case-by-case basis in connection with Agency decisions where the Agency determines that such an

> analysis would be beneficial. Among the criteria that may be considered in making such a determination are: (a) the potential for improved coordination with other federal agencies taking related actions; (b) the potential for using an EA or EIS to comprehensively address large-scale ecological impacts, particularly cumulative effects; (c) the potential for using an EA or an EIS to facilitate analysis of environmental justice issues; (d) the potential for using an EA or EIS to expand public involvement and to address controversial issues; and (e) the potential of using an EA or EIS to address impacts on special resources or public health.

63 Fed. Reg. 58045-58047 (Oct. 29, 1998).

Yet, EPA did *not* conduct a NEPA review of the NPDES permit at all. Additionally, despite the fact that EPA was a cooperating agency in the OSM's December 22, 2008 Record of Decision ("ROD") and Final Environmental Impact Statement ("FEIS") which analyzed the LOM permit for Peabody creating the Black Mesa Complex, EPA's NPDES permit was not analyzed as part of the NEPA process for Peabody's LOM permit.[11] *See* Fact Sheet at 2 (EPA describing the LOM as a "separate permitting activity from the NPDES permit").[12] In fact, EPA's NPDES permit was not publically noticed until February 19, 2009—*i.e.*, two months *after* the close of the NEPA process on the LOM permit.

EPA's NPDES permit renewal "incorporates new outfalls" and "eliminate[s] expired outfalls" at the Black Mesa Complex. Fact Sheet at 1. The permit also "incorporates new regulatory requirements for the Western Alkaline Coal Mining Subcategory for reclamation areas (promulgated January 2002)… ." *Id.* In other words, EPA's permit specifically covers "new sources" as defined by Section 306 of the CWA, 33 U.S.C. § 1316, (*i.e.*, new outfalls) which should have been analyzed under NEPA. 33

[11] The ROD and FEIS are available on OSM's website: http://www.wrcc.osmre.gov/WR/BlackMesaEIS.htm.

[12] Additionally, according to EPA's Fact Sheet at 5, OSM conducted a technical review of the "Sediment Control Plan submitted by the Permittee."

U.S.C. § 1371(c)(1) ("discharge of any pollutant by a new source ... *shall* be deemed a major Federal action significantly affecting the quality of the human environment" within the meaning of NEPA) (emphasis supplied). For example, there are over eight (8) new sources that are now covered by the new regulations for Western Alkaline Coal Mining Subcategory for reclamation areas. *See* NPDES Permit at Appendix C. The environmental impacts of these new sources were never considered pursuant to NEPA.

Moreover, and as outlined in Appellants' comments on the draft NPDES, a NEPA process would facilitate analysis of environmental justice issues, expand public involvement, and address controversial issues as well as impacts on special resources or public health. As stated in the comments,

> Many of the people directly impacted by EPA's permit issuance are Navajo and Hopi tribal members who, if they speak English at all, speak English primarily as a second language. Many Native American communities in the Black Mesa area bear a disproportionate share of Peabody's ongoing discharge of numerous pollutants onto tribal lands. These communities often lack the political agency and economic leverage required for effective participation in environmental decision-making processes. Further, EPA owes a trust obligation to indigenous people and therefore needs to ensure that tribal people and lands are not being disproportionately impacted by Peabody's massive mining operation and ongoing discharge of pollutants.

Appellants' Comments (Ex. B) at 1.

In summary, and for the reasons set forward above, Appellants respectfully request that this matter be remanded back to EPA with orders that the agency comply with NEPA and include adequate public notice, comment, and participation pursuant to NEPA's implementing regulations at 40 C.F.R. §1506.6.

E. EPA failed to ensure that the impoundments are lawful under CWA Section 404 prior to issuance of the NPDES permit.

EPA seeks to issue the NPDES permit for discharges from earthen impoundments that have not been permitted by the Army Corps of Engineers ("Corps") under Section 404 of the CWA. 33 U.S.C. § 1344. In other words, EPA is issuing a discharge permit for unlawful impoundments that are prohibited by Section 404 and where EPA failed to consult or contact the Corps or involve the Corps as a cooperating agency in the development of an EIS considering the effects of the NPDES permit. As EPA itself acknowledged, "[t]he facility may also require authorization under a separate permit under the authority of Section 404 of the CWA for the discharge of fill material to a water of the U.S." Comment Response Document at 8. Yet, despite the agency's recognition that a Section 404 permit could be required, it elected not to consider one in connection with its issuance of the NPDES permit. *See id.* ("While the requirements and design parameters that may be necessary to implement Section 404 of the CWA will be considered upon the issuance of a 404 permit, they are not a consideration for the issuance of the NPDES permit.").

However, the issuance of a Section 404 permit by the Corps is a connected action that should have been analyzed in any NEPA document.[13] NEPA requires agencies to address connected actions in the same impact statement. 40 C.F.R. § 1508.25(a)(1). The CEQ regulations provide that a "connected action" is "closely related" to other actions

[13] The Corps, like EPA, must consider the environmental impacts of granting a Section 404 permit under NEPA. *See Greater Yellowstone Coalition v. Flowers,* 321 F.3d 1257, 1269 n.11 (10th Cir. 2004); *Tillamook County v. U.S. Army Corps of Eng'rs*, 288 F.3d 1140, 1142 (9th Cir. 2002); *Holy Cross Wilderness Fund v. Madigan,* 960 F.2d 1515, 1525 (10th Cir. 1992).

and "therefore should be discussed in the same impact statement" and is identified based on three factors:

> (i) Automatically trigger other actions which may require environmental impact statements.
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

See id. As the Tenth Circuit has noted:

> [P]rojects that have "independent utility" are not "connected actions" under 40 C.F.R. § 1508.25(a)(1)(iii). An inquiry into independent utility reveals whether the project is indeed a separate project, justifying the consideration of the environmental effects of that project alone.

Utahns for Better Transp. v. U.S. Dept. of Transp., 305 F.3d 1152, 1182-83 (10th Cir. 2002) (citing *Custer County Action Ass'n v. Garvey,* 256 F.3d 1024, 1037 (10th Cir. 2001), *Piedmont Heights Civic Club, Inc. v. Moreland,* 637 F.2d 430, 440 (5th Cir. 1981)).

Under the CEQ's implementing regulations for NEPA, a cooperating agency "means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment." 40 C.F.R. § 1508.5. The selection and responsibilities of a cooperating agency are described in 40 C.F.R. §1501.6 which emphasizes "agency cooperation early in the NEPA process." Thus:

> Upon request of the lead agency, any other Federal agency which has jurisdiction by law *shall* be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

40 C.F.R. § 1501.6 (emphasis applied). The CEQ addresses the importance of comprehensive and integrated NEPA analysis in its document entitled "NEPA's Forty Most Asked Questions":

> Agencies must integrate the NEPA process into other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.
> . . .
> The regulations emphasize agency cooperation early in the NEPA process.
> . . .
> These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval.
> . . .
> Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions.

46 Fed. Reg. 18026, 18029 (1981) ("Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations.").

Thus, the "connected" issuance of Section 404 permit should have been addressed in an environmental impact statement that also evaluated the environmental impacts of issuing the NPDES permit, and the Corps should have been identified as a cooperating agency in that NEPA analysis. Accordingly, the Board should remand this matter back to EPA with an order directing EPA to consult with the Corps and/or to make the Corps a cooperating agency in any NEPA process which analyzes the NPDES permit and related 404 permitting for the impoundments.

F. EPA failed to consider more stringent tribal laws.

The record released to the public indicates that EPA failed to analyze the application of much more stringent Navajo Nation laws to Peabody's operation. *See* 4

N.N.C. § 1301 *et seq.* (Navajo Nation Clean Water Act); 4 N.N.C. § 901, *et seq.* (Navajo Nation Environmental Protection Act) and Diné Bi Beenahaz'áanii (Diné Fundamental Law), 2 N.N.C. §§ 201-206. Navajo law would apply to all Navajo lands. Similarly, EPA failed to analyze the application of much more stringent Hopi Nation laws to Peabody's operation—in fact, EPA erroneously informed the public that the Hopi tribe did not have treatment as state status. Hopi law would apply to all Hopi lands. Such evaluation is especially critical where, as here, EPA has permitting authority over discharges from Peabody's mining operation and at a minimum, supports Appellants argument for a NEPA process.

In particular, EPA has failed to make any "401 WQS certifications by the Hopi and Navajo nations available to the public—as part of the administrative record. Appellants reserve the right to supplement this argument as necessary.

G. EPA failed to ensure through consultation pursuant to section 7(a)(2) of the Endangered Species Act that the operations authorized by the NPDES permit will not jeopardize the continued existence of threatened and endangered species or adversely modify their designated critical habitat.

In issuing the NPDES permit, EPA also failed to meet its affirmative obligations pursuant to Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA)" and ensure that its effects will not jeopardize the continued existence of threatened and endangered species, or adversely modify their designated critical habitat, that may be affected by the discharges of pollutants from active mine areas, coal preparation areas, and reclamation areas within the Complex. Potentially-affected species include the southwestern willow flycatcher, Mexican spotted owl, and Navajo sedge.

1. The ESA requires EPA to ensure that its issuance of the permit will not jeopardize the continued existence of threatened and endangered species or adversely modify their critical habitat.

Congress enacted the ESA in 1973 to provide for the conservation of endangered and threatened fish, wildlife, and plants and their natural habitats. *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, slip op. at 34 (EAB Sep. 24, 2009) (hereinafter "*Desert Rock*") (citing 16 U.S.C. § 1531, 1532). To accomplish this goal, the ESA requires the Secretaries of the Interior and Commerce to determine which species should be added to the lists of endangered and threatened species, and to designate "critical habitat" for listed species. *Id.* (citing 16 U.S.C. § 1533(a)). The two secretaries generally share responsibilities under the ESA; thus, the Secretary of the Interior acts through the U.S. Fish and Wildlife Service ("FWS") to implement ESA requirements with respect to terrestrial species, and the Secretary of Commerce, through the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, handles responsibilities for marine species. *Id.* at n.32 (citing 16 U.S.C. 1532(15) (definition of "Secretary"); 50 C.F.R. § 402.01(b); ESA Consultation Regulations, 51 Fed. Reg. 19926, 19926 (June 3, 1986)).[14]

The ESA imposes substantive and procedural obligations on all federal agencies, including EPA, with regard to threatened and endangered species and their critical habitat. *Id.* at 35 (citing 16 U.S.C. §§ 1536(a)(1), (a)(2), 1538(a)(1), (a)(2); 50 C.F.R. § 402.06(a)). As in *Desert Rock*, the relevant here is section 7(a)(2), which requires that:

> Each federal agency shall, in consultation with and with assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency

[14] Because the species at issue in this appeal are not marine species, this brief uses the term "FWS" when referring to the duties or responsibilities of the "Secretary" or the U.S. Fish and Wildlife Service.

> ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species ... .

16 U.S.C. § 1536(a)(2). The definition of agency "action" is "broad and includes 'the granting of licenses, contracts, leases, easements, rights-of-way, [or] *permits*.'" *Desert Rock*, slip op. at 35 (quoting 50 C.F.R. § 402.02) (emphasis added) (other citations omitted). Thus, as the EAB recognized in *Desert Rock*, "section 7(a)(2) imposes a substantive duty on federal agencies to ensure that none of their actions—including EPA's issuance of a NPDES permit—is likely to jeopardize listed species or destroy or adversely modify the critical habitat of such species." *Id.* (citing 51 Fed. Reg. at 19926; *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 94-95 (EAB Sep. 27, 2006) ("*Indeck-Elwood*"); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 485 (EAB 2002); *In re Dos Republicas Res. Co.*, 6 E.A.D. 643, 649, 666 (EAB 1996)).

Thus, the ESA's implementing regulations set forth a specific process, fulfillment of which is the only means by which an action agency ensures that its affirmative duties under section 7(a)(2) of the ESA are satisfied. *Desert Rock*, slip op. at 36 (citing 50 C.F.R. § 402.14(a); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995); *Indeck-Elwood*, slip op. at 95). By this process, each federal agency must review its "actions" at "the earliest possible time" to determine whether any action "may affect" listed species or critical habitat in the "action area." 50 C.F.R. § 402.14. The "action area" is defined to mean all areas that would be "affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The Board has explained that the term "may affect" is "broadly construed by FWS to include '[a]ny possible effect, whether beneficial, benign, adverse, or of an

undetermined character,' and is thus easily triggered." *Indeck-Elwood*, slip op. at 96 (quoting 51 Fed. Reg. at 19926); *Desert Rock*, slip op. at 36 n. 33. If a "may affect" determination is made, "consultation" is required. *Id.*

Consultation is a process between the federal agency proposing to take an action (the "action agency")—here, EPA—and, for activities affecting terrestrial species, FWS. "Formal consultation" commences with the action agency's written request for consultation and concludes with FWS's issuance of a "biological opinion" ("BiOp"). 50 C.F.R. § 402.02. The BiOp issued at the conclusion of formal consultation "states the opinion" of FWS as to whether the federal action is "likely to jeopardize the continued existence of listed species" or "result in the destruction or adverse modification of critical habitat." 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).[15]

Prior to commencing formal consultation, the federal agency may prepare a "biological assessment" ("BA") to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat" and "determine whether any such species or habitat are likely to be adversely affected by the action." 50 C.F.R. § 402.12(a); *Desert Rock*, slip op. at 36 (citing *Phelps Dodge*, 10 E.A.D. at 486 & n.23; *Dos Republicas*, 6 E.A.D. at 666 & n.68). While the action agency is required to

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[15] If FWS concludes that the activities are not likely to jeopardize listed species, it must provide an "incidental take statement" with the BiOp that specifies the amount or extent of such incidental take, the "reasonable and prudent measures" that FWS considers necessary or appropriate to minimize such take, the "terms and conditions" that must be complied with by the action agency or any applicant to implement any reasonable and prudent measures, and other details. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). "Take" means an action would "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," or "attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Thus, a BiOp with a no-jeopardy finding effectively green-lights a proposed action under the ESA, subject to an incidental take statement's terms and conditions. *Bennett v. Spear*, *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

use a BA in determining whether to initiate formal consultation, FWS may use the results of a BA in determining whether to request the action agency to initiate formal consultation or in formulating a BiOp. 50 C.F.R. §§ 402.12(k)(1), (2). If a BA concludes that the action is "not likely to adversely affect" a listed species, and FWS concurs in writing, that is the end of the "informal consultation" process. 50 C.F.R. § 402.13.

Review of EPA's compliance with section 7(a)(2) is based on the standard set forth in Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"). Under Section 706(2)(A) of the APA, a federal court will review the decision to grant the permit based on whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 2d 965, 966 (C.D. Cal. 2000), *affirming In re Catalina Yachts, Inc.*, 8 E.A.D. 199 (EAB 1999); *accord, Adams v. EPA*, 38 F.3d 43, 49 (1st Cir. 1994). Review under Section 706(2)(A) is based on the administrative record. It is EPA's duty to establish that it has complied with section 7(a)(2).

2. EPA has failed to establish that it has satisfied its duties pursuant to section 7(a)(2) of the ESA.

Threatened and endangered species are known to occur within the "action area" of the permit for the Complex and clearly "may" be affected directly, indirectly, and/or cumulatively by the activities authorized by the permit. At a minimum, such species include the endangered southwestern willow flycatcher, the threatened Mexican spotted owl, and the threatened Navajo sedge and its critical habitat. *See, e.g.*, U.S. Dep't of the

Interior, Office of Surface Mining Reclamation and Enforcement, *Black Mesa Project Biological Assessment* (Nov. 2008) ("Black Mesa BA") (Ex. C).[16]

For example, the southwestern willow flycatcher is a riparian-obligate species that relies on rivers, streams, and other wetlands for breeding. *Id.* at 6-1. Suitable foraging and resting habitat is known to exist in the area of the Complex for this species, "near the black mesa mining operation", including in Moenkopi Wash. *Id.* at 6-3. Southwestern willow flycatchers are known to be threatened in part due to the "reduction, degradation, or elimination of riparian habitat, which has curtailed the range, distribution and populations of this species." *Id.* The loss of riparian habitat results from impoundments, among other things. *Id.*

The NPDES permit authorizes new and continued discharges from active mine areas, coal preparation areas, and reclamation areas within the Complex, including into the Moenkopi Wash Drainage. In addition, the effects of EPA's issuance of the NPDES permit to Peabody include discharges of selenium and other pollutants that are known to affect flora and fauna. Clearly, the effects of EPA's issuance of the NPDES permit "may affect" the survival and recovery of the endangered southwestern willow flycatcher (and other threatened and endangered species), yet in reaching a "no effect" determination,

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[16] The Black Mesa BA was developed in connection with the proposal by OSM to grant Peabody's application to revise the LOM permit for the Complex. *Id.* Thus, the Black Mesa BA purports to evaluate the effects of the revision to Peabody's permit to mine the Complex pursuant to the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1234-1328 ("SMCRA") and purports to identify all of the threatened and endangered species in the vicinity of the Complex that could be affected by such activities. Appellants and other parties are pursuing an appeal of OSM's decision to grant the LOM revision to Peabody before an Administrative Law Judge within the Department of Interior, and their appeal includes claims that challenge the insufficiencies of the Final BA. That said, the Final Black Mesa BA does clearly indicate that EPA's issuance of the final NPDES permit "may affect" the flycatcher, owl, and sedge in ways that were apparently never considered by EPA when it issued the NPDES permit.

EPA either did not consider these or related effects, or just dismissed them outright. This is patently arbitrary, capricious, and an abuse of agency discretion. 5 U.S.C. § 706(2)(A). EPA's failure to consider these effects further through preparation of a BA or BiOp runs counter to the agency's affirmative duties under Section 7(a)(2) of the ESA.

In addition, EPA's "no effect" conclusion is arbitrary and capricious because the agency did not disclose documents related to any ESA consultation developed in connection with the agency's issuance of the NPDES permit at the draft permit stage. Indeed, it was not until EPA issued the final permit that Appellants were even informed that a "no effect" determination for all threatened and endangered species that occur in the "action area" had been made. *See* Comment Response Document at 12.[17] The lack of any information about ESA consultation at the draft permit stage prevented the public from being able to meaningfully understand and participate in the permitting process. *See, e.g., In re City of Phoenix*, 9 E.A.D. 515, 526 (EAB 2000) ("In NPDES proceedings, as well as other permit proceedings, the broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final.").[18]

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[17] Given the lack of public disclosure of this information to date, it is nonsensical for EPA to claim that Appellants failed to raise this issue in comments on the draft permit. *Id.*

[18] In light of EPA's failure to make the ESA consultation records available to the public at the draft permit stage or even to Appellants in the context of this appeal to date, there are procedural and substantive ESA violations that cannot be squarely addressed by the parties and may go unresolved. For instance, without the benefit of reviewing the ESA consultation records, there is no way to know whether EPA completed that consultation *before* it issued the final permit—and, if EPA completed consultation after it issued the final permit, then there are unique issues related to the timing of that consultation. *See, e.g., Desert Rock*, slip op. at 38-40; *Indeck-Elwood*, slip op. at 198 and n. 148 ("to ensure compliance with the law, any consultation required under the ESA should in the ordinary

Thus, because EPA has failed to establish that it has satisfied its duties under Section 7(a)(2) of the ESA, the NPDES permit should be remanded on this basis as well.

V. Conclusion

For all of the foregoing reasons, the Board should remand the EPA's NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179.

RESPECTFULLY SUBMITTED on Thursday, October 22, 2009.

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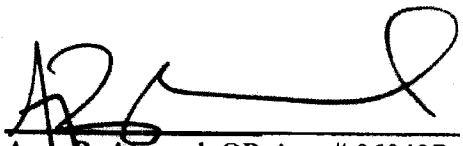
course conclude prior to issuance of the final federal PSD permit"). As stated above, Appellants therefore request that the administrative record in this matter be limited to records publicly-available on EPA's website as of the date of issuance of the final permit. *See* 40 C.F.R. § 124.18(c) (The record shall be complete on the date the final permit is issued."). EPA should not be allowed to produce *post-hoc* a record which includes additional records which, to date, have never been made available to the public. At a minimum, Appellants respectfully request that the Board order a remand directing that the ESA-related materials be included in the administrative record and subjected to public review and comment. If the Board elects not to remand the permit on this basis, then Appellants will file a motion requesting that the Board allow them to file a reply brief and/or amend their petition with further development of this claim if and when EPA makes the documents available, *e.g.*, when the agency files a response to Appellants' supplemental brief.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 22, 2009, she caused a copy of the foregoing to be served by first-class mail on:

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