

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

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In re: )  
)  
) NPDES APPEAL No. 14-\_\_\_\_\_  
)  
Lee Ranch Coal Company, )  
El Segundo Mine )  
)  
NPDES Permit No. NM0030996 )  
)  

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**PETITION FOR REVIEW BY LEE RANCH COAL COMPANY**

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**I.**  
**INTRODUCTION**

Pursuant to 40 C.F.R. § 124.19(a), Lee Ranch Coal Company (“Petitioner” or “LRCC”) petitions for review of the conditions of National Pollution Discharge Elimination System (“NPDES”) Permit No. NM0030996 (the “Permit”), which was issued to LRCC on September 30, 2014, by the United States Environmental Protection Agency (“EPA”), Region 6 (the “Region”). The Permit is attached hereto as Exhibit A. The Permit at issue in this proceeding authorizes the LRCC to discharge water from specified point sources at the El Segundo Mine located in Grants, New Mexico. Petitioner contends that certain newly imposed permit conditions by the Region as part of the Permit’s renewal are based on clearly erroneous findings of fact and conclusions of law and should either be changed as further addressed below or remanded to the Region for further consideration.

Specifically, Petitioner challenges the following permit conditions:

- (1) TDS Limitation - Imposition of a Total Dissolved Solids (“TDS”) effluent limitation of 2,000 lbs/day from outfalls Nos. 1 to 41 under the Colorado River Salinity Control Program.<sup>1</sup> Permit, Part I.A.5.
- (2) WACM Rule SCP - Submission of a Sediment Control Plan (“SCP”) under the Western Alkaline Coal Mining (“WACM”) Rule<sup>2</sup> within six months of Permit’s effective date. Permit, Part I.A.6.

**II.**  
**FACTUAL AND STATUTORY BACKGROUND**

**A. El Segundo Mine NPDES Permit**

The El Segundo Mine, located in Northwest New Mexico, opened in 2008. Pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342, the Region initially issued an NPDES

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<sup>1</sup> As authorized by the Colorado River Basin Salinity Control Act of 1974; 43 U.S.C. § 1571, *et seq.*

<sup>2</sup> 40 C.F.R. Ch. I, Subpart H (§§ 434.80–434.85).

permit for the mine on December 29, 2008, with an effective date of February 1, 2009, and an expiration date of January 31, 2014 (the “2008 Permit”). A copy of the 2008 Permit is attached hereto as Exhibit F. The 2008 Permit and the Permit authorize the El Segundo Mine to discharge from multiple outfalls subject to conditions. According to the Region, as set forth in the Permit, the relevant receiving waters are the Kim-me-ni-oli Valley Tributary, thence into Chaco River, a tributary of San Juan River (about 100 miles northwest of El Segundo Mine) and to Inditos Draw, a tributary of Vought Draw, which flows into Arroyo Chico, then to Rio Puerco (about 60 miles southeast of the mine area), a tributary of the Rio Grande River. Kim-me-ni-oli Valley and Inditos Draw are ephemeral (unclassified) receiving waters pursuant to 20.6.4.97 NMAC.<sup>3</sup> Permit, Cover Page. Runoff at the mine is controlled through the use of ditches, berms, and impoundments to control discharges. Sediment ponds are the primary measures used to control solids in runoff water from storms and other sources. To date, no discharges have occurred from the El Segundo Mine. Fact Sheet, p. 3, *infra*.

On July 24, 2013, LRCC timely applied for a new permit. On May 30, 2014, the Region issued a draft permit. Copies of the Region’s public notice of the proposed permit renewal and draft permit are attached hereto as Exhibits C (“Public Notice”) and D (“Draft Permit”), respectively.<sup>4</sup> The Region’s Fact Sheet for the Permit is attached hereto as Exhibit E (“Fact Sheet”). On June 30, 2014, LRCC submitted comments on the Draft Permit to the Region, a copy of which is attached hereto as Exhibit F (“Comment Letter”).<sup>5</sup> On September 30, 2014, the Region issued its final permit decision issuing the Permit with certain changes from the 2008 Permit, which LRCC contests as further set forth below.

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<sup>3</sup> See also New Mexico Waters Subject to 20.6.4.97 NMAC, NMED <http://www.nmenv.state.nm.us/swqb/UAA/HP/>.

<sup>4</sup> The Region’s website also contains the draft permit, public notice and fact sheet. See <http://www.epa.gov/region6/water/npdes/publicnotices/nm/nmdraft.htm>

<sup>5</sup> Letter from J. Boswell, Peabody Investments Corporation to E. Rosborough, EPA (June 30, 2014).

**B. NM Mining Permit**

The El Segundo Mine operates pursuant to the authority of and permits issued by the Mining and Minerals Division, of the Energy, Minerals and Natural Resources Department, of the State of New Mexico (“NMMMD”), Permit No. 2010-01, which was renewed and approved on September 15, 2010, for a term of five years (the “NM Mining Permit”). A copy of relevant excerpts of the NM Mining Permit are attached hereto as Exhibit G. The NM Mining Permit is issued pursuant to the New Mexico Surface Mining Act, § 69-25A-1, *et seq.* NMSA (1978), and the Coal Surface Mining Commission's Rules (Title 19 (Natural Resources and Wildlife), Chapter 8, (Coal Mining)) of the New Mexico Administrative Code (19.8 NMAC), that are part of the New Mexico State Program adopted under the U.S. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (“SMCRA”), which was initially conditionally approved by Secretary of the Interior, effective December 31, 1980. 30 C.F.R. § 931, *et seq.*

**III.  
THRESHOLD PROCEDURAL REQUIREMENTS**

Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:<sup>6</sup>

1. Petitioner has standing to petition for review of the permit decision because it submitted its Comment Letter and participated in the public comment period on the Permit. *See* 40 C.F.R. § 124.19(a). *See* Comment Letter.

2. The issues raised by Petitioner in this Petition were raised during the public comment period and therefore were preserved for review. As further addressed below, LRCC raised both issues set forth in this Petition in its Comment Letter (item Nos. 3 and 5). *See* Comment Letter, pp. 1-6. As explained below, the Region’s response (“Response to

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<sup>6</sup> This Petition has been timely filed in accordance with 40 C.F.R. § 124.20(c) and (d), as the Permit was mailed on September 30, 2014. *See also* U.S. EPA, Environmental Appeals Board, Practice Manual, at 42 (Aug. 2013).



Comments”), attached hereto as part of Exhibit A, to the subject comments by LRCC was clearly erroneous.

#### **IV. ARGUMENT**

##### **A. TDS Limitation**

LRCC appeals the newly imposed total effluent limit for Outfalls Nos. 1 to 41, limiting TDS to 2,000 lbs/day. The Region based the TDS limit on Colorado River Salinity Control Program (“CRSCP”) salinity standards. NPDES Permit, Part I.A.5; *see* Response to Comments, No. 4. Although not included in the 2008 Permit, and even though no relevant change occurred with respect to either the mine’s operations or the CRSCP, the Region added the TDS limit to the Permit due to a potential for discharges to the San Juan River, which is part of the Colorado River Basin for which the CRSCP was established in 1974. Fact Sheet, pp. 7-8.

As indicated in Section V.C.4 of the Region’s Fact Sheet, the TDS limit in the Permit is a state water quality-based limit imposed by the Region pursuant to regulations promulgated at 40 C.F.R. § 122.44(d). Fact Sheet, p. 6-7. The record, however, does not demonstrate that the Region conducted a reasonable potential assessment in accordance with 40 C.F.R. § 122.44(d)(1)(ii) to determine whether discharges from the mine, 100 miles from the San Juan River by the Region’s own account, “cause, has the reasonable potential to cause, or contribute to” an exceedance of Colorado River salinity standards, which the State of New Mexico has incorporated by reference into its Water Quality Standards (“WQSs”). Moreover, the administrative record is inadequate to determine whether the Region exercised “considered judgment,” and does not support the Region’s application of the Colorado River salinity standards, its reasoning in finding that the mine discharges have a reasonable potential to cause or contribute to an exceedance of the Colorado River salinity standards, or the imposition of a TDS limit. Given the Region clearly erred and the lack of a record supporting the Region’s

imposition of the TDS limit, this new permit condition should be eliminated or the matter should be remanded to the Region for further consideration.

#### 1. **Colorado River Salinity Control Program**

The Colorado River Basin is 242,000 square miles (approximately 155 million acres) of the western United States and a small portion of northern Mexico.<sup>7</sup> The Colorado River Basin is located within seven states: Colorado, New Mexico, Arizona, California, Nevada, Utah and Wyoming (the “Basin States”). In 1973, the Basin States established the Colorado River Basin Salinity Control Forum (the “Forum”) for interstate cooperation and to provide the states with information necessary to comply with Section 303(a) and (b) of the Clean Water Act.<sup>8</sup> In 1974, Congress enacted the Colorado River Basin Salinity Control Act (“CRBSCA”), which authorized the construction, operation and maintenance of salinity control works in the Colorado River Basin. 43 U.S.C. § 1571, *et seq.* Title II of CRBSCA created the CRSCP and directed the Department of Interior, Department of Agriculture and EPA to cooperate and coordinate their activities effectively to carry out the objective of CRBSCA.

In 1975, the Forum proposed, the Basin States adopted, and EPA approved water quality standards that include numeric criteria and a plan of implementation to control salinity increases in the Colorado River, which is reviewed and modified as appropriate at least every three years. (This review was last completed in 2011. *See* 2011 Review.) The plan of implementation consists of a number of federal and non-federal projects and measures to maintain the flow-weighted average annual salinity in the Lower Colorado River at or below numeric criteria at the three stations. One of the components of the plan of implementation consists of placing effluent limitations, through the NPDES permit program, on industrial and municipal discharges.<sup>9</sup> In

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<sup>7</sup> 2011 Review, Water Quality Standards for Salinity, Colorado River System, Colorado River Basin Salinity Control Forum (October 2011) (the “2011 Review”), p. 2. A copy of the 2011 Review is attached hereto as Exhibit H.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

1977, the Basin States adopted the “Policy for Implementation of Colorado River Salinity Standards through the NPDES Permit Program.”<sup>10</sup> *See Environmental Defense Fund v. Costle*, 657 F.2d 275 (1981) (upholding EPA’s approval of the Basin States’ adoption of the Colorado River Salinity Standards as water quality standards).

According to the 2011 Review, New Mexico’s portion of the Colorado River Basin above Imperial Dam is comprised of two major drainages: (1) the Rio Puerco, which is a tributary of the Little Colorado River, and (2) the San Juan River, which is a major tributary of the Colorado River.<sup>11</sup> The State of New Mexico has incorporated the Colorado River Salinity Standards as part of its WQSS. 20.6.54 NMAC.

## 2. **The El Segundo Mine**

The El Segundo Mine is located near Grants, New Mexico, outside of the Colorado River Basin (in the San Juan River Basin),<sup>12</sup> as are the unclassified receiving waters that are the subject of the Permit. Kim-me-ni-oli Valley Tributary is located in the San Juan River Basin and the Inditos Draw is located in the Rio Grande River Basin.<sup>13</sup> Fact Sheet, p. 1. The Region recognizes that the *San Juan River is approximately 100 miles northwest of the El Segundo Mine*. Permit, p. 1; Public Notice, p. 1. Nonetheless, the Region imposed the TDS limit on Outfalls Nos. 1 to 41, since it found that the outfalls lead to the Kim-me-ni-oli Valley Tributary, thence to the San Juan River,<sup>14</sup> which is part of the Colorado River Basin and a tributary to the Colorado River. Response to Comments, Comment 4; Fact Sheet, pp. 7-11.

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<sup>10</sup> *Id.*, Appendix A, *Policy For Implementation Of Colorado River Salinity Standards Through The NPDES Permit Program*, Adopted by The Colorado River Basin Salinity Control Forum (February 28, 1977, Revised October 30, 2002).

<sup>11</sup> 2011 Review, p. 20.

<sup>12</sup> New Mexico EMNRD Coal Mine Query, El Segundo Mine, Stats <http://www.wapps.emnrd.state.nm.us/MMD/CoalMinesQuery/default.aspx?Mode=MineInformation&MineID=830>

<sup>13</sup> *See also* Use Attainability Analysis for Unclassified Non-Perennial Watercourses with NPDES Permitted Facilities New Mexico Environment Department (June 2012).

<sup>14</sup> The Region’s Response to Comments neglects to indicate that the Kim-me-ni-oli Valley Tributary is not a direct tributary to the San Juan River, but rather via the Chaco River, which is a tributary to the San Juan River. Response to Comments, p. 5 (“The established TDS limit is applicable to outfalls (outfalls 1 to 41) leading to Kim-me-ni-oli Valley Tributary, thence to the San Juan River”). Moreover, the Region fails to explain that the outfalls are another

3. **The Region Failed to Conduct a Reasonable Potential Analysis for the Mine Discharges to Cause Exceedances of the Colorado River Salinity Standard**

The Region clearly erred as a matter of law and fact and abused its discretion since it has not set forth any data or support to justify a reasonable potential that discharges from Outfalls Nos. 1–41 will cause any salt loading to the Colorado River. The Permit flatly imposes a total TDS limit of 2,000 lbs (one ton) per day for all subject outfalls without the Region having first determined there is a reasonable potential that the TDS discharge could cause or contribute to any salt loading in the Colorado River via the Kim-me-ni-oli Valley Tributary, Chaco River and the San Juan River – located 100 miles away from the El Segundo Mine.

a. **Reasonable Potential Requirement**

“Under the federal regulations implementing the NPDES program, permit issuers are required to determine whether a given point source discharge ‘causes, has the reasonable potential to cause, or contributes to’ an exceedance of the narrative or numeric criteria for various pollutants set forth in state water quality standards.” *In Re Town of Concord Department of Public Works*, NPDES Appeal No. 13-08, slip op. at 7(EAB Aug. 28, 2014), 16 E.A.D. \_\_; 40 C.F.R. § 122.44(d)(1)(ii); Office of Water, U.S. EPA, EPA-833-K-10-001, U.S. EPA NPDES Permit Writers’ Manual, ch. 6 (Sept. 2010) (“EPA NPDES Permit Writers’ Manual”). The “reasonable potential analysis” requirement provides:

When determining whether a discharge causes, has the *reasonable potential to cause, or contributes to an instream excursion above a narrative or numeric criteria within a [s]tate water quality standard*, the permitting authority *shall use* procedures [that] account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

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step removed from the Kim-me-ni-oli Valley Tributary, as there is first an unnamed tributary before the Kim-me-ni-oli Valley Tributary. See <http://www.nmenv.state.nm.us/swqb/UAA/HP/>

*Id.* at 8 (emphasis added).

If a discharge is found to cause, have the reasonable potential to cause, or contribute to exceedances of numeric or narrative state water quality criteria, the permit writer must calculate Water Quality-Based Effluent Limits (“WQBELs”) for the relevant pollutants. 40 C.F.R. § 122.44(d)(1)(i), (iii)-(vi). The permit writer must then compare the resulting WQBELs to any Technology-Based Effluent Limits (“TBELs”) developed for particular pollutants and incorporate the more stringent set of effluent limitations into the permit. *Id.* (citing CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)). “A reasonable potential analysis need not take any particular form in the administrative record, but may simply consist of a permit issuer’s finding, supported by the record, that reasonable potential exists in light of the factors in section 122.44(d)(1)(ii), and that the chosen effluent limit is necessary to ensure compliance with water quality standards.” *Id.* at 28; *In re Town of Newmarket, New Hampshire*, NPDES Appeal No. 12-05 (EAB Dec. 2 2013), 16 E.A.D. \_\_\_.

**b. The Administrative Record Lacks a Reasonable Potential Analysis**

The administrative record is lacking with regard to a reasonable potential analysis and is contrary to EPA’s own guidance. The Region’s determination that TDS limits should be imposed on mine discharges to meet CRSCP requirements is entirely conclusory. The Region does not indicate and provides no support to demonstrate that discharges of TDS from the El Segundo Mine outfalls could cause or contribute to an instream excursion above the criteria of the Colorado River salinity standards. Indeed, nowhere with regard to the imposition of the TDS limits does the Region make a finding that the El Segundo Mine has a reasonable potential to cause or contribute to an exceedance of the salinity standards for the Colorado River.

The administrative record plainly shows that the Region has not satisfactorily determined that the pollutant will “cause, have reasonable potential to cause, or contribute to” a violation of state water quality standards (i.e., the salinity policy). According to the Fact Sheet, the Region

merely indicated that the New Mexico Environmental Department (“NMED”) incorporated the Colorado River salinity standards by reference into their WQS and that the TDS limit will be established for outfalls leading to the San Juan River, without any documentation of a reasonable potential determination that such discharges will either reach the Colorado River or cause or contribute to a violation of the WQS. Fact Sheet, V.C.4.d.

In its Comments, LRCC pointed out that outfalls were located outside of the Colorado River Basin, that the El Segundo Mine is at least 70 miles away from the San Juan River,<sup>15</sup> and that the Region set forth no evidence that the discharges (of TDS) would ever reach the Colorado River. Citing stream gauging data, LRCC raised that “[t]here was *no evidence* that the outfalls at the El Segundo Mine *have any reasonable potential* to influence salinity within the Colorado River Basin because surface water flows in the vicinity of the El Segundo Mine are typically of short duration, and commonly dissipate completely due to infiltration along the downstream sand bed channels.” (Emphasis added.) LRCC also indicated that the mine sediment ponds likely decrease the overall salt loading below that in drainage from undisturbed upstream locations and that treatment of TDS by reverse osmosis would be cost-prohibitive.

In its Response to Comments, the Region merely clarified that the TDS limit is applicable to outfalls Nos. 0-41, which “lead to Kim-me-ni-oli Valley Tributary, thence to the San Juan River.” However, the Region did not cite to any data or provide any analysis as to how it determined there was a reasonable potential for such discharges to cause or contribute to an instream excursion of the salinity limit in the Colorado River. Indeed, the Region conceded that “discharges may not reach the tributaries of the Colorado River [let alone not reach the Colorado River itself] under every discharge event.” *Id.* Yet, it went on to speculate without support that “the TDS could remain in the tributaries to be washed into downstream but (sic) subsequent discharges or storm events.” *Id.*

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<sup>15</sup> As indicated above, in the Permit and Fact Sheet, the Region indicates that the San Juan River is 100 miles northwest of the El Segundo Mine.

The Region has not followed its own guidance for conducting and documenting a reasonable potential analysis as set forth in the EPA NPDES Permit Writers' Manual.<sup>16</sup> There is no data from the El Segundo Mine with regard to TDS concentrations for the mine's drainage or discharges. The 2008 Permit did not require TDS testing and monitoring and did not have a TDS discharge limit. 2008 Permit, Part I.A. and B. Appendix A. When conducting a reasonable potential analysis without data,<sup>17</sup> the EPA NPDES Permit Writers' Manual provides:<sup>18</sup>

The permit writer should always provide justification for the decision to require WQBELs in the permit fact sheet or statement of basis and must do so where required by federal and state regulations. *A thorough rationale is particularly important when the decision to include WQBELs is not based on an analysis of effluent data for the pollutant of concern.*

After evaluating all available information characterizing the nature of the discharge without effluent monitoring data for the pollutant of concern, if the permit writer is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to an excursion above a water quality criterion, he or she may determine that effluent monitoring should be required to gather additional data.

EPA NPDES Permit Writers' Manual, p. 6-30-31 (emphasis added).

In its Comments, in light of the lack of data, LRCC requested to no avail that the TDS limit be removed or changed to "report only," if necessary. Comments, p. 5. Unlike with regard to TDS, as to toxics under the Permit, the Region concluded that "due to no discharge data EPA determined that there is inadequate information to determine [a] reasonable potential to cause or contribute an exceedance of the state WQS." Fact Sheet V.C.4.b.

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<sup>16</sup> See <http://water.epa.gov/polwaste/npdes/basics/NPDES-Permit-Writers-Manual.cfm>

<sup>17</sup> The EPA NPDES Permit Writers' Manual provides four steps for conducting a reasonable potential analysis *with data*:

- Step 1. Determine the appropriate water quality model.
- Step 2. Determine the expected receiving water concentration under critical conditions.
- Step 3. Answer the question, "Is there reasonable potential?"
- Step 4. Document the reasonable potential determination in the fact sheet.

EPA NPDES Permit Writers' Manual, p. 6-23.

<sup>18</sup> The EPA NPDES Permit Writers' Manual further indicates that a qualitative assessment should include, among other things, "[d]ilution information such as critical receiving water flows or mixing zones," which the Region also failed to consider when imposing the TDS limit in the Permit.

Accordingly, the Region erred by not conducting a reasonable potential analysis.

4. **The Administrative Record Does Not Reflect the Application of Considered Judgment**

The Region's imposition of the TDS effluent limit also does not reflect the application of "considered judgment." *In re San Jacinto River Authority*, 14 E.A.D. 688, 709 (EAB 2010); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). For the reasons set forth above, the administrative record does not support and does not adequately explain the basis for imposing the TDS limits.

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment" . . . . The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion . . . . As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." " *In Re Town of Concord Department of Public Works*, NPDES Appeal No. 13-08, slip op. at 5 (EAB Aug. 28, 2014), 16 E.A.D. \_\_ (citations omitted).

On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record.

*Id.* at 6.

As explained above, with regard to the Region's decision to include the TDS limit, the Region clearly erred as it has failed to adequately and fully explain its rationale and support its reasoning in the administrative record for changing the prior permit by adding the TDS limits, including as to how TDS discharges from the mine could cause an exceedance of the salinity standard in the Colorado River. Other than indicating that the TDS limit was being added due to the CRSCP, there was no explanation for imposing TDS limit set forth in the Fact Sheet or



otherwise. The EPA region must provide an analysis of the statutory and regulatory provisions it relied upon in the permitting process. *In re San Jacinto River Authority*, 14 E.A.D. 688, 702-203 (EAB 2010); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). Once the EPA region explains the applicable regulatory provisions, it must apply those provisions to the facts of the case and exercise considered judgment. *Id.*; *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997) *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997). It did not do so here.

The record is essentially devoid of any explanation or reasoning. After LRCC objected to the new condition, in its Response to Comments, the Region merely speculated that “[t]he possible future discharges may not reach the tributaries of the Colorado River under every discharge event, however, the TDS could remain in the tributaries to be washed into downstream by subsequent discharges or storms.” In light of the information in the record and lack thereof, the Region’s response to LRCC’s comments is not rational, is not supported by data or facts, and is not a sufficient explanation that reflects its considered judgment. The Region does not adequately explain either the legal or factual bases and provides no support for its conclusion set forth in its Response to Comments that TDS could remain in the tributaries, or that any such TDS would be in sufficient concentrations in water that could reach the Kim-me-ni-oli Valley Tributary and thereafter reach the Chaco River, the San Juan River, and then the Colorado River. Despite lacking any TDS data from the El Segundo Mine, even if the Region found that discharges from the mine could reach the Colorado River and cause some amount of salt loading, it provides no support for imposing the one-ton-per-day limit at the point of discharge that is several tributaries and over 100 miles away. Indeed, under the NPDES Permit Program Policy for the Implementation of Colorado River Salinity Standards, “the permitting authority may permit the discharge of salt . . . in cases where the *salt loading to the Colorado River* from the new construction<sup>19</sup> is less than one ton per day or 366 tons per year.”<sup>20</sup> 2011 Review, Appendix

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<sup>19</sup> “New construction is defined as any facility from which a discharge may occur, the construction of which is commenced after October 18, 1975.” 2011 Review, Appendix A, p. A-5.

<sup>20</sup> EPA Region 6’s Procedures for Implementing National Pollutant Discharge Elimination System Permits in New Mexico provide that for New Construction, “the permit writer may permit the discharge of salt for a new discharge

A, p. A-5 (emphasis added).

For the reasons set forth above, given the lack of a satisfactory reasonable potential analysis and that the Region failed to exercise its considered judgment, LRCC respectfully requests that the TDS effluent limitation be eliminated or that the EAB remand the TDS effluent limitation to the Region for further consideration. *In Re Town of Concord Department of Public Works*, NPDES Appeal No. 13-08, slip op. at 27-28 (EAB Aug. 28, 2014), 16 E.A.D. \_\_\_ (remanding certain effluent limits to EPA region for further explanation); *In re City of Marlborough*, 12 E.A.D. 235, 245 (EAB 2005) (remanding permit where rationale for effluent limit not sufficiently clear).

**B. WACM Rule SCP**

The Region clearly erred in law and fact and its decision does not reflect the application of considered judgment with regard to its decision to impose a new permit condition requiring the submission of an SCP within six months of the Permit's issuance. Permit, Part I.A.6. The Region has misapplied the WACM Rule. Rather, the SCP should be required only when eligible drainage from reclamation and other areas becomes subject to the WACM Rule. The administrative record is void of any facts supporting a conclusion that drainage subject to the WACM Rule exists at the El Segundo Mine as of the Permit's effective date, or will be within six months of it, to trigger the preparation of an SCP.

**1. LRCC's Comments and the Region's Response**

In its Comments, LRCC indicated that effluent limits should apply where the disturbed area above an outfall may not be completely reclaimed and objected to the proposed timing for submitting the SCP being within six months of the effective date of the Permit. Comments, pp.

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from a new facility if a demonstration is made that it is not practical to prevent the discharge of all salt, if it is less than one ton per day or 366 tons per year." Procedures for Implementing National Pollutant Discharge Elimination System Permits in New Mexico (November 30, 2009), p. 27. To the extent that this guidance provides that the one ton per day should be measured at the facility outfalls, it is contrary to the NPDES Permit Program Policy for the Implementation of Colorado River Salinity Standards and, therefore, the New Mexico Water Quality Standards.

2-3. LRCC asserted that the WACM Rule applies to outfalls only when 100 percent of its drainage is characterized by conditions defined under the WACM Rule. Comments, p. 3. In regard to its permit renewal application, LRCC explained to the Region that “none of the outfalls we are asking to be incorporated into the renewed permit will be eligible for [the WACM category] because active mining activities will be ongoing within the watersheds of each outfall for the foreseeable future, including the upcoming 5-year permit term.”<sup>21</sup>

As a result, LRCC requested that the Permit “mimic” the NPDES Permit for the Lee Ranch Mine (No. NM0029581), also issued by EPA Region 6 (the “Lee Ranch Mine Permit”). *Id.* at 2. A copy of the Lee Ranch Mine Permit is attached hereto as Exhibit J. The Lee Ranch Mine Permit provides that “[t]his subpart applies to any outfall that 100% of its associated drainage is western alkaline coal mining operations from reclamation areas, brushing and grubbing areas, topsoil stockpiling areas, and regraded areas where the discharge, before any treatment, meets all of the following requirements . . . .” Lee Ranch Mine Permit, Section II.E. The Lee Ranch Mine Permit further provides that “No later than three (3) months prior to any discharge from the above areas, the operator must submit a sit[e] specific Sediment Control Plan (Plan) approved by the State mining agency under the authority of SMRCA to EPA . . . .” *Id.*

In its Response to Comments, the Region expressed reservations about such an interpretation of the WACM Rule and, contrary to the Region’s prior handling of the Lee Ranch Mine Permit, indicated that “the stated language (‘This subpart applies to any outfall that 100% of its associated drainage is as western alkaline coal mining operations . . .’) does not fully reflect the WACM applicability.” Response to Comments, Comment 2. The Region went on to indicate that “since this limitation is a BPT, there is no compliance schedule provided to meet this requirement. Pursuant to 40 CFR 122(d)(5), ‘After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to

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<sup>21</sup> Email from J. Cochran, to N. Tung, EPA, Jan. 27, 2014, attached hereto as Exhibit I.

operate the source in violation of those standards applicable to the source.’ ” Response to Comments, Comment 2.

## 2. **The WACM Rule Is Not Applicable if the Drainage Is Commingled with Active Mining Drainage**

The Region’s Response to Comments and the subject permit condition are misplaced. The Region erred as a matter of law and fact since it has no authority to require the submission of an SCP until there are areas with drainage subject to the WACM Rule. Contrary to the Region’s conclusion in the Fact Sheet, the WACM Rule does not require that all western coal mining operations (either new or existing sources) have an SCP. In particular, the WACM Rule provides that “[a]ny new source western coal mining operation *with drainage subject to this [Subpart H]* must meet the effluent limitations in § 434.82” (which requires the operator to submit a site-specific SCP).<sup>22</sup> 40 C.F.R. § 434.84 (emphasis added).<sup>23</sup> The regulation is unambiguous in this regard and the plain language controls. *Ohio Valley Env’tl. Coalition v. United States Army Corps of Eng’rs*, 556 F.3d 177, 194 (4th Cir. 2009). As a result, the submission of an SCP and watershed modeling under the WACM Rule is not triggered by the permit effective date, or a set period of time thereafter, but rather it is required when drainage exists that becomes subject to the rule.<sup>24</sup> 40 C.F.R. §§ 434.83 and 85.

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<sup>22</sup> Similarly, 40 C.F.R. § 434.82 provides that it “applies to mine drainage from applicable areas of western coal mining operations.”

<sup>23</sup> The “drainage subject to” the WACM Rule includes “drainage at western coal mining operations from reclamation areas, brushing and grubbing areas, topsoil stockpiling areas, and regraded areas where the discharge, before any treatment, meets all the following requirements: (1) pH is equal to or greater than 6.0; (2) Dissolved iron concentration is less than 10 mg/L; and (3) Net alkalinity is greater than zero.” 40 C.F.R. § 434.81(b). The term “reclamation area” means the surface area of a coal mine which has been returned to required contour and on which revegetation (specifically, seeding or planting) work has commenced. 40 C.F.R. § 434.11(l). The term “brushing and grubbing area” means the area where woody plant materials that would interfere with soil salvage operations have been removed or incorporated into the soil that is being salvaged. 40 C.F.R. § 434.80(a). The term “regraded area” means the surface area of a coal mine that has been returned to required contour. 40 C.F.R. § 434.80(b). The term “topsoil stockpiling area” means the area outside the mined-out area where topsoil is temporarily stored for use in reclamation, including containment berms. 40 C.F.R. § 434.80(e).

<sup>24</sup> Since the need for an SCP is tied to specified drainage, the Region’s concern that a discharge could be caused by a major precipitation event does not justify the need for an SCP tied to the effective date of the Permit. Moreover, sediment control measures, including sediment ponds, are in place at the mine that are intended to address drainage from such precipitation events.

The Region also fails to set forth any facts and has not demonstrated considered judgment for its assumption that drainage exists at the El Segundo Mine that is subject to the WACM Rule, which warrants the submission of the SCP and watershed modeling under 40 C.F.R. § 434.82, as of the effective date of the Permit. As LRCC asserted in its Comments and as the Region previously found with regard to the Lee Ranch Mine Permit, the WACM Rule only applies when drainage to an outfall consists entirely (i.e., 100 percent) of drainage regulated under the rule. If any drainage from reclamation, brushing and grubbing, topsoil stockpiling, or regrading occurs, but is commingled with active mining drainage to a common outfall, the WACM Rule does not yet apply to drainage from such areas.<sup>25</sup>

According to EPA's interpretation of the WACM Rule, more stringent active mining effluent standards govern where nonactive mining drainage is commingled with it. Commingled drainage from such areas must comply with the effluent limitations for the active mine discharges from the sediment ponds, which would be subject to the Alkaline Mine Drainage requirements, as set forth in Part I.A.2 of the Permit, not the WACM Rule. 40 C.F.R. Ch. I, Subpart D (§§ 434.40 – 434.45).

EPA made this clear when it issued the WACM Rule:<sup>26</sup>

The provisions in Subpart D--Alkaline Mine Drainage will continue to apply to discharges produced or generated in active mining areas. Section 434.11(b) defines active mining area as "the area, on and beneath land, used or disturbed in activity related to the extraction, removal, or recovery of coal from its natural deposits. This term excludes coal preparation plants, coal

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<sup>25</sup> In the Region's response to comments when issuing the Lee Ranch Mine Permit in 2010, it indicated that "[t]he final permit clarifies that only 100% of the drainage area to an outfall that meets the western alkaline coal mining operations from reclamation areas, brushing and grubbing areas, topsoil stockpiling areas, and regraded areas is covered by the SCP . . . *Because none of mining areas has met the defined areas under the Western Alkaline Coal Mining subcategory, the final permit changes the SCP submittal requirement from three months from the permit effective date to three months prior to any discharge occurs.*" Lee Ranch Mine Permit, Response to Comment 4 (emphasis added).

<sup>26</sup> In its Comment Letter, LRCC explained to the Region that the terms of the Lee Ranch Mine Permit's 100% WACM drainage requirement "is clearly in line with the intent of the WACM effluent limits as the USEPA intended them to apply to Western coal mining operations (see Federal Register, Volume 67, Number 15, Wednesday, January 23, 2002)."

preparation plant associated areas and post-mining areas.” Wastewater discharges produced or generated by active coal mining operations will not be affected by this regulation and will remain subject to the effluent limitations already established in part 434.

*Additionally, in accordance with Sec. 434.61, any waste stream subject to this rule that is commingled with a waste stream subject to another subpart of part 434 will be required to meet the most stringent limitations applicable to any component of the combined waste stream. Today's new rule simply maintains this regulatory approach.*

40 Fed. Reg. 3370, 3375 (2002).<sup>27</sup>

Moreover, compliance with the WACM Rule *watershed-based* modeling requirement would be problematic and futile when the watershed also contains non-WACM drainage. 40 C.F.R. § 434.82(b). The WACM Rule requires that the operator demonstrate, using watershed models, that implementation of Best Management Practices in accordance with the SCP will result in *average annual* sediment yields that will not be greater than the sediment yield levels from pre-mined, undisturbed conditions. *Id.* Where the watershed still contains active mining with new pits being excavated, it will not be feasible to perform such modeling given the continuing changes of conditions and active mining drainage.<sup>28</sup>

The NM Mining Permit also requires the management of drainage mixed with active mining drainage be passed through a sedimentation pond. Subject to certain exceptions, the New Mexico Coal Surface Mining Commission Rules require “all surface flow that leaves the

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<sup>27</sup> This longstanding regulatory approach was also recognized by EPA with regard to the promulgation of earlier changes to the Coal Mining Point Source Category Effluent Limitations. “Where discharges are commingled, the most stringent limitations applicable to the drainages prior to commingling should apply.” 40 Fed. Reg. 41,296, 41,304 (1985).

<sup>28</sup> The intention that the watershed modeling for the WACM Rule not apply to drainage commingled from active mining and reclamation can be drawn from EPA’s Development Document – Western Alkaline Coal Mining Subcategory, which studied the potential rule considering watersheds with non-process areas. For instance, the Development Document cites to a case study where “Non-process area surface conditions also included *a final pit* undergoing reclamation with the potential for non-process mine drainage to run off the site.” Development Document – Western Alkaline Coal Mining Subcategory, EPA (2002), Case Study 1 (Western Coal Mining Work Group, 1999c), p. 5-4 (emphasis added).  
See [http://water.epa.gov/scitech/wastetech/guide/coal/western\\_index.cfm](http://water.epa.gov/scitech/wastetech/guide/coal/western_index.cfm)

disturbed area<sup>29</sup> shall be passed through a sedimentation pond or series of sedimentation ponds or other treatment facilities before leaving the permit area.” 19.8.20.2010.A.(1) NMAC. Pursuant to this requirement, the NM Mining Permit requires that sediment control for the mine area be addressed by pit protection ponds and mine sediment ponds.<sup>30</sup> NM Mining Permit 900.B.(6), 907.A.(1). The New Mexico Coal Surface Mining Commission Rules also provide that “[w]here the sedimentation pond or series of sedimentation ponds is used so as to result in *the mixing of drainage* from the disturbed areas with drainage from other areas not disturbed by current surface coal mining and reclamation operations, the permittee shall achieve the effluent limitations [set forth in 40 C.F.R. Part 434] for *all of the mixed drainage* when it leaves the pond discharge point.”<sup>31</sup> 19.8.20.2010.A.(7) NMAC (emphasis added).

For the reasons set forth above, LRCC respectfully requests that the Permit’s condition for an SCP be changed so that the SCP is required to be submitted three months prior to when a 100 percent of a drainage area to an outfall becomes subject to the WACM Rule or that the EAB remand the SCP requirement in the Permit to the Region for further consideration.

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<sup>29</sup> “Disturbed area” is defined as “any area where vegetation, topsoil, or overburden is removed or upon which topdressing, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as disturbed until reclamation is complete and the performance bond or other assurance of performance required by NMAC 19.8.14 is released.” 19.8.1.7.A.(5) NMAC.

<sup>30</sup> The sediment ponds for capturing drainage from active mining watersheds are required sediment control measures approved under El Segundo Mines’ NM Mining Permit as Best Available Technology (“BAT”). 19.8.20.2013.A NMAC. The NM Mining Permit sediment control plan is based on the worst-case year of mining in a watershed (i.e., maximum acres of mining-related disturbances) using SEDCAD modeling and must factor in runoff from native, mining and reclaimed areas for the worst-case year. (Collectively, the ponds are designed, at a minimum, to provide treatment of disturbed area runoff resulting from the 10-year, 24-hour storm before leaving the mine area in order to minimize contributions of suspended solids to receiving streams. NM Mining Permit, 900-4-5; 900.A.(1); 19.8.20.2014C. NMAC). Under the NM Mining Permit, the sediment ponds can only be removed subsequent to regrading of the mine pits, after which sediment ponds are to be established on the regraded area to provide sediment control until the NMMMD authorizes the removal. NM Mining Permit, 907.A.(1).

<sup>31</sup> The NM Mining Permit requires that reclamation activities be conducted as contemporaneously as practical with the mining operations for the protection of surface water systems, further adding to the inability to segregate drainage to avoid commingling and mixing and to the infeasibility of updating the SCP and performing modeling, until all active mining in the watershed has ceased. NM Mining Permit 907.A.(1). *See also* 30 C.F.R. 816.34(b)(1); 816.100.

V.  
CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the EAB: (1) strike the TDS effluent limitation in the Permit or remand the condition to the Region for further consideration, and (2) change the requirement in the Permit for an SCP so that an SCP is required to be submitted three months prior to when a 100 percent of a drainage area to an outfall becomes subject to the WACM Rule or remand the SCP requirement to the Region for further consideration.

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Date: November 3, 2014



**STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS**

I hereby certify that this petition for review, including all relevant portions, contains less

14,000 words.

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Date: November 3, 2014

## LIST OF ATTACHMENTS

- Exhibit A LRCC El Segundo Mine, NPDES Permit No. NM0030996 (Sept. 30, 2014)
- Exhibit B LRCC El Segundo Mine, NPDES Permit No. NM0030996 (Dec. 29, 2009)
- Exhibit C Public Notice for Permit Renewal  
LRCC El Segundo Mine, NPDES Permit No. NM0030996
- Exhibit D Draft LRCC El Segundo Mine, NPDES Permit No. NM0030996
- Exhibit E Fact Sheet for Permit Renewal  
LRCC El Segundo Mine, NPDES Permit No. NM0030996
- Exhibit F Letter from J. Boswell, Peabody Investments Corporation to  
E. Rosborough, EPA (June 30, 2014)
- Exhibit G El Segundo Surface Coal Mine, Permit 2010-01 (Sept. 15, 2010)  
(excerpts, including Section 907. Reclamation Plan: Protection of  
Hydrologic Balance)
- Exhibit H 2011 Review, Water Quality Standards for Salinity, Colorado River System,  
Colorado River Basin Salinity Control Forum (October 2011)
- Exhibit I Email from J. Cochran to N. Tung, EPA, Jan. 27, 2014
- Exhibit J Lee Ranch Mine, NPDES Permit No. NM0029581 (Sept. 8, 2010)

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## CERTIFICATE OF SERVICE

I, Peter R. Duchesneau, hereby certify that on this 3<sup>rd</sup> of November, 2014, I served a copy of the foregoing Petition for Review and Statement of Compliance with Word Limitations on the parties identified below by U.S. first class mail, postage prepaid.

Ron Curry  
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and

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/s/ \_\_\_\_\_  
Peter R. Duchesneau