

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

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

**PETITION FOR REVIEW AND
MOTION FOR EXTENTION OF TIME TO FILE SUPPLEMENTAL BRIEF**

Brad A. Bartlett, CO Atty # 32816
Travis Stills, CO Atty #27509
Energy Minerals Law Center
1911 Main Ave., Suite 238
Durango, Colorado 81301
Phone: (970) 247-9334
FAX: (970) 382-0316

E-mail: brad.bartlett@frontier.net
E-mail: stills@frontier.net

Amy Atwood
Senior Attorney, Public Lands Energy Director
Center for Biological Diversity
PO Box 11374, Portland OR 97211-0374
Phone: 503-283-5474
Fax: 503-283-5528

E-mail: atwood@biologicaldiversity.org

I. INTRODUCTION

Pursuant to 40 C.F.R. §124.19, Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, C-Aquifer for Diné, and Center for Biological Diversity (hereinafter “Petitioners”) by and through the undersigned counsel hereby submits this petition for review of the U.S. Environmental Protection Agency’s (“EPA’s”) NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 (“NPDES”).¹ EPA’s NPDES permit authorizes continued discharge from over 111 outfall locations from permanent waste “ponds” at Peabody Western Coal Company’s (“Peabody’s”) Black Mesa Mine, many of which are exceeding Water Quality Standards (“WQS”). The permit does not address, cover or remedy “seeps” or discharges from many of the over 230 impoundments on the Black Mesa Complex—a number of which are exceeding WQS.

EPA issued this NPDES permit to Peabody because the Black Mesa Complex is on Navajo and Hopi lands. While both the Navajo and Hopi have approved programs and treatment as a state status, EPA is responsible for permit issuance and ensures compliance with applicable Federal and tribal WQS.

As set forward herein, Petitioners contend that EPA committed numerous significant and procedural errors in connection with issuing the NPDES to Peabody. Based on the errors listed below, Petitioners request that the Environmental Appeals Board (“EAB” or “Board”) grant the petition for review and remand the NPDES to EPA with instructions for EPA to correct all

¹ Available on the U.S. EPA’s website. See <http://www.epa.gov/region09/water/npdes/permits.html> (providing the permit, fact sheet and comment response).

substantive and procedural shortcomings and provide for appropriate supplemental public notice and comment after the required analyses have been completed and the permit has been corrected.

For the reasons discussed more fully below, including the number and complexity of the issues, the volume of relevant materials, and the unavailability of Petitioners' expert witness, Petitioners request a 45-day extension of time until October 23, 2009, to file a supplemental brief with a complete and detailed description of each objection to the NPDES permit and the factual and legal justifications for such objections.²

II. PETITIONERS HAVE STANDING AND THE BOARD HAS JURISDICTION OVER THIS APPEAL

Each Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. In particular, organizational Petitioners have standing to petition for review of the permit decision because each organization participated in the public comment period. *See* 40 C.F.R. §124.19(a). Petitioners filed written comments during the public comment period. *See*, Comment Letter (Exh. 1). As EPA denied Petitioners request for a public hearing on the NPDES, there was no opportunity for Petitioners to participate in a public hearing—thereby effectively denying Petitioners the ability to gain additional information, ask questions in a culturally sensitive format and raise additional issues or objections. Regardless, and for now, the issues raised by Petitioners here were raised with EPA in writing during the public comment period. Consequently, the Board has jurisdiction to hear Petitioners' timely request for review. *See* 40 C.F.R. §71.11(g).

² Petitioners request this extension of time to submit "specific information" to "demonstrate why the permitting authority's response to [Petitioners'] objections warrants review," in order to fully comply with the Board's filing requirements as outlined in the EAB Practice Manual. EAB Practice Manual at 33.

III. STATEMENT OF FACTS

EPA's NPDES permit was issued in draft form and publicly noticed in the *Navajo Times* on February 19th, 2009. During the comment period, Petitioners timely submitted written comments on April 3, 2009 that, among other things, requested a public hearing. On August 5, 2009, EPA issued the NPDES permit to Peabody and, in so doing, denied Petitioners request for a public hearing. No public hearing was held on the permit.

EPA's NPDES permit authorizes continued discharge from over 111 outfall locations from permanent waste "ponds" at Peabody's Black Mesa and Kayenta Mines, many of which are already are exceeding WQS. The permit does not address, cover or remedy "seeps" or discharges from many of the over 230 impoundments on the Black Mesa Complex—a number of which are exceeding WQS.

In a related matter, the Office of Surface Mining, Reclamation and Enforcement ("OSM"), on December 22, 2008, issued a Record of Decision ("ROD") which included a life-of-mine ("LOM") permit for Peabody creating the Black Mesa Complex. The ROD was the result of a National Environmental Policy Act ("NEPA") process, which included an Environmental Impact Statement ("EIS"), on Peabody's LOM permit. EPA was a cooperating agency in this process.

The ROD and LOM permit approved the creation of a 62,930 acre program permit area by adding the 18,857 acre program area for the Black Mesa mine (including surface facilities and coal reserves) to the 44,073 acre Kayenta mine. The Kayenta mine currently supplies coal to the Navajo Generating Station in Arizona. The Kayenta mine provides all of the coal needed by the Navajo Generating Station through 2026. The Black Mesa mine historically supplied coal to the

Mohave Generating Station in Nevada. Due to closure of the Mohave Generating Station in 2005, the Black Mesa mine has not been in operation since January of 2006. OSM's approval of the LOM permit authorizes Peabody to renew mining of coal at the Black Mesa mine. Approximately 5,950 acres of mineable coal remain at the Black Mesa mine.

EPA's NPDES permit was not available for public review during the comment period for the LOM permit and ROD for the Black Mesa Complex. Further, EPA's NPDES permit was not analyzed as part of the agency's NEPA compliance and EIS for the Black Mesa Complex and even though EPA was a cooperating agency on the Black Mesa EIS.

IV. ISSUES PRESENTED FOR REVIEW

Petitioners identify herein the general issues that were raised in public comments on the draft permit, which Petitioners preliminarily believe provide grounds for Board review. The issues justifying review and remand of this permit include:

(1) EPA's failure to hold a public hearing in the impacted community. 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.

(2) EPA's failure to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, et seq., in permit issuance and by failing to consider and take a 'hard look' at the environmental impacts.

(3) EPA's failure to ensure through consultation with U.S. Fish and Wildlife Service that no jeopardy to the continued existence of threatened and endangered species would occur or that

adverse modification of their critical habitat would occur and as required by Section 7(a)(2) of the Endangered Species Act (“ESA”). 16 U.S.C. §1536(a)(2).

(4) EPA’s failure to control and regulate “seeps” or discharges (including use of Best Management Practices) from many of the over 230 impoundments on the Black Mesa Complex—a number of which are exceeding WQS—in violation of the Clean Water Act.

(5) EPA’s failure to make public a “Seep Management Plan” during the public comment period on the NPDES permit and in issuance of the final NPDES permit.

(6) EPA’s failure to address compliance with WQS (including issuance of a compliance order) for ponds 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, J-21A1 and N14-P-S1 in violation of the Clean Water Act. According to EPA’s “fact sheet” and the Final EIS for Black Mesa discharges from all of these ponds are currently noncompliant with one or more WQS.

(7) EPA’s failure to conduct its own inspections, monitoring and sampling of discharges on the Black Mesa Complex.

(8) EPA’s “deletion” of outfalls covered under its current NPDES permit for ponds J16-I, J16-J, J16-K, J21-J, N2-G, N7-A1, N8-A, N8-B and N14-M and WW-9D is inappropriate because EPA has not confirmed that discharge has ceased because of “limited agency resources.”

(9) EPA’s failure to address designed parameters for the addition of 16 ponds to be covered under the NPDES permit and as required by Section 404 of the Clean Water Act.

(10) EPA’s failure 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 make any “401 WQS certification” by the Navajo Nation public—as part of the administrative record.

(11) EPA’s failure 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. Additionally, EPA failed to make any “401 WQS certification” by the Hopi Nation public—as part of the administrative record.

(12) EPA’s allowance to Peabody in the proposed permit to collect discharges resulting from precipitation events “from a sampling point representative of the type of discharge, rather than from each point of discharge” is unlawful and violates the Clean Water Act. At a minimum, Peabody should be required to “show cause” for each instance where a use of a “representative sampling point” was necessary.

(13) EPA’s failure to require a stormwater management plan for the Black Mesa Complex in violation of the Clean Water Act.

V. MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF

Petitioners hereby move for a 45-day extension of time, until October 23, 2009, to file a supplemental brief in support of their Petition for Review. In general, the Board will grant reasonable extensions of time for good cause shown. The Board routinely grants such extensions. *See In re Northern Michigan University*, Order Granting Motion for Extension of Time to File Response (July 10, 2008)(granting a 20 day extension where Michigan requested “additional time to evaluate and respond to the petition due to the number and complexity of

legal arguments...”; *In re Deseret Power Electric Cooperative*, Order Granting Extension of Time (Feb. 12, 2008); *In re ConocoPhillips Co.*, Order (Oct. 1, 2007).

Additionally, the Board will, where appropriate, grant extensions of time to file supplemental briefing on an initial petition for review. As the Board has explained, “[t]he Board has, on occasion and for good cause shown, granted this kind of motion and entertained such supplemental briefs.” *In re Town of Marshfield*, NPDES Appeal 07-03, slip op. fn. 10 (EAB, March 27, 2007).

In this instance, a 45-day extension of time is reasonable and appropriate. The administrative record in this case and the draft permit stage was voluminous. There were hundreds of pages of application and related materials before the agency. However, EPA has yet to make available the full administrative record before the agency and for purposes of appeal. See <http://www.epa.gov/region09/water/npdes/permits.html> (providing only the permit, fact sheet and comment response). As part of Petitioners’ comments, Petitioners noted that the administrative record was incomplete. See, Petitioners’ Comments (Exh. 1) at 5, ftnt. 4. This issue has not been remedied by the agency and for purposes of preparing the present appeal.

Additionally, EPA failed to hold a public hearing thus making it difficult for Petitioners, who are primarily small grass-roots tribal organizations whose membership includes impacted Navajo and Hopi tribal members, to understand both the nature and ramification of EPA’s permit decision.

For example, and as set forward in Petitioners’ comment letter, Petitioners requested a public forum so that the following information could be made available to tribal members in a culturally sensitive format: (1) copies of the permit materials 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 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. Exh. 1 at 1-2.

Petitioners also requested an interpreter. *Id.* EPA rejected this request outright and in so doing made it extremely difficult for Petitioners to understand the nature and impact of EPA's actions.³

Petitioners respectfully assert that it would be unreasonable to expect Petitioners to process this (incomplete) administrative record, fully evaluate EPA's very technical response—and in a manner appropriate with the interests of tribal petitioners, and prepare a complete and robust factual and legal analysis in support of a petition for review in just 30 days. Petitioners respectfully assert that it is in the best interest of the Board to allow sufficient time for a well crafted and fully developed briefing.

Moreover, and because of the technical nature of EPA's response and due to EPA's failure to hold any type of public hearing to explain EPA's NPDES permitting for Black Mesa, Petitioners will now need to acquire and consult with an expert witness regarding EPA's response to comments. Petitioners also intend to have their expert review the Petition for scientific accuracy. At least one of Petitioners' proposed expert witnesses is unavailable until

³ Petitioners also requested that EPA directly contact impacted tribal members including, but not limited to, tribal members who hold grazing permits in areas affected by Peabody's outfalls (and because the Administrative Record suggests that multiple sites some of which are highly contaminated are currently being used for livestock watering. Exh. 1 at 2. EPA rejected this request.

October 1, 2009. Accordingly, allowing the requested extension will allow Petitioners to confer with their expert and further the scientific accuracy of their Petition.

In addition, the issuance of the final permit in August (which includes the Labor day weekend holiday) has resulted in scheduling conflicts that, absent an extension, affect Petitioners' ability to adequately respond to EPA's analysis in support of the final permit.

Finally, neither EPA nor the permittee would be prejudiced by the Board's grant of the requested extension of time. The NPDES permit is a renewal, not a new permit. Thus, Peabody's operations will, in all likelihood, continue to go forward.

For the reasons set forward above, Petitioners have good cause for an extension of time and the Board should grant Petitioners' request for a 45-day extension of time, until October 23, 2009 to file a supplemental brief in support of their Petition.

RESPECTFULLY SUBMITTED on Friday, September 4, 2009.



Brad A. Bartlett, CO Atty # 32816
Travis Stills, CO Atty #27509
Energy Minerals Law Center
1911 Main Ave., Suite 238
Durango, Colorado 81301
Phone: (970) 247-9334
FAX: (970) 382-0316

E-mail: brad.bartlett@frontier.net
E-mail: stills@frontier.net

Amy Atwood, Senior Attorney, Public Lands Energy Director
Center for Biological Diversity
P.O.Box 11374

Portland Oregon 97211-0374
Phone: 503-283-5474
FAX: 503-283-5528

E-mail: atwood@biologicaldiversity.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 4, 2009 he caused a copy of the foregoing to be served by mail on:

Douglas E. Eberhardt, Chief
NPDES Permits Office
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105-3901

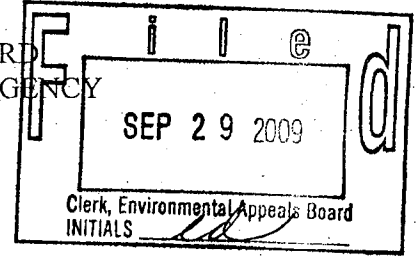
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 40460

And by electronic mail to:

John Tinger
U.S. EPA Region IX
NPDES Permits Branch
Tinger.John@epamail.epa.gov

A handwritten signature in black ink, appearing to be 'John Tinger', written over a horizontal line.

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



In re: Peabody Western Coal Company)
Black Mesa Complex) NPDES Appeal No. 09-10
NPDES Permit No. NN0022179)
_____)

ORDER GRANTING EXTENSION OF TIME TO SUPPLEMENT PETITION

On September 9, 2009, Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, C-Aquifer for Diné, and Center for Biological Diversity ("Petitioners") petitioned the Environmental Appeals Board ("EAB") to review the NPDES Permit issued by U.S. EPA Region 9 ("Region") to Peabody Western Coal Company (NPDES Permit No. NN0022179). The Petition itself contains a list of 13 issues presented for review with no further argument or discussion. Instead, Petitioners seek an additional 45 days, or until October 23, 2009, to file a supplemental brief substantiating its Petition, due to the number and complexity of the issues, the volume of relevant materials, and the unavailability of Petitioners' expert witnesses. Petitioners also state that the permittee will not be prejudiced by the grant of an extension inasmuch as this is a permit renewal and, in all likelihood, operations will continue during the pendency of appeal. Petitioner at 10. The Region does not oppose the extension of time. See Letter from Julia Jackson, Office of Regional Counsel, U.S. EPA Region 9, to Brad A. Bartlett and Amy Atwood, Attorneys for Petitioners (dated Sept. 22, 2009) (Docket No. 2).

Pursuant to 40 C.F.R. § 124.19, “any person who filed comments on [a] draft [NPDES] permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision” within 30 days after notice of the final permit decision is served, unless otherwise specified by the permit issuer.¹ Petitioners are required to state in the petition the reasons supporting review, including a demonstration that any issues being raised were raised during the public comment period. 40 C.F.R. 124.19(a). The Board has the discretion to relax or modify its procedural rules to facilitate an orderly decisionmaking process. *See, e.g. Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *see also, e.g., Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 & 08-04 (EAB, Aug. 21, 2008) (Order granting, inter alia, Desert Rock’s motion for extension of time to file brief in support of petition for review where Region’s response to comments was 220 pages and included 42 attachments totaling 700 pages).

The Final Permit in this case appears to have been issued by Region 9 on August 5, 2009. Thus, the petition and the motion for extension were filed one day after they were due.² Given the circumstances of delivery, however, the Board will exercise its discretion to treat this petition

¹ 40 C.F.R. § 124.20(d) provides for an additional three days to the prescribed time for appeal to account for service by mail.

² The Petition for Review and Motion for Extension of Time to File Supplemental Brief were mailed by Express Mail to the EAB on Friday, September 4, 2009. The U.S. Postal Service apparently attempted delivery to the EAB street address on September 8th, which would have rendered the Petition as timely filed, but for reasons unclear to the Board, but through no fault of Petitioner, the postal service diverted delivery to EPA’s headquarters’ mailing address. Thus, the Petition was not received by the Agency or the Board until September 9, 2009. Documents are “filed” with the Board on the date they are received, which in this case was one day after the appeal deadline.

as timely filed. *See In re AES Puerto Rico, LP*, 8 E.A.D. 324, 328-330 (EAB 1999) (relaxing a filing deadline where special circumstances warranted as much).

Although the Permit itself is only 21 pages and the Region's response to comments document is only 13 pages long, Petitioners state that the record in the case is "voluminous," and that "[t]here were hundreds of pages of application and related materials before the agency." Petition at 3, 8. Additionally, Petitioners assert that the experts they intend to consult are unavailable until after October 1, 2009. Petition at 9-10. Based on these assertions, and given the number of issues raised and the apparent lack of harm to the permittee in extending the time for briefing, the Board will grant Petitioners' motion for extension.

Although the Board determines here that the decisionmaking process will benefit from affording Petitioners additional time to fully present their arguments, the Board cautions Petitioners against waiting until the deadline to file an extension in the future. *See EAB Practice Manual* at 38 (June 2004) *available at* <http://www.epa.gov/eab/pmanual.pdf> (motions for extension of time must be filed sufficiently in advance of the due date so as to allow other parties sufficient time to respond and to allow the Board a reasonable opportunity to issue an order); *cf.* 40 C.F.R. § 22.7(b) (same). The Board also cautions Petitioners against assuming that motions which essentially seek to extend the filing deadline for a petition on the date the petition is due, such as the one filed here, will be routinely granted by the Board. The 30-day deadline is not an unreasonable deadline and, indeed, is routinely met. The Agency and the public have an interest in the timely resolution of permit proceedings.

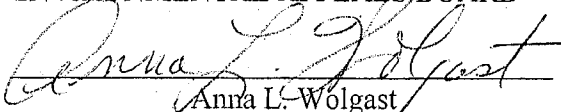
Nevertheless, upon consideration and for good cause shown, the Board GRANTS Petitioners an extension of time, until October 23, 2009, to file a brief supplementing its Petition. Petitioners are limited to the issues identified in their September 9, 2009, Petition.

Further, to assist the Board in determining whether the matters raised by the Petitioners should be reviewed, the Region should prepare a response to the Petition and any supplemental brief filed, together with a certified index of the entire administrative record, by December 7, 2009.³

So Ordered.

Date: September 29, 2009

ENVIRONMENTAL APPEALS BOARD


Anna L. Wolgast
Environmental Appeals Judge

³ The Environmental Appeals Board has an innovative system that allows parties to submit copies of documents, including exhibits, electronically in PDF. Instructions on registration and document submission, are available by using the "Electronic Submission" link on the Board's website. Please note that, at the present time, electronic submissions will not be considered a substitute for filing an original document with the Clerk of the Board. The Clerk of the Board still must actually receive the original document by the document's due date in order for it to be timely filed. However, Agency offices and private parties that use this system for submitting electronic copies will be excused from the requirement to submit multiple paper copies with their original filing.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Granting Extension of Time to Supplement Petition** in the matter of *Peabody Western Coal Company, Black Mesa Complex*, NPDES Appeal No. 09-10, were sent to the following persons in the manner indicated:

By U.S. Mail and Facsimile:


Brad A. Bartlett
Travis Stills
Energy Minerals Law Center
1911 Main Ave., Ste. 238
Durango, CO 81301
FAX: (970) 382-0316

Amy Atwood
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
FAX: (503) 283-5528

By Pouch Mail and Facsimile:

Julia Jackson
Office of Regional Counsel
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
FAX: (415) 947-3571

Dated: SEP 29 2009


Annette Duncan,
Secretary

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

September 22, 2009

Brad A. Bartlett
Energy Minerals Law Center
1911 Main Ave., Suite 238
Durango, CO 81301

Amy Atwood
Center for Biological Diversity
PO Box 11374
Portland, OR 97211-0374

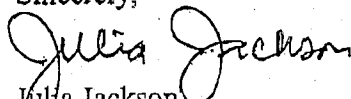
Re: *In re NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No. NN0022179:
Black Mesa Mine Complex*

Dear Mr. Bartlett and Ms. Atwood,

Regarding your clients' Petition for Review and Motion for Extension of Time to File a Supplemental Brief in *In re NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No. NN0022179: Black Mesa Mine Complex*, the U.S. Environmental Protection Agency, Region IX ("EPA Region 9") does not oppose an extension of 30 days to file a supplemental brief in this proceeding. While EPA Region 9 does not oppose a 30-day extension, EPA Region 9 is not taking a position on two issues. First, EPA takes no position as to whether or not Petitioners have demonstrated good cause for an extension of time to file a supplemental brief. See *In re City and County of Honolulu*, NPDES Appeal No. 09-01, Order Granting Alternative Motion for Extension of Time to File Petitions for Review, Feb. 2, 2009 ("the Board has, on occasion, and for good cause shown, granted motions seeking leave to file supplemental briefs to support the issues identified in timely petitions for review"). Second, EPA Region 9 also takes no position on whether the Petition for Review was sufficiently specific. See *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n. 9 (EAB 1993) (finding that granting review should be "sparingly exercised" and that petitions for review must "specifically identify disputed permit conditions and demonstrate why review is warranted").

Should you have any questions, please contact me at (415) 972-3948.

Sincerely,


Julia Jackson
Office of Regional Counsel
EPA - Region IX

CC: Eureka Durr, Clerk of the Board

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
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WASHINGTON, D.C.**

In Re NPDES Permit Renewal:)	
Peabody Black Mesa NPDES Permit No.)	NPDES Appeal No. 09-10
NN0022179: Black Mesa Mine Complex)	
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UNOPPOSED MOTION TO INCLUDE ALL COMMENTERS AS APPELLANTS

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 submits this motion to request that all persons who commented on U.S. Environmental Protection Agency's ("EPA's") NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES") be included as Appellants in this matter. Cause for this motion is as follows:

(1) Black Mesa Water Coalition, Diné C.A.R.E., Dine Hataalii Association, Inc., To Nizhoni Ani, C-Aquifer for Diné, Sierra Club, and Center for Biological Diversity, through counsel, timely submitted comments on EPA's NPDES permit. *See*, Appellants Comment Letter (attached as Exhibit ("Ex.") 1 to Appellants' Petition for Review).

(2) Due to the limited amount of time provided by regulation to file the present appeal (*i.e.* 30 days), Dine Hataalii Association, Inc. and the Sierra Club did not have sufficient time to join the present appeal.

(3) Diné Hataalii Association (“DHA”) is an all Navajo organization that has 24 board members, two from each of the six Navajo agencies. Many DHA members do not speak English and do not have access to electronic mail or facsimile and, in some instances, the U.S. Postal Service. DHA comments on matters of Navajo custom and is renowned and prominent Diné (Navajo) men and women who 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 protection of the Black Mesa life-of-mine issues and raised concerns related to the interconnectedness of land, water, air, and global warming issues and the deliberate destruction and desecration of Navajo natural resources by outside corporate interests. DHA members live around or near and are directly impacted by pollution discharges from the Black Mesa Mine Complex.

(4) Sierra Club has 1.3 million members and supporter who work for a safe and healthy community in which to live, smart energy solutions to combat global warming and an enduring legacy for America's wild places. Since 1892, the Sierra Club has been working to protect communities, wild places, and the planet itself. Sierra Club is the oldest, largest, and most influential grassroots environmental organization in the United States. A national board of directors sets national policy and state chapters organize executive committees of local leaders to set local policies. In Arizona, Sierra Club has over 11,000 members with over 150 members living on or around Black Mesa. It has been a priority of the Sierra Club nationally and locally to support Navajo and Hopi communities in their efforts to protect the N Aquifer and stop irresponsible coal mining. The Sierra Club has worked since 2000 specifically on issues surrounding the Black Mesa and Kayenta Mines.

(5) Dine Hataalii Association, Inc. and the Sierra Club do not intend to expand the issues on appeal and will be represented by undersigned counsel for Appellants.

(6) Inclusion of Dine Hataalii Association, Inc. and the Sierra Club as Appellants would not prejudice EPA or interfere or disrupt proceedings before the Board.

(7) Not including Dine Hataalii Association, Inc. and the Sierra Club would deny these organizations and their membership the ability to adequately participate in EPA decisionmaking—*i.e.*, decisions that directly and irreparably impact these organizations and their interests.

For the reasons set forth herein, Appellants respectfully request that Dine Hataalii Association, Inc. and the Sierra Club be included as Appellants in this matter.

Counsel for Appellants conferred with counsel for Respondent EPA to determine Respondent's position on this motion. Counsel for EPA indicated that EPA does not oppose this motion.

RESPECTFULLY SUBMITTED on Thursday, October 22, 2009.



Amy R. Atwood, OR Atty # 060407
Center for Biological Diversity
P.O. Box 11374
Portland Oregon 97211-0374
Phone: 503-283-5474
FAX: 503-283-5528

E-mail: atwood@biologicaldiversity.org

Brad A. Bartlett, CO Atty # 32816
Travis Stills, CO Atty #27509

Energy Minerals Law Center

1911 Main Ave., Suite 238

Durango, Colorado 81301

Phone: (970) 247-9334

FAX: (970) 382-0316

E-mail: brad.bartlett@frontier.net

E-mail: stills@frontier.net

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APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR
REVIEW

Brad A. Bartlett, CO Atty # 32816
Travis Stills, CO Atty #27509
Energy Minerals Law Center
1911 Main Ave., Suite 238
Durango, Colorado 81301
Phone: (970) 247-9334
FAX: (970) 382-0316

E-mail: brad.bartlett@frontier.net
E-mail: stills@frontier.net

Amy R. Atwood, OR Atty # 060407
Center for Biological Diversity
P.O. Box 11374
Portland OR 97211-0374
Phone: 503-283-5474
Fax: 503-283-5528

E-mail: atwood@biologicaldiversity.org

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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

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).

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 consist 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 an 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 responsibility 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. Evtl. 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

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,

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

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.

/s/ Brad Bartlett

Brad A. Bartlett, CO Atty # 32816
Travis Stills, CO Atty #27509
Energy Minerals Law Center
1911 Main Ave., Suite 238
Durango, Colorado 81301
Phone: (970) 247-9334
FAX: (970) 382-0316

E-mail: brad.bartlett@frontier.net

E-mail: stills@frontier.net

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.



Amy R. Atwood, OR Atty # 060407

Center for Biological Diversity

P.O.Box 11374

Portland Oregon 97211-0374

Phone: 503-283-5474

FAX: 503-283-5528

E-mail: atwood@biologicaldiversity.org

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:

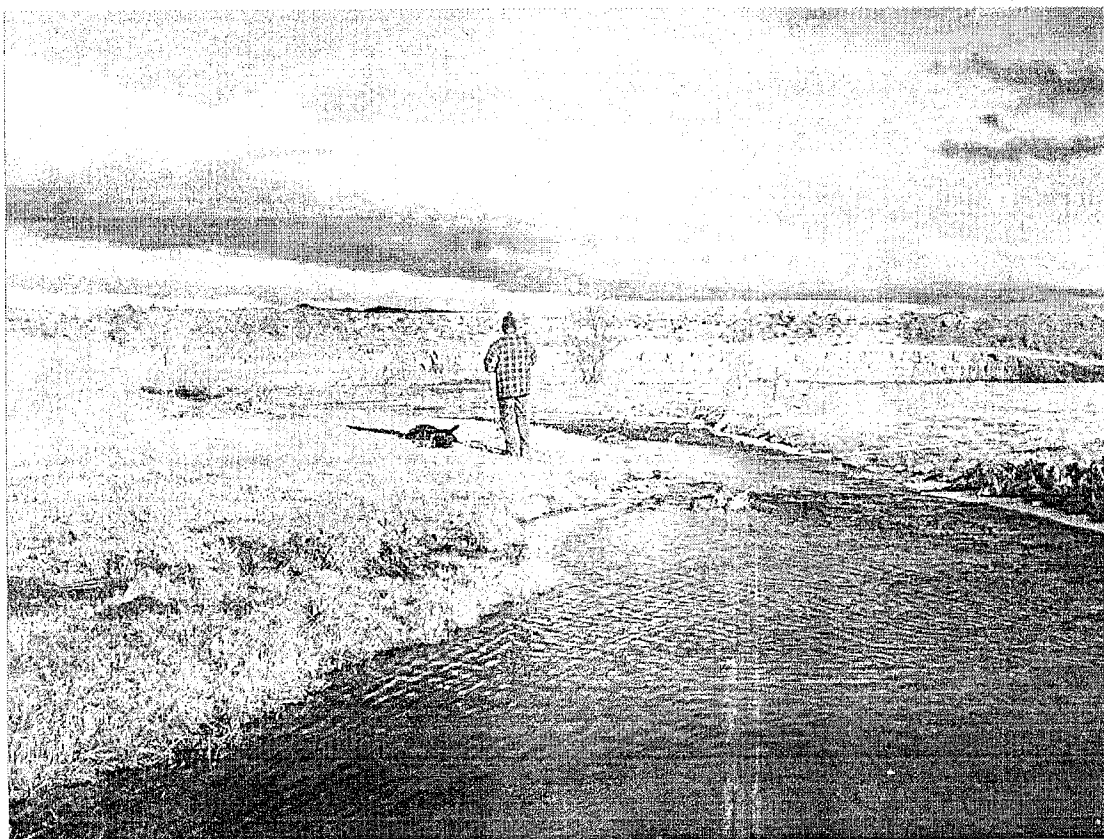
Julia Jackson
Office of Regional Counsel
EPA—Region IX
75 Hawthorne Street
San Francisco, CA 94105

Counsel for U.S. Environmental Protection Agency


Rebecca O'Sullivan

2006/2008
STATUS OF AMBIENT SURFACE
WATER QUALITY IN ARIZONA
Arizona's Integrated 305(b) Assessment
and 303(d) Listing Report

November 2008



Approved by:

Joan Card, Director, Water Quality Division

Linda Taunt, Surface Water Section Manger (Acting)

Jason Jones, Monitoring Unit Supervisor

Jason Sutter, TMDL Unit Supervisor

Steve Pawlowski, Standards and Assessment Unit Supervisor

2006/2008 Status of Surface Water Quality in Arizona

Arizona's Integrated 305(b) Assessment and 303(d) Listing Report

Drafted by:

Anel Avila, 305(b) Water Quality Assessment Coordinator
Steve Pawlowski, Water Quality Standards & Assessment Unit
Diana Marsh, Watersheds and Assessment Program

Editing, Graphics, and Database Assistance:

Lisa Rowe, Jason Sutter, Linda Taunt,
Patti Tuve, Chris Varga, Yan Zhao, Nicholas Moore, and Peter Bierly

A special thanks to ADEQ's monitoring staff who traveled across the state collecting the data used in this report:

Amanda Fawley, Susan Fitch, Tim Franquist, Jennifer Hickman, Lee Johnson, Lin Lawson, Doug McCarty, Greg Olsen, Patsy Olsen, Kyle Palmer, Jamie Piver, Samuel Rector, Robert Scalamera, Patti Spindler, Jason Sutter, Doug Towne, and R. Scott Williams

Special Note:

ADEQ has combined the 2006 and 2008 305(b) assessment and 303 (d) listing report. No new data was evaluated for the 2008 integrated report. ADEQ anticipates a full update on Arizona waters in 2010.

CHAPTER I

INTRODUCTION AND PURPOSE

Every two years, the Arizona Department of Environmental Quality (ADEQ) is required by the federal Clean Water Act to conduct a comprehensive analysis of water quality data associated with Arizona's surface waters to determine whether state water quality standards are being met and designated uses are being supported. This integrated surface water assessment and impaired waters listing report (2006/2008 Assessment Report) serves three functions.

- Nationally, it fulfills a reporting requirement of the Clean Water Act, and is submitted to the Environmental Protection Agency (EPA), and used to report on national water quality issues and concerns.
- For ADEQ, it provides a mandate to compile environmental data and information from ADEQ's surface water quality protection programs, as well as from other agencies, organizations, and individuals. This comprehensive evaluation of quality of water in Arizona is used to set priorities, allocate resources, and make decisions about land use activities, discharges to the water, future monitoring, and program initiatives.
- For the public, it provides an opportunity to learn about and comment on the status of surface water quality in the state.

Surface Water Assessment Methods and Technical Support

ADEQ has created a separate assessment methods document. It is assumed that the reader will obtain and reference this technical support document (Appendix G) when using the information in this assessment.

The Assessment Methods and Technical Support document provides a description of the assessment process and specific assessment and impaired water listing criteria. It also provides information about the monitoring data and information used in this assessment and Arizona's credible data requirements. The three appendices provide: surface water quality standards used in the assessment, Arizona's TMDL statute, and the Impaired Water Identification Rule.

Report Overview

- Chapter I – Introduction and Purpose
- Chapter II – Assessments of individual surface waters, organized by watershed
- Chapter III – Summary Information
- Chapter IV – Action Plan
- Annotated References
- Appendix A – Look up table of surface waters, indicating the watershed
- Appendix B – Assessment Category Lists
- Appendix C – Impaired Water Schedule and Prioritization
- Appendix D – Critical Conditions
- Appendix E – Delisting Impairments
- Appendix F – Water Quality Improvements
- Appendix G – Surface Water Assessment Methods and Technical Support Document

Although an attempt was made to avoid technical jargon and unnecessary abbreviations, this is a technical report. Acronyms and terms used in the assessment report are defined in the Assessment Methods and Technical Support document (draft 2006/2008).

Changes Affecting the Assessment Process

Although ADEQ has proposed revisions to surface water quality standards and the Impaired Water Identification Rule, this assessment does not reflect any changes in either of these rule packages. The assessment is using the same rules that were in effect for the 2004 assessment. However, the following changes and clarifications in federal guidance for completing assessments and listings were incorporated in this assessment:

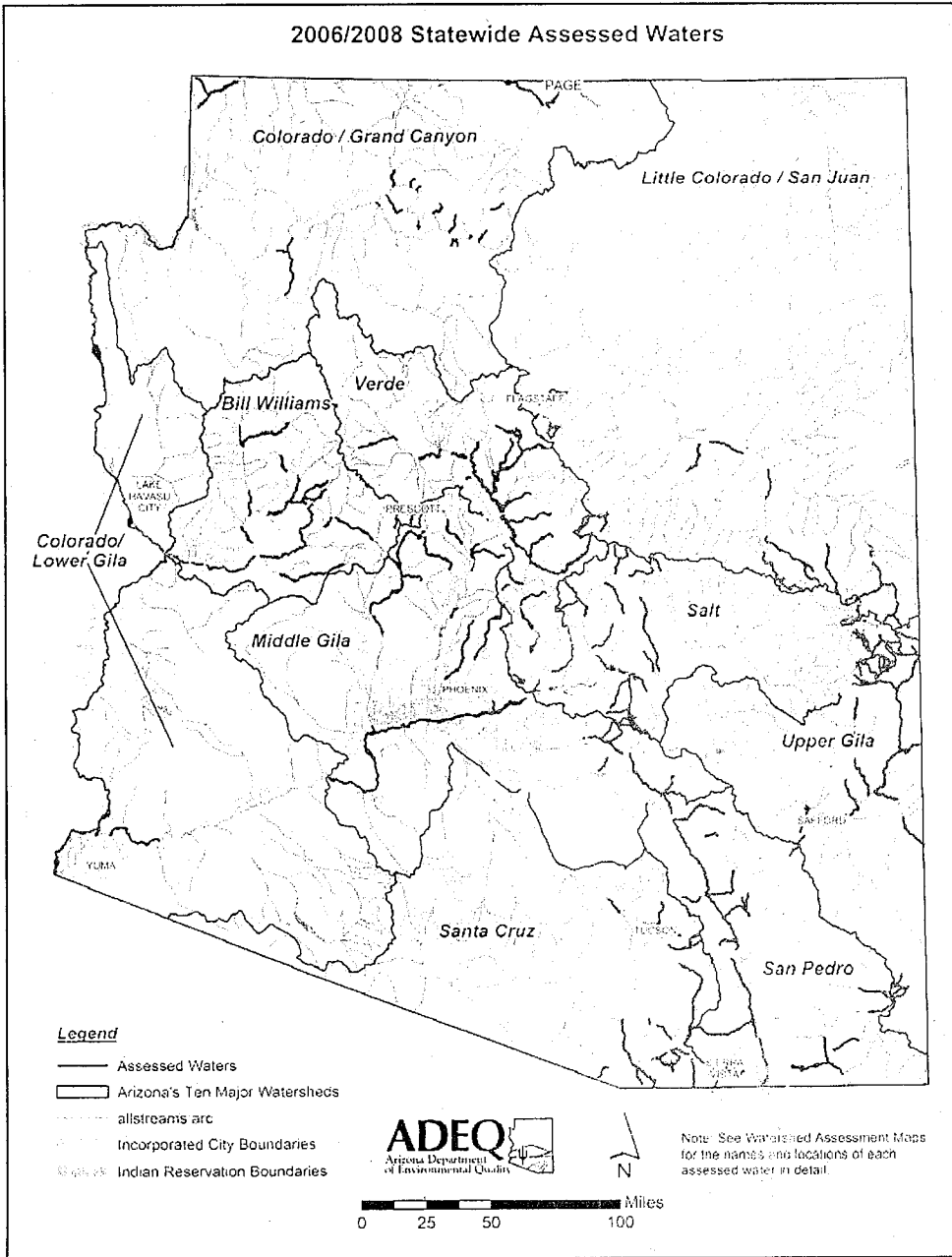
- Evidence of whether a sample represents a 4-day period, such as hydrologic stability, should be evaluated where available, when using a grab sample to represent chronic aquatic and wildlife conditions.
- An assessment unit can be listed in multiple categories when a TMDL has been completed on some pollutants, but not all pollutants causing impairment.
- When listing an impaired assessment unit in Category 4B, based on alternative pollution control requirements, the state must provide substantial supporting evidence of a regulatory commitment to bringing the surface water into compliance with its standards.

The Surface Water Assessment Methods and Technical Support document describes how these changes were implemented in this assessment. Further revisions of the Impaired Water Identification Rule are required to establish any of these as listing or delisting requirements.

CHAPTER II

WATER QUALITY ASSESSMENTS BY WATERSHED

Assessments are reported alphabetically by individual assessment units in this chapter and grouped by the 10 watersheds, as illustrated on the following map: Bill Williams Watershed, Colorado – Grand Canyon Watershed, Colorado – Lower Gila Watershed, Little Colorado Watershed, Middle Gila Watershed, Salt Watershed, San Pedro Watershed, Santa Cruz Watershed, Upper Gila Watershed, and Verde Watershed.



If the reader is uncertain about which watershed to look in for assessment information, an alphabetical listing of surface waters assessed is provided in Appendix A.

Assessment Information

A summary page is provided for each assessment indicating:

- Designated use support and an overall assessment
- Impairment status and pollutant causing impairment (if applicable)
- Monitoring used in the assessment
- Exceedances
- Data gaps and monitoring priorities.

The data gaps and monitoring needs information provides the "Planning List" information used to prioritize future monitoring. Surface waters not assessed are also included in the general planning list, as the lack of data to support assessments is a reason to be placed on ADEQ's internal Planning List.

The reader should refer to the Surface water Assessment Methods and Technical Support document for information concerning the assessment process, determining exceedances, assessment criteria, assessment categories, and monitoring prioritization criteria.

Watershed Information

General background information and a few maps are provided for each watershed to provide some context for the assessments. One map (or a series of maps) shows the assessed surface waters and the monitoring sites used in this assessment. The watershed reports also provide descriptions of TMDLs, water quality improvement projects, and other studies that have been initiated or completed since 2000.

Little Colorado River Watershed

Watershed Description

This watershed is defined by the Little Colorado River, from its headwaters to the Colorado River, and tributaries to the San Juan River which flow into north and east into New Mexico and Utah. This area contains horizontally stratified sandstone and limestone which have eroded to form canyon and plateaus. In a few areas, igneous rocks have deposited on sedimentary formations due to volcanic activity. Natural erosion can be easily increased by human activities in such locations.

Land ownership is divided approximately as: 60% tribal, 12% federal, 12% private, 6% state. This 26,794 square mile watershed is sparsely populated outside of Flagstaff, with 236,500 people (including Flagstaff) (2000 census). Land use is primarily open grazing, forestry, recreation, and mining. The area contains four national monuments, four wilderness areas, and two national forests with varying levels of use restrictions.

Elevations range from 12,600 feet (above sea level) at Humphrey's Peak near Flagstaff to 2,700 feet near the Colorado River. However, most of the watershed is above 5000 feet elevation, with desert highlands flora and fauna, and coldwater aquatic communities where perennial waters exist.

Water Resources

The climate provides approximately 10 inches of rain and 15 to 20 inches of snow yearly. Snow melt has been a primary source of water for this region. The flow on the Little Colorado River is "interrupted" (stretches of perennial, intermittent, and ephemeral flow). Perennial flow is generally limited to headwaters streams.

An estimate of surface water resources in the Little Colorado Watershed is provided in the following table. Waters on Tribal lands are not assessed by ADEQ; therefore, those statistics are shown separately.

Estimated Surface Water Resources in the Little Colorado Watershed

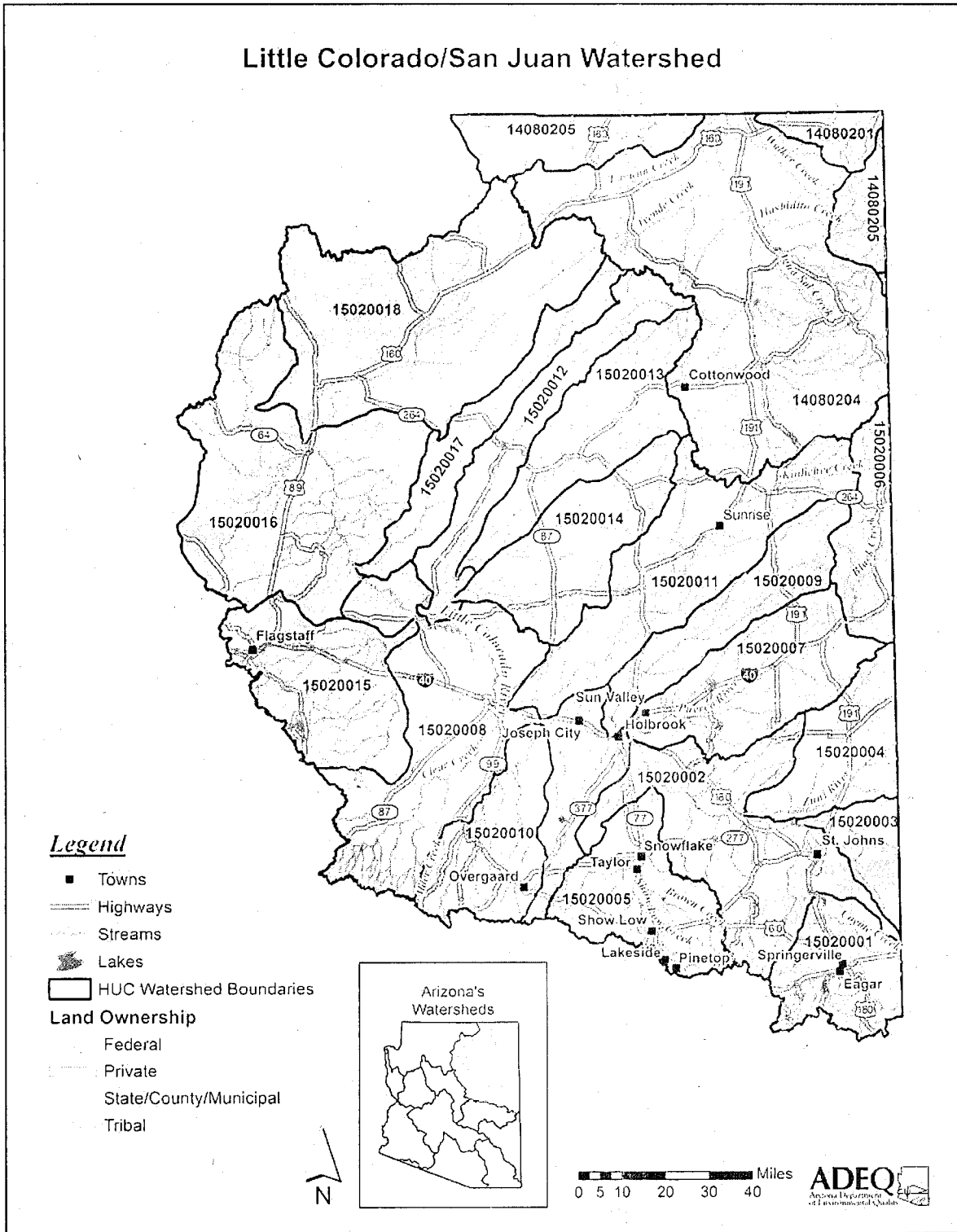
	Perennial	Intermittent	Ephemeral
Stream miles	640	1,655	9,635
	Perennial	Non-perennial	
Lake acres	16,050	6,830	

On Tribal Lands – Not assessed

	Perennial	Intermittent	Ephemeral
Stream miles	305	170	15,310
	Perennial	Non-perennial	
Lake acres	5,295	118	

Ambient monitoring focuses on perennial waters; however, special investigations may identify water quality problems on intermittent and even ephemeral waters. Estimated miles and acres are based on USGS digitized hydrology at 1:100,000 and have been rounded to the nearest 5 miles or 5 acres.

Little Colorado/San Juan Watershed



Watershed Partnerships

- **Little Colorado River Watershed Coordinating Council**

This council looks at water quality and quantity issues across an immense watershed covering nearly 27,000 square miles that includes parts of New Mexico. They coordinate and encourage efforts by the smaller subwatershed listed below. The council meets in Holbrook or Winslow for quarterly meetings. For information contact: Ronald Smith, Project Director, at (928) 367-335 or rsmith@whitemtns.com; Jim Boles, Chair, 928-298-2422; or Larry Winn, Vice Chair, 505-879-3060.

The following subwatershed groups are also meeting and working on projects:

- Show Low Creek Group – Tom Thomas at (928) 368-8885, tthomas@ci.pinetop-lakeside.az.us;
- Silver Creek Advisory Commission – Ron Solomon, (928) 536-7366, ron@tayloraz.org; or Kerry Ballard, (928) 536-2539;
- Upper Little Colorado River Partnership (above Lyman Lake) – Bill Greenwood, (928) 333-4128 x226, bgreenwood@eagar.com.

Special Studies and Water Quality Improvement Projects

Total Maximum Daily Load Analyses – The following TMDL analyses are scheduled to be completed in this watershed. Further information about the status of these investigations or a copy of the TMDL if completed can be obtained at ADEQ's website: www.azdeq.gov

- Nutrioso Creek is impaired by suspended sediment (turbidity). A TMDL was completed in 2000. Field investigations found that historic grazing and some forestry practices had contributed to a loss of riparian vegetation and stream entrenchment. Healthy riparian areas are needed to stabilize stream banks and dissipate stream energy during high flow events. Stream entrenchment causes a loss of flood plain, which leads to further increased stream velocity and related shear stress during higher flows. The silty-organic clay soils in this area are highly susceptible to water transport. The TMDL identified a variety of management practices to improve cattle grazing and forestry practices. Several of these have been implemented and effectiveness monitoring is ongoing.
- Rainbow Lake is impaired by nutrient loadings, high pH, and low dissolved oxygen. Excess nutrients can lead to high pH and low dissolved oxygen, algal blooms and even fish kills. A nutrient TMDL was approved in 2000. Nutrient load reductions were assigned to several sources to achieve water quality standards:
 - Septic systems – 75% reduction in nitrogen loading,
 - Runoff (residential, commercial, agricultural, and forests) – 50% reductions in nitrogen and phosphorus loadings
 - Macrophyte (aquatic plant) decomposition – 50% reductions in nitrogen and phosphorus loadingsADEQ is working with landowners and other interested stakeholders to implement strategies identified in the TMDL to achieve water quality standards. Further monitoring is scheduled to determine whether these strategies have been successful.
- The Little Colorado River near Springerville is impaired by suspended sediment (turbidity). Suspended sediment which causes high turbidity readings represents a risk to aquatic life. A turbidity/suspended sediment TMDL was completed in 2002. The investigation indicated that sediment loadings actually start upstream of these segments. The main cause of the suspended sediments is loss of vegetative cover due to historic grazing practices. Loss of vegetation, especially in the riparian area, allows increased runoff, soil erosion, and bank destabilization. Effective management strategies include increasing riparian vegetation, stream bank stabilization, maintenance of flood plains, and minimization of the impact of cattle in the general area. ADEQ has been working with landowners and other interested stakeholders to implement strategies to reduce sediment transport in the Little Colorado River. Further monitoring to determine the effectiveness of implemented strategies is ongoing.

- The Little Colorado River near Joseph City is impaired due to copper, silver, and suspended sediment concentration (SSC). These pollutants pose a risk to aquatic life and wildlife. Further monitoring is needed to identify sources in this drainage area. TMDLs will be initiated in 2007.
- The Little Colorado River near Woodruff is impaired due to *E. coli* bacteria and suspended sediment. *Escherichia coli* contamination presents a significant public health concern if people are swimming or even wading in the water. A bacteria TMDL will be initiated in 2007. Monitoring for the sediment TMDL will occur in conjunction with monitoring for the other TMDLs on the Little Colorado River.
- Lakes in the Lake Mary region near Flagstaff are impaired by mercury: Upper Lake Mary, Lower Lake Mary, Lower Long Lake, Soldiers Lake, and Soldiers Annex Lake. Fish consumption advisories have been issued at each of these lakes because consumption of mercury poses risks to humans who eat the fish. Mercury also poses risks to other animals that prey on the fish.

A draft model development report for the Lake Mary region (Malcolm Pirnie, 2006) indicates that mercury is from indirect sources such as: air deposition to the lake and to the watershed (transported to the lakes via runoff), ground water, and natural background. Several remediation scenarios were evaluated using the model: lake aeration, sediment dredging, watershed load reduction, lake level management, and fisheries management. This analysis indicated that reduction of water column concentrations would require reductions in atmospheric loads directly and by reducing soil erosion in the watershed. A draft TMDL should be completed in 2006.

- Lyman Lake (near Springerville) is also impaired by mercury. A fish consumption advisory has been issued at this lake because consumption of mercury poses risks to humans who eat the fish. Mercury also poses risks to other animals that prey on the fish.
- Bear Canyon Lake is impaired by low pH (alkaline conditions). Low pH conditions can negatively impact most designated uses (swimming, aquatic life, agriculture). A TMDL is scheduled and will investigate whether sources of this water quality problem.

Water Quality Improvement Grant Projects – ADEQ awarded the following Water Quality Improvement Grants (319 Grants) in this watershed. More information concerning these grants or projects can be obtained at: <http://www.azdeq.gov/environ/water/watershed/fin.html>.

- **EC Bar Ranch Turbidity Reduction Projects**
EC Bar Ranch (2000, 2001, 2002, 2003, 2004, and 2005)
Restore riparian conditions by exclude cattle from riparian areas and provide alternative water sources for cattle. This should result in stream bank stabilization and reductions in sediment loading to Nutrioso Creek.
- **Rogers Ranch Turbidity Reduction Project**
Rogers Ranch (2000)
Restore riparian vegetation and stream bank stability by excluding cattle from riparian areas and providing alternative water sources along Nutrioso Creek.
- **Big Ditch Water Quality Improvement Project**
The Town of Eager (2000)
Line “Big Ditch”, an irrigation canal, to reduce leakage and improve riparian growth.
- **Murray Basin – Saffel Canyon Phase II Project**
The Apache Sitgreaves National Forest (2001)
Restore stream channels to their natural form and function on two severely degraded tributaries to Nutrioso Creek. Project includes realigning and regrading roads, obliterated some roads, and revegetated some disturbed sites in the Apache Sitgreaves National Forest.
- **Overgaard Townsite Water Protection Project**

The Overgaard Domestic Wastewater Improvement District (2001, 2004)
Connect 20 homes to a 10,000 gallon septic tank and leach field to protect public health and underlying aquifers and nearby streams.

- **Greenwood Sediment Reduction Project**
The Apache Sitgreaves National Forest (2001)
Reconstruct and realign forest roads to reduce sediment contributions to Nutrioso Creek. Erosion stabilization techniques were applied to control active head-cutting and bank erosion caused by roads.
- **Best Management Practices for Wastewater Treatment at Tolani Lake Project**
The Navajo Nation (2001)
Develop a modern wastewater lagoon system and constructed wetland at Tolani Lake. The project was used to teach and promote best management practices associated with the operation and maintenance of wastewater systems, including effluent reuse.
- **Juan Curley Project**
The Navajo Nation (2004)
Develop and implement a grazing management plan for a 270 acre Navajo allotment. The plan is to identify strategies to reduce stream bank and gully erosion.
- **Hell's Hole Spring Development Project**
Apache-Sitgreaves National Forest (2003)
Improve water quality, wetland function, and water capacity at the following springs: Yellow Bull, Upper Linden, Coyote, and Miner.

Water Protection Fund Projects – The following Water Protection Fund Projects have been awarded by the Arizona Department of Water Resources. Information about these funds or projects can be obtained from ADWR at: <http://www.azwater.gov>.

- **Murray Basin – Saffel Canyon Phase II Project**
The Apache-Sitgreaves National Forest (2000)
Restore stream channels to their natural form and function on two severely degraded tributaries to Nutrioso Creek. The Forest Service also realigned and regraded roads, obliterated some roads, and revegetated some disturbed sites.
- **Pueblo Colorado Wash Project**
Hubbell Trading Post Natural Site (2000)
Continue the riparian area restoration of Pueblo Colorado Wash. This project was first funded in 1997 and has been successful in reestablishing the natural sinuosity of the channel, function of the riparian area, and natural vegetative communities in the area.
- **Hubbell Trading Post Riparian Restoration using Treated Effluent Project**
Hubbell Trading Post Natural Site (2000)
In conjunction with the project above, develop a distributions system to use secondary treated effluent to irrigate four acres of flood plain while reestablishing native vegetation in this riparian area.
- **Lake Mary Watershed Streams Restoration Project**
Northern Arizona University (2000)
Reduce sedimentation in tributaries to both Upper and Lower Lake Mary. The project will modify stream channels, revegetate riparian areas, and where possible, relocate roads further from the tributaries.
- **Upper Fairchild Draw Riparian Restoration Project**
Apache Sitgreaves National Forest (2000)

Build an 8-foot high fence to enclose grazing wildlife from a 14 acre wet meadow and plant willows within the enclosure. This work is to reduce detrimental grazing, improve riparian conditions in this headwater to Willow Creek, and therefore, reduce sediment loadings.

- **Round Valley Water Users Project**
Town of Eagar and Round Valley Water Users Association Project (2000)
Study water losses due to current irrigation delivery system and feasibility of a more efficient system. Reductions in water losses are expected to encourage riparian area growth and therefore water quality in the Little Colorado River.
- **Polacca Wash Grazing Management Project**
The Hope Tribe (2000)
Exclude livestock from riparian areas and revegetate using native plants along portions of Polacca Wash.
- **Wet Meadows – A Riparian Restoration Project**
The National Wild Turkey Federation (2003)
Fence off wildlife from five wet meadows in the Apache Sitgreaves National Forest.
- **Wilkins' Little Colorado River Riparian Enhancement Project**
Ranchers (2003)
In collaboration with Arizona Game and Fish Department, revegetate using native plants, stabilize ¾ mile of stream banks, and create better wildlife habitat along the Little Colorado River near Springerville.
- **Diamond X Ranch Riparian Enhancement Project**
Diamond X Ranch (2004)
Revegetate and improve riparian conditions along the Little Colorado River to reduce sediment loading.
- **EC Bar Ranch Well and Drinker Project**
EC Bar Ranch (2004)
Develop alternative water sources to minimize livestock and wildlife use of a fragile riparian area along Nutrioso Creek.

Other Water Quality Studies

- ***Bathymetric Study of Northern Arizona Lakes – Draft Final Report***
Paul Gremillion and Cristina Piastrini, Northern Arizona University (2005)
Bathymetric maps of the following lakes were created to support the development of Total maximum Daily Loads for mercury and other water quality studies: Ashurst Lake, Kinnikinick Lake, Long Lake, Lower Lake Mary, Upper Lake Mary, Soldier Lake, and Soldier Annex Lake. Along with the maps, tables of surface area and volume versus storage were developed for these seven lakes.
- ***Upper Little Colorado River Concept Plan – A Road Map and Resource Guide to Riparian Enhancement for Private Landowners***
Tom Moody, Ruth Valencia, Kelly Wirtanen, and Mark Wirtanen, Northern Arizona University, College of Engineering and Technology, Dept of Civil and Environmental Engineering (2001)
This report provides information to the riverside landowner for the management of their private lands. It describes fundamental characteristics of a stream and its riparian community and recommends specific practices to reduce bank erosion and channel incision, and improve riparian condition, fishery habitat, livestock watering, and water diversions. The plan also provides information about regulatory permits necessary to conduct projects in and along the riparian corridor and a set of potential funding sources for stream enhancement projects.
- ***Generalized Hydrogeology and Ground Water Budget for the C Aquifer, Little Colorado River Basin and Parts of the Verde and Salt River Basins, Arizona and New Mexico***
Robert J. Hart, John J. Ward, Donald J. Bills, and Marilyn E. Flynn – U.S.G.S.(2002)

This report discusses the hydrogeology, structural controls, aquifers, ground water movement and development, interaction of ground water and surface water, and ground water budget components for the C aquifer. The C aquifer covers more than 27,000 square miles and is the most productive aquifer in the Little Colorado River Watershed. It has a direct hydraulic connection to the Little Colorado River in some places, especially at spring discharges in the lower 13 miles (just above the Colorado River confluence). Ground water pumpage from the C aquifer during 1995 was about 140,000 acre-feet. Discharge from the C aquifer is estimated to be 319,000 acre-feet/year, with downward leakage to limestones accounting for most of the total discharge.

- ***Ground Water, Surface Water, and Water Chemistry Data, Black Mesa Area, Northeastern Arizona 2000-2001, and Performance and Sensitivity of the 1988 USGS Numerical Model of the N Aquifer***
Blakemore E. Thomas – U.S. Geological Survey, in cooperation with the Arizona Dept of Water Resources and Bureau of Indian Affairs (2002)
The N aquifer is the major source of water in the 5,400 square mile Black Mesa area in northeastern Arizona. Since 1971, monitoring has been designed to determine the long term effects of ground water withdrawals from the N aquifer for industrial and municipal uses. During the past 10 years, total withdrawals increased at an average rate of about 3% per year. Water levels in 33 wells dropped an average of 17 feet during the past 35 years (ranging 169-foot drop to 10-foot increase). Long-term effects of pumping on surface waters could not be measured. No significant trend in the annual average discharges for Moenkopi Wash and Laguna Creek, while median winter flows for Dinnebito Wash and Polacca Wash have decreased during the last 6 years.
- ***Ground Water, Surface Water, and Water Chemistry Data, Black Mesa Area, Northeastern Arizona 2001-2002***
Blakemore E. Thomas – U.S. Geological Survey, in cooperation with the Arizona Dept of Water Resources and Bureau of Indian Affairs (2002)
This is a continuation of study above.
- ***Ground Water, Surface Water, and Water Chemistry Data, Black Mesa Area, Northeastern Arizona 2001-2002***
Blakemore E. Thomas – U.S. Geological Survey, in cooperation with the Arizona Dept of Water Resources and Bureau of Indian Affairs (2003)
This is a continuation of study above.
- ***Ground Water, Surface Water, and Water Chemistry Data, Black Mesa Area, Northeastern Arizona 2002-2003***
Blakemore E. Thomas – U.S. Geological Survey, in cooperation with the Arizona Dept of Water Resources and Bureau of Indian Affairs (2004)
This is a continuation of study above.
- ***Ground Water, Surface Water, and Water Chemistry Data, Black Mesa Area, Northeastern Arizona 2003-2004***
Blakemore E. Thomas – U.S. Geological Survey, in cooperation with the Arizona Dept of Water Resources and Bureau of Indian Affairs (2005)
This is a continuation of study above.
- ***Hydrology of the D Aquifer and Movement and Ages of Ground Water Determined from Geochemical and Isotopic Analyses, Black Mesa Area, Northeastern Arizona.***
Margot Truini and Steve A. Longworth, U.S. Geological Survey, in cooperation with the Bureau of Indian Affairs (2003)
Water samples from the D aquifer contain higher concentrations of dissolved solids than samples from the N aquifer; therefore, the Navajo Nation and the Hopi Tribe in Black Mesa are concerned about leakage from the overlying D aquifer into the N aquifer which is their primary source of potable water. The study found that leakage is most likely to occur in the southern part of Black Mesa.

- **Water Quality Data from Navajo National Monument, Northeastern Arizona 2001-2002**
Blakemore E. Thomas – U.S.G.S., in cooperation with the National Park Service (2003)
Water samples were collected from two springs and one well near Betatakin ruin, one spring near Keet Seel Ruin, and one spring and one stream near Inscription House Ruin in 2001 and 2002. Water from all sites is from the N aquifer.
- **Water Quality Data for Walnut Canyon and Wupatki National Monuments, Arizona 2001-02**
Blakemore E. Thomas, U.S. Geological Survey in cooperation with the National Park Service (2003)
Water quality data were collected from Cherry Canyon seep in Walnut Canyon, the Walnut Canyon headquarters well, Heiser Spring in Wupatki, and from the Little Colorado River at the edge of Wupatki to provide baseline water quality information.

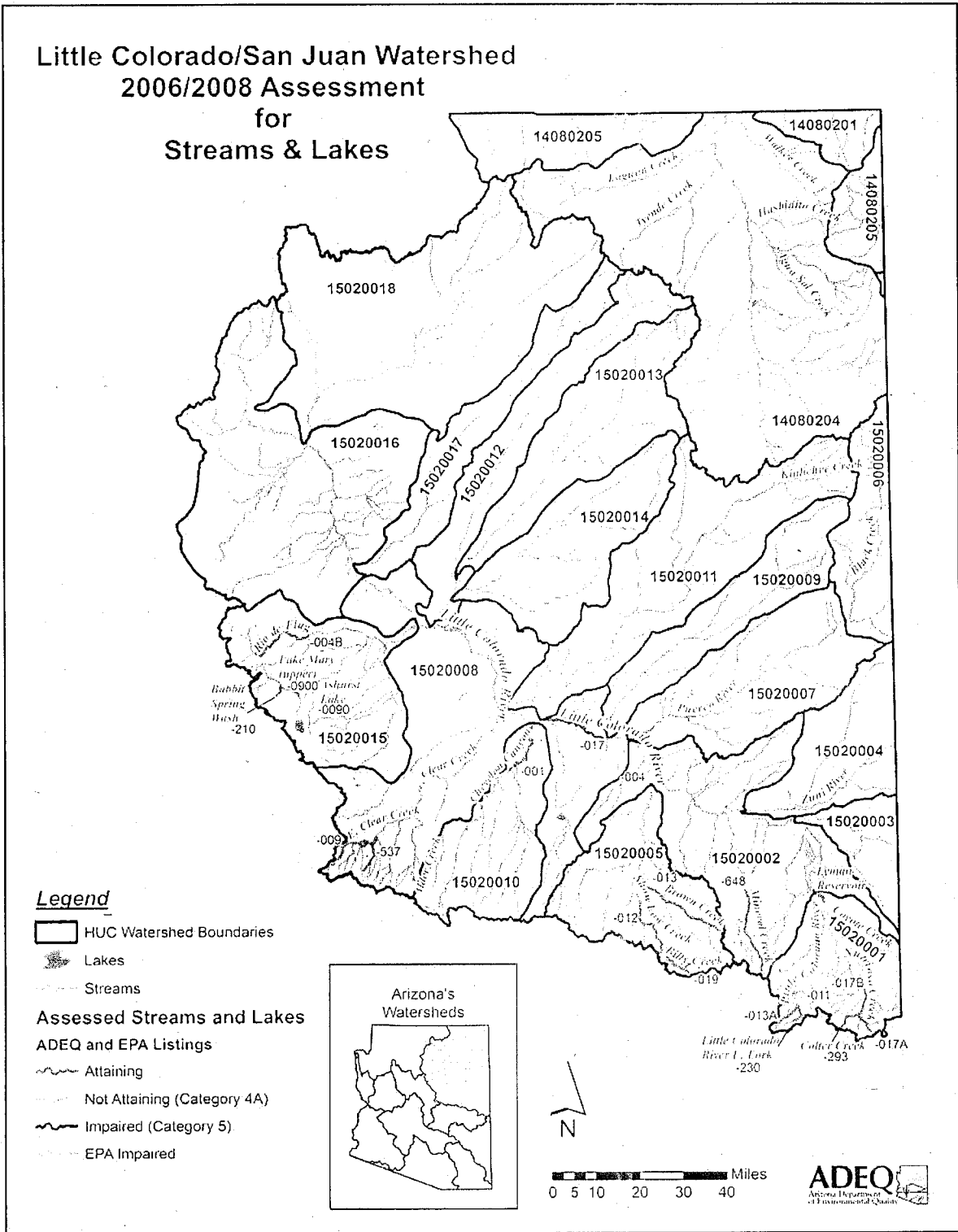
Assessments

The Little Colorado River Watershed can be separated into the following drainage areas (subwatersheds):

14080105	La Plata River Drainage Area (Tribal Land – Not assessed)
14080106	Charco River Drainage Area (Tribal Land – Not assessed)
14080201	Cottonwood Creek Drainage Area (Tribal Land – Not assessed)
14080204	Chinle Wash Drainage Area (Tribal Land – Not assessed)
14080205	Oljeto Wash Drainage Area (Tribal Land – Not assessed)
15020001	Little Colorado River Headwaters Drainage Area
15020002	Upper Little Colorado River Drainage Area
15020003	Carrizo Wash Drainage Area
15020004	Zuni River Drainage Area
15020005	Silver Creek Drainage Area
15020006	Upper Puerco River Drainage Area (Tribal Land – Not assessed)
15020007	Lower Puerco River Drainage Area
15020008	Middle Little Colorado River Drainage Area
15020009	Wide Ruin Wash Drainage Area
15020010	Chevelon Canyon Drainage Area
15020011	Puerco Colorado Wash Drainage Area
15020012	Oraibi Wash Drainage Area (Tribal Land – Not assessed)
15020013	Polacca Wash Drainage Area (Tribal Land – Not assessed)
15020014	Jadito Wash Drainage Area (Tribal Land – Not assessed)
15020015	Canyon Diablo Drainage Area
15020016	Lower Little Colorado River Drainage Area
15020017	Dinnebito Wash Drainage Area (Tribal Land – Not assessed)
15020018	Moenkopi Wash Drainage Area (Tribal Land – Not assessed)

These drainage areas and the surface waters assessed as “attaining” or “impaired” are illustrated on the following watershed map. Methods used to complete these assessments are described in the “Surface Water Assessment Methods and Technical Support” document (2006).

Little Colorado/San Juan Watershed
 2006/2008 Assessment
 for
 Streams & Lakes





Energy Minerals Law Center

a nonprofit law firm serving communities impacted by energy development

1911 Main Avenue, Suite 238, Durango, Colorado 81301
Phone: (970) 247 9334 Fax: (970) 382 0316
Email: emlc@frontier.net

April 3, 2009

VIA E-MAIL ATTACHMENT – BY FIRST CLASS MAIL

Mr. John Tinger
U.S. Environmental Protection Agency
Region IX, CWA Standards and Permits
75 Hawthorne Street
San Francisco, CA 94105
Email: Tinger.John@epamail.epa.gov

**Re: NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No.
NN0022179: Black Mesa Mine Complex**

Dear Mr. Tinger,

On behalf of Black Mesa Water Coalition, Diné C.A.R.E., Dine Hataalii Association, Inc., To Nizhoni Ani, C-Aquifer for Diné, Sierra Club, Center for Biological Diversity (hereinafter, "Commenters"), the undersigned attorney hereby submits the following comments on the U.S. Environmental Protection Agency's ("EPA's") NPDES Permit Renewal for the Black Mesa Project (Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES")). These comments are timely filed within the fourteen (14) day extension of the comment period granted by EPA on March 17, 2009.

Request for Public Hearing

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.

Remedying Violations of WQS Standards

Much of the limited background information contained in EPA's Administrative Record indicates a significant water quality problem at the Black Mesa Complex. Commenters respectfully assert that EPA's renewal permit (as currently proposed) would exacerbate the problem by authorizing Peabody to continue its unabated discharge of, in some instances, highly contaminated wastewater from over 110 outfalls—while directing Peabody to seek a "variance" to deal with ongoing exceedences of applicable WQS.¹

Commenters believe that EPA's approach to dealing with Peabody's ongoing violations of the Clean Water Act ("CWA") is flawed and that a fundamentally different approach needs to be immediately employed by the agency to deal with this very serious situation.

EPA provides no discussion or legitimate basis for the proposed use of "variances." *See*, EPA's "Fact Sheet." *See e.g.*, 40 C.F.R. §124.8(5)(requiring EPA to "justify" use of variances). In particular, EPA provides no discussion or analysis of "the economic and social costs and the benefits to be obtained" from allowing Peabody to evade compliance with (even temporarily) applicable WQS. 33 U.S.C. §1312(b)(2).

¹ While nowhere defined in EPA's permit materials or Administrative Record, Commenters understand EPA's proposed "variance" to mean a period of time where water quality effluent limits would not apply to Peabody.

According to Peabody's website, "Peabody Energy (NYSE: BTU) is the world's largest private-sector coal company, with 2008 sales of 256 million tons and \$6.6 billion in revenues."² Peabody recently reported record revenues.³

Commenters expect EPA, consistent with the requirements of the CWA, to hold Peabody to the highest of standards and order to exercise the "maximum degree of control" of its discharge of pollutants. 33 U.S.C. §1312(b)(2). Achievement of WQS is achievable both from a technological and financial perspective as Peabody is clearly in a financial position to implement technological-based pollution controls that eliminate discharges (e.g. temporary/permanent wastewater treatment facilities, liners, etc.).

That said and instead of recommending that Peabody seek "variances" from WQS to deal with its ongoing Clean Water Act violations (presumably from the Navajo Nation), EPA should immediately issue a "compliance order" within the next 30 days. 33 U.S.C. §1319 (dealing with "compliance orders"); *see also*, 40 C.F.R. §131.12 (outlining EPA's antidegradation policy).

In particular, a compliance order should be issued for ponds 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. According to EPA's "fact sheet," discharges from all of these ponds are currently non-compliant with one or more WQS. EPA's compliance order should establish a wastewater treatment process for each discharge point as well as a timeframe for compliance with WQS. Commenters believe 60-days is a sufficient time for Peabody to take any necessary corrective action to halt violations of the CWA.

Additionally, and according to the Final Environmental Impact Statement ("FEIS") for the Black Mesa Complex and prepared by the URS Corporation, at least two ponds, J-21A1 and N14-P-S1 which are violating WQS do not appear to be covered by Peabody's current NPDES permit. FEIS at 3-27. That said EPA needs to take immediate (and similar) enforcement actions to halt these unpermitted discharges.

EPA itself should monitor and sample discharges from the outfalls listed above to ensure compliance with WQS and ground-truth any argument (expected from Peabody) that certain exceedences of WQS somehow constitute "background levels" or are attributable to "natural processes"-- a claim that is not substantiated by any independent agency review or analysis in the Administrative Record.

Commenters recognize that in at least two situations (Ponds J-7 and BMA-1), and while temporary and immediate cleanup measures are necessary, a permanent wastewater treatment facility will need to be constructed by Peabody. This should be expressly accounted for in any compliance order. Establishment of a permanent wastewater treatment facility is certainly within the "economic capability" of Peabody. 33 U.S.C. §1312(b)(2).

² <http://www.peabodyenergy.com/default-netscape.asp>

³ http://www.peabodyenergy.com/pdfs/EarningsRelease_01_27_09.pdf

Additionally, Commenters affirmatively state their opposition to any Peabody proposal to dewater contaminated ponds and use the water for “dust control.” This is not a viable solution and poses significant environmental health and safety issues. Any such remediation proposals by Peabody should be rejected by EPA.

Other Outfalls

Because of the significant number of violations of WQS already occurring at Peabody’s Black Mesa Complex and because of the large number of discharges being covered by EPA’s NPDES permit (over 100 outfalls), EPA needs to conduct its own independent review of all of outfalls in the Black Mesa Complex to ensure compliance with WQS and existing permit conditions.

The administrative record suggests that EPA has conducted one (1) site visit over the last ten years and that the agency’s visit may have been limited to two ponds. One site visit does not constitute meaningful regulatory oversight of this operation. This is especially true where, as here, there are over 230 impoundments on the Black Mesa Complex and where Peabody intends to make at least 51 impoundments permanent.

Further, Peabody is requesting “deletion” of outfalls covered under its current NPDES permit for ponds J16-I, J16-J, J16-K, J21-J, N2-G, N7-A1, N8-A, N8-B and N14-M and WW-9D. However, there is no indication from the Administrative Record that EPA or any other regulatory agency (e.g. Navajo Nation Environmental Protection Agency) has verified and confirmed the permanent elimination of discharge from these ponds. Deletion should not occur unless and until EPA has physically verified elimination of discharges from these outfalls.

Additionally, Peabody has now requested the addition of 16 ponds to be covered under the NPDES permit. Given the problems (and violations of WQS) at existing Peabody impoundments, EPA (in conjunction with the U.S. Army Corps of Engineers) should be establishing design parameters and any necessary wastewater treatment processes up front. Design parameters should be established during the 404 permitting process.

Peabody’s Significant Permit Revision and EIS

EPA’s proposed permit draft (1/20/08)” states that EPA is a cooperating agency in review of Peabody’s Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01 (SMCRA Permit Revision) and the production of the Environmental Impact Statement (“EIS”) evaluating the establishment of the Black Mesa Complex.

That said EPA was under a duty to notify the Federal Office of Surface Mining, Control and Enforcement (“OSM”) of Peabody’s ongoing violation of the CWA and WQS. Additionally, and because of these ongoing violations, EPA should have instructed OSM to deny Peabody’s Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01. It was unlawful for OSM (and EPA) to authorize a SMCRA Permit Revision where, as here, Peabody is not meeting water quality standards.

Additionally, and equally troubling, is the fact that the EIS prepared for Peabody's SMCRA Permit Revision (in both draft and final form) did not analyze or even mention Peabody's pending NPDES application with EPA. *See e.g.*, 40 C.F.R. §124.61 According to EPA's "fact sheet", Peabody's NPDES renewal application was submitted to EPA in August of 2005 and was pending before the agency by February of 2006. The Draft EIS for Peabody's Black Mesa Complex was issued in November 2006. The Final EIS and Record of Decision ("ROD") was issued in November 2008. Thus, it appears that EPA and OSM unlawfully segmented the NPDES permit decision in violation of the National Environmental Policy Act ("NEPA"). *See e.g.*, 40 C.F.R. §1508.25(a)(1).

Further, the EIS for the Black Mesa Complex omitted analysis of highly relevant information including, but not limited to, Final Reports on the Seepage Management Plan for NPDES Permit No. NN0022179 and submitted to EPA in April and May of 2008 and a Sediment Control Plan which was submitted to EPA in September 24, 2008.⁴ These records constitute significant new information none of which was analyzed in the EIS for the Black Mesa Complex. *See e.g.*, 40 C.F.R. §1502.9(c).

At a minimum, OSM, EPA and U.S. Army Corp of Engineers need to prepare a new or supplemental EIS to analyze this information.

Other Issues

First, and as rightfully noted by EPA, there is no discussion in the EIS for the Black Mesa Complex or the Administrative Record for the NPDES permit of 404 permitting for the ponds and impoundments at Peabody's Black Mesa Complex. Because Peabody has now created over 230 impoundments on the Black Mesa Complex, this situation warrants intensive on-site investigation by EPA. The Army Corp of Engineers, unlike EPA, was not made a cooperating agency in production of the EIS. 404 permitting should also be addressed in a new or supplemental EIS.

Second, some of the data in the Administrative Record suggests that some of the "seeps" and discharges may be leeching into groundwater. EPA needs to analyze whether the Safe Drinking Water Act is implicated. This should be addressed in a new or supplemental EIS.

Third, and because of the Navajo Nation's treatment as a state status, EPA needs to discuss 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. As Hopi does not have treatment as state status, it is assumed that Federal law and EPA's effluent limitations would apply by default.

⁴ The Sediment Control Plan (September 24, 2008) was not released as part of EPA's Administrative Record. Commenters reserve the right to supplement their comments once the plan has been made public.

Approximately 25,000 acres of land are held exclusively by the Navajo Nation. However, approximately 40,000 acres of land are located in the former Hopi and Navajo Joint Minerals Ownership Lease Area and the surface has been partitioned with 6,000 acres partitioned to Navajo and 34,000 partitioned to Hopi. That said Navajo law does not govern on Hopi lands. EPA needs to identify which outfalls may be subject to more stringent Navajo Nation laws and which are on Hopi lands and would be subject to EPA standards. This should be addressed in a new or supplemental EIS.

Fourth, Commenters object to EPA's allowance to Peabody in the proposed permit to collect discharges resulting from precipitation events "from a sampling point representative of the type of discharge, rather than from each point of discharge." At a minimum, Peabody should be required to "show cause" for each instance where a use of a "representative sampling point" was necessary.

Fifth, Peabody's application does not contain a stormwater discharge plan. It is not clear whether such a plan is needed or whether stormwater issues are addressed in the Sediment Control Plan.

Last, EPA has failed to consult with U.S. Fish and Wildlife Service. Section 7(a)(2) of the Endangered Species Act ("ESA") states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. §1536(a)(2). In fulfilling these requirements, each agency is to use the best scientific and commercial data available. *Id.* This section of the ESA sets out the consultation process, which is further implemented by regulation, 50 C.F.R. §402. The Administrative Record indicates that this process has not been followed.

Conclusion

The proposed NPDES permit for Peabody is wholly deficient and requires significant investment of agency resources to become workable. Peabody has been given a free-pass to pollute with impunity. This situation is untenable and needs to be immediately corrected.

That said we respectfully request that EPA abide by its statutory duties and act as both regulator and enforcer.

We look forward to meeting you and discussing these matters with you face-to-face at the public hearing. If you have any comments or questions regarding this submittal, please do not hesitate to contact me at (970) 247-9334 or emlc@frontier.net.

Sincerely,

s/ Brad A. Bartlett, esq.

Brad A. Bartlett
Managing Attorney
Energy Minerals Law Center

Copy: Laura Yoshii, Director EPA Region IX (yoshii.laura@epa.gov)
Alexis Strauss, Director, EPA Region IX Water Division (strauss.alexis@epa.gov)



United States Department of the Interior

U.S. Fish and Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

Telephone: (602) 242-0210 Fax: (602) 242-2513



In Reply Refer to:

AESO/SE

22410-2005-I-0565

December 12, 2008

Memorandum

To: Richard Holbrook, Chief, Program Support Division, Office of Surface Mining,
Denver, Colorado

From: Field Supervisor

Subject: Black Mesa Project – Permanent Program Permit AZ-0001D

Thank you for your correspondence of November 26, received on December 1, 2008. This letter documents our review of the Black Mesa Project, in Navajo County, in compliance with section 7 of the Endangered Species Act of 1973 (ESA) as amended (16 U.S.C. 1531 et seq.). Your letter concluded that the proposed project may affect, but is not likely to adversely affect the endangered black-footed ferret (*Mustela nigripes*), endangered southwestern willow flycatcher (*Empidonax traillii extimus*), threatened Mexican spotted owl (*Strix occidentalis lucida*), threatened Navajo sedge (*Carex specuicola*) and its critical habitat, and California condor (*Gymnogyps californianus*). Within the action area the California condor is designated as a non-essential experimental population. Under this designation action agencies are only required to consult with us when they determine their action may jeopardize the continued existence of that species. However, we are including the California condor per your request. We concur with your determinations and provide our rationales below.

You also concluded that the proposed project may affect, but is not likely to adversely affect the bald eagle (*Haliaeetus leucocephalus*), which was removed from the Federal List of Threatened and Endangered Wildlife and Plants effective August 8, 2007. Since the bald eagle has been delisted there is no need to consult under section 7 of the ESA, and effects to the bald eagle will not be considered in this document. However, our evaluation of the Black Mesa Project with respect to the Bald and Golden Eagle Protection Act is included in Appendix A.

Description of the Proposed Action

A complete description of the proposed action is found in your November 2008, biological assessment (BA). The proposed action is to revise the life-of-mine (LOM) plans for Peabody Western Coal Company's (Peabody) permitted Kayenta mining operation. The LOM revision would allow minor modifications to the operation and reclamation plans for the Kayenta mining operation, and would incorporate into these plans the area previously occupied by the adjacent Black Mesa mining operations. Coal from the Kayenta mining operation is delivered by electric

railroad 83 miles northwest to the Navajo Generating Station near Page, Coconino County, Arizona. The Black Mesa mining operation previously supplied coal, via a coal slurry pipeline, to the Mohave Generating Station (MGS) in Laughlin, Clark County, Nevada, prior to suspension of the station's operations in 2005. Peabody believes that reopening the MGS for operation as a coal-fired power plant is unlikely. The Kayenta mining operation (covering 44,073 acres) and the Black Mesa mining operation (18,857 acres) are referred to, collectively, as the Black Mesa Complex (BMC) (62,930 acres). The LOM revision would not change the mining methods or average annual production rate of the Kayenta mining operation. Un-mined coal-resource areas within the Black Mesa mining operation would be incorporated into the expanded permit area for the BMC, but Peabody would not be authorized to mine these areas. Black Mesa operation infrastructure would be used as necessary to facilitate mining and reclamation by the Kayenta mining operation. Water, used for mining-related purposes, would be withdrawn from the Navajo (N) aquifer at an average rate of 1,236 acre-feet per year (af/yr). Mining operations would cease in 2026 when water use would decrease to 505 af/yr through 2028 and 444 af/yr through 2038, for reclamation and well maintenance purposes. The BMC is located on land either leased or within grants-of-easement within the boundaries of the Hopi and Navajo Indian Reservations, about 125 miles northeast of Flagstaff, Arizona, near the northern edge of Black Mesa within the protracted boundaries of Townships 35 through 37 North, Ranges 17 through 19 East, Navajo County, Arizona. Conservation measures, incorporated into the Black Mesa Project, include: monitoring Mexican spotted owls within two miles of the lease boundary beginning two years prior to scheduled disturbance in the N10 area and continuing until three years after the disturbance (BA section 6.3.3); and contingency measures in the event California condors occur at the BMC (6.5.3).

DETERMINATION OF EFFECTS

We concur with your determination that the proposed action may affect, but is not likely to adversely affect, the black-footed ferret, southwestern willow flycatcher, Mexican spotted owl, California condor, and Navajo sedge and its critical habitat for the following reasons:

Black-footed ferret

- The only known occurrence of this species in Arizona in the wild in the last 77 years is recently reintroduced populations located over 120 miles west of the BMC. The BMC is located within woodlands, with reclaimed BMC lands offering the only large areas of vegetation and topography suitable for prairie dog colonies, the ferret's habitat. Prairie dog colonies on the BMC are too small and scattered to support ferrets. Therefore, it is extremely unlikely that the species currently occurs in the action area and any potential direct or indirect effects on the species are discountable.

Southwestern willow flycatcher

- Riparian habitat suitable for breeding is not present on the BMC. Riparian vegetation, primarily in the form of tamarisk, occurs as narrow or small patches in several ephemeral washes that lack surface flows or saturated soil during the breeding season. However, this vegetation could potentially be used by migrant willow flycatchers. A total of three acres of tamarisk would be removed with the continuation of mining operations. The effects associated with this limited loss of habitat on migrant southwestern willow flycatchers are insignificant.

- Off-BMC and on the Navajo Nation, there may be some limited suitable breeding habitat associated with washes that will be affected by ground water pumping by Peabody (D. Mikesic, personal communication). Peabody pumps water from the N aquifer, which provides base flow to various drainages surrounding Black Mesa. Based on the lack of monitored decreases in ground water-discharge for N aquifer-fed springs, the proposed decrease in mining-related ground water pumping, and the small modeled change in ground-water discharge associated with all ground-water pumping, the effects to flycatcher habitat are considered to be insignificant.

Mexican spotted owl

- Mexican spotted owls occur in the vicinity of the BMC. Mining-related activity includes access road development, use by support vehicles, and road reclamation activities. The closest mining and mining-related activities would occur in the N-10 area greater than or equal to one-half mile from the nearest protected activity center (PAC). Therefore, effects on the Mexican spotted owl from project-generated noise are insignificant and discountable.
- Bright lights mounted on draglines that allow them to operate at night could have an effect on nocturnal spotted owl activities. However, the intervening topography and vegetation will likely filter most if not all of the light, at least as viewed from within the vegetation, which consists of well-developed stands of relatively dense pinon and juniper. Topography in between the PAC and the mining area consists of drainages and three associated ridges with elevations higher than the mining area. Based on the distance in between the PAC and the mining area (0.71 miles at a minimum) and the intervening topography and vegetation, effects associated with lighting are insignificant.
- Mining and mining-related activity will not alter Mexican spotted owl habitat.

California condor

- This species is being reintroduced at Vermillion Cliffs where it breeds (in addition to the Grand Canyon) and routinely travels throughout the Grand Canyon complex and along the Colorado River corridor, about 70 miles west of the BMC. Condors are capable of traveling long distances in a short period of time (e.g., 200 miles/day) and so may fly over the BMC. No condors have been reported at the BMC, and there are no unique foraging or nesting features (e.g., concentrations of carrion, or tall cliffs, respectively) within one mile of the BMC, so condors are not expected to stay in the area. Therefore, any effects of mining on condors are insignificant.

Navajo sedge with critical habitat

- Peabody pumps water from the N aquifer, the source of water for seeps and springs, which is habitat for this species. Based on the lack of monitored decreases in ground water-discharge for N aquifer-fed springs, the proposed decrease in mining-related ground water pumping, and the small modeled change in ground-water discharge associated with all ground-water pumping, the effects on Navajo sedge are insignificant.

- Designated critical habitat for Navajo sedge is located about 20 miles northwest of the BMC. Based on the limited hydrologic connection between the portion of the N aquifer where mining-related pumping occurs and the portion of the aquifer where critical habitat has been designated, effects on Navajo sedge critical habitat are insignificant.

When the Fish and Wildlife Service enters consultation on a proposed action for which the Bureau of Indian Affairs is a consultation participant, we treat affected American Indian Tribes as license or permit applicants entitled to full participation in the consultation process. This includes, but is not limited to, invitation to meetings between FWS and the action agencies, opportunities to provide pertinent scientific data and review the administrative record, and opportunities to review biological assessments and related documents. In keeping with our trust responsibilities to Tribes, by copy of this memorandum, we are notifying the Hopi Tribe and Navajo Nation, which may be affected by this proposed action.

Thank you for your continued coordination. No further section 7 consultation is required for this project at this time. Should project plans change, or if information on the distribution or abundance of listed species or critical habitat becomes available, this determination may need to be reconsidered. In all future correspondence on this project, please refer to the consultation number 22410-2005-I-0565. Should you require further assistance or if you have any questions, please contact John Nystedt (x104) or Brenda Smith (x101) at (928) 226-0614 of our Flagstaff Suboffice.

Brenda H. Smith

Steven L. Spangle

cc (hard copy):

- Chairman, Hopi Tribe, Kykotsmovi, AZ (Attn: Arnold Taylor, Natural Resources Department)
- Project Manger, Black Mesa Project, Hopi Tribe, Flagstaff, AZ (Attn: Joelynn Roberson)
- President, Navajo Nation, Window Rock, AZ (Attn: John Stucker, Mineral Department)
- Director, Navajo Nation Department of Fish and Wildlife, Window Rock, AZ
- Director, Navajo Regional Office, Bureau of Indian Affairs, Gallup, NM (Attn: Omar Bradley)
- NEPA Coordinator, Environmental Services, Navajo Regional Office, Bureau of Indian Affairs, Gallup, NM (Attn: Harrilene Yazzie)
- Environmental Specialist, Environmental Services, Western Regional Office, Bureau of Indian Affairs, Phoenix, AZ (Attn: Amy Heuslein)
- Environmental Scientist, U.S. Environmental Protection Agency, Region 9, San Francisco, CA (Attn: Jeanne Geselbracht)
- Senior Project Manager, Army Corps of Engineers, Los Angeles District, Regulatory Branch, Arizona Section, Tucson Project Office, Tucson, AZ (Attn: Marjorie Blaine)
- Chief, Environmental Resources Management Division, Bureau of Reclamation, Phoenix, AZ (Attn: Bruce Ellis)
- Manager, Environmental Engineering, Peabody Group, Peabody Western Coal Company, Casper, Wyoming, (Attn: Brian Dunfee)

cc (electronic copy):

Chief, Division of Endangered Species, Fish and Wildlife Service, Albuquerque, NM

(Attn: Susan Jacobsen) (ARD-ES)

Tribal Liaison, Southwest Region, Fish and Wildlife Service, Albuquerque, NM (ARD-EA)

Assistant Field Supervisor, Fish and Wildlife Service, Flagstaff, AZ

Fish and Wildlife Biologist, Fish and Wildlife Service, Flagstaff, AZ (Attn: Shaula Hedwall)

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APPENDIX A – TECHNICAL ASSISTANCE

This appendix contains our evaluation regarding the likelihood of take of bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*) from implementation of the Office of Surface Mining's proposed Black Mesa Project.

The final rule to remove the bald eagle from the Federal List of Threatened and Endangered Species was published in the Federal Register on July 9, 2007, and took effect on August 8, 2007. However, bald and golden eagles continue to be protected by the Bald and Golden Eagle Protection Act (Eagle Act). The Eagle Act prohibits anyone, without a permit issued by the Secretary of the Interior, from taking eagles, including their parts, nests, or eggs. "Take" is defined under the Eagle Act as "to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb" eagles. Disturb means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based upon the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment by substantially interfering with normal breeding, feeding, or sheltering behavior (USDI 2007).

We believe mining and mining-related activities associated with the Black Mesa Project are not likely to result in take of eagles for the following reasons:

Bald Eagle

- This species may occur at the BMC infrequently during migration or winter. Impacts of mining and mining-related activities on migrant or wintering bald eagles foraging over the BMC are not expected to rise to the level of take.
- Mining and mining-related activities are not proposed to occur closer than one-half mile from potential roosting habitat (drainages with mixed conifer woodland vegetation). Based on this distance and the intervening topography and vegetation, the impacts of sound and light (from dragline floodlights) are not expected to rise to the level of take.

Golden Eagle

- This species may forage over the BMC but there is no potential nesting habitat within a mile of the BMC. Reclaimed mine lands offer potential foraging habitat. Impacts of mining and mining-related activities on golden eagles foraging over the BMC are not expected to rise to the level of take.

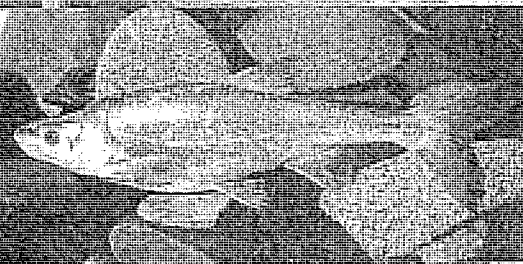
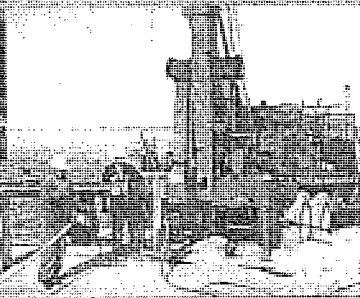
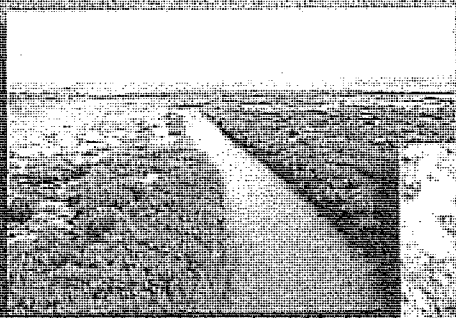
We recommend that any observations of bald or golden eagles be reported to the Zoologist, Natural Heritage Program, Navajo Nation Fish and Wildlife Department, at (928) 871-7070.

LITERATURE CITED

U.S. Department of the Interior (USDI), Fish and Wildlife Service. 2007. Protection of Eagles and Authorizations under the Bald and Golden Eagle Protection Act for Take of Eagles; Final Rule. Federal Register 72(107):31132-31140. June 5, 2007.

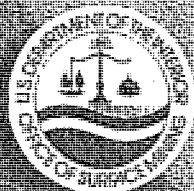
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BLACK MESA PROJECT BIOLOGICAL ASSESSMENT



Prepared by

URS

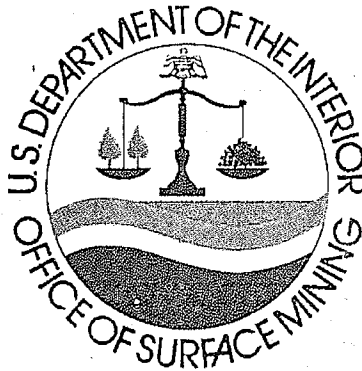


U.S. Department of the Interior
Office of Surface Mining
Reclamation and Enforcement

November 2008

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LIST OF ACRONYMS

af/yr	acre-feet per year
AGFD	Arizona Game and Fish Department
AVEPA	Aubrey Valley Experimental Population Area
BA	biological assessment
BFFRIT	Black-Footed Ferret Recovery Implementation Team
BIOME	BIOME Ecological and Wildlife Research
BLM	Bureau of Land Management
C aquifer	Coconino aquifer
CFR	Code of Federal Regulations
cfs	cubic feet per second
cm	centimeters
cms	cubic meters per second
dBA	A-weighted decibel(s)
ESA	Endangered Species Act
Forest Service	U.S. Forest Service
FR	Federal Register
FWS	U.S. Fish and Wildlife Service
GeoTrans	GeoTrans, Inc.
ha	hectare(s)
kg	kilogram
km	kilometer(s)
LOM	life-of-mine
m	meter(s)
m ³	cubic meter(s)
m ³ /yr	cubic meter(s) per year
N/A	not applicable
N aquifer	Navajo aquifer
NDFW	Navajo Department of Fish and Wildlife
NNHP	Navajo Natural Heritage Program
No.	number
OSM	Office of Surface Mining Reclamation and Enforcement
PAC	protected activity center
Peabody	Peabody Western Coal Company
Reclamation	Bureau of Reclamation

SSPA	S.S. Papadopoulos & Associates
U.S.C.	United States Code
URS	URS Corporation
USEPA	U.S. Environmental Protection Agency
USGS	U.S. Geological Survey

1.0 INTRODUCTION

This biological assessment (BA) was prepared pursuant to Section 7 of the Endangered Species Act (ESA) of 1973, as amended (Title 16, United States Code, Section 1531 et seq. [16 U.S.C. §§ 1531 et seq.]), to address potential effects on federally listed threatened and endangered species, species proposed for listing, candidate species and, where applicable, their designated critical habitat. This BA addresses the potential effects of a number of actions associated with the Black Mesa Project, which would continue the supply of coal to the Navajo Generating Station near Page, Arizona, from the Kayenta mining operation. The Kayenta mining operation and Black Mesa mining operation comprise the Black Mesa Complex. Peabody Western Coal Company (Peabody), the mine operator, proposes several revisions to the life-of-mine (LOM) mining plans for the Black Mesa Complex.

Concurrent with the development of the BA, the Office of Surface Mining Reclamation and Enforcement (OSM), the lead Federal agency, has prepared an environmental impact statement for the project to analyze and disclose the potential impacts of the proposed action and alternatives. The Bureau of Indian Affairs, Bureau of Land Management (BLM), U.S. Environmental Protection Agency (USEPA), Hopi Tribe, Hualapai Tribe, Navajo Nation, County of Mohave (Arizona), and City of Kingman (Arizona) are cooperating agencies in the preparation of the environmental impact statement.

1.1 BACKGROUND

Since the early 1970s, Peabody has operated two surface-coal-mining operations within the Black Mesa Complex, an area composed of three contiguous leases and two surface rights-of-way and easements granted from the Hopi Tribe and Navajo Nation. The Black Mesa Complex comprises approximately 24,858 acres (10,060 hectares [ha]) of land where the surface and mineral interests are held exclusively by the Navajo Nation, and approximately 40,000 acres (106,187 ha) of land are located in the 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. The portion of the leasehold that lies in the former Joint Lease Area consists of approximately 6,137 acres (2,484 ha) partitioned to the Hopi Tribe and 33,863 acres (13,704 ha) partitioned to the Navajo Nation. The coal-mining leases with the Hopi Tribe and Navajo Nation provide that Peabody may produce up to 290 million tons (263 million metric tons) of coal from the Navajo Lease Area (Lease 14-20-0603-8580) and up to 380 million tons (345 million metric tons) of coal from the Hopi and Navajo Joint Lease Area (Leases 14-20-0603-9910 and 14-20-0450-5743) for a combined total of 670 million tons (608 million metric tons).

The coal-mining leases provide Peabody rights to prospect, mine, and strip leased lands for coal and kindred products, including other minerals, except for oil and gas, as may be found. Peabody also is given the right to construct support facilities such as buildings, pipelines, tanks, plants, and other support structures; make excavations, stockpiles, ditches, drains, roads, spur tracks, electric power lines, and other improvements; and to place machinery and other equipment and fixtures and do all other things on the leased lands necessary to carry on mining operations, including right of ingress and egress; and develop and use water for the mining operations, including the transportation by slurry pipeline of coal mined from the leases.

A complete coal-removal, -preparation, and -transportation system is in place and, though separate operations, the Kayenta and Black Mesa mining operations historically have shared some facilities and structures (e.g., offices, shops, coal-handling facilities, roads, etc.).

There are several grants of rights-of-way and easements on Hopi and Navajo Reservation lands allowing Peabody access and use of land outside the existing coal-lease areas. These rights-of-way and easements include an overland conveyor; a coal-loading site; two parcels of land providing access for utilities, haul roads, maintenance roads, sediment-control ponds, a rock-borrow area, and an electrical transmission line.

Peabody has been supplying coal from the Kayenta mining operation to the Navajo Generating Station since 1973. The Kayenta mining operation currently produces coal and reclaims land under OSM Permit AZ-0001D, originally issued in 1990 under OSM's permanent Indian lands program. The Kayenta mining operation is permitted to mine coal reserves that would last through 2026 at current production rates. The Kayenta mining operation is the sole coal supplier for the Navajo Generating Station, and the Navajo Generating Station is its sole customer.

The Black Mesa mining operation supplied coal to the Mohave Generating Station from 1970 to December 2005, when operations were suspended at the power plant. Until the latter date, the Black Mesa mining operation was the sole supplier of coal to the Mohave Generating Station, and the Mohave Generating Station was its sole customer. After the effective date (December 13, 1977) of the Surface Mining Control Reclamation and Enforcement Act of 1977 (SMCRA), Title 30 United States Code, Section 1201 et seq. (30 U.S.C. 1201 et seq.), the Black Mesa mining operation produced coal and reclaimed land under OSM's initial regulatory program.¹ Although Peabody is authorized to mine coal from the Black Mesa mining operation until such time that OSM makes a decision on the LOM revision, Peabody has not produced coal at the Black Mesa mining operation for the Mohave Generation Station since December 2005.

On February 17, 2004, Peabody filed a life-of-mine permit revision application with OSM proposing several revisions to the LOM mining plans for the Kayenta and Black Mesa mining operations (LOM revision). OSM reviewed the application and found it administratively complete. However, in letters dated February 25, 2008, and April 3, 2008, Peabody notified OSM of its intention to amend the pending mine permit revision application for the Black Mesa Complex to remove proposed plans and activities that supported supplying coal to the Mohave Generating Station because Peabody believed that reopening the Mohave Generating Station for operation as a coal-fired power plant is unlikely. Peabody submitted an amended application on July 2, 2008, which is consistent with its letters omitting components to supply coal to the Mohave Generating Station and the haul road.

At this time, Peabody has not indicated that new customers are being considered for the coal from the Black Mesa mining operation. Although, under the proposed action and preferred alternative, the unmined coal-resource areas in the Black Mesa mining operation would be incorporated into the permanent permit area, mining of these resources would not be authorized until Peabody proposed that these resources be mined and BLM and OSM approved this mining. Without knowing a new customer's purpose and need for purchasing and using the coal, the amount and quality of coal needed per year, and a plan for mining and transporting the coal, impacts associated with the potential transaction cannot be projected. If and when there is such a proposal, associated actions (e.g., mining plan revision, development and construction of a means of transporting the coal to its destination) will need to be reviewed under the National Environmental Policy Act and associated regulations.

¹ Between 1990 and 2005, the Black Mesa operation mined coal under the Office of Surface Mining Reclamation and Enforcement (OSM's) initial regulatory program. Since 2005 Peabody Western Coal Company (Peabody) has continued to use surface facilities at the Black Mesa mining operation under the initial regulatory program for both its reclamation activities at the Black Mesa mining operation and in conjunction with its Kayenta mining operation. Prior to 1990, Peabody had submitted a permanent program permit application to OSM for both the Kayenta and Black Mesa mining operations. In 1990, OSM approved and issued a permit for the Kayenta operation. Under the direction of the Secretary of the Interior, OSM administratively delayed its decision on the Black Mesa operation owing to concerns of the Hopi Tribe and Navajo Nation regarding use of Navajo-aquifer (N aquifer) water for coal slurry and mine-related purposes. Under this administrative delay, Peabody continued to conduct the Black Mesa operation under the initial regulatory program until December 2005, when mining operations ceased due to suspension of operations at the Mohave Generating Station.