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

In the Matter of:	)	
Arizona Public Service Company	)	NPDES Appeal No. 19-06
NPDES Permit No. NN0000019	)	

EPA REGION 9'S RESPONSE TO THE PETITION FOR REVIEW

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APPENDIX B: Documents in the Administrative Record referenced in EPA's Response to Petitioners for Review for EAB Appeal re: NPDES No. 19-06

EXHIBIT LIST

No.	AR No.	Name
1	26.b	Final Permit NPDES NN0000019. September 30, 2019.
2.	6.d	Amendments to 40 C.F.R. Parts 122, 125, 79 FR 48300 August 15, 2014.
3.	2.f.i	Revised application for NPDES Permit. February 15, 2013 (Cover Letter Only).
4.	20.d	Revised Draft Permit released for Public Comment. April 30, 2019.
5.	26.d	Final Response to Comments. September 30, 2019.
6.	15.a	APS Request for 401 Certification. March 27, 2019.
7.	23	401 Certification. September 30, 2019.
8.	26.b	Schematic Rendering of outfalls and flow patterns (from Permit).
9.	6.1.d.	ELGs for Steam Electric Regulations, updated November 2015.
10	6.f.	Existing Facilities Rule 316(b) adopted May 2014.
11	7.i.	USFWS Biological Opinion FCPP. April 8, 2015.
12.	26.c	Final Permit Fact Sheet. September 30, 2019.
13.	20.1.a	Comments from Petitioners on Draft Permit April 30, 2019.

14.	15.d	Decision Document Approval of the Navajo Nation Application for Treatment as a State, January 20, 2006.
15.	15.b.	EPA Letter Approving Navajo Nation Water Quality Standards. March 26, 2009.
16.	6.3	Discharge Monitoring Reports (Web Link).
17.	6.1.a.	Reasonable Potential Analysis, April 22, 2019.
18.	8.a.	Letter from N. Brown to R. Williamson. April 3, 2013.
19.	8.e	Groundwater Quality Data Submittal. March 25, 2013.
20.	24 a,b	Aerial photographs of the FPPC.
21.	2.c.	[Intentionally Blank]
22.	28.a.	1993 Four Corners Power Plant NPDES Permit.
23.	28.b.	2001 Four Corners Power Plant NPDES Permit.
24.	8.1.a.3;. 8.1.v	APS 2018 data. MW-15 Boron and Groundwater Elevation Chart/Seeps-Boron Concentrations.
25.	20.c.	Proposed Permit Public Notice Fact Sheet. April 30, 2019.
26.	8.d.	FCPP Groundwater Data Timeline.
27.	1.1.g	Letter from Saliba (APS) to Yoshikawa (EPA), November 29,2006.
28.	29	Memo Perciasepe (EPA) to Florida, December 13, 1993
29.	No AR	47 Fed. Reg. 52,290, 52,291, 52,305 (Nov. 19, 1982) (deleting definition of cooling ponds).
30.	No AR	*Dine Citizens Against Ruining Our Environment, et al., v. United States Bureau of Indian Affairs,* Order Denying Petition for Hearing En Banc, No. 17-17320 (Ninth Cir., December 11, 2019).
31.	No AR	45 Fed. Reg. at 33290, 33412 (May 19, 1980) (Initial adoption of Part 124 regulations) (excerpted)

32.	8.1.a	Email Allmon (APS) to Sheth (EPA), April 19, 2018.
33.	6.2.a	Email Allmon (APS) to Minor (EPA), Sept 27, 2019
34.	11.a	Pumping Plan Email, June 5, 2018.
35.	11.b	Pumping Plan Email, June 5, 2019.
36.	20.1.b	APS Comment on Proposed Permit, June 27, 2019

I. INTRODUCTION

The United States Environmental Protection Agency ("EPA"), Region 9 ("Region") hereby responds to the Petition for Review ("Petition") submitted by Dine' Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club (collectively, "Petitioners") in the above-captioned matter. On September 30, 2019, the Region issued National Pollutant Discharge Elimination System ("NPDES") Permit No. NN0000019 ("Permit") to Arizona Public Service Company ("APS" or "Permittee") authorizing discharges from the Four Corners Power Plant ("FCPP") under Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. Pursuant to 40 C.F.R. § 124.19, Petitioners filed a Petition on November 1, 2019, with the Environmental Appeals Board ("EAB" or "Board") seeking review of the Permit. On November 18, 2019, the Board issued an order granting Petitioners' motion for leave to exceed the word limits for the Petition and ordered any responses to be filed on or before December 18, 2019.

The Petitioners seek the Board's review of the Permit based upon twelve numbered "Issues Presented for Review." The Permit is in compliance with the CWA and underlying regulations and is supported by an extensive Administrative Record. The Region adequately addressed the issues raised in the Petitioners' comments on the draft permit in the response to comments document that accompanied issuance of the final Permit. The Petition fails to identify a contested Permit condition or a specific response and show that the Permit condition or response is based on a clearly erroneous finding of

fact or conclusion of law or involves an important policy consideration that the Board should, in its discretion, review. Thus, Petitioners have failed to meet their burden to obtain review by the Board, and the Region requests that the EAB deny the Petition.

II. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Under CWA Section 402, 33 U.S.C. § 1342, the EPA Administrator (or the State or Tribe, in the case of an approved state or tribal program) may issue NPDES permits "for the discharge of any pollutant, or combination of pollutants" if the permit conditions assure that the discharge complies with certain requirements, including those of Section 301 of the CWA, 33 U.S.C. § 1311. There is a "discharge of a pollutant" when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "[N]avigable waters," in turn, are "the waters of the United States." *Id.* § 1362(7).

Section 301 of the CWA provides for two types of effluent limitations to be included in NPDES permits: "technology-based" limitations and "water quality-based" limitations. *See* 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. Parts 122, 125, 131 and 136 Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), requires that NPDES permits include effluent limits more stringent than technology-based limits whenever:

> necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to [the CWA].

NPDES permits must contain effluent limitations necessary to attain and maintain applicable water quality standards, without consideration of the cost, availability or

effectiveness of treatment technologies. *See Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 33 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2282 (2013).

EPA implements CWA Sections 301(b)(1)(C) and 402 through numerous regulations that specify when to include permit conditions, water quality-based effluent limitations or other requirements in NPDES permits. Most relevant to this appeal are the national, technology-based regulations governing discharges to surface waters and publicly owned treatment works from "Steam Electric Power Generating Point Sources" (40 C.F.R. Part 423), which are called "Effluent Limitations Guidelines and Standards" ("ELGs").

CWA Section 303 requires each State to adopt water quality standards ("WQS") for its waters. *See* 33 U.S.C. § 1313(a)-(c). Water quality standards consist of: (1) designated "uses" of the water, such as propagation of fish, aquatic life, and wildlife, recreation and aesthetics; (2) "criteria," expressed either in numeric or narrative form, which, *inter alia*, specify the amounts of various pollutants that may be present in those waters without impairing the designated uses; and (3) an antidegradation policy to maintain and protect existing uses and high quality waters. *See* 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. §§ 131.2, 131.3, 131.6, 131.10, 131.11.

EPA's regulations set out the process for determining whether permit limits are "necessary" to achieve WQS and for the formulation of permit requirements. *See* 40 C.F.R. § 122.44(d). Permit writers are first required to determine whether pollutants "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion" of the narrative or numeric criteria set forth in the WQS. 40 C.F.R. § 122.44(d)(1)(i). If a discharge is found to cause, have the reasonable

potential to cause, or contribute to an excursion of a state water quality criterion, then a permit *must* contain effluent limits as stringent as necessary to achieve the applicable WQS. 40 C.F.R. § 122.44(d)(1), (5).

Under CWA Section 401, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a state or authorized tribe where the discharge would originate issues a CWA Section 401 water quality certification verifying compliance with applicable water quality requirements or waives the certification requirement. If the state or tribe does not have authority to give such a certification, EPA acts as the certifying authority for CWA Section 401. Although the Navajo Nation received recognition for "treatment as a state" ("TAS") for purposes of administering its water quality standards program and CWA Section 401 certifications, EPA explicitly excluded the area leased for the Four Corners Power Plant from the TAS recognition, per the Tribe's request.[1] Thus, EPA is responsible for certifying or waiving CWA Section 401 certification for the FCPP.

CWA Section 316(b), 33 U.S.C. § 1326(b), requires that the "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." EPA adopted regulations

[1] *See* Decision Document: Approval of the Navajo Nation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act at p. 2 (Jan. 20, 2006). (AR # 15.d). Accordingly, EPA declined to approve Navajo Nation water quality standards for Morgan Lake for purposes of administering the CWA. EPA Letter Approving Navajo Nation Water Quality Standards at p.1 (Mar. 26, 2009) ("EPA is approving the Navajo Nation WQS to apply specifically to those waters for which the Navajo Nation has received TAS approval.") (AR # 15.b).

implementing CWA Section 316(b) for existing facilities in 2014. *See* 40 C.F.R. Parts 122 and 125; 79 Fed. Reg. 48,300 (Aug. 15, 2014). (AR # 6.d).

B. Endangered Species Act

As relevant here, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, has two primary components: (1) a federal government action and interagency cooperation program, found in ESA Section 7(a)(2); and (2) a list of prohibited acts, found in ESA Section 9. The relevant provision for this Petition is ESA Section 7(a)(2), which requires all federal agencies to ensure, in consultation with the Secretary of the Interior (or Commerce, for marine species), that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of a species' designated critical habitat. 16 U.S.C. § 1536(a)(2). Section 7(a)(2) responsibilities come into play where there is an "agency action," such as the issuance of a federal permit. *Id.*; 50 C.F.R. § 402.01-.022; *see also* 40 C.F.R. § 122.49(c) (ESA procedures must be followed when issuing NPDES permit). Federal agencies typically begin the ESA Section 7(a)(2) process by determining whether

[2] The Region notes that the Departments of the Interior and Commerce have recently promulgated certain revisions to the ESA Regulations, which became effective on October 28, 2019. *See* Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019). The Permit, which was issued September 30, 2019, was issued pursuant to a consultation process and, ultimately, a United Stated Fish and Wildlife Service Biological Opinion guided by the ESA regulations as they existed prior to these targeted revisions. Notably, the revisions to the ESA regulations are not retroactive. *Id.* at 44,976 ("The revisions to the regulations in this rule are prospective; they are not intended to require that any previous consultations under section 7(a)(2) of the Act be reevaluated at the time this final rule becomes effective . . . ."). Further, the changes in the regulations do not materially affect any of the findings or determinations included in the ESA process supporting issuance of the Permit. In any event, given the nature of the claim in the Petition, as discussed below, the change in regulations does not make a difference in this Permit appeal.

a proposed action "may affect" listed species or designated critical habitat in a particular geographical area. 50 C.F.R. § 402.14. Federal agencies may document their "may affect" determinations in a "biological evaluation" or, in certain circumstances, a "biological assessment." If the proposed action will have no effect on listed species or designated critical habitat in the action area, there are no further federal agency responsibilities under ESA Section 7(a)(2). If an agency determines, with written concurrence from the United States Fish and Wildlife Service ("USFWS") in this case, that its proposed action "may affect" listed species or their designated critical habitat but is not likely to adversely affect any listed species or designated critical habitat, the Section 7(a)(2) process ends and the federal agency's responsibilities under the ESA have been fulfilled. 50 C.F.R. § 402.13. Otherwise, the USFWS will prepare a biological opinion ("BO") that includes the Service's conclusion on "whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat" and specifies "reasonable and prudent measures . . . necessary or appropriate to minimize" any take of listed species. 50 C.F.R. § 402.14(h), (i).

III. FACTUAL AND PROCEDURAL BACKGROUND

The FCPP is located on the Navajo Nation, approximately 20 miles southeast of Farmington, New Mexico, and discharges into waterbodies that are on the Navajo Nation. As discussed in more detail below, the FCPP and the immediately adjacent waters (Morgan Lake and upper No Name Wash) have been explicitly excluded from regulation by the Navajo Nation. EPA has authority to issue NPDES permits where neither a state

nor a tribe has that authority. Therefore, EPA is the CWA permitting authority for the FCPP.

APS and/or its predecessor entities began operating the FCPP in 1963. The plant burns low sulfur coal obtained from the adjacent Navajo Mine, owned by the Navajo Transitional Energy Company, LLC. The cooling water for the FCPP comes from the man-made cooling pond Morgan Lake, which is located adjacent to the FCPP. (AR # 24.a and 24.b) (containing aerial photographs of the FCPP). The 1,200-acre lake is replenished with water from the San Juan River at an average rate of about 14.3 million gallons per day ("MGD")[3]. The plant provides electrical power to utilities in Arizona, Texas, and New Mexico.

The preceding NPDES permit for the FCPP was issued by the Region on January 24, 2001. APS initially submitted an application for a renewed permit for the FCPP on October 5, 2005. Several years of negotiations amongst a large set of stakeholders regarding facility upgrades, environmental compliance, and ownership structures resulted in a series of significant operational changes to the FCPP. The changes most relevant to this Permit were that three of the five generating units (Units 1, 2, and 3) were permanently retired by 2014, and the overall generating capacity of the FCPP was reduced from 2,100 MW to 1,540 MW. To reflect these operational changes, and upon EPA's explicit request, APS submitted a revised application on February 15, 2013 (AR # 2.f.i).

[3] APS withdraws water from the San Juan at an average rate of 14.3 MGD and a maximum rate of 24.5 MGD. The Final September 2019 Fact Sheet has the correct 14.3 MGD average figure. However, the draft Fact Sheet that went out for public comment incorrectly referred to 24.5 MGD as the average withdrawal. (AR # 20.c and 26.c). APS confirmed the correct figure in a September 27, 2019 email from Jeffrey Allmon to Dustin Minor. (AR # 6.2.a).

The Region developed a permit and fact sheet based on the latest information regarding operations and issued a renewed permit in June 2018. The June 2018 permit was appealed to the EAB, and EPA withdrew it in December 2018 to address certain issues raised on appeal. A revised draft permit and draft fact sheet were released for public comment on April 30, 2019 (AR # 20.c and 20.d). The Region also simultaneously requested public comment on its proposed waiver of CWA Section 401 certification. EPA signed the final Permit (AR # 26.b) and formally waived CWA Section 401 certification (AR # 15.a) (Permittee request for certification); (AR # 23) (EPA waiver of certification) on September 30, 2019, and at that time also issued a final fact sheet (AR # 26.c) and a response to comments document ("RTC") (AR # 26.d).

The APS application requests authorization to continue discharging water from the cooling pond, Morgan Lake, through Outfall No. 001. Outfall No. 001 discharges from Morgan Lake to the No Name Wash, which flows to the Chaco River, which in turn drains to the San Juan River. According to the permit application submitted by APS, discharges from Outfall No. 001 are intermittent with an average of 2.5 days per week of discharge for about 6 months in a year. The average flow rate for the discharge is 4.2 MGD. The length of the No Name Wash from Outfall 001 to the Chaco River is about 2.5 miles, and the point where the No Name Wash meets the Chaco River is about 7 miles from where the Chaco eventually meets the San Juan River. APS discharges blowdown into No Name Wash primarily to regulate total dissolved solids (TDS) build up in Morgan Lake, which is used as a closed cycle cooling system for the generating units.

APS also requested continued coverage in the Permit for discharges from three internal outfalls: (1) Internal Outfall No. 01A, which discharges condenser cooling water

from Units 4 and 5 into an effluent channel to be recirculated through and cooled off in Morgan Lake; (2) Internal Outfall No. 01B, which was previously used to discharge chemical waste cleaning wastewater; and (3) Internal Outfall No. 01E, which discharges from the combined waste treatment pond (CWTP). The CWTP is a treatment lagoon that treats about 5-8 MGD of various waste streams, including in-plant storm water runoff. Effluent from the CWTP enters a culvert leading to the cooling water discharge canal and Internal Outfall No. 01E. Water from Internal Outfall No. 01E is then blended with condenser cooling water discharges prior to discharge from Internal Outfall No. 01A into Morgan Lake.[4]

APS operates a closed-cycle recirculating system, circulating from around 1,000 up to about 1,700 MGD through Morgan Lake. The Permittee withdraws up to a maximum of 24.5 MGD of water from the San Juan River as make-up water to replenish losses that have occurred due to blowdown, drift, and evaporation within Morgan Lake and the cooling system. Currently the San Juan River intake system is equipped with a weir and a channel with a gate. If the water in the river is too low at the intake screens to supply the pumps, the gate in the channel is lowered. The gate and the weir together increase the level at the intake screens to supply the pumps.

The Permit includes three broad categories of requirements for the FCPP:

Numeric effluent limits. The Permit's numeric discharge limitations are based on 40 C.F.R. Part 423, Effluent Limitation Guidelines and Standards ("ELGs") for the Steam Electric Power Generating Point Source Category. EPA has established national

[4] A schematic representation of the various outfalls and flow patterns are included in the Permit as Attachment D, p. 35.

standards based on the performance of treatment and control technologies for wastewater discharges to surface waters for certain industrial categories. ELGs reflect pollutant reductions achievable in categories or subcategories of industrial point sources through implementation of available treatment and pollution prevention technologies, and are based on Best Practicable Control Technology, Best Conventional Pollutant Control Technology, or Best Available Technology Economically Achievable. *See* 33 U.S.C. §§ 1311 and 1314(b)(1)(B), (b)(2)(B), (b)(4)(B).

In addition to the technology-based numeric effluent limitations, Sections 402 and 301(b)(1)(C) of the CWA require that an NPDES permit contain effluent limitations that, among other things, are necessary to meet applicable water quality standards. An NPDES permit must contain effluent limits for pollutants that are determined to be discharged at a level which has "the reasonable potential to cause or contribute to an excursion above any State [or Tribal] water quality standard, including State [or Tribal] narrative criteria for water quality" established pursuant to CWA Section 303. 40 C.F.R. § 122.44(d)(1)(i). To determine whether the discharge causes, has the reasonable potential to cause or contributes to an excursion of a numeric or narrative water quality criterion for individual toxicants, the regulatory authority must consider a variety of factors. 40 C.F.R. § 122.44(d)(1)(ii). Based on an application of these factors to the FCPP operations and projected wastewater quality data provided in the APS application, EPA concluded that the discharges do not present a "reasonable potential" to cause or contribute to an exceedance of water quality standards. EPA has made the most conservative and protective assumption of no available dilution in its analysis so that water quality standards must be met at the end of pipe prior to discharge. Therefore, based on sampling data and an evaluation of discharge characteristics, EPA concluded that there is no

reasonable potential for pollutants to cause or contribute to a violation of receiving water standards.

***Additional Limits*.** The Permit includes the following two additional provisions for the protection of water quality.

(i) **Provisions Addressing Surface Seepage.** Based on best professional judgment and consistent with the requirements imposed in the previous permit cycle, surface seepage intercept systems are required to be maintained and operated for existing unlined ash ponds. Water collected by these intercept systems shall be returned to the double lined decant pond. Additionally, a Seepage Monitoring and Management Plan shall be established and implemented to determine the source of and pollutants in seepages below all ash ponds that receive or received coal combustion residue either currently or in the past.

(ii) **Provisions Addressing Cooling Water Intakes.** FCPP intakes greater than 2 MGD of cooling water, therefore it must comply with CWA Section 316(b), which regulates the design and operations of intake structures for cooling water operations. A rule for existing facilities was adopted by EPA on May 19, 2014, and effective October 14, 2014. *See* 40 C.F.R. §§ 125.90-.98. (AR # 6.d). The rule requires facilities to utilize the best technology available (BTA) to minimize adverse environmental impacts due to impingement mortality and entrainment of aquatic organisms in the intake structure and provides that a closed cycle recirculating system as defined by 40 C.F.R. § 125.92(c) may be BTA. *Id.* § 125.94. The rule also allows EPA to include additional measures

to protect Federally-listed threatened and endangered species and designated critical habitat identified by USFWS.

Monitoring and Reporting Requirements. The Permit requires APS to conduct monitoring for all pollutants or parameters where effluent limits have been established, at the minimum frequency specified. Additionally, where effluent concentrations of toxic parameters are unknown or where data are insufficient to determine reasonable potential, monitoring may be required for pollutants or parameters where effluent limits have not been established. A Priority Toxic Pollutants scan must be conducted within 30 days after the effective date of the Permit, as well as during the fourth year of the five-year permit term to ensure that the discharge does not contain toxic pollutants in concentrations that may cause a violation of water quality standards.[5] APS must perform all monitoring, effluent sampling and analyses for the priority pollutants scan in accordance with the methods described in the most recent edition of 40 C.F.R. Part 136, unless otherwise specified in the proposed permit or by EPA. The Priority Toxic Pollutants scan shall be conducted on the discharge from Outfall No. 001. Finally, the permit establishes special monitoring requirements for chronic toxicity for discharges from Internal Outfall 01A.

EPA's renewal of the Permit is part of a suite of federal agency actions intended to permit and regulate the expansion of the Navajo Mine and the revised operation of the FCPP. Due to the interrelated and interconnected nature of the federal actions, and the desire to identify and address environmental impacts comprehensively, the federal agencies agreed to develop a single environmental impact statement ("EIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., conduct a single

[5] A complete list of Priority Toxic Pollutants is available at 40 C.F.R. § 131.36.

consultation on potential impacts to listed species under the ESA, and conduct a single consultation under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f ("NHPA").[6] These comprehensive evaluations explicitly include EPA's renewal of this NPDES Permit as part of the suite of federal actions. The federal actions were collectively referred to as the "Four Corners Power Plant and Navajo Mine Energy Project," and the Office of Surface Mining Reclamation and Enforcement ("OSMRE") served as the lead agency. The final EIS was released on May 8, 2015. A biological assessment for purposes of the ESA consultation was submitted to the USFWS on August 8, 2014, and was supplemented on March 13, 2015. The USFWS issued its BO for the Four Corners Power Plant and Navajo Mine Energy Project on April 8, 2015. (AR # 7.i). Relevant BO measures have been incorporated into the Permit.[7]

On April 20, 2016, Petitioners filed a complaint in federal district court challenging the federal agencies' NEPA and ESA compliance for the Four Corners Power Plant and Navajo Mine Energy Project. *See Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, No. CV-16-08077-PCT-SPL (D. Ariz.). EPA was not a party to that litigation. The district court dismissed the lawsuit for failure to join an indispensable party, and the Ninth Circuit affirmed the dismissal and denied a

[6] EPA relied on the analysis conducted by OSMRE for the Four Corners Power Plant and Navajo Mine Energy project to determine that the Permit did not have the potential to affect any historic properties. NHPA compliance is not at issue in this appeal.

[7] As noted in the Final Fact Sheet (p. 12), "[t]he reasonable and prudent measures delineate responsibilities for each of the consulting federal agencies, depending upon each agency's authorities and the proposed actions. EPA incorporated two of these measures into the permit; 1) the Pumping Plan for the cooling water intake structure and 2) sufficiently sensitive sampling methods (as described above pursuant to 40 CFR 136) primarily for mercury and selenium; and initiated a longer-term effort to identify appropriate protocols for evaluating fish tissue concentration and water column values."

rehearing.[8] Thus, EPA continues to rely on the NEPA and ESA analyses associated with the Four Corners Power Plant and Navajo Mine Energy Project.

As noted above, the Region issued a revised permit in June 2018. The June 2018 permit was then appealed to the EAB, and EPA withdrew the permit in December 2018 to address certain issues raised on appeal. A revised draft permit was released for public comment on April 30, 2019. Two comments were received: one from the Petitioners ("Petitioners' Comment Letter") (AR # 20.1.a) and one from the Permittee (AR # 20.1.b). A final Permit was signed on September 30, 2019, along with a 112-page RTC. The Region also requested public comment on April 30, 2019, on its proposed waiver of CWA Section 401 certification, and formally waived certification on September 30, 2019.

IV. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19, the Board ordinarily will not grant a petition for review of an NPDES permit unless the petition establishes that the permit is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. § 124.19(a)(4)(i); *see In re City of Attleboro*, NPDES Appeal No. 08-08, at 10 (EAB 2009) (Order Denying Review); *In re City of Marlborough*, NPDES Appeal No. 04-13, at 239-40 (EAB 2005) (Order Denying Petition for Review in Part and Remanding in Part); *In re Gov't of D.*C. *Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002).

[8] *Dine' Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, No. 17-17320 (9th Cir. July 29, 2019 and Dec. 11, 2019) (attached).

The Board analyzes NPDES permits guided by the preamble to the NPDES permitting regulations at Part 124, which states that the Board's power to review "should be only sparingly exercised." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (attached); *accord In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 472 (EAB 2004); *In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). This restraint by the Board is based, at least in part, on Agency policy that favors resolution of issues related to the promulgation of NPDES permits at the regional level. *See* 45 Fed. Reg. at 33,412 (initial adoption of Part 124 regulations) (attached); *see also Teck Cominco*, 11 E.A.D. at 472. The burden is on the petitioner to demonstrate, pursuant to 40 C.F.R. § 124.19, that review by the Board is warranted. *See In re City of Attleboro*, NPDES Appeal No. 08-08, at 10; *In re Amerada Hess Corp.*, 12 E.A.D. 1, 8 (EAB 2005).

In order to meet their burden, Petitioners must demonstrate that any issues being raised before the Board were preserved for review. 40 C.F.R. § 124.19(a)(4)(ii) ("Petitioners must demonstrate . . . that each issue being raised in the petition was raised in the petition period . . . [or] explain why such issues were not required to be raised during the public comment period . . . ."); *see also In re City of Attleboro*, NPDES Appeal No. 08-08, at 10; *In re City of Moscow*, 10 E.A.D. at 141. The petitioner must state its objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous, an abuse of discretion or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii); *see also In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Hawaii Elec. Light Co.*, 8 E.A.D. 66, 71-72 (EAB 1998). As the Board has repeatedly stated, and of particular relevance in this case, to obtain review, "petitioners must include specific information

in support of their allegation. It is not sufficient simply to repeat objections made during the comment period; instead, a petitioner 'must demonstrate why the [permit issuer's] response to those objections (the [permit issuer's] basis for its decision) is clearly erroneous or otherwise warrants review." *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001) (quoting *In re LCP Chems.*, 4 E.A.D. 661,664 (EAB 1993)); *see also In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. In other words, petitioners may not simply repeat previous comments made, but must "substantively confront" the Region's subsequent explanations to the issues raised in public comments. *In re City of Attleboro*, NPDES Appeal No. 08-08, at 10. Petitioners repeatedly fail to meet this burden in the Petition and often repeat the same arguments made in their comments without acknowledging or referring to the Region's RTC or articulating why a particular response was clearly erroneous or otherwise warrants review.

The Board has refused to grant review to petitioners who have merely reiterated or attached previously submitted comments without engaging EPA's responses to those comments, and federal courts have upheld those decisions. *See, e.g.*, *City of Pittsfield v. U.S. EPA*, 614 F.3d 7, 11-12 (1st Cir. 2010) (finding "the city made no effort in its petition to the Board to engage the EPA's initial response to its draft comments"); *Mich. Dep't of Env't Quality v. U.S. EPA*, 318 F.3d 705, 707-08 (6th Cir. 2006) (noting "[i]nstead of explaining to the Board why the Region's detailed responses to its comments were clearly erroneous, [the Petitioner] simply repackaged its comments").

Finally, a petitioner seeking review of issues that are technical in nature bears a heavy burden, as the Board generally gives substantial deference to the permit issuer on

questions of technical judgment. *In re City of Attleboro*, NPDES Appeal No. 08-08, at 11; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. at 667.

V. ARGUMENT

The Region will address each of the Petition's claims in the order presented in the Petition. At the outset, however, this Petition as a whole fails to meet the Board's requirements for specificity in addressing the Region's RTC. As noted above, a petition "must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii).[9] This Petition fails to do so. Instead, it repeats and frequently copies claims made in the Petitioners' Comment Letter. *Cf. In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001) ("It is not sufficient simply to repeat objections made during the comment period . . . ."). The Board should consider dismissing the Petition as a whole for failure to comply with the relevant regulations. Alternatively, the Board should dismiss each issue where Petitioners fail to meet the Board's requirements for addressing the Region's RTC in the Petition.

A. Petitioners' Claims About the Jurisdictional Status Of Morgan Lake Are Incorrect

[9] The 74-page Petition mentions the Final Response to Comments only approximately 12 times. Twice it cites the response to comments document for the released and withdrawn 2018 permit (p. 23, fn 103; p. 25, fn 106)(which is largely irrelevant to this appeal). Once it cites the RTC to define the Exhibit (p.1, fn 1). Three times it cites the RTC in a failed attempt to raise a new issue not previously raised in the comment process (p. 4, fn 6; p. 20, fn 87; p. 50, #168) (*see* discussion below). Five times the Petition cites the RTC in the lengthy claim about the status of Morgan Lake (p. 9, fn 28; p. 23, fn 103; p. 28, fn113; p. 29, fn 133) or the need for water quality standards in Morgan Lake (p. 35). Finally, the Petition cites the RTC in the context of Best Available Technology (BAT) issues (p. 44, fn 158, 159, 160).

Petitioners assert that Morgan Lake is a jurisdictional "water of the United States" and that EPA thus erred in failing to regulate discharges from FCPP into Morgan Lake. Petition, p. 21. Petitioners' claims regarding the jurisdictional status of Morgan Lake are unfounded and disregard EPA's consistent approach to regulating discharges from FCPP in recent permit cycles.

EPA's regulations provide that "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act" are not "waters of the United States." 40 C.F.R. § 122.2. A waste treatment system may be "designed to meet the requirements of the [CWA]" where, for example, it is constructed pursuant to a CWA Section 404 permit, *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 214-15 (4th Cir. 2009), or where it is "incorporated in an NPDES permit as part of a treatment system," *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007).

As an artificial cooling pond designed and constructed to be used as treatment for the FCPP's waste heat, Morgan Lake is a waste treatment system and is excluded from the definition of "waters of the United States." 40 C.F.R. § 122.2; Letter from Saliba (APS) to Yoshikawa (EPA) dated November 29, 2006 (AR # 1.1.g) (describing Morgan Lake as constructed "to serve as part of the [FCPP's] recirculating cooling water system, providing both a reliable supply of cooling water and waste heat treatment"). Since Morgan Lake falls within this exclusion from the definition of "waters of the United States," contrary to Petitioners' suggestions, issues such as which water quality standards apply to Morgan Lake (Petition, p. 21) or whether Morgan Lake supports interstate and foreign commerce (Petition, p. 22) are not relevant. Put simply, application of the

exclusion results in the temporary removal of the subject waters from CWA jurisdiction. *See, e.g.*, *Ohio Valley*, 556 F.3d at 215 ("When the Corps exercises its § 404 authority to permit the use of a stream segment as part of the treatment system for fill runoff, it has allowed the temporary removal of these waters from the definition of 'waters of the United States' …."). Here, because Morgan Lake is not a jurisdictional "water of the United States," discharges *into* Morgan Lake need not comply with the CWA, while discharges *from* Morgan Lake to jurisdictional downstream waters are subject to the Act's requirements. Discharge monitoring reports confirm that Morgan Lake is properly serving its treatment purpose; indeed, there have been no observed exceedances of temperature limits for both monthly average and daily maximum limits for at least nine years. (AR # 6.3).

Petitioners claim that regulating Morgan Lake as a waste treatment system is arbitrary and capricious given the Agency's prior characterizations of or treatment of Morgan Lake. Petition, p. 25. EPA acknowledges that prior NPDES permits for the FCPP deemed Morgan Lake a "receiving water" and that a 2008 NPDES permit for the adjacent Navajo Mine treated Morgan Lake like a jurisdictional "water of the United States" by, for example, imposing effluent limitations on discharges into the lake. *Id.*; *see also* RTC at pp. 43-44 (explaining the evolution of EPA's approach to regulating discharges into Morgan Lake from the 1970s through the 1990s). Yet, regardless of these early inconsistencies in the Agency's approach to the FCPP NPDES permit, discharges from the FCPP into Morgan Lake have consistently been labeled as Internal Outfalls, with the discharge from Morgan Lake into upper No Name Wash consistently treated as the final discharge point to downstream jurisdictional "waters of the United States," since

1993 to the present 2019 Permit. *See* RTC at pp. 43-44. Even if the Permit's approach to Morgan Lake differed from that of more recent FCPP NPDES permits, EPA has provided a reasoned explanation for its finding that Morgan Lake falls within the waste treatment system exclusion. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 981 (2005) ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating'."); *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (rejecting the argument that an agency's change in position is invalid simply because it is inconsistent with a prior position).

Petitioners also contend that EPA erred in relying on the 2015 rule defining "waters of the United States" under the CWA given recent administrative actions affecting that regulatory definition. Petition, p. 26. The Region issued the Permit on September 30, 2019. Petitioners correctly note that on October 22, 2019, EPA and the Department of the Army published a final rule repealing the 2015 definition of "waters of the United States" and reinstating the prior regulatory definition. Petition, p. 26. That final rule will not go into effect until December 23, 2019. 84 Fed. Reg. 56,626 (Oct. 22, 2019). Thus, at the time of the Permit's issuance, the 2015 regulatory definition remained in effect and properly served as the applicable definition of "waters of the United States" for the Permit.

Nonetheless, contrary to Petitioners' contentions, applying the previous regulatory definition of "waters of the United States" to the Permit would have no impact on the jurisdictional status of Morgan Lake. Petitioners' argument rests on the prior definition's inclusion of an exception to the exclusion for "cooling ponds as defined in 40 CFR 123.11(m)." Petition, pp. 26-27. Yet, that definition of cooling ponds no longer exists in

the Code of Federal Regulations and was removed decades ago. *See* 47 Fed. Reg. 52,290, 52,291, 52,305 (Nov. 19, 1982) (deleting definition of cooling ponds) (attached). Despite this change, the waste treatment system exclusion continued to reference the outdated, nonexistent cooling pond definition until the agencies revised the regulatory definition of "waters of the United States" in the 2015 rule. In the interim, EPA found that "given the deletion of the steam electric cooling pond definition," the waste treatment system exclusion may be interpreted "as encompassing all steam electric cooling ponds." EPA, Memorandum, "Waters of the United States" Determination for Proposed Cooling Pond Site in Polk County, Florida. December 13, 1993 ("Perciasepe Memo 1993") (AR # 29).[10] As such, in removing the cooling pond cross-reference in the 2015 rule, the agencies did not make any substantive changes to the waste treatment system exclusion or how it is applied. 79 Fed. Reg. 22,188, 22,217 (Apr. 21, 2014). Because the 2015 rule did not substantively change the pre-existing waste treatment system exclusion, Morgan Lake

[10] Petitioners significantly misread the Perciasepe memo. Petition, p. 28. First, Petitioners repeatedly suggest the memo finds that application of the waste treatment system exclusion is "fact-specific" and requires EPA to conduct a jurisdictional analysis prior to applying the exclusion. *Id.* at pp. 28-29. Yet, reviewing this language in its full context, it is clear the memo's discussion of a "fact-specific" inquiry refers to making findings of a nexus to interstate commerce for purposes of CWA jurisdiction generally. Perciasepe Memo 1993 at 3 & n.2. Second, Petitioners claim the memo was limited to consideration of a single cooling pond but ignore language demonstrating that the memo clearly served a broader purpose. *See, e.g.*, Perciasepe Memo 1993 at 4-5 (providing direction for "Interim NPDES Permitting Decisions" and referring to "NPDES decisions" involving steam electric cooling ponds generally); *id.* at 1 & n.1 (noting that the "directions provided" therein "would also apply" to a different cooling pond). Lastly, Petitioners quote the memo's reference to the 1980 definition of "waters of the United States"—seemingly to suggest that the 1980 version of the waste treatment system exclusion applies—and entirely overlook the memo's discussion of the impact of the 1982 removal of the cooling pond definition on application of the exclusion. *See* Petition, p. 28; Perciasepe Memo 1993 at 3-4.

falls within the exclusion regardless of whether the 2015 rule or the previous regulatory regime applies.

Lastly, Petitioners' claim that the Permit violates the CWA's antibacksliding provision is misplaced. *See* Petition, p. 25 n.107. The antibacksliding requirements under the CWA and its implementing regulations are triggered only when permit effluent limitations are revised to be "less stringent than the comparable effluent limitations in the previous permit." *See* 33 U.S.C. § 1342(o)(1); 40 C.F.R. § 122.44(l)(2). Because the effluent limits in the renewed Permit are identical to those in the previous permit, and therefore not less stringent, the antibacksliding prohibition does not apply.

B. The Region Properly Regulated Discharges from Morgan Lake into No Name Wash

Since Morgan Lake is not a jurisdictional water, discharges into Morgan Lake need not comply with the CWA. Nonetheless, the Region has found it appropriate to regulate direct discharges from the FCPP into Morgan Lake as "internal outfalls" as authorized under 40 C.F.R. § 122.45(h).[11] That provision allows EPA to impose requirements at "internal waste streams" when imposing such limits at the final discharge point would be impracticable because the waste at the point of final discharge would be so diluted that monitoring would be very difficult if not impossible. The Permit's internal outfall requirements protect water quality in Morgan Lake "upstream" of the discharge to No Name Wash and protect the jurisdictional waters downstream by limiting the amount of pollutant flowing into Morgan Lake by setting requirements for chlorine, oil and

[11] Permit at pp. 5, 10, 11 (setting forth requirements for internal outfalls).

grease, TSS, copper, iron and pH at the relevant internal outfalls before these waste streams are diluted by Morgan Lake.

Petitioners claim that the lease provisions between APS and the Navajo Nation require certain monitoring and effluent limitations at the point of discharge from FCPP into Morgan Lake. Petition, p. 31. Yet, those lease provisions have no impact on EPA's authority under the CWA or this Permit. EPA is not a party to the lease, and a private party lease agreement has no effect on federal jurisdiction or applicable federal legal requirements.

C. Petitioners Cannot Challenge the Absence of Water Quality Standards through a Permit Appeal

Petitioners, at Petition p. 31, raise several concerns related to the absence of federally approved CWA Section 303(c) water quality standards for Morgan Lake and, to a lesser extent, No Name Wash.

Petitioners' primary concern seems to be that EPA has not yet promulgated water quality standards for Morgan Lake. As noted herein, Morgan Lake is not a jurisdictional water body because it is a cooling pond that is excluded from regulation under the CWA as a waste treatment system. Therefore, federal water quality standards are neither required nor appropriate pursuant to the CWA. The Permit regulates the discharge from Morgan Lake to upper No Name Wash, which is a jurisdictional water body without federally approved water quality standards. As discussed at length in the RTC (at p. 9), in the absence of federally approved water quality standards, EPA permit writers must rely on "best professional judgment" to determine the appropriate targeted levels of protection. This reliance is explicitly authorized in CWA Section 402(a)(1)(B) ("[T]he Administrator

may . . . issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."). In this case, the permit writer has relied on the Navajo Nation water quality standards for the "downstream" Chaco River as a reference tool for defining the likely best targets for numeric and narrative goals that should be used in determining impacts to upper No Name Wash. This is both permissible under the statute and reasonable in these circumstances.

In addition, the Board has consistently found that it does not have jurisdiction to hear challenges concerning CWA Section 303 water quality standards in the context of NPDES permit appeals. The Board's jurisdiction to consider an issue is limited by its governing regulations. 40 C.F.R. § 1.25 (e)(2) (providing that the Board "shall exercise any authority expressly delegated to it in this title"). Appeals to the Board of NPDES permit decisions are explicitly provided for in 40 C.F.R. § 124.19, but the Board does not have authority to hear appeals associated with the CWA Section 303 water quality standards program. As a result, the Board has declined to exercise jurisdiction over challenges to CWA Section 303 water quality standards approvals (*In re City of Hollywood, Florida*, 5 E.A.D. 157, 175 (EAB 1994) ("This is not the proper forum for such a challenge.")), challenges to approvals of variances under the CWA Section 303 program (*In re Mesabi Nugget Delaware, LLC*, 15 E.A.D. 812 (EAB 2013)), and, as discussed below, challenges to CWA Section 303 Total Maximum Daily Loads ("TMDLs"). *See also In re Bethlehem Steel v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976) (drawing a clear distinction for purposes of court jurisdiction between actions addressing the NPDES permit program and those involving the CWA Section 303 water quality

standards program). The Board should dismiss Petitioners' third claim regarding the failure to have water quality standards for Morgan Lake because the Board does not have jurisdiction to review it.

Petitioners assert that the Permit should incorporate the Navajo Nation water quality standards for Morgan Lake. As discussed above, however, Morgan Lake is not a federal jurisdictional water body, so federal water quality standards are not required. The Region also notes that the Navajo Nation's request for "treatment as a state" ("TAS") for purposes of administering CWA Section 303(c) water quality standards explicitly excluded Morgan Lake, so Morgan Lake was not included in the EPA's related TAS approval. For these reasons, the Petitioners' discussion of temperature standards in Morgan Lake (Petition, p. 34) and of the use of Navajo Nation's water quality standards for Morgan Lake as reference standards (Petition, p. 35) are unfounded.

D. The Region's "Reasonable Potential Analysis" was Appropriate and the Petition Fails to Meet the Board's Minimum Specificity Requirements

Petitioners allege (Petition, p. 36) that EPA erred in its reasonable potential analysis and raises issues that the Region addressed in the RTC. Petitioners fail, however, to provide citations to the relevant comments and RTC to explain why the RTC and/or Permit were clearly erroneous or why the issue otherwise warrants review, as required by 40 C.F.R. § 124.19(a)(4)(ii). The Petition essentially repeats language from the Petitioners' Comment Letter. For example, the Petitioners' comments as excerpted in Comment 10 of the RTC (starting at page 49) are nearly identical to arguments presented in the Petition (starting at page 36). Additionally, no reference is made in the Petition to the Region's Response 10 in the RTC (at p. 52). The Board should dismiss this claim for

failure to meet the Board's minimum requirements for specificity. 40 C.F.R. § 124.19(a)(4)(ii).

Further, most of the issues raised in this claim are not relevant to the issue of whether EPA erred in its reasonable potential analysis. Challenges regarding regulating discharges into Morgan Lake (Petition, pp. 36-37) are irrelevant, as Morgan Lake is not a jurisdictional water of the U.S. Arguments raised in the Petition about designated uses and water quality standards in Morgan Lake, including but not limited to specific pollutants (Petition, pp. 36-37), as well as temperature, mixing zones, fish tissue levels, fish consumption standards in Morgan Lake (Petition, pp. 38-42) or the application of ELGs to Morgan Lake (Petition, p. 36) are therefore not germane to the question of whether EPA conducted a sound analysis in concluding that there is no reasonable potential for pollutants to cause or contribute to a violation of receiving water standards.

The Region provided a detailed and reasoned argument for applying the 2007 Navajo Nation Water Quality Standards as the appropriate standards for the "downstream" Chaco River to the discharge from Morgan Lake based upon EPA's best professional judgment ("BPJ"). *See* RTC at pp. 52-53. Yet, the Petitioners failed to address the Region's responses in their lengthy Petition.

Petitioners argue erroneously that EPA relied largely on the 2012 priority pollutant scan ("PPS") submitted by the Permittee for the reasonable potential analysis. Petition, p. 38. Once again, Petitioners fail to address the Region's response to this issue. *See* RTC at p. 53. The RTC acknowledged the shortcomings of the 2012 PPS data and noted that the Region relied on detailed data from the Navajo Nation Environmental Protection Agency ("NNEPA") both in early 2015 and then again in 2019 (AR # 27.a and AR # 27.b) (containing NNEPA data), as well as on regular discharge monitoring reports submitted

by the Permittee (AR # 6.3). As indicated in the RTC, the data submitted by NNEPA was extensive in terms of the geographic locations where samples were collected (including Morgan Lake, No Name Wash, and the Chaco and San Juan Rivers), the time period over which sampling was done (from 1998 to 2017), and the breadth of pollutants analyzed (including but not limited to mercury, selenium, antimony, boron, chromium, nickel and zinc, as well as more traditional water quality parameters such as pH, dissolved oxygen, temperature, and hardness). *See* Memo to File re: Updated Reasonable Potential Analysis (April 22, 2019) (AR # 6.1.a). The analysis of the samples collected by NNEPA was done using EPA-recognized sufficiently sensitive methods, with detection limits for key pollutants such as mercury and selenium well below the detection limits of the analysis that the FCPP owners submitted as part of their 2012 PPS. For example, the mercury detection limit for the NNEPA data was 0.2 nanograms per liter, or ten times lower than the 2.0 nanograms per liter most stringent standard for mercury. Similarly, for selenium the detection limit was 0.5 micrograms per liter—well below the 5 micrograms per liter most stringent selenium standard. All of this information was explained in detail in the RTC (at p. 53) and was not acknowledged or discussed in the Petition.

Although the reasonable potential analysis was valid, the Permit also includes monthly monitoring for a suite of chemicals, including mercury and selenium, from the discharge Outfall No. 001 from Morgan Lake to No Name Wash. The Permit also requires two additional PPS to be conducted, first within 30 days after the effective date and then in the last year of the permit cycle prior to the next permit renewal application. The Permit requires that both the additional monitoring and two PPS be conducted using the latest sufficiently sensitive methodologies approved by EPA.

The Permit also has a re-opener clause as part of its standard conditions, which would allow EPA to re-open the Permit and impose limits for any pollutants that monitoring data show have the reasonable potential to cause or contribute to violations of receiving water standards.

E. EPA's Selection of the Compliance Date for New ELGs is Reasonable and Supported by the Administrative Record

The Permit is updated from the June 2018 withdrawn permit to include the 2015 ELGs for bottom ash transport water ("BATW"). To address the no discharge of BATW, APS will construct and develop a closed-loop recycling system. Petitioners assert that EPA improperly deferred to the Permittee in establishing December 31, 2023, as the date by which the Permittee must meet the no discharge prohibition in the revised "Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category" ("2015 ELGs") (AR # 6.1.d).[12] Petitioners are mistaken. EPA considered the information submitted by the Permittee and applied it to the factors in 40 C.F.R. § 423.11(t) and independently determined that the appropriate "as soon as possible" date is December 31, 2023.

The 2015 ELGs, 40 C.F.R. § 423.11(t), allow EPA to select a later date between November 1, 2020, and December 31, 2023, based on the following factors: 1) time to expeditiously plan, design, procure, and install equipment; 2) changes being made at the plant pursuant to other regulations, including coal combustion residuals ("CCR"); and 3) other factors as appropriate. APS's April 4, 2019 submittal to EPA, *NPDES Effluent*

[12] The 2015 ELGs were published in the Federal Register on November 3, 2015, and provide there shall be no discharge of pollutants in BATW. (AR # 6.1.d). The 2015 ELGs required dischargers to meet the new no discharge prohibition by a date determined by EPA that is as soon as possible beginning November 1, 2018, but no later than December 31, 2023. On September 18, 2017, EPA issued a rule "Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category" ("Postponement Rule") extending the earliest compliance date for the 2015 ELGs for bottom ash transport water from November 1, 2018, to November 1, 2020. The Postponement Rule did not extend the December 31, 2023 date.

Limitation Guideline Compliance Project Summary, APS, Four Corners Power Plant, set forth how these factors apply to the FCPP. (AR # 21.a).

EPA considered the information submitted by the Permittee and applied it to the factors in 40 C.F.R. § 423.11(t) and independently determined that the appropriate "as soon as possible" date is December 31, 2023. The information submitted by APS goes into detail to address the factors in 40 C.F.R. § 423.11(t)(1)-(2). APS is currently making substantial changes to how the plant's waste is handled in order to address the CCR rule. APS committed to stop sending CCR and non-CCR waste streams to the CWTP by October 31, 2020, and initiate closure procedures within 30 days thereafter. (AR # 20.1.b. at 7-8).

As discussed in detail in the RTC (at pp. 16-18), APS will construct a new system of concrete holding and treatment tanks to manage BATW flows. APS intends to shift all BATW flows to the new tank in the third quarter of 2020. APS indicated that it is necessary to sequence these projects so that construction of the BATW closed-loop recycling system follows the finalization of the BATW holding and treatment tank system because construction access limitations and power plant operational requirements require that the BATW holding and treatment tank system be built first. EPA evaluated the information provided by the Permittee and determined that it is appropriate to sequence the construction in this manner.

Although it is not necessary for EPA to evaluate 40 C.F.R. § 423.11(t)(4) "other factors as appropriate," including the Postponement Rule and whether the ELGs may be amended, given EPA's analysis of the factors in 40 C.F.R. § 423.11(t)(1)-(2); EPA acknowledges that the date selected for technical reasons may allow APS to know if the

requirements change before it begins construction and implementation of its closed loop recycling system.[13] This factor also supports selection of the December 31, 2023 date.

Petitioners request that the Board reverse EPA's selection of December 31, 2023, as the applicable date for the no discharge requirement, remand the issue and order EPA to adopt November 1, 2020, as the compliance date. Petition, p. 44. As noted above, a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment. After evaluating all of the technical information submitted by APS pursuant to the factors in 40 C.F.R. § 423.11(t), EPA determined that December 31, 2023, is the appropriate "as soon as possible" date. The Region's decision is supported by the Administrative Record, and Petitioners have not provided a basis for the Board to second guess the Region's technical determination.

Petitioners also assert that it is arbitrary and capricious for EPA not to use its "best professional judgment" or BPJ to select the best available technology economically achievable ("BAT") for legacy BATW[14] because the Fifth Circuit vacated and remanded EPA's 2015 BAT regulations for legacy BATW in *Southwestern Electric Power Company v. EPA*, 920 F.3d 999 (Apr. 12, 2019). Petition, p. 44. As noted in the RTC (at pp. 22-23), EPA is not required to use its BPJ to establish BAT effluent limitations for legacy BATW at the FCPP.

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[13] On November 22, 2019, EPA issued a proposed rule, *Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category* (84 Fed. Reg. 64,620) ("2019 Proposed ELG for BATW") for public comment.

[14] Legacy BATW is BATW that is generated before December 31, 2023, the date on which the new zero discharge requirements begin to apply.

EPA's final Permit includes effluent limitations for TSS and oil & grease in legacy BATW. These limitations are consistent with ELGs currently in effect, and EPA is not withdrawing the Permit to conduct a BPJ analysis for the FCPP. Even if EPA agreed with Petitioners that there are no applicable ELGs with respect to FCPP's discharges of BATW generated before December 31, 2023, EPA would exercise its discretion and decline to do a site-specific BPJ analysis at this time.

It is appropriate to await a national response to the Fifth Circuit's remand and vacatur before imposing any more stringent requirements in this Permit. Indeed, the Ninth Circuit has previously upheld EPA's decision not to impose BPJ limits in anticipation of promulgation of a national guideline. *Nat. Res. Def. Council v. EPA*, 863 F.2d 1420, 1424-25 (9th Cir. 1988). As with the permit in that case, EPA has concerns about imposing limitations based on a more stringent technology in this Permit than might be used as a basis for a national rule. EPA would like to have this Permit conform to national standards, which are developed using industry-wide cost, availability, and other data.

Furthermore, even if EPA were to conduct a BPJ analysis for discharges of legacy BATW, it is likely that it would result in limitations equal to those in the Permit. EPA selected December 31, 2023, as the date when the zero-discharge technology is available for this plant because EPA concluded that the FCPP cannot achieve zero discharge any sooner. Any other treatment system for legacy BATW would require time and expense to design, construct, and test. It would take time and be costly for FCPP to install a new treatment system for its legacy BATW at the same time it is working toward the zero discharge requirement that applies as of December 31, 2023.

These are costs that would be incurred for a waste stream that would cease to be generated by December 31, 2023 (i.e., anything generated thereafter would be subject to the zero-discharge requirement). Also, there may be operational constraints in installing and testing new treatment technologies while the plant is working to install and test a closed-loop system to meet its zero discharge requirement. Considering the statutory factors, which include "costs," "age of equipment," "process changes" and "other factors," as specified in CWA Section 304(b)(2)(B), it is unlikely EPA would impose more stringent limitations in the final permit on legacy BATW were it to use its BPJ. Thus, it is not arbitrary and capricious for EPA to rely on the existing ELGs for legacy BATW instead of withdrawing the Permit again to do a BPJ analysis to cover this limited time period.

F. The Facts Do Not Establish a Permittable Discharge at the Seeps Above Chaco River

Petitioners claim (Petition, p. 45) that the Permit is deficient because it "fails to require permitting for seepage from the coal ash ponds into the Chaco River." Specifically, Petitioners assert that the Region failed to include effluent limits for pollutants discharging from the seeps. There is no factual nor legal basis to impose these additional NPDES permitting requirements.

Two areas near the Chaco River had seeps. The "South Seeps" were along the canyon walls adjacent to the Chaco. The "North Seeps" were in the bed of a dry wash, approximately 150 feet from the Chaco River. Notably, in 2014, the South Seeps dried up entirely (APS 2018 Data, Table Labeled Seep-Boron Concentrations (AR # 8.1.a.iii and 8.1.a.v). The North Seeps have slowed to such a low flow that is difficult to measure, and the related monitoring wells also show a major reduction in both flow and groundwater

levels (*see id.*) (AR # 8.1.a). Indeed, 30 years of groundwater management activities and investments involving the coal ash ponds have succeeded in *elimination* of discharges from the coal ash ponds before they ever reach the Chaco River. *See* 1993 and 2001 Four Corners Power Plant NPDES Permits (NPDES Permit No. NN0000019), at p. 5, Part I, and at p. 8, respectively (AR # 28.a and 28.b) (describing extensive monitoring and the development of an intercept system that would collect groundwater migrating downstream from the area of the unlined coal ash ponds and return it to those ponds or to some other disposal process); 2013 Letter, Attachment, at p. 8 (AR # 8.a and 8.e) (describing various iterations of additional monitoring wells and sump pumps, leading the current configuration that includes two intercepts trenches that have contained and prevented migration of groundwater toward the Chaco River). Given the success of the intercept systems and monitoring programs, the Region's decision to forego further NPDES regulation (beyond continuing to implement the Seepage Monitoring and Management Plan) of these disappearing seeps is reasonable.

In addition to there being no factual basis for the Petitioners' assertions, the Region also notes that, even if the seeps reached the Chaco River, additional permit conditions would likely not be required as a legal matter if the sole means by which the pollutants reach the Chaco River is via migration through groundwater. On April 23, 2019, EPA issued an Interpretive Statement on the NPDES program's applicability to releases of pollutants from a point source to groundwater that subsequently migrate or are conveyed by groundwater to jurisdictional surface waters. 84 Fed. Reg. 16,810, 16,811 (Apr. 23, 2019). EPA determined that the Clean Water Act is "best read as excluding *all* releases of pollutants from a point source to groundwater from NPDES program coverage and liability . . . regardless of a hydrologic connection between the groundwater and a

jurisdictional surface water." *Id.* Here, as noted above, the seeps do not release pollutants into the Chaco River via the canyon walls nor the dry wash. However, if they were releasing pollutants at those two locations, absent subsequent movement through a point source, additional NPDES permit conditions would not be required.

G. Petitioners' Challenge of the Absence of a 303(d) Impairment Analysis Cannot Be Addressed through a Permit Appeal to the Board

Petitioners contend (Petition, p. 48) that the Permit is defective because it fails to perform a CWA Section 303(d) impairment analysis and include any effluent limitations based on a Total Maximum Daily Load ("TMDL"). The Board has consistently held that challenges to a 303(d) list or a TMDL, or the absence of a 303(d) list or TMDL, are not within the Board's jurisdiction:

> The BMWC petition does not request Board review of either the failure of the tribes to submit a 303(d) list and associated TMDLs to EPA or the failure of EPA to step into the shoes of the tribes and develop a 303(d) list or prescribe its own TMDL calculations. If BMWC Petitioners had brought such a challenge, however, the Board would lack jurisdiction to review it. Cases challenging the "constructive submission of no TMDLs" or the "constructive submission of no 303(d) lists" are properly brought in federal district court. . . . [T]o the extent BMWC Petitioners may be claiming that the Region must await the development of TMDLs before processing Peabody's permit renewal application, the Board has previously rejected such claims. *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 605 (EAB 2010) ("There [] is no clear error in the Region's conclusion that the statute does not contemplate a delay in processing applications for permit renewal to wait for development of a wasteload allocation or TMDL.").

In re Peabody Coal Company, 15 E.A.D. 406, 415 n.11 (EAB 2011). *See also* discussion of Petitioners' Third Claim, above, and the cases cited therein, which clarify that the EAB does not have jurisdiction over appeals associated with the CWA Section 303 program.

In our case, instead of delaying the Permit pending development of a CWA Section 303(d) list and corresponding TMDLs, the Region developed effluent limitations for the Permit using its authority under CWA Section 402(a)(1)(B). Should

Petitioners want to challenge the alleged absence of an appropriate CWA Section 303(d) list or TMDLs, their recourse is in federal district court. The Board should dismiss Petitioners' Seventh Claim for lack of jurisdiction

H. The Region Appropriately Waived CWA Section 401 Certification

The FCPP, the associated cooling pond (Morgan Lake), and the receiving waters of No Name Wash and Chaco River are all within the Navajo Nation. As such, the Navajo Nation, once granted "treatment as a state" ("TAS") status, would normally be the entity responsible for certifying projects under CWA Section 401 that discharge into No Name Wash and the Chaco River. *See* 40 C.F.R. § 131.4. As discussed above and in the RTC (at p. 7), however, the Region, at the Navajo Nation's request, explicitly excluded Morgan Lake and No Name Wash from the Agency's approval of the Nation's TAS status. For that reason, the Region is responsible for any CWA Section 401 certifications relating to Morgan Lake or No Name Wash. In this case, the Region solicited public comment on its proposed waiver of CWA Section 401 certification when it issued the draft NPDES permit for public comment. *See* Proposed Permit Public Notice Fact Sheet dated April 30, 2019, at page 12. (AR # 20.c). The Region then formally waived certification contemporaneously with issuing the final Permit on September 30, 2019. (AR # 23).

Petitioners contend (Petition, p. 49) that EPA's waiver of 401 certification was improper, citing the requirements of 40 C.F.R. Part 121. The EAB, however, has recognized that Part 121 does not apply to NPDES permits, and that the applicable

requirements are in 40 C.F.R. Part 124.[15] Those regulations clearly allow for a waiver: "EPA may not issue a permit until a certification is granted *or waived* . . . ." 40 C.F.R. § 124.53(a) (emphasis added).

Petitioners claim that the waiver of certification was invalid because EPA did not adopt explicit water quality standards and/or the water quality standards of the Navajo Nation (Petition, pp. 35, 49). This issue was addressed above.

Petitioners also claim, for the first time, that the Region failed to require CWA Section 401 certification for the construction of the groundwater intercept system. Petition, p. 50. This vague claim must be rejected in that it was never raised before (40 C.F.R. § 124.19(a)(4)(ii)), and it fails to state a claim under any circumstances. The intercept system was constructed years ago in upland areas, and there is no indication that a discharge to waters of the U.S.—which is required to invoke CWA Section 401—was involved in the construction of the intercept system. *See* Aerial Photograph, Four Corners Boron Timeline, April 2013 (AR # 8.d).

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[15] "The certification requirements at 40 C.F.R. Part 121, however, do not apply to NPDES permits. These regulations predate the 1972 amendments to the CWA (under which the NPDES permit program was established) and apply only to the certification of non-NPDES permit or license applications. *See* 44 Fed. Reg. 32,880 n.1 (June 7, 1979) (recognizing that the regulations at Part 121 were promulgated prior to establishment of the NPDES program and are in need of revision, but stating that 'because of the impact of State certification of *non-NPDES* permits on a myriad of Federal programs, it will be necessary to consult with the affected agencies in some detail before changes are made.') (emphasis added). Further, as the regulations make clear, the procedures applicable to NPDES permits (including State certification of federally-issued permits) are governed by 40 C.F.R. Part 124 (Specific Procedures Applicable to NPDES permits)." *In re Ketchikan Pulp Company*, 6 E.A.B. 675, 686 n.14, NPDES Appeal No. 95-6, 1996 WL 7780308 (Dec. 10, 1996).

The waiver procedure EPA used in this case meets the requirements of 40 C.F.R. § 124.53 and addresses the broader concerns about Agency transparency in issuing the Permit. Broadly speaking, the NPDES permit is a mechanism for assuring compliance with applicable water quality requirements, as is the CWA Section 401 certification process. Here, where the permitting agency and the certifying agency are one and the same—the Region—it would be a wasteful exercise in bureaucratic redundancy to impose a duplicative 401 certification review and public comment process on top of the Region's comprehensive NPDES permit issuance process. Any water quality concerns initially identified by the Region, or later raised in the public's comments on the draft permit, have been addressed in the final NPDES Permit. Moreover, the Region expanded the NPDES public comment process by expressly soliciting and responding to public comment on its proposed waiver of CWA Section 401 certification. The Region's waiver was both appropriate and effective, and Petitioners' Eighth Claim should be dismissed.

I. Petitioners' Contention that the Permit Must Require a Waiver of Sovereign Immunity Was Not Raised in the Comment Period, and is Incorrect

As noted above, 40 C.F.R. § 124.19 requires Petitioners to demonstrate that each issue raised in the Petition was raised in the public comment period. Here, Petitioners cite to a single sentence in the Region's RTC as raising this issue. *See* RTC, page 100, APS Comments (AR # 20.1.b). That sentence is a statement from the Permittee clarifying that its corporate ownership had changed during 2018, and that an instrumentality of the Navajo Nation now has an ownership interest. Nowhere does this comment response, nor the Petitioners' comment nor any other comment letter, discuss the question of whether

the Permit requires a waiver of tribal sovereign immunity. The Board should reject this attempt to raise this issue now in the Petition.

The Region also notes that Petitioners' contention is bereft of any citation to authority, either regulatory or judicial, supporting their contention that the Permit must require a waiver of tribal sovereign immunity, and indeed there is none. The Region can clearly enforce Permit conditions regardless of partial or full tribal ownership of the Permittee. *See United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987) ("[I]t is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States."); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) ("The United States may sue Indian tribes and override tribal sovereign immunity."). The Region acted properly, and the Board should reject this claim.[16]

J. The Permittee Operates a Closed Cycle Recirculation System Pursuant to 40 C.F.R. § 125.92(c)

Petitioners assert that the Administrative Record does not support EPA's determination that FCPP operates a closed-cycle recirculating system pursuant to 40 C.F.R. § 125.92(c). Petition, p. 51. Once again Petitioners fail to acknowledge the facts presented in EPA's RTC (at pp. 46-48). Petitioners also cite a report for the first time in

[16] In a footnote, Petitioners assert that "EPA must require the NTEC [Navajo Transitional Energy Company, LLC] and the Navajo Nation to waive their sovereign immunity and be subject to the jurisdiction of U.S. federal courts for purposes of enforcing federal environmental laws, including but not limited to the *Clean Water Act citizen suit provision*." Petition, p. 4 n.7 (emphasis added). Here again, Petitioners provide no support for the assertion that such a waiver is legally required, or that, were it necessary for EPA to require such a waiver, that it should also extend to citizen suits. As noted above, the Region sees no impediments to enforcing the permit conditions due to the fact that a tribe is a part owner, and it need not opine on how a court might address a potential citizen suit brought by Petitioners, which is beyond the scope of this permit appeal.

its Petition and assert it is an admission by the Permittee that FCPP is not a closed cycle recirculating system. The report is titled, *Pinnacle West Capital Corporation - Water 2018*, and Petitioners mistakingly say it demonstrates that only 80% of the water is recirculated.[17] It was not included in the comments on the draft permit, and therefore is not properly before the Board. The report says that "Four Corners uses a cooling lake, returns 20% of water used to the source, and recycles the remaining 80%." However, the amount of water returned to the San Juan River as blowdown is irrelevant for purposes of Section 316(b) of the CWA.

The relevant numbers are the amount of water withdrawn from the San Juan compared to the amount the Permittee would need to withdraw if it had a once through cooling system. As noted in the RTC (at p. 47):

> Approximately 99% of the water that is pumped from the San Juan River to Morgan Lake is used for cooling purposes and is reused multiple times. See APS Comments on Proposed NDPES Permit, July 1, 2019. [AR # 20.1.b.] APS reuses the water multiple times for cooling purposes as illustrated by the volume recirculated from Morgan Lake for cooling compared to the volume withdrawn from the San Juan River. Since APS withdraws on average14.3 MGD of water from the San Juan River, but circulates approximately 1,000 to 1,700 MGD through the FCPP, . . . FCPP uses only approximately 1 percent of the water from the San Juan River that it would use if it were a once through system.

APS discharges blowdown from Morgan Lake to avoid TDS buildup in the cooling water. As noted in the preamble to the CWA Section 316(b) regulations, this is consistent with the definition of a closed cycle cooling system.[18]

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[17] *See* Exhibit 66 to the Petition.

[18] The preamble to the Section 316(b) rule, 79 Fed. Reg. 48,300, 48,326 (Aug. 15, 2014), refers to blowdown as related to closed cycle systems as noted below:

Petitioners makes a variety of other arguments claiming that the Permittee does not operate a closed cycle recirculating system pursuant to 40 C.F.R. § 125.92(c). Petitioners raise the following issues: 1) failure to prove the system is properly operated to minimize blowdown; 2) failure to prove FCPP uses the water multiple times; 3) failure to prove the Morgan Lake is not a water of the United States; 4) failure to prove new source water is withdrawn only to replenish losses; 5) failure to prove that make up water withdrawals are minimized; 6) failure to document the Morgan Lake was constructed pursuant to CWA Section 404 or some other permit or license to construct an impoundment; and 7) failure to prove that Morgan Lake was built in uplands. Petition, pp. 52-53. These responses fall into a few categories that EPA responds to below.

Petitioners challenge whether EPA may rely on the Permittee's statements in the record regarding the amount of water withdrawn from the San Juan River and used in the FCPP for cooling purposes. This information was submitted to EPA in the permit application and in subsequent correspondence, and is contained in the Administrative Record. (AR # 20.1.b. at 9-11; AR # 26.d. at 46-48)). It is reasonable for EPA to rely upon the Permittee's application and updated information submitted by the Permittee about the quantity of water used in its operations. Moreover, Petitioners have not cited

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> Discharge of a portion of the water (called "blowdown") is used to control the buildup of these minerals. . . . As an example, in the case of a facility that uses make-up water from a freshwater source, a Director may determine that a closed-cycle recirculating system can generally be deemed to minimize makeup and blowdown flows if it reduces actual intake flows (AIF) by 97.5 percent as compared to a once-through cooling system. . . . These reductions and cycles of concentration are illustrative. A Director may determine that other levels near these numbers could also constitute a closed-cycle recirculating system. (AR # 6.d).

any information calling into question Permittee's representations regarding the quantity of water used for cooling purposes and/or the volume of water withdrawn from the San Juan River.

Petitioners assert that Morgan Lake is a jurisdictional water of the United States and suggest that Morgan Lake should be the point of compliance for CWA Section 316(b) purposes. As noted elsewhere herein, Morgan Lake was constructed in uplands and falls within the waste treatment system exclusion. *See also* RTC at pp. 42-45. Therefore, Morgan Lake is not subject to CWA Section 316(b). The Region is not aware of any facilities where EPA regulates two sequential withdrawal points pursuant to CWA Section 316(b).

Petitioners also note that Morgan Lake does not utilize cooling towers. Petition, p. 55. However, the regulations do not require cooling towers for closed cycle recirculating systems like Morgan Lake. As noted in the RTC, CWA Section 316(b) regulations contemplate situations such as Morgan Lake:

> "40 C.F.R. 125.92(c)(1-2) provides:
>
> (1) Closed-cycle recirculating system includes . . . a system of impoundments that are not waters of the United States. . . . (2) For impoundments constructed in uplands or not in waters of the United States, no documentation of a section 404 or other permit is required." (AR # 26.d. at 47)

Since Morgan Lake was constructed in uplands prior to the enactment of the CWA, no documentation of a CWA Section 404 permit or other permit is required. In issuing the CWA Section 316(b) regulations, EPA explained:

> "[S]ection 316(b) and today's final rule apply only to withdrawals of cooling water from waters of the United States; accordingly, to the extent a facility withdraws cooling water from a pond or reservoir that is not itself a water of the United States and does not withdraw any makeup water from waters of the

> U.S., the requirements of today's rule do not apply to such systems. *Impoundments that are not constructed from a waters of the U.S. but do withdraw make-up water from waters of the U.S. can be closed-cycle recirculating systems subject to the requirements of today's rule, provided that withdrawal for make-up water is minimized.*

79 Fed. Reg. 48,300, 48,307 (Aug. 15, 2014) (emphasis added). (AR # 6.d).

Although EPA acknowledges there were inconsistent statements regarding this issue in the past, the FCPP clearly operates a closed cycle recirculating system pursuant to 40 C.F.R. § 125.92(c) by reducing the flow by approximately 99% of what it would be if it operated a once through system. Petitioners do not cite any information in the Administrative Record or otherwise to indicate that the Permittee does not reuse 99% of the water withdrawn from the San Juan River.

K. The Region Properly Regulated the Cooling Water Intake System and Complied with the Endangered Species Act

1. The Region's Selection of a Closed Cycle Recirculating System at BTA for the Cooling Water Intake System is Consistent with EPA's 316(b) Regulations

Petitioners assert that EPA failed to properly regulate the cooling water intake system by concluding that BTA for the cooling water intake structure consists of a closed cycle recirculating system pursuant to 40 C.F.R. § 125.94(c) and (d) and the USFWS approved Pumping Plan pursuant to 40 C.F.R. § 125.94(g). However, Petitioners once again fail to address EPA's RTC and explain why it is inadequate. *See* RTC at pp. 58-60. As noted in the RTC (at p. 60), EPA determined that "since this is an ongoing permit proceeding as provided in 40 CFR § 125.98(g) (APS submitted its revised application on February 15, 2013), EPA determined that is was not necessary to submit the information required pursuant to 40 CFR § 122.21(r) prior to selecting closed cycle circulating as BTA pursuant to 40 CFR § 125.94(c & d) and the USFWS approved Pumping Plan pursuant to

40 CFR § 125.94(g)." EPA also explained in the RTC that the guidance cited by Petitioners does not modify the regulations and preclude EPA from relying on the ongoing permit proceeding provisions of 40 C.F.R. § 125.98(g).

Since this is an ongoing permit proceeding, EPA could have required the Permittee to submit the information in the next permit cycle. However, to address concerns raised by Petitioners in the comments on the proposed permit, EPA modified the final Permit to require the submission of the information required pursuant to 40 C.F.R. § 122.21(r) within two years of the effective date of the Permit. If EPA determines that it is necessary to modify the Permit to require additional controls after reviewing the information provided pursuant to 40 C.F.R. § 122.21(r)(1)-(8), then EPA can reopen the Permit pursuant to Permit Section III.B.

EPA's explanation of how BTA was determined for FCPP is contained in the RTC (at pp. 59-60) and provides the following:

> EPA's selection of a closed cycle recirculating system based upon 40 CFR 125.94(c) is consistent with the regulations for Section 316(b). Section 125.94(c) provides that an existing facility must select one of the alternatives in paragraphs (c) (1-7). Closed cycle recirculating systems are authorized in 40 CFR 125.94(c)(1). In fact, closed cycle recirculating systems were recognized by EPA in the preamble as the most effective technology for impingement and entrainment. EPA noted the following in the preamble to the final rule: "EPA concluded that closed cycle recirculating systems reduce entrainment (and impingement mortality) to the greatest extent and are the most effective performing technology. EPA also determined that there were no other "available" technologies for entrainment whose performance came close to that of closed-cycle recirculating systems). See National Pollutant Discharge Elimination System−Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300, at 48,340 (Aug. 15, 2014). [AR # 6.d] It is worth noting that closed cycle recirculating systems or

> their equivalent are also BTA for both impingement and entrainment for new units at existing facilities pursuant to 40 CFR 125.94(e) (1-2).

Selection of closed cycle recirculating system is also consistent with 40 C.F.R. § 125.94(d) BTA Standards for Entrainment. EPA selected closed cycle on a site-specific basis for FCPP based on the information submitted by the applicant to EPA and to USFWS for the BO and the factors in 40 C.F.R. § 125.98. Entrainment and impingement at the Cooling Water Intakes were discussed in depth in the ESA BO. *See* ESA BO, pp. 109-113. USFWS, as the expert agency, developed reasonable and prudent measures that addressed the entrainment issue. The Reasonable and Prudent Alternatives ("RPMs") required the project proponents to develop and implement a "Pumping Plan", (AR # 11.a-b; AR # 20.1.b), to reduce the magnitude and types of entrainment of Colorado pikeminnow and razorback suckers. *See* RPM 2, ESA BO at p. 144, and Amendment to BA, March 13, 2015, at page 3. EPA considered all of this information in selecting closed cycle as BTA for entrainment pursuant to 40 C.F.R. § 125.94(d). EPA incorporated the Pumping Plan and the additional measures required therein as BTA pursuant to 40 C.F.R. § 125.94(g). (AR # 26.d. at 58-60).

Petitioners assert that EPA should require the Permittee to minimize withdrawals from the San Juan River. Petition, p. 60. Yet Petitioners again fail to acknowledge the Region's response to comments and explain why it is inadequate. As noted in the RTC (at p. 61):

> APS minimizes the intake from the San Juan River so as to withdraw only as much water as necessary for Morgan Lake management purposes. APS is also implementing the Pumping Plan to further minimize the impingement and entrainment of fish from the CWIS in the San Juan River. By implementing the Pumping Plan, APS has minimized impingement and entrapment losses. Additionally, FCPP has reduced its average intake rate from the San Juan

> River to 14.3 MGD and its maximum intake to 24.5 MGD. With the retirement of Units 1, 2, and 3, APS has no incentive to intake more water than is necessary to provide adequate cooling for the two remaining units. Thus, there is no need to cap the applicant's intake of water from the San Juan River in the proposed permit beyond the requirements in the Pumping Plan.

APS further minimized the withdrawal from the San Juan River pursuant to the Pumping Plan (AR # 11.a-b; AR # 20.1.b). For example, APS implemented the following measures: 1) APS connected the sumps used as part of the CWIS, which reduces the screen approach and through screen velocities by up to 50%; 2) APS shuts down the pumps during certain periods of the year to minimize the impact on fish and larvae; and 3) APS performed a study to determine the optimal screen size, which concluded that the current screen sizes are optimal. (AR # 20.1.b. at 9). EPA reasonably relied upon the Permittee's statements in the Administrative Record, as well as the Pumping Plan, to determine that the Permittee minimizes withdrawals for make-up water.

The Region's selection of closed cycle recirculating system as BTA pursuant to 40 C.F.R. § 125.94(c) and (d) and the USFWS approved Pumping Plan pursuant to 40 C.F.R. § 125.94(g) is supported by the Administrative Record, and Petitioners have not provided a basis to justify the Board's review of this technical decision.

2. Petitioners' Allegations Regarding ESA Violations Do Not Meet the Board's Requirement of Specificity and Responsiveness and Should be Dismissed

Although lengthy, Petitioners' allegations regarding ESA violations do not meet the requirements of specificity and responsiveness to the Region's RTC. The first three pages of this claim reassert the general claim from Petitioners' Comment Letter that the Region must comply with the ESA in issuing the Permit. The Region agreed with this

point in the RTC (at p. 66). The more substantive ESA allegations in the Petition are those regarding the impacts of the impingement and entrainment at APS Weir (Petition, pp. 63-65) and the need for closed-cycle or dry cooling technology (Petition, pp. 65-68). A short side-by-side comparison shows that these claims are taken directly from Petitioners' Comment Letter at pp. 67-69 (entrainment/impingement) and pp. 70-71 (closed cycle cooling), with *very* minimal abridgment in the Petition. The Petition also fails to discuss the Region's RTC on these issues (*see* RTC at p. 94 (entrainment/impingement) and pp. 97-98 (closed cycle cooling)). As noted above, Petitioners may not simply repeat previous comments made, but must "substantively confront" the Region's subsequent explanations in the final permit to the issues that were raised in public comments. *In re City of Attleboro*, NPDES Appeal No. 08-08, at 10; 40 C.F.R. § 124.19(a)(4)(ii). The Board should dismiss these ESA allegations for failure to meet the Board's requirements for specificity.

In addition, the Board has noted that "[t]he [EPA's] substantive obligations under the ESA—i.e., to ensure that its actions are not likely to jeopardize listed species or destroy or adversely modify critical habitat—are generally satisfied by reasoned reliance on the FWS's expert opinion, as documented in the [BO]." *In re Phelps Dodge Corp. Verde Valley Ranch Development*, 10 E.A.D. 460, 487 (EAB 2002). As demonstrated at length in the RTC, EPA has carefully reviewed the Final BO in light the Petitioners' Comment Letter, and has responded to those comments. *See* RTC at pp. 63-98. The Region's reliance on the Final BO is neither arbitrary nor capricious, and the Board should dismiss these ESA claims.

L. Petitioners' Alleged "Other CWA Section 316(b) Deficiencies" Are Redundant and Fail to Raise Any Issues that Warrant Review

Petitioners' alleged "other CWA section 316(b) deficiencies" restate various issues that EPA has responded to above. Petitioners also raise new issues that were not raised in their comments and therefore are not properly before the Board. Thus, there are no issues raised in this section that warrant a response.

For example, Petitioners cite the wrong regulatory provisions for various requirements and misrepresent how they apply. Petitioners claim that EPA failed to meet the traveling screen and impingement requirements at "40 C.F.R. § 125.92(c)(5) and (c)(7)." The Region assumes Petitioners are referring to 40 C.F.R. § 125.94(c)(5) and (c)(7). However, 40 C.F.R. § 125.94(c)(5) and (c)(7) are not applicable, because the Region selected a closed cycle recirculating system pursuant to 40 C.F.R. § 125.94(c)(1). *See* 40 C.F.R. § 125.94(c) (requiring compliance with only one of the seven alternatives available in in paragraphs 125.94(c)(1)-(7)).

To the extent that Petitioners restate issues that the Region already responded to, once again Petitioners fail to cite to the relevant comments and RTC and fail to explain why the RTC were clearly erroneous or otherwise warrant review as required by 40 C.F.R. § 124.19(a)(4)(ii).

VI. CONCLUSION

The Petition should be denied.

Respectfully submitted,

Dated: December 18, 2019

/*S/ Thomas M. Hagler*

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this response to the petition for review contains less than 15,000 words, consistent with the contemporaneously filed Motion to Exceed Word Limitation, as provided in 40 C.F.R. § 124.19(d)(3).

Dated: December 18, 2019

/S/ Thomas M. Hagler
Thomas M. Hagler

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to the Petition for Review and Statement of Compliance with Word Limitations, in the matter of Four Corners Power Plant, NPDES Appeal No. 19-06, were served on the following persons in the manner indicated:

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