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To:	U.S. Environmental Appeals Board	**Fax:**	(202) 233-0121
From:	Brad A. Bartlett, Esq.	**Date:**	11/1/2010
Re:	*In Re NPDES Permit Renewal: NPDES Permit Renewal No. 10-15 Supplemental Brief*	**Pages:**	31 (including this cover sheet)
CC:			

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

In Re NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No. NN0022179: Black Mesa Mine Complex	) NPDES Appeal No. 10-15

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to 40 C.F.R. §124.19, Petitioners Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and Sierra Club (hereinafter "Petitioners") by and through the undersigned counsel hereby submit this supplemental brief in support of Petitioner's petition for review of the U.S. Environmental Protection Agency's ("EPA's") NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES") which was timely filed on October 18, 2010.[1] EPA's NPDES permit authorizes continued discharge from over 111 outfalls from both permanent and temporary waste "ponds" at Peabody Western Coal Company's ("Peabody's") Black Mesa and Kayenta Mines, many of which are exceeding Water Quality Standards ("WQS").

EPA's permit covers a limited number of outfalls and does not address or analyze possible discharges from all of the 230 permanent and temporary impoundments at the Black Mesa and Kayenta mines. EPA's NPDES Permit authorizes Peabody to monitor only "20%" (*i.e.* 22) of the 111 outfalls covered by the permit and as identified and determined by Peabody. EPA *Fact Sheet* at 19-20. Of the sites selectively monitored by Peabody, discharges from 21 impoundments are currently in violation of Water Quality Standards ("WQS"). *See* Proposed NPDES permit at 9-11. Additionally, and despite the fact that EPA's permit adds "several new outfall locations" and is being issued concurrent with the Federal Office of Surface Mining Reclamation and Enforcement's

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[1] Available on the U.S. EPA's website. *See* http://www.epa.gov/region9/water/npdes/permits.html. (providing the permit, fact sheet and comment response).

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("OSM's") decision to renew Peabody's operating permit for the Kayenta Mine (a connected action), EPA did not analyze the impacts of permit issuance in an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA").

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

As set forward herein, Petitioners contend that EPA committed numerous significant and procedural errors in connection with issuing the NPDES to Peabody. Based on the errors listed below, Petitioners request that the Environmental Appeals Board ("EAB" or "Board") grant the petition for review and remand the NPDES to EPA with instructions for EPA to correct all substantive and procedural shortcomings and provide for appropriate supplemental public notice and comment after the required analyses have been completed and the permit has been corrected.

I. The Administrative Record Has Not Been Provided to Petitioners

The complete administrative record has not been provided to Petitioners. As stated by Petitioners in their comment letter,

> The Administrative Record provided to *BMWC* by the agency is entirely inadequate. Although there are numerous documents cited in the permit application that would assist the public in assessing the validity of EPA's assertions and the adequacy of the proposed NPDES permit, these materials are not part of the agency's Administrative Record. Their absence precludes the public (and by extension the agency) from forming a defensible conclusion on the adequacy of the proposed permit.
>
> In particular, the Administrative Record does not include the monitoring data upon which may of the assertions in the application rely. Rather than data that shows analyses and trends over the decades that have been monitored, the application and the Administrative Record include only summaries of the data.

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Further, these summaries are presented only for sites that have had exceedences and report only the number of exceedences and the ranges and averages. Absent entirely are time series data from which one might extract insights with respect to either typical trends or anomalous trends at specific points.

Letters in the Administrative Record seemingly acknowledge that meaningful trends may possibly exist (and allude to specific trends in general terms), but again no data is provided in the application, the permit or the Administrative Record from which to view or understand those discussed or others that may be present.

This inadequacy applies to both water chemistry and flow rates. Flow rates are simply (and generally) listed as the numbers of occasions with flow, with ponded water, with wetness, or with dry. The information on flow rates provided in the record provides no meaningful understanding of the sequencing, duration, or magnitude of flow.

Among the more important missing documents are the results of the annual seep investigations that track conditions at some impoundment locations over a period of about a decade. These reports are cited and clearly relied upon by the applicant and EPA, but are not part of the Administrative Record and accessible by the public for independent review and assessment.

Finally, the record fails to include maps showing the location of the outfalls. The record is also devoid of any related 404 permitting materials from the Army Corps of Engineers.

BMWC respectfully requests that these materials be incorporated into the agency's Administrative Record and that the draft permit be re-noticed for additional public review and comment.

BMWC notes that on March, 29, 2010, the *Center for Biological Diversity* submitted a Freedom of Information Act ("FOIA") request to EPA for all records related to the proposed NPDES permit. At a minimum, *BMWC et al.* should be allowed to supplement their comments on the NPDES permit 60-days after release of any records under FOIA by the agency.

Comment Letter (Exh. 1 to Petitioners' *Petition for Review*)(emphasis in original) at 2-3. EPA has yet to make available the full administrative record before the agency and for purposes of appeal. *See* http://www.epa.gov/region9/water/npdes/permits.html (providing only the permit, fact sheet and comment response).

Petitioners reserve the right to raise additional issues and address the arguments set forward herein in greater detail in a reply brief and once the agency has certified and filed the administrative record.

II. Clean Water Act ("CWA") Compliance

A. EPA Violated the CWA by Issuing A NPDES Permit Covering New Sources Where No WQLS and TMDL's Have Been Established for the Moenkopi and Dinnebito Drainages

EPA violated the Clean Water Act. 33 U.S.C. § 1251. *et seq*. ("CWA") by issuing a NPDES Permit for new sources[2] where no Water Quality Limited Segments ("WQLS") and Total Maximum Daily Loads ("TMDLs") are established for Moenkopi Wash Drainage and Dinnebito Wash Drainage.

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

[2] To date, EPA has refused to identify which outfalls have been added to or eliminated from the NPDES issued to Peabody. Instead, the agency has placed the burden on the reviewing public to figure out which outfalls have been added or eliminated. As stated by the agency, "[w]hile EPA did not present a detailed description...of each of the more than 100 outfalls, a comparison of the two permits [*i.e.* the previous permit and the newly proposed permit] provides a list of the outfall [sic] eliminated or added." EPA *Response to Comment* at 23.

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

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

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

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

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

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

In addition, and particularly important with respect to the Black Mesa, <u>the CWA requires states (or tribes) to identify any degraded waterbodies within their borders, and</u>

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

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

Despite the fact that both the Navajo Nation and Hopi Tribe have received "Treatment as a State" status for purposes of Sections 106 and 303 of the CWA. 33 U.S.C. §§ 1256, 1313, neither the Tribes (nor the State of Arizona) have submitted to EPA for its approval a list of waterbodies in the tribal land portion of the Little Colorado River Watershed (and in particular Moenkopi Wash Drainage and Dinnebito Wash Drainage) that do not meet water quality standards—*i.e.*, the state or tribe's Section 303(d) list. These drainages have not been assessed by Arizona Department of Environmental Quality ("AZ DEQ"), EPA or the Tribes to determine whether they are "attaining" TMDLs or are "impaired." *See* AZ DEQ 2006-2008 Status at 8 (identifying the drainages as "Tribal Land—Not Assessed").[3] Further, there are at least two stream segments in the Little Colorado/San Juan Watershed that have been identified by AZ DEQ and EPA as being impaired or not attaining TMDL's for copper, silver and suspended sediments. *Id.* at 9.[4]

In light of this, it is unlawful for EPA to issue a permit for new sources or increase permitted discharges without first identifying whether these waterbodies are compromised despite permit-based limits on point-source pollutant discharges, and if so, without first ensuring that TMDLs are established for the tribal land portion of the Little Colorado River Watershed. and in particular, Moenkopi Wash Drainage and Dinnebito Wash Drainage. *See, e.g., Friends of the Wild Swan v. U.S. Envtl. Protection Agency,*

[3] Available on AZ DEQ's website:
http://www.azdeq.gov/environ/water/assessment/download/2008/lg.pdf.

[4] *Petitioners* note that the tribes' water quality standards require monitoring of water quality to assess the effectiveness of pollution controls and to determine whether water quality standards are being attained as well as assessment of the probable impact of effluents on receiving waters in light of designated uses and numeric and narrative standards. *See e.g.* Hopi WQS §2.102(A)(1997); Navajo WQS §203 (2008).

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130 F. Supp. 2d 1199. 1203 (D. Mo. 2000) (holding that "[u]ntil all necessary TMDLs are established for a particular WQLS, the EPA shall not issue any new permits or increase permitted discharge for any permit under the [NPDES] permitting program"), *aff'd in part, rev'd in part, remanded by, Friends of the Wild Swan v. U.S. EPA*, 2003 WL 31751849, 2003 U.S. App. LEXIS 15271 (9th Cir. Mont. 2003).[5]

In its response to comments, EPA makes two rebuttal arguments. First, the agency alleges, without support, that "the permit renewal does not authorize a new source" of discharge. EPA *Response to Comments* at 11. EPA is wrong. According to EPA, "several new outfall locations have been added…" Fact Sheet at 2 (January 2010)(emphasis supplied). To date, EPA has refused to identify the added outfalls. *See e.g.* EPA *Response to Comment* at 23 ("[w]hile EPA did not present a detailed description…of each of the more than 100 outfalls, a comparison of the two permits [*i.e.* the previous permit and the newly proposed permit] provides a list of the outfall [sic] eliminated or added."). Here, EPA's mere refusal to identify new outfalls during the draft permit stage does negate the existence of new discharages covered by the NPDES permit issued by EPA.

Second, the agency argues that "no waterbodies receiving discharges from Black Mesa and Kayenta Mines have been identified as impaired." EPA *Response to*

[5] *Petitioners'* argument is consistent with, but not identical to, the Hopi Tribe's 401 Certification for the NPDES Permit and the Tribe's condition that "[w]ater discharged under this permit shall not contain settleable materials or suspended materials in concentrations greater than or equal to ambient concentrations present in the receiving stream that cause nuisance or adversely affect beneficial uses." *See* June 12, 2009 Letter from Hopi Tribe to John Tinger (emphasis supplied). In this case, and until all necessary TMDLs are established for these WQLS (*e.g.* until EPA knows the "ambient concentrations" present in the receiving streams), a permit renewal incorporating new discharges and outfalls cannot be issued.

Comments at 11. EPA's response merely begs the question and misses the point. EPA's response is simply an acknowledgement that, as a factual matter, the Moenkopi Wash Drainage and Dinnebito Wash drainages have not been assessed by AZ DEQ, EPA or the Tribes to determine whether they are in fact "impaired." Further, EPA neither examined nor provided any record evidence during public comment to indicate whether water quality in these drainages may already be impaired for particular pollutants. Among other things, the records publicly available from EPA during the draft permit stage indicate that neither AZ DEQ or the tribes have submitted to EPA for its approval a list of waterbodies on tribal lands that do not meet water quality standards—*i.e.*, the state's or tribe's Section 303(d) list. *See* 33 U.S.C. § 1313(d).[6]

In this case, and prior to authorizing discharge from new sources, must to ensure that the receiving waterbodies are not compromised despite permit-based limits on point-source pollutant discharges, and if so, without first ensuring that TMDLs are established for the tribal land portion of the Little Colorado River Watershed. *See, e.g., Friends of the Wild Swan*, 130 F. Supp. 2d at 1203.

B. EPA's NPDES Permit Would Cause Or Contribute To Exceedances of WQS

EPA's NPDES permit would cause or contribute to exceedences of water quality standards ("WQS"). Under the CWA, EPA may not issue NPDES permits for discharges that cause or contribute to an exceedence of water quality standards. 33 U.S.C.

[6] EPA's claim that "[n]either Tribe has listed any of the waterbodies receiving discharages from Black Mesa and Kayenta Mines on the Clean Water Act Section 303(d) list" is highly disingenuous. EPA's *Response to Comments* at 11. In this case, there is no tribal 303(d) list. EPA neither sought nor required impairment analysis or 303(d) listing for receiving tribal watersheds prior to EPA's approval of discharge from new sources under the NPDES permit.

§1311(b)(1)(c); 40 C.F.R. §122.4(a)(no permit may be issued "[w]hen the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA"); 40 C.F.R. § 122.44(d) (no permit may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States").

EPA's NPDES permit authorizes discharge from over 111 outfall locations from permanent and temporary waste "ponds" at Peabody's Black Mesa and Kayenta Mines. At least 21 discharges from Peabody's impoundments already are exceeding WQS. EPA *Fact Sheet* at 10-12. In authorizing Peabody's continued discharge of pollutants in violation of WQS, EPA relies on a *Seep Monitoring and Management Plan* developed by Peabody. *Id.* Peabody's plan, in turn, calls for and relies upon EPA issuance of "regulatory variances" for at least twelve of the ongoing WQS violations. *Id.*

In its response to comments, EPA, and while acknowledging the ongoing violations of WQS, provides no legal authority for its proposed use of variances. *See* EPA *Response to Comments* at 17-18 ("several seeps have shown concentrations of pollutants above water quality standards").

In this case, it is unlawful for EPA to issue a permit for discharges that cause or contribute to an exceedence of WQS. Further, the ongoing WQS exceedences should have been corrected and remedied prior to NPDES permit issuance.

C. EPA's Monitoring Waiver for 89 Outfalls Violates the CWA

EPA has granted Peabody a monitoring waiver for 89 of the 111 outfalls covered by the NPDES permit. EPA's NPDES Permit authorizes the operator to monitor only "20% of outfalls" as identified and determined by Peabody. Comment Letter (Exh. 1)

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19-20. In other words, Peabody is only required to monitor 22 of 111 outfalls as selected and determined by Peabody.

CWA regulations require that "any grant of the monitoring waiver must be included in the permit as an express permit condition and the reasons supporting the grant must be documented in the permit's fact sheet or statement of basis." 40 C.F.R. §124.44(a)(2)(iv). Additionally, "[a]ny request for this waiver must be submitted when applying for a reissued permit or modification of a reissued permit. The request must demonstrate through sampling or other technical information, including information generated during an earlier permit term that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger." *Id.* §124.44(a)(2)(iii).

In this case, neither Peabody's application nor EPA's permit provides any explanation and in particular actual sampling and monitoring data for all of the discharges--as to why 89 of the 111 discharges covered by the permit are exempt or waived from CWA monitoring requirements. EPA's waiver is unlawful especially where, as here, 21 of the monitored discharges are exceeding WQS and EPA's permit includes new outfalls which were not previously subject to EPA's NPDES permit. *See* Proposed NPDES permit at 9-11. Given the relative abundance of outlets with exceedences of one or more water quality standards, it seems exceedingly likely that there are many others not on the radar for lack of actual monitoring.

Further, outfalls covered by NPDES cannot legitimately be considered in compliance with the CWA without actual monitoring data. EPA provided no actual monitoring data at the draft permitting stage for all of the 111 outfalls which would

substantiate a monitoring waiver in permit issuance and Appellants find nothing in the CWA that would allow EPA to rely on a subset or sample of monitored outlets to determine CWA compliance for non-monitored outlets.

Finally, EPA provides no discussion or rationalization for choosing data from one monitored outlet over another and for purposes of monitoring.

D. EPA Fails to Provide Adequate Effluent Limits

EPA's NPDES permit fails to provide effluent limits on Peabody's discharge for anything but suspended solids, iron, and pH. NPDES Permit at 3. Additional effluent limits are critical where, as here, the limited monitoring data provided by Peabody indicates ongoing WQS violations for nitrates, aluminum, chloride, selenium, sulfates and cadmium. *See* NPDES permit at 9-11.

E. EPA Fails to Meaningfully Address Related Agency Actions by the Corps and OSM

EPA failed to address two significant and related Federal agency actions in issuance of a NPDES permit. First, EPA fails to address *vacatur* of OSM's "technical review" of Peabody's *Sediment Control Plan* and for purposes of approval of the NPDES Permit is an abuse of discretion. According to EPA's *Fact Sheet* at 5, and based on a Memorandum of Understanding between EPA and OSM, EPA is required to rely directly on OSM's "technical review and approve[al of] the permittee's Sediment Control Plan." *Id.* Specifically, "OSMRE completed a technical review of PWCC's Sediment Control Plan, which PWCC submitted in order to re-categorize outfalls as Western Alkaline Reclamation Areas and to apply for a revision of its permit under the Surface Mining and [sic] Control Reclamation Act. See January 28, 2009 letter from Dennis Winterringer, OSMRE to Gary Wendt, PWCC." *Id.*

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Peabody requested under the Clean Water Act Western Alkaline Drainage Category regulations to use "best management practices in lieu of eight existing sedimentation ponds in areas N6, J7 (ponds 021 (N6-C), 022 (N6-D), 037 (N6-F), 049 (J7-CD), 0505 (J7-E), 051 (J7-F), 174 (J21-D), and 175 (J21-E))." *See* June 16, 2009 Letter from Dennis Winterringer, OSM to Gary Wendt, Peabody.[7] OSM approved Peabody's request as "an application for minor revision of Black Mesa Complex permit AZ 0001D (project AZ-0001-D-J-58)." *Id.* (w/attached "Application for Mine Permit Revision").

On January 5, 2010, Administrative Law Judge Holt issued an *Order* on vacating the underlying Life of Mine ("LOM") permit from OSM, and by extension, OSM's "minor revision" approving technical review of Peabody's sediment plan. Thus, it was unlawful for EPA to continue to rely on OSM's technical review, where as here, such review is non-existent and needs to be reinitiated.

Second, and last, EPA failed to ensure that the permitted discharges or outfalls from earthen impoundments have been or will be properly permitted in the first instance by the Army Corps of Engineers ("Corps") under Section 404 of the CWA—especially where as here, EPA's permit covers and "addresses the construction of new impoundments." NPDES Permit at 8.

III. National Environmental Policy Act ("NEPA") Compliance

EPA failed to comply with the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA") in issuance of a NPDES permit. No NEPA document has *ever* analyzed EPA's authorization of discharges at Peabody's Black Mesa Complex which were first issued on December 29, 2000. That said, Appellants requests that EPA analyze

[7] This document should be included in EPA's administrative record.

the impacts of the NDPES Permit in an Environmental Impact Statement ("EIS") or, at a minimum, an Environmental Assessment ("EA").

At the outset, Appellants would like to stress that EPA's issuance of a NPDES permit to Peabody would greatly benefit from NEPA analysis in the form of an EA or EIS. Not only has such analysis never been done, but the impacted community is low-income and minority. *See* Executive Order 12898: "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations" Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994)(requiring agencies to meaningfully involve impacted minority communities). Additionally, there are multiple Federal and tribal agencies involved with overlapping jurisdiction (*e.g.* OSM, Corps, Navajo Nation, Hopi Tribe) and with outstanding connected actions (*e.g.* OSM's Kayenta Mine permit renewal, issuance of 404 permits by the Corps, etc.).

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

448, 458 (8th Cir. 2000) (*quoting Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *cert. denied* 502 U.S. 994 (1991) (*citing Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997))).

NEPA applies to EPA's decision to issue a NPDES permit. *See* 33 U.S.C. § 1371(c)(1) (CWA section specifically making EPA "new source" permit approvals subject to NEPA); 40 C.F.R. § 6.101. New source means "any source" the construction of which is commenced after the promulgation of Clean Water Act standards applicable to the source. 33 U.S.C. §1316(a)(2). Additionally, as stated by EPA's *Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents*:

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

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

In this case, "several new outfall locations have been added and several have been eliminated to reflect changes in ongoing mining activities." Fact Sheet at 2 (January 2010).[8] The permit also "incorporates new regulatory requirements for the Western Alkaline Coal Mining Subcategory for reclamation areas that were promulgated in January 2002... ." *Id.* In other words, EPA's permit specifically covers "new sources"

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[8] Neither the draft permit nor the fact sheet identifies what outfalls have been added or eliminated. EPA must identify with specificity these changes.

as defined by Section 306 of the CWA. 33 U.S.C. § 1316. (*i.e.*, new outfalls) which should have been analyzed under NEPA. 33 U.S.C. § 1371(c)(1) ("discharge of any pollutant by a new source ... *shall* be deemed a major Federal action significantly affecting the quality of the human environment" within the meaning of NEPA) (emphasis supplied). For example, there are over eight (8) new sources that are now covered by the new regulations for Western Alkaline Coal Mining Subcategory for reclamation areas. *See* NPDES Permit at Appendix C. The environmental impacts of these new sources were never considered or analyzed pursuant to NEPA and must be analyzed in and EIS or EA.

Further, the proposed NPDES Permit is based on significant new information. According to EPA's Fact Sheet, "the proposed permit also incorporates revisions to the Seep Monitoring and Management Plan, which was created pursuant to the previous permit, in order to reflect the results of previous monitoring and to address the impoundments causing seeps." Fact Sheet (January 2010) at 2 (emphasis supplied). Again, this significant new information must be analyzed in a NEPA document.

Moreover, there are multiple connected actions that must be analyzed in an EIS or EA including, but not limited to, OSM's proposed permit renewal for the Kayenta Mine;[9] OSM "technical review" of the PWCC's Sediment Control Plan (which was based on the now vacated Life of Mine permit issued by OSM); and/or, any and all 404 permitting by the U.S. Army Corps of Engineers. NEPA and its implementing regulations define "connected actions" as, among other things, actions that are "interdependent parts of a

[9] Comments are due on the operating permit renewal on May 17, 2010. A highly incomplete version of the permit application is available on OSM's website: http://www.wrcc.osmre.gov/

larger action and depend on the larger action for their justification." and require that they be addressed in the same NEPA review document. 40 C.F.R. § 1508.25(a)(1). Additionally, and from the public's perspective, NEPA compliance is clearly necessary to facilitate and increase agency cooperation and evaluation of these interrelated matters. *See* 40 C.F.R. §1501.6 (dealing with cooperating agencies).

Finally, a NEPA process would allow for meaningful public evaluation and understanding of EPA's NPDES permitting process and these complex environmental matters. It would also facilitate analysis of environmental justice issues, expand public involvement, address controversial issues and allow for analysis of impacts to special resources (such as livestock grazing) or public health. Many of the people directly impacted by EPA's permit issuance are downstream Navajo and Hopi tribal communities in the Black Mesa area (including tribal members who use these impoundments for livestock grazing) who bear a disproportionate share of Peabody's ongoing discharge of numerous pollutants onto tribal lands. These communities often lack the political agency and economic leverage required for effective participation in environmental decision-making processes. EPA should use the NEPA process to take the required "hard look" and ensure that tribal people and lands are not being disproportionately impacted by Peabody's massive mining operation and ongoing discharge of pollutants.

In its response to comments, EPA argues because no "new sources" are covered under the NPDES permit, EPA need not comply with NEPA. EPA *Response to Comments* at 3. EPA's argument is nonsensical. According to EPA, "several new outfall locations have been added" to the NPDES permit. Fact Sheet at 2 (January 2010)(emphasis supplied).

Second. EPA argues that the statutory definition of "new source" under the CWA is limited by the definition of "new source coal mine." EPA Response to Comments at 3 (citing 40 C.F.R. §434.11(j). To the extent Appellants even understand that agency's argument, Appellants find nothing in 40 C.F.R. §434.11 which bars (or even addresses) the agency's NEPA compliance duties. In this case, the new point sources of discharge created by Peabody over the last five years and covered for the first time by the NPDES permit meet the statutory definition of "new source" within the meaning to §306 of the CWA.

Finally, EPA argues that some outfalls have merely been reclassified. EPA *Response to Comments* at 3. EPA does not identify which outfalls have been added, reclassified or removed. *Id.* Regardless, and because new sources/outfalls are added to the permit, EPA's argument is of no consequence.

For the reasons set forward above, EPA's permit should be remanded to the agency with direction that the agency comply with NEPA and produce an EA or EIS.

IV. Endangered Species Act ("ESA") Compliance

A. The Endangered Species Act

EPA failed to comply with must comply with the Endangered Species Act, 16 U.S.C. § 1531, et seq. ("ESA") when issuing the NPDES permit. Section 7 of the ESA places affirmative obligations upon federal agencies. Section 7(a)(1) provides that all federal agencies "shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). Section 7(a)(2) mandates that:

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> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical, unless such agency has been granted an exemption for such action ... pursuant to subsection (h) of this section.

Id. § 1536(a)(2).

The ESA's implementing regulations set forth a specific process, fulfillment of which is the only means by which an action agency ensures that its affirmative duties under section 7(a)(2) of the ESA are satisfied. *In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06, slip op. (EAB Sep. 24, 2009) at 36 (citing 50 C.F.R. § 402.14(a); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995); *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. (EAB Sep. 27, 2006) at 95). By this process, each federal agency must review its "actions" at "the earliest possible time" to determine whether any action "may affect" listed species or critical habitat in the "action area." 50 C.F.R. § 402.14. The "action area" is defined to mean all areas that would be "affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The term "may affect" is "broadly construed by FWS to include '[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,' and is thus easily triggered." *Indeck-Elwood*, slip op. at 96 (quoting 51 Fed. Reg. at 19926); *Desert Rock*, slip op. at 36 n. 33. If a "may affect" determination is made, "consultation" is required. *Id.*

Consultation is a process between the federal agency proposing to take an action (the "action agency") – here, EPA – and, for activities affecting terrestrial species, the U.S. Fish and Wildlife Service ("FWS"). "Formal consultation" commences with the

action agency's written request for consultation and concludes with FWS's issuance of a "biological opinion" ("BiOp"). 50 C.F.R. § 402.02. The BiOp issued at the conclusion of formal consultation "states the opinion" of FWS as to whether the federal action is "likely to jeopardize the continued existence of listed species" or "result in the destruction or adverse modification of critical habitat." 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).[10]

Prior to commencing formal consultation, the federal agency may prepare a "biological assessment" ("BA") to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat" and "determine whether any such species or habitat are likely to be adversely affected by the action." 50 C.F.R. § 402.12(a). While the action agency is required to use a BA in determining whether to initiate formal consultation, FWS may use the results of a BA in determining whether to request the action agency to initiate formal consultation or in formulating a BiOp. 50 C.F.R. §§ 402.12(k)(1), (2). If a BA concludes that the action is "not likely to adversely affect" a listed species, and FWS concurs in writing, that is the end of the "informal consultation" process. 50 C.F.R. § 402.13.

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

B. EPA Failed to Consult with FWS to Consider the Effects of the NPDES Permit to Threatened and Endangered Species in the Action Area.

Threatened and endangered species that are known to occur within the "action area" of the permit that may be affected directly, indirectly, and/or cumulatively by the activities authorized by the permitted discharges. At a minimum, such species include the endangered southwestern willow flycatcher, the threatened Mexican spotted owl, and the threatened Navajo sedge and its critical habitat, black-footed ferret as well as species and habitat that occur downstream from the discharges, such as the Little Colorado River spinedace, and species that are affected by the air emissions resulting from combustion of the coal at the Navajo Generating Station. The NPDES permit authorizes new and continued discharges from active mine areas, coal preparation areas, and reclamation areas within the Complex, including discharges of selenium and other pollutants that are known to affect flora and fauna such as these species. But rather than meeting its ESA section 7 duties and considering the full spectrum of such potential effects, EPA avoids its ESA section 7 duties altogether, choosing to skip consultation with FWS to consider the effects of the NPDES permit issuance to listed species and critical habitat.

As an initial matter, it must be noted that EPA's attempt to apply the analysis contained in an ESA document prepared by a separate federal agency, the Office of Surface Mining Reclamation & Enforcement ("OSM"), for a different agency action, OSM's now-invalidated issuance of a life-of-mine permit revision for the Black Mesa and Kayenta coal mines, to EPA's separate issuance of the NPDES permit. *See* EPA *Response to Comments* at 33. Indeed, there is nothing in the ESA's regulations, statutory language, or fundamental purposes that would EPA to do this, and EPA's attempt to do so here illustrates the problems with such an approach.

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First, OSM's BA[11] does not actually consider the effects of discharges to threatened and endangered species in the action area. As a result, it is palpably incorrect for EPA to suggest, as it does, that FWS concluded that there would not be "any effects on listed species due to the discharges that would be regulated by PWCC's NPDES permit." *Fact Sheet* at 13-14. FWS made no such conclusion, and OSM's BA contained no such analysis. Thus, EPA cannot escape its duties under ESA section 7 to consult with FWS directly over the effects of discharges including by obtaining FWS's concurrence in its own determinations, as appropriate – on this basis.

Indeed, there are numerous other flaws in the OSM BA that would render EPA's reliance on it in the NPDES permitting context particularly arbitrary. For example, OSM's BA does not consider, at all, the effect of the mines' operations to the *recovery* of threatened and endangered species, and only considers the potential effects to species' survival. This is a patent violation of the letter and spirit of the ESA, as is particularly illustrated in the omission of any analysis of the effects of mining operations (again, not discharges) downstream from the source, such as to threatened and endangered species that occur in the Little Colorado River watershed including the Little Colorado spinedace and other listed species and their critical habitat. Instead, the BA dismisses these species out of hand by stating that such species have no "suitable" habitat in the action area. Completely unaddressed are, e.g., whether any listed species located downstream of the "project area" (i.e., within the "action area") have areas in the "action area" for the NPDES permit that are essential to their recovery, regardless of whether such areas are

[11] Petitioners assume the materials cited in this section will be provided by EPA as part of the agency's administrative record.

currently "suitable" or inhabited by listed species.[12]

In addition, in its BA OSM focused exclusively on *direct* effects – *i.e.*, those effects occurring as a result of impacts in the direct footprint of the mines and their related infrastructure. For example, the OSM BA only considered the potential direct effects to the Southwestern willow flycatcher habitat within the footprint of the "project area" – an area that is not described in the BA but is depicted on a map included in the document. *See* OSM BA at 6-2 to 6-5 (discussing effects to Southwestern willow flycatcher within the "project area"); *id.* at 2-2 (Figure 2-1) (Map of "Project Area").[13] The Final BA also focuses on impacts in areas occupied by listed species or critical habitat and the area of "Mining Operations," *see id.* at 6-5 (addressing potential effects to Mexican spotted owl), or the "Lease Area." *Id.* (considering effects to black-footed ferret). Completely ignored throughout the OSM BA – as indirect or interrelated effects or as part of the environmental baseline – are the effects of emissions of mercury and selenium from coal combustion at the Navajo Generating Station that will occur within 300 km of the mines.

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

[13] The draft permit's Fact Sheet expressly adopts this flawed approach. *See Fact Sheet* at 13 (stating that EPA has reached a "no effect" determination for listed species because "as evidenced by OSMRE's Biological Assessment for the Life-of-Mine permit, no threatened or endangered species are located in the *project area*") (emphasis added).

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The ESA's implementing regulations are clear and require a biological assessment to discuss the "effects of the action," which include both direct and indirect effects, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. 50 C.F.R. §402.02. Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur. "Interrelated actions" are those that are part of a larger action and depend on the larger action for their justification; 'interdependent actions' are those that have no independent utility apart from the action under consideration. *Id.* Under this regulatory scheme, it is clear that the effects of burning coal at the Navajo Generating Station must be considered as part of EPA's ESA section 7 consultation. Yet. the OSM BA does not consider these effects at all. Thus, it is unlawful for EPA to rely on its flawed analysis.

The "environmental baseline" must, for its part, include analysis of "the past and present impacts of all Federal, State, or private actions and other human activities in the action area." 50 C.F.R. § 402.02. Here, because emissions of air pollutants from the San Juan Generating Station and Four Corners Power Plant are affecting endangered fish in the San Juan River Basin, which is also within 300 km of the Black Mesa Project area, these plants' emissions should have been accounted for as part of the environmental baseline for the mines, and hence, the NPDES permit. The OSM BA omits consideration of these problems as well.

FWS has acknowledged that mercury and selenium contamination are of particular concern to the endangered fish species and to fish-eating birds along the San Juan River and that fish tissue samples exceed recommended mercury thresholds, putting

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the birds that eat them at risk for mercury toxicity. *See e.g. Draft Biological Opinion for the Desert Rock Energy Project, U.S. Bureau of Indian Affairs, Gallup, New Mexico* (Oct. 2009) ("Desert Rock BO"). Studies also show that diet items for Colorado pikeminnow, including small fish, speckled dace, and red shiners, exceed threshold levels of concern and compromise the species' ability to reproduce. *Id.* Continued coal burning at Navajo Generating Station, together with coal combustion at the San Juan Generating Station and the Four Corners Power Plant, will only exacerbate these effects.[14]

The purpose of a biological assessment is to determine, based on the "best available scientific ... data", 16 U.S.C. § 1536(a)(2), whether an action "may affect" listed species or critical habitat, and the "may affect" threshold is low. 51 Fed. Reg. 19926 (June 3, 1986) (the "may affect" threshold is a "low threshold" that is "easily triggered" and "broadly construed" to include "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character")(emphasis added). Given the elevated levels of mercury and selenium in endangered fish within the action area of the mines, the indirect effects of such emissions from the Navajo Generating Station, San Juan Generating Station, and Four Corners Power Plant clearly "may affect" – and indeed, are affecting and will continue to affect – these and other species, and therefore should have been considered. By adopting OSM's flawed effects analysis, EPA fails also to consider these emissions is a violation of the plain language of the ESA's implementing regulations. *Nat'l Wildlife Fed'n v. Nat'l Marine Fish. Serv.*, 481 F.3d 1224, 1235 (9th Cir. 2007) (compliance with the ESA's implementing regulations is "not optional" and is the only way to ensure that action agency's affirmative duties under section 7 are

[14] The Navajo Generating Station, San Juan Generating Station, and Four Corners Power Plant are some of the largest and highest-polluting coal-fired power plants in the United States.

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satisfied).

Third, the OSM BA fails to incorporate into the environmental baseline any acknowledgement or analysis of the ongoing effects of global warming that are already being observed in the action area. The OSM BA does not incorporate an analysis of the ongoing and projected global warming-related changes to vegetation, fire regimes, or water availability, despite the plethora of information about such impacts in the southwestern United States that was available at the time OSM was engaging in ESA section 7 consultation for the life-of-mine permit revision – and which is certainly available now, when EPA should be conducting its own ESA section 7 consultation for issuance of the NPDES permit.

Furthermore, despite being dated "November 2008," the Final BA does not even refer to many studies dated after 2006.[15] This is because the bulk of the ESA consultation history for OSM's life-of-mine permit revision occurred between May 2005 and March 2007. OSM only spent June through November 2008, when the OSM BA is dated – or, less than six months – focused on considering the effects of the life-of-mine permit revision to listed species and critical habitat, and even then, simply revised the BA

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[15] There are only three references, out of dozens listed in the References section of the Final EA, are dated after 2006, all of which are at least almost two years old. They are:

> BIOME Ecological and Wildlife Research (BIOME). 2008. *Final report 2007: wildlife monitoring, Black Mesa, Arizona.* Submitted to Peabody Western Coal Company, Black Mesa and Kayenta Mines.
>
> Roth, D. 2008. Personal communication by D. Roth, botanist, Navajo Natural Heritage Program, with Jean Charpentier, URS Corporation. June 25. 2008.
>
> U.S. Department of the Interior, Fish and Wildlife Service (FWS). 2008a. Coconino County Listed Species. Accessed online July 2008. http://www.fws.gov/southwest/es/arizona/Documents/CountyLists/Yuma.pdf.

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to omit discussion of certain aspects of the mines that have since been discontinued (such as the coal-slurry pipeline). Yet, numerous scientific studies and reports were released during 2007 through 2008 that document changing conditions due to climate change in the Southwest, and these should have been considered during the ESA consultation for the life-of-mine permit revision, but were not. These changing conditions, which are already occurring, include decreasing water availability and streamflows, and increasing temperatures and aridity. *See NRDC v. Kempthorne*. 506 F. Supp. 2d at 369 (citing *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1033 (9th Cir. 2001)) ("[a]t the very least, these studies suggest that climate change will be an 'important aspect of the problem' meriting analysis" during section 7 consultation); *cf. Greater Yellowstone Coal., et al. v. Servheen, et al.*, 9:07-cv-00134-DWM, slip op. at 26-29 (D. Mont. Sep. 21, 2009) (vacating rule delisting Yellowstone population of grizzly bears for failure to consider effects of decreasing whitebark pine due caused in part by climate change).[16]

Finally, even it could somehow be said that it is appropriate for EPA to rely on the OSM BA in this instance to comply with ESA procedural obligations, EPA still has not met its duty under section 7(a)(1), which "imposes a specific obligation upon all federal agencies to carry out programs to conserve each endangered and threatened species." *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1146 (11th Cir. 2008) (citing *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998) ("Given the plain language of the

[16] Indeed, the OSM BA only mentions the term "climate change" twice – both times, in connection with a discussion about the anticipated effects to Navajo sedge. *See* Final BA at 6-15 (Bates # 3-01-01-001119). But even then, the OSM BA fails to actually consider what the converging effects of the Project and global warming to Navajo sedge would actually be.

statute and its legislative history, we conclude that Congress intended to impose an affirmative duty on each federal agency to conserve each of the species listed pursuant to [16 U.S.C.] § 1533. In order to achieve this objective, the agencies must consult with [the] FWS as to each of the listed species, not just undertake a generalized consultation."). While EPA has some discretion to determine how it will meet section 7(a)(1)'s affirmative duty, "[t]otal inaction is not allowed." *Id.* Yet, here EPA totally avoids its duty to comply with section 7(a)(1), an error which is corollary to its decision to simply adopt OSM's flawed BA for its own purposes. *See id.* at 1147 (citing *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1417 (9th Cir. Nev. 1990)). At the very least, section 7(a)(1) requires EPA to consult with FWS to ensure that OSM's BA is adequate for this purpose, up-to-date, will significantly contribute to the recovery as well as the survival of listed species, and that nothing more will be required to conserve listed species affected by discharges. *See Pyramid Lake*, 898 F.2d at 1417 (in exercising their duty to conserve, non-Interior Department agencies must do so in consultation with the Secretary").

V. Conclusion

For the reasons set forward above, Petitioners request that EPA's NPDES permit be vacated and remanded back to the agency.

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RESPECTFULLY SUBMITTED on Monday, November 1, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 1, 2010 he caused a copy of the foregoing to be served by fax or email and overnight mail on:

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