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# Energy Minerals Law Center

ENVIRONMENTAL APPEALS BOARD

<b>To:</b> Environmental Appeals Board	<b>Fax:</b> 202-233-0121
<b>From:</b> Brad A. Bartlett 	<b>Date:</b> 10/18/2010
<b>Re:</b> Petition for Review	<b>Pages:</b> 33+

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ENVIR. APPEALS BOARD

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

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

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

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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 submits this petition for review of the U.S. Environmental Protection Agency's ("EPA's") NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES").<sup>1</sup> 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").

The permit only covers a limited number of outfalls and does not address or analyze possible discharges from all of the over 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"<sup>2</sup> and is being issued concurrent with the Federal Office of Surface

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<sup>1</sup> 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).

<sup>2</sup> 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

Mining Reclamation and Enforcement's ("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.

For the reasons discussed more fully below, including EPA's representation that the agency's administrative record will be available in "1 to 2 weeks." Petitioners request a 30-day extension of time until November 18, 2010, to file a supplemental brief with a complete and detailed description of each objection to the NPDES permit and the factual and legal justifications for such objections.<sup>3</sup> Beginning on October 11, 2010, Petitioners attempted to

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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.

<sup>3</sup> Petitioners request this extension of time to submit "specific information" (in this case, EPA's administrative record) to "demonstrate why the permitting authority's response to [Petitioners'] objections warrants review," in order to fully comply with the Board's filing requirements as outlined in the EAB Practice Manual. EAB Practice Manual at 33.

confer on multiple occasions with EPA Region 9, Regional Counsel Julia Jackson and Samuel Brown via multiple voice and electronic mails. EPA did not provide a timely response to and position on Petitioners' request for a 30-day extension of time to file a supplemental brief.

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

Each Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. In particular, organizational Petitioners have standing to petition for review of the permit decision because each organization participated in the public comment period. See 40 C.F.R. §124.19(a). Petitioners filed written comments during the public comment period. See, Comment Letter (Exh. 1). Members of petitioners' organizations also participated in public hearing on the NPDES. The issues raised by Petitioners herein were raised with EPA both orally and in writing during the public comment period. Consequently, the Board has jurisdiction to hear Petitioners' timely request for review. See 40 C.F.R. §71.11(g).

## **III. STATEMENT OF FACTS**

EPA issued a NPDES permit for the mine complex in 2009 and later, after appeal to the EAB by Petitioners, voluntarily withdrew the permit on November 20, 2009 to provide for additional public review and comment. EPA's NPDES permit was re-issued in draft form on January 20, 2010 whereby "EPA modified the permit several times to incorporate new outfalls and eliminated expired outfalls due to the ongoing mining activities." See *Proposed Permit Fact Sheet* (January 2010) at 1. During the comment period, Petitioners timely submitted written comments on April 27, 2010. Members of Petitioners' organizations also participated in public hearings in Kaytenta, Arizona and February 24, 2010 in Kykostmovi, Arizona. On September 16, 2010, EPA issued the NPDES permit to Peabody.

EPA's NPDES permit authorizes continued 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 are already 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.*

Additionally, EPA's issuance of a NPDES permit to Peabody relies, in whole or in part, on a, now vacated, "technical review" and approval by the Federal Office of Surface Mining Control and Enforcement ("OSM") of Peabody's *Sediment Control Plan*. OSM's authorization would have allowed Peabody to eliminate numeric effluent limitations at the wastewater discharge points and replace these limitations with Best Management Practices ("BMPs") implemented via a *Sediment Control Plan*. However, OSM's authorization, which was part of a Life of Mine operating permit amendment, was vacated on January 5, 2010 by an Administrative Law Judge.

Finally, and as EPA was in the process of renewing an NPDES for the Kayenta and Black Mesa Mines, OSM was in the process of renewing an operating permit for Peabody's Kayenta Mine. As of the date of filing of this *Petition for Review*, OSM has not approved permit a renewal for the Kayenta Mine and no federal agency has initiated a NEPA process which is required for these connected "major federal actions."

#### IV. ISSUES PRESENTED FOR REVIEW

This petition for review is necessarily limited to three pieces of information (final permit, fact sheet and response to comments) available from the agency at the date of filing and reflects the issues that were raised in public comments on the draft permit. The information available to Petitioners provides grounds for Board review. However, Petitioners reserve the right to supplement this petition once Petitioners receive and are able to review the administrative record. The issues justifying review and remand of this permit include:

*Failure to comply with the Clean Water Act, 33 U.S.C. § 1251, et seq. ("CWA")*

(1) EPA's failure to first identify whether the receiving waterbodies are compromised despite permit-based limits on point-source pollutant discharges, and if so, without first ensuring that Total Maximum Daily Loads ("TMDLs") are established for the tribal land portion of the Little Colorado River Watershed, and in particular, Moenkopi Wash Drainage and Dinnebito Wash Drainage. Comment Letter (Exh. 1) at 3-6.

(2) EPA's failure to require monitoring of discharge from all 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) 19-20.

(3) EPA's failure to provide effluent limits on Peabody's discharge for anything but suspended solids, iron, and pH. NPDES Permit at 3.

(4) EPA's failure to enforce Water Quality Standards ("WQS") and require Peabody to address and terminate ongoing WQS exceedances prior to permit issuance. See Proposed NPDES permit at 9-11 (identifying 21 impoundments with WQS exceedances).

(5) EPA's failure 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.

(6) EPA's failure to properly determine that discharges from Peabody's 111 outfalls and 230 impoundments do not present a "reasonable potential" to cause or contribute to an exceedence of water quality standards based on actual monitoring data from all outfalls and impoundments. Comment Letter (Exh. 1) at 7.

(7) EPA's reliance in whole or in part on OSM's, now vacated, "technical review" of Peabody's *Sediment Control Plan* for purposes of approval of the NPDES Permit is an abuse of discretion. Comment Letter (Exh. 1) at 10.

Failure to comply with the National Environmental Policy Act 42 U.S.C. § 4321, et seq. ("NEPA")

(8) EPA's failure to analyze the impacts of adding and eliminating new discharges to Peabody's NPDES permit in an environmental impact statement ("EIS") or environmental assessment ("EA"). Fact Sheet at 2 (January 2010) ("several new outfall locations have been added and several have been eliminated to reflect changes in ongoing mining activities.").<sup>4</sup> 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. Even if a lawful NEPA document had been prepared in 2000, changed circumstances prevent reliance on determinations made in 2000.

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<sup>4</sup> Neither the draft permit nor the fact sheet identifies what outfalls have been added or eliminated.



(9) EPA's permit also "incorporates new regulatory requirements for the Western Alkaline Coal Mining Subcategory for reclamation areas that were promulgated in January 2002..." *Id.* EPA's permit specifically covers "new sources" as defined by Section 306 of the CWA, 33 U.S.C. § 1316, (*i.e.*, new outfalls) which should have been analyzed under NEPA. 33 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).

(10) 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;<sup>5</sup> OSM's "technical review" of Peabody's Sediment Control; and/or, any and all 404 permitting by the U.S. Army Corps of Engineers.

Failure to Comply with the Endangered Species Act, 16 U.S.C. §§1531, et seq. ("ESA")

(11) EPA's failure to ensure through consultation with U.S. Fish and Wildlife Service ("FWS") that no jeopardy to the continued existence of threatened and endangered species would occur or that adverse modification of their critical habitat would occur and as required by Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. §1536(a)(2). Comment Letter (Exh. 1) at 11-17.

Failure to Comply with Other Federal Statutes, Regulations and Executive Orders

(12) EPA's failure to make public during the draft permitting stage the monitoring data upon which many of the assertions in Peabody's application rely. Rather than data that shows analyses and trends over the decades that have been monitored, Peabody's application and data

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<sup>5</sup> A highly incomplete version of the permit application is available on OSM's website: <http://www.wrcc.osmre.gov/>

made publicly available from EPA include only summaries of the data and only for sites that have had exceedences. The absence of a complete monitoring data precludes the public (and by extension the agency) from forming a defensible conclusion on the adequacy of the permit. Comment Letter (Exh. 1) at 2-3.

(13) EPA's failure to hold meaningful public hearings in the impacted community. EPA's hearings were held in February during a time when the Navajo Nation was under a state of emergency due to winter weather conditions and during the month when the Hopis traditionally undertake their religious ceremonies. Additionally, agency officials from the Corps, OSM and FWS were not present at the hearings and were therefore unable to answer any related questions. Comment Letter (Exh. 1) at 1-2.

#### V. MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEF

Petitioners hereby move for a 30-day extension of time, until November 18, 2010, to file a supplemental brief in support of their Petition for Review. In general, the Board will grant reasonable extensions of time for good cause shown. The Board routinely grants such extensions. *See In re: Peabody Western Coal Company Black Mesa Permit*, Order Granting Extension of Time to File Response (September 29, 2009)(granting a 30-day extension of time based on voluminous records and unavailability of experts); *In re Northern Michigan University*, Order Granting Motion for Extension of Time to File Response (July 10, 2008)(granting a 20 day extension where Michigan requested "additional time to evaluate and respond to the petition due to the number and complexity of legal arguments..."; *In re Deseret Power Electric Cooperative*, Order Granting Extension of Time (Feb. 12, 2008); *In re ConocoPhillips Co.*, Order (Oct. 1, 2007).

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

In this instance, a 30-day extension of time is reasonable and appropriate. 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 many 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. 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)(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). This issue has not been remedied by the agency and for purposes of preparing the present appeal.

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

Petitioners exercised due diligence and contacted both EPA staff and regional counsel to determine when EPA anticipated filing of the administrative record. Based on the email representation of Mr. John Tinger, EPA Region 8 NPDES Permits Manager dated October 13,

2010, EPA state that the Administrative Record for the Black Mesa Complex NPDES will be available and submitted to both the Board and Petitioners within "a week or two" of filing of the present *Petition for Review*.

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

For the reasons set forward above, Petitioners have good cause for an extension of time and the Board should grant Petitioners' request for a 30-day extension of time, until November 18, 2010 to file a supplemental brief in support of their Petition.

RESPECTFULLY SUBMITTED on Monday, October 18, 2010.

  
s/Brad A. Bartlett

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Travis Stills, CO Atty #27509  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 18, 2010 he caused a copy of the foregoing to be served by fax and overnight mail on:

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Environmental Appeals Board  
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Washington, D.C. 20460  
Fax: (202) 233-0121

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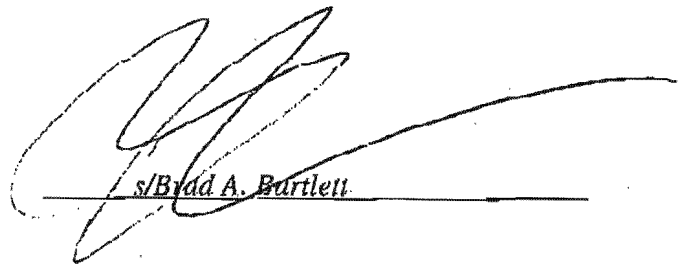
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s/Brad A. Bartlett

# **EXHIBIT 1**



## Energy Minerals Law Center

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April 27, 2010

**BY CERTIFIED MAIL RETURN RECEIPT REQUESTED  
BY ELECTRONIC MAIL**

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NPDES Permits Branch  
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**Re: Comments on Proposed NPDES Permit No. NN0022179 (January 2010)**

Dear Mr. Tinger:

On behalf of *Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity* and *Sierra Club* (hereinafter "*BMWC*"), the undersigned attorney(s) respectfully submit these comments on the proposed *Peabody Western Coal Company-Black Mesa Complex NPDES Permit No. NN0022179* (January 2010)(hereinafter "*NPDES Permit*").

**I. Request for Additional Public Hearings and A Community Workshop**

At the outset, we would like to thank the U.S. Environmental Protection Agency ("EPA") for holding two public hearings on the NPDES Permit. However, we are extremely disappointed that EPA elected to hold such hearings in February during a time when the Navajo Nation was under a state of emergency due to winter weather conditions and during the month when the Hopis traditionally undertake their religious ceremonies. Not only did we alert you to these conditions prior to the hearings, most if not all of the people who were able to attend the hearings mentioned the weather as a cause for the low turnout and decreased public participation.

Additionally, and although *BMWC* had specifically requested it in prior comments to the agency, the U.S. Army Corp of Engineers, the Federal Office of Surface Mining Control and Enforcement ("OSM") and U.S. Fish and Wildlife Service were not present at the hearings and were therefore unable to answer any related questions—such as how EPA's permitting decision is impacted by remand of the OSM's Life-of-Mine permit by Administrative Law Judge Holt.

Further, and as directly requested by *BMWC* and as suggested by the agency during our face-to-face meeting in San Francisco, California, EPA should have held additional hearings or a community workshop on the proposed permit and prior to the expiration of the deadline for public comment. Such actions would have gone a long way toward broadening community



understanding of EPA's permitting procedures and EPA's compliance with environmental justice requirements.

*BMWC* again requests an additional public hearing and/or community workshop be held within sixty (60) days of receipt of this letter to address the very serious and substantial issues and concerns raised herein.

Many of the people directly impacted by EPA's permit issuance were unable to make the public hearings which EPA knowingly scheduled in remote parts of the reservation in the middle of winter during a time of ceremony. Here, many impacted Navajo and Hopi tribal members, if they speak English at all, speak English primarily as a second language. Additionally, many Native American communities in the Black Mesa area bear a disproportionate share of Peabody's ongoing and potentially permanent discharge of numerous pollutants onto tribal lands. These communities often lack the political agency and economic leverage required for effective participation in environmental decision-making processes. Further, EPA owes a trust obligation to indigenous people and therefore needs to ensure that tribal people and lands are not being disproportionately impacted by Peabody's massive mining operation and ongoing discharge of pollutants.

EPA's public hearings were not meaningful and were carried out in such a manner so as to exclude (rather than maximize) public—and in particular tribal member—participation. Executive Order 12898 (Feb. 11, 1994) ("EO 12898") requires that each federal agency must: (1) identify and address the disproportionately high and adverse human health, environmental, social, and economic effects of agency programs and policies on communities of color and low-income; and (2) develop policies, programs, procedures, and activities to ensure that these specific impacted communities are meaningfully involved in environmental decision-making. 59 Fed. Reg. 7629 (Feb. 16, 1994). *BMWC* respectfully requests that EPA comply with these procedures and provide for more meaningful community involvement by, at a minimum, holding additional hearings and a community workshop.

## II. Inadequacies in the Agency's Administrative Record

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 many 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. 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.

### III. Clean Water Act Compliance

#### A. TMDL's Are Not Established for Moenkopi and Dinnebito Drainages

It is unlawful for EPA to issue a NPDES Permit for new sources unless and until Water Quality Limited Segments ("WQLS") and Total Maximum Daily Loads ("TMDLs") are established for Moenkopi Wash Drainage and Dinnebito Wash Drainage.

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

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

1. Each state (or tribes who have received "Treatment as a State" status) has the responsibility in the first instance to identify waterbodies that are compromised despite permit-based limits on point-source pollutant discharges. 33 U.S.C. § 1313(d).
2. If a waterbody is not in violation of a water quality standard, NPDES permits may be issued so long as they do not violate effluent limits. 33 U.S.C. § 1342(a)(1).
3. If a waterbody is in violation of a water quality standard despite effluent limits, the State (or Tribe) must identify the waterbody as impaired on its § 303(d) list and establish a TMDL for it. 33 U.S.C. § 1313(d).
4. Where the State (or Tribe) has established a final TMDL, it may issue an NPDES permit so long as the applicant can show that the TMDL provides room for the additional discharge and establishes compliance schedules for current permit holders to meet the water quality standard. 40 C.F.R. § 122.4(i). Otherwise, no NPDES permits may be issued which allow new or additional discharges into the impaired waterbody. *Id.*

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

For these degraded waterbodies, the state or tribe must develop and implement a "total maximum daily load" ("TMDL") to restore water quality. *See* 33 U.S.C. § 1313(d)(1)(C) (explaining TMDLs). The TMDL process includes identifying sources of pollution that have caused or contributed to the degraded water quality, then establishing waste load allocations (for point sources of pollution) and load allocations (for nonpoint sources of pollution), for those sources

which have caused or contributed to the degraded water. 40 C.F.R. § 130.2(g) and (h). The final TMDL represents a "pie chart" of the pollution sources and their respective pollutant allocations which, if properly adhered to, is intended to result in restoration of the stream to water quality standards; it reflects an impaired waterbody's capacity to tolerate point source, nonpoint source, and natural background pollution, with a margin of error, while still meeting state or tribal water quality standards.

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, EPA's Administrative Record demonstrates that 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").<sup>1</sup> 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.

*BMWC* notes 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).

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

*BMWC's* request 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

<sup>1</sup> Available on AZ DEQ's website:

<http://www.azdeq.gov/environ/water/assessment/download/2008/lg.pdf>.

<sup>2</sup> According to EPA, "several new outfall locations have been added..." Fact Sheet at 2 (January 2010)(emphasis supplied). The Fact Sheet does not identify the additional outfalls.

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.

#### **B. CWA Section 404 permitting**

EPA seeks to issue the NPDES permit for discharges or outfalls from earthen impoundments with no indication that such impoundments have not been properly permitted in the first instance by the Army Corps of Engineers ("Corps") under Section 404 of the CWA. 33 U.S.C. § 1344. It is impossible to discern from EPA's administrative record which impoundments were subject to 404 permitting. When contacted, the head of EPA's permitting office, David Smith, claimed that he "was personally unfamiliar with the 404 permitting history at the site and that I did not personally recall seeing any 404 permitting issues raised during the period I managed EPA Region 9's Wetlands Office." No other information has been provided by the EPA regarding this matter.

Additionally, and because EPA has acknowledged that "[t]he facility may also require authorization under a separate permit under the authority of Section 404 of the CWA for the discharge of fill material to a water of the U.S.," Comment Response Document (August 3, 2009) at 8, *BMWC* requests that EPA: (1) identify all impoundments which will be subject to 404 permitting under the terms and conditions of the current NPDES permit renewal; (2) identify all of the impoundments (and outfalls) which are or have been subject to 404 permitting; and, (3) identify and provide any and all previously issued or to be issued 404 permits for inclusion in EPA's administrative record. Additionally, *BMWC* requests that EPA identify and any and all requirements and design parameters that may be necessary to implement Section 404 of the CWA and as they relate to the 112 outfalls now covered by EPA's NPDES permit.

#### **C. All Outlets Covered by the NPDES Permit Must to be Monitored**

EPA must require monitoring of all impoundments (or outlets) at the mine and covered by the NPDES Permit. According to EPA's permit, there are over 230 impoundments that exist on the Black Mesa/Kayenta Complex and which are covered by the proposed permit. EPA's Proposed NPDES Permit at 8.

In this case, *PWCC* argues without legal authority that, because the operation at Black Mesa is huge and results in many hundreds of individual outlets *PWCC* (and by extension EPA) can monitor less than all of the outlets. Only a small percentage of *PWCC*'s outlets are monitored and the results of monitoring this small subset is asserted as somehow indicative or representative of the total population of outlets.

First, designated outlets cannot legitimately be considered in compliance with the CWA without actual monitoring data. *BMWC* finds 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. Second, there is no discussion or rationalization for choosing data from one monitored outlet

over another for purposes of monitoring. Third, there is no indication that there is a feed-back or spot checking procedure to ensure the adequacy and appropriateness of the selected monitoring points or that all problematic monitoring locations are being evaluated. Finally, 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.

In sum, EPA must require monitoring of all outlets covered by the proposed NPDES permit. Additionally, EPA should require PWCC to recover at least 1-years worth of data for all outlets prior to issuance of an NPDES permit renewal.

#### D. EPA must Enforce WQS and Address Exceedences

For outlets and seeps subject to monitoring and that have exceedences of water quality standards ("WQS"), EPA must enforce WQS standards and require PWCC to address the exceedences. See Proposed NPDES permit at 9-11 (identifying 21 impoundments with exceedences). 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. §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").<sup>3</sup>

Additionally, EPA should reject PWCC's extraordinary request for a waiver of the WQS standards so that the outlet can be considered in compliance. *BMWC* is aware of no legal basis for EPA to grant such a request.

#### E. Compliance with New EPA Guidance

New EPA guidance (April 1, 2010) provides instructions for improving EPA's of surface coal mining operations in Appalachian coal mines.<sup>4</sup> As this guidance is equally applicable to the Black Mesa mine, *BMWC* asks EPA to use this new guidance in permitting for Black Mesa. Among other things, EPA should conduct a "reasonable potential analysis" of the permit's potential to contribute to narrative or numeric water quality standards to ensure the permit complies with the CWA.

<sup>3</sup> Additionally, the permit application and some of the exchanges between the applicant and the agency establish that maintenance of leaking impoundments (of questionable design criteria and 404 permitting status) is being advanced as the preferred means to address problematic releases of polluted water. In one unusually straight forward example, and in response to a query by the agency about lining a pond to stop problem seeps below the impoundment, the idea was dismissed by the PWCC because doing so would result in substantial and frequent outlet discharges that do not currently occur. As discussed in more detail below, and among other things, EPA should use the NEPA process to address appropriate corrective enforcement measures to address these issues.

<sup>4</sup> [http://www.epa.gov/wetlands/guidance/pdf/appalachian\\_mtntop\\_mining\\_summary.pdf](http://www.epa.gov/wetlands/guidance/pdf/appalachian_mtntop_mining_summary.pdf)

#### IV. NEPA Compliance

EPA must 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, *BMWC* requests that EPA analyze the impacts of the NPDES Permit in an Environmental Impact Statement ("EIS") or, at a minimum, an Environmental Assessment ("EA").

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 the first NPDES permit renewal. 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).<sup>5</sup> 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" 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 an 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;<sup>6</sup> 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 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

<sup>5</sup> Neither the draft permit nor the fact sheet identifies what outfalls have been added or eliminated. EPA must identify with specificity these changes.

<sup>6</sup> 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/>



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.

Any NEPA process should include adequate public notice, comment, and participation pursuant to NEPA's implementing regulations at 40 C.F.R. §1506.6.

#### IV. EPA Cannot Rely on OSM's Technical Review Because of Remand and Vacation of OSM's LOM Permit

Here, it is unlawful for EPA to rely on OSM's "technical review" of PWCC's Sediment Control Plan for purposes of approval of the NPDES Permit. According to EPA's Fact Sheet at 5, and based on a Memorandum of Understanding between EPA and OSM, EPA is relying 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 Winterring, OSMRE to Gary Wendt, PWCC." *Id.*

PWCC 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))." June 16, 2009 Letter from Dennis Winterring, OSM to Gary Wendt, Peabody. OSM approved PWCC'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 Miner Permit Revision").

As EPA is aware Administrative Law Judge Holt issued an *Order* on January 5, 2010 vacating the underlying Life of Mine ("LOM") permit from OSM. OSM's LOM permit allowed Peabody to operate the Black Mesa and Kayenta mines jointly as the Black Mesa Project (*a.k.a.* Black Mesa Complex). Because the LOM is now vacated, OSM's approval of a "minor revision" to the LOM permit should also be considered vacated.<sup>7</sup> Any other interpretation would be inconsistent with Judge's Holt's *Order*.

Additionally, and as *BMWC* has already requested and because there is no Black Mesa Complex, EPA should temporarily withdraw the proposed NPDES Permit for the Black Mesa Complex and reissue any proposed permit at some future date in accordance with Judge Holt's findings and the existing *status quo* (*i.e.* treating the mines as separate entities for permitting purposes).

In sum, it is unlawful for EPA to rely on OSM's "technical review" and approval of a "minor revision" of the LOM and for purposes of approval of the NPDES Permit. At a minimum, EPA and OSM should use the NEPA process to evaluate any "technical review" and approval of the permittee's Sediment Control Plan and issuance of any proposed NPDES permit in accordance the existing *status quo* (*i.e.* treating the mines as separate entities for permitting purposes).

<sup>7</sup> *BMWC* has copied the Solicitor's office on these comments and will be separately following up with the Solicitor on this matter.

## V. EPA Cannot Rely on OSM's Biological Assessment for ESA Compliance.

### A. The Endangered Species Act

EPA 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:

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. (FAB Sep. 24, 2009) at 36 (citing 50 C.F.R. § 402.14(a); *Sierra Club v. Bubbitt*, 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).<sup>8</sup>

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.

**B. EPA Must 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. Indeed, there is nothing in the ESA's regulations, statutory

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<sup>8</sup> 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).

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.

First, OSM's BA 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 currently "suitable" or inhabited by listed species.

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").<sup>10</sup> The Final BA also focuses on impacts in areas occupied by listed species

<sup>9</sup> 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.*

<sup>10</sup> 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).

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.

In evaluating the effects of the proposed Desert Rock Energy Project, a coal-fired power plant that is proposed to be sited on the Navajo Nation within New Mexico, the FWS determined that three hundred kilometers (300 km) is the appropriate distance for properly evaluating the effects of air emissions from major sources like coal-fired power plants on federally-listed species. FWS, Attachment A (Ex. 3) at 4. In this case, the desert tortoise, southwestern willow flycatcher, Colorado pikeminnow, and razorback sucker, as well as other listed species all occur within 300 km the Navajo Generating Station, as well as the Black Mesa Project area, and therefore are potentially affected by mercury and selenium emissions. *See* Center for Biological Diversity Maps. Some species, including Colorado pikeminnow, razorback sucker, humpback chub, Little Colorado spinedace, Mexican spotted owl, and Southwestern willow flycatcher, occur within 300 km of the San Juan Generating Station and Four Corners Power Plant as well. *See id.* There is also critical habitat for the desert tortoise, Colorado pikeminnow, razorback sucker, humpback chub, Little Colorado spinedace, southwestern willow flycatcher, Mexican spotted owl, and Navajo sedge within 300 km of the Black Mesa Project area.

Coal-fired power plants are the largest source of mercury emissions in the United States. Mercury levels in the Four Corners region are already high and adversely affecting the Colorado pikeminnow and razorback sucker. In fact, the Navajo Generating Station, which is within the 300km Black Mesa Project area, is a large source of mercury and selenium, particularly in combination with the San Juan Generating Station and Four Corners Power Plant. *See* EPA's Emissions of Mercury by Plant – 1999 (Ex. 1).<sup>11</sup>

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 CFR 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. 50 CFR 402.02. Under this regulatory scheme, it is clear that the

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<sup>11</sup> OSM does not define the Project's "action area" in its BA for the life-of-mine permit revision for the mines. Had OSM and FWS identified the "action area" for the life-of-mine permit, such a description would have been included in the Final BA. *See* 50 C.F.R. § 402.02 ("biological assessment" contains, by definition, "the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat *that may be present in the action area* and the evaluation of potential effects of the action on such species and habitat") (emphasis added). The fact that the Final BA contains no description of the action area simply confirms that the agencies never considered the effects to listed species and critical habitat, and EPA has not remedied this defect by adopting OSM's BA.

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 the birds that eat them at risk for mercury toxicity. Biological Assessment for the Proposed Desert Rock Energy Project (Rev. Oct. 2007) ("Desert Rock BA") at 27. 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.<sup>12</sup>

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 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

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<sup>12</sup> 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.

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.<sup>13</sup> 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 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).<sup>14</sup>

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 statute and its legislative history, we conclude that

<sup>13</sup> There are only three references, out of dozens listed in the References section of the Final BA, 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>.

<sup>14</sup> 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.

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”).

For all of these reasons, EPA has failed to comply with its affirmative duties under ESA section 7 in connection with its issuance of the NPDES permit.

## V. Conclusion

In summary, *BMWC* requests that EPA re-notice the draft NPDES permit, hold additional hearings and a community workshop and provide to *BMWC* within ten (10) business days all of the supplemental information requested and identified herein as part of a revised Administrative Record. Additionally, and as a substantive matter, EPA must comply with both the Clean Water Act and Endangered Species Act in permit issuance. As a procedural and analytic matter, EPA must additionally comply with the requirements of the National Environmental Policy Act and develop an EIS or EA.

If you have any comments or questions regarding this request, please do not hesitate to contact me at (970) 247-9334 or [brad.bartlett@frontier.net](mailto:brad.bartlett@frontier.net).

Respectfully submitted,

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