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

In re: Dry Creek Rancheria Wastewater Treatment Plant NPDES Permit No. CA 0005241	NPDES Appeal Nos. 07-14 & 07-15 **EPA Region IX's Response to Petitions for Review**

Region IX of the United States Environmental Protection Agency ("Region") submits the following response to the Petitions for Review of NPDES Permit No. CA 0005241 ("Final Permit" or "Permit") filed by the County of Sonoma, California ("County") and by the Alexander Valley Association ("AVA") (collectively, the "Petitions" or "Petitioners").[1] The Final Permit authorizes the Dry Creek Rancheria Band of Pomo Indians ("Permittee" or "Tribe") to discharge treated wastewater from the Dry Creek Rancheria Wastewater Treatment Plant ("WWTP" or "Facility") to an unnamed tributary to the Russian River under the National Pollutant Discharge Elimination System ("NPDES").

Petitioner AVA argues that the Region committed reviewable error by 1) "failing to prepare an environmental impact statement pursuant to the National Environmental Policy Act ["NEPA"]"; 2) "failing to require a third-party enforcement mechanism as a condition of the permit"; 3) "failing to inquire, disclose, or analyze the Permittee's proposal to utilize

[1] At the Petitioners' requests, the Environmental Appeals Board has granted a number of extensions of time for the Region to file its response in this matter. The purpose of the extensions was to allow the Petitioners and the Permittee to continue their complex settlement discussions. The most recent Order from the Environmental Appeals Board (Fifth Order Granting Extension of Time, dated December 18, 2007) established February 22, 2008, as the due date for the Region's response.

an unidentified 12 acres of land located off the Rancheria for a spray field in violation of the Tribe's Class III Gaming Compact and the federal Indian Gaming Regulatory Act"; and 4) "by issuing or omitting permit conditions that rely on clearly erroneous findings of facts and conclusions of law, and by failing to adequately respond to comments on the Proposed Permit."[2] Petitioner Sonoma County argues that 1) the Region "fail[ed] to set specific Permit limitations on summertime discharges"; 2) the Region provided "brief and conclusory responses to comments regarding summertime discharges"; 3) the Region "should have recirculated a revised proposed permit after it replaced Stream A1 with a summertime irrigation plan"; 4) the Region "fail[ed] to limit discharges to the Plant's maximum treatment capacity"; 5) the Region provided only a "brief response to comments requesting a NEPA analysis"; and 6) the Region "fail[ed] to impose appropriate effluent limitations for electrical connectivity and total dissolved solids."[3]

For the reasons stated herein, the Environmental Appeals Board ("EAB" or "Board") should deny the Petitions, because Petitioners have not satisfied the requirements of 40 C.F.R. § 124.19 for obtaining review.

I. Factual and Statutory Background

A. Background

The Dry Creek Rancheria is located on Highway 128 in Sonoma County, California near the City of Geyserville.[4] The approximately 75-acre Rancheria has been home to the

[2] AVA Petition at 9.
[3] County Petition at 13.
[4] Administrative Record ("AR") at 37 (Final Statement of Basis at 1).

Tribe for approximately a century.[5] The Tribe operates the River Rock Casino on the Rancheria. To serve the casino, the Tribe constructed a WWTP in 2003.[6] The Tribe has been land-applying (through landscape irrigation or spray-field irrigation) or reusing (e.g., through toilet flushing) all of its treated wastewater effluent,[7] so the Tribe was not required to secure an NPDES permit for its current operations.

B. Permit Application, Review, and Proposal

In contemplation of expanding its casino, the Tribe applied to the Region on February 17, 2005 for a NPDES permit to discharge tertiary treated wastewater.[8]

The Clean Water Act ("CWA") generally prohibits the discharge of pollutants to waters of the United States without a NPDES permit. CWA §§ 301, 402; 33 U.S.C. §§ 1311, 1342. NPDES permits are the mechanism used to implement technology-based and water quality-based effluent limits and other CWA requirements, including monitoring and reporting. A permitting agency may not issue an NPDES permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." ["WQR"]. 40 C.F.R. § 122.4(d). Applicable WQR include limitations necessary to achieve water quality standards ("WQS") established by States and approved by EPA pursuant to CWA § 303, 33 U.S.C. § 1313, including narrative criteria for water

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[5] Dry Creek Rancheria Band of Pomo Indians, Dry Creek Tribe, at http://www.riverrockcasino.com/pomo.html. The Tribe's original territory is now submerged under Sonoma Lake. Id.

[6] AR at 37 (Final Statement of Basis at 1). Its average daily flow rate was 40,000 gpd in 2005. Id.

[7] AR at 37 (Final Statement of Basis at 1).

The term "land application" includes use of irrigation and sprayfields.

[8] AR at 170 (NPDES Permit Application and Wastewater Engineering Report for the Dry Creek Rancheria Project ("Permit Application") (Feb., 2005) at 3 (Form 3510-2A).

quality.[9] See 40 C.F.R. § 122.44(d)(1). EPA's authority in the NPDES permitting process is strictly limited to ensuring that the permit meets CWA requirements. See NRDC v. EPA, 859 F.2d 156, 169-70 (D.C. Cir. 1988) ("EPA can properly take only those actions authorized by the CWA—allowing, prohibiting, or conditioning the pollutant discharge"); see also NRDC v. EPA, 822 F.2d 104, 129 (D.C. Cir. 1987).

The Region has jurisdiction to issue the Permit to the Dry Creek Rancheria under the authority of 40 C.F.R. § 123.1(h), which authorizes EPA to administer the NPDES program on "Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands."[10] The Facility is located on "Indian lands" for purposes of 40 C.F.R. § 123.1(h) because the Facility is located within an Indian reservation.[11]

The Tribe does not currently have its own water quality standards. In this instance, consistent with 40 C.F.R. §§122.4 and 122.44(d), the Region developed water quality-based effluent limitations necessary to achieve the federal water quality standards found in the California Toxics Rule as codified in 40 C.F.R § 131.38, and the State of California's federally-approved water quality standards found in the Basin Plan for the Regional Water Quality Control Board for the North Coast Region ("RB1 Basin Plan"), both of which are applicable to waters downstream of Tribal boundaries.

[9] State certification under CWA § 401(a)(1) that the discharge will meet applicable water standards is not relevant to this case, since the discharge does not originate on State lands. 33 U.S.C. § 1341.
[10] See AR at 82-83 (Response to Comments at 26-27). The State of California has not demonstrated that it has authority to regulate NPDES activity on the Dry Creek Rancheria, and EPA has not approved the Tribe to implement the NPDES program.
[11] See AR at 82-83 (Response to Comments at 26-27).

The Region reviewed the Tribe's application and determined it was incomplete on May 27, 2005.[12] The Region found that the Tribe's revised application of June 30, 2005 was complete.[13]

Prior to proposing a permit for the Facility, the Region consulted with the National Oceanic & Atmospheric Administration Fisheries Service ("NOAA Fisheries") under § 7(a) of the Endangered Species Act ("ESA").[14] 15 U.S.C. § 1536. NOAA Fisheries concurred with the Region that there are no listed threatened or endangered species or their critical habitats under NOAA Fisheries jurisdiction that are likely to be adversely affected by the Permit.[15]

The Region proposed the Permit on June 29, 2006.[16] The WWTP was projected to have an average annual flow of 112,000 gallons per day ("gpd").[17] Despite allowing discharges to surface waters, the primary means for disposing of effluent under the Proposed Permit was reuse and land application on-site. The Proposed Permit required the Tribe to "minimize the discharge of advanced treated wastewater effluent to surface waters

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[12] AR at 340 (Letter from Doug Eberhardt, Chief, CWA Standards and Permits Office, EPA Region IX, to Tom Keegan, Environmental Director, Dry Creek Rancheria (May 27, 2005)) (identifying eight specific items that the Tribe needed to give the Region to supplement its application).

[13] See AR at 342 (Dry Creek Rancheria, NPDES Permit Application Forms 2A and 2S for the Dry Creek Rancheria Project (Jul., 2005) ("Supplement to Application")).

[14] AR at 826 (Letter from Doug Eberhardt, EPA Region IX, to Dick Butler, Supervisor, NOAA Fisheries (Apr. 18, 2006) ("Request for Concurrence")).

[15] AR at 823 (Letter from Rodney McInnis, Regional Administrator, NOAA Fisheries Southwest Region to Doug Eberhardt, EPA Region IX) ("NOAA Concurrence Letter"). As explained below in Section III.C.2., the Region did not consult with the U.S. Fish and Wildlife Service because the Region determined that its proposed action would have no effect on listed terrestrial species.

[16] AR at 122 (Proposed Permit); AR at 461 (Region IX, Notice of Proposed Action and Public Hearing, SANTA ROSA PRESS DEMOCRAT (Jun. 29, 2006)).

[17] AR at 149 (Proposed Statement of Basis at 2).

For context, this flow is typical of a very small WWTP. For example, the nearby Sonoma County Water Agency and Russian River County Sanitation District WWTP (No. CA0024058) has an average daily design flow of 0.71 mgd, approximately 5 times the design flow of the Dry Creek Rancheria WWTP. AR at 67 (Response to Comments at 11). In addition, since there are no industrial activities or households connected to the system, there is a low probability of toxic pollutants in the effluent. See generally AR at 122-147 (Proposed Permit at 1-24).

at all times by maximizing available irrigation, recycle, and re-use of treated wastewater."[18] The Tribe voluntarily agreed to meet standards for reuse of treated wastewater established by the California Department of Heath Services ("Title 22"), so the Region incorporated these standards into the Proposed Permit.[19] Among other benefits, these standards assure that land application of effluent will not cause unpermitted discharges to waters of the U.S. by prohibiting land application where direct or windblown spray causes effluent to enter surface watercourses, where vegetative demand or field capacity is exceeded, and when uncontrolled runoff may occur.[20]

The Proposed Permit authorized discharge of tertiary-treated effluent that could not be reused or land-applied to two unnamed stream channels located on the Rancheria.[21] The primary receiving water, an unnamed stream termed "Stream P1" for purposes of this Permit, flows from the Rancheria to the Russian River.[22] The secondary discharge (which

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[18] AR at 124 (Proposed Permit at 3); see also AR at 149 (Proposed Statement of Basis at 2) ("Wastewater generated by the WWTP will continue to be recycled and re-used on site for toilet flushing and on-site irrigation as much as practical. Only the volume of wastewater that cannot be recycled or re-used will be discharged. Due to climatic conditions, a higher percentage of wastewater flow will be dedicated for irrigation use during the summer months than during the winter months.").

The Tribe agreed to the required condition that they maximize reuse and irrigation, which the Region drafted in order to minimize permitted discharges to Stream P1, in accordance with the Basin Plan.

[19] AR at 131-132 (Proposed Permit at 10-11).

The California Department of Health Services has established statewide reclamation criteria in Chapter 3, Division 4, Title 22, California Code of Regulations ("CCR"), Section 60304, *et seq.* ("Title 22"). Title 22 standards are a standard component of NPDES permits issued by the State of California for dischargers that propose to reuse treated wastewater. In this case, the Region and the Tribe agreed that memorializing the Tribe's voluntary agreement to meet Title 22 standards would help address community concerns about the reuse program.

[20] AR at 131-132 (Proposed Permit at 10-11).

[21] AR at 122-147 (Proposed Permit at 1-24).

[22] See AR at 149-150 (Proposed Statement of Basis at 2-3).

The WWTP will convey effluent to an existing storm water detention basin on the Rancheria. The effluent will then flow down a cascade aeration system, enter a culvert, and flow down a channel for approximately 500 feet before entering Stream P1. The effluent will then flow through Stream P1, pass into a culvert under Highway 128, and flow to the Russian River. The

was removed prior to issuance of the Final Permit) was to "Stream A1," an unnamed ephemeral channel with no direct surface connection to the Russian River.[23]

Before reaching the Russian River, the discharge to Stream P1 will flow in portions of Stream P1 under State jurisdiction, for which the State of California has established WQS in the Water Quality Control Plan for the North Coast Region ("Basin Plan").[24] Pursuant to CWA § 401(a)(2) and 40 C.F.R. § 122.44(d), the Region established effluent limits in the Permit stringent enough to ensure that State WQS for the Russian River and its tributaries will be met at the boundary of Tribal and State land.[25] The Region imposed applicable State WQR without any allowance for dilution between the discharge point and the State boundary.[26]

In accordance with the Basin Plan, the Proposed Permit prohibited discharges to Stream P1 between May 15 and September 30 each year ("the dry season") and during other periods when the waste discharge flow would exceed one percent of the Russian River's flow.[27] The Proposed Permit would have allowed discharges to Stream A1 during the dry season, subject to the requirement that the Tribe minimize such discharges by maximizing reuse and land application.[28]

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distance between the WWTP and P1's confluence with the Russian River is approximately one mile. Id.

[23] See AR at 149-150 (Proposed Statement of Basis at 2-3).

[24] See AR at 38-39 (Final Statement of Basis at 2-3).

[25] AR at 44 (Final Statement of Basis at 8).

[26] AR at 49 (Proposed Statement of Basis at 8).

[27] AR at 124 (Proposed Permit at 3).
The period from October 1 through May 14 is termed the "wet season."

[28] AR at 125-126 (Proposed Permit at 4-5).

C. Public Process

On June 29, 2006, the Region published public notice of Proposed Permit in the *Santa Rosa Press Democrat*.[29] The Region notified known interested parties, including adjacent landowners, of the Proposed Permit and the public hearing.[30] The comment period was originally scheduled to close on September 12, 2006, but the Region extended the comment period to October 2, 2006 because of the significant public interest.[31]

The Region held a public workshop and public hearing on September 7, 2006 in Geyserville, California.[32] Approximately 150 people attended the hearing, and the Region received comments from approximately 50 interested parties.[33] One of the primary comments was the argument by the California Regional Water Quality Control Board for the North Coast Region (RWQCB) that the proposed A1 discharge would not comply with

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[29] AR at 461 (Region IX, Notice of Proposed Action and Public Hearing, SANTA ROSA PRESS DEMOCRAT (Jun. 29, 2006)).

[30] See AR at 464-66 (Email from John Tinger, Permitting Officer, EPA Region IX to Interested Parties (Jun. 28, 2006) and Email from John Tinger, EPA Region IX to Interested Parties (Jul. 31, 2006)).

The Proposed Statement of Basis listed Permitting Officer John Tinger's contact information for members of the public who wished to obtain further information, and the Public Notice explained that the administrative record was available for public review. AR at 168 (Proposed Statement of Basis at 21); AR at 459 (Notice of Proposed Action and Public Hearing ("Public Notice") at 1).

[31] AR at 459 (Public Notice at 1); AR at 472 (Notice of Change to Public Hearing Location at 1).

[32] See AR at 472 (Notice of Change to Public Hearing Location at 1).

The AVA's Petition at page 8 cites a December 26, 2006 letter from Larry Cadd to the Region for the proposition that "EPA conducted a public meeting after the close of the public comment period." Contrary to the AVA's assertion, the Region's public meeting occurred during the public comment period. Id.

[33] See AR at 726-822 (Comments Received); AR at 575-651 (Transcript of Public Hearing).

the Basin Plan.[34] Several other commenters, including the County, also requested that the Region not authorize the A1 discharge.[35]

The Region undertook additional efforts to ensure that it had heard and understood public concerns. EPA Region IX Permitting Officer John Tinger met with neighboring landowners to explain the permit process and listen to their concerns, and exchanged multiple emails with concerned parties.[36] In addition, the Region's Water Division Director, Alexis Strauss, facilitated a meeting at the Sonoma County offices on April 17, 2007 to provide another forum to discuss the status of the Permit and public concerns.[37] The Region agreed to give the concerned parties additional information that was being developed in response to comments raised during the comment period, including a projected "water balance" analysis that assesses the Tribe's utilization and disposal of treated wastewater.[38]

D. Final Permit Issuance

The Region made several revisions to the Permit following the public comment process. The most significant change is that the Final Permit does not authorize discharges

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[34] AR at 728-729 (Letter from Catherine Kuhlman, Executive Officer, RWQCB, to John Tinger, EPA Region IX (Oct. 2, 2006) ("RWQCB Comments")). The RWQCB administers the NPDES program in the northern coastal region of California under an EPA-approved NPDES program.
[35] AR at 733 (Letter from Paul Kelley, Chair, Sonoma County Board of Supervisors, to John Tinger, EPA Region IX (Sept. 29, 2006) ("County's Comments") at Attached Comments at 2).
[36] See, e.g., AR at 953 (Memorandum re Site Visit to Dry Creek Rancheria – meeting with property owners Larry & Candy Cadd, by John Tinger (Dec. 19, 2006)).
[37] See AR at 1027 (Memorandum re 4/17/07 Meeting at Sonoma County, by John Tinger (Apr. 19, 2007)).

Approximately 20 people attended, including Alexis Strauss (the Region's Water Division Director), Regional staff, the County, RWQCB, AVA, and several neighboring landowners. See AR at 1028 (Attachment to Memorandum re 4/17/07 Meeting at Sonoma County, by John Tinger (Apr. 19, 2007)).
[38] AR at 1027 (Memorandum re 4/17/07 Meeting at Sonoma County, by John Tinger (Apr. 19, 2007)).

to Stream A1, because the Tribe decided to withdraw its request for this authorization.[39] In response to this change, the Region did not authorize the Tribe to discharge additional effluent to Stream P1 or require the Tribe to increase its reuse or land application of effluent (which the Proposed Permit already required to be maximized).[40] The only alteration of the Permit's conditions as a result of the removal of the A1 discharge was that the Region placed an additional flow restriction on discharges of stored wastewater to Stream P1 during the wet season.[41] Additionally, the Region made several minor revisions in the Final Permit to address public comments. The Region increased monitoring frequency for several parameters, added effluent limitations for total residual chlorine, and required notification of the RWQCB in case of emergencies.[42]

The Region issued the Final Permit on April 30, 2007.[43]

II. Standard of Review

Ordinarily, the Board grants petitions for review under 40 C.F.R. § 124.19(a) only where it appears from the petition that the permitting authority's decision involved a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration or an exercise of discretion which the Board, in its

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[39] See AR at 1020 (Letter from Michelle Hickey, Attorney for Dry Creek Rancheria, to Bruce Goldstein, Assistant County Counsel, Sonoma County (Apr. 17, 2007)).

[40] The removal of the A1 discharge point meant that if the Tribe could not dispose of all its treated effluent through land-application or discharges to Stream P1 in accordance with the Permit conditions, the Tribe would have to reduce wastewater production or lawfully dispose of excess treated wastewater by other means, such as resale.

[41] AR at 3 (Final Permit at 3) ("During the period of October 1 through May 14, the discharge of stored wastewater from on-site storage shall not exceed 50,000 gallons per day.") This condition prevents the Tribe from releasing a large batch of wastewater stored during the dry season, which could cause erosion.

[42] AR at 1-26 (Final Permit). See AR at 64, 66, 67, 72 (Response to Comments at 8, 10, 11, 16).

[43] AR at 1 (Final Permit at 1).

discretion, should review. 40 C.F.R. § 124.19(a); see e.g., In re Miners Advocacy Council, 4 E.A.D. 40, 42 (EAB 1992); In re City of Moscow, 10 E.A.D. 135, 140-41 (EAB 2001).

The Board has repeatedly underscored, and the preamble to the Part 124 regulations makes clear, that the Board was intended to exercise its broad powers of review "only sparingly" and that "most permit conditions should be finally determined at the Regional level." Consolidated Permit Regulations: Final Rule, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); see also In re Rohm & Haas Co., 9 E.A.D. 499, 504 (EAB 2000).

Only those persons who participated in the permit process leading up to the permit decision, either by filing comments on a proposed permit or by participating in the public hearing, may appeal a permit decision. 40 C.F.R. § 124.19(a). A party petitioning the Board for review must raise "all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under section 124.10." See 40 C.F.R. § 124.13. Moreover, "the petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period." See In re Government of the District of Columbia Municipal Separate Storm Sewer System, 10 E.A.D 323, 339 (EAB 2002) (construing In re RockGen Energy Ctr., 8 E.A.D. 536, 547-48 (EAB 1999)). A person who has not filed comments or participated in a hearing on a draft permit may petition for review only with respect to the "changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a).

There is no appeal as of right from Regional permit decisions. Miners Advocacy Council, 4 E.A.D. at 42. Rather, the burden of demonstrating that review is warranted

rests squarely with the petitioners. 40 C.F.R. § 124.19(a); see Rohm & Haas, 9 E.A.D. at 504. Petitioners may not simply raise generalized objections to a permit, but must argue with specificity why the Board should grant review – "mere allegation[s] of error" are insufficient to warrant review. In re Puerto Rico Elec. Power Auth., 6 E.A.D. 253, 255 (EAB 1995); accord In re Phelps Dodge Corp., 10 E.A.D. 460, 496, 520 (EAB 2002). To meet this requirement of specificity, "petitioners must include specific information supporting their allegations. Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review." See In re Knauf Fiber Glass, GmbH, 9 E.A.D. 1, 5 (EAB 2000); In re Genesee Power Station L.P., 4 E.A.D. 832, 866-67 (EAB 1993).

The EAB's jurisdiction under 40 C.F.R. § 124.19(a) is limited to issues related to the "conditions" of the federal permit that are claimed to be erroneous. The EAB does not have authority to rule on matters that are outside the permit process. In re Federated Oil & Gas of Traverse City, 6 E.A.D. 722, 725 (EAB 1997); see also In re Tondu Energy Co., 9 E.A.D. 710, 716 n. 10 (EAB 2001) (the appeals process is not generally available to challenge Agency regulations); In re Environmental Disposal Systems, Inc., UIC Appeal Nos. 04-01 & 04-02, slip op. at 19 (EAB, September 6, 2005) (the Board lacks jurisdiction to adjudicate challenges concerning land use or property rights); In re Phelps Dodge Corp., 10 E.A.D. at 514 ("We are not at liberty to resolve every environmental claim brought before us in a permit appeal but must restrict our review to conform to our regulatory mandate.") (citing In re Encogen Cogeneration Facility, 8 E.A.D. 244, 259 (EAB 1999) (no jurisdiction to consider acid rain, noise, and water-related issues in Clean Air Act

("CAA") permitting context)); Knauf Fiber Glass, 8 E.A.D. at 161-72 ("[t]he Board's jurisdiction to review PSD permits extends to those issues directly relating to permit conditions that implement the federal PSD program"; no jurisdiction in CAA permitting context to consider issues concerning use of landfill for waste disposal, emissions offsets, NEPA issues, opacity limits, and other issues).

III. Argument

A. The AVA and County Have Failed to Meet Their Procedural Burden for Establishing that Review of Several of Their Arguments Is Warranted

1. Failure to preserve issues for review

The AVA's Petition, in particular, fails to establish with specificity that the AVA or any other commenter raised *any* of the issues that the AVA requests the Board to review. To support its allegation that all of its arguments were raised, the AVA only cites generally to the AVA's written comments on the Proposed Permit and to the County of Sonoma/Sonoma County Water Agency's Comments on the Proposed Permit/Request for Voluntary NEPA Compliance.[44] By making only general allegations that it met the threshold procedural requirements, AVA has failed to meet its burden of demonstrating that EAB review of any of its arguments is warranted. 40 C.F.R. § 124.19(a).

The Region's review of public comments revealed that several issues the AVA and County raise in their Petitions were not raised during the public comment period or in public hearings, as required by 40 C.F.R. § 124.19(a). While the Region contends that the EAB should therefore deny review on these issues, in the alternative, the Region addresses these issues on their merits in Section III.C. below.

[44] AVA Petition at 7. The AVA does not cite to any specific pages or sections of these documents.

The issues that were not raised during the public comment process include:

(a) Terrestrial species. Neither of the two documents the AVA cites to establish that its arguments were preserved for review mentions terrestrial species, nor did any other commenters raise the issue of terrestrial species during the public comment period. Comments about aquatic species during the comment period did not put the Region on notice of issues concerning terrestrial species. The Board has generally refused to grant review of an issue raised on appeal when that issue and the issues raised during the public comment period were *different* aspects of one topic. See RockGen Energy Center, 8 E.A.D. at 545. Accordingly, the Board should decline to review arguments concerning terrestrial species.

(b) Sufficiency of information submitted on plans to land-apply effluent. The County received the Tribe's application form and related materials in response to a Freedom of Information Act request in December, 2005, so the County was certainly aware of how the Tribe's permit application addressed land application.[45] However, the County's Petition does not establish that this comment was raised during the comment period.[46] In its general argument concerning why it meets the threshold procedural requirements, the County cites six separate documents, none of which mentions any deficiency in the information the Tribe provided with respect to location, size, volume, or continuous/intermittent nature of land application.[47]

Moreover, the Region could not find this issue raised anywhere in the public comments. The County attempts to evade this procedural barrier by saying that the

[45] AR at 904 (Letter from Doug Eberhardt, EPA Region IX, to Bruce Goldstein, Sonoma County (Dec. 20, 2005) (attaching copy of NPDES application and related materials in response to Freedom of Information Act request)).
[46] County Petition at 23-24.
[47] County Petition at 12-13.

"information became particularly important after the Region agreed to remove Stream A1, and to approve a wastewater disposal plan in which all summer effluent would be applied to land."[48] This argument fails, because both the Proposed and Final Permits obligated the Tribe to reuse and land apply the maximum possible amount of effluent, consistent with its original plans.[49] The decision to remove A1 as an authorized discharge point did not materially affect the Tribe's stated purpose or ability to land apply effluent, or alter the Proposed Permit's requirement to maximize reuse and land application. If the Tribe finds that it cannot reuse or land apply all of its treated effluent during the dry season, it is obligated to take other measures to avoid an unpermitted discharge to waters of the U.S., such as selling water to another entity for irrigation, connecting to a sewer line, underground injection, storing more wastewater on-site for later discharge, or reducing its production of wastewater. In sum, the issue was ascertainable during the comment period, no commenters raised the issue, and there was no change in projected sprayfield use between the Proposed Permit and Final Permit. Accordingly, the Board should decline to review arguments concerning sufficiency of information submitted on land application plans pursuant to 40 C.F.R. § 122.21(j)(1)(viii)(C).

(c) Requiring the Tribe to waive its sovereign immunity and submit to a third-party enforcement mechanism as a condition of the Permit. The AVA has not demonstrated that any commenter raised this issue with reasonable specificity during the comment period. As noted above, their Petition's discussion of threshold procedural requirements only cites generally to the AVA's and the County's written comments. Indeed, although various

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[48] County Petition at 23.

[49] AR at 124 (Proposed Permit at 3); AR at 3 (Final Permit at 3).

The Tribe planned from the outset to discharge treated effluent on up to 16 acres of sprayfields (as the permit application clearly shows). AR at 180 (Permit Application at 3 (Form 3510-2A).

commenters raised general enforcement concerns, including what one commenter characterized as his "pet peeve" that there is "one set of EPA laws for sovereign land [and] ... one set of EPA laws for our county operations," a comment that it would be advantageous for the Tribe to "elect" to be subjected to State jurisdiction, and a comment encouraging the use of the RWQCB as an "agent" or " adjunct to EPA's own resources," no one specifically identified immunity from suit as an aspect of tribal sovereignty, much less asserted that the Region should require the Tribe to waive its sovereign immunity as a condition of the Permit.[50] The Board frequently denies review of specific issues raised in a petition that were raised in a general manner during the public comment period. In re Steel Dynamics, Inc., 9 E.A.D. 165, 230 (EAB 2000). Similarly, the Board has denied review where a commenter raised an issue without suggesting that the permitting authority had made any erroneous decision concerning that issue. RockGen Energy Ctr., 8 E.A.D. at 543-44. Since there were no comments specifically concerning sovereign immunity, and the comments that mentioned Tribal sovereignty did not address sovereign immunity, much less assert that the Region erred in failing to require the Tribe to waive its sovereign immunity, the comments "lacked the degree of specificity required to put the Region on notice as to the specific objection now being raised." See In re City of Newburyport Wastewater Treatment Facility, NPDES Appeal No. 04-06, slip op. at 22 (EAB, December 8, 2005). Accordingly, the Board should decline to review arguments that the Region should have required the Tribe to waive its sovereign immunity as a condition of the Permit.

[50] AR at 636 (Transcript of Public Hearing at 62); AR at 754 (Letter from Candace Cadd, President, AVA, to EPA Region IX (Sept. 27, 2006) ("AVA's Comments") at 8).

(d) The Tribal Gaming Compact and the Indian Gaming Regulatory Act ("IGRA"). The documents that the AVA cites to establish that it met the procedural threshold requirements do not mention the Gaming Compact or IGRA, much less the argument that the Region improperly sanctioned a violation of the Gaming Compact or IGRA by allowing the Tribe to land-apply effluent outside the Rancheria.[51] The Region could not find a record of any commenter raising these issues during the comment period. The underlying concern that the Tribe planned to land-apply effluent on at least 12 acres was certainly ascertainable during the comment period, because the Proposed Permit required the Tribe to maximize its reuse and land application of effluent, and because the permit application detailed the Tribe's plan to land-apply effluent.[52] Therefore, the issue was ascertainable during the comment period. Accordingly, the Board should decline to review arguments that the Region sanctioned a violation of the Tribal Gaming Compact or IGRA.

(e) Electrical conductivity ("EC") and total dissolved solids ("TDS"). In the argument section of its Petition, the County only cites two documents to support its assertion that commenters raised the issue of whether the Region should impose limits on EC and TDS.[53] The first document, the County's comments on the Proposed Permit, discusses Biochemical Oxygen Demand ("BOD"), Total Suspended Solids ("TSS"), and priority pollutants.[54] Since EC and TDS are not priority pollutants (or BOD or TSS) and

[51] As discussed below in Section III.C.5., the AVA is incorrect in its assumption that the Region is somehow permitting the Tribe to discharge effluent outside the Rancheria.
[52] AR at 180 (Permit Application at 3 (Form 3510-2A)); AR at 124 (Proposed Permit at 3).
[53] County Petition at 29-31.
[54] AR at 735 (County's Comments at 4).

the County did not otherwise refer to EC or TDS, this letter does not support the County's procedural claim. See Appendix A to 40 C.F.R. § part 423 (listing priority pollutants).[55]

The second document the County cites, the AVA's comments on the Proposed Permit, does not raise the issue of EC or TDS with any meaningful specificity and does not raise the issue that is now before the Board.[56] The page that the County cites lists "Significant Concerns," with the subheading "Effluent Limits for Priority Pollutants."[57] The discussion under that subheading argues that the Tribe should have provided effluent data from the existing facility on priority pollutants, which would allow the Region to set appropriate limits on priority pollutants.[58] There is one sentence at the bottom of the page stating: "The above concern also applies to a number of non-priority pollutants, including, at a minimum, electrical conductivity (or optionally total dissolved solids), ammonia, aluminum, iron, and manganese, and temperature."[59] This is a generalized laundry list of issues, unsupported by facts or explanations. At most, the comment raises a different issue from the issue concerning EC and TDS that the County raises in its Petition. The commenter asked the Region to require the Tribe to provide *additional* data to the Region. In contrast, the County's Petition argues that sufficient information on EC and TDS already existed when the Region was processing this permit application, and that the Region should have imposed an effluent limitation based on that information.

In sum, the Petitioner is now raising a specific issue that is significantly different from a comment made during the comment period, and that related comment was only

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[55] Priority pollutants are toxic pollutants that EPA has designated pursuant to CWA § 307(a). See Proposed California Toxics Rule, 62 Fed. Reg. 42160, 42162 (Aug. 5, 1997).
[56] AR at 756 (AVA's Comments at page 1 of Attached Memorandum from Tom Grovhoug, Larry Walker Associates, to Ralph Sceales, AVA (Aug. 9, 2006)).
[57] Id.
[58] Id.
[59] Id.

raised in a very general manner during the comment period. The EAB has previously declined to review such claims. Steel Dynamics, Inc., 9 E.A.D. at 230; RockGen Energy Ctr., 8 E.A.D. at 543-44. Accordingly, the Board should decline to review arguments concerning EC and TDS.

2. Failure to raise issues with sufficient specificity in Petitions for Review

In two instances, the AVA's and County's Petitions for Review make highly generalized claims without presenting specific arguments to which the Region can respond. The Board has recognized that "mere allegation[s] of error" unsupported by specific information are insufficient to warrant review. See Puerto Rico Elec. Power Auth., 6 E.A.D. at 255; accord In re Phelps Dodge Corp., 10 E.A.D. at 496, 520. Therefore, the Board should decline to review these issues.

First, the AVA's Petition lists the Region's "issuing or omitting permit conditions that rely on clearly erroneous findings of fact and conclusions of law, and [failure] to adequately respond to comments on the draft permit" as the fourth of its "Issues Presented for Review."[60] However, there is no section in Petitioner's "Argument" that addresses these issues directly. The AVA has failed to even *identify* the erroneous findings of facts, conclusions, and comments for which it seeks EAB review, and it certainly does not argue why review is appropriate for those issues. The AVA has therefore failed to carry its burden to demonstrate that EAB review of this issue is warranted. See 40 C.F.R. § 124.19(a); see Rohm & Haas, 9 E.A.D. at 504.

Second, the County lists the issue of "[w]hether review is warranted by the Region's failure to limit discharges to the Plant's maximum treatment capacity" as the

[60] AVA Petition at 9.

fourth of its "Issues Presented for Review."[61] In the corresponding section of the County's "Argument," the County alleges that "[t]he Permit does not limit discharges to the treatment capacity of the Permittee's plant, raising a reasonable potential for discharges in violation of federal and state [WQS]."[62] The County provides no explanation of why the lack of such a limit may give rise to a "reasonable potential"; it merely avers that without this limit the Region "cannot meet its duty to 'ensure compliance with the applicable water requirements.'"[63] The only other basis the County provides for review is the erroneous claim that the Region "promised" to impose this limit.[64] Although the merits of this issue are discussed below in Section III.C.9., this argument is a "mere allegation of error" unsupported by specific information, and therefore the EAB should decline to review this issue on procedural grounds. See Puerto Rico Elec. Power Auth., 6 E.A.D. at 255.

3. Failure to properly raise an issue for review

In discussing its NEPA claim, the AVA indirectly suggests that the Region did not comply with the ESA, 16 U.S.C. § 1531 *et. seq.*[65] The AVA does not list ESA compliance as an Issue Presented for Review, so the issue is not properly before the Board.[66] Accordingly, the Board should decline to review the AVA's ESA-related argument.

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[61] County Petition at 13.
[62] County Petition at 28.
[63] Id.
[64] Id.
[65] AVA Petition at 12.
[66] AVA Petition at 9.

B. Petitioners' Arguments Are Based on a Fundamental Misunderstanding of the Scope of the Region's Action

1. The Region's Permit did not "authorize" land application

The Petitions for Review are based on the fundamental misconception that the Region "authorized" the land application of effluent and that the Region made this decision at the "11th hour." The Region's Permit authorizes the Tribe to discharge treated wastewater into Stream P1. It does not "authorize" the land application or spraying of treated effluent. Any right that the Tribe has to land apply effluent exists independently of this NPDES permit process. In fact, the Tribe has been land-applying treated wastewater on five acres of the Rancheria since the existing WWTP was constructed.[67] However, to the extent the Tribe consented and the CWA authorized EPA to impose conditions, the Region did incorporate numerous *conditions* relating to land application in the Proposed and Final Permits, including the requirement that the Tribe maximize its land application and reuse of effluent.[68] Contrary to Petitioners' arguments, the requirement that the Tribe maximize its reuse and land application of effluent was a basic and explicit assumption throughout the permit process[69] that was not altered by the elimination of the discharge to Stream A1 in the Final Permit:

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[67] AR at 37 (Final Statement of Basis at 1); AR at 102 (Water Balance – Revised Technical Memorandum from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 24, 2007)).

[68] AR at 3 (Final Permit at 3); AR at 124 (Proposed Permit at 3).

[69] See, e.g., AVA Petition at 15, 17; County Petition at 23, 24.

It is disingenuous for the AVA to claim that the planned sprayfields were "first identified in the final Permit," that there were "last minute changes to the permit which would allow effluent to be sprayed on 12 acres of land," and that "no interested party had a chance to review or analyze [the sprayfield condition of the Permit]." AVA Petition at 12-13, 16, 17. The AVA's comments to Region IX state: "During the summer, it is reasonable to assume that land application of effluent

- The Tribe's permit application, which was available for public review and which the County obtained through a FOIA request, indicated that the Tribe planned to land-apply effluent on up to 16 acres.[70]
- The Proposed Statement of Basis stated: "Wastewater generated by the WWTP will continue to be recycled and re-used on site for toilet flushing and on-site irrigation as much as practical. *Only the volume of wastewater that cannot be recycled or re-used will be discharged.* Due to climatic conditions, a higher percentage of wastewater flow will be dedicated for irrigation use during the summer months than during the winter months."[71]
- The Proposed Permit stated: "The permittee shall minimize the discharge of advanced treated wastewater effluent to surface waters at all times by maximizing available irrigation, recycle, and re-use of treated wastewater."[72]

The AVA's argument that the Region authorized the Tribe to land-apply wastewater on 12 acres at the "11th hour" is simply incorrect.[73] Similarly, the County's argument that the Final Permit "replace[d]" the A1 discharge with a "summertime irrigation plan"[74] misstates the facts. There was no "replacement," because the Tribe already was required to maximize land-application as a condition of the Proposed Permit. Moreover, the Final Permit did not allow the Tribe to increase the amount of effluent it land-applied, since the Proposed Permit already required the Tribe to maximize its land-application.[75]

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through on-site irrigation and spraying will be a very significant component of the Tribe's effluent disposal plan...." AR at 751 (AVA's Comments at 5). The AVA was clearly aware of the planned sprayfields from the outset and had the opportunity to comment on this plan, so the AVA should not and cannot now claim that the sprayfields were a last-minute addition to the Permit.

[70] AR at 180 (Permit Application at 3 (Form 3510-2A)).

[71] AR at 149 (Proposed Statement of Basis at 2 (emphasis added)).

[72] AR at 124 (Proposed Permit at 3).

[73] AVA Petition at 15, 17.

[74] County Petition at 24.

[75] As explained above, if the Tribe discovers that it cannot reuse or land apply all of its treated effluent during the dry season, it must take other measures to avoid an unpermitted discharge to

2. The Region is limited to reviewing NPDES permit conditions and cannot regulate land use decisions

The AVA's Petition, in particular, is based on another incorrect premise: that it is EPA's role to prevent undesirable or even harmful land uses. Their Petition states: "[a] resident of the Alexander Valley expressed the views of many of his neighbors by writing that the 'Casino represents the absolute epitome of the sort of things the EPA was created to prevent.'"[76] The Region recognizes that there is significant public concern about the possible aesthetic, traffic, land use, and related effects of the proposed casino expansion[77] and that the NPDES permit was one of the few possible barriers to the expansion.[78] However, the NPDES permit process is not the appropriate forum in which to address these concerns. EPA's authority in the NPDES permitting process is strictly limited to reviewing whether the application meets CWA requirements. See NRDC v. EPA, 859 F.2d at 169-70 ("EPA can properly take only those actions authorized by the CWA--allowing, prohibiting, or conditioning the pollutant discharge."); NRDC v. EPA, 822 F.2d at 129 ("EPA's jurisdiction [under the CWA] is limited to regulating the discharge of pollutants...").

The relevant facts are that the Region imposed appropriate permit limitations to ensure that the discharge meets the regulatory standards of the NPDES program. The Permit imposes appropriate technology-based and water quality-based effluent limits,

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waters of the U.S., such as selling the wastewater, storing it on-site, connecting to a sewer line, underground injection, or reducing its production of wastewater.

[76] AVA Petition at 6.

[77] See AR at 745-46 (Exhibit A to County's Comments (Clark Mason, River Rock Expansion a Step Closer, SANTA ROSA PRESS DEMOCRAT (Aug. 13, 2006) ("the wastewater expansion plans have alarmed Sonoma County officials and Alexander Valley residents who have fought the casino since it opened in the picturesque vine-growing region in 2002.")).

[78] AR at 732 (County's Comments at 1 ("Issuance of the proposed permit would remove the last physical and legal restraint on non-gaming development at the Rancheria, and would thus allow the Tribe to approximately triple the size and scope of its operations.")).

monitoring and reporting requirements, and other limitations needed to meet applicable WQR. The RWQCB agreed in its CWA § 401(a)(2) letter to the Region. While the RWQCB objected to the now-eliminated discharge to Stream A1, it said:

> Overall, we believe this is a well drafted permit that includes many requirements necessary to protect water quality and public health. The permit requires that wastewater be treated to an advanced level and it contains effluent limits for pollutants of concern. We support these requirements and, if properly implemented, we believe they should ensure a high level of wastewater treatment.[79]

C. Response to Petitioners' Arguments

1. This Permit is exempt from NEPA, and the Region properly exercised its discretion under EPA's policy on voluntary compliance with NEPA

a. This Permit is exempt from NEPA

The CWA and its implementing regulations provide that NEPA compliance is not required for this NPDES permit.[80] Section 511(c) of the CWA is explicit: the only EPA actions under the CWA that require the Agency to comply with NEPA are the funding of publicly owned treatment works ("POTWs") and the issuance of NPDES permits to "new sources." 33 U.S.C. § 1371(c); see also Phelps Dodge Corp., 10 E.A.D. at 475; NRDC v. EPA, 859 F.2d at 167; NRDC v. EPA, 822 F.2d at 127. CWA § 306 defines a "new source" as "any source, the construction of which is commenced after the publication of

[79] AR at 728-29 (RWCQB Comments).

Aside from its objection to the A1 discharge, the RWQCB requested that monitoring reports be forwarded to the RWQCB, it requested prompt notification in case of an accidental spill or effluent discharge that would result in a risk to public health, and it requested chlorine effluent limits and monitoring. Id. The Final Permit incorporated the RWQCB's requested changes concerning emergency notification and chlorine, and the Region agreed to forward monitoring reports to the RWQCB. AR at 2, 13 (Final Permit at 2, 13).

[80] In Section III.C. of this Response, the Region first addresses the AVA's arguments in the order in which they appear in the AVA's Petition. The Region then responds to the County's arguments in the order in which the County presented them. The exception to this rough order is the County's NEPA argument, to which the Region responds here, along with the AVA's NEPA argument.

proposed regulations prescribing a standard of performance under this section ["new source performance standard," or "NSPS"] which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2); see also NRDC v. EPA, 822 F.2d at 112; Phelps Dodge Corp., 10 E.A.D. at 476 (noting that "NSPSs do not exist, nor have they yet been proposed, for every possible point source category"); In re Town of Seabrook, 4 E.A.D. 806, 816-17 n.20 (EAB 1993) (finding that a proposed WWTP was not a "new source" because no applicable NSPSs exist for such facilities). EPA has not financially assisted the construction of the Dry Creek Facility, nor has it promulgated § 306 standards of performance for POTWs, such as this Facility. Therefore, under the explicit terms of CWA § 511, this NPDES permit is exempt from NEPA.

b. The Region properly exercised its discretion under EPA's Voluntary NEPA Policy

Although the Region's action in issuing the Dry Creek Permit is statutorily exempt from NEPA, EPA's Policy and Procedures for Voluntary Preparation of NEPA Documents ("Voluntary NEPA Policy") provides that the Agency may, at its discretion, conduct NEPA analyses with respect to Agency actions that are not subject to NEPA, such as the Dry Creek NPDES permit.[81] The Policy states that the Agency may conduct NEPA analyses "on a case-by-case basis in connection with Agency decisions where the Agency determines that such an analysis would be beneficial."[82] Under the Voluntary NEPA

[81] Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents, 63 Fed. Reg. 58045, 58046 (Oct. 29, 1998). The 1974 NEPA policy that was previously in effect had construed CWA § 511(c) as *prohibiting* voluntary NEPA analyses for this type of NPDES permit. Id. The revised policy allows the Agency at its discretion to prepare NEPA analyses for such actions. Id.

[82] 63 Fed. Reg. 58045, 58046. In relevant part, the Voluntary NEPA Policy provides that:

Policy, the decision of whether to voluntarily prepare a NEPA analysis is left solely to the Agency's discretion.

In this case, the Region decided that it would not be beneficial to voluntarily conduct a NEPA analysis for this NPDES permit. Nevertheless, the Region responded to comments requesting that the Region conduct a voluntary NEPA analysis. The Region's response accurately and adequately explains its decision. The Region first explained the applicable statutory and regulatory framework, including why the Permit was not subject to NEPA. The Region then explained that the public comment process had addressed public concerns and that a NEPA analysis was not warranted.[83]

Since the decision not to voluntarily prepare a NEPA analysis was fully committed to the Agency's discretion, this is not an appropriate matter for EAB review. See, e.g., Knauf Fiber Glass, 8 E.A.D. at 161-62, 171 (denying review of NEPA claim where the challenged CAA permit was exempt from NEPA review, noting that EAB has no authority to review issues that "are not explicit requirements of the PSD provisions of the [CAA] or EPA's implementing regulations and have not been otherwise linked to the federal PSD program in the context of this case").

> "EPA *may* undertake voluntary preparation of EAs and EISs under programs where it is not legally required to prepare such documents, where such voluntary documents can be beneficial in addressing Agency actions. ... 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."

Id. (emphasis added).

[83] AR at 62 (Response to Comments at 6).

2. The Region fully complied with the ESA

As discussed above, the AVA does not list ESA compliance as an Issue Presented for Review, so this issue is not properly before the Board. Even if it were, however, the Region fully complied with the ESA's requirements in developing and issuing the Permit.

A federal agency's obligations under the ESA are clearly stated in the statute and its implementing regulations at 50 C.F.R. part 402. Under ESA § 7(a)(2), federal agencies must ensure, in consultation with the U.S. Fish and Wildlife Service ("USFWS") and/or NOAA Fisheries,[84] that their actions are not likely to jeopardize the continued existence of any listed threatened or endangered species ("listed species") or result in the destruction or adverse modification of designated critical habitat for listed species. 16 U.S.C. § 1536(a)(2). Prior to taking any final agency action, a federal agency must consider whether its action may affect any listed species or designated critical habitat. 50 C.F.R. § 402.14(a). If so, the agency must initiate informal or formal consultation with the USFWS and/or NOAA Fisheries. 50 C.F.R. § 402.13; 50 C.F.R. § 402.14. If, during the consultation process, the agency concludes that its action is "not likely to adverse affect" the listed species or critical habitat, then it will communicate that finding to the appropriate consulting agency and, after it receives the written concurrence of that agency, conclude its consultation. 50 C.F.R. § 402.13(a); 50 C.F.R. § 402.14(b)(1).

The Region followed these requirements as it prepared the Dry Creek Permit. The Region first prepared a Biological Evaluation to determine whether the Permit could affect

[84] The USFWS has jurisdiction over terrestrial species and most freshwater aquatic species. NOAA Fisheries has jurisdiction over marine species and anadromous species such as salmonids.

any threatened or endangered species.[85] The Biological Evaluation found that there would be no effect on listed terrestrial species[86] or on critical habitat but that the action "may affect" the threatened California Coastal Chinook salmon, the threatened Central California Coast coho salmon, and threatened Central California Coast steelhead.[87] Accordingly, the Region initiated consultations under ESA § 7 with NOAA Fisheries.[88] As the Region determined that its proposed action would have no effect on listed terrestrial species,[89] consultation with USFWS was not required. See 50 C.F.R. § 402.14(a); Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1447-48 (9th Cir. 1996).

When the Region requested NOAA Fisheries' concurrence, the Region provided NOAA Fisheries with a copy of the Proposed Permit and the accompanying statement of basis, which authorized discharges to P1 and A1 and explained that the Tribe must maximize reuse and land application of effluent.[90] The Region's initiation letter made a finding that the project was "not likely to adversely affect" listed species.[91] Based on its review of the project, NOAA Fisheries concurred with the Region that "no listed

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[85] AR at 827 (Biological Evaluation – New NPDES Permit for the Dry Creek Rancheria Waste Water Treatment Plant (Apr. 2006)); see also AR at 834 (Dry Creek Rancheria Treated Wastewater Discharge Project Biological Evaluation (Jan., 2005)).

[86] AVA raises concerns about terrestrial species in a footnote to its Petition. AVA Petition at 13. As noted above, neither of the two documents AVA cites raises concerns about terrestrial species, nor did any other public comments, so this issue is not properly before the Board. In any case, the draft Biological Evaluation properly considered effects to terrestrial species, and the Region's conclusion that its action would not affect terrestrial species was appropriate given the information developed in the Biological Evaluation.

[87] AR at 827-33 (Biological Evaluation – New NPDES Permit for the Dry Creek Rancheria Waste Water Treatment Plant (Apr. 2006)); see also AR at 253-254 (Dry Creek Rancheria Treated Wastewater Discharge Project Biological Evaluation (Jan., 2005) at 15-16).

[88] AR at 826 (Request for Concurrence).

[89] AR at 828-30 (Biological Evaluation – New NPDES Permit for the Dry Creek Rancheria Waste Water Treatment Plant (Apr. 2006)).

[90] AR at 826 (Request for Concurrence).

[91] Id.

anadromous salmonids or their designated critical habitats are likely to be adversely affected by this project."[92] At that point, the Region's obligations under ESA § 7 were satisfied.

The ESA consultation regulations provide that the Region should reinitiate consultation if "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered" or if "the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion."[93] 50 C.F.R. § 402.16. Petitioners claim that the changes between the Proposed Permit and the Final Permit required the Region to reinitiate consultation.[94] The Region disagrees. The principal change in the project description between the Proposed and Final stages was the elimination of one discharge point (Stream A1) with no corresponding increase in permitted discharge to the second discharge point (Stream P1). The Final Permit envisioned relying on a water reuse program in the same way as the Proposed Permit. The only possible effect of this change would be to reduce overall impacts to aquatic species. This change in the Final Permit (which was made largely in response to public concerns about using Stream A1 for any discharge) did not present relevant new information that would reveal, or create permit modifications that would cause, any effects to listed species or critical habitat in a manner or to an extent not previously considered. Therefore, the Region plainly was under no duty to reinitiate consultation with respect to the Permit.

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[92] AR at 824 (NOAA Concurrence Letter at 2).

The NOAA concurrence letter recognized that the project would include irrigation and recycling of treated wastewater. AR at 823 (NOAA Concurrence Letter at 1).

[93] The NOAA concurrence letter also noted that reinitiation would be required in these cases. AR at 824-25 (NOAA Concurrence Letter at 2-3).

[94] AVA Petition at 15.

3. The Region cannot and should not require a Tribe to waive its sovereign immunity as an NPDES permit condition and include a third-party enforcement mechanism in the Permit

As discussed above, the argument that the Region should have required the Tribe to waive its sovereign immunity and include a third-party enforcement mechanism as a condition of the NPDES permit was not raised during the comment period. Therefore, the EAB should decline to review this argument on procedural grounds.

Even if the issue had been raised, it would be appropriate for the Board to follow its precedent of declining to review generalized concerns or objections regarding the enforcement of a permit condition. See City of Newburyport, NPDES Appeal No. 04-06, slip op. at 26 ("The Board has declined to review generalized concerns or objections regarding the enforcement of a permit condition. See Federated Oil & Gas, 6 E.A.D. at 722, 730 (declining to review objections related to the ability of a permit issuer to ensure compliance); In re Envotech, L.P., 6 E.A.D. 260, 273-74 (EAB 1996) ('The Board has no jurisdictional basis to review a permit based solely on a company's past compliance history.'); In re Brine Disposal Well, 4 E.A.D. 736, 746 (EAB 1993) (denying review where petitioner alleged concern over EPA's ability to enforce compliance with regulatory requirements).") Explained somewhat differently, the EAB's jurisdiction under 40 C.F.R. § 124.19(a) is generally limited to issues related to the "conditions" of the federal permit that are claimed to be erroneous.

As a substantive matter, the Region could not have required the Tribe to waive its sovereign immunity as an NPDES permit condition.[95] The CWA simply provides no authority for requiring a Tribal permittee to waive its sovereign immunity.

[95] The Region respectfully disagrees with the County's contention that "the Permittee is unique among NPDES permittees because of its status as a federally recognized Indian Tribe and its

See, e.g., NRDC v. EPA, 859 F.2d at 169-70 ("EPA can properly take only those actions authorized by the CWA—allowing, prohibiting, or conditioning the pollutant discharge"); see also NRDC v. EPA, 822 F.2d at 129. EPA has no power to expand or restrict access to courts through NPDES permits.

Furthermore, even if EPA did have the authority to require a waiver of sovereign immunity, it would be unreasonable for the Region to exercise that authority with respect to this Permit. "EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace." EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984). Requiring a Tribe to waive its sovereign immunity and consent to suits to enforce environmental laws would undercut that Policy by compelling the Tribe to diminish its sovereignty, by waiving an immunity to suit that is an aspect of that sovereignty. The assertion of Tribal sovereign immunity, however, would not bar EPA from taking enforcement actions against a Tribal NPDES permittee. Moreover, the Region has sufficient criminal, civil, and administrative enforcement authority under CWA § 309 and adequate enforcement resources to protect public and environmental health.[96] In addition,

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willingness to assert sovereign immunity as a shield against private actions." County Petition at 9. In California alone, the Region is processing at least five NPDES permits for Tribal permittees. See Region IX Water Program, NPDES Permits and Stormwater, at http://www.epa.gov/region09/water/npdes/permits.html (last visited Jul. 13, 2007).

[96] See AR at 81 (Response to Comments at 25).

The County seriously mischaracterizes the Region's statement concerning its enforcement resources at the April, 2007 meeting. County Petition at 9. The Region did not state that it had "'at least 50' greater problems" than enforcement concerns on the Rancheria under the proposed NPDES permit. Rather, Alexis Strauss said that the Region has at least 50 greater problems than investigating photographs that property owners showed her at the meeting of small water puddles from an unidentified source.

In addition, the Region notes that the AVA incorrectly assumes that EPA enforcement authority depends on the Department of Justice. EPA may use its administrative enforcement authority without involving the Department of Justice.

citizen groups such as AVA have the right to review monitoring and effluent data under NPDES permits. See 40 C.F.R. § 2.302(f).

Finally, the EAB should decline to review Petitioners' related allegations that poor past compliance by either the Tribe or its proposed operator warrant imposition of a third party enforcement mechanism or otherwise more stringent permit requirements.[97] The Board does not have jurisdiction to review generalized concerns about a permittee's prior regulatory violations. See In re Laidlaw Environmental Serv., 4 E.A.D. 870, 882-83 (EAB 1993); Envotech, 6 E.A.D. at 273-74. For example, in a case where the petitioners similarly claimed that a permittee had a "history of violations" without specifying what those violations were or how they were connected to any condition of the permit under consideration, the EAB declined to review the petitioner's enforcement argument. Puerto Rico Electric Power Authority, 6 E.A.D. at 258.

4. The Region did not improperly sanction any violations of the Tribal Gaming Compact or the Indian Gaming Regulatory Act

As an initial matter, the EAB should decline to review this argument because it was not raised during the comment period, even though the underlying issue—planned land application—was a condition of the Proposed Permit.

Alternatively, the EAB should find that this issue is outside the scope of its jurisdiction. The EAB lacks authority to address possible violations of laws outside the scope of its jurisdiction. See, e.g., Federated Oil & Gas, 6 E.A.D. at 724 ("This Board …simply has no authority to intervene in private contractual disputes."); Envotech, 6 E.A.D. 274-76 ("EPA is simply not the correct forum for litigating contract- or property-

[97] AVA Petition at 6.

law disputes that may happen to arise in the context of waste disposal activity for which a federal permit is required. These disputes properly belong in a court of competent jurisdiction.") (quoting Brine Disposal Well, 4 E.A.D. at 741; citing In re Suckla Farms, 4 E.A.D. 686, 695 (EAB 1993)).

The AVA's argument also fails on substantive grounds. The AVA's entire argument is premised on the erroneous assumption that the Tribe will discharge effluent on sprayfields *located off the Rancheria.*[98] The AVA does not support with any specific facts its conclusory allegations that the Tribe must use off-site locations for sprayfields.[99] In fact, as the County's Petition recognizes, the Tribe's permit application shows that the Tribe will use sprayfields located squarely within the boundaries of the Rancheria.[100] As discussed below in Section III.C.5.c., the Region conducted a water balance analysis which shows that the proposed land application area on the Rancheria can accommodate the land-applied effluent. Because the Tribe's permit application contains plans for land application only within the Rancheria, the Region is in no way authorizing or requiring the Tribe to land-apply effluent outside the Rancheria.

As noted above, the Region's action in this matter is limited to issuing an NPDES permit under the CWA. NPDES permits do "not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations." 40 C.F.R. § 122.5(c). Therefore, the Region cannot and does not "sanction" or "authorize" a violation of the Gaming Compact or IGRA.

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[98] AVA Petition at 17-18.

[99] The AVA also fails to consider that the Tribe may conduct re-landscaping in the course of its project that may create new areas that are appropriate for land application from areas that currently appear to the AVA as unsuitable for land application.

[100] AR at 348 (Supplement to Application at Figure 2A-1); AR at 180 (Permit Application at 3 (Form 3510-2A)).

5. The Region set appropriate discharge prohibitions and permit conditions concerning land-applied effluent

The County's arguments concerning land-applied effluent fail for three reasons.[101] First, as discussed above, the Region did not "authorize" land application, so the Region was not required to ensure that land application complies with state WQR. Second, the Permit does establish discharge prohibitions and permit conditions that ensure that land-applied effluent will not reach waters of the U.S. Third, although the Region was not required to conduct a water balance analysis, the Region voluntarily conducted a thorough water balance that demonstrates that the Tribe's land application will comport with applicable standards.

a. The Region did not authorize land application, so it was not required to establish limitations for effluent applied to land

As discussed above, in this Permit the Region did not specifically allow or disallow the land application of treated effluent that does not reach a "water of the U.S." and thus, did not "authorize" land application. The Region does not have a duty to impose permit limitations on activities, such as this, that the Region is not authorizing under the NPDES permit. Accordingly, the Region is not required to "ensure" that land application does not cause violations of downstream WQR.

b. The Region did impose permit conditions that assure that land application will not be discharged to waters of the U.S. and thereby cause violation of downstream WQR

[101] One of the County's specific claims presented in Section I of its Argument—that the Tribe did not identify the area to be used for sprayfields in accordance with 40 C.F.R. § 122.21(f)(7) and 40 C.F.R. § 122.21(j)(1)(viii)(C)—is also raised in the context of the County's argument in Section III that the Region should have recirculated a revised Proposed Permit. The Region responds to this claim below in Section III.C.7.

The Permit assures that the Tribe will not land-apply effluent in a manner that causes discharges to P1 by explicitly prohibiting discharges to P1 (and all discharges to the Russian River and its tributaries) between May 15 and September 30, in accordance with the Basin Plan.[102] In addition to that prohibition, the Permit requires compliance with the following Title 22 standards (which the Tribe voluntarily agreed to follow):[103]

> (i) direct or windblown spray of reclaimed water shall not enter surface watercourses;
> (ii) wastewater shall not be applied to land where vegetative demand or field capacity is exceeded, or during periods where uncontrolled run-off may occur;
> (iii) a 15-foot buffer zone must be maintained between any watercourse and the area wetted through land application of effluent; and
> (iv) areas irrigated with effluent shall be managed to prevent ponding and conditions conducive to the proliferation of mosquitoes and disease vectors.[104]

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[102] AR at 3 (Final Permit at 3).

[103] AR at 8 (Final Permit at 8).

The County suggests that sprayfield discharges have the potential to flow not only to P1 but also to a surface water impoundment on the Rancheria. County Petition at 16. Flows to any impoundments located on the Rancheria do not implicate State WQR, which only apply where effluent crosses the boundary from the Rancheria to lands under State jurisdiction, as discussed in Section I.B.

The Region and the Tribe agreed that memorializing the Tribe's voluntary agreement to meet Title 22 standards would help address community concerns about the reuse program.

The applicable Title 22 standards also include other requirements, such as monitoring for turbidity and a buffer zone between wells and the area wetted by land-applied effluent. AR at 8 (Final Permit at 8).

[104] As these requirements show, the County is incorrect that the Region "declined to impose specific permit limits on summertime discharges." County Petition at 16.

The County improperly characterizes the RWQCB's comments about the possibility of algal blooms and mosquito habitat. County Petition at 6. The RWQCB made this comment with respect to the proposed discharge from Stream A1, not with respect to land application. AR at 728 (RWQCB Comments). In any case, the Title 22 standards require the Permittee to manage irrigation areas so as to prevent ponding and conditions conducive to mosquitoes and disease vectors.

The Region will ensure compliance with discharge prohibitions through monitoring and reporting requirements and the Surface Water Discharge Operations Plan and Report.[105] Under this requirement, the Tribe must develop a Surface Water Discharge Operation Plan for determining discharge locations and volumes within 90 days of Permit adoption.[106] On a yearly basis, the Tribe must submit a Report documenting (1) compliance with the Plan; (2) compliance with discharge limitations, including restrictions on discharges to P1; (3) the total volume of effluent reused and acreage which is used for land application; and (4) planned reclamation for the upcoming year, including acreage available for irrigation.[107] The Region will use this Plan and Report to verify that discharges do not violate applicable WQR and to help decide when and how to inspect the Facility.

The Region notes that it is the Tribe's responsibility to land-apply effluent in compliance with these requirements. The Tribe may also pursue other options to manage its treated effluent, such as hauling off-site, connecting to a sewer line, underground injection, selling water to another entity for irrigation, storing more wastewater on-site for later discharge, or reducing its production of wastewater. These options are beyond the scope of the NPDES Permit, and the Region does not dictate which of these options the Tribe must use. However, if the Tribe finds that it cannot land-apply effluent without violating Permit requirements, the Tribe must curtail its land application and find another way to reduce effluent production or dispose of the effluent in a lawful manner.

In sum, the Final Permit does prevent land-applied effluent from reaching waters of the U.S. Thus, any misapplication of effluent that caused a discharge to Stream P1 would

[105] AR at 7 (Final Permit at 7).
[106] Id.
[107] Id.

not be a *deficiency* of this NPDES permit. Misapplication of effluent that caused runoff to Stream P1 would, however, be a *violation* of the Permit.

The City of Marlborough decision, which the County cites to support its argument that the Dry Creek NPDES permit conditions offer an inadequate "possibility of compliance," is inapposite.[108] In City of Marlborough, an NPDES permit issued by EPA Region I imposed a 0.1 mg/l limitation on phosphorous, along with voluntary measures and the possibility of revisiting the phosphorous limit when the permit expired. In re City of Marlborough, NPDES Appeal No. 04-13, slip. op at 18-24 (EAB, August 11, 2005). However, the EAB found that the record suggested that the Region doubted whether the discharge limitation by itself was stringent enough to meet applicable WQS. Id. at 18-22.

The facts of the Dry Creek Permit are fundamentally different from those in City of Marlborough. While the permitting authorities in City of Marlborough had direct regulatory authority over phosphorous discharges from the WWTP, Region IX in this Permit did not "authorize" the land application of effluent. Moreover, the EAB found that the permitting authority understood that the Marlborough permit posed a reasonable likelihood of phosphorous violations, but Region IX's Permit specifically prohibits land application from causing unpermitted discharges to P1, and Region IX has no reason to suspect that the Dry Creek land application will result in downstream WQR violations. In addition, the permittee in Marlborough could have violated state WQS *while complying with* the phosphorous limits in the NPDES permit. By contrast, under the Dry Creek Permit, any summertime runoff to P1 would violate Permit requirements.

[108] County's Petition at 15, 20.

In sum, the County has not demonstrated that the Region committed clear error or abuse of discretion in setting permit limitations, so its argument should be dismissed. See Knauf Fiber Glass, 9 E.A.D. at 6.

c. The Region conducted an independent, thorough review of the water balance and this technical review warrants substantial deference

The County appears to believe that the CWA obligates permitting authorities to conduct water balance analyses when an NPDES permittee plans to land-apply effluent in connection with an NPDES permit. This belief is unfounded; the Region was not required to prepare a water balance analysis. There simply is no legal requirement in the statute, regulations, or case law that mandates preparation of a water balance analysis in this situation, and the Region is not required to ensure that land application does not cause an unintentional discharge to waters of the U.S.

Although a water balance was not a necessary element of this permitting process, the Region requested the Tribe to provide a water balance analysis in response to commenters' request.[109] The Region conducted a thorough, independent review of the water balance and concluded that the analysis provided a reasonable reality-check on the feasibility of the Tribe's land application plans.[110]

Regions are entitled to substantial deference on technical issues such as this.

> [I]n permit appeals, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are technical in nature. When "presented with technical issues, we look to determine whether the record

[109] See, e.g., AR at 734 (County's Comments at 3).

[110] The County relies on comments that a member of the Region's staff made in a telephone call with the office of Senator Boxer. This call took place before the Region completed the water balance. The Region did not "reject as infeasible" the plan of land-applying effluent. AR at 932 (Memorandum re Conference Call, by Ginette Chapman (Oct. 6, 2006)).

demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the Final Permit decision that is rational and supportable, we typically will defer to the Region's position." Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the theory is unsubstantiated. City of Newburyport, NPDES Appeal No. 04-06, slip op. at 9-10 (citing In re Teck Cominco Alaska, Inc., NPDES Appeal No. 03-09, slip op. at 22 (EAB, June 15, 2004); In re City of Moscow, 10 E.A.D. 135, 142 (EAB 2001); In re Town of Ashland Wastewater Treatment Facility, 9 E.A.D. 661, 667 (EAB 2001); In re Washington Aqueduct Water Supply Sys., NPDES Appeal No. 03-06, slip op. at 12 (EAB, July 29, 2004); In re Gov't of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323, 342-43 (EAB 2002)) (internal citations omitted).

When reviewing the water balance analysis, the Region noted that the water balance included conservative assumptions.[111] First, the water balance assumed that the Facility's daily flow would be 120,000 gpd,[112] while the actual daily average flow is projected to reach only 112,000 gpd.[113] Second, the water balance was based on the 100-year precipitation rate of 62.79 inches per year, rather than the average precipitation rate of 32.79 inches per year.[114] The water balance therefore demonstrates that the Tribe can

[111] See AR at 1045 (Email from John Tinger, EPA Region IX, to Jeff Brax, Office of the Sonoma County Counsel (Apr. 30, 2007).
[112] AR at 99 (Water Balance – Revised Technical Memorandum from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 24, 2007)).
[113] AR at 38 (Final Statement of Basis at 2.)
[114] AR at 100 (Water Balance – Revised Technical Memorandum from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 24, 2007)).

manage up to 120,000 gpd of effluent on-site even during the wettest conditions expected to occur in 100 years.

The County's Petition makes a variety of allegations about both the impropriety of the water balance and the Region's review of the water balance.[115] These allegations are irrelevant to the issue of whether the Region issued an NPDES permit that complies with applicable CWA requirements, because the Region was not required to conduct a water balance or ensure that the Tribe's land application does not cause unpermitted discharges to waters of the U.S.[116] Nevertheless, the Region found that the estimates of Kc values, loss rates, precipitation indices, toilet reuse volumes, and storage capacity in the water balance were reasonable.[117] Several of these factors, including Kc values and the leachate

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[115] County's Petition at 7-12, 15-22.

[116] Further, the County's allegations generally either lack specific factual support or misconstrue the facts, as the following two examples illustrate:

First, the County's allegation that the Region allowed a "shift between three separate Kc values without ever changing the resulting irrigation demands" is incorrect. County Petition at 17. In emails explaining the water balance, Permitting Officer John Tinger erroneously transcribed the Kc value as 1.4, in explaining how the proper value was in the 1.1 to 1.4 range. AR at 1045 (Email from John Tinger, EPA Region IX, to Jeff Brax, Sonoma County (Apr. 30, 2007)). In fact, the water balance calculations consistently used a Kc value of 1.15. See, e.g., AR at 1041 (Email from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 27, 2007)).

Second, the County's comment regarding the choice of the 1.15 Kc value gives the impression that the Kc value was erroneously chosen by selectively quoting the description for the high microclimate Kc value. County Petition at 18. In fact, that description provides other examples of high microclimate areas, including "[p]lantings located in medians, parking lots, or adjacent to south or southwest facing walls which are exposed to higher canopy temperatures than those found in a well-vegetated setting" and notes that "[t]he specific value assigned will depend on the specific conditions. For example, a shrub planting located next to a southwest facing wall may be assigned a Kmc value of 1.2, while a similar planting next to a southwest wall which is composed of reflective glass and is exposed to extraordinary winds may be assigned a value of 1.4." AR at 1044 (Email from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 30, 2007)). Therefore, the Kc value for high microclimates is not limited to areas by southwest walls near panes of reflective glass exposed to extraordinary winds, as the County suggests. The Region concluded that the "high microclimate" reference and the value of 1.15—a conservative estimate in the range of 1.1 to 1.4—were both reasonable.

[117] See AR at 1045 (Email from John Tinger, EPA Region IX, to Jeff Brax, Sonoma County (Apr. 30, 2007)); AR at 98-102 (Water Balance – Revised Technical Memorandum from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 24, 2007)).

factor, took the Rancheria's specific runoff patterns, soil conditions, and slopes into account.[118]

The County's argument that the Tribe is currently exceeding agronomic demand is deficient for two reasons. First, the County does not support its assertion with any specific facts to show that unpermitted discharges are occurring. Second, the County does not recognize the fact that the Tribe plans to conduct even *less* intensive land application of effluent in the future. The Tribe will land-apply 4.2 acre-feet of water per acre (50.15 acre-feet for 12 acres), instead of the current rate of 4.6 acre-feet of water per acre (22.96 acre-feet for 5 acres).[119] Therefore, it is reasonable to expect that the Tribe's land application plan will not produce unpermitted discharges to waters of the U.S.

Of course, agronomic models cannot predict with certainty whether run-off will occur under daily climatic conditions. Water balance analyses are models, not an exact science. If the Tribe finds that unpermitted discharges will occur despite application of effluent in accordance with the agronomic model, the Tribe must curtail its land application; conversely, if on-the-ground conditions permit the Tribe to apply more effluent than the agronomic demand suggests is possible, the Tribe may do so. The purpose of the water balance was to demonstrate that the Tribe had realistic options for disposing of its effluent in a lawful manner. While the water balance focused on the land application option, there are many other options available to the Tribe, as described above. The Region properly conditioned the Permit with discharge prohibitions, monitoring, and

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[118] AR at 98-102 (Water Balance – Revised Technical Memorandum from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 24, 2007)); AR at 1044 (Email from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 30, 2007)).
[119] AR at 98-102 (Water Balance – Revised Technical Memorandum from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 24, 2007)).

reporting requirements to ensure compliance, and the Region has every expectation that the Permittee will be able to comply with the Permit requirements.

6. The Region adequately responded to comments on summertime discharges

The County questions the adequacy of the Region's permit decisions concerning land application and the Region's review of the water balance in this section of its Petition. As explained in the preceding section, the Region did set appropriate limits that will ensure compliance with applicable WQR, and the Region conducted an appropriate review of the water balance, even though it was not required to do so.

With respect to the Region's response to comments, the County asserts that the Region should have explained its reasons for "issuing a Permit without specific discharge limits."[120] As explained above, although the Region did not establish effluent limitations to ensure that land-applied effluent would meet downstream WQR, the Region *did* limit discharges during the dry season by prohibiting discharges to Stream P1 and by incorporating Title 22 standards for effluent reuse into the Permit. The Region did not find it necessary to respond to comments on the decision to issue a Permit "without specific discharge limits," since the Permit did in fact contain specific limitations on land application and restrictions on discharges to P1 during the dry season.

The County also claims that the Region's response to comments and administrative record does not provide adequate information on the water balance analysis.[121] However, as explained above, the water balance was not a necessary element of the permitting process, either as a legal or a practical matter. For that reason, the Region arguably could have decided that comments concerning the water balance were not significant and

[120] County Petition at 21.
[121] County Petition at 21-22.

declined to respond to those comments in full compliance with 40 C.F.R. § 124.17. However, the Region's response to comments did contain a thorough summary of the water balance, and the entire analysis was attached as an appendix to the comment responses.[122] The Region's response therefore met the requirements of 40 C.F.R. § 124.17.

Further, contrary to the County's argument, the record demonstrates ample "considered judgment" on the Region's part.[123] For example, Permitting Officer John Tinger thoroughly explained his review of the water balance in a lengthy email to the County, and stated that "the proposed water balance represents a reasonable approach to on-site water usage."[124] To explain that conclusion, Tinger noted that the water balance contained conservative assumptions based on the design daily flow capacity of the treatment plant and 100-year rainfall events, as well as reasonable estimates concerning Kc values, loss rates, precipitation indexes, toilet reuse volumes, and storage capacity.[125] Based on the above, the removal of the A1 discharge from the Final Permit did not require further explanation.

This set of facts differs substantially from the Amoco Oil and City of Marlborough cases the County cites, where Regions did not explain in the record why they agreed with specific comments and changed requirements in the Final Permit. In Amoco Oil, the permitting Region included a new permit condition in the Final Permit in response to a

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[122] AR at 78-79 (Response to Comments at 22-23); AR at 98-102 (Water Balance – Revised Technical Memorandum from Curtis Lam, Hydroscience Engineers, to John Tinger, EPA Region IX (Apr. 24, 2007)).

[123] See County Petition at 21.

[124] AR at 1045 (Email from John Tinger, EPA Region IX, to Jeff Brax, Sonoma County (Apr. 30, 2007)).

[125] Id.

During this period, John Tinger also conversed via email with the Tribe's consultant about the water balance. See, e.g., AR at 1041 (Email from John Tinger, EPA Region IX, to Curtis Lam, Hydroscience Engineers (Apr. 27, 2007)). These emails show that the Region conducted an independent review of the water balance.

comment provided by the State, and merely stated that the Region concurred with the State's request. In re Amoco Oil Co., 4 E.A.D. 954, 980-81 (EAB 1993). The EAB found that the new condition was significant and imposed potential compliance costs on the permittee, but that the Region did not explain why it was appropriate to impose this condition on the permittee. Id. In City of Marlborough, the permitting authorities changed the language in the Final Permit describing how a phosphorous limitation would be measured from the language in the Proposed Permit. City of Marlborough, NPDES Appeal No. 04-13, slip. op. at 13-14. The permitting authorities simply stated in one sentence that they had changed the measurement language in response to the City of Marlborough's comment about the risk of potential violations that the Proposed Permit language presented. Id. The Petitioner claimed that the change in measurement would make the limitation too weak to ensure compliance with applicable WQS. Id. The EAB remanded the permit "[b]ecause the Region ... failed to explain why it apparently agreed with [the City of Marlborough's] comment and decided to change the terms of the permit." Id. at 14.

In the Dry Creek Permit, the Region did not make a Permit change that required explanation with respect to land application.[126] The removal of the A1 discharge did not cause any increase in planned or authorized land application beyond the land application that the Proposed Permit required. Further, the Region did provide substantial information to the public on the water balance and why it considered the Permit's discharge requirements appropriate. In sum, the County has not shown that the Region's response to comments was erroneous or otherwise warrants review.

[126] The Region's Response to Comments did explain that the A1 discharge had been removed from the Permit. AR at 70 (Response to Comments at 16).

7. The Region received adequate information on land application in the Tribe's NPDES permit application

As noted above in Section III.A.1., this issue was not preserved for review, so it may not be raised here.

Even if the County were not procedurally barred from raising this argument, the argument would fail. According to 40 C.F.R. § 122.21(j)(1)(viii)(C), applicants for POTWs must provide the following information on the effluent they plan to land-apply: "(1) The location of each land application site; (2) The size of each land application site, in acres; (3) The average daily volume applied to each land application site, in [gpd]; and (4) Whether land application is continuous or intermittent."[127]

In its original application, the Tribe stated that it planned to land-apply and spray 0.03 million mgd of effluent on up to 16 acres on an intermittent basis.[128] In a May 27, 2005 letter, the Region asked the Tribe to provide the location of the land-application/sprayfield areas.[129] In a supplement to its application, the Tribe submitted a highly detailed map showing the exact location of the proposed land-application/sprayfield areas.[130] If anything, the map provides the Region more information to aid its permitting process than a numeric answer without a map would have.[131] The Agency is entitled to

[127] The County also argues that 40 C.F.R. § 122.21(f)(7) applies to this Permit. County Petition at 16. That regulation requires "[a]*ll applicants* for NPDES permits *other than POTWs...*" to provide detailed topographic maps. (Emphasis added.) As defined in 40 C.F.R. § 403.3, 33 U.S.C. § 1292, and 33 U.S.C. § 1362, the Tribe's proposed treatment facility is a POTW. The County itself notes on page 23 of its Petition that the Tribe's facility is a POTW. Therefore, this regulation does not apply.

[128] AR at 180 (Permit Application at 3 (Form 3510-2A)).

[129] AR at 340 (Letter from Doug Eberhardt, EPA Region IX, to Tom Keegan, Dry Creek Rancheria (May 27, 2005)).

[130] AR at 348 (Supplement to Application at Figure 2A-1).

[131] While the County argues that the Tribe did not provide the exact volume anticipated to be applied to each of the 13 specific sprayfield/land-application areas delineated in the map, the Region notes that all of these areas are located on the 75-acre Rancheria and are generally

significant deference in interpreting its own regulations and determining when an application is complete. See Auer v. Robbins, 519 U.S. 452, 460 (1997); see also Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). The Region properly concluded that the map provided all necessary information, and the County has not demonstrated clear error or abuse of discretion. See Knauf Fiber Glass, 9 E.A.D. at 6. Accordingly, the EAB should decline to review this issue.

8. The Region properly exercised its discretion not to circulate a revised Proposed Permit after removing the A1 discharge

The only major change between the Proposed Permit and the Final Permit was the removal of the A1 discharge—a change that multiple commenters had requested.[132] The removal of the A1 discharge point did not result in the Region authorizing any additional discharges to P1. There is a small possibility of slightly increased flows to P1, but that de minimis change falls well within the range of discharges to P1 authorized by the Proposed Permit.[133] Since the Tribe was already required to maximize its land application of effluent, the removal of the A1 discharge point will not cause the Tribe to land apply any more effluent than it otherwise would have applied.

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contiguous, separated only by landscape relief, stream channels, or buildings. Several of these individual land irrigation areas are simply planters located along the face of the parking garage. The Region believes that it would be wholly unrealistic and unnecessary for NPDES permit review purposes to require the Tribe to specify the projected volume of effluent to be applied to each individual sprayfield or landscape irrigation area.

[132] As explained in Section I.D., the other changes to the Permit were chiefly minor enhancements of monitoring and reporting requirements, which were imposed in response to commenters' requests, and which certainly do not merit recirculation of the revised Permit.

[133] Any additional flows to P1 would be limited to the amount of additional storage the Tribe could build to store effluent. As described further in Section III.C.9., the Final Permit prohibits the Tribe from discharging more than 50,000 gpd of stored wastewater from on-site storage between October 1 and May 14 each year.

Where a Region changes permit terms in response to public comments on a draft permit, the EAB has held that "[t]he determination of whether or not the comment period should be reopened ... is generally left to the sound discretion of the Region." Amoco Oil Company, 4 E.A.D. at 980 (citing 40 C.F.R. § 124.14; In re GSX Services of South Carolina, 4 E.A.D. 451 (EAB 1992). Even if the Region had already issued a Final Permit authorizing discharges to A1, the NPDES regulations would allow the Region to remove this point source outfall from the Permit without following the decisionmaking procedures outlined in 40 C.F.R. part 124. Under the explicit provisions of 40 C.F.R. § 122.63(e)(2), the removal of A1 would be considered a "minor modification" because the Region merely "terminated" a point source outfall and the deletion did not "result in discharge of pollutants from other outfalls except in accordance with permit limits." Id.

In this case, the authorizations contained in the Final Permit—limited discharges to P1 and a requirement that the Tribe maximize its reuse and land application of effluent—are merely a subset of the project presented for consideration in the Proposed Permit—limited discharges to P1 *and to A1* and a requirement that the Tribe maximize its reuse and land application of effluent.[134] The significant elements of the Final Permit were all disclosed and analyzed in the Proposed Permit. In other words, the Final Permit was a "logical outgrowth" of the notice and comment process and the public had a fair opportunity to present comments. See, e.g., In re Old Dominion Electric Cooperative, 3 E.A.D. 779 (EAB, January 29, 1992); NRDC v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002). In sum, since the Final Permit terms were a lesser-included scenario of the Proposed Permit terms and only *reduced* authorized discharges, there was no significant new

[134] AR at 1-22 (Final Permit at 1-22); AR at 122-145 (Proposed Permit at 1-24).

information making it necessary or appropriate for the Region to recirculate the revised Permit.

9. The Region's decision to not limit discharges to the WWTP's maximum treatment capacity was appropriate and reasonable

As noted above, the County failed to meet its burden to support this allegation with specific information, so the EAB should decline to review this argument on procedural grounds.

Even if the County had met its procedural burden here, its argument would fail on substantive grounds. The Region is entitled to substantial deference on technical issues, such as this, and Petitioners must meet a "heavy burden." City of Newburyport Wastewater Treatment Facility, NPDES Appeal No. 04-06, slip op. at 20.

During the April, 2007 meeting with concerned parties, the County expressed a concern that the Tribe could store large volumes of wastewater on-site during the summer and then release large volumes to P1 after September 30 (when the Permit again allowed discharges to P1).[135] Release of large volumes of stored wastewater could pose risks concerning erosion and flooding. At the meeting, Permitting Officer John Tinger said that it would be reasonable to include a permit condition that would prevent this scenario from occurring.[136]

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[135] AR at 1027 (Memorandum re 4/17/07 Meeting at Sonoma County, by John Tinger, EPA Region IX (Apr. 19, 2007)).

[136] Id.

John Tinger did not, as the County alleges, specifically promise to limit discharges to the WWTP's maximum treatment capacity in order to address the County's concern. Id. The meeting minutes read: "Concerns were raised that if A1 were to be removed, that the permit should incorporate flow limitations on P1 to prevent a very large volume of water being discharged [sic] on the 1st day of allowable discharge. EPA stated that this would be a reasonable inclusion if the permit was changed." Id.

After the meeting, the Region assessed what kind of permit limitations would best address the concerns about large discharges of stored wastewater. The Region concluded that the most appropriate and direct solution was to limit discharge of stored wastewater from on-site storage.[137] Therefore, the Final Permit prohibits the Tribe from discharging more than 50,000 gpd of stored wastewater from on-site storage between October 1 and May 14 each year.[138]

The Final Permit does contain restrictions that address the concern that discharges will exceed the Facility's maximum treatment capacity. The Permit establishes daily maximum, average monthly, and average weekly mass-based effluent limitations for BOD and TSS to control the mass of pollutants that can be discharged from the WWTP to Stream P1.[139] The Region determined the daily maximum mass limitation by multiplying the daily maximum concentration limit by the daily maximum flow capacity of the WWTP. Similarly, the Region multiplied the average monthly concentration limit by the average monthly flow capacity of the WWTP to determine the monthly mass limitation. (The weekly average limitations were calculated in the same manner.) As noted in EPA's NPDES Permit Writers' Manual, "expressing limitations in terms of concentration as well as mass encourages the proper operation of a treatment facility at all times."[140] Because these mass-based limits are based on the capacity of the WWTP, they also serve to restrict the volume of effluent which may be discharged to waters of the U.S.

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[137] See AR at 1031 (Email from John Tinger, Region IX, to Tom Grovhoug, Larry Walker Associates, and Bruce Goldstein, Sonoma County (Apr. 27, 2007)).
[138] AR at 3 (Final Permit at 3).
[139] See AR at 2 (Final Permit at 2).
[140] AR at 1073 (U.S. EPA, NPDES Permit Writers' Manual (December, 1996), available at http://www.epa.gov/npdes/pubs/owm0243.pdf at 66-67).

Therefore, the County has not demonstrated that the Region committed clear error or abuse of discretion by not limiting the flow to the maximum treatment capacity of the WWTP, and this claim should be dismissed. See Knauf Fiber Glass, 9 E.A.D. at 6.

10. The Region established sufficient limits on EC and TDS

As discussed above in Section III.A.1., this issue was not preserved for review, so the EAB should decline to review it on procedural grounds.

Even if the County were not procedurally barred from raising this issue, the County's argument would fail on its merits. The record demonstrates that the Permit includes appropriate requirements to evaluate and control discharges of EC and TDS. As noted above, the Board accords the Regions significant deference when presented with technical issues. City of Newburyport Wastewater Treatment Facility, NPDES Appeal No. 04-06, slip op. at 20.

The requirements for setting limits to protect applicable designated uses and water quality criteria are set forth in 40 C.F.R. § 122.44(d). First, the permitting authority must impose applicable technology-based effluent limitations. In this case, technology-based effluent limitations do not apply, because there are no applicable technology-based requirements for EC or TDS for POTWs.[141] 40 C.F.R. § 133.102.

Next, if the permitting authority determines that the discharge has a reasonable potential to cause or contribute to an excursion above any applicable water quality criteria, the permitting authority must impose water quality-based effluent limitations that are as stringent as necessary to meet water quality criteria. 40 C.F.R. § 122.44(d). There are two general types of applicable water quality criteria: numeric and narrative.

[141] As discussed in Section I.B., State WQRs apply where the discharge enters State lands.

The Basin Plan lists water quality objectives for specific conductance (micromhos at 77 degrees F) and TDS (mg/l) for the "upstream" Russian River, which "refers to the mainstem river upstream of its confluence with Laguna de Santa Rosa."[142] The upstream Russian River has a 90% upper limit of 320 micromhos and a 50% upper limit of 250 micromhos for EC, as well as a 90% upper limit of 170 mgl and a 50% upper limit of 150 mgl for TDS.[143] The Dry Creek WWTP will discharge to Stream P1, a tributary to the upstream Russian River, and will represent less than 0.001% of the flow of the Russian River.[144] The Russian River is not currently impaired for EC or TDS.[145]

The Basin Plan also contains two general narrative criteria that could be affected by EC and TDS: toxicity and chemical constituents. With respect to toxicity, the Plan states that "[a]ll waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life."[146] The Plan's standard for chemical constituents states that "[w]aters designated for use as agricultural supply (AGR) shall not contain concentrations of chemical constituents in amounts which adversely affect such beneficial use."[147]

The County would have the EAB believe that the United Nations goal and the Title 22 recommendations for EC and TDS discussed in the Region's Statement of Basis[148] are

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[142] AR at 1067 (Basin Plan at 3-8.00).
[143] AR at 1067 (Basin Plan at 3-8.00).
[144] See AR at 68 (Response to Comments at 12).
[145] See AR at 1079 (RWQCB, CWA Section 303(d) List of Water Quality Limited Segment (2002) at http://www.swrcb.ca.gov/tmdl/docs/2002reg1303dlist.pdf).
[146] AR at 1067 (Basin Plan at 3-4.00).
[147] AR at 1067 (Basin Plan at 3-5.00).
[148] In the Proposed and Final Statements of Basis, the Region states: "To protect the beneficial uses of water for agriculture uses, studies by the United Nations have recommended a goal of 700 umhos/cm for electrical conductivity (EC). The California Department of Health Services has recommended an SMCL for EC of 900 umhos/cm, with an upper level of 1600 umhos/cm and a short term level of 2200 umhos/cm."

also incorporated into the Basin Plan as binding water quality criteria. The County asserts that the "Regional Board uses the United Nations 700 umhos/cm goal to establish compliance with the Basin Plan's narrative water quality objective for the protection of agricultural supplies."[149] The County also alleges that the Basin Plan "incorporates" the Title 22 recommended SMCL levels cited in Section 3-4.00 of the Basin Plan.[150] The Basin Plan, however, does not mention the United Nations goal, and the section of the Basin Plan that cites sections of Title 22 does not mention EC or TDS.[151] In short, neither the United Nations goal nor the Title 22 recommendations are applicable numeric standards, and their implementation is not mandatory to ensure that applicable water quality criteria are met. The United Nations goal may nevertheless be appropriate to consider, as the Region did in this instance, in determining whether a particular discharger will meet the applicable Basin Plan water quality criteria.

Due to lack of discharge data, it is unknown at this time if the discharge from the new WWTP has a reasonable potential to cause or contribute to an excursion above Basin Plan criteria. Therefore, the Final Permit establishes monthly monitoring requirements for EC and TDS to assess reasonable potential.[152]

The Region notes that TDS and EC effluent concentrations have a direct relationship to the salt levels contained in the discharger's source water, and to the number

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[149] County Petition at 29.

[150] Id. Furthermore, the County oversimplifies the relationship between EC and TDS which, while related, do not measure the same characteristics in water. Although the County does not provide a citation for the assertion that EC can be determined by multiplying the TDS level by a factor of 1.6, the Region believes this is a factor typically applied to surface waters and may not be appropriate for wastewater.

[151] The first cited regulation, 22 C.C.R. § 64435 has been renumbered as 22 C.C.R. § 64431. The second regulation, 22 C.C.R. § 64444.5 has been renumbered as 22 C.C.R. § 64444. None of these regulations refers to EC or TDS.

[152] AR at 2 (Final Permit at 2); AR at 46 (Final Statement of Basis at 10).

of times that the wastewater is treated and recycled (e.g., for toilet flushing) because each use adds dissolved solids to the wastewater which are not generally removed by traditional treatment. In addition, EC is affected by temperature. It is unknown how these factors will affect effluent quality under the conditions regulated by the Final Permit. The current WWTP has a smaller capacity than the capacity of the proposed WWTP, it has never discharged wastewater to surface waters, and it has recycled or reused all of its treated effluent for several years. Therefore, existing data on TDS and EC concentrations may not be representative of the future conditions under which the proposed WWTP will operate and discharge.

The proposed Dry Creek WWTP is classified as a new discharger under 40 C.F.R. § 122.2. EPA's NPDES Permit Writer Manual provides the following guidance for determining reasonable potential in cases such as this, where the Region lacks effluent monitoring data:

> If the permit writer, after evaluating all available information on the effluent, in the absence of effluent monitoring data, is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to an excursion above a numeric or narrative criterion for WET [whole effluent toxicity] or for individual toxicants, the permit writer should require WET or chemical-specific testing to gather further data. In such cases, the permit writer can require the monitoring prior to permit issuance, if sufficient time exists, or may require the testing as a condition of the issued (or reissued) permit. The permit writer could then include a clause in the permit that would allow the permitting authority to reopen the permit and impose an effluent limit if the effluent testing establishes that there is

reasonable potential that the discharge will cause or contribute to an excursion above a water quality criterion.[153]

In accordance with this guidance and 40 C.F.R. § 122.44(d)(1), the Region decided it was appropriate to establish weekly monitoring requirements for EC and TDS for the new discharger, which will enable the Region to assess reasonable potential to cause excursions above the applicable water quality criteria.[154] The Permit contains a re-opener clause that allows modification of the Permit "to include appropriate conditions or limits to address demonstrated effluent toxicity based on newly available information."[155] In accordance with the narrative criteria of the Basin Plan, the Final Permit also prohibits the discharge from "caus[ing] the receiving waters to contain toxic substances in concentrations that are toxic to, degrade, or that produce detrimental physiological responses in humans or animals or cause acute or chronic toxicity in plants or aquatic life" and prohibits the discharge from "caus[ing] concentrations of chemical concentrations of chemical constituents to occur in excess of limits specified in Table 3-2 of the Basin Plan."[156]

Finally, it is noted that the County's argument ignores the fact that the Region's approach to regulating EC and TDS in the Permit is consistent with other NPDES permits that the RWQCB has issued for nearby POTWs[157] and that the RWQCB did not object to the Region's approach in its CWA § 401(a)(2) comment letter to the Region. In that letter,

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[153] AR at 1073 (U.S. EPA, NPDES Permit Writers' Manual (December, 1996), available at http://www.epa.gov/npdes/pubs/owm0243.pdf at 104).
[154] AR at 2 (Final Permit at 2).
[155] AR at 8 (Final Permit at 8).
[156] AR at 5 (Final Permit at 5). (Table 3-2 does not refer to EC or TDS.)
[157] See, e.g., AR at 1080 (City of Santa Rosa Laguna Subregional Wastewater Collection, Treatment, Conveyance, Reuse, and Disposal Facilities (Permit No. CA0022764)); AR at 1080 (Russian River County Sanitation District and Sonoma County Water Agency Wastewater Treatment and Disposal Facility (Permit No. CA0024058)).

the RWQCB stated that it believes the Dry Creek Permit "requires that wastewater be treated to an advanced level and it contains effluent limits for pollutants of concern."[158] The RWQCB did not object to the EC or TDS conditions in the Permit.[159] Therefore, the Region believes that its Permit is consistent with the State's interpretation of the Basin Plan.

In sum, the County has not demonstrated clear error or abuse of discretion, so its claim should be dismissed. See Knauf Fiber Glass, 9 E.A.D. at 6.

IV. Conclusion

For the foregoing reasons, the Region submits that the Petitions should be dismissed in their entirety because the Petitioners have failed to carry the burden necessary to warrant review.

Respectfully submitted,

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[158] AR at 728-29 (RWCQB Comments).
[159] AR at 728-29 (RWCQB Comments).

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