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

In re: Peabody Western Coal Company, Black Mesa Complex NPDES Permit No. NN 0022179	NPDES Appeal Nos.: 10-15 and 10-16

PEABODY WESTERN COAL COMPANY'S RESPONSE

TO PETITIONS FOR REVIEW

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Peabody Western Coal Company ("Peabody") hereby responds in the above-captioned matter to the petitions of Black Mesa Water Coalition, Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and Sierra Club, NPDES Appeal No. 10-15 (the "EMLC Petition"),[1] and Californians for Renewable Energy (CARE) and former Hopi Tribal Chairman Ben Nuvamsa, NPDES 10-16 (the "CARE Petition") (collectively, the "Petitions").[2]

Pursuant to 40 C.F.R. § 124.19(a), Petitioners filed appeals with regard to the September 16, 2010 renewal by the U.S. Environmental Protection Agency ("EPA"), Region IX (the "Region"), of Peabody's National Pollutant Discharge Elimination System ("NPDES") Permit, No. NN0022179 (the "Permit"). Petitioners challenge the Permit's renewal based upon a host of wide-ranging, unsupported grounds. As explained below, the Petitioners have failed to meet their burden and have not shown that the Region based any Permit conditions on a clear error of law or fact or that the EAB should otherwise exercise discretion on an important policy matter. *See* 40 C.F.R. §§ 124.19(a)(1) & (2); *see also In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 509 (EAB 2006). Accordingly, the Petitions should be denied.

I. BACKGROUND

A. The Mines

The Permit concerns the Kayenta and Black Mesa coal mining operations, collectively referred to in the Permit as the "Black Mesa Complex," located southwest of Kayenta, Arizona. Both mines date back to the early 1970s. *See* Fact Sheet, Peabody Western Coal Company –

[1] For purposes of this Response, unless otherwise indicated, the "EMLC Petition" will also refer to Petitioners' Supplemental Brief in Support of Petition for Review filed by EMLC on or about November 1, 2010. *See* EAB Order Accepting Supplemental Brief for Filing and Granting Permittee Permission to Respond to Petitions, EAB, Nov. 4, 2010.

[2] *See* EAB Order Accepting Supplemental Brief for Filing and Granting Permittee Permission to Respond to Petitions, EAB, Nov. 4, 2010; *see also* EAB Order Granting Region and Permittee Additional Time to Respond to Petitions , EAB, Dec. 15, 2010.

Black Mesa Complex, NPDES Permit No. NN0022179, U.S. EPA (2010) ("Fact Sheet") at 2. Peabody has operated the mines pursuant to leases granted by the Navajo Nation and Hopi Tribe to mine up to 670 million tons of coal.

Peabody also has operated the mines pursuant to the authority of and permits issued by the U.S. Office of Surface Mining Reclamation and Enforcement ("OSM"). The Kayenta mine has operated since 1973. It currently operates under OSM Permit AZ-0001D, originally issued as AZ-0001C in 1990 under OSM's permanent Indian Lands program and after being renewed for five-year periods, as Permit AZ-0001D, by OSM in accordance with 30 C.F.R. § 774.15. The Black Mesa mining operation operated from 1970 until December 2005, after the Mohave Generating Station ceased operations. The Black Mesa mine has operated under OSM's initial regulatory program under the Surface Mining Control and Reclamation Act of 1977[3] and under an administrative delay at the direction of the Secretary of the Interior.

B. The NPDES Permit

The Permit regulates discharges of runoff from mine areas, coal preparation plant areas and reclamation areas. Permit; Fact Sheet at 3. From the start, both mines have been addressed under the same permit. *See* Ex. A (NPDES Permit No. AZ0022179 (June 1983)); Comment Response Document, Peabody Western Coal Company – Black Mesa Complex, NPDES Permit No. NN0022179, Final 2010 ("Response to Comments") at 4-5. The original NPDES permit was issued by the Region on June 15, 1983, and has been reissued several times since. Most recently, the Permit was reissued on December 29, 2000. Fact Sheet at 1.

On August 3, 2005, Peabody filed a timely renewal of its NPDES permit. EPA Fact Sheet at 1. Pending renewal, the Region has administratively continued the Permit. *Id.* On

[3] 30 U.S.C. § 1201, *et seq.*

February 19, 2009, the Region proposed a permit renewal and issued a final permit on August 5, 2009. *Id.* Thereafter, certain appeals were filed with the Environmental Appeals Board ("EAB") by essentially the same petitioners in the above-captioned case. *See In re Peabody Western Coal Company, Black Mesa Complex Permit No. NN0022179*, NPDES Appeal No. 09-10. In response, on December 1, 2009, the Region filed a notice withdrawing the August 5, 2009 permit and opted to reopen the public comment period, prepare a new fact sheet, and hold public hearings on Navajo and Hopi lands. As a result, EAB dismissed the petitions with prejudice, but without a determination on the merits of any arguments. *In re Peabody Western Coal Company, Black Mesa Complex Permit No. NN0022179*, NPDES Appeal No. 09-10 (Dec. 3, 2009) (Order Dismissing Petition for Review with Prejudice).

On September 16, 2010, the Region reissued the Permit following the additional comment period, two public hearings located on tribal lands, and another fact sheet and response to comments. On or about October 18, 2010, the Petitioners filed the subject appeals wherein the Petitions raise substantially the same unfounded arguments made in the previous appeal[4] and put

[4] The EMLC Petition again asserts that EPA failed to hold meaningful public hearings. Yet, in an effort to accommodate the varied stakeholders, the Region more than met its obligations for public notice and public comment for the Permit under 40 C.F.R. §§ 124.10 to 124.14. Besides the Permit being originally noticed and renewed in 2009, it was subsequently withdrawn to provide for additional public review and comment. In 2010, the public comment period was initially set from January 20, 2010 to March 1, 2010, with two public hearings in February 2010. The comment period was thereafter twice extended and ultimately ended on April 30, 2010. As a result, the total comment period exceeded three months, not including the public vetting in 2009, which exceeds the standards in 40 C.F.R. § 124.10(b) (providing for at least 30 days for public comment) and 40 C.F.R. § 124.14 (stating that a period of over 60 days may be necessary for "complicated proceedings"). The Region also met with representatives of petitioners (the Sierra Club, Center for Biological Diversity, and Black Mesa Trust) on March 3, 2010, and offered formal government-to-government consultations with the Hopi Tribe and Navajo Nation. These efforts together more than met the Region's responsibilities concerning administrative transparency. *See* Response to Comments at 5-8.

at issue and misconstrue unrelated proceedings before the Department of the Interior concerning Peabody's OSM permit, as explained below.

C. U.S. Department of the Interior Proceedings

In February 2004, Peabody filed a permit revision application with OSM proposing several revisions to the mine plans for the Kayenta and Black Mesa mining operations, including, among other things, a request to bring the Black Mesa mine under the permanent regulatory program of the Surface Mining Control and Reclamation Act ("SMCRA"). From 2005 to 2008, OSM prepared an Environmental Impact Statement ("EIS") concerning the application pursuant to the National Environmental Policy Act. In 2008, Peabody opted to amend its pending mine permit revision application as to the Black Mesa mine operations, since it believed the Mohave Generating Station was unlikely to reopen. After OSM published a Final EIS in November 2008 and approved Peabody's SMCRA application in December 2008, the approval was challenged on several different grounds, including claims that the Final EIS did not consider a reasonable range of alternatives under NEPA, and heard before U.S. Department of the Interior Administrative Law Judge Robert G. Holt. On January 5, 2010, Judge Holt ruled that, as a result of the amended application, either a supplemental draft EIS should have been prepared or a new NEPA process initiated under Council on Environmental Quality regulations and vacated OSM's December 2008 approval of the permit as a result. Ex. B (*Nutumya's NEPA Motion Granted*, In re Black Mesa Complex Permit Revision, Docket No. DV 2009-1-PR thru DV 2009-8-PR, January 5, 2010).

II. STANDARD OF REVIEW

The petitioner bears the burden of establishing that review by the EAB is appropriate. 40 C.F.R. § 124.19(a); *see In re Rohm & Hass*, 9 E.A.D. 499, 504 (EAB 2000). A petitioner does not have an appeal as a right of a region's permitting decision. 40 C.F.R. § 124.19; *In re*

City of Phoenix, Arizona, 9 E.A.D. 515, 523 (EAB 2000) (citing *In re Arizona Municipal Storm Water NPDES Permits*, 7 E.A.D. 646, 651 (EAB 1998); *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 282 (EAB 1997); *In re Florida Pulp and Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995)). As explained below, petitioners must preserve the issues for review by participating and raising the issues in the public comment process. Before the EAB, petitioners must demonstrate with specificity that the region erred in law or in fact.

A. Issues Must Have Been Preserved for Review

The issues raised in a petition for review must have been preserved during the public comment period. The petitioner must have raised "all reasonably ascertainable issues" and "all reasonably available arguments supporting [his] position" by the close of the public comment period. 40 C.F.R. § 124.13; 40 C.F.R. § 124.19(a).[5] In addition, "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)). This threshold requirement allows the region the opportunity to respond fully to comments raised during the comment period and to correct any errors in the final permit it issues. *Id.* (citing *RockGen Energy Ctr.*, 8 E.A.D. at 547-48).

B. Petitioner Must Demonstrate With Specificity That the Region Clearly Erred in Law or Fact

The petitioner must also show with specificity that the region based a permit condition on either a clear error of law or fact or an exercise of discretion or an important policy matter that

[5] Persons who have 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).

the Board should, in its discretion, review. *See* 40 C.F.R. §§ 124.19(a)(1) & (2); *see also In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 509 (EAB 2006). The Board is to exercise its powers of review "only sparingly," and "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). U.S. EPA, Environmental Appeals Board, Practice Manual at 50 (Sept. 2010).

1. Petitions Must Specifically Show Why the Region Erred

In order to meet its burden, the petitioner must be specific in showing why the region erred and its objections must address specific permit conditions. "Mere allegations of error" are not enough to warrant review. *See In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 32, 45, 61, 74 (EAB Sept. 15, 2009); *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 136 n.71 (EAB 2005) (quoting *In re New Eng. Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001)); *In re Carlota Copper Co.*, 11 E.A.D. 692, 720 (EAB 2004). *See also* U.S. EPA, Environmental Appeals Board, Practice Manual at 42 (Sept. 2010).

Mere repetition of objections made during the comment period or the "mere allegation of error" without specific supporting information is insufficient to warrant review. *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496, 520 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). Rather, the petitioner must argue with specificity as to why the Board should grant review. *In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995). To meet this minimal specificity requirement, "a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review." *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002). A petitioner must support its allegations with solid evidence that the permit issuer clearly erred in its decision, as "the Board will not entertain vague or unsubstantiated claims." *Attleboro*, slip op. at 61. *See In re*

NPDES Permit for Wastewater Treatment Facility of Union Township, NPDES Appeal Nos. 00-26, 00-28, at 10-11 (EAB Jan. 23, 2001), *pet. for rev. denied, Michigan Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708-9 (6th Cir. 2003) (citing *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 2005)).

Moreover, a petitioner must object to a specific permit condition because the EAB's jurisdiction under 40 C.F.R. § 124.19(a) is to ensure that the Region's permit decision comports with the applicable requirements of the NPDES program. *In re Knauf Fiber Glass*, 8 E.A.D. 121, 161-62 (EAB 1999). The Board's review is limited to "permit conditions" that are claimed to be erroneous. *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725 (EAB 1997). In other words, the Board is "not at liberty to resolve every environmental claim brought before [it] in a permit appeal but must restrict [its] review to conform to [its] regulatory mandate." *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 514 (EAB 2002) (refusing to review the facility's impacts on water rights during a NPDES permit appeal) (citing *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 259 (EAB 1999); *In re Knauf Fiber Glass*, 8 E.A.D. 121, 127 & 161-172 (EAB 1999)). Thus, if the petitioner's petition for review does not address a specific permit condition, the Board should deny review.

2. Technical Challenges Require Compelling Arguments as to Why the Region's Technical Judgment or Previous Explanation Is Clearly Erroneous

Last, when a petitioner seeks review of a permit decision based on issues that are fundamentally technical in nature, the petitioner's burden of demonstrating that review is appropriate is particularly high. *In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 510 (EAB 2006). A petitioner cannot establish clear error or a reviewable exercise of discretion simply by presenting a difference of opinion or alternative theory regarding a technical matter. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). Instead,

when a petitioner challenges the region's technical judgment, "[p]etitioners must provide compelling arguments as to why the region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review." *Id.* at 668 (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997)). For permit challenges based on technical issues, the Board expects a petitioner to present "references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." U.S. EPA, Environmental Appeals Board, Practice Manual at 42 (Sept. 2010); *Attleboro*, slip op. at 32 (citing *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005)).

Thus, deference to the region's decision is generally appropriate if "the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the region is rational in light of all the information in the record." *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), *rev. denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

III. ARGUMENT

A. The Inexistence of TMDLs or the Failure to Identify Water Quality Limited Segments Is No Bar to the Region's Renewing Peabody's Permit

The EMLC Petitioners argue that the Region cannot lawfully issue permits for new sources or increased discharges, since the Hopi Tribe and the Navajo Nation have not identified water quality limited segments ("WQLSs") to determine whether Total Maximum Daily Loads ("TMDLs") for those impaired segments must be promulgated. EMLC Brief at 5-10. A challenge with regard to the tribe's progress, or lack thereof, to identify impaired water basins and promulgate TMDLs does not properly rest before the EAB in this matter. Importantly, besides this being the improper forum and the lack of legal authority to support its position,

Petitioners' argument is misplaced as the Permit's renewal does not involve a new discharger or new source.[6] 42 C.F.R. § 122.4(i).

Section 303(d) of the Clean Water Act requires states, territories, and authorized tribes to develop lists of impaired waters and establish priority rankings for waters on the lists and develop TMDLs for these waters. 40 U.S.C. § 1313(d). However, nothing in the CWA limits EPA's authority to issue NPDES permits until these separate obligations imposed on states and tribes are fulfilled. 42 U.S.C. § 1342. *See also San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 881 (9th Cir. 2002) (EPA does not have an affirmative duty to identify WQLSs). Rather, only after a TMDL is final and effective can it be integrated into NPDES permits and become enforceable by concerned parties. 40 C.F.R. § 122.44(d)(1)(vii)(B); *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002). Despite aggressive goals in the Clean Water Act, it has taken years for the states, tribes, and EPA to identify WQLSs, and years more for them to develop TMDLs. Yet, over the same time period, authorities have issued and reissued countless NPDES permits. If the EMLC Petitioners were correct, the NPDES permits issued prior to the TMDL era never would have been promulgated.

[6] Petitioners fail to cite any study, report, or other data indicating even a potential impairment of any pollutant in the alleged receiving waters identified in the Permit, including Moenkopi Wash Drainage and Dinnebito Wash Drainage, or the need for TMDLs. Moreover, it is completely speculative to take any position on whether TMDLs, if they were in place, would even affect the effluent limitations in the Permit. For permit challenges based on technical issues, a petitioner must present "references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." *Attleboro*, slip op. at 32 (citing *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005)). EPA's conservative reasonable potential analysis indicating that permitted discharges do not have a reasonable potential to cause or contribute to an exceedance of water quality standards strongly suggests that, even if a TMDL were in place, the Permit would not violate the TMDL. Together, the evidence and law show that the lack of TMDLs or identification of WQLSs do not bar issuance of the renewed permit.

In support of their argument, Petitioners cite *Friends of the Wild Swan v. U.S. EPA*, 130 F. Supp. 2d 1199 (D. Mont. 2000), *aff'd in part, rev'd in part,* remanded by *Friends of the Wild Swan v. U.S. EPA*, 74 Fed. Appx. 718 (9th Cir. 2003, *unpublished*). Neither this District Court order, the unpublished appellate decision, nor the Clean Water Act supports Petitioners' assertion. The EMLC Petitioners' interpretation of *Friends of the Wild Swan* would in effect impose a complete ban on NPDES permits, regardless of whether it was a new permit or an established permit up for regular renewal.

Friends of the Wild Swan concerned an action brought by environmental groups under 33 U.S.C. § 1313 with regard to the rate at which the State of Montana was adopting TMDLs for its WQLSs. *Friends of the Wild Swan v. U.S. EPA*, 74 Fed. Appx. 718 (9th Cir. 2003, *unpublished*); *Friends of the Wild Swan v. U.S. EPA*, 130 F. Supp. 2d 1199 (D. Mont. 2000). The case did not concern a challenge to a particular NPDES permit, as in this appeal of a permit renewal. *Friends of the Wild Swan,* 74 Fed. Appx. at 724, fn. 4. Instead, in *Friends of the Wild Swan*, the district court found that EPA violated the Administrative Procedure Act and CWA by arbitrarily and capriciously approving Montana's 1998 list of WQLSs and corresponding TMDLs submitted to EPA pursuant to CWA § 303(d).[7] The district court remanded to the EPA with a deadline for establishment of TMDLs for all WQLSs and prohibited EPA from issuing "any new permits or increas[ing] permitted discharge[s] for any permittee under the National Pollutant Discharge

[7] The District Court of Montana found that in Montana's 1998 presentation of TMDLs to EPA for approval, Montana had only promulgated 130 TMDLs for 900 water quality limited segments. *Friends of the Wild Swan I,* 130 F. Supp. 2d at 1200.

Elimination System permitting program"[8] for particular WQLSs not having associated TMDLs. *Id*.

Here, Petitioners' claim that the tribes are delinquent in identifying impaired basins and developing TMDLs is not appropriate before the EAB as it is a matter outside of the Permit. *In re Tondu Energy Co*., 9 E.A.D. 710, 716 n.10 (EAB 2001) (the permit appeals process is not the appropriate venue to challenge EPA's regulations). Consistent with *Friends of the Wild Swan*, Petitioners' challenge would not rest in this forum, but rather in a separate action against the Hopi Tribe and Navajo Nation for failure to identify WQLSs, or possibly against EPA, if the court found that a "constructive submission" of WQLSs was made to EPA. *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 881 (9th Cir. 2002); *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001).

In briefing this point, Petitioners also fail to reconcile their argument with the fact that the Permit's renewal does not involve a new discharger or new source (as explained below) and is therefore not subject to prohibitions under EPA regulations regarding the issuance of NPDES permits for discharges to identified impaired water bodies. 42 C.F.R. § 122.4(i); Response to Comments at 11-12. Nor do the facts fit within Petitioners' own interpretation of *Friends of the Wild Swan,* despite the Region pointing out in its Response to Comments that there is no new source or increased discharge under the renewed permit. Response to Comments at 11-12. *See also Friends of the Wild Swan,* 74 Fed. Appx. at 723-24 (Ninth Circuit affirmed the District Court's prohibition on new permits and increased permitted discharges specifically because the District Court did not impose a "complete ban" on issuing discharge permits and because the

[8] Petitioners fail to note that this ordering paragraph was subsequently amended by the Court to include Montana within its scope. *Friends of the Wild Swan v. U.S. EPA*, 130 F. Supp. 2d 1204, 1206 (2000).

order closely resembled the Clean Water Act regulation at 40 C.F.R. § 122.4(i), which clearly governs only new sources and new dischargers). As explained below, the Region correctly concluded that there is neither a new source, new discharger, nor increased discharge involved with the permit renewal.

B. The Monitoring Plan in the Permit Is Representative and Reasonable

The EMLC Petition attacks the Permit, claiming that it violates the CWA because the Region authorizes monitoring at 20 percent of the outfalls. This claim is neither grounded in law nor merited technically and provides no support for EAB to overturn the Region's technical judgment. *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997); U.S. EPA, Environmental Appeals Board, Practice Manual at 42 (Sept. 2010).

EPA's regulations at 40 C.F.R. § 122.41(j)(1) give the agency latitude to determine a monitoring plan that is representative of the monitored activity, in this case discharges from Peabody's impoundments. During precipitation events of less than or equal to a 10-year, 24-hour precipitation event, the Permit allows Peabody to monitor a subset of outfalls accounting for at least 20 percent of the precipitation-induced discharges. Permit at 6. While Petitioners might prefer that all outfalls are monitored during precipitation events, Petitioners do not attempt to show, scientifically, mathematically, or otherwise, why or how EPA's monitoring plan will not produce results representative of Peabody's precipitation-induced discharges. To challenge this condition of the Permit, Petitioners must adduce evidence of how the precipitation-induced discharges are so heterogeneous that sampling of a subset is not representative of the discharge.[9]

[9] For permit challenges based on technical issues like this one, a petitioner must present "references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." *Attleboro*, slip op. at 32 (citing *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005)). *On this point, petitioners fail to cite any study, report, or other data indicating heterogeneous*

If Petitioners' challenge is directed at EPA's regulation itself, this forum is improper for the challenge. *In re Tondu Energy Co*., 9 E.A.D. 710, 716 n.10 (EAB 2001) (the permit appeals process is not the appropriate venue to challenge EPA's regulations).

Moreover, the EMLC Petitioners' claim that the Region has unlawfully granted Peabody a "monitoring waiver" is neither grounded in law or fact (EMLC Petition at 11-12), citing 40 C.F.R. Section 122.44(a)(2)(iv). 40 C.F.R. Section 122.44(a)(2) concerns waivers for the monitoring of certain "pollutants"—not outfalls—and as such is not applicable. As the Region indicated in its Response to Comments, Peabody has not requested a waiver from monitoring any pollutants, and EPA has not granted a waiver. Response to Comments at 18.

C. As the Permitting Authority, the Region Approved Peabody's Sediment Control Plan, Not OSM

The EMLC Petitioners argue that EPA improperly relied "in whole or in part" on OSM's review of Peabody's Sediment Control Plan in violation of Judge Holt's January 2010 Order and in violation of a 2003 Memorandum of Understanding ("MoU") between the Region and the Western Regional Coordinating Center ("WRCC") of the OSM. EMLC Petition at 5; EMLC Brief at 13-14; Ex. B. However, Judge Holt's Order concerning Peabody's mining application has nothing to do with the Region's approval of the Sediment Control Plan as being in compliance with EPA's Western Alkaline Coal Mining Subpart H rule ("Subpart H"). 40 C.F.R. Part 434.80; Ex. B. As the Region pointed out in its response to comments, regardless of OSM's technical review, it is the Region that is the permitting authority responsible for the plan's approval, not OSM, and it is the Region that approved the adequacy of the Sediment Control Plan. Response to Comments at 21; Fact Sheet at 5-6; 40 C.F.R. Part 434.80.

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discharges from the outfalls during precipitation that would cast doubt on the Region's conclusions here.

The EMLC Petitioners ignore the fact that the Region is the permitting authority under Subpart H[10]—not OSM—and mischaracterize the 2003 MoU,[11] which sets out a *concurrent* review process for the Region and OSM.[12] It does not authorize OSM as the permitting authority for NPDES permits or with regard to Subpart H. Only the Region has the administrative authority to approve the Sediment Control Plan under Subpart H.[13] Section 434.82(a) states:

> The operator must submit a site-specific Sediment Control Plan to the permitting authority that is designed to prevent an increase in the average annual sediment yield from pre-mined, undisturbed conditions. **The Sediment Control Plan must be approved by the permitting authority and be incorporated into the permit as an effluent limitation.** The Sediment Control Plan must identify best management practices (BMPs) and also must describe design specifications, construction specifications, maintenance schedules, criteria for inspection, as well as expected performance and longevity of the best management practices.

(emphasis added).

To advance their argument, the EMLC Petitioners also take gross liberties with characterizing the effect of the January 2010 Order (attached as Exhibit B). The EMLC Petitioner's characterization of "*vacatur* of OSM's 'technical review' of Peabody's *Sediment Control Plan*" is utterly incorrect and misleading. EMLC Brief at 13; Ex. B. In reality, Judge Holt found a *procedural* error with regard to OSM's conformance with the National Environmental Policy Act concerning Peabody's SMCRA permit application, and vacated

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[10] Subpart H establishes new effluent limitation guidelines for western coal mines. EPA promulgated these guidelines, which are to be integrated by the NPDES permitting authorities into NPDES permits when appropriate.

[11] The MoU is a guidance document, and as such is not a regulatory action and thus is preempted by contrary law or regulation. *See* EPA's webpage at http://www.epa.gov/regulations/guidance/guidancedef.html#guidance (a guidance document is not a regulatory action).

[12] "EPA, OSM, the Tribes and BIA will conduct *concurrent* reviews of the application. All parties will have 60 days to submit comments and deficiencies to OSM. OSM will contact EPA at the end of the 60-day period to determine if EPA has identified any deficiencies. If OSM identifies deficiencies in the application, it will provide EPA with a copy of the letter describing those deficiencies." MoU, paragraph 2.

[13] Subpart H is codified at 40 C.F.R. Sections 434.80 to 434.85.

OSM's approval of that application on that sole basis. Ex. B at 37. That the application has been vacated purely on NEPA procedural grounds has no bearing on the quality or correctness of OSM's technical review of Peabody's Sediment Control Plan for purposes of the NPDES Permit (nor on the Region being the permitting authority that approved the plan). Response to Comments at 21. This is clear from Judge Holt's comments concerning motions seeking declaratory judgment on the validity of OSM's Cumulative Hydrologic Impact Assessment ("CHIA") and OSM's Final Biological Assessment ("BA"), which he denied as moot or unripe. Ex. B at 35-36. Judge Holt refused to rule on these other motions because both assessments were separate documents that were not dependent upon the Final Environmental Impact Statement, which he ruled to be invalid for procedural reasons:

> Since the CHIA depends on the [permit application], and not on the Final EIS, a conclusion that the Final EIS is inadequate does not necessarily mean that the CHIA is inadequate. [...] Similar to the CHIA, the Final BA is a separate document not dependent on the validity of the Final E[IS].

Id. The same reasoning applies to Petitioners' argument concerning the Sediment Control Plan (which is misplaced for other reasons as explained herein), the validity of which did not, and does not, depend on the validity of the invalidated Final EIS.

Nor do Petitioners point to any technical errors in the modeling or other data supporting the Sediment Control Plan or in the Region's analysis of the Plan and therefore do not meet their burden to overturn the Region's technical judgment approving the plan. "Petitioners must provide compelling arguments as to why the Region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review." *Id.* at 668 (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997)). For permit challenges based on technical issues, the Board expects a petitioner to present "references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about

permitting matters that were not adequately considered by a permit issuer." U.S. EPA, Environmental Appeals Board, Practice Manual at 42 (Sept. 2010); *Attleboro*, slip op. at 32 (citing *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005)).

Petitioners have not shown how the Region's approval of the Sediment Control Plan is clearly erroneous as to either fact or law. As the Region has fully complied with Subpart H, the Board should not overturn this component of the Permit.

D. Alleged Discharges in Excess of Water Quality Standards and Unsupported Assertions Concerning the Effects of Discharges on Receiving Water Do Not Merit Review

Petitioners allege that the Permit will allow discharges in excess of water quality standards and that past violations go unaddressed. These allegations are not true.

EMLC Petitioners allege that "21 of the monitored discharges are exceeding WQS." EMLC Petition at 6; EMLC Supplemental Brief at 11. The EMLC Petitioners generically assert that the Permit would "cause or contribute to exceed[a]nces of water quality standards[.]" EMLC Brief at 10. To support their argument, EMLC Petitioners misconstrue impoundment seep data cultivated from Peabody's Seep Management Plan set forth in the Fact Sheet. Fact Sheet at 10-12. However, the Permit does not authorize discharges of pollutants from the seeps to waters of the United States, and therefore the NPDES effluent limitations are not relevant. Response to Comments at 15-18; Fact Sheet at 12; Permit Appendix A-C. Rather, the Permit authorizes discharges only from designated outfalls and seeps are addressed and controlled through the Seep Management Plan. *Id.* In addition, compliance under the Permit with the Western Alkaline Reclamation Areas requirements is intended to eliminate many of the impoundments and associated seeps. Response to Comments at 17-18.

Likewise, the EMLC Petitioners misconstrue the Region's reference to a potential water quality variance with regard to the seeps. Supplemental Brief at 11. The Region makes clear

that it is not relying upon a variance for its renewal of the Permit and only points out that it "may" explore the feasibility of doing so with the Navajo and Hopi Tribes.[14] Response to Comments at 12, 18. Even so, the Region further points out that any potential water quality variance would require public notice and comment. *Id.*

The EMLC Petitioners further argue that "the ongoing WQS exceed[a]nces should have been corrected and remedied prior to NPDES permit issuance." EMLC Brief at 11. In support of this claim, petitioners cite 40 C.F.R. Section 122.4(a), which prohibits issuance of a permit that does not provide for compliance with the Clean Water Act or Clean Water Act regulations, and 40 C.F.R. Section 122.4(d), which prohibits issuance of a permit when "imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States[.]" Besides Petitioners misapplying the water quality standards as explained above, the Region also makes clear that it believes that adherence to the Permit's conditions will comply with all applicable water quality requirements and also conditions the Permit on compliance with Hopi and Navajo water quality standards. Permit at 10-12, Fact Sheet at 7; Response to Comments at 14. Petitioners have not shown and cannot show how the Region's judgment is erroneous in law or in fact. *See also* Section III.E and F, *infra*.

Last, with regard to claims that enforcement is necessary for past permit conditions, including whether a compliance order should be issued as raised in the CARE Petition, besides not being grounded in fact, including as explained above, and lacking any detailed evidence to

[14] As the Region points out, many of the seep pollutant levels, such as aluminum, TDS and sulfate, are believed to be from natural causes and do not exceed naturally occurring background levels. Fact Sheet at 12. These pollutants in the seeps are caused by the seepage activity itself (i.e., when the storm water infiltrates the soil and leaches constituents from the soil) and not from the mining activities. Response to Comments at 17.

support such an assertion, these proceedings are not the proper forum for such claims. *See* Response to Comments at 18.

E. Adequacy of Effluent Limitations

The EMLC Petitioners boldly assert that effluent limits for additional pollutants are necessary, such as heavy metals. EMLC Brief at 13. To succeed on this technical point, petitioners must present "references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." *Attleboro*, slip op. at 32 (citing *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005)). The Region, in its Response to Comments, stated that it found no evidence of heavy metals in the untreated runoff or in the regulated discharges. Response to Comments at 15. On this point, petitioners do not supply such evidence and fail to cite any study, report, or other data indicating additional pollutants at levels of concern discharged from the regulated outfalls in prior years. Moreover, as the Region explains, discharges must also comply with the tribal Water Quality Standards. Response to Comments at 14. Thus, the petitioners cannot show clear error and do not cast doubt on the Region's conclusions. This point merely alleges error and is not enough to warrant review. *See Attleboro*, slip op. at 32, 45, 61, 74.

F. The Region's Reasonable Potential Analysis

In a conclusory fashion, Petitioners assert that the Region's reasonable potential analysis is deficient. EMLC Petition at 7 (not addressed in its Supplemental Brief). The Petitioners merely state that it is deficient and cite to their comment letter which only suggests that a reasonable potential analysis should be done (EMLC Petition at 7). In fact, the Region performed this analysis and concluded that the permitted discharges do not present a reasonable potential to cause or contribute to an exceedance of water quality standards. Response to

Comments at 12-13; Fact Sheet at 6-7. The Region used the most conservative and protective assumptions in arriving at this conclusion, especially in its assumption of no available dilution. *Id.* Critically, Petitioners do not respond to or address the Region's treatment of this issue in the Response to Comments document (at 12-13) or the Fact Sheet (at 6-7). *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002) ("[A] petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review."). Without specifically addressing the Region's approach to its reasonable potential analysis, petitioners cannot show clear error. Moreover, without citation to technical data, petitioners have waived their opportunity to challenge the Region's technical conclusion.

G. The Region Fully Complied With the Endangered Species Act

EMLC erroneously asserts that the Region failed to comply with the Endangered Species Act ("ESA"). In particular, EMLC's argument boils down to three premises: (1) the Region violated the ESA by failing to consult with the Fish & Wildlife Service ("FWS"), (2) the Region wrongly relied upon OSM's biological assessment with regard to the Life-of-Mine permit, and (3) the Region failed to consider all relevant effects of its actions on endangered species, including air emissions from the Navajo Generating Station, San Juan Generating Station, Four Corners Power Plant, and global warming. EMLC Brief at 19-29. Each of these claims is misplaced.

1. The Region Complied With the ESA and Did Not Abuse Its Discretion by Not Formally Consulting With FWS

The Region determined that there would be no effect on any federally listed species or federally designated critical habitat. Fact Sheet at 12-14. Because the Region determined that its proposed action would have no effect on any listed species, formal consultation with the FWS or NMFS was not required. 50 C.F.R. § 402.14; *In re Desert Rock Energy Company, LLC*, PSD

Appeal Nos. 08-03, 08-04, 08-05 & 08-06, slip op. at 36 and n. 34 (2009); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 196, n.134 (EAB 2006); *In re Phelps Dodge*, 10 E.A.D. 460, 485-486 (EAB 2002). As previously found by the EAB to be appropriate procedure, the draft permit and accompanying fact sheet with the Region's finding of no effect were sent to the FWS at the time the Region provided public notice. Response to Comments at 32. *See In re Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, NPDES Appeal Nos. 08-02, 08-03, 08-04 & 08-05 (Jan. 14, 2009) (Order Denying Review in Part and Remanding in Part) at 15. The Region did not receive comments from FWS. This process is consistent with agreed-upon procedures between EPA and FWS and is not an abuse of the Region's discretion. *See Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act*, 66 Fed. Reg. 11202 (February 22, 2001) at 11215-17.

2. The Region Made Its Own "No Effect" Determination

Despite the Region informing it to the contrary in its Response to Comments and Fact Sheet, EMLC misconstrues the facts by claiming that the Region inappropriately deferred to OSM's biological assessment, which EMLC asserts inadequately addresses the effects of EPA's actions. Fact Sheet at 12-14; Response to Comments at 30-34. While agencies may utilize biological assessments prepared by other agencies for similar actions and incorporate them by reference, in this instance, the Region only used the list created by FWS of threatened and endangered species on June 13, 2005, for OSM's revision of the Life-of-Mine permit action. 50 C.F.R. § 402.12(g); Fact Sheet at 12; Response to Comments at 31-33. Notably, EMLC does not

dispute the list of species considered by the Region.[15] Using this list of previously identified threatened and endangered species, the Region determined that the action would have no effect and supported its determination by reasons set forth in the Fact Sheet. Fact Sheet at 12-14; Response to Comments at 30-34.

3. The Region Considered the Proper Effects of Its Action Under the Endangered Species Act

EMLC claims that the Region erred by only considering the direct effects of the discharge under the Permit and by not considering the effects of air emissions from the generating stations and global warming.[16] Yet, EMLC's briefs lack any specificity as to why the effects of these activities must be considered with regard to the Region's renewal of the Permit other than to regurgitate terms from the ESA and regulations. For instance, EMLC dedicates several pages to repeating definitions of direct and indirect effects, the action area, interrelated actions, interdependent actions, and any potential cumulative activities, but never specifically explains how these terms apply in this circumstance to the generating stations and global warming.

The first step in the effects analysis is to identify the federal action at issue (i.e., the "larger action"). The direct and indirect effects, the action area, interrelated actions, interdependent actions, and any potential cumulative activities cannot be determined without initial consideration of the specific larger action at issue. 50 C.F.R. § 402.02. "Action" is defined as:

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[15] In comments, EMLC raised the desert tortoise, which it improperly put at issue due to the power plant emissions, as addressed below.

[16] "[D]ue to the low frequency of discharge, the requirement that the discharge must meet water quality standards, and the absence of aquatic species or species that could be detrimentally impacted by the wastewater discharge, EPA has made a no effect determination." Fact Sheet at 14.

> all ***activities*** or programs of any kind ***authorized***, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the ***granting of*** licenses, contracts, leases, easements, rights-of-way, ***permits***, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. 402.02. (Emphasis added.)

Accordingly, as the Region pointed out in the Fact Sheet and Response to Comments, the larger action at issue in this matter concerns the Region's renewal of the Permit, which authorizes certain regulated discharges under specified conditions. Response to Comments at 30. The Region therefore evaluated the potential effect on threatened and endangered species by the discharges authorized by the Permit. *Id.*

The Region properly did not consider the effects of mine operations, air emissions from the power plants, or global warming, as they are not direct, indirect, interrelated, or interdependent activities with regard to the Region's action at issue. The Region correctly concluded that the renewal of the NPDES permit neither authorizes Peabody to mine coal at the existing mines, nor authorizes the combustion of the coal at any of the existing power plants in the region. Response to Comments at 31. Moreover, as explained below, the permit renewal does not involve any new sources. Rather, regardless of the status of coal extraction, as in the case of the inactive Black Mesa Mine, as the Region pointed out, a NPDES permit is still required by law for the existing mine sites, since the CWA remains applicable to the discharge of pollutants from the mine sites until the discharges cease and the performance bond issued to the facility has been released. Response to Comments at 4; 40 C.F.R. §§ 434.52(a) and 434.81(c).

EMLC is also off base claiming that the effects of alleged mercury and selenium air emissions from the existing Navajo Generating Station, San Juan Generating Station, and Four Corners Power Plant or global warming must somehow be considered as effects. EMLC fails to

explain how such preexisting projects could be interrelated actions to the Region's renewed authorization for the water discharges under the NPDES permit (i.e., how are they "part of the larger action and depend on the larger action for their justification"?). 50 C.F.R. § 402.02. Nor could it be legitimately argued that the power plants are "interdependent actions" as having "no independent utility apart from the action under consideration." *Id.* Likewise, EMLC's assertion that the emissions from generating stations, power plant emissions, or global warming are "indirect effects" of the Region's action fares no better. "Indirect effects" are "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02. The alleged air emissions from the generating stations and power plant or global warming are neither "caused by," nor "reasonably certain to occur" as a result of, the Region's limited action renewing the Permit authorizing certain discharges from the mines.[17]

Further, it is not necessary to consider the generation stations' and power plant's emissions or global warming as cumulative effects in this instance. "Cumulative effects" are "those effects of future State or private activities, not involving any Federal activities, that are reasonably certain to occur within the action area of the Federal action." 50 C.F.R. § 402.2. However, in light of the Region's determination that its action of renewing the NPDES permit will have no effect on threatened or endangered species, neither formal consultation nor consideration of cumulative effects was necessary. 50 C.F.R. §§ 402.14(c) and (g)(4).

[17] *See also* Memorandum, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases,* U.S. Department of the Interior, October 3, 2008 (a proposed action that will involve the emission of greenhouse gases cannot pass the "may affect" test and is not subject to consultation under the ESA and its implementing regulations).

H. The Region Complied With NEPA as No New Sources Are at Issue

Both petitions assert that the Region failed to comply with the National Environmental Policy Act ("NEPA"). *See, e.g.,* EMLC Petition at 7-8; CARE Petition. Yet neither petition demonstrates that the Region erred in either any finding of fact or conclusion of law when the Region found that a review under NEPA was not triggered by the NPDES permit renewal, since it did not involve any new sources constituting a "major federal action." 40 C.F.R. § 434.11. Response to Comments at 3-4.

EMLC claims that the Region's actions constituted a "major federal action" because the renewed permit covered new sources by purportedly authorizing new outfall locations and relying upon the Western Alkaline Coal Mining Subcategory Rule, 40 C.F.R. § 434.81, for certain outfalls. EMLC further argues that the Region should have conducted an evaluation under NEPA in order to allow for greater public involvement and analysis of various alleged impacts. Equally void of any legal authority, the CARE Petition claims that since the OSM found that its action with regard to the Life-of-Mine permit required an EIS, so should the Region for its renewal of the Permit. The CARE Petition also claims, without support, that federal financial assistance will ultimately be needed to assist the Hopi Tribe to construct a water treatment facility to address discharges authorized under the permit, which would require the Region to comply with NEPA.

Consistent with the Region's conclusions, each of these claims is wrong and NEPA evaluation is unwarranted. The Region properly concluded that its actions in renewing the NPDES permit do not require it to conduct a NEPA analysis. Response to Comments at 3. The Clean Water Act provides that "no action taken by [EPA] pursuant to [the statute] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]," with two limited exceptions: (1) Federal financial assistance

for assisting the construction of publicly owned treatment works ("POTW"), and (2) issuance of an NPDES permit under section 1342 for the discharge of any pollutant by a new source. 33 U.S.C. § 1370(c). As the Region found, neither exception applied. Response to Comments at 3-4.

1. The Region's Action Did Not Concern Federal Financial Assistance for Construction of a POTW

CARE appears to contend that the first exception under the Clean Water Act with regard to POTW funding somehow applies by stringing together a hypothetical scenario that is grounded in neither fact nor law. Despite the fact that the Permit requires that the discharges comply with the tribes' water quality standards and that the mines have operated for nearly forty years, CARE claims that federal financial assistance will "most certainly be needed" to build a water treatment facility to treat groundwater from the Navajo sandstone aquifer.[18] CARE has not provided any evidence to support either its assertion that the alleged treatment will be needed, or that the Region's action in this matter concerns federal financial assistance for construction of a POTW meeting the requirements of 33 U.S.C. § 1371(c)(1). The Region's actions at issue plainly do not involve financial assistance to construct a POTW, nor would the drinking water treatment system alleged by CARE constitute a "POTW," which is defined as "devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant." 33 U.S.C. § 1292(2); 40 C.F.R. § 403.3(q).

[18] To the extent that CARE is contending that discharges or impoundment seepage contaminate ground water, the claim is neither supported in fact nor law and is beyond the scope of an NPDES permit, which regulates discharges to surface waters. 33 U.S.C. § 1342. *See also* Response to Comments at 40.

2. The Permit Renewal Does Not Concern Discharge by a New Source

Contrary to the Petitions, the Region's renewal of the NPDES permit does not concern the discharge by a new source. A "new source" is defined as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source." 33 U.S.C. § 1316(a)(2). A "new source coal mine" is defined under EPA regulations as a coal mine for which construction commenced after May 4, 1984, or which is determined by EPA to constitute a "major alteration." 40 C.F.R. § 434.11(j). As the Region correctly found, the two mines subject to the NPDES permit commenced operations in the early 1970s, well before either May 4, 1984, as set forth in 40 C.F.R. § 434.11(j), [19] or October 9, 1985, the date when the Coal Mining Point Source Category, BPT, BAT, BCT Limitations and New Source Performance Standards were proposed. 40 C.F.R. Part 434 *et seq*.; 50 Fed. Reg. 41305. Indeed, the mines received their first NPDES permit in 1983.

Neither the EMLC Petition nor the CARE Petition demonstrates that the Region committed clear error or an abuse of discretion when finding that the permit renewal did not involve a major alteration. 40 C.F.R. § 124.19(a). As the Region concluded, the renewal of an existing NPDES permit merely involves the addition of a new outfall and reclassification of certain existing outfalls as Western Alkaline Reclamation Areas, which applies to both new and existing sources.[20] The Region did not abuse its discretion by not considering such changes as a

[19] *See* Memorandum, *New Source Dates for Direct and Indirect Dischargers*, U.S. EPA, September 28, 2006, Appendix B.
[20] 40 C.F.R. §§ 434.83 and 434.85.

major alteration under 40 C.F.R. § 434.11(j)[21] or by declining to voluntarily prepare a NEPA analysis. *See* Response to Comments at 3-4.

I. CWA Section 404 Is Not Applicable

Both EMLC and CARE incorrectly assert that the Permit's renewal is in error since EPA has failed to ensure that the authorized discharges from the impoundments are permitted by the U.S. Army Corps of Engineers (the "Corps") under Section 404 of the Clean Water Act. The Petitions, however, do not specify how discharges authorized under the Permit trigger a Section 404 permit, including any particular dredge and fill discharge that would warrant a Section 404 permit. Moreover, to the extent that any Section 404 regulated discharges were to exist, the remedy would be with the Corps,[22] and not in this proceeding as it is beyond the scope of the Permit.[23] Response to Comments at 41; *see, e.g., In re Knauf Fiber Glass*, 8 E.A.D. 121,

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[21] When determining whether a major alteration will occur, "the Regional Administrator shall take into account whether one or more of the following events resulting in a new, altered or increased discharge of pollutants has occurred after May 4, 1984 in connection with the mine for which the NPDES permit is being considered: (A) Extraction of a coal seam not previously extracted by that mine; (B) Discharge into a drainage area not previously affected by wastewater discharge from the mine; (C) Extensive new surface disruption at the mining operation; (D) A construction of a new shaft, slope, or drift; and (E) Such other factors as the Regional Administrator deems relevant." 40 C.F.R. 434.11(j)(ii).

[22] Nor are the Petitioners' claims reconciled with the Corp's Nationwide Permit 21 for Surface Coal Mining Operations. *Reissuance of Nationwide Permit*, Department of Defense, Department of the Army, Corp of Engineers, 47 Fed. Reg. 11092, 11184 (March 12, 2007).

[23] Moreover, Petitioners' assertions run counter to regulating discharges of pollutants under the NPDES program, since EPA may not issue NPDES permits for discharges that fall under the Corps' Section 404 permitting authority. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* 557 U.S. ___, 129 S.Ct. 2458, 2467 (2009). Fundamentally, EPA would lack authority for issuance of the NPDES permit. Section 402(a) states:

> *Except as provided in … [CWA §404, 33 U. S. C. §1344]*, the Administrator may . . . issue a permit for the discharge of any pollutant, … notwithstanding [CWA §301(a), 33 U. S. C. §1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under [CWA §301, 33 U. S. C. § 1311(a); CWA § 302, 33 U. S. C. §1312; CWA § 306, 33 U. S. C. §1316; CWA § 307, 33 U. S. C. §1317; CWA § 308, 33 U. S. C. § 1318; CWA § 403, 33 U. S. C.

161-62 (EAB 1999) (petitioner must object to a specific permit condition because the EAB's jurisdiction under 40 C.F.R. § 124.19(a) is to ensure that the Region's permit decision comports with the applicable requirements of the NPDES program); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 514 (EAB 2002) (the EAB is not at liberty to resolve every environmental claim brought before it in a permit appeal and must restrict its review to conform to its regulatory mandate).

Section 404(a) of the CWA empowers the Corps to authorize the discharge of "dredged or fill material." 33 U.S.C. § 1344(a). *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 486 F.3d 638 (2009). Section 404(a) gives the Corps power to "issue permits … for the discharge of dredged or fill material." 33 U.S.C. § 1344(a). In addition to this proceeding being the improper forum, Petitioners have provided no evidence of any discharges authorized under the Permit's renewal to involve material being excavated or dredged from waters of the United States. *See* Response to Comments at 41. "Dredged material" is defined as "material that is excavated or dredged from waters of the United States." 40 C.F.R. § 232.2. Likewise, no evidence has been proffered by Petitioners as to discharges authorized under the Permit renewal involving fill material. *Id.* "Fill material" means "[M]aterial placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United

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> § 1343], or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U. S. C. § 1342(a)(1) (emphasis added). Even if there were ambiguity on this point, the EPA's own regulations would resolve it. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* 557 U.S. ___ (2009), 129 S.Ct. 2458, 2467. Those regulations provide that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA . . . do not require [§402] permits" from the EPA. 40 C.F.R. § 122.3. The Supreme Court has concluded that "[t]he Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under *§ 404*, then the EPA lacks authority to do so under *§ 402*." 557 U.S. ___ (2009), 129 S.Ct. 2458, 2467.

States." 40 C.F.R. § 232.2. Yet, Petitioners have provided no evidence of a discharge authorized by the Permit that will have the effect of either replacing any portion of a water in the United States with dry land or changing the bottom elevation.

IV. CONCLUSION

For the reasons set forth above, Peabody respectfully requests that EAB deny review of the Petitions.

Respectfully submitted,

Dated: January 13, 2011 By: /s Craig A. Moyer

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on January 13, 2011, I caused an electronic copy of the foregoing **PEABODY WESTERN COAL COMPANY'S RESPONSE TO PETITIONS FOR REVIEW** in the matter of Peabody Western Coal Company Black Mesa Complex, NPDES Permit No. NN 0022179, Appeal Nos. 10-15 and 10-16, to be filed with the U.S. EPA Environmental Appeals Board's Central Data Exchange, located at:

U.S. Environmental Protection Agency
Environmental Appeals Board
Clerk of the Board, Environmental Appeals Board
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