

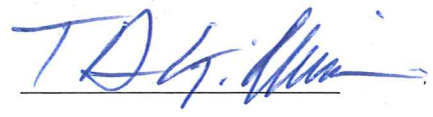
**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)
In re:)
)
)
City of Ruidoso Downs and)
Village of Ruidoso WWTP)
)
NPDES Permit No. NM 0029165)
_____)

NPDES APPEAL No. 17-03

**RESPONDENT EPA REGION 6'S REPLY TO PETITIONER'S MEMORANDUM
BRIEF IN OPPOSITION TO THE EPA'S MOTION TO SUPPLEMENT THE
ADMINISTRATIVE RECORD**

Respectfully Submitted,



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The United States Environmental Protection Agency Region 6 (EPA Region 6) respectfully submits to the Environmental Appeals Board (EAB) this Reply to Petitioner's Memorandum Brief In Opposition to the EPA's Motion To Supplement the Administrative Record.

EPA Region 6 issued a National Pollution Discharge Elimination System permit to the City of Ruidoso Downs and Village of Ruidoso on July 25, 2017 (the Ruidoso permit), based on a new Total Maximum Daily Load (TMDL). The Ruidoso permit has been challenged by Petitioner in this matter. On October 29, 2018, EPA filed an Opposed Motion to Supplement the Administrative Record. EPA's motion stated that, "it has been discovered by EPA counsel that the TMDL document in the Administrative Record for this matter titled 'Final Draft Total Maximum Daily Load for the Rio Ruidoso,' dated November 3, 2016 (AR #7), and cited in EPA's filings in this matter, was a document provided to EPA for technical review and that the TMDL document approved by EPA is titled 'WQCC Approved Total Maximum Daily Load for the Rio Ruidoso,' dated November 15, 2016." Respondent EPA Region 6's Opposed Motion to Supplement the Administrative Record, at 2 (emphasis added). The November 15, 2016, EPA-approved version of the TMDL inadvertently was not included in EPA's Administrative Record.

Petitioner has filed a "Memorandum Brief in Opposition to the Environmental Protection Agency's Motion to Supplement the Administrative Record" (Petitioner's Opposition Brief). Petitioner's argument appears to be that EPA did not consider the November 15 TMDL in making its permit decision, and therefore it should not be added to the record. See Petitioner's Opposition Brief, at 4 ("EPA's Motion to Supplement the

Record should be denied so that the record in the matter is clear that the permit writer did *not* consult the EPA-approved 2016 TMDL when he made the challenged permit decision”) (emphasis in original). Petitioner’s argument is both unsupported and circular, relying on the sole fact that the document is not in the record as proof that EPA did not consider the document. See Petitioner’s Opposition Brief, at 2 (“it has now become apparent that the permit writer did not even consider the EPA-approved 2016 TMDL [dated November 15, 2016] for nutrients in the Rio Ruidoso when he made the permit decision, as the EPA-approved TMDL is not in the administrative record for this matter.”). Petitioner’s argument misses that the very point of this motion is to supplement the record with a document that EPA considered in its permit decision but inadvertently omitted in compiling the record. Petitioner’s argument is inconsistent with the record, which reflects such consideration:

The current TMDL for nutrients approved by EPA is the TMDL that must be implemented by the permit. EPA must ensure the permit conditions are consistent with the assumptions, requirements and WLAs in the approved TMDLs pursuant to 40 CFR 122.44(d)(1)(vii)(B). Newly established limits for nutrients are consistent with the current TMDL, approved by the WQCC on November 15, 2016 and then approved by EPA on December 13, 2016.

Exhibit 6 to EPA Region 6’s Response Brief to the Petition for Review, (AR #6) (emphasis added).

In addition, EPA disagrees with Petitioner's assertion that there is "no reasoned analysis whatsoever in the administrative record to justify the permit limits." Petitioner's Opposition Brief at 2. The administrative record, even without supplementation, contains the pre-approval (November 3, 2016) version of the TMDL, which Petitioner explicitly acknowledges is "largely identical in its substance to the draft TMDL which is in the record." Petitioner's Opposition Brief, at 2. Indeed, as explained in EPA's motion to supplement, there is no substantive difference between the two versions. The November 3, 2016 version of the TMDL in the administrative record contains the technical analysis justifying the permit decision.

EPA also disagrees with Petitioner's assertion that the permit writer in this case "endeavors to rely entirely and exclusively on the EPA-approved 2016 TMDL to justify impermissible back-sliding." Petitioner's Opposition Brief, at 5. The Clean Water Act Section 303(d)(4)(A) requires a demonstration that the revised limits in a permit based on a revised TMDL will assure attainment of water quality standards, and the permit writer reasonably made such a demonstration by relying on the identical technical analysis that is contained in both the November 3 and November 15 versions of the TMDL. Whether the permit writer consulted the November 3 or the November 15 version is immaterial given the identical nature of the technical analysis and thus either version of the TMDL could reasonably be used by the permit writer to support the permit decision.

Therefore, EPA respectfully moves the EAB to grant EPA's Motion to Supplement the Administrative Record, adding the additional document "WQCC Approved Total Maximum Daily Load for the Rio Ruidoso" dated November 15, 2016, as Administrative Record # 42.

Respectfully submitted this 29th day of November, 2018.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 6**



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2018, copies of the foregoing were served upon the following via email.

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