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

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

PETITION FOR REVIEW SUBMITTED BY FORMER HOPI TRIBAL CHAIRMAN BEN NUVAMSA AND BY CALIFORNIANS FOR RENEWABLE ENERGY ("CARE")

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Introduction

Under 40 C.F.R. §124.19, Petitioners CAlifornians for Renewable Energy and former Hopi Tribal Chairman Ben Nuvamsa petition for review of the Environmental Protection Agency's NPDES Permit Renewal for the Black Mesa Project: Peabody Black Mesa NPDES Permit No. NN0022179 ("NPDES").[1]

Standing and Jurisdiction

The Petitioner satisfy the threshold requirements for filing a petition for review under 40 C.F.R. Part 124. The Petitioners participated in the public-comment period, reviewed the comments of others, and made their own detailed comments. 40 C.F.R. §124.19(a). Petitioners filed written comments during the public-comment period and participated in the public-hearing process. The Board has jurisdiction to hear Petitioners' timely request for review. See 40 C.F.R. §71.11(g).

Background

On September 16, 2010, The Region 9 Office of the Environmental Protection Agency re-issued National Pollutant Discharge Elimination System (NPDES) Permit NN0022179 to Peabody Western Coal Company (Peabody). The permit covers wastewater discharge from over 200 impoundments at two separate coal-mine operations. They are the Kayenta and Black Mesa surface coal mines. The permit had been re-issued on December 29, 2000. The 2000 permits expired on February 1, 2006 and September 16, 2009, had been continued under an administrative delay.

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

In 1990, the Kayenta mine received an operational life-of-mine permit under the Surface Mining Control and Reclamation Act. The initial administrative life-of-mine decision for Black Mesa mine has yet to be made. The life-of-mine permit is a separate permitting activity from the NPDES permit and authorizes Peabody to mine coal. On the other hand, the NPDES permit lets Peabody discharge treated wastewater from the mine site. That wastewater is composed of runoff from active mine areas.[2]

Since 1985, Peabody has tried to get a life-of-mine permit for Black Mesa coal resources. A life-of-mine permit was twice approved. Both times, it was later rejected. The first time was in 1990, when Secretary of Interior Manual Lujan reversed the Record of Decision for the Black Mesa mine pending further hydrological studies. The latest was a December 22, 2008 Record of Decision which attempted to combined the Kayenta and Black Mesa mines into one mine plan. On January 5, 2010, The U.S. Department of Interior's Office of Hearings and Appeals overturned the Life-of-Mine permit for failure to comply with the National Environmental Policy Act. The Black Mesa mine currently is operating under Secretary Lujan's administrative delay—as it has since 1990.

Statement of Reasons

Petitioners in this matter are CAlifornians for Renewable Energy, Inc. (CARE) and former Hopi Chairman Benjamin Nuvamsa. CARE submitted written comments to the NPDES permit renewal April 30, 2010 and thus has standing for a review. Chairman Nuvamsa made comments at a public comment hearing in Kykotsmovi Arizona on February 24, 2010 and also has standing for review. A summary of the issues in their

[2] Fact Sheet: Peabody Western Coal Co. Final Permit 2010. Page 2, section II.

comments and satisfaction of the required conditions are as follows:

The Black Mesa Complex Does Not Exist

The Black Mesa and Kayenta mines are separate, unique operations. Each has its own mine plans, coal-supply agreements, budgets, physical facilities, operational permits, resources, and employees. Even Peabody and OSM consider them independent.

In 2004, when the Black Mesa Project EIS was conducted, it was Peabody's intent to study the environmental impacts of combining the Black Mesa and Kayenta mines into one mine plan. Peabody had already tried to merge the two mines in 1985. But then-Secretary of Interior Manual Lujan rejected the plan. In 1990, Secretary Lujan let the Kayenta part of the mine receive a permanent-program permit and administratively delayed the life-of-mine decision for Black Mesa. At issue was the hydrological concern of Black Mesa aquifers. The Black Mesa mine now operates under OSM's interim program permit, as it continues the application process to get its own life-of-mine permit.

The NPDES application that EPA considered consistently references the separate Black Mesa and Kayenta mines as one "Black Mesa Complex." The NPDES permit-renewal application needs to be re-submitted without using the name "Black Mesa Complex." That name is misleading and confusing, since it implies to a layperson that the plan to combine the mines actually succeeded. Using the wrong name also prevents meaningful public comment and review. By hiding behind a false name, Peabody does not have to distinguish between Black Mesa and Kayenta operations, resources and impoundments. But that is critical information for any reviewer to know in considering environmental impacts.

Finally, the name flim-flam creates an even more fundamental flaw. By applying for the permit under the name "Black Mesa Complex," Peabody is asking for a discharge permit for a mine plan that does not exist. A debate on a nonexistent mine plan is not productive and erodes the comment and review rights of those affected by Peabody's machinations.

The NPDES Permit Needed a NEPA Analysis.

OSM and the EPA are playing jousting in jargon with the Hopi people. As a group, the Hopi people are not sophisticated in the technical-permitting jargon that should or should not trigger an EIS. To the Hopi people, there is no difference between a "significant permit revision" and a "major alteration." On February 17, 2004 Peabody filed a life-of-mine permit revision application to OSMRE proposing several revisions to its previous Kayenta Life-of-Mine permit.[3] As published, the final EIS essentially combined the *unpermitted* Black Mesa mine and *permitted* Kayenta mine into one mine plan and called it the Black Mesa Complex. The permit revisions were "significant" and thus triggered an Environmental Impact Statement.

Eighteen months later, on August 3, 2005, Peabody filed a timely renewal of its NPDES permit for the discharge of wastewater into waters of the United States.[4] For this permit however, the EPA ignored the "significant permit revision" pending with OSM. The EPA Regional Administrator had the duty to recognize that this was also a "major alteration" under 40 C.F.R. § 434.11(j) and, like OSM, mandate an EIS.

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[3] Fact Sheet: Peabody Western Coal Co. Final Permit 2010. Page 2, section II
[4] Fact Sheet: Peabody Western Coal Co. Final Permit 2010. Page 1, section I

Peabody's Comment Response Document is incorrect when it asserts "A major alteration in connection with the mine has not occurred."[5] When Peabody filed its NPDES permit-renewal application, a major alteration to the mine plan had occurred. It was so major, in fact, that OSM required an EIS.

The Hopi people believe that the law on NEPA is consistent among federal agencies and that if the permitting and creation of the Black Mesa Complex can trigger an EIS with OSM, the permitting and creation of the Black Mesa Complex within an EPA NPDES permit renewal should also mandate an EIS. If OSM needed to take a hard look, so does the EPA. But more important, the creation of the Black Mesa Complex was rejected as a matter of law, and as such should be rejected here.

Other items within the permit renewal also need a hard look. Impoundment seepage is one of them. For this however, the EPA seems content to pass the buck to OSM, although the seepage may contaminate what is, as a practical matter, the Hopi Tribe's sole source of drinking water. The OSMRE and the EPA are letting Peabody conduct only minimal monitoring and have offered no alternative solutions. Simple hydrological dye tests or simple inflow-minus-outflow calculations should be done—but have not. An EIS would take a "hard look" at impoundment leakage and consider alternatives beyond Peabody just keeping an eye on it. That, by default, is only a no-action alternative. No action is simply inaction.

Publicly-owned treatment works also constitute an area where inaction avoids an

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[5] Comment Response Document, Peabody Western Coal Company – Black Mesa Complex, NPDES Permit No. NN0022179, Final 2010. Page 3.

EIS. The September 16, 2010 discharge permit considers the ground waters of the Hopi Tribe and states "taste and odor-producing substances from other than natural origins shall not interfere with the production of potable water supply by modern treatment methods."[6]

What the permit fails to mention or analyze is that the Hopi tribe has no water treatment facilities. The sole source of drinking water for the Hopi tribe comes from the Navajo sandstone aquifer and is so pure, it requires no treatment. The Hopi Tribes modern treatment method is the same one they used a thousand years ago, they get water from the ground.

The fact that this discharge permit seems to require a water treatment facility so as to not interfere with the production of potable water requires a "hard look". Since Peabody has no plans to build one privately, and the Hopi Tribe lacks the financial resources to build one publically, federal financial assistance would most certainly be needed and that would require the EPA to comply with NEPA.[7]

This particular issue is a Catch 22. If the EPA doesn't take a "hard look," Peabody can avoid an EIS. But taking a "hard look" would expose the lack of available modern treatment methods, it would expose that the Hopi Tribe needs federal assistance in building modern treatment methods, and it would also expose the fact an EIS would be mandatory because of the federal assistance. Peabody benefits from the EPA turning a blind eye, because if no one looks, Peabody can evade a costly (but beneficial) EIS.

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[6] NPDES Permit No. NN0022179. Page 11, section d.

[7] CWA § 511(c), 33 U.S.C. § 1371(c). *See also* Comment Response Document. Page 3.

Another reason an EIS needs to be conducted by the EPA is because the Black Mesa mine does not have an operational life-of-mine EIS. Black Mesa operations are still ongoing and although mining is currently dormant, the administrative delay would allow resumption with no further environmental analysis. Before any new discharge is created by renewed operational activity, someone, somewhere, needs to do an EIS for the Black Mesa portion of the mine.

For the years 2005, 2006, 2007, and 2009 Peabody averaged about 20 acre-feet of discharge due to precipitation events and dewatering. During 2008, Peabody discharged a 373 acre-feet of water.[8] That exorbitant discharge occurred just before the EPA's permit renewal of February 19, 2009 and just before OSM's December 22, 2008 record of decision. What is so egregious is that this discharge occurred while both Black Mesa's life-of-mine permit and Black Mesa's NPDES permit were administratively delayed and no EIS was in place. Peabody hurried to wipe the chalkboard while no one was looking to create new baselines for measuring future impacts.

The NPDES Lacks the Proper Section 404 Permits.

Based on Peabody's compliance record the EPA (in conjunction with the U.S. Army Corps of Engineers) should establish design parameters and any necessary wastewater treatment processes as part of the NPDES permit and section 404 permitting process for mine impounds concurrently.

All storm-water generated at the mine site is subject to NPDES permitting requirements and is treated in pond impoundments prior to discharge. At the

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[8] Fact Sheet: Peabody Western Coal Co. Final Permit 2010. Page 4, section IV

impoundments, collected and stored storm-water may infiltrate into the soil. At several impoundments, depending on the location of the impoundment and the geologic formations under them, water that has seeped into the soils may re-emerge below the impoundment structure. EPA observed these seeps on a compliance inspection, and required Peabody Western Coal Company (PWCC) to monitor and characterize these seeps in the previous permit (issued December 2000). The administrative record suggests that EPA has conducted one site visit over the last ten years and that the agency's visit may have been limited to two ponds. One site visit does not constitute meaningful regulatory oversight of this operation. This is especially true where, as here, there are over 230 impoundments on the so-called Black Mesa Complex and where Peabody intends to make at least 51 impoundments permanent.

PWCC submitted an "Interim Final Report" ("Report") on April 1, 2008. That Report summarized the data collected at each of the seeps. The NPDES improperly relies on PWCC's characterization that both the water quality of the impoundments and the water quality of the seeps are part of the Report. Based on a comparison of the analysis, it was concluded without any independently-verified substantial evidence in the record to support it that many pollutant levels found at the seep locations were caused by the seepage activity itself (during which storm-water infiltrates certain soil layers below the impoundment ponds and leaches pollutants found in the soil layers) and not from mining activities. The EPA then erroneously concluded, based on Peabody's biased and flawed analysis, that the characterization of the seeps must be considered separate from the characterization of both the authorized outfalls and the characterization of the storm-

water contained in the ponds.

Seep identification and characterization has demonstrated that several seeps have shown concentrations of pollutants above water-quality standards. As stated in the Fact Sheet, EPA has required PWCC to monitor all 230 impoundments on the so-called Black Mesa Complex, many of which are internal impoundments for treatment and storage and which may discharge to a water of the U.S. There are 111 ponds that discharge to waters of the U.S., and which are thus listed as NPDES outfalls in this permit. EPA has instructed PWCC to monitor all seeps located within 100 feet of an impoundment. Many of the seeps are simply moist areas which do not generate actual flow volumes. Regardless of the cause of the pollutant concentrations documented in Section VI of the Fact Sheet, and regardless of whether the seep is or is not considered a discharge to a water of the U.S., EPA has required PWCC to implement the Seep Management Plan at all impoundments at the mine site to characterize and implement corrective actions to control all seeps.

As indicated in the fact sheet (Part VI Special Conditions- Seep Monitoring and Management Plan), EPA and PWCC established a prioritization process to address seeps, including 1) reclaim as many ponds as possible, 2) eliminate monitoring requirements for seeps not causing problems, 3) continue monitoring where data is inconclusive, 4) establish a permanent fix for problem areas, and 5) explore if regulatory variances may be applicable for certain non-bioaccumulative parameters. EPA notes that a regulatory variance may be allowed as specified under 40 CFR 131.10(g) if certain conditions are met, including the presence of naturally-occurring pollutant concentrations. EPA has

made no such determination at this time.

A compliance order is well within US EPA's discretionary authority and should have been issued for ponds BM-A1, J3-D, J-7A, J7-CD, J7- Dam, J7-JR, J16-A, J16-E, J19-D, J21-C, J27-A, J27-RC, N6-C, N6-F, N14-B, N14-H, N14-P, WW-9. According to EPA's "fact sheet," discharges from all of these ponds are currently noncompliant with one or more water-quality standard (WQS).

The NPDES permit, in the absence of EPA's compliance order, should establish a wastewater-treatment process for each discharge point, as well as a timeframe for compliance with WQS. The fact that commenters asked that the EPA issue a compliance order to PWCC is not a separate matter from the effluent limitations, monitoring requirements, or from special conditions contained in the reissued NPDES permit. Moreover, and according to the now-vacated Final Environmental Impact Statement ("FEIS") for the Black Mesa Complex, and prepared by the URS Corporation, at least two ponds, J-21A1 and N14-P-S1 which are violating WQS do not appear to be covered by Peabody's current NPDES permit. FEIS at 3-27. That said, the EPA needs to take immediate (and similar) enforcement actions to halt the unpermitted discharges.

Peabody is requesting "deletion" of outfalls covered under its current NPDES permit for ponds J16-I, J16-J, J16-K, J21-J, N2-G, N7-A1, N8-A, N8-B and N14-M and WW-9D. However, nothing in the Administrative Record indicates that the EPA or any other regulatory agency (such as the Navajo Nation EPA) has verified and confirmed the permanent elimination of discharge from these ponds. Deletion should not occur unless and until EPA has physically verified elimination of discharges from these outfalls.

Peabody and EPA wrongly claim that, as stated in the fact sheet (Section VI), "there are over 230 impoundments on the so-called Black Mesa Complex; many are internal impoundments for treatment and storage which purportedly do not discharge to a water of the U.S. The ponds referenced by the commenter's are internal impoundments used to treat storm-water runoff at locations within the mine site, which may be located miles away from a discharge location." According to Peabody—but unverified by the EPA—"these impoundments do not discharge to a Water of the U.S. and are not subject to NPDES permitting requirements." But if that were true, why is EPA requiring Peabody to sample, characterize, and install corrective actions for all seeps identified at the mine site, including seeps that may not be subject to NPDES permitting regulations? EPA wants it both ways when it says that certain impounds are exempt from NPDES requirements but then requires Peabody "to sample, characterize, and install corrective actions for all seeps identified at the mine site, which includes seeps that may not be subject to NPDES permitting regulations".

As stated in CARE's comments: "The baseline data on which the permit relies is inadequate. It is common for such documents to rely on insufficient data. EPA specifies that a hydro-geologic study should be conducted to evaluate the flow of water to the seeps. This can be accomplished by conducting a dye trace study, but this has apparently not happened. Also, the receiving streams of the outfalls are listed, but there is no indication that sub-watersheds have been delineated or that storm-water calculations have been completed to evaluate the increase in storm-water discharge from outfalls which may flow into the same sub-watershed. This is important because the increased storm-

water discharge can cause stream bank erosion, resulting in increased sedimentation downstream. . . . The Permit needs to address the water allotment rights of Moenkopi farmers whose water rights are being adversely impacted by the mine's impounds and water usage."

EPA itself should monitor and sample discharges from the outfalls listed above to ensure compliance with WQS and ground—testing any argument (expected from Peabody) that certain exceedances of WQS somehow constitute "background levels" or are attributable to "natural processes." That is a claim that remains unsubstantiated by any independent agency review or analysis in the Administrative Record.

Peabody has now asked to add 16 ponds under the NPDES permit. Given the problems (and violations of WQS) at existing Peabody impoundments, the EPA (in conjunction with the U.S. Army Corps of Engineers) should be establishing design parameters and any necessary wastewater treatment processes up front. Design parameters should be established during the NPDES permitting process. While temporary and immediate cleanup measures are necessary, Peabody will need to build a permanent wastewater-treatment facility. This should be expressly accounted for in the NPDES permit. Establishment of a permanent wastewater-treatment facility is well within the "economic capability" of Peabody. 33 U.S.C. §1312(b)(2).

Moenkopi farmers have been denied their historic water allotments because of Peabody's impounds. Peabody's has failed to release treated water from these impounds. And the EPA has failed to require treatment and release of the impound waters for the Moenkopi farmers to use as part of any compliance order or the NPDES permit issued.

EPA stated in the Fact Sheet that "EPA believes that the first priority to address seeps is to reclaim the impoundments, which would eliminate associated seeps entirely. In certain cases, the impoundment ponds are necessary either on a temporary basis (for treatment of active mining areas) or on a permanent basis (for livestock watering as determined by the property owner)."

In the table in Section VI of the Fact Sheet, EPA has noted the pond condition as temporary or permanent and their purported rationale for this categorization. "If the pond cannot be reclaimed, the treatment options for the seeps depend up the characterization of the pond (temporary or permanent treatment) and the pollutants that are present in the seep. EPA believes the continued [non-]implementation of [Peabody's so-called] Seep Management Plan is the most comprehensive approach to address seeps."

This fails to address who pays for the cost of a permanent wastewater-treatment facility for those impound ponds that Peabody has created. And that ensures that Moenkopi farmers will continue to be denied their historic water allotments protected under the United States Constitution's Fifth Amendment. These farmers are entitled to a claim for compensation for a taking by the United States.[9]

Peabody presumes that issuing a compliance order is not a mandatory act, but within the EPA's enforcement discretion, since issues related to EPA's enforcement of the effluent limitations, monitoring requirements, and special conditions contained in the

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[9] A partial taking is compensable. *United States* v. *Kansas City Life Ins. Co.,* 339 U.S. 799, 809; *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 739; *United States* v. *General Motors Corp.,* 323 U. S. 373; *United States* v. *Shoshone Tribe,* 304 U.S. 111, 118.

NPDES permit are subject to EPA discretionary enforcement policy. Peabody thus presumes that they should not be part of the consideration for EPA's establishment of the NPDES permit conditions. This is clearly wrong, since Peabody's record of compliance must be part of the basis for special conditions contained in the NPDES permit.

In 2000, the EPA amended its permitting procedures for several programs, including the NPDES program. Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886 (May 15, 2000) (hereinafter "2000 Final Rule"); *see also* [Proposed] Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 61 Fed. Reg. 65,268 (Dec. 11, 1996) (hereinafter "1996 Proposed Rule").

The amendments had been proposed in response to a 1995 presidential directive instructing all agencies to conduct a comprehensive review of the regulations administered by them and to identify those rules that were obsolete or unduly burdensome. President's Memorandum on Regulatory Reform, 1 Pub. Papers 304 (Mar. 4, 1995), *available at* 1995 WL 15155159; President's Remarks on Regulatory Reform, 1 Pub. Papers 235 (Feb. 21, 1995), *available at* 1995 WL 15155111; *see also* 1996 Proposed Rule, 61 Fed. Reg. at 65,269.

The EPA's amendments, therefore, were particularly focused on revising the NPDES permitting program by "eliminat[ing] redundant regulatory language, provid[ing] clarification, and remov[ing] or streamlin[ing] unnecessary procedures which do not provide any environmental benefits." 2000 Final Rule, 65 Fed. Reg. at 30,886.

For example, as part of this rulemaking, the EPA specifically eliminated the

provisions authorizing evidentiary hearings on NPDES permit conditions following permit issuance.[10] *Id.* at 30,896-900; *see also* 1996 Proposed Rule, 61 Fed. Reg. at 65,275-82. The part 124 evidentiary hearing procedures were replaced with the current system, which contains a direct appeal to the Board. 2000 Final Rule, 65 Fed. Reg. at 30,887; *see also supra* Part I.A.2. The EPA implemented this change by interpreting the phrase "opportunity for public hearing" as used in CWA section 402 to allow for informal adjudication of permit applications. 2000 Final Rule, 65 Fed. Reg. at 30,896-97; 1996 Proposed Rule, 61 Fed. Reg. at 65,275. Thus, the 2000 Final Rule essentially changed the regulatory scheme for NPDES permit issuance from a formal adjudicatory scheme under sections 554, 556, and 557 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554, 556, 557, to a system of informal adjudication not covered by APA sections 554, 556, and 557.[11]

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[10] The US EPA did retain formal hearing requirements in certain limited contexts—for NPDES and Resource Conservation and Recovery Act ("RCRA") involuntary permit *terminations*. *See* 2000 Final Rule, 65 Fed. Reg. at 30,904 (amending part 22 to authorize hearings for termination of NPDES permits); 1996 Proposed Rule, 61 Fed. Reg. at 65,279-80 (proposing to retain hearings for involuntary permit terminations). The EPA recognized that there were major differences between involuntary permit terminations and other permit proceedings that warranted holding formal hearings for terminations. 1996 Proposed Rule, 61 Fed. Reg. at 65,279; *see also id.* at 65,277 (discussing rationale for holding full adjudicatory hearings for administrative enforcement actions). The EPA did not retain the part 124 hearing procedures for NPDES and RCRA permit terminations, however. Instead, EPA amended the part 22 rules, which already included procedures for holding formal hearings in a variety of administrative enforcement actions, to include NPDES and RCRA permit terminations. 2000 Final Rule, 65 Fed. Reg. at 30,904; *see also* 1996 Proposed Rule, 61 Fed. Reg. at 65,280. Thus, a permittee whose NPDES permit has been terminated may request an evidentiary hearing under part 22. *See* 40 C.F.R. §§ 22.13, .15(c).

[11] Section 554 of the APA lists certain procedures to follow, except in limited circumstances, "in every case of adjudication required by statute to be determined on the

The new procedures for NPDES permits are identical to the informal adjudication procedures that the EPA had adopted and used for many years in many other permit programs, such as the Subtitle C permit program under the Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act ("RCRA"),[12] the Underground Injection Control program under the Safe Drinking Water Act ("SDWA"),[13] and the Prevention of Significant Deterioration program under the Clean Air Act ("CAA").[14] *See* 1996 Proposed Rule, 61 Fed. Reg. at 65,276; *see also* 40 C.F.R. § 124.1(a) (2003) (describing current scope of part 124).

Thus, in amending the NPDES procedures to conform to other permit programs' procedures, the EPA brought the CWA permit mechanism into alignment with EPA's other permitting-program procedures, which had been in use since at least 1980. *See* Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA NPDES, CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration, 45 Fed. Reg. 33290, 33,405 (May 19, 1980) (explaining that public hearings are available for all programs, but that evidentiary hearings are only available for issuances of NPDES permits). In the preambles to both the Proposed and Final Rules, the Agency provided a thorough, detailed rationale for

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record after opportunity for an US EPA hearing." 5 U.S.C. § 554(a). For example, § 554 requires that the EPA "give all interested parties opportunity for—(1) the submission of facts, arguments, offers of settlement, or proposals of adjustment * * * and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of [the APA]." *Id.* § 554(c).

[12] 42 U.S.C. §§ 6901-6992k.

[13] 42 U.S.C. §§ 300h to 300h-7.

[14] 42 U.S.C. §§ 7470-7492.

changing the NPDES procedural regulations to conform with those in other permitting programs. *See* 2000 Final Rule, 65 Fed. Reg. at 30,896-900; 1996 Proposed Rule, 61 Fed. Reg. at 65,275-79.

The CWA makes it unlawful for any person to "discharge"[15] from any point source[16] into the waters of the United States any "pollutant,"[17] including dredged or fill material,[18] except in compliance with certain enumerated sections of the Act, one of which is section 404.[19] 33 U.S.C. §§ 1311(a), 1344(a), 1362(6), (7), (12), (16); 33 C.F.R.

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[15] Section 301(a) specifically provides that "[e]xcept as in compliance with this section and section[] * * * 1344 [section 404], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The term "discharge," when used in the Act without qualification, includes "a discharge of a pollutant, and a discharge of pollutants." *Id.* § 1362(16). The statute defines the term "discharge of a pollutant," in relevant part, as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The CWA defines "navigable waters" to be "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

[16] Section 502 of the Act defines "point source" as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[17] The Act broadly defines the term "pollutant" to include "dredged spoil, solid waste, * * * rock, sand, [and] cellar dirt * * * discharged into water." 33 U.S.C. § 1362(6).

[18] As mentioned at note 4, "pollutant" has an expansive definition, and has been interpreted to include dredged and fill material. *See United States v. Pozgai*, 999 F.2d 719, 725 (3d Cir. 1993) (applying definition to fill materials), *cert. denied*, 510 U.S. 1110 (1994); *United States v. Huebner*, 752 F.2d 1235, 1242 (7th Cir. 1985) (applying to dredged material), *cert. denied*, 474 U.S. 817 (1985); *United States v. Banks*, 873 F. Supp. 650, 656 (S.D. Fla. 1995) (applying to fill material and dredged soil), *aff'd*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1999). In addition, section 404 of the CWA authorizes the U.S. Army Corps of Engineers ("Corps") to issue permits "for the discharge of dredged or fill material into the navigable waters" of the United States. 33 U.S.C. § 1344. The Corps' regulations define both "fill material" and "dredged material," as well as the "discharge" of each of the substances. *See* 33 C.F.R. § 323.2(c)-(f).

[19] Section 402 of the CWA is among those other "enumerated sections of the Act" that allow for discharges into the waters of the United States. *See* 33 U.S.C. § 1311(a).

§ 323.2(a), (c)-(f); *accord Tull v. United States*, 481 U.S. 412, 414 (1987); *In re Britton Constr. Co.*, 8 E.A.D. 261, 264 (EAB 1999).

Section 404 of the Act, which the U.S. Army Corps of Engineers ("Corps") and EPA jointly administer, authorizes the Corps to issue permits for the discharge of dredged or fill material into the waters of the United States. 33 U.S.C. § 1344(a). The Corps may prescribe conditions and/or limitations in these 404 permits, and typically does. *See* 33 C.F.R. §§ 320.4(r) (1), 325.2(a)(6); *see also* 33 U.S.C. § 1344(s) (authorizing the Corps to issue compliance orders or bring a civil action when it finds that a person has violated any condition or limitation in the permit); *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir. 1985) (stating that the CWA authorizes the Corps to "issue such permits under certain conditions and procedures"), *cert. denied*, 474 U.S. 817 (1985). The term "waters of the United States" is interpreted broadly,[20] and includes the wetlands adjacent to such waters. 33 C.F.R. § 328.3(a); *accord Tull*, 481 U.S. at 1833; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

Thus, in order to legally discharge fill or dredged material into wetlands that are waters of the United States, a person must obtain a permit from the Corps authorizing such discharge into the wetland and must adhere to any condition or limitation contained in such permit.

Section 402 sets up another critical permitting provision of the CWA, the National Pollutant Discharge Elimination System ("NPDES"), which authorizes the EPA to issue permits for the discharge of pollutants in accordance with certain conditions. *Id.* § 1342(a).

[20] Although the CWA does not define "waters of the United States," the associated regulations contain an extensive definition. *See* 33 C.F.R. § 328.3(a)(1)-(8); 40 C.F.R. § 122.2.

Section 309 of the CWA has several remedies, including administrative penalties, which are available for violations of the Act. 33 U.S.C. § 1319. Under section 309(g), the EPA may assess civil administrative penalties when the Agency "finds that any person has violated section [301] * * * of this title." *Id.* § 1319(g) (1). This statutory provision establishes two categories of penalties. *Id.* § 1319(g) (2). Class I penalties "may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000."[21] *Id.* § 1319(g)(2)(A). Class II penalties, on the other hand, "may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000."[22] *Id.* § 1319(g)(2)(B).

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[21] Congress later enacted the Debt Collection Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701, which directs EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation. *See* Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (Dec. 31, 1996). Under the regulations implementing the DCIA, for violations occurring after January 31, 1997, the maximum amount allowed per violation for a class I penalty under section 309(g)(2)(A) of the CWA has increased to $11,000, and the maximum overall amount has increased to $27,500. 40 C.F.R. § 19.4 (2002). Recently, the Agency has increased the maximum penalty amounts for various environmental laws it administers. *See* Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004) (increasing the maximum overall amount for a class I CWA penalty to $32,500, but keeping the per violation maximum at $11,000). These latest inflation adjustments apply to violations occurring after March 15, 2004, and, as such, are inapplicable here.

[22] Under the regulations implementing DCIA, for violations occurring after January 31, 1997, the maximum amount allowed per violation for a class II penalty under section 309(g)(2)(B) of the CWA has increased to $11,000, and the maximum overall amount has increased to $137,500. 40 C.F.R. § 19.4 (2002). The recent 2004 inflation adjustment rule, *see supra* note 8, increases the maximum overall amount for a class II CWA penalty to $157,500, but maintains the maximum per violation amount at $11,000.

DATED this 18th day of October, 2010.

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Certificate of Service

COPIES of the foregoing were sent by United States Postal Service Express Mail, overnight delivery, on this 18th day of October, 2010, to the following:

- Douglas E. Eberhardt, Chief, NPDES Permits Office, U.S. Environmental Protective Agency, 75 Hawthorne Street, San Francisco, CA 94105-3901.
- Office of the General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 40460.

COPY of the foregoing was sent by electronic mail on this 18th day of October, 2010, to the following:

- John Tinger, U.S. Environmental Protective Agency, Region IX, NPDES Permits Branch, Tinger.John@epamail.epa.gov