

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

In re:)	
)	
)	NPDES APPEAL No. 17-03
Ruidoso Downs and)	
Village of Ruidoso WWTP)	
)	
NPDES Permit No. NM 0029165)	
)	

EPA REGION 6'S RESPONSE TO THE PETITION FOR REVIEW

Respectfully Submitted,



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I. INTRODUCTION

This case involves a challenge to EPA Region 6's reissuance of a National Pollution Discharge Elimination System ("NPDES") permit authorizing discharges from the Ruidoso Downs and Village of Ruidoso (collectively "Ruidoso") wastewater treatment plant into the Rio Ruidoso in New Mexico. This receiving waterbody is subject to a revised Total Maximum Daily Load ("TMDL"), a state-developed plan that EPA approved in December 2016 establishing the pollutant loading allocations necessary to meet applicable water quality standards. As EPA will explain below, the permit limits in the reissued permit are based on the allocations in this revised 2016 TMDL.

The Rio Hondo Land and Cattle Company ("Petitioner"), a downstream private hunting preserve, is challenging certain revised limits in the reissued permit, arguing that such revisions constitute impermissible backsliding under the Clean Water Act ("CWA"). However, the CWA specifically authorizes revision of permit limits based on subsequently revised TMDLs, under the antibacksliding exception at Section 303(d)(4)(A). As the Board noted in a similar case addressing the applicability of this exception, "TMDLs and WLAs are merely the means of attaining an end (attainment of water quality standards). Therefore, as long as a new TMDL or WLA protects water quality (and is itself lawful), existing effluent limitations can be relaxed accordingly." *In the Matter of City of Tulsa*, 3 E.A.D. 505, 510 (EAB 1991).

As EPA will explain below, Petitioner fails to meet its burden to demonstrate that this antibacksliding exception does not apply. Moreover, Petitioner's challenge to this permit represents a fundamentally misguided and impermissible attempt to challenge the validity of the underlying TMDL – a challenge that the Board has previously held does not belong in this forum. *See City of Moscow*, 10 E.A.D. 135, 161 (EAB 2001) (denying review of underlying

determinations of a TMDL in the context of a NPDES permit appeal). The Board should deny review of this petition.

II. STATEMENT OF THE CASE

A. The Applicable Legal Standards

1. Water Quality Standards and TMDLs

Section 303 of the Clean Water Act “requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.” *PUD No. 1 of Jefferson Co. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994); 33 U.S.C. § 1313. State water quality standards include designated uses for each waterbody and water quality criteria to protect those designated uses. CWA § 303(c), 33 U.S.C. § 1313(c); 40 C.F.R. § 131.10, §131.11. CWA Section 303(d) requires states to identify all impaired or threatened waters, which either do not meet or are not expected to meet the state’s EPA-approved water quality standards. 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(b)(1). The state addresses the impaired or threatened waters by, among other means, establishing TMDLs. CWA § 303(d), 33 U.S.C. § 1313(d).

A TMDL is a state planning document, developed to establish the total maximum daily load of a pollutant “necessary to implement the applicable water quality standards” for impaired waterbody segments. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1); *City of Dover v. EPA*, 36 F. Supp. 3d 103, 109 (D.D.C. 2014). TMDLs address pollutants from all sources, *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-29 (9th Cir. 2002), but do not themselves regulate specific sources of pollutants. Instead, TMDLs establish a “pollution budget,” by identifying the maximum amount of specific pollutants each impaired waterbody can receive and

still meet state water-quality standards. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011).

Calculating the allowable pollutant daily load limit necessary to ensure attainment of water-quality standards is a highly technical undertaking. It is based on numerous factors, including the waterbody's flow and physical characteristics, amounts and sources of pollutants, and impact on designated beneficial uses. These and other considerations are factored into the technical calculations used to derive the TMDL. The daily loads established in a TMDL need not be exact and must include a cushion that reflects "a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C).

There are two categories of load targets in a TMDL, one for point sources (called a "wasteload allocation" or "WLA") and one for nonpoint sources (called a "load allocation"). 40 C.F.R. § 130.2(g), (h). Once the load calculations for each category that are necessary (with a margin of safety) to achieve state-defined water-quality standards are generated, those calculations are subject to public review and comment, which occurs through the state TMDL administrative process. 40 C.F.R. § 130.7(c)(1)(ii). After considering public comments, the state finalizes the TMDL and submits it to EPA for approval. 40 C.F.R. § 130.7(d).

The states are primarily responsible for establishing TMDLs, but EPA has approval authority. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). In particular, EPA has thirty days after submission by a state to consider the TMDL's allocations, conclusions, scientific analysis, modeling, and underlying record, and then to either approve or disapprove the TMDL. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). EPA's central task in conducting its 30-day review is to assess whether the TMDL is "established at a level necessary to implement

the applicable water quality standards.” CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); *NRDC v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001); *Anacostia Riverkeeper*, 798 F. Supp. 2d 210, 238 (D.D.C. 2011).

EPA’s decision to approve a TMDL is subject to judicial review in federal district court under the Administrative Procedures Act (“APA”). See *City of Moscow*, 10 E.A.D at 160 (“It is well settled that a party dissatisfied with EPA’s approval may seek review of EPA’s approval decision in United States district court under the APA”), citing cases.

2. Water Quality Based Effluent Limits

Under section 301(a) of the Clean Water Act, the discharge of any pollutant into waters of the United States is unlawful, except in compliance with the Act, including section 402, which establishes the National Pollutant Discharge Elimination System (“NPDES”) permit program. CWA § 301(a), 402; 33 U.S.C. §§ 1311(a), 1342. NPDES permits must include technology-based effluent limits based on the degree of control that can be achieved by implementing specified levels of pollution control technology. CWA § 301 (b)(1)(A)-(B), (b)(2), 33 U.S.C. § 1311(A)-(B) (b)(2); 40 C.F.R. § 122.44 (a)(1). In addition, when necessary to meet state-specific water quality standards, permits must include more stringent water quality based effluent limits (“WQBELs”). CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1). Where there is an applicable TMDL, WQBELs must be “consistent with the assumptions and requirements of any available wasteload allocations for the discharge.” 40 CFR § 122.44(d)(1)(vii)(B).

3. Antibacksliding

CWA Section 402(o) prohibits backsliding – the revision of a permit to contain less stringent effluent limits than the prior permit -- except in certain defined circumstances. One of these

circumstances, contained in the second sentence of CWA Section 402(o)(1), provides that for permits including water quality based effluent limitations, backsliding is permissible if in compliance with Section 303(d)(4). Section 303(d)(4)(A), in turn, provides:

For waters... where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or other waste load allocation will assure the attainment of such water quality standard...

The legislative history explains that “[P]ermits developed on the basis of water quality based effluent limitations * * * may be renewed, reissued or modified on the basis of subsequently revised waste load allocation formulas [WLAs] but only in compliance with new section 303(d)(4).” Joint Explanatory Statement of Conference Committee, H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 156 (1986). Section 402(o)(3) includes an additional backstop provision, providing that permits may not be revised to contain less stringent limitations if “implementation of such limitation would result in violation of a water quality standard.” 33 U.S.C. § 1342(o)(3).

B. Factual Background

1. Permit Overview

On July 25, 2017, EPA Region 6 issued an NPDES permit authorizing discharge from the City of Ruidoso Downs and Village of Ruidoso wastewater treatment plant. 2017 Permit (Exhibit (“Exh.”) 1, Administrative Record (“AR”) 1). The wastewater is discharged into a receiving water segment that is listed on the New Mexico’s Section 303(d) list as impaired for nutrients/eutrophication. The state’s applicable water quality criteria for nutrients consist of a segment specific numeric water quality criterion for Total Phosphorus (TP) of 0.1 mg/L (*See*

2017 Permit Fact Sheet at 8 (Exh. 2, AR 4)), and a statewide narrative criterion for plant nutrients (*See* 2016 TMDL at 14 (Exh. 2, AR 7))¹

The 2017 NPDES permit contains WQBELs for key nutrient pollutants, Total Nitrogen (TN) and Total Phosphorus (TP). 2017 Permit (Exh. 1, AR 1). The limits in this permit differ from the ones in the previous (2012) permit for this discharger, as the 2017 permit limits are based on a TMDL that New Mexico revised and EPA approved in 2016. EPA Approval Letter (Exh. 5, AR 8). In this permit appeal, Petitioner is challenging the increased mass-based limit for TN and the removal of the concentration-based limits for TN and TP in the revised 2017 permit.²

2. 2006 TMDL

The prior TMDL was approved by EPA on February 10, 2006. 2006 TMDL (Exh. 4, AR 27). It contained a specific WLA for the Ruidoso wastewater treatment plant, expressed in the TMDL as both a mass-based WLA (2.16 lbs/day TP; 18.9 lbs/day TN) and a concentration-based WLA (0.1 mg/l TP; 0.9 mg/l TN). *See* 2006 TMDL at p. 45 (Exh. 4, AR 27).

3. 2016 TMDL

The revised TMDL, approved by EPA on December 13, 2016, also contains a discharger-specific WLA for the Ruidoso wastewater treatment plant. Unlike the WLA in the 2006 TMDL, however, the WLA in the 2016 TMDL is expressed only as a mass loading (1.64 lbs/day TP; 37.1 lbs/day TN), not as a concentration. *See* Table 3-8, 2016 TMDL at p. 23 (Exh. 2, AR 7).

¹ New Mexico's narrative criterion for plant nutrients is set forth in Subsection E of 20.6.4.13 NMAC: "*Plant Nutrients: Plant nutrients from other than natural causes shall not be present in concentrations which will produce undesirable aquatic life or result in the dominance of nuisance species in surface waters of the state*".

² Petitioner's opening brief does not include a challenge to the mass-based limit for TP, which is more stringent than the limit in the prior permit (*Compare* 2.16 lbs/day in 2012 permit *with* 1.64 lbs./day in the 2017 permit). Therefore, EPA's response brief will not address the mass-based limits for TP in the revised permit.

Reflecting this change, the implementation section of the 2016 TMDL specifically recommends that permits not include concentration based limits. *See* 2016 TMDL at p. 33 (Exh. 2, AR 7) (“SWQB [the TMDL-issuing agency] encourages EPA Region 6 to include only loading (and not concentrations) in future permits.”).

The 2016 TMDL also includes a larger mass-based WLA for TN than in the prior TMDL. The TMDL explains that the larger WLA for TN was a function of revised flow assumptions, which were based on more recent streamflow data and on the average annual median flow, rather than the 4Q3 flow used previously. *See* 2016 TMDL at pp. 13, 17 (Exh. 2, AR 7) (explaining that average annual median flow is more appropriate for assessing nutrient impairments “because of the long term growth cycle of algae in response to excess nutrients, in contrast to protecting for acute toxicity using the 4Q3.”). The revised assumptions about instream flow allow for increased mass loadings of TN while still ensuring attainment with the concentration-based water quality criteria for TP and the corresponding TN target based on the state’s narrative nutrient criteria.³ As explained in the TMDL, “the revised TMDL is calculated using the same protective, in-stream targets from the original TMDL and the revised wasteload allocations assigned to the Ruidoso/Ruidoso Downs WWTP... are consistent with the TMDL. Therefore, *if the conditions in the TMDL are met, attainment of the water quality is assured.*” 2016 TMDL at p. 32 (Exh. 2, AR 7) (emphasis added). EPA approved this TMDL as consistent with the statutory and regulatory requirements. *See* EPA Approval Letter (Exh. 5, AR 8).

³ The TMDL target value for TP is the segment-specific TP criterion of 0.1 mg/L (20.6.4.208 and 20.6.4.209 NMAC). Lacking a numeric water quality criterion for TN, the state developed a TMDL target value for TN based on a 10:1 ratio of TN:TP, supported by site-specific data from the Rio Ruidoso and eco-regional studies. *See* 2016 TMDL at 15 (Exh. 2, AR 7).

4. WQBELs in 2017 Permit

Unlike the 2012 permit, the reissued permit did not include concentration based limits for TN and TP. 2017 Permit (Exh. 1, AR 1). The reissued permit included an increased mass-based limit of 37.8 lbs./day for TN. This was based on the revised mass-based WLA for this discharger – which was 37.1 lbs./day, with a future growth allocation up to 53.3 lbs/day. *See* 2017 TMDL at p. 21 (Exh. 2, AR 7).⁴ The permit fact sheet explains that “[t]hese limits have been developed in accordance with the revised 2016 TMDL and are in compliance with the CWA Section 303(d)(4) for Anti-backsliding.” 2017 Permit Fact Sheet at p. 10 (Exh. 3, AR 4).

C. Standard of Review

A party seeking review of a NPDES permit carries the burden of demonstrating that a permit condition is based on a clearly erroneous finding of fact or conclusions of law, or involves an exercise of discretion or an important policy consideration warranting review by the Board. *See* 40 C.F.R. § 124.19(a)(4). *In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004); *Rohm & Haas*, 9 E.A.D. 499, 504 (EAB 2000). The Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998). As detailed below, Petitioner has not carried its burden, and review should be denied.

⁴ As explained in the 2017 permit fact sheet, “a portion of the ‘future’ WLA may be included in the permit up to the inclusion of the full WLAs... of... 53.3 lbs/day TN.” 2017 Permit Fact Sheet at 10 (Exh. 3, AR 4). *See also* Response to Comments for the 2017 Permit at page 4, explaining that the mass-based limits in the final permit increased from 37.1 lbs/day to 37.8 lbs/day, taking into account the permittee’s commitments to achieve certain non-point source reductions. (Exh. 6, AR 5).

III. ARGUMENT

Petitioner fails to meet its burden to demonstrate that the revised permit limits constitute impermissible backsliding under the CWA. As discussed below, EPA's revision to the prior permit limit for TN and removal of the concentration based limits for TN and TP were fully consistent with the applicable requirements of the antibacksliding exemption provided in CWA Section 303(d)(4)(A).⁵ Petitioner's real disagreement here is with the underlying determinations of the TMDL, review of which the Board should deny in the context of this permit appeal.

1. EPA Reasonably Revised the Mass-Based Limit for Total Nitrogen Based on the Antibacksliding Exception at CWA Section 303(d)(4)(A)

Section 303(d)(4)(A) provides that "any effluent limitation based on a total maximum daily load or other waste load allocation" may be revised if "the cumulative effect of all such revised effluent limitations based on such total maximum daily load... will assure the attainment of such water quality standard."

With respect to the mass-based limits for TN, Petitioner argues that EPA cannot assure that the relaxed effluent limit will "assure the attainment of" the water quality standards. Petitioner's

⁵ In its permit fact sheet and response to comments, EPA had also referenced another antibacksliding exception – the new information exception under Section 402(o)(2)(B)(i). See 2017 Permit Fact Sheet (Exh. 3, AR 4) and 2017 Permit Response to Comments (Exh. 6, AR 5). However, because the Section 303(d)(4)(A) exception is better tailored to address this particular situation – where permit limits are revised based on subsequently revised TMDL WLAs – this brief will focus solely on this exception. EPA notes that the exceptions to antibacksliding under Section 303(d)(4) are independently applicable -- that is, they apply "in addition" to the other exceptions listed under 402(o)(2). See *City of Tulsa*, 3 E.A.D at 513 (EAB 1991) (finding that the legislative history demonstrates an intent to allow backsliding if an exception under either statutory provision is met), citing *Conference Report, supra* at p. 156; *American Iron and Steel Inst. v. EPA*, 115 F.3d 979, 993 (D.C. Cir. 1996) ("§402(o) allows relaxation of water quality-based limits if the requirements of either §402(o)(2) or §303(d)(4) are met.")

Brief (“Pet. Br.”) at 18.⁶ This argument must fail because the TMDL on which this permit limit was based did precisely that – concluding that “if the conditions in the TMDL are met, attainment of the water quality is assured.” 2016 TMDL at p. 32 (Exh. 2, AR 5). Indeed, EPA had approved the TMDL as “meet[ing] the requirements found in Section 303(d) of the Clean Water Act and the implementing regulations found at 40 CFR § 130.7,” which specifically require TMDLs to be established at “levels necessary to attain and maintain the applicable narrative and numerical WQS[s].” 40 CFR § 130.7. Here, the 2016 TMDL allocated a specific mass loadings “budget” for TN to this particular discharger, and the revised permit limits were within that budget.⁷ Accordingly, the Board should find that the revised mass based limit would “assure attainment” of standards within the meaning of 303(d)(4)(A).

The Board’s prior decision in *City of Tulsa* is instructive. There, as here, permittees had challenged EPA’s relaxation of permit limits based on a subsequently revised TMDL. There, as

⁶ Petitioner’s argument that the prior permit limit was not “based on the TMDL” appears to be restricted to the concentration-based limits – not the mass-based limit. *See* Pet. Br. at 17 (“neither of these two concentration limits is based on a TMDL or other WLA”). Moreover, Petitioner appears to acknowledge that the mass-based limit for TN was “based on” the prior TMDL. (*See* Pet. Br. at 19, noting that the 2012 permit incorporates the “mass load limits for TP and TN as calculated in the 2006 TMDL.”). However, to the extent that Petitioner is raising such argument with respect to the TN mass-based limit, EPA notes that there can be no question that the mass-based limit in the 2012 permit was “based on” a TMDL. The 2006 TMDL had a specific WLA for this facility of 18.9 lbs/day TN – and the permit limit, based on this WLA, was an identical 18.9 lbs/day. *See* 2012 Permit Fact Sheet at p. 13 (Exh. 8, AR 28) (noting that the TN limit was established “to ensure consistency with the waste load allocations... established in the TMDL”).

⁷ The TMDL includes a WLA of 37.1 lbs/day for this discharger, with a future growth of 53.5 lbs/day. EPA included a permit limit of 37.8 lbs/day, reasonably relying on a small fraction of the future growth allocation, and taking into account the permittee’s commitment to effectuate certain nonpoint source reductions. *See* 2017 Permit Fact Sheet at 10 (Exh. 3, AR 4) and 2017 Permit Response to Comments at 4 (Exh. 6, AR 5). EPA’s regulations, while requiring WQBELs to be “consistent with” the assumptions of the TMDL’s WLA (40 CFR § 122.44(d)(1)(vii)(B)), do not require them to be identical. *In re City of Moscow*, 10 EAD 135, 148 (2001).

here, the relaxed permit limits were based on changed assumptions regarding in-stream flow, and thus the assimilative capacity of the waterbody, as reflected in the TMDL's WLA. The Board held that the revised permit limits were justified under Section 303(d)(4)(A), reasoning that:

"If the characteristics of the 'waters' change in some fundamental way – for example, as here, where the assimilative capacity of [the waterbody] will increase as a result of flow augmentation – no violence is done to the intent of the anti-backsliding provisions if the previous TMDL (or WLA) is disregarded, provided the permit is based on the new TMDL (or WLA) and it ensures protection of water quality."

In the Matter of City of Tulsa, 3 E.A.D at 510 (EAB 1991). Accordingly, because the revised permit limits are based on the new TMDL, approved by EPA as ensuring protection of water quality, the Board should similarly find that the revised permit limits are justified under Section 303(d)(4)(A).

Petitioner appears to be asking the Board to independently conclude, based on "common sense," that because the waterbody was not in attainment under the prior permit, increased mass loadings of TN into the waterbody would not assure attainment of the water quality standards.⁸ See Pet. Br. at 19, 20. However, for the Board to do so would ignore the technical findings of the TMDL – which explicitly authorized these increased loadings, based on adjusted assumptions for stream flow. And it would ignore the conclusion of the TMDL (and EPA's approval thereof) that the overall allocations contemplated under the TMDL, including the increased mass-based WLA for this discharger, would result in attainment of standards.

⁸ Petitioner also points to Ruidoso's apparent representations that it will not be able to meet the TN limits, as evidence that the permit limits do not assure attainment of standards. EPA notes that the statute requires a demonstration that the limitations assure attainment with standards – in other words, that the limitations are calculated at a level that would ensure such attainment if met -- not a guarantee as to compliance with such limitations.

Because the cumulative effect of the revised limits based on a revised TMDL will assure attainment of standards, the Board should reject Petitioners' argument that revision of the mass-based TN limit constitutes impermissible backsliding under the CWA.

2. EPA Reasonably Removed the Concentration-Based Limits for Total Nitrogen and Total Phosphorus Based on the Antibacksliding Exception at CWA Section 303(d)(4)(A)

Petitioner's main argument with respect to the removal of the concentration-based limits in the 2017 permit focuses, rather curiously, on the basis for the *prior* permit limits, rather than on whether the *revised* permit limits are justified under the antibacksliding exception. Specifically, Petitioner argues that the concentration-based limits in the prior 2012 permit are not "based on a TMDL or other WLA" – but on New Mexico's water quality standard for TP (Pet. Br. at 17). As discussed below, this argument is not only unsupported, but also fundamentally misguided – as it places undue emphasis on the *prior* permit in assessing the applicability of the antibacksliding exception.

First, in response to Petitioner's argument that the concentration based limits in the 2012 permit were not "based on" a TMDL, EPA first notes that the limits were essentially the same as the 2006 TMDL WLAs. *Compare* concentration-based limits in 2012 permit (0.1 mg/l TP and 1.0 mg/l TN) *with* 2006 TMDL's concentration-based WLAs (0.1 mg/l TP; and 0.9 mg/L TN). *See also* 40 CFR 122.44(d)(1)(vii)(B) (requiring water quality-based effluent limits in permits to be "consistent with the assumptions and requirements of any available wasteload allocation for the discharger" in a TMDL). In addition, Petitioner's assertions that the concentration-based limits in the 2012 permit were based on New Mexico's water quality standards for TP and TN – while not incorrect as a factual matter – does not mean that such limits were not *also* based on the 2006 TMDL, which used the applicable water quality standards as the endpoint in calculating

the necessary loading reductions. And, to address another point made by Petitioner, even if the same concentration-based limits appeared in permits preceding the development of the TMDL, this does not mean that the 2012 concentration-based permit limits were not *also* based on the WLAs in the TMDL. The critical point in dismissing Petitioner's argument is that the limits in the 2012 permit would not be meaningfully different if based on the 2006 TMDL WLAs or New Mexico's water quality standards. The absence of an explicit statement in the 2012 permit fact sheet that the limits were based on the 2006 TMDL WLAs should not be a basis to conclude that Section 303(d)(4)(A) is not met, even accepting Petitioner's interpretation of the section as requiring the limit being revised to have been previously based on a TMDL. Petitioner's argument should accordingly be rejected.⁹

Next, and more fundamentally, Petitioner's challenge with respect to the removal of the concentration-based limits places undue emphasis on the *prior* permit limit. Despite some ambiguity in the statutory language,¹⁰ the critical inquiry with respect to this antibacksliding

⁹ EPA further notes that, under the Petitioner's interpretation of the statute, the prior permit limit must be "based on a total maximum daily load *"or other wasteload allocation."* (emphasis added). Accordingly, even if the 2012 permit limit was not based on the 2006 TMDL, it was – as Petitioner acknowledges – based on allocations derived from the water quality standards, which could reasonably be considered an "other wasteload allocation" within the meaning of Section 303(d)(4)(A). *See* EPA's 2010 Permit Writer's Manual at Section 6.4.1.1 ("A WLA may be determined from a TMDL or calculated for an individual point source directly. Where an EPA-approved TMDL has been developed for a particular pollutant, the WLA for a specific point source discharger is the portion of that TMDL that is allocated to that point source, as discussed in section 6.2.1.2 above. Where no TMDL is available, a water quality model generally is used to calculate a WLA for the specific point source discharger.").

¹⁰ The statute provides that "any effluent limitation *based on a total maximum daily load or other waste load allocation...* may be revised only if" certain conditions are met. (emphasis added). It is unclear whether the italicized phrase is intended to refer to the term "effluent limitation" or to the term "may be revised." If read to refer to the term "effluent limitation," per Petitioner's interpretation – and as indicated in EPA's permit writer's manual (*see* Pet. Br. at 16-17) – it would require that the prior effluent limit be based on a TMDL or other WLA. However, if read to refer to the term "may be revised," then it would mean that an effluent limitation could be

exception is not about the basis for the *prior* permit limit that is being revised – but about whether the *revised* limit based on a TMDL will assure attainment of water quality standards. See *In the Matter of City of Tulsa*, 3 E.A.D at 510 (EAB 1991). (“The overarching concern of the backsliding provisions is the protection of the relevant waters. If the characteristics of the ‘waters’ change in some fundamental way,...no violence is done to the intent of the anti-backsliding provisions if the previous TMDL (or WLA) is disregarded, provided the permit is based on the new TMDL (or WLA) and it ensures protection of water quality.”). There is nothing in the legislative history to indicate that Congress intended to allow backsliding only where the prior WQBEL was based on a TMDL – and not where the prior WQBEL was derived based on the water quality standards in a pre-TMDL situation. Rather, the legislative history simply states that “permits developed *on the basis of water quality based effluent limits*... may be revised, reissued or modified on the basis of subsequently revised waste load allocation formulas” (emphasis added). Joint Explanatory Statement of Conference Committee, H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 156 (1986). This reference to “water quality based effluent limits” generally – and not specifically to WQBELs “based on a TMDL” -- would support an interpretation of Section 303(d)(4)(A) to allow for the revision of any WQBEL based on the allocations of a subsequent TMDL – irrespective of the basis for the original WQBEL.

With respect to this more critical inquiry, the Region reasonably found that removal of the concentration based limits for TN and TP – like EPA’s revisions of the mass-based limit for TN – would assure attainment of water quality standards. The revised TMDL removes the concentration-based WLAs for TN and TP that were in the previous TMDL. The WLAs for both

revised “based on a total maximum daily load or other waste load allocation,” irrespective of the basis for the prior effluent limit.

TN and TP in the 2016 TMDL are expressed solely in terms of mass (lbs/day) – not in terms of concentration (mg/l). *Compare* 2006 TMDL at 45 (Exh. 4, AR 27) (Table 5.7 and 5.8, expressly including an “allowable WWTP effluent concentration” expressed in mg/l) *with* 2016 TMDL at p. 23 (Exh. 2, AR 7) (Table 3.8, lacking such terms). In addition, reflecting the removal of the concentration-based WLAs, the 2016 TMDL explicitly “encourages Region 6 to include only loading (and not concentrations) in future permits,” (2016 TMDL at 33) and concludes that “*if the conditions in the TMDL are met, attainment of the water quality is assured.*” 2016 TMDL at p. 32 (Exh. 2, AR 7) (emphasis added).

Again, Petitioner relies on a “common sense” argument that removal of the concentration limits cannot assure attainment of WQS when the previous permit (which included concentration limits) failed to result in the water meeting water quality standards. *See* Pet. Br. at 20. Despite what may be the intuitive appeal of this argument, it is one that is not supported by the TMDL – which, as discussed above, specifically found that the conditions in the revised TMDL, including the inclusion of mass-based limits alone, would be sufficient to assure attainment of water quality standards. *See* 2016 TMDL at 32 (Exh. 2, AR 7).

Petitioner also points to EPA guidance noting the importance of concentration based limits (*See* Pet. Br. at 20), which is similarly inapposite. First, EPA’s regulations generally require permit limits to be expressed in terms of mass, not concentration. 40 C.F.R. § 122.45(f). This regulation specifically leaves it to the discretion of the permit writer as to whether to include supplemental concentration-based limits, but does not require such limits. 40 C.F.R. § 122.45(f)(2) (“Pollutants limited in terms of mass additionally *may* be limited in terms of other units of measurement...” (emphasis added)). Certainly, EPA’s guidance recommends the inclusion of supplemental concentration based limits in certain circumstances where necessary to

meet water quality standards¹¹ – but here, where the EPA-approved TMDL does not contain concentration-based WLAs and concludes that mass-based limits alone would be sufficient to meet standards, it would be reasonable for a permit to not include concentrations based limits.¹²

Accordingly, the Board should find that the Region’s removal of the concentration based limits for TN and TP, based on the 2016 revised TMDL, does not constitute impermissible backsliding under the CWA.

3. The Revised Permit Limits Will Assure Attainment of Water Quality Standards, Thus Meeting the Backstop Requirements of 402(o)(3)

Section 403(o)(3) of the Act includes a general backstop provision with respect to the various antibacksliding exceptions, providing that permit limits may not be made less stringent if “implementation of such limitation would result in a violation of a water quality standard.”

Petitioner’s argument with respect to this provision is at essence the same as its arguments raised

¹¹ One of the guidance documents that Petitioner cites to, EPA’s “Technical Support Document for Water Quality Based *Toxics* Control” (“TSD”) (emphasis added), was, per its title, developed specifically to address toxic pollutants. TN and TP are not considered toxic pollutants under the CWA. See CWA Section 307(a)(1), 33 U.S.C. § 1317 (a)(1). EPA has cautioned that the procedures described in the TSD “are not applicable or appropriate for developing nutrients limits.” See Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, *Annual Permit Limits for Nitrogen and Phosphorus for Permits Designed to Protect Chesapeake Bay and its tidal tributaries from Excess Nutrient Loading under the National Pollutant Discharge Elimination System* (March 3, 2004). (Exh. 9).

¹² Indeed, the Board has denied review of another EPA-issued NPDES permit containing only a mass-based limit – and no corresponding concentration based limit – for TN. See *In re City of Taunton Dept of Public Works*, 17 E.A.D. 105, 119-120, fn. 11 (EAB 2016) (describing Region’s basis for including only mass-load limits in permit, including its determination that “the mass-only limit is ‘protective of water quality standards... without any corresponding concentration-based limit.’”). The Board decision references the Region’s Response to Comment document, which further notes that mass-only limits for nutrients have been implemented in certain approved state NPDES programs, including a Connecticut mass-load based general permit for nitrogen discharges from POTWs and permitting approaches for discharges of nutrients in the Chesapeake Bay watershed. See *id.*, citing Taunton Permit Response to Comments at 13.

with respect to Section 303(d)(4)(A) – i.e., that the revised permit limits will not assure attainment with water quality standards. As discussed above, EPA reasonably found that the revised permit limits based on the discharger-specific allocations in the revised TMDL would assure attainment of water quality standards – and accordingly, such limits would not result in a “violation of” – water quality standards under Section 403(o)(3).

4. Petitioners’ Challenge to Validity of the TMDL Cannot Be Addressed Through a Permit Appeal Before the Board

Petitioner’s challenge here is really about the underlying determinations in the TMDL – the increased mass-based WLA for TN, and the removal of the concentration-based WLAs for both TN and TP. As discussed above, the Region revised the permit based on the assumptions of the revised WLAs in the TMDL – and it is precisely these assumptions that Petitioner disagrees with, as not being sufficient to attain water quality standards in the waterbody.

As the Board has previously held, and as Petitioner acknowledges in its brief (*see* Pet. Br. at fn. 1), challenges to the underlying determinations in a TMDL cannot be brought in the context of a permit appeal before the Board. *See City of Moscow*, 10 E.A.D. at 159 (declining to review challenge to the algal growth assumptions incorporated from the TMDL into the permit, finding that such allegations “are in essence challenges to the underlying determinations of the TMDL and to the Region’s decision to approve the... TMDL.”). The Board noted that its authority is limited under 40 CFR 124.19(a) to review of “contested permit conditions,” which “does not ordinarily extend to considerations of the validity of prior, predicate regulatory decisions that are reviewable in other fora.” *Id* at 160-161. Accordingly, the Board declined to address this allegation, finding that the petitioner’s challenge should have earlier been brought either as a challenge to the TMDL itself in state court or in federal district court as a challenge to EPA’s approval of the TMDL under the Administrative Procedure Act. *Id.* at 159, citing *Scott v. City of*

Hammond, 741 F.2d 992, 997 (7th Cir. 1984) ("The only recognized avenue for challenges to the substance of EPA's actions taken with respect to state submissions [of TMDLs] is a suit for judicial review under the [APA]."); *United States Steel Corp. v. Train*, 556 F.2d 822, 836-37 (7th Cir. 1977) (The "authority to approve or disapprove a state's identification of polluted waters and calculation of total maximum daily loads is conferred on the Administrator by § 303(d)(2). These determinations are reviewable in an action in the district court under the judicial review provisions of the APA."); *Hayes v. Browner*, 117 F. Supp. 2d 1182, 1197 (N.D. Okla. 2000) ("[D]etermining whether or not the submitted and approved 'TMDLs' really are 'TMDLs' requires the Court to review something that the EPA has actually approved. Such an evaluation is appropriately left to an APA action.").

Here, Petitioner has in fact challenged the validity of the state TMDL in state court¹³ – which is, as the Board held in *Moscow*, the appropriate forum for such challenge. If the state court finds the TMDL to be invalid, EPA's permit includes a reopener provision that would allow EPA to modify the permit to reflect such decision. Petitioner has not challenged EPA's approval of the TMDL in federal district court – but this option remains open to them.¹⁴ Accordingly, the Board should deny the Petitioner's impermissible attempt to challenge the underlying TMDL determinations in the context of this permit appeal.

¹³ *Rio Hondo Land and Cattle Co., LP and WildEarth Guardians v. New Mexico Water Quality Control Commission and New Mexico Environment Department* (N.M. Ct. App. Case No. a-1-CA-36039). Petitioner's Notice of Appeal was filed on December 12, 2016; Petitioner's opening brief was filed on November 15, 2017; responsive briefing and potential oral argument is pending.

¹⁴ The statute of limitations for challenging EPA's TMDL approval is six years. 28 U.S.C. § 2401(a).

IV. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the petition for review should be denied.

V. STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the Region's Response to the Petition for Review in the matter of Ruidoso Downs and Village of Ruidoso Wastewater Treatment Plant, NPDES Appeal No. 17-03, contains less than 14,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Respectfully submitted this 18th day of January, 2018.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 6



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EXHIBIT LIST
EPA REGION 6'S RESPONSE TO THE PETITION FOR REVIEW

1. NPDES Permit No. NM0029165 Parts I-VI, Part III Revised March 2013, Part IV Revised April 2013 final on September 1, 2017.
2. Total Maximum Daily Load (TDML) for Rio Ruidoso, November 3, 2016.
3. Fact Sheet for NPDES Permit No. NM002965 for the Draft NPDES Permit No. NM0029165 Prepared on April 24, 2017.
4. Final Approved Total Maximum Daily Load (TDML) for Rio Hondo Watershed (Lincoln County) Pecos River to Headwaters on February 10, 2006.
5. Letter of December 13, 2016 from EPA R6 to Mr. Butch Tongate, Secretary of New Mexico Environment Department (NMED) Regarding Approval of the 2016 Total Maximum Daily Load (TMDL) for the Rio Ruidoso.
6. Letter of July 25, 2017 from EPA R6 to City of Ruidoso Downs and Village of Ruidoso WWTP Enclosing Responses to Comments.
7. NPDES Permit No. NM0029165 effective on August 1, 2012.
8. Fact Sheet for NPDES Permit No. NM002965 for the Draft NPDES Permit No. NM0029165 Prepared on May 4, 2012.
9. Memorandum from James A. Hanlon, Director, EPA Office of Wastewater Management, *Annual Permit Limits for Nitrogen and Phosphorus for Permits Designed to Protect Chesapeake Bay and its tidal tributaries from Excess Nutrient Loading under the National Pollutant Discharge Elimination System* (March 3, 2004).

CERTIFICATE OF SERVICE

I, David Gillespie, hereby certify that on this 18th day of January, 2018, I served a copy of the foregoing Response on the parties identified below by electronic mail and on the Environmental Appeals Board by FedEx.

Via email:

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CERTIFICATION OF IDENTICAL PAPER FILING

I, David Gillespie, hereby certify that the EPA Region 6's Response to the Petition for Review and the exhibits attached thereto in this matter of NPDES Appeal 17-03, sent to the Environmental Appeals Board via FedEx, are identical copies of those filed electronically in this matter by EPA Region 6.

Dated: January 18, 2018.



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

In re:

Ruidoso Downs and
Village of Ruidoso WWTP

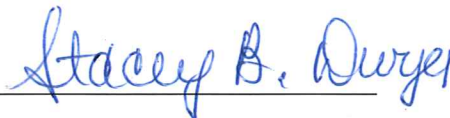
NPDES Permit No. NM 0029165

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NPDES APPEAL No. 17-03

CERTIFIED INDEX TO THE ADMINISTRATIVE RECORD

I, Stacey B. Dwyer, Acting Associate Director of the Water Division, EPA Region 6, hereby certify that the attached index constitutes the Certified Index to the Administrative Record in Support of EPA Regions 6's NPDES Permit No. NM0029165 issued to Ruidoso Downs and the Village of Ruidoso.



Stacey B. Dwyer, P. E.
Acting Associate Director
Water Division
EPA, Region 6

INDEX TO THE EPA REGION 6 ADMINISTRATIVE RECORD

Administrative Record Index in Support of EPA Regions 6's NPDES Permit No. NM0029165 issued to Ruidoso Downs and the Village of Ruidoso

1. NPDES Permit No. NM0029165 Parts I-VI, Part III Revised March 2013, Part IV Revised April 2013 final on September 1, 2017.
2. Letter of February 15, 2017 from Molzen Corbin to EPA R6 Providing Additional Data Requested for NPDES Permit No. NM0029165, Application for Renewal.
3. Letter of April 21, 2017 from City of Ruidoso Downs to EPA R6 Providing Information On Elimination of Onsite Systems for Inclusion in the Draft Renewal of NPDES Permit No. NM0029165 in Response to Letter of February 28, 2017.
4. Fact Sheet NPDES Permit No. NM002965 for the Draft NPDES Permit No. NM0029165 Prepared on April 24, 2017.
5. Letter of July 25, 2017 from EPA R6 Regarding Application to Discharge to Waters of the United States Permit No. NM0029165 enclosing Responses to Comments Received During Public Comment Period and Final Permit.
6. Letter of June 2, 2017 from City of Ruidoso Downs and Village of Ruidoso WWTP to EPA R6 Regarding May 2017 Draft Permit No. NM0029165 for the City of Ruidoso Downs/Village of Ruidoso Wastewater Treatment Plant.
7. TMDL (Total Maximum Daily Load) for Rio Ruidoso dated November 3, 2016.
8. Letter of December 13, 2016 from EPA R6 to Mr. Butch Tongate, Secretary of New Mexico Environment Department (NMED) Regarding Approval of the Total Maximum Daily Load (TMDL) for the Rio Ruidoso.
9. State of New Mexico Water Quality Control Commission, In the Matter of: Final Total Maximum Daily Load for the Sacramento Mountains [Rio Hondo, Tularosa, and Rio Penasco Watersheds], ORDER Issued August 11, 2015.
10. EPA-Approved Total Maximum Daily Load (TMDL) for the Sacramento Mountains [Rio Hondo, Tularosa, and Rio Penasco Watersheds] on September 21, 2015.
11. Letter of September 21, 2015 from EPA R6 to Mr. Ryan Flynn, Secretary New Mexico Environment Department (NMED) Regarding Approval of the Non-Nutrient Total Maximum Daily Load (TMDL) for the Sacramento Mountains [Rio Hondo, Tularosa, and Rio Penasco Watersheds].

12. Public Notice issued on May 6, 2017, NPDES Authorization to Discharge to Waters of the United States, Permit No. NM0029165, Applicants, City of Ruidoso Downs and Village of Ruidoso WWTP.
13. Letter of June 4, 2017 from Steven Sugarman, Attorney At Law to EPA R6 Regarding Comments on Proposed NPDES Permit No. NM0029165 Village of Ruidoso and Ruidoso Downs WWTP, Comments on behalf of the Rio Hondo Land & Cattle Co., including Comments from August 7, 2014 and September 29, 2016.
14. Letter of August 7, 2014 from Steven Sugarman, Attorney At Law to Ms. Heidi Henderson, New Mexico Environment Department (NMED) Regarding Comments to Draft TMDL for the Sacramento Mountains on behalf of Rio Hondo Land & Cattle Co., LP and WildEarth Guardians including Comments from September 29, 2016.
15. Letter of June 9, 2017 from Shelly Lemon, Bureau Chief Surface Water Quality Bureau of New Mexico Environmental Department (NMED) to Mr. William Honker, Director Water Quality Protection Division (6WQ) EPA R6 Regarding: State Certification.
16. Village of Ruidoso/City of Ruidoso Downs Joint Use Board Renewal Application for 2017 NPDES Permit Renewal NM0029165 Prepared by Molzen Corbin, Engineers submitted on January 2017, Including Letter of February 1, 2016 to EPA R6 from Village of Ruidoso Regarding Identification of all Treatment Processes to Achieve P.F.R.P.
17. Letter of January 30, 2017 from Village of Ruidoso, Ruidoso-Ruidoso Downs Wastewater Treatment Plant to EPA R6 Regarding, City of Ruidoso Downs/Village of Ruidoso Wastewater Treatment Plant NPDES Permit No. 0029165 Application for Renewal Submitting the Application Package.
18. Letter of February 15, 2017 from Molzen Corbin, Engineers to Mr. Tung Nguyen, 6WQ-PP EPA R6 Regarding City of Ruidoso Downs/Village of Ruidoso Wastewater Treatment Plant NPDES Permit No. NM002965 Application for Renewal enclosing the Additional Data Requested in email of February 7, 2017.
19. Previous NPDES Permit No. NM0029165 effective on August 1, 2012.
20. Reference: Implementation Plan (IP), Procedures for Implementing National Pollutant Discharge Elimination System Permits in New Mexico – NMIP prepared by NPDES Permits Branch EPA R6 in Consultation With the Surface Water Quality Bureau, New Mexico Environment Department (NMED) on March 15, 2012.
21. Whole Effluent Toxicity (WET), Reasonable Potential Analyzer for City of Ruidoso Downs/Village of Ruidoso WWTP, NPDES Permit No. NM0029165, Outfall No. 001, Data on September 1, 2017.
22. Report by U.S. Fish and Wildlife Services, Endangered Species Act (ESA), Species by County Report: Lincoln County, New Mexico on January 31, 2017.
23. 2016-2018 State of New Mexico Clean Water Act § 303(d) § 305(b) Integrated List, Rio Ruidoso (Carrizo Ck to Mescalero Apache bnd).

24. Dissolved Oxygen (DO) Report for Ruidoso-Ruidoso Downs WWTP, NM0029165.
EPA uses LA-QUAL version 9.30 to model DO in a receiving stream.
25. Report: Final Recovery Plan; Southwestern Willow Flycatcher prepared by Southwestern Willow Flycatcher Recovery Team Technical Subgroup on August 2002 for Region 2 U.S. Fish and Wildlife Service.
26. Map: Ruidoso-Ruidoso Downs WWTP, Project 1 on November 15, 2016.
27. Final Approved Total Maximum Daily Load (TDML) for Rio Hondo Watershed (Lincoln County) Pecos River to Headwaters on February 10, 2006.
28. Fact Sheet NPDES Permit No. NM002965 for the Draft NPDES Permit No. NM0029165 Prepared on May 4, 2012.
29. Discharge Monitoring Report (DMR), Data for Permit No. NM0029165 on September 1, 2017. Scope of Works Replace Onsite Systems to Monitor Data.
30. Report to EPA R6 from Molzen Corbin, Engineers, Sewering of Onsite Systems, for Ruidoso/Ruidoso Downs Joint Use Board prepared May 2017.
31. NOTICE OF APPEAL In The Court Of Appeals, For The State Of New Mexico; Rio Hondo Land & Cattle Co., LP and WildEarth Guardians vs. New Mexico Water Quality Control Commission; On Appeal From State of New Mexico Water Quality Control Commission, In the Matter of: Final Total Maximum Daily Load for the Rio Ruidoso, Approved November 15, 2016, Submitted December 12, 2016.
32. DOCKETING STATEMENT (Appeal No. 36039) In The Court Of Appeals, For The State Of New Mexico; Rio Hondo Land & Cattle Co., LP and WildEarth Guardians vs. New Mexico Water Quality Control Commission; On Appeal From State of New Mexico Water Quality Control Commission, In the Matter of: Final Total Maximum Daily Load for the Rio Ruidoso, Approved November 15, 2016, Submitted January 11, 2017.
33. Letter of July 22, 2016 from City of Ruidoso Downs to Mr. Brent Larsen Chief Permitting Section EPA R6 Regarding City of Ruidoso Downs/Village of Ruidoso Wastewater Treatment Plant NPDES Permit No. NM0029165, Status of Permit and Upcoming Renewal.
34. Sign-in Sheet for EPA R6 and Ruidoso-Ruidoso Downs WWTP, Meeting on November 10, 2016 on Permit No. NM0029165.
35. Letter of January 13, 2017 from Village of Ruidoso, City of Ruidoso Downs to Mr. Brent Larsen Chief, Permitting Section, Water Division, EPA R6 Regarding Follow Up From Our Meeting on November 10, 2016.

36. Letter of February 28, 2017 from Village of Ruidoso, City of Ruidoso Downs to Mr. Brent Larsen Chief, Permitting Section, Water Division, EPA R6 Regarding Report on Replacement of Onsite Systems.
37. Letter of July 5, 2017 from Village of Ruidoso, City of Ruidoso Downs to Mr. Brent Larsen Chief, Permitting Section, Water Division, EPA R6 Regarding Ruidoso/Ruidoso Downs NPDES Permit No. NM0029165 Wastewater Treatment Facility Design Flow Verification.
38. Letter of July 5, 2017 from Village of Ruidoso, City of Ruidoso Downs to Mr. Brent Larsen Chief, Permitting Section, Water Division, EPA R6 Regarding Ruidoso/Ruidoso Downs NPDES Permit No. NM0029165 Wastewater Treatment Facility Connection Commitment.
39. Email from Mr. Tung Nguyen, Permitting Section, Water Division, EPA R6 (6WQ-PP) to Sarah Holcomb, NMENV and Jennifer Foote, NMENV on February 3, 2017 @ 8:36 a.m., Ruidoso WWTP, NM0029165. Application Received, Please Provide Additional Information/Data.
40. Email thread from Mr. Tung Nguyen, Permitting Section, Water Division, EPA R6 (6WQ-PP) to Gladys Gooden-Jackson, EPA R6, Jennifer Foote, NMENV, Silvia Bogdan, EPA cc: Sarah Holcomb, NMENV, Helen Nguyen, EPA R6, Brent Larsen, EPA R6 and Senkayi Abu, EPA R6 on February 21, 2017 @ 10:24 a.m., Preliminary NPDES Review- Ruidoso/Ruidoso Downs WWTP, NM0029165. Review and Comment, Sent Back by March 7th.
41. Email thread from Jennifer Foote, NMENV to Mr. Tung Nguyen, Permitting Section, Water Division, EPA R6 (6WQ-PP) on March 14, 2017 @ 3:26 p.m., RE: Preliminary NPDES Review – Ruidoso/Ruidoso Downs WWTP, NM0029165. Clarifications and Comments Received.