IN RE ARIZONA PUBLIC SERVICE CO.

NPDES Appeal No.19-06

ORDER DENYING REVIEW

Decided September 30, 2020

Syllabus

Diné Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club (collectively, "Petitioners") filed a petition with the Environmental Appeals Board ("Board") seeking review on several grounds of a National Pollutant Discharge Elimination System ("NPDES") permit renewal issued by Region 9 of the U.S. Environmental Protection Agency to the Arizona Public Service Company ("APS"). The Permit authorizes APS to discharge wastewater effluent from a steam electric power plant ("Plant") under Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. The Plant is located on the Navajo Nation and is adjacent to Morgan Lake, a water body used by APS for circulating cooling water to the Plant. The Permit regulates discharges of the effluent from Morgan Lake to No Name Wash, a tributary to the Chaco River that flows into a segment of the San Juan River.

Held: Based on the record, Petitioners have not demonstrated that review of the permit is warranted on any of the grounds presented. As such, the Board denies the petition for review in all respects.

First, Petitioners failed to demonstrate that the Region clearly erred in concluding that Morgan Lake qualifies for the exclusion from the regulatory definition of "waters of the United States" for waste treatment systems. The waste treatment system exclusion includes cooling ponds, such as Morgan Lake, which provide treatment and are incorporated into a NPDES permit. The applicable definition of waters of the United States for this proceeding is the definition promulgated by EPA in 2015 because that was the definition in force when the Region issued its permit decision. In 2019, EPA repealed the 2015 definition and reinstated the pre-2015 definition of waters of the United States, but that reinstatement had no substantive effect on the scope of the waste treatment system exclusion and does not affect Morgan Lake's qualification for the waste treatment system exclusion. In the more recent 2020 revision to the definition of the waters of the United States, the waste treatment system exclusion has remained substantively unchanged and does not affect this decision.

Petitioners also have not shown that the Region clearly erred in how it incorporated requirements from the CWA's effluent limitations guidelines for steam electric power plants into the Permit. Petitioners did not show that the Region clearly erred in setting a deadline for compliance with the guidelines' zero-discharge requirement for bottom ash transport water. Petitioners also failed to show that the Region clearly erred in setting effluent limits on legacy bottom ash transport water. As to those effluent limits, the Region appropriately took into account applicable effluent limitations guidelines as well as site-specific cost and feasibility concerns arising due to APS' ongoing modifications of the Plant to comply with the zero-discharge requirement for bottom ash transport water and the requirements of the Coal Combustion Residuals rule. The Region focused on accomplishing the Clean Water Act's goal of eliminating discharges to navigable waters—here, through the timely achievement of the zero-discharge effluent limit for bottom ash transport water. This approach is consistent with the statutory requirement that determinations on the best available technology economically achievable must result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.

For several of their arguments, Petitioners failed to satisfy the threshold requirements for Board review under 40 C.F.R. § 124.19(a)(4)(ii). Petitioners did not show that their challenges to the Region's decision to establish site-specific permit terms in the absence of water quality standards or the Region's decision not to require the Navajo Transitional Energy Company to sign a waiver of sovereign immunity were raised in the public comment period on the draft permit. Petitioners challenged matters for which the Board is not the proper forum or failed to explain why the Region's response to their comments was clearly erroneous or otherwise warrants review with respect to: the Region's analysis of whether discharges from the Plant had a reasonable potential to exceed water quality standards; the Region's decision not to regulate discharges, or "seepage," from the coal ash ponds into the Chaco River watershed; the Region's decision to forgo an impairment analysis pursuant to section 303(d) of the CWA to determine whether water bodies are meeting water quality standards; the Region's decision to waive certification requirements for APS's application under CWA § 401, 33 U.S.C. § 1341(a); the Region's conclusion under the regulations that implement CWA section 316(b) that APS operates a closed-cycle recirculating system and its selection of the best technology available for minimizing adverse environmental impacts (BAT); and other various aspects of the Region's compliance with CWA 316(b) and the Endangered Species Act.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

Opinion of the Board by Judge Lynch:

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I. *STATEMENT OF THE CASE*

Diné Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club (collectively, "Petitioners") filed a petition with the Environmental Appeals Board ("Board") seeking review of a National Pollutant Discharge Elimination System ("NPDES") permit renewal ("Permit") issued by Region 9 ("Region") of the U.S. Environmental Protection Agency ("EPA" or "Agency") to the Arizona Public Service Company ("APS" or "Permittee"). The Permit authorizes APS to discharge wastewater effluent from the Four Corners Power Plant ("Plant") under section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. The Plant is located on the Navajo Nation and is adjacent to Morgan Lake, a water body used by APS for circulating cooling water to the Plant. The Permit regulates discharges of the effluent from Morgan Lake to No Name Wash, a tributary to the Chaco River that

flows into a segment of the San Juan River. Petitioners seek Board review on twelve issues. Both the Region and APS filed response briefs opposing the petition for review. In addition, the Navajo Transitional Energy Company filed an amicus brief addressing and supporting the Region's permitting decision on two of the issues raised by Petitioners. The Board held oral argument on September 3, 2020. For the reasons set forth below, the Board denies the Petition for Review.

II. *SUMMARY OF ISSUES ON APPEAL AND OUTCOME*

Petitioners' challenge to the Permit raises the following issues on appeal:

1. Did the Region clearly err by concluding that Morgan Lake is not a "water of the United States" subject to the requirements of the CWA?

2. Did the Region clearly err by not imposing effluent limitations on the discharge of pollutants from the Four Corners Power Plant into Morgan Lake?

3. Did the Region clearly err by failing to promulgate water quality standards for Morgan Lake and No Name Wash?

4. Did the Region clearly err in finding the discharges from the Four Corners Power Plant do not present a "reasonable potential" to cause or contribute to an excursion above a water quality standard?

5. Did the Region clearly err when it established the date for the Four Corners Power Plant to comply with the 2015 Effluent Limitations Guidelines and Standards ("ELGs") or when it declined to use its best professional judgment in setting effluent limits in the Permit for legacy bottom ash transport water?

6. Did the Region clearly err by not requiring permit provisions regarding seepage from coal ash ponds into the Chaco River?

7. Did the Region clearly err by not conducting a CWA section 303(d) impairment analysis?

8. Did the Region clearly err when it waived CWA section 401 certification?

9. Did the Region clearly err by not requiring the Navajo Transitional Energy Company to waive its sovereign immunity as an owner of the Four Corners Power Plant?

10. Did the Region clearly err by concluding that the Permittee operates a "closed-cycle recirculating system" pursuant to CWA section 316(b) and its implementing regulations?

11. Did the Region clearly err when it regulated the Plant's Cooling Water Intake Structure ("CWIS") and determined that the closed-cycle recirculating system and Pumping Plan constitute the best technology available for minimizing adverse environmental impact ("BTA") standard for impingement and entrainment pursuant to CWA section 316(b) and its implementing regulations, and did the Region comply with the Endangered Species Act?

12. Did the Region clearly err regarding "Other CWA Section 316(b) deficiencies"?

The Board denies review on all issues because Petitioners fail to confront the Region's responses to comments or fail to carry their burden to demonstrate clear error by the Region. The Board notes that at oral argument in this case, Petitioners' counsel asked the Board to review this case on a de novo basis. Oral Argument Transcript 80, 87 (Sept. 3, 2020) ("Oral Arg. Tr."). But as discussed below, Board review of permit decisions is based on the administrative record and Petitioners must preserve the issues for review and confront the permit writer's response to comments. A number of issues raised to the Board in this case fail based on the applicable principles that govern Board review.

III. *PRINCIPLES GOVERNING BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of NPDES permitting decisions. EPA's intent in promulgating these regulations was that "review should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also In re Gen. Elec. Co.*, 17 E.A.D. 434, 446 (EAB 2018).

In considering a petition filed under 40 C.F.R. § 124.19, the Board evaluates whether a petitioner has met threshold procedural requirements, including whether each issue raised has been preserved for Board review. 40 C.F.R. § 124.19(a)(2)-(4). A petitioner satisfies the preservation requirement by demonstrating that the issues and arguments it raises on appeal were raised previously—either in comments submitted on the draft permit during the public comment period or at a public hearing. *Gen. Elec.*, 17 E.A.D. at 445. If the Board concludes that a petitioner has satisfied the threshold requirements, the Board evaluates the merits of the petition for review. *Id.*

Under 40 C.F.R. § 124.19(a), the burden of demonstrating that review of a permit decision is warranted rests with petitioner and the Board has the discretion to grant or deny review. *Id.* at 445-46. The Board will ordinarily deny review of a

permit decision, and thus not remand it, unless the decision is based on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 124.19(a)(4)(i); *see, e.g.*, *Gen. Elec.*, 17 E.A.D. at 446; *In re ESSROC Cement Co.*, 16 E.A.D. 433, 435 (EAB 2014). To meet that standard, it is not enough for a petitioner to merely cite or reiterate comments previously submitted on the draft permit. *In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 111 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). The petitioner must demonstrate, with factual and legal support, why the Region's response to comments on the issue raised is clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(i); *see, e.g.*, *In re Seneca Res. Corp.*, 16 E.A.D. 411, 416 (EAB 2014).

When evaluating a permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised "considered judgment" in rendering its decision. *Gen. Elec.*, 17 E.A.D. at 446. The Board does not find clear error simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter. *Id.* at 446-47. On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer has adequately explained its rationale and supported its reasoning in the administrative record. *Id.* at 514-15.

IV. *STATUTORY AND REGULATORY FRAMEWORK*

A. *Relevant CWA Provisions and Implementing Regulations*

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). To help achieve this objective, the Act prohibits the discharge of pollutants into the waters of the United States, unless authorized by an NPDES permit or other specified provision of the Act. *See* CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342. Section 402 of the CWA authorizes EPA (or the State or Tribe, in approved state or tribal programs) to issue permits for the discharge of pollutants, provided that certain statutory requirements are satisfied. A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."[1] 33 U.S.C. § 1362 (12). "Navigable waters" are "the waters of the

[1] A "point source" is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel

United States." *Id.* § 1362 (7). As explained below, although the Four Corners Power Plant is located on the Navajo Nation and the Navajo Nation has been generally authorized to administer the CWA program for Navajo Nation lands, EPA has excluded—at the Navajo Nation's request—the Plant and its adjacent waters from that authorization. Accordingly, EPA Region 9 is the permitting authority for the Plant.

B. *NPDES Permits, Water Quality Standards, and Effluent Limitations*

The CWA and its implementing regulations require permitting authorities to ensure that any NPDES permit issued complies with the water quality standards of all States affected by the discharge.[2] *See* CWA §§ 301(b)(1)(C), 401(a)(1)-(2), 33 U.S.C. §§ 1311(b)(1)(C), 1341(a)(1)-(2); 40 C.F.R. §§ 122.4(d), .44(d)(1). In order to achieve this requirement, all permits must include effluent limits that impose restrictions on pollutants that a permitted entity may lawfully discharge. *See generally* CWA §§ 301, 303, 304(b), 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. pts. 122, 125, 131.

The Clean Water Act provides for two different kinds of permit effluent limits: those based on the technology available to control or treat a pollutant and those necessary to attain and maintain water quality standards that apply to the receiving waterbody. EPA generally develops technology-based effluent limitations—denoted as "effluent limit guidelines" in the CWA—on an industry-by-industry basis, establishing in each instance a minimum level of control or treatment that the Agency deems technologically available and economically achievable for facilities within that specific industry. *See* CWA §§ 301(b), 304(b), 33 U.S.C. §§ 1311(b), 1314(b); 40 C.F.R. pt. 125, subpt. A; *see also* 40 C.F.R. pts. 405-71 (effluent limitations guidelines for various point source categories). If EPA has not developed industry-wide limits, the NPDES permit writer is

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or other floating craft, from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

[2] Water quality standards are promulgated by States or Tribes and approved by EPA. *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12. Water quality standards include the following three components: (1) the "designated uses" of a waterbody, such as public drinking supply, recreation, or wildlife habitat; (2) "water quality criteria," expressed in numeric or narrative form, specifying the amount of various pollutants that may be present in the waterbody without impairing the designated uses; and (3) an "antidegradation" provision that protects existing uses and high quality waters. *See* CWA §303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) ; 40 C.F.R. §§ 131.10-.12.

authorized to develop technology-based limits on a case-by-case basis utilizing his or her best professional judgment. *See* CWA § 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3(c). Technology-based effluent limitations are at issue in this appeal.

Effluent limits based on water quality standards are more stringent permit limits used where technology-based standards are not sufficient to ensure that water quality standards will be met. The CWA prohibits (with limited exceptions) renewal, reissuance, or modification of an NPDES permit to contain water quality-based limits that are less stringent than the comparable effluent limits in the previous permit. CWA § 402(o), 33 U.S.C. § 1342(o); *see also* 40 C.F.R. § 122.44(*l*). This provision generally is referred to as the "antibacksliding" provision.

Because the CWA requires permitting authorities to issue NPDES permits that ensure compliance with the water quality standards of all affected States, NPDES regulations require permit issuers to determine whether a given discharge "causes, has the reasonable potential to cause, or contributes to" an exceedance of the numeric or narrative water quality criteria for various pollutants set forth in state water quality standards. 40 C.F.R. § 122.44(d)(1)(ii). If a discharge is found to cause, have the reasonable potential to cause, or contribute to exceedances of numeric or narrative state water quality criteria, the permit must contain water quality-based effluent limitations for the relevant pollutants. *Id.* § 122.44(d)(1)(i), (iii)-(vi).

Under CWA section 401, no NPDES permit may be issued until the State or Tribe certifies (or waives certification) that the permit contains all conditions necessary to assure compliance with the CWA and applicable water quality standards. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 124.53(a), .55(a)(2). A State or Tribe may grant, deny, or waive certification. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 124.53. While EPA has authorized the Navajo Nation for treatment in the same manner as a state for purposes of administering its water quality standards program and CWA section 401 certification, the Region excluded the Four Corners Power Plant leased area from the Nation's authorization. *See* CWA § 518(e), 33 U.S.C. § 1377(e); Decision Document: Approval of the Navajo Nation Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act (Jan. 20, 2006) (Administrative Record ("A.R.") 15.d) ("Treatment as State Authorization"); Letter from Stephen B. Etsitty, Dir., Navajo Nation EPA, to Wayne Nastri, Reg. Admin'r, U.S. EPA, Region 9, at 2 (Oct. 31, 2005) (A.R. 15.d) ("Etsitty Letter").

Therefore, EPA is responsible for certifying or waiving CWA section 401 certification for the Four Corners Power Plant area.

C. *Impaired Waters and Total Maximum Daily Loads*

In addition to regulating discharges by requiring effluent limits in NPDES permits, CWA section 303(d) requires states to undertake separately a process to identify waters where the technology-based effluent limitations and other CWA pollution controls are not stringent enough to achieve applicable water quality standards. CWA § 303(d), 33 U.S.C. § 1313(d). The identified waters are commonly referred to as "impaired" waters and are prioritized on a list that is commonly referred to as a "303(d) list." The CWA and its implementing regulations require states to submit an updated 303(d) list to EPA for approval every two years and require EPA to approve or disapprove that list. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d).

Once a water is identified on the 303(d) list, the state begins a planning process for bringing these waters into compliance with water quality standards. This process includes setting priorities for establishing total maximum daily loads ("TMDLs") for individual pollutants in the impaired waters. CWA § 303(d)(1)(C)-(D), 33 U.S.C. § 1313(d)(1)(C)-(D). Individual wasteload allocations are then determined based on the TMDL to limit and allocate pollutant loads among facilities discharging to impaired water bodies. 40 C.F.R. §§ 130.2(h), .7(c). Where TMDLs have been established, NPDES permit limits must ensure consistency with the assumptions and requirements of the wasteload allocations established by those TMDLs. 40 C.F.R. § 122.44(d)(1)(vii)(B); *see In re City of Homedale Wastewater Treatment Plant*, 16 E.A.D. 421, 426 (EAB 2014) (explaining that "consistent with" in this context does not mean that permit limits must be identical to the wasteload allocation established by the TMDL).

Where TMDLs have not been established, water quality-based effluent limitations in NPDES permits must nonetheless comply with applicable water quality standards. In discussing the relationship between NPDES permitting and TMDLs, EPA has explained that the applicable NPDES rules require the permitting authority to establish necessary effluent limits, even if 303(d) listing determinations and subsequent TMDLs lag behind. NPDES: Surface Water Toxics Control Program, 54 Fed. Reg. 23,868, 23,878, 23,879 (June 2, 1989); *City of Taunton v. EPA*, 895 F.3d 120, 139-40 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019) (citing *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 26 (1st Cir. 2012), *cert. denied*, 569 U.S. 972 (2013)).

D. *CWA Section 316(b) and Implementing Regulations*

The CWA also contains a provision that specifically focuses on point sources with thermal discharges and their related cooling water intake structures ("CWISs").[3] CWA § 316, 33 U.S.C. § 1326. Section 316(b) of the Act is designed to address the adverse environmental impacts caused by the intake of cooling water rather than the discharge of pollutants into water.[4] U.S. EPA, *Technical Development Document for the Final Section 316(b) Existing Facilities Rule* 1-4 (May 2014) (A.R. 6.f). While effluent limitations in NPDES permits apply to the discharge of pollutants from point sources into waters of the United States, CWA section 316(b) applies to NPDES-permitted facilities that also use a CWIS to withdraw water from a water of the United States for cooling. *Id.*

Section 316(b) provides that standards established under CWA sections 301 or 306 and applicable to a point source "shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b). The implementing rule EPA adopted for cooling water intake structures at existing facilities, effective October 14, 2014, established standards, applicable to existing power generation and manufacturing facilities, for best technology available for minimizing adverse environmental impact ("BTA") due to the impingement or entrainment of fish and shellfish, at all life stages.[5] NPDES—Final

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[3] Cooling water is "water used for contact or non-contact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content." 40 C.F.R. § 125.92(e). "The intended use of the cooling water is to absorb waste heat rejected from the process or processes used," *id.*, in this instance coal combustion to generate steam-powered electricity. *See* NPDES Permit Fact Sheet September 2019, Arizona Public Service Company, NPDES Permit No. NN0000019, at 2 (Sept. 30, 2019) (A.R. 26.c).

[4] The term "pollutant" under the CWA includes "heat," and thus discharges of heated wastewater (i.e., thermal discharges) are regulated under the Act. CWA § 502(6), 33 U.S.C. § 1362(6); *see also Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 874 (1st Cir. 1978); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 498 (EAB 2006).

[5] "All life stages of fish and shellfish means eggs, larvae, juveniles, and adults." 40 C.F.R. § 125.92(b). "Impingement means the entrapment of any life stages of fish or shellfish on the outer part of [a CWIS] or against a screening device during periods of intake water withdrawal." *Id.* § 125.92(n). "Entrapment" is "the condition where impingeable fish lack the means to escape [a CWIS]." *Id.* § 125.92(j). "Entrainment means

Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300, 48,300 (Aug. 15, 2014) (A.R. 6.d) (codified at 40 C.F.R. pt. 125, subpt. J) ("Final 316(b) Rule").

E. *Endangered Species Act*

Section 7 of the Endangered Species Act ("ESA"), enacted in 1973, requires all federal agencies to ensure, through consultation with, as relevant here, the Secretary of the Interior, that their actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of a species' critical habitat.[6] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Section 7 responsibilities commence when a regulated "agency action"—such as the issuance of a federal permit—is pending. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01; *see also* 50 C.F.R. § 402.02 (definition of "action"); 40 C.F.R. § 122.49(c) (specifying that ESA procedures must be followed when issuing an NPDES permit). Federal agencies typically begin the section 7

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any life stages of fish and shellfish in the intake water flow entering and passing through a cooling water intake structure and into a cooling water system, including the condenser or heat exchanger. Entrainable organisms include any organisms potentially subject to *entrainment*." *Id.* § 125.92(h).

In this decision, we use "fish" to refer collectively to fish and shellfish.

[6] The Secretary of the Interior, whose ESA authority is exercised by the U.S. Fish and Wildlife Service ("FWS"), has jurisdiction over terrestrial and freshwater aquatic species. The Secretary of Commerce has jurisdiction over marine species under the ESA, and the National Marine Fisheries Service acts on the Secretary of Commerce's behalf in this regard. *See* ESA §§ 3(15), 4, 16 U.S.C. §§ 1532(15), 1533. Because only terrestrial and freshwater aquatic species are implicated by this permit, we will refer to "FWS" or the "Service" throughout the remainder of this opinion.

A "listed species" is "any species of fish, wildlife, or plant [that] has been determined to be endangered or threatened under section 4 of the [ESA]." 50 C.F.R. § 402.02. The lists of species determined to be currently endangered or threatened are set forth in 50 C.F.R. §§ 17.11- .12.

"Critical habitat" consists of specific areas containing physical and biological features that are "essential to the conservation of the species" and that may require special management or protection. ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A); *see* 50 C.F.R. § 402.02 (definition of "critical habitat"); 50 C.F.R. pts. 17, 226 (critical habitat lists).

process by determining whether a proposed action "may affect" listed species or designated critical habitat in a geographical area. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a) ("Each [f]ederal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.").[7] That area, called the "action area," includes all areas to be affected directly or indirectly by the Federal action. 50 C.F.R. § 402.02 (definition of "action area"). Agencies may document their "may affect" determinations in a "biological assessment" ("BA").[8] ESA § 7(c), 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12.

If the agency decides that the proposed action will have no effect on listed species or designated critical habitat in the action area, the section 7 process ends. *See* 50 C.F.R. § 402.14(a); *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 401 (EAB 2017) (citing cases). If, however, the agency decides the action "may affect" these entities, the agency must then consider whether the action is "likely to have

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[7] The regulations governing interagency cooperation procedures under ESA § 7 were revised in a final rule that became effective on October 28, 2019, after the issuance of this permit. *See* Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976, 44,976 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 50,333 (Sept. 25, 2019) (delaying effective date of the rule until October 28, 2019). The final rule states that "[t]he revisions to the regulations in this rule are prospective; they are not intended to require that any previous consultations under section 7(a)(2) of the Act be reevaluated at the time this final rule becomes effective." *Id.*

The Permit was issued pursuant to a consultation process that culminated in FWS issuing a Biological Opinion guided by the ESA regulations as they existed in 2015, prior to these targeted revisions. As such, the changes in the regulations do not affect any of the findings or determinations included in the ESA consultation process that supports this Permit. *See, e.g., In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 82 (EAB 2010) (appropriate point for determining what standards apply is the issuance date of a permit) (citing cases); *see also* below Part VI.A. The Region also notes that, in fact, the changes do not materially affect any of the findings or determinations included in the ESA process. EPA Region 9's Response to the Petition for Review 7 n.2 (Dec. 18, 2019).

[8] A biological assessment ("BA") documents the species and habitat present in the action area and evaluates potential effects of the proposed action on such species and habitat. 50 C.F.R. § 402.02. While BAs are required for "major construction activities," *see id.*, agencies may voluntarily prepare BAs for other kinds of projects, as was the case in this matter.

an adverse effect" on any federally listed species or critical habitat. 50 C.F.R. § 402.14(b)(1). An affirmative answer to this inquiry leads to the initiation of formal section 7 consultation with U.S. Department of the Interior's Fish and Wildlife Service ("FWS" or "the Service"). *Id.* § 402.14(a)-(c). The formal consultation process culminates in a Biological Opinion, which is the Service's opinion as to whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. ESA § 7(b)(3), 16 U.S.C. § 1536(b)(3); 50 C.F.R. §§ 402.14(h), 402.02 (definition of "biological opinion"). The action agency has certain data gathering responsibilities and is required to provide the Service with the "best scientific and commercial data available" to formulate its Biological Opinion. 50 C.F.R. § 402.14(d). If the evidence indicates that the proposed action is not likely to jeopardize protected species or destroy or adversely modify critical habitat, the FWS will issue a "no jeopardy opinion." 50 C.F.R. § 402.14(h)(1)(B). If, however, the evidence indicates otherwise, FWS will issue a "jeopardy opinion." *Id.* § 402.14(h)(1)(A). A "jeopardy opinion" must include "reasonable and prudent alternatives" to the agency's proposed action, if any such alternatives exist. ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2). Biological Opinions, whether "jeopardy" or "no jeopardy," may also authorize the "incidental take" of listed species that will be caused as a result of the proposed federal action.[9] ESA § 7(b)(4), 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). FWS may condition an incidental take permit on the implementation of "reasonable and prudent measures" it deems necessary to minimize impact on the listed species. ESA § 7(b)(4)(ii), 16 U.S.C. § 1536(b)(4)(ii).

Once the Service issues its Biological Opinion, the action agency must determine "whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a); *see also In re Phelps Dodge Corp.*, 10 E.A.D. 460, 487 (EAB 2002); *In re Dos*

[9] The ESA makes it illegal to "take" (i.e., harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect) protected fish or wildlife species or remove, damage, destroy, or import/export protected plant species. ESA §§ 4(d), 9(a)(1)-(2), 16 U.S.C. §§ 1533(d), 1538(a)(1)-(2); *see* 50 C.F.R. §§ 17.21, .31, .61, .71. "Incidental takes" are those "that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the [f]ederal agency or applicant." 50 C.F.R. § 402.02. In this matter, the Service's Biological Opinion authorized the incidental takes of Colorado pikeminnow and razorback sucker, among other species. U.S. FWS, New Mexico Ecological Services Field Office, *Biological Opinion for Four Corners Power Plant and Navajo Mine Energy Project* 137-141 & tbl.11 (Apr. 8, 2015) (A.R. 7.i) ("Biological Opinion").

Republicas Res. Co., Inc., 6 E.A.D. 643, 666 n.69 (EAB 1996). The agency's substantive obligations under the ESA—i.e., to ensure that its actions are not likely to jeopardize listed species or destroy or adversely modify critical habitat—are generally satisfied by reasoned reliance on the FWS's expert opinion, as documented in the Biological Opinion, even in cases where the opinion is based on "admittedly weak" information, provided the information is the best available at the time. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); *Phelps Dodge*, 10 E.A.D. at 487-88; *see also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) (noting that "the fact that the evidence [that an agency relies on] is 'weak'" is not dispositive), *cited in San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 618 (9th Cir. 2014). The Service's action in developing the Biological Opinion is relevant in an appeal to the extent the agency's reliance on the opinion is arbitrary or capricious. *See, e.g., Pyramid Lake*, 898 F.2d at 1415 (Service's action, or lack thereof, in preparing Biological Opinion is only relevant on appeal to the extent the action agency's reliance on the opinion is arbitrary and capricious) (citing *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1459-60 (9th Cir. 1984), *cert. denied* 471 U.S. 1108 (1985)); *id.* at 1416 (party challenging action agency's reliance on Biological Opinion must "put forth new information" that FWS did not account for in the opinion or provide other data that "undermines seriously the FWS opinion[]" to prove that action agency's reliance on FWS Biological Opinion to ensure compliance with ESA § 7(a)(2) was arbitrary and capricious).

V. *FACTUAL AND PROCEDURAL SUMMARY*

A. *The Four Corners Power Plant*

The Four Corners Power Plant is located on the Navajo Nation and discharges into waterbodies on the Navajo Nation. The Plant is co-owned and operated by APS on behalf of itself, the Salt River Project Agricultural Improvement and Power District, Navajo Transitional Energy Company, LLC, Public Service Company of New Mexico, and Tucson Electric Power Company and provides electrical power to utilities in Arizona, Texas, and New Mexico. NPDES Permit Fact Sheet September 2019, Arizona Public Service Company, NPDES Permit No. NN0000019 at 2 (Sept. 30, 2019) (A.R. 26.c) ("Fact Sheet").

The Four Corners Power Plant burns coal from the adjacent Navajo Mine Energy Project, owned by the Navajo Transitional Energy Company, LLC. Operation of the Plant requires a continuous supply of cooling water, which is drawn from Morgan Lake, a 1,200-acre artificially constructed cooling pond adjacent to the Plant. Morgan Lake is replenished by water piped three miles from the San Juan River at an average annual rate of 14.3 million gallons per day. Fact

Sheet at 2; *see also* Letter from David L. Saliba, Fossil Plant Mgr., APS, to Nancy Yoshikawa, Region 9, attach. at 5(Nov. 29, 2006) (A.R. 1.1.g) ("2006 Saliba Ltr."); Aerial Photographs (A.R. 24.a and 24.b). The Plant releases wastewater into Morgan Lake and water from Morgan Lake is periodically released to No Name Wash at an average annual rate of 4.2 million gallons per day. No Name Wash flows two and one-half miles from Morgan Lake to the Chaco River, which joins the San Juan River after an additional seven miles. Fact Sheet at 2-3. The San Juan River is a sub-basin of the Colorado River. *See, e.g.*, Biological Opinion at 76. EPA has excluded, at the Navajo Nation's request, the immediately adjacent waters to the Four Corners Power Plant (Morgan Lake and upper No Name Wash) from the Navajo Nation's authorization to administer the CWA program, and, as noted above, EPA is the permitting authority. *See* above Part IV.A.

B. *Permit Overview*

The Four Corners Power Plant has been operating pursuant to successive NPDES permits for several decades. Notice of Proposed Action by the U.S. EPA, Region 9 (Apr. 25, 2019) (A.R. 20.a) (published in the *Navajo Times* and *Farmington Daily Times*) ("Public Notice Document"); *see also* Response to Comments Document, APS Four Corners Power Plant, NPDES Permit No. NN0000019, at 43 (Sept. 30, 2019) (A.R. 26.d) ("RTC"). The Plant is currently operating under an NPDES permit that was issued by the Region in 2001. That permit expired in 2006 but was administratively extended by APS' submission of a permit renewal application in 2005. *See* Fact Sheet at 1.

The Four Corners Power Plant originally included five generating units, but the Plant shut down Units 1, 2, and 3 on December 30, 2013. *See id.* at 1, 2. APS submitted a revised permit renewal application reflecting these operating changes on February 15, 2013. *See generally* Letter from David C. Bloomfield, Four Corners Site Mgr., to David Smith, Mgr., NPDES Permits Off. U.S. EPA, Region 9, NPDES Permit Re-Application NN0000019 (Feb. 15, 2013) (A.R. 2.f) ("2013 Permit Re-Application"); *see also* Fact Sheet at 1. EPA initially issued a revised NPDES permit in June 2018 for the remaining Units 4 and 5 but withdrew that permit in December 2018 after it was challenged before the Board by these same Petitioners. *See* Fact Sheet at 1; *see generally* Authorization to Discharge Under the NPDES, Arizona Public Service Co., NPDES Permit No. NN0000019 (June 12, 2018) (A.R. 17.a).

A revised draft permit and fact sheet were released for public comment on April 30, 2019. *See* [Draft] Authorization to Discharge under the NPDES, Arizona Public Service Co., NPDES Permit No. NN0000019 (Apr. 30, 2019) (A.R. 20.d); [Draft] NPDES Permit Fact Sheet, Arizona Public Service Co., Permit

No. NN0000019 (Apr. 30, 2019) (A.R. 20.c). At the same time, the Region requested public comment on its proposed waiver of the CWA section 401 certification. *See* Public Notice Document at 2, 6, 9. Petitioners submitted joint comments on EPA's draft 2019 permit. *See* Letter from John M. Barth to Gary Sheth, Water Div., U.S. EPA Reg. 9, Comments on [ ] Draft Renewal NPDES Permit for Four Corners Power Plant, Permit NN0000019 and 401 Certification Waiver (July 1, 2019) (A.R. 20.1.a) ("Petitioners' Comments"). On September 30, 2019, the Region signed the final permit, waived the section 401 certification, and issued a final fact sheet[10] and response to comments document. *See generally* Authorization to Discharge under the NPDES, Arizona Public Service Co., Permit No. NN0000019 (Sept. 30, 2019) (A.R. 26.b) ("Final Permit"); Letter from Michael B. Stoker, Reg'l Adm'r, to Neil Brown, Arizona Public Service Co., Section 401 of the CWA Water Quality Certification Waiver for the Four Corners Power Plant (Sept. 30, 2019) (A.R. 23) ("401 Certification Letter"); Fact Sheet; RTC.

The Permit includes three main types of requirements for the Four Corners Power Plant. The first are technology-based numeric effluent limits based on the Effluent Limitations Guidelines and Standards ("ELGs") for Steam Electric Power Generating Point Source Category. *See* 40 C.F.R pt. 423. The Region concluded that the discharges from the Plant do not present a "reasonable potential" to cause or contribute to an exceedance of water quality standards and did not change the Permit's existing water-quality based effluent limitations. Fact Sheet at 5-6; Memorandum from Gary Sheth, U.S. EPA Region 9, to Administrative Record for NPDES Permit NN0000019, re: Reasonable Potential Analysis for NPDES Permit NN0000019, at 2 (Nov. 10, 2014) (A.R. 6.c) ("2014 RP Analysis"). In addition to effluent limits, the second category of requirements are provisions to address surface seepage from existing unlined ash ponds, as well as provisions addressing cooling water intakes to comply with CWA section 316(b). *See* Final Permit at 16, pt. III.A. Finally, the permit includes monitoring and reporting requirements. *See id.* at 13-16, pt. I.C. A re-opener provision is included as part of the permit's standard conditions. *See id.* at 16, pt. III.B.

The Region's renewal of the permit was part of a larger group of federal agency actions to permit and regulate the expansion of the Navajo Mine and revised operation of the Four Corners Power Plant. Fact Sheet at 11. The federal agencies developed a single environmental impact statement under the National

[10] The final fact sheet was updated to reflect certain minor administrative "update[s]" and "correct[ions]" from the draft. RTC at 100. We refer to the fact sheet issued concurrently with the Final Permit unless otherwise noted.

Environmental Policy Act, 42 U.S.C §§ 4321 to 4370m-12, and conducted a single consultation on potential impacts to listed species under the ESA. *See* Fact Sheet at 11; Biological Opinion at 14, 105, 124. These evaluations explicitly include EPA's renewal of the Four Corners Power Plant NPDES permit. Biological Opinion at 26-27; *see also* Fact Sheet at 11. The consulting federal agencies submitted a biological assessment to the FWS in August 2014 and later supplemented and amended the biological assessment in March 2015. Fact Sheet at 11. The Service issued its Biological Opinion for the Four Corners Power Plant on April 8, 2015.[11] *Id.* The Biological Opinion included an incidental take statement with reasonable and prudent measures that delineate responsibilities for each of the consulting federal agencies, depending on the proposed actions and authorities. The Region incorporated the two Biological Opinion reasonable and prudent measures it was responsible for into the Permit. *See* Fact Sheet at 12.

VI. *ANALYSIS*

The Board addresses the merits of the Petitioners' appeal below. Before turning to the analysis of the issues, we note that the Region and APS challenge the Petition on the threshold ground that Petitioners fail to meet the requirement in 40 C.F.R. § 124.19(a)(4)(ii) that, for issues raised in the petition and addressed by

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[11] In 2016, Petitioners in this matter filed a lawsuit in federal district court challenging various federal agencies' compliance with their ESA and National Environmental Policy Act obligations related to the Four Corners Power Plant and the neighboring Navajo Mine. *See Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, No. CV-16-08077-PCT-SPL, 2017 WL 4277133, at *1 (D. Ariz. Sept. 11, 2017), *aff'd* 932 F.3d 843 (9th Cir. Ariz. July 29, 2019), *reh'g en banc denied*, No. 17-17320 (Dec. 11, 2019), *cert. denied* ___S. Ct.___, 2020 WL 3492672, (June 29, 2020); *see also* RTC at 68. EPA was not a party to the litigation. The lawsuit challenged the agencies' reliance on the Biological Opinion that FWS issued in 2015. *Diné Citizens*, WL 4277133, at *1. The district court held that the Navajo Transitional Energy Company, LLC—an amicus curiae in the appeal before the Board—was a required party pursuant to Rule 19 of the Federal Rules of Civil Procedure but that it nonetheless enjoys sovereign immunity such that it could not be joined in district court. *Id.* at *3. The court dismissed the case with prejudice. *Id.* at *4. The Ninth Circuit affirmed the dismissal and denied rehearing. 932 F.3d at 861. The Supreme Court denied a petition for a writ of certiorari. 2020 WL 3492672. As discussed later in this decision, the Board has no reason to find that the Region's reliance on the Four Corners Power Plant Biological Opinion was arbitrary or capricious. *See, e.g.*, *Phelps Dodge*, 10 E.A.D. at 487 (Agency's substantive obligations under ESA are generally satisfied by reasoned reliance on FWS's expert opinion); *see also* below Part VI.I.3.a.

the Region in its Response to Comments, a "petitioner must * * * explain why" the Region's response to comments was clearly erroneous or otherwise warrant review. EPA Region 9's Response to the Petition for Review 19 & n.9 (Dec. 18, 2019) ("Region Resp. Br."); Arizona Public Service Company's Response to Petition for Review 12-13 (Dec. 18, 2019) ("APS Resp. Br."). The Region asks the Board to dismiss the Petition in its entirety for failure to comply with this regulatory requirement. Region Resp. Br. at 19. Alternatively, the Region asks the Board to dismiss each issue where Petitioners fail to meet the requirements for addressing the Region's Response to Comments in the Petition. *Id.*; *see also* APS Resp. Br. at 12-13. The Board will address any procedural failures in the context of each issue discussed below.

A. *Petitioners Have Not Demonstrated that the Region Clearly Erred by Concluding that Morgan Lake is Excluded from the Definition of Waters of the United States as a Waste Treatment System*

As discussed above, under CWA section 301(a), a point source may not discharge pollutants into navigable waters without first obtaining an appropriate CWA permit. 33 U.S.C. § 1311(a) (prohibiting discharge of pollutants unless in compliance with the law); *see* CWA § 502(12), 33 U.S.C. §1362(12) (defining "discharge of a pollutant" broadly as the addition of any pollutant into a navigable water from a point source). The parties agree that the Four Corners Power Plant discharges pollutants to navigable waters and therefore may operate only pursuant to an appropriate permit—here, an NPDES permit. However, the parties dispute the location at which that discharge into navigable waters occurs. The Region based the permit on its view that the discharge to navigable waters occurs where water is released from Morgan Lake to No Name Wash. Petitioners object to that conclusion, arguing that CWA jurisdiction attaches with Four Corners Power Plant's discharge to Morgan Lake.

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7). While the Act does not define "the waters of the United States," EPA regulations promulgated pursuant to the Act contain a detailed definition of this term. This regulatory definition, however, has been modified three times in recent years. In 2015, EPA amended its long-standing regulation defining waters of the United States. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, (June 29, 2015). In 2019, EPA withdrew the 2015 regulatory amendment and reinstated the pre-2015 regulatory definition of waters of the United States. *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019). In 2020, EPA promulgated a revised definition of waters of the United States, replacing the pre-2015 definition of waters

of the United States that had been reinstated in 2019. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020).

Accordingly, the first question we face is what regulatory definition of waters of the United States applies to our review of the Region's permit decision. Here, the Region issued the Four Corners Power Plant Permit on September 30, 2019, shortly before the 2015 definition of waters of the United States was withdrawn on October 22, 2019, and the pre-2015 definition reinstated. The Region contends that the 2015 definition applies because that was the regulatory definition in force at the time of permit issuance. Region Resp. Br. at 22. Petitioners disagree, arguing that the pre-2015 definition applies because their petition has stayed "the effective date of this permit * * * and thus EPA's repeal of the 2015 Rule [reinstating the pre-2015 definition] [became] effective prior to this permit becoming effective."[12] Petition for Review by Diné Citizens Against Ruining the Environment, San Juan Citizens Alliance, Amigos Bravos, Center for Biological Diversity, and Sierra Club 26 (Nov. 1, 2019) ("Pet.")

We have previously addressed in numerous cases the question of what law applies in a permit appeal before the Board when the law has changed following permit issuance. The general rule from these decisions is that, in a permit appeal, 'the proper point in time for fixing applicable [] standards and guidelines is when the [permit issuer] initially issues a final permit." *In re Russell City Energy Ctr.*, 15 E.A.D. 1, 82 (EAB 2010) (quoting *U.S. Pipe & Foundry Co*., NPDES Appeal No. 75-4 (Adm'r 1975), *aff'd in part, rev'd in part sub nom. Alabama ex rel. Baxley v. EPA*, 557 F.2d 1101, 1108 (5th Cir. 1977); *see In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 615-16 (EAB 2006) (citing cases). And as the Administrator explained in *U.S. Pipe*, "to allow permit limitations and conditions to change according to a 'floating' standard or guideline during the pendency of a permit review proceeding would be highly disruptive and counter-productive." *Alabama ex rel. Baxley,* 557 F.2d at 1108 (quoting *U.S. Pipe & Foundry*). Moreover, we have repeatedly rejected the argument that because an appealed permit does not become final and effective until the Board has completed its review, the Board must review the permit in light of any changes to the law that have occurred following permit issuance, or else remand the matter to the Region for its reconsideration. *In re Vulcan Constr. Materials, LP,* 15 E.A.D. 163, 190-91

[12] Although Petitioners accurately state that the pre-2015 definition of waters of the United States was effective at the date the Petition was filed, they ignore the law in effect when the Permit was issued.

(EAB 2011); *Russell City,* 15 E.A.D. at 81-82 & n.100; *Dominion Energy,* 12 E.A.D. at 616.

Under these precedents, the applicable law for the purpose of this permit appeal is the 2015 definition of the waters of the United States, which was the regulatory definition in force at the time the Region issued the Permit, and not the pre-2015 definition that was reinstated after the Region's September 30, 2019, permitting decision. The only argument the Petitioners advance in support of the Board applying the pre-2015 definition is that the Permit did not become final and effective prior to the date the 2015 definition was withdrawn.[13] But Petitioners do not acknowledge that the Board has repeatedly rejected that argument, much less do they provide any reason for disregarding Board precedent.[14] Accordingly, we

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[13] Challenges to the 2015 rule have led to the rule taking effect in some states but not others. One day prior to the 2015 rule's effective date of August 28, 2015, the U.S. District Court for the District of North Dakota preliminarily enjoined the rule in thirteen states that had challenged the it. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015); *see also North Dakota v. EPA*, Case 3:15-cv-00059, slip op. at 3, 4 (D.N.D. Sept. 4, 2015) (document. #79) (subsequent order clarifying that the preliminary injunction applied only to plaintiffs). Early in 2019, New Mexico and Colorado each filed a motion to withdraw as plaintiffs in the lawsuit. *North Dakota v. EPA*, Case 3:15-cv-00059, slip op. at 1 (D.N.D. May 14, 2019) (document #280). The district court granted the motions to withdraw and ordered the preliminary injunction lifted for these two states "because the Court previously limited the scope of the preliminary injunction order of August 27, 2015, to only those entities before the [c]ourt." *Id.* slip op. at 2.

[14] We have discretion to remand a permit when a regulation has changed post-permit issuance. *Dominion Energy*, 12 E.A.D. at 616. In determining whether to exercise that discretion, the Board has focused on whether a new rule contemplates retrospective rather than prospective application and whether a remand would promote efficiency in the permit proceeding. *Russell City*, 15 E.A.D. at 83-84. Petitioners have offered no reasons why we should grant a discretionary remand for the permit in this proceeding. Nor do we see any reason to take such action. We have previously concluded that "[t]he NPDES regulations support a reading that discourages application of rules adopted after permit issuance." *Dominion Energy*, 12 E.A.D. at 617. The 2019 withdrawal rulemaking is consistent with that reading of the NPDES regulations, indicating that EPA intended that the reinstatement of the pre-2015 definition should be applied prospectively. *See* 84 Fed. Reg. at 56,626 (specifying that "as of the effective date of this final rule, the agencies will administer the regulations promulgated in 1986 and 1988"). Further, we perceive no efficiency in remanding the permit on this issue given that it is long overdue for renewal.

will adhere to long-standing Board practice and examine the Region's decision under the 2015 definition of the waters of the United States.[15]

The 2015 rule defines waters of the United States as including, among other things, waters used in interstate commerce, interstate waters, and the territorial seas, as well as waters adjacent to, or which have a significant nexus to, the previously identified waters. 40 C.F.R. § 122.2 (2016) (paragraph (1)(i)-(iii) of the definition of "waters of the United States"). Further, the 2015 definition *includes* "impoundments of waters otherwise identified as waters of the United States under this section." *Id*. at § 122.2 (paragraph (1)(iv) of the definition of "Waters of the United States"). However, the 2015 definition expressly *excludes* certain waters from falling within the definition, even if those waters would otherwise qualify as waters of the United States because they are impoundments of waters of the United States or because they are adjacent to, or have a significant nexus to, waters used in interstate commerce, interstate waters, or the territorial seas. *Id*. at § 122.2 (paragraph (2) of the definition of "Waters of the United States"). Relevant to this case is an exclusion from the definition of waters of the United States for waters used as "[w]aste treatment systems." *Id.* at § 122.2 (paragraph (2)(i) of the definition of "Waters of the United States").

A waste treatment system is defined by section 122.2 as "including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." *Id*. A water body is considered a waste treatment system where, for example, it is constructed pursuant to a CWA section 404 permit, *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.,* 556 F.3d 177, 215-16 (4th Cir. 2009), or is "incorporated in an NPDES permit as part of a treatment system," *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007). As the Ninth Circuit has explained, the waste treatment system exception covers both a self-contained treatment pond that has no connection to waters of the United States as well as "a body of water that is connected to a water of the United States, but is part of an approved treatment system." *Id*. at 1001-02. In the latter instance, the Ninth Circuit

[15] We further note that at oral argument both Petitioners and the Region took the position that it does not matter what rule is applicable in order to support their interpretation of "waters of the US" or the waste treatment system exclusion to Morgan Lake. Oral Arg. Tr. at 19-20 (Petitioners), 45-46 (Region). Moreover, the official position of the United States is that there were no substantive changes to the waste treatment system exclusion by the promulgation of the 2015 rule and thus as to this case, as discussed below, the exclusion applies regardless of whether the 2015 rule or the pre-2015 rule applies to this case.

noted, a CWA permit is required to authorize the "discharges *from* treatment ponds." *Id*. at 1002.

Morgan Lake is "a man-made cooling water reservoir constructed in 1960" that was "designed and constructed to serve as part of the [Four Corners Power] [P]lant's recirculating cooling water system, providing both a reliable supply of cooling water and waste heat treatment." 2006 Saliba Ltr., attach. at 4. As the Region has explained, "Morgan Lake was created by pumping water from the San Juan River" and "Morgan Lake would dry up and cease to exist if APS ceased replenishing it with water from the San Juan River." RTC at 43; *accord* Memorandum from Gary Sheth, U.S. EPA Region 9, to Administrative Record for NPDES Permit NN0000019 and NPDES Permit NN0028193, re: Morgan Lake Status (July 20, 2017) (A.R. 14.c).

Under the Permit, the Region regulates discharges from the Plant into Morgan Lake and discharges from Morgan Lake into No Name Wash. Final Permit at 3-8, pts. I.A.1 to I.A.5. The discharges to Morgan Lake are regulated as discharges to an "internal waste stream" under 40 C.F.R. § 122.45(h), and not as a discharge to a water of the United States. Section 122.45(h) explicitly authorizes the Region to establish internal effluent limits at a point before final discharge to a water of the United States if imposing limits at the final discharge point are impracticable or infeasible. *See* 40 C.F.R. § 122.45(h); RTC at 44 (explaining that imposing effluent limits at the discharge point to No Name Wash would be impracticable because the Plant's wastes "would be so diluted as to make monitoring and detection very difficult if not impossible"); Final Permit at 6-8, pts. I.A.3 to I.A.5 (imposing effluent limits on several internal outfalls at the Plant for various wastes). The discharges to No Name Wash are regulated as discharges to waters of the United States, and the Permit imposes effluent limits on the temperature, flow rate, and pH of these discharges. Final Permit at 3-4, pt. I.A.1. tbl.1. Additionally, monitoring reports are required on the discharges from Morgan Lake to No Name Wash for total dissolved solids, arsenic, boron, cadmium, chromium, mercury, nickel, selenium, and zinc. *Id*.

Given these facts, the Region concluded that Morgan Lake was excluded from the definition of waters of the United States as a waste treatment system under 40 C.F.R. § 122.2. RTC at 42. As noted above, at the time of permit issuance the exclusion applied to "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." 40 C.F.R. § 122.2 (paragraph (2)(i) of the definition of "Waters of the United States") (2016). The Region explained that "[a]s an artificial cooling pond designed and constructed to be used as treatment for the [Four Corners Power Plant]'s waste heat, Morgan

Lake is a waste treatment system and is excluded from the definition of 'waters of the United States.'" RTC at 42. In reaching this conclusion, the Region followed federal court precedent explaining that the waste treatment system exclusion applies to a water body "incorporated in an NPDES permit as part of a treatment system." *Id*. (citing *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d at 1001; *Cal. Sportfishing Prot. All. v. Cal. Ammonia Co.*, No. 05-0952, 2007 WL 273847, at *6-7 (E.D. Cal. 2007)). The Region reasoned that "[a] waste treatment system may be considered 'designed to meet the requirements of the CWA' where discharges from the system meet the requirements of CWA section 402." RTC at 45. At oral argument, the Region further clarified that "designed to meet the requirements of the Clean Water Act" means that the waste treatment system—here, a cooling pond—is "treating water[] such that the discharges are complying with * * * permit requirements."[16] Oral Arg. Tr. at 48.

Petitioners have not shown that the Region's determination regarding Morgan Lake was clearly erroneous. As noted above, Morgan Lake provides waste treatment for cooling water used in operating the Four Corners Power Plant by dissipating the heat—a pollutant—added to the water as it circulates through the Plant. Petitioners admit as much. Petitioners' Consolidated Reply Brief to EPA and APS' Response Briefs and to NTEC's Amicus Brief 7 (Jan. 13, 2020) ("Reply Br.") ("all parties agree that Morgan Lake is a 'cooling pond'"); Letter from John Barth to Gary Sheth, Water Div., U.S. EPA Region 9, *Comments on May 1, 2019 draft renewal NPDES permit for Four Corners Power Plant* 32 (July 1, 2019) (A.R. 20.1.a) ("Petitioners' Comments") ("Morgan Lake * * * is used to remove heat from condenser water"); *see* RTC at 42; CWA § 502(6), CWA § 502(6), 33 U.S.C. § 1362(6) (defining "pollutant" as including "heat").[17] Further, the

[16] Petitioner stated that this explanation is correct. Oral Arg. Tr. at 77 (noting that as to the meaning of the phrase "designed to meet the requirements of the CWA," the Region's attorney "did give the correct answer, that it's compliance with the requirements of the Clean Water Act includ[ing] water quality-based effluent limits").

[17] Heat is a common pollutant discharged by steam electric power plants. As the preamble to the 2015 effluent limitations guidelines for steam electric plants explained, steam electric "plants generate wastewater composed of chemical pollutants and thermal pollution (heated water) from their wastewater treatment, power cycle, ash handling and air pollution control systems." Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838, 67,839 n.1 (Nov. 3, 2015). A 1974 rulemaking on steam electric power plant guidelines explained that "[t]hermal (waste heat) control and treatment technologies are of two general types; those [that] are designed to reduce the quantities of waste heat rejected from the process

Morgan Lake waste treatment system is incorporated into the Permit for ensuring compliance with the CWA by limitations imposed both on the discharge of waste to Morgan Lake as well as the discharge from Morgan Lake into No Name Wash. And as the Region noted, this incorporation is confirmed because "discharges from the system meet the requirements of CWA section 402." RTC at 45. Specifically, the Region's analysis of data monitoring reports under the existing 2001 permit—which contains the same temperature effluent limits as the 2019 permit—shows "that effluent limits, including internal outfall limits for [whole effluent toxicity], were not exceeded." 2014 RP Analysis at 2. Accordingly, the Region did not clearly err in excluding Morgan Lake from the definition of waters of the United States and hence the discharges from the Four Corners Power Plant to the Lake are not governed by the CWA, other than as an internal waste stream.[18] *See Ohio Valley Envtl. Coal.,* 556 F.3d at 215-16 (holding that in-stream sediment ponds and waters upstream from them qualified under waste treatment system exclusion when sediment ponds and upstream waters were approved under CWA section 404 permit).

In their Petition, Petitioners advance three arguments as to why the Region's invocation of the waste treatment system exclusion is flawed. Pet. at 26-30. First, Petitioners argue that the Region erred by analyzing the question of whether the exclusion applies to Morgan Lake under the 2015 rule's definition of waters of the United States. *Id*. at 26. According to Petitioners, this proceeding is governed by the pre-2015 definition of waters of the United States and Petitioners interpret this definition as containing a narrower version of the waste treatment system exclusion that does not cover certain cooling ponds. Petitioners base this interpretation on a parenthetical in the pre-2015 definition that states that waste treatment systems include treatment ponds or lagoons "(other than cooling ponds as defined in

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* * * and those which are designed to eliminate to some degree the reliance upon a navigable water body." Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 39 Fed. Reg. 8294, 8295 (Mar. 4, 1974). The latter type of heat treatment, according to the preamble, "take[s] the form, on one extreme, of surface water bodies confined to the property of the powerplant; and, on the other, of configured engineering structures." *Id*. at 8295-96.

[18] Because we have concluded that the Region reasonably found that Morgan Lake is a waste treatment system exempt from the definition of a water of the United States, it is unnecessary for us to address APS' alternative argument that Morgan Lake is not a water of the United States independent of its function as a waste treatment system. *See* APS Resp. Br. at 16-20.

40 C.F.R. § 423.11(m) which also meet the criteria of this definition)" and their conclusion that Morgan Lake meets the definition of a cooling pond in the parenthetical. *Id*.; *see* 40 C.F.R. § 122.2 (2014). However, the 2015 definition does not contain the parenthetical that Petitioners rely upon, and the 2015 rule is the one that applies to this proceeding. [19] *See* 80 Fed. Reg. at 37,114; *see also* Region Resp. Br. at 22-23.

In any event, even if the pre-2015 definition of the waters of the United States applied in this proceeding, Petitioners' arguments would fail. The cooling pond parenthetical in the waste treatment exclusion within the pre-2015 regulatory language was rendered obsolete in 1982 when EPA removed the cooling pond regulations from 40 C.F.R. pt. 423, including the accompanying definition that the parenthetical references. Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52,290, 52,304-05 (Nov. 19, 1982). The

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[19] Relying on this removed parenthetical on cooling ponds, Petitioners also argue that the Region errs in asserting that whether Morgan Lake qualifies as a water of the United States is not relevant to application of the waste treatment system exclusion. Pet. at 26; Oral Arg. Tr. at 20-21. As support, Petitioners contend that the cooling pond parenthetical "specifically requires an analysis of whether the cooling pond 'also meet[s] the criteria of this definition' of 'waters of the United States.'" Pet. at 26. Building on this contention, Petitioners then argue that Morgan Lake is a water of the United States because it has a "significant hydrological connection to the San Juan River[,] * * * an extensive connection to interstate commerce[,]" and the Region is wrong to claim that "Morgan Lake was constructed 'wholly in uplands.'" *Id*. at 27. Petitioners' interpretation of the cooling pond parenthetical on this point is not well grounded. The language in the parenthetical specifying that the exclusion would only apply to waste treatment systems that otherwise qualify as waters of the United States appears to be a straightforward affirmation that the exclusion applies to waters of the United States. No exclusion is needed if the water body is not a water of the United States and nothing in the parenthetical's language requires a permitting authority to formally find that a water body meets the definition of waters of the United States before making a determination on the exclusion. However, as explained in the text immediately above and below, the parenthetical reference to cooling ponds–the basis for these arguments–is not present in the waste treatment system exclusion in the 2015 definition of waters of the United States and has been considered as obsolete since 1982 when the definition of a cooling pond referenced in the parenthetical was removed. Further, the 2015 rule expressly provides that exclusions to the definition of waters of the United States (such as the waste treatment system exclusion) apply "even where [the waters] otherwise meet the terms" of the definition of waters of the United States. 40 C.F.R. § 122.2 (2016) (paragraph (2) of the definition of "waters of the United States").

reference to the cooling pond definition in the parenthetical had been intended to designate those cooling ponds that "fall outside" the exclusion as compared to those cooling ponds that could qualify for the exclusion. *See* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,298 (May 19, 1980). In promulgating the 2015 rule, EPA confirmed that the cooling pond parenthetical was obsolete, describing its removal as "mak[ing] no substantive change to the existing exclusion for waste treatment systems." 80 Fed. Reg. at 37,073, 37,097. Rather, EPA described the deletion as "ministerial" in nature. *Id*. at 37,097. In the promulgating the 2020 revision to the definition of the waters of the United States, EPA again confirmed that removing the cooling pond parenthetical from the pre-2015 definition was a "ministerial change." 85 Fed. Reg. at 22,325 (this parenthetical had to be removed a second time because in 2019 EPA had reinstated the pre-2015 definition as a replacement to the 2015 rule). The United States, in defending the waste treatment system exclusion in the 2020 rule as consistent with prior regulatory definitions, has reiterated that "the waste treatment system exclusion remained substantively unchanged as the 'waters of the United States' definition was revised in 1986, 1988, and 2015." Brief for the United States at 34, *S. Carolina Coastal Conservation League v. Wheeler*, Case No. 2:20-cv-01687-DCN (D. S.C. Aug. 24, 2020) (Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment). The 2020 rule continues this long-standing approach to the waste treatment exclusion, defining "waste treatment system" as including "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge." 40 C.F.R. § 120.2(3)(xv) (2020).

Second, Petitioners argue that "the administrative record for this Final Permit is completely devoid of any analysis of the regulatory requirement that Morgan Lake was 'designed to meet the requirements of the CWA' including compliance with technology or water quality based effluent standards." Pet. at 29. Yet, the Region explained in the Response to Comments that Morgan Lake meets the terms of the waste treatment system exclusion "[a]s an artificial cooling pond designed and constructed to be used as treatment for the [Four Corners Power Plant]'s waste heat," citing to caselaw that specifies that the waste treatment system exclusion is intended to exclude "waters that are incorporated in an NPDES permit as part of a treatment system." RTC at 42. The Region further explained that "[a] waste treatment system may be considered 'designed to meet the requirements of the CWA' where discharges from the system meet the requirements of CWA section 402." *Id*. at 45. More than this was not necessary. There is no dispute that the waste heat discharged by the Four Corners Power Plant is a "pollutant" under the CWA, CWA § 502(6), 33 U.S.C. § 1362(6), Morgan Lake serves as a cooling pond

for dissipating this waste heat, and the Permit regulates the heat that may be discharged from Morgan Lake by imposing a water quality-based effluent limit. Final Permit pt. I.A.1, tbl.1, at 3-4 (imposing a water quality-based effluent limit on the temperature of discharges from Morgan Lake to No Name Wash); *see also* 2014 RP Analysis at 2 (noting that monitoring reports showed that discharges from Morgan Lake did not exceed the temperature effluent limits).

Finally, Petitioners argue, in a three-sentence conclusory paragraph, that classifying Morgan Lake as meeting the waste treatment system exclusion violates the CWA's antibacksliding provision on revising permit limitations to be "less stringent than the comparable effluent limitations in the previous permit." Pet. at 25 n.107, 29; *see* CWA § 402(o)(1), 33 U.S.C. § 1342(o)(1). Petitioners contend that the Region's approach constitutes backsliding "because the discharges into the lake are no longer regulated" and "EPA previously regulated discharges, and imposed effluent limitations, into Morgan Lake from both [Four Corners Power Plant] and the Navajo Mine." Pet. at 25 n.107, 29-30. Petitioners made the same allegation in their comments on the draft permit, and, in the Response to Comments, the Region addressed the allegation by noting that the antibacksliding provision does not apply to the 2019 Permit because "the effluent limits in this revised [2019] Permit are identical to those in the previous permit, and therefore not less stringent." *See* RTC at 45; *see also In re City of Ruidoso Downs*, 17 E.A.D. 697, 704 (EAB 2019). In their Petition, Petitioners fail to explain why the Region's determination on the inapplicability of the antibacksliding provision was clearly erroneous, as is required by 40 C.F.R. § 124.19(a)(4)(ii). A petitioner must demonstrate why the permit issuer's response to the petitioner's objections (i.e., the basis for its decision) is clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii); *see In re City of Taunton,* 17 E.A.D. 105, 110-11 & n.1, 180, 182-83, 189 (EAB 2016) *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). As we have previously stated, "a petitioner's failure to address the permit issuer's response to comments is fatal to its request for review." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 170 (EAB 2006), *quoted in In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 100-01 (EAB 2013).

In their reply brief, Petitioners add four new arguments: (1) the Region has "inadequately explained" its reasons for invoking the waste treatment system exclusion after explicitly declining to rely on it previously; (2) the waste treatment system exclusion does not apply to artificial bodies of water impounded from waters of the United States; (3) EPA's revocation of the definition of a cooling pond in 40 C.F.R. § 423.11(m) does not eliminate the exclusion of cooling ponds from the waste treatment system exclusion; and (4) Morgan Lake is not eligible for the waste treatment system exclusion because it is not "designed to meet the

requirements of the Clean Water Act." Reply Br. at 6-12. These arguments come too late. EPA's permit appeal regulation bars petitioners from raising new issues or arguments in reply briefs. 40 C.F.R. § 124.19(c)(2); *see, e.g.*, *City of Taunton,* 17 E.A.D at 183. New arguments in a reply brief are the equivalent of a late-filed appeal. *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 (EAB 2006).

Even if we were to consider these arguments, we would still deny Petitioners' claim that the Region clearly erred in relying on the waste treatment system exclusion. First, Petitioners have not shown that the Region "inadequately explained" what Petitioners allege is a "change in position" on whether Morgan Lake qualifies under the waste treatment system exclusion.[20] Reply. Br. at 7. Other

[20] Petitioners have not established that the Region "changed its position" on the waste treatment system exclusion. Rather, all Petitioners have shown is that the Region in 2018 declined to take a position on whether the waste treatment system exclusion applies to Morgan Lake. *See* Reply Br. at 6-7; Response to Comments Document, APS Four Corners Power Plant 18 (undated [AR Index indicates issued June 2018]) ("2018 RTC"). Over the years, the Region has taken inconsistent positions on whether Morgan Lake meets the criteria defining waters of the United States in permits for both the Four Corners Power Plant and the Navajo Mine. *See* RTC at 43-44 (noting that Morgan Lake was treated as a water of the United States for Four Corners Power Plant permits issued prior to 1993 and in a Navajo Mine NPDES permit in force between 2008 until 2018); 2018 RTC at 15-16 (explaining that more recent Four Corners Power Plant permits have not treated Morgan Lake as a water of the United States because the evidence shows that Morgan Lake was constructed in uplands, has no more than an incidental connection to interstate commerce, and is not a tributary of a water of the United States). Here, however, the Region does not base its conclusion on the regulatory status of Morgan Lake on whether Morgan Lake meets the criteria of a water of the United States, but instead relies on a different legal theory—the waste treatment system exclusion. Moreover, the Region's regulatory conclusion—that discharges to Morgan Lake should not be regulated as discharges to a water of the United States—is consistent with the existing permits for the Four Corners Power Plant and the Navajo Mine and has been its consistent position with respect to the Four Corners Power Plant permit since 1993. RTC at 43-44. Thus, the Region has not reversed course on its overall regulatory position. To the extent the adoption of a different legal theory to justify the same regulatory position is judged a change in position, the Region has explained the basis for relying on the waste treatment system exclusion adequately under federal precedent. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it").

than to simply assert that the Region's position on the applicability of the waste treatment system exclusion to Morgan Lake is "sudden and inadequately explained," *id.*, Petitioners offer no support for their argument. A conclusory allegation is insufficient to carry the Petitioners' burden to show that the Region clearly erred. *See In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 69 n.83, 74-75 (EAB 2010) (holding that "conclusory" assertions without explanation for their basis are "unpersuasive" and "conclusory assertions of error" without supporting information do not "cast[] doubt" on permitting agency's determination), *pet. for review denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012). In any event, as discussed above, the Region has adequately explained its basis for concluding that Morgan Lake qualifies under the waste treatment system exclusion.

Second, Petitioners are wrong in contending that the waste treatment system exclusion does not extend to artificial water bodies created from impoundment of waters of the United States. *See* Reply Br. at 7. In support, Petitioners cite to regulatory language appearing to impose such a limitation on the exclusion. *Id*. (citing sentence in 40 C.F.R. § 122.2 (2014) (definition of "Waste treatment systems") stating that "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States * * * nor resulted from the impoundment of waters of the United States."). However, the cited regulatory language was suspended by EPA in 1980 and that indefinite suspension was reaffirmed with promulgation of the 2015 rule. *See* 40 C.F.R. § 122.2 Editorial Note (referencing 45 Fed. Reg. 48,620 (July 21, 1980) and 80 Fed. Reg. 37,114 (June 29, 2015)); *see also Ohio Valley Envtl. Coal.,* 556 F.3d at 212-13.

Third, Petitioners' discussion of the impact of EPA's revocation of the cooling pond definition referenced in the pre-2015 waste treatment system exclusion's cooling pond parenthetical is not relevant to this proceeding.[21] *See* Reply Br. at 7. As noted above, the 2015 rule applies in this proceeding, and the 2015 rule does not include the cooling pond parenthetical. And, in any event, as

[21] As discussed previously, in 1982, EPA amended 40 C.F.R. § 423.11(m) to remove the definition of cooling ponds. *See* 47 Fed. Reg. at 52,291, 52,305. The Region's position—and, as noted, the official position of the United States—is that as a result of the removal of the cooling pond definition, the waste treatment system exclusion in the pre-2015 definition of waters of the United States may be interpreted as including all steam electric cooling ponds. Region Resp. Br. at 23.

discussed above, the rulemaking record demonstrates that the removal of the cooling pond parenthetical was a ministerial change without substantive impact.

Finally, Petitioners have not shown that the Region clearly erred in concluding that Morgan Lake qualifies as a waste treatment system "designed to meet the requirements of the Clean Water Act." *See* 40 C.F.R. § 122.2 (2016). As noted above, the Region followed federal court precedent specifying that the waste treatment system exclusion applies to water bodies "incorporated in an NPDES permit as part of a treatment system." *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d at 1001 (also explaining that the waste treatment system exclusion can apply to "a body of water that is connected to a water of the United States, but is part of an approved treatment system"). Petitioners counter that Morgan Lake is not part of a treatment system because "APS admits ***under oath*** that the Morgan Lake 'cooling pond' provides ***no treatment***." Reply Br. at 9; *accord id*. at 11. In support, Petitioners cite to a form attached to APS' 2005 permit application that states that "cooling pond discharge" receives no treatment. *See* Reply Br. at 9, 11 (citing Letter from David Saliba, Fossil Plant Mgr., APS, to Doug Eberhardt, Chief, Permits Issuance Section, U.S. EPA Region 9, *NPDES Permit Renewal Application #NN0000019*, encl. Form 2C NPDES (Oct. 5, 2005)). To the extent this form can be read as an APS statement that its *cooling* pond did not treat waste heat, APS subsequently corrected that statement on several occasions. *See* 2013 Permit Re-Application, Form 2C NPDES, at 2 (Feb. 14, 2013) (A.R. 2.f.iii) (describing discharge from Outfall 001 to No Name Wash as subject to treatment from a "closed cycle recirculated cooling water pond (1200 acres)"); 2006 Saliba Ltr., attach. at 4 ("Morgan Lake was designed and constructed to serve as part of the plant's recirculating cooling water system, providing both a reliable supply of cooling water and waste heat treatment."). And importantly, the Region incorporated Morgan Lake cooling pond in the current permit through, among other things, the imposition of temperature-based effluent limitations. It is the current permit that is under review, not a position expressed fifteen years ago.

For all of the above reasons, Petitioners have not shown that the Region clearly erred in concluding that Morgan Lake qualified for the waste treatment system exclusion.[22]

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[22] In a related challenge, Petitioners argue that the Region erred by not imposing effluent limitations on the Four Corners Power Plant's discharge of pollutants to Morgan Lake. Pet. at 30-31. Petitioners reason that "Morgan Lake itself is a 'water of the United States' and thus EPA must establish effluent limitations for the discharge of [the pollutant Total Dissolved Solids] ***into*** Morgan Lake." *Id*. at 30. Because Petitioners have failed to

B. *Petitioners Did Not Preserve Their Argument That the Absence of Water Quality Standards for Morgan Lake and No Name Wash Render the Permit Arbitrary and Capricious*

Currently, there are no approved water quality standards applicable to Morgan Lake and No Name Wash. In connection with this lack of standards, Petitioners raise several challenges to the Permit. To fully understand Petitioners' arguments, some additional background is necessary.

Under the CWA, water quality standards are promulgated by States and authorized Tribes and approved by EPA. *See* CWA §§ 303(a), (c), 518(e), 33 U.S.C. §§ 1313(a), (c), 1377(e). Authorized Tribes may establish water quality standards for "protection of water resources which are within the borders of the Indian reservation." 40 C.F.R. § 131.8(a)(3) *see* Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. 66,900, 66,902 (Sept. 29, 2016). Additionally, EPA is authorized to establish water quality standards in circumstances where a "standard submitted by such State [or authorized Indian tribe] * * * is determined by the Administrator not to be consistent with the applicable requirements of this chapter" or "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter." CWA § 303(c)(4), 33 U.S.C. § 1313(c)(4). Although Morgan Lake and No Name Wash are located on Navajo Nation lands and the Navajo Nation has been authorized to establish water quality standards, Morgan Lake and No Name Wash are, as mentioned above, specifically excluded from the Navajo Nation's authorization. *See* Treatment as State Authorization at 2, 11; Etsitty Letter at 2. The Navajo Nation has promulgated water quality standards for the remainder of its lands and those standards have been approved by EPA. Navajo Nation Surface Water Quality Standards 2007 (May 13, 2008) (A.R. 6.b); Letter from Alexis Strauss, Dir., Water Div., U.S. EPA Region 9, to Joe Shirley, Jr., Pres., Navajo Nation (Mar. 26, 2009) (A.R. 15.b). In these circumstances, the responsibility for water quality standards for Morgan Lake and No Name Wash falls to EPA. *See* 81 Fed. Reg. at 66,902 & n.9. EPA has not established water quality standards for Morgan Lake and No Name Wash.[23]

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show that the Region clearly erred in concluding that Morgan Lake is covered by the waste treatment system exclusion from the definition of waters of the United States, this argument lacks merit.

[23] As described above, Morgan Lake is exempted from the definition of waters of the United States because it is a waste treatment system. *See* Part A., above. Accordingly,

Petitioners argue that the absence of water quality standards for Morgan Lake and No Name Wash necessarily make the Region's "site-specific decisions" in the Permit "indefensible, arbitrary, and capricious." Pet. at 32-33. To support this blanket claim, Petitioners cite to general statements from an EPA advanced notice of public rulemaking on water quality standards for Indian Reservations to argue that (1) "Adoption of [water quality standards] for Morgan Lake and No Name Wash are necessary for EPA to make 'defensible, site-specific decisions that protect reservation waters'"; and (2) "[w]ithout applicable [water quality standards], * * * mechanisms [for protecting water quality] may be limited." Pet. at 33 (citing 81 Fed. Reg. at 66,903).

Petitioner has not preserved this issue for review by the Board. EPA's regulations require that a petitioner "demonstrate * * * that each issue being raised in the petition was raised during the public comment period." 40 C.F.R. § 124.19(a)(4)(ii). To meet this requirement, an issue must be "specifically raised," *In re Maui Elec. Co.,* 8 E.A.D. 1, 9 (EAB 2001), so that the Region is not forced to "guess the meaning behind imprecise comments," *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002). The requirement that comments be specifically raised ensures "that the permitting authority * * * has the first opportunity to address any objections to the permit, and that the permit process will have some finality." *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). If an issue is not clearly raised, "the permitting authority is provided no opportunity to address the issue specifically prior to permit issuance." *In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005).

In their petition, Petitioners cite to several pages in their comments in an attempt to show that they raised the argument that the Region's site-specific determinations on the Permit's terms are arbitrary and capricious due to the absence of water quality standards for Morgan Lake and No Name Wash. Pet. at 19-20 n.81. In those pages, Petitioners make several arguments, but only one asserts that the Region has acted arbitrarily and capriciously with regard to the existence, or the lack thereof, of water quality standards. In that argument, Petitioners contended that "EPA's reliance on the 2007 Navajo Nation Water Quality standards appears to be arbitrary and capricious because such standards may not be applied to the operations of the [Four Corners Power Plant]." Petitioners' Comments at 6. Petitioners briefly made two other arguments. Petitioners asserted that if the

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as the Region notes, "federal water quality standards are neither required nor appropriate pursuant to the CWA" for this water body. Region Resp. Br. at 25. For this reason, although parties frequently group Morgan Lake and No Name Wash together in their discussion of this issue, we focus primarily on No Name Wash.

Region does rely on the Navajo Nation's water quality standards, the Region "must produce a written rationale" for that reliance, including "why it chose to apply Navajo Nation water quality standards instead of New Mexico standards." *Id*. Finally, in a single sentence, Petitioners contended that if the Region determines that neither the Navajo Nation nor New Mexico's water quality standards "can be legally applied" to Morgan Lake and No Name Wash, "then EPA must promulgate federal water quality standards for these waterbodies prior to issuing a draft NPDES permit and [section] 401 Certification decision." *Id*. at 7.

Petitioners have not demonstrated that they raised in their comments the issue regarding the alleged arbitrariness of making permit decisions in the absence of water quality standards for Morgan Lake and No Name Wash that they now raise in their Petition. Their specific arbitrary-and-capricious argument addressed the use of existing Navajo Nation water quality standards, not proceeding in the absence of federal standards. Their other two arguments asserted only that the Region must explain its reasoning for applying either the Navajo Nation or New Mexico water quality standards or, if it rejects those standards, promulgate water quality standards itself. Although as to the latter assertion Petitioners argued that "EPA must promulgate federal water quality standards for these water bodies," *id.*, in the absence of other water quality standards, Petitioners offered no reason why such standards "must" be promulgated and do not contend that federal standards are necessary to provide guidance to the permitting authority—the argument they make in their Petition. Hence, the argument in the Petition has not been preserved.

Even if we were to consider Petitioners' argument that establishing permit terms in the absence of water quality standards is necessarily arbitrary and capricious, we would deny review of this claim. In the Response to Comments, the Region explained that it has broad statutory authority to establish permit terms that the Region determines are necessary to meet the requirements of the CWA. RTC at 9. Specifically, the Region references statutory language in section 402(a)(1)(B) providing that "the Administrator may * * * issue a permit for the discharge of any pollutant, or combination of pollutants, * * * upon condition that such discharge will meet * * * such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." *Id*. (citing CWA § 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B)) (omissions in original). Petitioners' citation of conditional statements by EPA in an advanced notice of public rulemaking indicating that water quality standards "can provide an important tool for Tribes" in protecting water quality does *not* mean that applicable water quality standards are always necessary for the Region to be able to set permit terms in a manner that is not arbitrary and capricious. *See* 81 Fed. Reg. at 66,903. Accordingly, even if Petitioners' argument had been preserved, Petitioners' argument that the mere absence of water quality

standards "renders" the Four Corners Power Plant permit on its face "arbitrary and capricious" would be rejected as without merit.[24]

Petitioners additionally argue that the Permit is invalid because the Region failed to explain (1) why "it did not adopt or rely on ***numerical*** Navajo water quality standards established for Morgan Lake and No Name Wash in setting permit limits;" and (2) why "the Navajo Nation's water quality standards for Morgan Lake and No Name Wash are not [the] most protective of beneficial uses in these receiving waters."[25] Pet. at 34. Petitioners' argument lacks merit. First, there are no approved water quality standards for Morgan Lake and No Name Wash. The Navajo Nation did not seek authorization to establish water quality standards for Morgan Lake and No Name Wash, and EPA specifically limited its approval of the Navajo Nation's water quality standards to those waters over which the Navajo

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[24] The Region argues that Petitioners are primarily challenging the failure of the Region to establish water quality standards for Morgan Lake. Region Resp. Br. at 25. After reiterating its position that Morgan Lake is not a jurisdictional water, the Region argues that with respect to any issue about the establishment of water quality standards for Morgan Lake or No Name Wash, that the Board "does not have jurisdiction to hear challenges concerning CWA Section 303 water quality standards in the context of NPDES permit appeals." *Id.* at 26. Petitioners insist that they are challenging "an EPA-issued NPDES permit and not * * * specific water quality standards." Reply Br. at 5 & n.7. The Region is correct that a permit appeal before the Board is not the appropriate forum in which to challenge prior predicate regulatory decisions of the Agency that are reviewable in other fora. *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001); *see also* Part VI.F below. Water quality standards are required to be developed under CWA Section 303 and its implementing regulations and are subject to challenge in federal court. *In re City of Hollywood*, 5 E.A.D. 157, 175-76 (EAB 1994) (denying review of challenge to EPA's approval of state water quality standards under CWA § 303(c), 33 U.S.C. 1313(c)). This is separate and apart from the NPDES permitting provisions of the CWA and its implementing regulations. *City of Moscow*, 10 E.A.D. at 160-161; *see also In re Mesabi Nugget Delaware, LLC*, 15 E.A.D. 812, 816 (EAB 2013) (holding that the Board "lacks jurisdiction to review Agency decisions regarding water quality standards under CWA § 303(c)" as well as variances issued under that provision). Thus, to the extent Petitioners are challenging the Region's alleged failure to promulgate a water quality regulation for Morgan Lake and No Name Wash, such a claim will not be considered by the Board.

[25] Confusingly, Petitioners argued in their public comments that "EPA's draft permit arbitrarily applies the Navajo Nation Water Quality Standards despite the fact that such standards cannot be used to regulate the discharge of pollutants from the [Four Corners Power Plant]." Petitioners' Comments at 5.

Nation had received EPA authorization. *See* Treatment as State Authorization at 2, 11; Etsitty Letter at 2. Second, Petitioners' argument that the Region did not explain what water quality standards it relied upon and why it chose those standards is misplaced. In the Response to Comments, the Region stated that it had relied on the Navajo Nation's water quality standards for the Chaco River—downstream receiving waters from Morgan Lake and No Name Wash—"as a reference tool for defining the likely best targets for numeric and narrative goals that should be used in determining impacts to Morgan Lake and the upper No Name Wash." RTC at 9. The Region explained that given the location of the Chaco River, water quality standards applying to it "are a legitimate adjacent jurisdictional assessment of scientifically-based measures that would protect the uses in Morgan Lake and upper No Name Wash." *Id*. Petitioners offer no reasons as to how the Region erred in following the approach discussed in the Response to Comments and, as noted above, Petitioners' failure in this regard "leaves us with a record that supports the Region's approach." *Westborough*, 10 E.A.D. at 311.

In sum, Petitioners have not preserved for review their argument that establishing permit terms in the absence of water quality standards is necessarily arbitrary and capricious. Nor have they shown that the Region clearly erred by, in the absence of federal water quality standards for Morgan Lake and No Name Wash, relying on Navajo Nation water quality standards for the Chaco River in setting permit terms for Four Corners Power Plant's discharge to No Name Wash.

C. *Petitioners Have Not Shown That the Region Clearly Erred in Analyzing Whether Discharges from the Four Corners Power Plant Had a Reasonable Potential to Exceed Water Quality Standards*

As discussed above, EPA regulations state that NPDES permits "must control all pollutants * * * [that] will cause, have the reasonable potential to cause, or contribute to" an exceedance of "any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i). Petitioners argue that EPA's examination of the reasonable potential for the Four Corners Power Plant's discharge to exceed water quality standards was flawed for several reasons: (1) the analytical methods the Region used in a 2012 Priority Pollutant Scan to sample for the levels of various metals were so insensitive that they were insufficient to determine whether the Four Corners Power Plant's discharge violated the Navajo Nation's numerical water quality standards, Pet. at 37-38; (2) the Region failed to investigate whether discharges to Morgan Lake would violate the Navajo Nation's narrative water quality standards, *id*. at 38-39; and (3) the Region failed to consider whether discharges to Morgan Lake and No Name Wash exceeded the numerical temperature restrictions in the Navajo Nation's water quality standards, *id*. at 39-42. For the most part, Petitioners' challenge to the

Region's reasonable potential analysis fails because Petitioners simply repeat, word-for-word, the text of their public comments in their Petition, without addressing the Region's response to Petitioners' comments. *Compare* Petitioners' Comments at 35-40 *with* Pet. at 36-41.

Permitting authorities are given a "significant amount of flexibility in determining whether a particular discharge has a reasonable potential to cause an excursion above a water quality criterion." National Pollutant Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed. Reg. 23,868, 23,873 (June 2, 1989). The Region conducted two separate reasonable potential analyses in conjunction with the 2019 permit. In a 2014 analysis, the Region reviewed data monitoring reports and inspection reports submitted by APS under the prior permit for the previous five years as well as data submitted as part of APS's application for permit renewal. 2014 RP Analysis at 1-2. The Region found no exceedances of permit limits and no reasonable potential that Four Corners Power Plant discharges would present a reasonable potential to exceed Navajo Nation water quality standards. *Id*. at 2. In 2019, the Region conducted a supplemental reasonable potential analysis, taking into account ambient water quality data collected by the Navajo Nation. *See* Memorandum from Gary Sheth, U.S. EPA Region 9, to Administrative Record for NPDES Permit NN0000019, re: Updated Reasonable Potential Analysis for NPDES Permit NN0000019, at 1-2 (Apr. 22, 2019) (A.R. 6.1.a) ("Updated RP Analysis"). Again, the Region concluded that the data showed no reasonable potential for Four Corners Power Plant discharges to exceed Navajo Nation water quality standards.[26] RTC at 53.

Petitioners' challenge to the sensitivity of the methods used in the Region's reasonable potential analysis fails because Petitioners do not explain how the Region erred in responding to Petitioners' public comments on this issue. In addressing Petitioners' comments on the sensitivity of the methods in the 2012 Priority Pollutant Scan, the Region noted that in conducting the reasonable potential analysis for the 2019 permit it had considered supplemental ambient water quality data provided by the Navajo Nation EPA in 2015 and 2019. *Id.* at 53. That data, the Region explained, "was obtained using sufficiently sensitive methodologies for the parameters monitored." *Id*. Despite the Region's discussion of how it had used

[26] To the extent new information becomes available regarding compliance with water quality standards, the Permit contains a reopener provision that allows the Region to modify the Permit in the future "to address new information indicating * * * the reasonable potential for the discharge to cause or contribute to exceedances of water quality standards." Final Permit at 16, pt. III.B.

more recent data using more sensitive methodologies, Petitioners repeat in their Petition almost word-for-word their public comments that criticized reliance on the sensitivity of the methods used in the 2012 Priority Pollutant Scan. It is not enough for a petitioner to merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. *E.g., In re City of Pittsfield*, NPDES Appeal No. 08-19, at 6-9 (EAB Mar. 4, 2009) (Order Denying Review) (citing cases), *pet. for review denied*, 614 F.3d 7 (1st Cir. 2010). Rather, a petitioner must demonstrate why the permit issuer's response to those objections (i.e., the basis for its decision) is clearly erroneous or otherwise warrants review. *Id*. § 124.19(a)(4)(ii); *see In re City of Taunton,* 17 E.A.D. 105, 111, 180, 182-83, 189 (EAB 2016) *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). Having failed to respond to the Region's explanation in the Response to Comments, Petitioners have left us with "a record that supports the Region's approach." *In re Westborough*, 10 E.A.D. 297, 311 (EAB 2002); *see also In re Evoqua Water Tech's, LLC*, 17 E.A.D. 795, 814-15; *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 508-09 (EAB 2002) (denying review where petitioner "merely duplicate[d] the challenge it advanced in comments" without attempting "to contest the adequacy of the permit issuer's response").

Petitioners' argument that the Region did not analyze whether the discharges to Morgan Lake complied with the Navajo Nation's narrative water quality standards also lacks merit. As the Region correctly points out, "[c]hallenges regarding regulating discharges into Morgan Lake * * * are irrelevant," given that Morgan Lake is excluded from the definition of waters of the United States. Region Resp. Br. at 28. Under the CWA, a NPDES permit governs only discharges of pollutants to waters of the United States. CWA §§ 402(a)(1), 33 U.S.C. §§ 1342(a)(1); *see also* CWA § 502(7), (12), 33 U.S.C. § 1362(7) & (12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters" and "navigable water" as "waters of the United States").

Petitioners final challenge to the Region's reasonable potential analysis concerns the Region's examination of whether discharges to Morgan Lake and No Name Wash would exceed the Navajo Nation's water quality criterion on thermal discharges. Pet at 39-42. This water quality criterion sets an upper limit on the allowable increase in ambient water temperature due to a thermal discharge. *Navajo Nation Surface Water Quality Standards 2007,* § 206.F. Temperature (May 13, 2008) (A.R. 6.b). Petitioners' argument concerning thermal discharges to Morgan Lake is flawed because, as noted immediately above, Morgan Lake is excluded from the definition of a water of the United States.

As to thermal discharges to No Name Wash, Petitioners argue that the Region lacks a "rational basis for its conclusion that the discharges from [Four Corners Power Plant] do not present a reasonable potential for violating temperature water quality standards." Pet. at 41. Citing to a reasonable potential analysis the Region prepared in 2014, Petitioners assert that the Region has admitted that it had no data on ambient water temperatures in downstream waters and, in the absence of such data, there was no basis for conducting a reasonable potential analysis. *Id*. Further, Petitioners note that data on water temperature in Chaco River from the United States Geological Service are available and suggest that these data, when viewed in light of temperature data on Morgan Lake discharges, show that the discharges from Morgan Lake to No Name Wash have the reasonable potential of causing an exceedance of the Navajo Nation water quality standard for temperature in No Name Wash or the Chaco River. *Id*.

Petitioners' argument that the Region had no data on ambient water temperature fails to take into account the Region's discussion of this issue in the Response to Comments. There, the Region explained that subsequent to its 2014 reasonable potential analysis it had conducted a second reasonable potential analysis in 2019 based on "supplemental ambient water quality data provided by the Navajo Nation EPA * * * in 2015 and again in 2019" that had been "collected from 23 separate sampling locations with exact latitudes and longitudes provided in the vicinity of the [Four Corners Power Plant]."[27] RTC at 53. According to the Region, these data "included monitoring for not just mercury and selenium but other parameters such as * * * more traditional water quality parameters such as pH, dissolved oxygen, *temperature*, and hardness." *Id*. (emphasis added). The Region stated that after examining these data, "[n]o reasonable potential for these pollutants to cause or contribute to an exceedance of receiving water standards was found." *Id*. In their Petition, Petitioners fail to explain why the Region clearly erred in relying on these new data—which included information on water temperature—in conducting its reasonable potential analysis for thermal discharges to No Name Wash. [28] *See, e.g.*, *City of Taunton,* 17 E.A.D. at 111, 180, 182-83,

[27] This 2019 reasonable potential analysis was included in the administrative record and Petitioners filed public comments regarding the analysis. *See* Updated RP Analysis; Petitioners' Comments at 39. Petitioners' comments on the 2019 analysis focused on the new data the Region relied upon bearing on mercury and selenium levels in Morgan Lake and No Name Wash. Petitioners' Comments at 39.

[28] In a footnote in their reply brief, Petitioners contend, for the first time, that the new data obtained from the Navajo Nation EPA do not contain any information from sampling stations in No Name Wash and, therefore, the Region did not consider any

189; *Indeck-Elwood*, 13 E.A.D. 126, 143, 170 (EAB 2006), *quoted in In re Pio Pico Energy Ctr.*, 16 E.A.D. at 100-101; *see also Evoqua*, 17 E.A.D. at 814-15.

Petitioners' assertion concerning the availability of United States Geological Service data on water temperature and what that data show is a new argument that was not included in Petitioners' public comments. The only specific statement in Petitioners' comments on the temperature impacts of the discharges from Morgan Lake to No Name Wash is the assertion that "EPA did not evaluate discharge of temperature * * * from Morgan Lake into No Name Wash." Petitioners' Comments at 40. Petitioners' comments contain no mention of temperature data from the United States Geological Service bearing on No Name Wash or the Chaco River.

In their appeal to the Board, Petitioners may not rely on data from the United States Geological Service to show an error in the Region's reasonable potential analysis, unless Petitioners referenced those data in its public comments on the draft permit and explained why those data contradicted the Region's conclusion.[29] Petitioners did neither of these things. The Board will not consider on appeal data

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temperature data from No Name Wash in making its conclusion on the reasonable potential for an exceedance of the Navajo Nation's water quality criterion on temperature. Reply Br. at 17 n.57. EPA regulations bar new arguments in reply briefs and, therefore, we will not consider this claim by Petitioners. *See* 40 C.F.R. § 124.19(c)(2) (barring inclusion of new issues or arguments in reply briefs); *see, e.g., In re City of Taunton*, 17 E.A.D at 183; *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 (EAB 2006) (holding that new arguments raised in reply brief are equivalent to late-filed appeals). At oral argument, Petitioners asserted that they raised this contention regarding the new data cited in the 2019 reasonable potential analysis on numerous pages in their public comments. Oral Arg. Tr. at 30-31 (citing pages 39-40 of their public comments and pages 15, 35, and 39-42 of their Petition). Our review of these pages discloses neither a mention of the new temperature data the Region relied upon nor a claim that the data do not contain information on No Name Wash. In their comments, Petitioners do discuss the new data the Region relied upon in the 2019 reasonable potential analysis in the context of its findings on selenium and mercury levels, but this discussion does not touch on temperature data, and Petitioners state that the Region's 2019 analysis discusses a sample taken from No Name Wash. Petitioners' Comments at 39.

[29] In their Petition, Petitioners state that the United States Geological Service's data are "readily available to EPA," Pet. at 41, but the fact that the data are publicly available does not cure Petitioners' failure to preserve its argument concerning the data by submitting the data and its arguments based on the data during the public comment period. *See* 40 C.F.R. §§ 124.13, .19(a)(4)(ii).

that could have been presented during the public comment process. *See* 40 C.F.R. §§ 124.19(a)(4)ii), 124.13 (requiring "all reasonably ascertainable issues," "reasonably available arguments," and "[a]ny supporting materials" be presented during the public comment period to be preserved for Board review); *see also In re Jordan Dev. Co., LLC,* 18 E.A.D. 1, 11, 21 (EAB 2019) (barring petitioner from raising on appeal Census data and other documents not submitted during the comment period); *In re Gen. Elec. Co.,* 17 E.A.D. 434, 582 n.62 (EAB 2018) (holding that "these studies are not in the administrative record and the Board will not consider studies presented for the first time on appeal").

The requirement that information and arguments be submitted to the Region during the public comment period "is a particularly important requirement as to technical issues * * * because 'the locus of responsibility for important technical decisionmaking rests primarily with the permitting authority, which has the relevant specialized expertise and experience.'" *In re Tucson Elec. Power,* 17 E.A.D. 675, 690 (EAB 2018), quoting *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005). Here, Petitioners ask the Board, in the first instance, to resolve a complex technical issue regarding the temperature impact that discharges from Morgan Lake would have on ambient water temperatures in No Name Wash and the Chaco River based on temperature data on the Chaco River and Morgan Lake. In its Petition, Petitioners do nothing more than present the data on temperature ranges in the Chaco River and the Morgan Lake discharges and then conclude that "it is clear that a discharge from Morgan Lake at 95 degrees F[ahrenheit] has a reasonable potential of exceeding the Navajo Nation's 3 degree Celsius maximum increase allowed by a thermal discharge." Pet. at 41. These data and Petitioners' interpretation of their meaning should have been presented to the Region during the public comment period. It is "[t]he Region, not the Board, [that] has the technical expertise to grapple with complex scientific questions * * * as a first line decision-maker." *In re W. Bay Explor. Co*., UIC Appeal No. 14-66, at 12 (EAB Sept. 22, 2014) (Order Denying Review). As we have explained, "[t]he Board's role is not to make initial scientific findings but to review the Region's decisions to determine if the Region has based its conclusions on clearly erroneous conclusions of fact or law." *Id*.

Because Petitioners did not explain why the Region's explanation in the Response to Comments on the reasonable potential of discharges to exceed water quality in No Name Wash was clearly erroneous, and did not demonstrate that they relied on arguments and data presented during the public comment period, Petitioners have failed to satisfy the threshold requirements for review under 40 C.F.R. § 124.19(a)(4). Accordingly, we are left with a record that supports the Region's approach. *Westborough*, 10 E.A.D. at 311.

D. *Petitioners Have Not Demonstrated That the Region Clearly Erred in Addressing the Effluent Limit Guidelines for Steam Electric Power Plants in the Permit*

Petitioners challenge two aspects of the Permit based on EPA's effluent limit guidelines for steam electric power plants ("steam electric ELGs"). Pet. at 42-45. Under sections 301 and 304 of the CWA, EPA is required to establish effluent limitations guidelines that are technology-based and applicable nationwide on an industry-by-industry basis. The CWA contains several different standards for these guidelines and the time for compliance with these standards vary. Point sources were required to achieve effluent limitations based on "best practicable control technology currently available," commonly referred to as "BPT," by 1977. CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A). Point sources were required to be in compliance with the effluent limitations for certain pollutants based on the more stringent standard of "best available technology economically achievable," or "BAT," "as expeditiously as practical" but not later than 1989. *Id*. § 301(b)(2)(A), (C)-(D); 33 U.S.C. § 1311(b)(2)(A), (C)-(D).

EPA established steam electric ELGs in 1974 and updated those ELGs in both 1982 and 2015. *See* Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838 (Nov. 3, 2015); Steam Electric Power Generating Point Source Category; Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards, 47 Fed. Reg. 52,290 (Nov. 19, 1982); Steam Electric Power Generating Point Source Category; Effluent Guidelines and Standards, 39 Fed. Reg. 36,185 (Oct. 8, 1974). These ELGs cover several waste streams from steam electric power plants, but the waste stream of interest in this proceeding is bottom ash transport water. Pet. at 42. Bottom ash transport water is water used to remove the heavier ash that falls to the bottom of the furnace. 80 Fed. Reg. at 67,846. The steam electric power plant waste streams, including bottom ash transport water, contain "both toxic and bioaccumulative pollutants such as arsenic, mercury, selenium, chromium, and cadmium." *Id*. at 67,839; *see* Office of Water, U.S. EPA, EPA-821-R-15-006, *Environmental Assessment for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category* §§ 2, at 2-2 tbl. 2-1; 3.1.1, at 3-2 to 3-4 (Sept. 2015). Traditionally, most coal-, petroleum coke-, and oil-fired steam electric plants have used water to transport (sluice) bottom ash to surface impoundments, where the ash settles to the bottom of the impoundment and the water is (usually) discharged to a surface water body. 80 Fed. Reg. at 67,846.

The 1974 steam electric ELGs established both BPT- and BAT-based effluent standards for bottom ash transport water. 39 Fed. Reg. at 36,199-200. Surface

water impoundments were considered to be BPT for bottom ash transport water, and effluent limits for pollutant discharges were set on that basis for total suspended solids, oil, and grease. Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 39 Fed. Reg. at 8297 (Mar. 4, 1974) (Notice of Proposed Rulemaking). "Re-use and recycle" of bottom ash transport water "to the maximum extent practicable" was determined to be BAT and BAT-based effluent limits were set for those same pollutants. *Id*. at 8298; 40 C.F.R. § 423.13(d) (1974). The level of the BAT-based effluent limits was tied to the BPT-based effluent limits with incorporation of a 12.5 recycling component. 40 C.F.R. § 423.13(d)(1975).

The 1982 amendments to the steam electric ELGs focused on "achievement by July 1, 1984, of best available technology economically achievable (BAT)." 47 Fed. Reg. at 52,290. Nonetheless, in that rulemaking EPA did not establish BAT-based effluent limits for bottom ash transport water, concluding that "[a]nalysis of available wastewater sampling data did not indicate that a quantifiable reduction of toxic pollutants would be achieved by requiring technologies beyond the BPT level of control." 47 Fed. Reg. at 52,297; *see* Effluent Limitations Guidelines; Steam Electric Power Generating Point Source Category, 45 Fed. Reg. 68,328, 68,338-39 (Oct. 14, 1980).

In the 2015 amendments to the steam electric ELGs, EPA determined that the 1974 and 1982 ELGs were "out of date" and "do not adequately control the pollutants (toxic metals and other) discharged by this industry, nor do they reflect relevant process and technology advances that have occurred in the last 30-plus years." 80 Fed. Reg. at 67,840. Accordingly, EPA amended, among other things, the then-existing steam electric ELGs for bottom ash transport water, imposing a zero-discharge effluent limit based on the determination that this limit could be achieved using the BAT of dry handling or a closed-loop system.[30] *Id*. at 67,849,

[30] Dry handling involves "a system in which bottom ash is collected in a water quench bath and a drag chain conveyor (mechanical drag system) then pulls the bottom ash out of the water bath on an incline to dewater the bottom ash." 80 Fed. Reg. at 67,852. A closed-loop system is one "in which the bottom ash is transported using the same processes as a wet-sluicing system, but instead of going to an impoundment, the bottom ash is sluiced to a remote mechanical drag system. Once there, a drag chain conveyor pulls the bottom ash out of the water on an incline to dewater the bottom ash, and the transport (sluice) water is then recycled back to the bottom ash collection system." *Id*. APS is installing a closed-loop system, which the Region has required to be implemented by December 31, 2023. RTC at 17.

67,852-53. Recognizing the magnitude of the process and equipment changes required by the new ELGs, EPA specified that point sources must achieve the zero-discharge limit by a date determined by the permitting authority that is "as soon as possible beginning November 1, 2018 * * * but that is also no later than December 31, 2023." *Id*. at 67,854. EPA later extended the beginning date for compliance until November 1, 2020, but retained the closing date of December 31, 2023. Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,496, 43,498 (Sept. 18, 2017). As to bottom ash transport water produced prior to the chosen compliance date—designated by the rule as "legacy wastewater"—EPA concluded that such wastewater "must comply with specific BAT limitations, which EPA is setting equal to the previously promulgated BPT limitations." 80 Fed. Reg. at 67,854.

Less than three weeks before the Region issued the draft Four Corners Power Plant permit for comment, the U.S. Court of Appeals for the Fifth Circuit vacated and remanded portions of the 2015 steam electric ELGs, including the part establishing effluent limits for legacy bottom ash transport water. *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019). The court concluded that "EPA's decision to set surface impoundments as BAT for legacy wastewater was arbitrary and capricious," reasoning that "the evidence recounted in the final rule shows that impoundments are demonstrably ineffective at [treating legacy wastewater] and demonstrably inferior to other available technologies." *Id*. at 1019. The implications of this vacatur for the Permit's requirements for legacy bottom ash transport water are explained in Part VI.D.2, below.

In the Permit, the Region required that APS comply with the zero-discharge limit for bottom ash transport water by the date of December 31, 2023, and included effluent limits for legacy bottom ash transport water based on "ELGs currently in effect." RTC at 22. Petitioners opposed both of these permit terms in their comments and renew their claims before us.

1. *December 31, 2023, Compliance Date*

If a permittee submits information supporting a compliance date later than November 1, 2020, for the bottom ash transport water effluent limits, a permitting authority must consider three factors in determining whether to approve that later date: (1) the time to expeditiously plan, design, procure, and install equipment; (2) changes being made at the plant pursuant to other regulations, including the coal combustion residuals rule; and (3) other factors as appropriate. 40 C.F.R. § 423.11(t); *see* 40 C.F.R. pt. 257, subpt. D (coal combustion residuals rule). The preamble to the regulation "recommend[s] that the permitting authority provide a

well-documented justification of how it determined the 'as soon as possible' date in the fact sheet or administrative record for the permit." 80 Fed. Reg. at 67,883.

Petitioners argue that the Region failed to make an "independent determination" on the applicable compliance date; rather, according to Petitioners, "EPA arbitrarily allowed the permit applicant to choose the latest date possible for compliance with the bottom ash transport water prohibition." Pet. at 43. Additionally, Petitioners argue that the Region failed to adequately "document" its decision on the compliance date "in its fact sheet," citing the Region's statement in the Response to Comments that it "'did not prepare a formal memorandum or detailed explanation in the fact sheet explaining how the criteria in 40 C.F.R. Section 423.11(t) are met.'" Pet. at 43 (quoting RTC at 16). In the single paragraph of its Petition that Petitioners devote to the specifics of their challenge to the compliance date, they offer no other reasons to support their claims of a lack of independence and documentation. *See* Pet. at 43-44. Further, Petitioners raise no substantive objection to the Region's conclusion that the submission by APS justified the Region's selection of the December 31, 2023, date. *See id.*

Petitioners have not carried their burden of showing that the Region failed to independently weigh APS's submission on the compliance date under the regulatory factors or adequately document its decision, and thus these arguments by Petitioners do not demonstrate the Region clearly erred. Here, APS submitted a detailed statement as to why a compliance date of December 31, 2023, was justified under the 40 C.F.R. § 423.11(t) factors. That statement is in the administrative record. *See* Email from Jeffrey Allmon, Pinnacle West, to Gary Sheth and Dustin Minor, U.S. EPA, Re: Updated ELG Project Summary (Apr. 4, 2019) (attaching NPDES Effluent Limitation Guideline Compliance Project Summary) (A.R. 21.a) ("ELG Project Summary"). In the Fact Sheet, the Region stated that it had reviewed APS's submission and selected the December 31, 2023, compliance date. Fact Sheet at 5. When Petitioners objected to this date in their public comments, EPA addressed the issue in the Response to Comments by discussing the APS submission and explaining why the information in that submission showed a compliance date of December 31, 2023, was warranted under the regulation. RTC at 16-18.

In the Response to Comments, the Region noted that a compliance date of December 31, 2023, was needed for the complex sequencing of the installation of closed-loop recycling system to meet the zero-discharge requirement of the 2015 steam electric ELGs. *Id*. at 17. Relative to the regulatory factors in 40 C.F.R. § 423.11(t) pertaining to design/installation of equipment and consideration of changes required to meet the coal combustion residuals rule, the Region highlighted

that: (1) APS has to coordinate steps required under the coal combustion residuals rule with step-by-step construction of the recycling system due to "narrow construction access to build piping, pumps, and other project components;" (2) APS is in the process of phasing out use of its combined waste treatment pond (impoundment) under the coal combustion residuals rule by directing both coal combustion residuals and other waste streams to a new system of concrete holding and treatment tanks with all bottom ash transport water flows being directed to these new tanks later in 2020; and (3) existing infrastructure at the Plant prevents construction of the closed-loop recycling system prior to completion of the new holding and treatment tanks. *Id*. The Region also stated that EPA is currently reconsidering the requirements for non-legacy bottom ash transport water under the 2015 steam electric ELGs and the potential that these requirements may change was an "other factor" supporting the December 31, 2023, compliance date. *Id*. All of these considerations, the Region concluded, made "its selection of December 31, 2023, as the applicable date for the no discharge prohibition for [bottom ash transport water] [] consistent with the requirements set forth in 40 CFR Section 423.11(t)."[31] *Id*. at 18.

Petitioners have not carried their burden of showing clear error. Simply noting that the Region relied upon information submitted by the Permittee and that the Region did not prepare a formal memorandum on its decision does not suffice to show that the Region failed to exercise independent judgment. The applicable regulation anticipates that a decision on a compliance date will be made only "after [the permitting authority] receive[s] information submitted by the discharger" and evaluates that information under certain named factors. 40 C.F.R. § 423.11(t)(1). Further, lack of a formal memorandum does not show a lack of independence in light of the analysis the Region provided in the Response to Comments. Nor have Petitioners carried their burden of showing that the Region inadequately documented its decision. APS's detailed submission, the Fact Sheet, and the Response to Comments provide a well-documented justification in the administrative record for the Region's decision on a compliance date.

[31] The Region also considered but rejected the conclusion in a report submitted by Petitioners that APS could meet the no discharge requirement within 24 months. The Region cited the site-specific factors discussed in the text above for finding that report non-persuasive. RTC at 18.

Accordingly, Petitioners have not shown that the Region clearly erred in the manner in which it made its determination on the compliance date or the method in which it documented its decision on this question.

2. *Use of Best Professional Judgment to Establish BAT for Legacy Bottom Ash Transport Water*

Petitioners also challenge the substance of the Permit's effluent limits for legacy bottom ash transport water. The Permit's effluent limits for bottom ash transport water are based on the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category in 40 C.F.R. pt. 423. Fact Sheet at 4. As noted above, these steam electric ELGs for legacy bottom ash transport water were established in the 1982 and 2015 rulemakings on steam electric ELGs. In the wake of the Fifth Circuit's vacatur of the requirements in the 2015 steam electric ELGs for legacy bottom ash transport water, Petitioners assert the Region erred by not using its best professional judgment to set BAT-based site-specific effluent limits for this waste stream. Pet. at 44. Petitioners argue that the Region had a statutory and regulatory obligation to establish such limits using best professional judgment because "currently there are no applicable ELGs." *Id*.

BAT-based effluent limitations are generally established by EPA in nationwide industry-by-industry effluent limitations guidelines promulgated under sections 301(b) and 304 of the Act. CWA §§ 301(b), 304; 33 U.S.C. §§ 1311(b), 1314. In making BAT determinations under section 304(b)(2), EPA must identify "the degree of effluent reduction attainable through the application of the best control measures and practices achievable" and consider, among other factors, "the cost of achieving such effluent reduction." CWA § 304(b)(2), 33 U.S.C. § 1314(b)(2). Where effluent limitations guidelines for an industry have been established under sections 301(b) and 304 of the Act, section 402(a)(1)(A) requires that the permitting authority include such limitations in permits for facilities within that industry. CWA § 402(a)(1)(A); 33 U.S.C. § 1342(a)(1) (conditioning a permit allowance for a discharge on that discharge "meet[ing] * * * all applicable requirements" under section 301, among other sections). Where applicable effluent limitations guidelines have not been established, section 402(a)(1)(B) authorizes the permitting authority to impose conditions representing technology-based standards such as BPT and BAT on a case-by-case basis. *See* CWA § 402(a)(1)(B); 33 U.S.C. § 1342(a)(1)(B); *see Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987); *Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 969 (5th Cir. 1986); *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984). Specifically, the statute states that the Administrator may impose such conditions "as the Administrator determines are necessary" to carry out the provisions of the Act,

giving the Administrator discretion in the implementation of this authority. CWA § 402(a)(1)(B); 33 U.S.C. § 1342(a)(1)(B).

EPA has implemented these statutory provisions in 40 C.F.R. § 125.3(c). That provision specifies that "[t]echnology-based treatment requirements may be imposed [in permits] through one of the following three methods:" (1) Application of EPA-promulgated effluent limitations guidelines; (2) a case-by-case determination of the minimum technology-based standards where EPA-promulgated effluent limitations guidelines are inapplicable; or (3) a combination of the first two methods when EPA-promulgated effluent limitations guidelines apply only to certain aspects of a discharger's operation or to some, but not all, discharged pollutants. 40 C.F.R. § 125.3(c). This regulatory section describes the case-by-case process for establishing effluent limits under Clean Water Act section 402(a)(1)(B) as involving the exercise of "Best Professional Judgment." *Id*. § 125.3(a)(2)(i)(B). EPA guidance on determining case-by-case technology-based effluent limitations reinforces that such permit limits are to be developed only in circumstances "where EPA promulgated effluent guidelines are inapplicable." *See* Office of Water, U.S. EPA, EPA-833-K-10-001, *NPDES Permit Writers' Manual* § 5.2.3.2, at 5-45 (Sept. 2010) ("Permit Writers' Manual") (A.R. 3); *accord* Office of Water, U.S. EPA, EPA-833-B-96-003, *NPDES Permit Writers' Manual* § 5.1.4, at 68-70 (Dec. 1996).

The Region asserts that it was "not required" to use best professional judgment to develop a case-by-case BAT-based limit for the Permit. Region Resp. Br. at 33; *see* RTC at 22-23; APS Resp. Br. at 33 (arguing that "it would be inappropriate for the Region to render any [best-professional-judgment] determination" on BAT-based effluent limits). The Region offered a two-part explanation for this position. RTC at 22-23. First, the Region explained that the effect of the Fifth Circuit's vacatur of portions of the 2015 steam electric guidelines was to render the corresponding portions in the 1982 steam electric ELGs the ones currently effective. Oral Arg. Tr. at 54; *see also* RTC at 22; APS Resp. Br. at 31. Accordingly, the Region reasoned in the Response to Comments that effluent limits on legacy bottom ash transport water in the Permit "are consistent with ELGs currently in effect."[32] RTC at 22. Second, the Region stated even if "there are no

[32] APS argues that the 1982 ELGs are currently the applicable BAT-based effluent limits for bottom ash transport water because EPA in promulgating the 1982 ELGs considered, but rejected, imposing BAT-based effluent limits. Thus, APS contends that the Region is barred by 40 C.F.R. § 125.3(c)(3) from using best professional judgment to impose site-specific BAT-based effluent limits in the Four Corners Power Plant permit.

applicable ELGs with respect to [the Four Corners Power Plant's] discharges of [legacy bottom ash transport water] * * *, [it] would exercise its discretion and decline to do a site-specific [best-professional-judgment] analysis at this time." *Id*. at 22. The principal reasons given by the Region were that (1) a site-specific best-professional-judgment decision might produce effluent limits not in conformity with EPA action to establish nationwide BAT effluent limitations guidelines; and (2) evaluation of the factors for consideration in a best-professional-judgment determination do not, at this time, support requiring more stringent effluent limits for legacy bottom ash transport water at the Four Corners Power Plant. RTC at 22-23. As discussed below, we find no clear error in this determination.

The Region did not clearly err in concluding that relevant parts of the 1982 ELGs are now currently in effect given the Fifth Circuit's vacatur of the corresponding parts of the 2015 ELGs. The general rule is that a court's judgment vacating a regulation has "the effect of reinstating the rules previously in force." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983); *see Prometheus Radio Project v. FCC*, 652 F.3d 431, 454 n.25 (3d Cir. 2011). On occasion, courts upon vacating a regulation specify what law should govern. For example, in *Paulsen v. Daniels*, the Ninth Circuit invalidated an interim 1997 regulation but held that a subsequent amendment to the regulation in 2000 should apply rather than the prior 1995 regulation because a court had held that the prior regulation misinterpreted the relevant statutory language. 413 F.3d 999, 1008 (9th Cir. 2005). But in *Southwestern Electric,* the Fifth Circuit did not specify that in light of vacatur of parts of the 2015 ELGs, permit writers should be governed by some other requirement than the prior regulation in force—the 1982 ELGs. Moreover, the Fifth Circuit vacated only the 2015 ELG's provisions on legacy bottom ash transport water. The 1982 steam electric ELGs were not before the Fifth Circuit on review, and the court took no action to vacate that regulation. *See Sw. Elec. Power,* 920 F.3d at 1003-04 (explaining that the court was hearing a challenge to the 2015 steam electric ELGs concerning "two discrete parts of the rule").

Petitioners' argument to the contrary is not convincing. Petitioners rely on the fact that EPA, in the 2015 steam electric ELG rule, concluded that "[t]he steam

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APS Resp. Br. at 31; Oral Arg. Tr. at 60-62. The Region takes no position on whether the 1982 ELGs are BAT. *Id*. at 56.

electric ELGs that EPA promulgated in 1974, 1977,[33] and 1982 are out of date * * * [because] [t]hey do not * * * reflect relevant process and technology advances that have occurred in the last 30-plus years," and the Fifth Circuit did not invalidate that finding. Reply Br. at 26 (quoting 80 Fed. Reg. at 67,840). Yet, Petitioners do not explain by what mechanism an EPA finding in a vacated rule retains a legal effect. Nor do Petitioners explain what authority the Board has to treat the 1982 ELGs as invalid in the face of the general rule that vacatur reinstates the regulation previously in force and the absence of a Fifth Circuit holding specifying a different result. *See Action on Smoking & Health*, 713 F.2d at 798 (noting that a prior rule reinstated as a result of a vacatur "cannot again be revoked without new rulemaking in accordance with the provisions of section 4 of the Administrative Procedure Act"). Any other determination as to the effect of the vacatur of the 2015 ELGs regulation lay with the Fifth Circuit, and the Fifth Circuit did not direct that the prior regulation in force be disregarded.

Nor did the Region clearly err in determining site-specific factors at the Four Corners Power Plant do not support establishing more stringent effluent limits to achieve BAT requirements for legacy bottom ash transport water. As noted above, the Region declined to use its best professional judgment to establish new BAT-based effluent limits because the Permit contains limits that are consistent with those currently in effect and "it is appropriate to await a national response to the Fifth Circuit's remand and vacatur" of the 2015 ELGs.[34] RTC at 22. Any site-specific limits in the Permit, the Region explained, might not "conform to national standards, which are developed using industry-wide cost, availability, and other data." *Id*. The Region further reasoned that consideration of the factors relevant to a best-professional-judgment evaluation supports its conclusion to wait for national rulemaking. As precedent for this approach, the Region relies on the Ninth Circuit's decision in *Nat. Res. Def. Council v. EPA*, 863 F.2d 1420 (9th Cir.

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[33] This appears to be a reference to EPA's promulgation of effluent limitations guidelines for pretreatment by existing steam electric power plants for copper in metal cleaning wastes, PCBs, and oil and grease. Part 423—Steam Electric Power Generating Point Source Category Pretreatment Standards for Existing Sources, 42 Fed. Reg. 15690 (Mar. 23, 1977). The parties have not otherwise cited to this rulemaking.

[34] In a pre-publication version of a final rule reconsidering elements of the 2015 steam electric ELGs (signed by the Administrator on August 31, 2020), EPA noted that it plans to address the Fifth Circuit's vacatur of the 2015 limitations on legacy wastewater and leachate "in a subsequent action." Steam Electric Reconsideration Rule, EPA–HQ–OW–2009–0819; FRL–10014–OW, at 20 (pre-publication version).

1988), upholding two EPA Regions' decisions to delay imposing proposed national ELGs while EPA gathered further data in support of the rulemaking. The court concluded that the Regions' concerns about conforming permit-specific effluent limits to the final national ELGs were justified on the record of the case. *Id*. at 1427-28.

In its consideration of the factors relevant to a best-professional-judgment analysis, the Region explained that it examined the statutory factors in section 304(b)(2)(B) of the Act bearing on determination of BAT, including considerations of the costs associated with requiring more stringent effluent limits and the feasibility of introducing new technology to achieve those limits at the Four Corners Power Plant. RTC at 22-23. The cost of achieving greater effluent reduction is expressly designated as a BAT factor in the CWA. *See* CWA § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B). As to the cost of achieving effluent reduction at the Plant, the Region made several salient points. The Region explained that additional treatment of legacy bottom ash transport water would require construction of a new treatment system at the Plant. RTC at 23. Moreover, the Region emphasized that given the Permit's December 31, 2023, deadline for zero discharge from bottom ash transport water, this new treatment system for legacy bottom ash transport water would have a relatively short lifespan. This short lifespan effectively increases the usual assessed cost of the system given that "EPA has previously used 20 years as the projected lifespan of a treatment technology in its cost estimates." *Id*.

As to the feasibility of implementing new technology necessary to achieve BAT-based effluent limits, the Region discussed the possibility that new treatment requirements for legacy bottom ash transport water would interfere with other ongoing pollution reduction projects at the Plant. As the Region explained in connection with choosing a compliance date for APS meeting the zero-discharge requirement for non-legacy bottom ash transport water, APS is concurrently implementing infrastructure changes at the Plant to comply with both the Coal Combustion Residuals rule and the zero-discharge requirement of the 2015 ELGs. RTC at 17, 22. According to the Region, APS must sequence its construction of lined holding tanks to meet requirements of the Coal Combustion Residuals rule with construction of a closed-loop recycling system for compliance with the 2015 ELGs. *See* RTC at 22 (noting that APS is "closing its combined waste treatment pond by October 31, 2020, to meet requirements in the [Coal Combustion Residuals] rule," and the lined holding tanks for bottom ash transport water that make this possible will be used as part of "the closed-loop recycling system to meet the no discharge of bottom ash transport water requirement by December 31, 2023"). This sequencing is necessary, the Region explained, "because of

construction access limitations that arise from the existence of significant plant infrastructure in this area [for the holding tanks and closed-loop system] that allows for narrow construction access to build piping, pumps, and other project components." *Id*. at 17; *see* ELG Project Summary at 3-5. Adding a third pollution treatment system in this same area (the legacy bottom ash transport water will be transferred to the lined holding tanks as part of the response to the Coal Combustion Residuals rule), will only further complicate the scheduling of construction in a constricted portion of the plant. Thus, the potential for additional bottom ash transport water treatment controls to interfere with the two other ongoing pollution control projects appears to be a legitimate consideration.

We conclude that the Region did not clearly err when it decided to rely on existing ELGs and await the development of national ELGs before imposing BAT-based effluent limits on legacy bottom ash transport water in this Permit. In making its determination, the Region was justified in considering the likely significant cost and feasibility issues posed by layering a third new technology requirement on the Four Corners Power Plant for a limited period given that APS is currently installing technology designed to result in the zero discharge of bottom ash transport water by December 31, 2023. Considering the existing ELGs and other factors discussed, the Region focused on accomplishing the Clean Water Act's goal of eliminating discharges to navigable waters—here, through the timely achievement of the zero-discharge effluent limit for bottom ash transport water in the Permit (as required by the portion of the 2015 ELGs not vacated).[35] *See* RTC at 22-23. This approach is consistent with the statutory requirement that BAT determinations "must result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." CWA § 301(b)(2)(A), 33 U.S.C. § 1311((b)(2)(A). Moreover, the Region's approach is also consistent with EPA's recognition that actions taken to comply with the Coal Combustion Residuals rule may impact the implementation of the 2015 steam electric ELGs and that actions under the former rule must be taken into account in establishing deadlines for compliance with the latter rule's zero-discharge requirements. *See* 40 C.F.R.

[35] The Region stated that it did not view this result as inconsistent with the Fifth Circuit's determination in *Southwestern Electric* that it was arbitrary and capricious to designate surface impoundments as BAT for legacy bottom ash transport water. RTC at 23 n.3. Noting that the Fifth Circuit's decision was based on the specific record before it, the Region reasoned that the Fifth Circuit "left open the possibility that surface impoundments could be used as the basis for BAT effluent limitations so long as the Agency identifies a statutory factor, such as cost, in its rationale for selecting surface impoundments." *Id*. (citing 920 F.3d at 1018 n.20).

§ 423.11(t)(2)(iii); 80 Fed. Reg. at 67,854 (noting that the considerations for establishing a compliance date under the 2015 ELGs "allow[] for consideration of plant changes being made in response to other Agency rules affecting the steam electric industry").

Petitioners question the Region's assessment of the likely results of a best-professional-judgment analysis, contending that the Region failed to consider the statutory factors for making a BAT determination and describing the Region's analysis as "half-baked speculation." Reply Br. at 26. We disagree. As discussed above, the Region focused on the cost of requiring and feasibility of constructing additional control or treatment technology at the Four Corners Power Plant at the same time other important pollution control technology is being installed. The statute explicitly contemplates consideration of "the cost of achieving such effluent reduction" and the potential interference with national regulatory pollution requirements certainly qualifies under the statutory catchall of "such other factors as the Administrator deems appropriate." CWA § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B). Further, Petitioners' questioning of the quality of the Region's assessment of the cost and feasibility of the use of additional technology at the Four Corners Power Plant is not supported by the record. *See* RTC at 22-23 (discussing the cost and feasibility of implementing additional technology requirements for legacy bottom ash transport water in light of, among other things, the activities at the Plant to comply with the Coal Combustion Residuals rule and meet the compliance date for zero discharge of pollutants associated with non-legacy bottom ash transport water); *see* ELG Project Summary at 2-5. The Board typically defers to technical determinations such as this by the Region and will not "second-guess the Region's technical determinations based on Petitioners' bald assertion." *In re FutureGen Indus. All., Inc.*, 16 E.A.D. 717, 739, 743 (EAB 2015), *pet. for review dismissed as moot sub nom. DJL Farm LLC v. EPA*, 813 F.3d 1048 (7th Cir. 2016).

Accordingly, we conclude that Petitioners have not shown that based on the current record the Region clearly erred in its determination on the Permit's effluent limits for legacy bottom ash transport water.

E. *Petitioners Fail to Demonstrate that EPA Clearly Erred When It Decided Not to Regulate Discharges, or "Seepage," into the Chaco River Watershed from the Coal Ash Ponds*

As noted previously, when a petitioner raises an issue that the permit issuer addressed in its response to comments document, the petitioner must "explain why the [permit issuer's] response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii). Here, Petitioners fail to confront the Region's response to Petitioners' comments challenging the Region's decision

not to regulate in the Permit seepage from the Four Corners Power Plant's coal ash disposal facilities into the Chaco River watershed. The Petition is therefore denied on this issue. *See, e.g.*, *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143, 170 (EAB 2006) ("[A] petitioner's failure to address the permit issuer's response to comments is fatal to its request for review."), *quoted in In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 100-01 (EAB 2013).

In their comments on the draft permit, Petitioners stated the Region should impose effluent limitations and monitoring requirements to address both "historic and existing seepage" from the coal ash facilities. Petitioners' Comments at 18 (stating the Region failed, among other things, to undertake a best-professional-judgment analysis, impose technology-based effluent limits, and impose water quality-based effluent limits for the pollutants discharging from the coal ash facilities). Petitioners also challenged the Seepage Monitoring and Management Plan in the draft permit as "deficient." *Id.* at 19. Petitioners allege that the timeframe to construct and operate a surface seepage intercept system was unenforceable because it was not specified. *Id.* They also maintain that the administrative record "does not contain any rationale" for the Region's decision to limit the capture of seeps to 650 meters down gradient of the coal ash ponds as opposed to the Petitioners' requested amendment to the permit that would require APS to trace all seeps from their source "to the point where they either terminate or reach a receiving water." *Id.* Finally, Petitioners proposed several amendments to the Seepage Management and Monitoring Plan, including increased monitoring and reporting, further water quality testing, a deadline to construct and operate the seepage intercept system, and a requirement for APS to produce additional studies and conduct site-specific testing to investigate hydrologic connections between coal ash facilities and receiving waters. *Id.* at 19-20.

The Region responded to Petitioners' comments, explaining that Petitioners' contention that the seeps should be regulated in the NPDES permit as point sources was "not supported by the available data." RTC at 26. The Region explained that there is no established, definitive connection between the water in the seeps and the wet fly ash disposal and stated there are several possible sources for the water in the seeps. *Id.* at 27 (noting Morgan Lake and nearby upslope irrigated agriculture as other possible sub-surface sources of water). Although there was uncertainty over the source of the seeps, in the previous permit cycle the Region required APS to construct and operate a seepage intercept system for existing unlined ponds, and to install monitoring wells down gradient from the intercept system. *Id.* EPA received results from the monitoring well evaluations, which are included in the administrative record, that demonstrate that water collected at the wells "largely replicates" background conditions and overall groundwater levels are decreasing,

"likely in response to the seep intercept system." *Id.*; *see also* E-mail from Jeffrey Allmon, Pinnacle West, to Gary Sheth, U.S. EPA (Mar. 19, 2018) (A.R. 8.1.a) & attachments 3 (Boron and Groundwater Elevation Chart) (A.R. 8.1.a.iii) & 5 (Seep - Boron Concentrations) (A.R. 8.1.a.v).[36] Finally, the Region explained that the Seepage Management and Monitoring Plan in this Permit contains an enhanced evaluation process to determine the pollutants present and the source(s) of those pollutants in seepages below the ash ponds, and that if these enhanced evaluations identify a greater potential for an NPDES-covered discharge, the Permit's reopener provision would enable the Region to respond appropriately.[37] RTC at 27.

In their petition for review Petitioners do nothing more than restate their comments on the draft permit. *Compare* Pet. at 45-48 *with* Petitioners' Comments at 17-20. Petitioners do not address the Region's explanation in the Response to Comments, nor have they explained why the Region's decision not to regulate seepage from the coal ash ponds is clearly erroneous. *See Indeck-Elwood*, 13 E.A.D. at 143, 170. As we have previously explained, "disagreeing with the Region's conclusion and alleging error is insufficient" to overcome Petitioner's

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[36] The certified index to the administrative record indicates Gary Sheth as the recipient of the e-mail. Upon inspection, the e-mail appears addressed to Tom Hagler, although the record indicates Mr. Sheth received the e-mail as well.

[37] In its response brief the Region cites, for the first time, an Interpretive Statement the Agency released in April 2019 regarding the NPDES program which concluded that the CWA "is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water." Interpretive Statement on Application of the Clean Water Act NPDES Program to Releases of Pollutants From a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16811 (Apr. 23, 2019), *cited in* Region Resp. Br. at 36 (stating that even if the seeps reached the Chaco River solely through groundwater, additional permit terms "would likely not be required as a legal matter" based on the Agency's Interpretive Statement).

As an initial matter, the Agency made clear that its interpretation "applies at this time only outside of the Fourth and Ninth Circuits" based on federal courts of appeal decisions in those circuits that differed from the Interpretive Statement "until further clarification from the Supreme Court" in a then-pending grant of certiorari. 84 Fed. Reg. at 16,812 & n.1. More recently, the Supreme Court rejected the Agency's Interpretive Statement as "neither persuasive nor reasonable." *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (U.S. 2020). The Board has not considered this Interpretive Statement in its decision in this case.

burden to demonstrate that the Region clearly erred. *Pio Pico,* 16 E.A.D. at 101 (citing cases); *see also In re Evoqua Water Tech's, LLC*, 17 E.A.D. 795, 814-15. We deny review of this issue.

F. *The Board Is not the Appropriate Forum to Review Whether EPA was Required to Conduct an Impairment Analysis Pursuant to CWA Section 303(d) and Petitioners Have Failed to Confront the Region's Response to Comments on this Issue*

While the regulations governing NPDES permit appeals provide for Board review of contested permit conditions and other specific challenges to the permit decision, *see* 40 C.F.R. § 124.19(a)(4)(i), we generally do not consider "the validity of prior, predicate regulatory decisions that are reviewable in other fora," including but not limited to development of TMDLs or the development of impaired water lists pursuant to CWA § 303(d), 33 U.S.C. § 1313(d). *In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001).

Petitioners commented that EPA's draft permit failed to determine whether pollutant discharges from the Four Corners Power Plant impaired Morgan Lake, No Name Wash, Chaco River, and San Juan River, and whether additional effluent limits should be placed in the permit as part of a Total Maximum Daily Load ("TMDL") to achieve compliance with water quality standards. Petitioners stated that the Region should determine whether these water bodies are impaired by any pollutant. Petitioners' Comments at 40. The Region responded that while the regulations that govern NPDES permits require that effluent limits be developed consistent with assumptions and requirements of any waste load allocation that is part of an approved TMDL, in this instance neither the Navajo Nation nor EPA had developed a list of impaired waters or TMDLs for any of the relevant waters pursuant to CWA § 303(d), 33 U.S.C. § 1313(d), and that such lists or TMDLs would be developed separately pursuant to the process under CWA § 303(d), not the permitting process for a particular NPDES permit. RTC at 55. The Region further responded that concerns about the adequacy or absence of TMDLs are properly raised in a separate federal district court action and referenced Board case law on this point. *Id.* (citing *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 605 (EAB 2010), *pet. for review denied*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 569 U.S. 972 (2013)); *see also* 40 C.F.R. § 122.44(d)(1)(vii)(B).

Petitioners repeat their claims in their appeal to the Board and allege that EPA erred by failing to undertake an impairment analysis required by section 303(d) of the CWA to determine whether these water bodies are meeting water quality standards, and whether loads and conditions must be established to bring these

water bodies into compliance with such standards.[38] Pet. at 20, 48-49. In its response brief, the Region recounts Board precedent that explains challenges to a 303(d) list or TMDL, or the absence of a 303(d) list or TMDL, are not within the Board's jurisdiction. Region Resp. Br. at 37-38. The Region further explains that consistent with Board precedent, and in the absence of an impaired waters list or TMDL, it proceeded with issuing the Permit and relied on its authority under CWA section 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B), to develop effluent limitations for the Permit. *See id.*; *City of Taunton v. EPA*, 895 F.3rd 120, 139-40 (1st Cir. 2018) (upholding Agency's decision to establish necessary permit limits to comply with water quality standards based on available information, even if CWA § 303(d) process lags behind (citing *Upper Blackstone Water Pollution Abatement Dist. v. EPA,* 690 F.3d 9, 26 (1st Cir. 2012), *cert. denied*, 569 U.S. 972 (2013))), *cert. denied*, 139 S. Ct. 1240 (2019); *see also* above Part VI.D.2 (discussing permit issuer's authority to impose necessary permit conditions on a case-by-case basis pursuant to CWA § 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B)).

The Region's reliance on Board precedent is well grounded and, as noted above, Petitioners fail to address this point in their Petition.[39] As we have previously explained, the 303(d) process and the NPDES permitting process are two different components of the CWA, do not use the same process or standards, and are implemented under a separate set of regulatory authorities. *In re City of Taunton,* 17 E.A.D 105, 142 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019); *see* note 24 above. The Board has made clear that it is not the proper forum for challenges to section 303 actions. *E.g., In re City of Ruidoso Downs*, 17 E.A.D. 697, 718 (EAB 2019) (Board is not the proper venue to consider validity of state-approved TMDL), *appealed sub nom. Rio Hondo Land & Cattle Co. v. EPA*, No. 19-9531 (10th Cir. docketed May 23, 2019); *In re Peabody*

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[38] Petitioners do not confront the Region's response to their comment, nor do they explain why the Region's response is clearly erroneous such that review of this issue is warranted. 40 C.F.R. § 124.19(a)(4)(ii); *see, e.g.*, *In re City of Taunton,* 17 E.A.D. 105, 111, 180, 182-83, 189 (EAB 2016) *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019).

[39] In their reply brief Petitioners attempt to argue, briefly and for the first time, that they are not challenging classifications or water quality standards for No Name Wash and Morgan Lake, but challenging the Permit. Based on the record and plain reading of the Petition, this argument is not persuasive and comes too late. *See* Reply Br. at 5. Petitioners may not raise new issues or arguments in reply briefs. 40 C.F.R. § 124.19(c)(2); *see* above note 28.

W. Coal Co., 15 E.A.D. 406, 415 n.11 (EAB 2011) ("Cases challenging the 'constructive submission of no TMDLs' or the 'constructive submission of no 303(d) lists' are properly brought in federal district court."); *In re City of Moscow*, 10 E.A.D. 135, 161 (EAB 2001); *accord In re City of Hollywood*, 5 E.A.D. 157, 175-76 (EAB 1994) (denying review of challenge to EPA's approval of state water quality standards under CWA § 303(c), 33 U.S.C. 1313(c)). To the extent that Petitioners suggest the Region needed to develop TMDLs for the receiving waters that surround the Four Corners Power Plant prior to issuing the Final Permit, we have previously rejected such arguments. *E.g., In re City of Taunton,* 17 E.A.D 105, 144 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019).

G. *Petitioners Have Not Demonstrated That the Region's Waiver of CWA Section 401 Certification Constituted Clear Error*

CWA Section 401(a) requires that an applicant for a federal permit "shall provide the licensing or permitting agency a certification from the State in which the discharge originates * * * that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." CWA § 401(a), 33 U.S.C. § 1341(a). This section further provides that "where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator." *Id*. EPA may not approve the permit application "until a certification is granted or waived * * *." 40 C.F.R. § 124.53(a).

Here, the Region is the certifying agency because, as explained above in Part IV.B, although the Navajo Nation has been generally authorized to establish water quality standards in its territory, the Nation was not been granted that authorization as to Morgan Lake and No Name Wash. The Region waived certification for the APS application, explaining "where EPA is both the certifying and the permitting authority, and where the purpose of both the certification and the permit is to protect water quality, it is appropriate for EPA to meet its obligations under Section 401 by waiving the certification requirement." RTC at 112.

Petitioners argue that the Region's waiver was invalid because "water quality standards serve as the basis for a [section] 401 Certification" and "EPA failed to adopt federal water quality standards for Morgan Lake and No Name Wash." Pet. at 49-50.

Petitioners have not shown the Region clearly erred in waiving certification under section 401. First, Petitioners have not even addressed, let alone explained, why the Region erred in concluding that a waiver was appropriate. As noted earlier, the failure by Petitioners "leaves us with a record that supports the Region's

approach." *In re Westborough*, 10 E.A.D. 297, 311 (EAB 2002). Second, Petitioners have cited to no authority for the proposition that in the absence of water quality standards, a proper certification or waiver cannot be made. In any event, as noted earlier, the Region adequately explained what water quality standards it considered in establishing effluent limits and conditions for the Four Corners Power Plant permit.[40]

H. *Petitioners Have Not Preserved for Review Whether EPA Must Require NTEC to Waive its Sovereign Immunity*

Petitioners argue that because the Navajo Transitional Energy Company, LLC ("NTEC") is now an owner of the Four Corners Power Plant and the Region has issued a NPDES permit for the Plant's regulated pollution discharges, the Region must require NTEC "to provide a written public waiver of sovereign immunity (if any) associated with its ownership of [the Four Corners Power Plant]." Pet. at 50-51; *see also* 40 C.F.R. § 122.2 (defining "owner or operator" and "facility or activity" under EPA-administered NPDES program). Specifically, Petitioners contend that the Region "must include an enforceable provision in the Final Permit stating that NTEC has waived any and all claims of sovereign immunity and is liable for suit in federal court for violations of the Final Permit and/or Clean Water Act, including the citizen suit provision." Pet. at 50 n.169.

The Region maintains that the issue of NTEC's sovereign immunity was not preserved for review because Petitioners do not demonstrate that the comment was made on the draft permit. *See* Region Resp. Br. at 40-41; 40 C.F.R. § 124.19(a)(4)(ii) (stating petitioners must demonstrate, by providing specific citation to the administrative record, that each issue being raised in the petition was raised during the public comment period). Similarly, APS and NTEC object that Petitioners' claim was not raised in comments and as a result deprived EPA of the first opportunity to address the issue. APS Resp. Br. at 27-28; NTEC's Amicus Brief 3-6 (Jan. 2, 2020) ("NTEC Br."); *see also In re Christian Cty. Generation, LLC*, 13 E.A.D. 449, 460 (EAB 2008) (petitioner's failure to raise issue in public comment period "deprived the permit issuer" of the "opportunity to consider

[40] Petitioners argue for the first time in their petition that the Region's waiver of section 401 certification resulted in the Region's failure to determine whether the Four Corners Power Plant's coal ash seepage collection system violates requirements of the CWA. *See* Pet. at 50. Because this issue was reasonably ascertainable but not raised during the public comment period it has been waived. 40 C.F.R. §§ 124.19(a)(4)(ii), 124.13; *see, e.g.*, *In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005).

[petitioner's] arguments in the first instance"). NTEC states that it was uniquely harmed because Petitioners' failure deprived it of the opportunity for any necessary dialogue with EPA and APS on the issue of the Navajo Nation's sovereignty. NTEC Br. at 3-6.

The regulations that govern this appeal require participants in the permitting process to "raise all reasonably ascertainable issues and submit all reasonably available arguments" by the close of the public comment period. 40 C.F.R. § 124.13; *id.* § 124.19(a)(4)(ii). We have routinely denied review of an issue where it was reasonably ascertainable but not raised in comments on the draft permit. *E.g.*, *Christian Cty.*, 13 E.A.D. at 457, 459 (citing cases), *cited in In re City of Palmdale*, 15 E.A.D. 700, 705, 721, 737 (EAB 2012).

In their petition for review, Petitioners cite to a comment APS submitted to the Region during the public comment period as support for its argument that NTEC should be required to waive any sovereign immunity it may have as an owner of the Four Corners Power Plant. Pet. at 50 & n.168, 51. The comment stated that as of July 2018, NTEC acquired an ownership interest in the Plant. APS Comments on Proposed NPDES Permit NN000019 for Four Corners Power Plant 3 (July 1, 2019) (A.R. 20.1.b) ("APS Comments"); *see also* RTC at 100. However, APS's comment did not raise the issue of sovereign immunity. Rather, it appeared under the heading "Corrections to Facility Descriptions" as an update to the list of the Plant's co-owners included in the fact sheet issued with the draft permit. APS Comments at 2-3.

It was reasonably ascertainable, public information that NTEC had acquired an ownership interest in the Four Corners Power Plant prior to the public comment period in this matter, and Petitioners had the opportunity to raise NTEC's sovereign immunity in their comments on the draft permit, but nonetheless did not.[41] *In re*

[41] In an apparent abundance of caution approach, the Region, APS, and NTEC go on to argue that Petitioners are wrong as a matter of law, albeit with some variations. *See* Region Resp. Br. at 41 (superior sovereign doctrine means that sovereign immunity is inapplicable to the federal government and would not impact EPA's ability to enforce the permit terms); NTEC Br. at 6-8 (definition of "person" under CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), includes "an Indian tribe or an authorized Indian tribal organization" and thus amounts to a congressional abrogation of sovereign immunity); APS Br. at 28 ("Congress has expressly abrogated tribal sovereign immunity in the CWA."). But all three maintain there is no issue with EPA enforcement of the Permit. The Board is not ruling on these arguments as the issue was not preserved.

BP Cherry Point, 12 E.A.D. 209, 219 (EAB 2005) (requirement that a petitioner raise issues during the public comment period is not an "arbitrary hurdle," intended to "make the process of review more difficult; rather it serves an important function related to the efficiency and integrity of the overall administrative scheme"), *cited in Palmdale*, 15 E.A.D. at 721 (citing cases), *and Christian Cty.*, 13 E.A.D. at 459. Petitioners included as an exhibit with their petition for review a press release dated July 9, 2018, nine months before the public comment period commenced in this matter, announcing that NTEC had obtained an ownership interest in the Plant. *See* Pet. ex. 5; *see also* NTEC Br. at 5. In addition, as NTEC explained in its amicus brief, *see* NTEC Br. at 5, Petitioners were parties to federal court litigation that commenced in April 2016 wherein they challenged several related federal agency actions and the court in that matter dismissed Petitioners' claims in September 2017 because NTEC was an indispensable party that could not be joined because it had sovereign immunity.[42] *See Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, No. CV-16-08077-PCT-SPL, 2017 WL 4277133, at *1 (D. Ariz. Sept. 11, 2017), *aff'd* 932 F.3d 843 (9th Cir. Ariz. July 29, 2019), *reh'g en banc denied*, No. 17-17320 (Dec. 11, 2019), *cert. denied* ___S. Ct.___ (2020 WL 3492672) (June 29, 2020); *see also Christian Cty.*, 13 E.A.D. at 458 ("A party's specific contemplation of a possible outcome of a pending * * * case in which that party is involved logically falls within a common sense understanding of 'reasonably ascertainable' or 'reasonably available.'"); NTEC Br. at 5. Petitioners have not met their burden to establish that they meet the threshold

[42] At oral argument, Petitioners stated they were "not certain" whether they were aware that NTEC became a co-owner of the Four Corners Power Plant before they submitted their comments on the Permit but acknowledged that this may be a newly raised issue. Oral Arg. Tr. at 86. In fact, in a 2016 complaint filed in federal district court Petitioners indicated they were aware El Paso Electric Company was selling its seven percent ownership share of the Plant. *See* Complaint for Declaratory and Injunctive Relief at 25, *Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, No. 3:16-cv-08077 (D. Ariz. Apr. 20, 2016) (document #1); *see also* APS Comments at 3 (stating in July 2018 NTEC acquired an ownership share of the Plant "equivalent to the shares previously owned by El Paso Electric Company"). And then in July 2018 a NTEC press release announced that it had acquired an ownership interest in the FCPP. *See* Pet. ex. 5. The Board also notes that in the federal court litigation involving NTEC's sovereign immunity, Petitioners filed a brief in February 2018 that discussed NTEC's limited waiver of sovereign immunity as it related to its ownership interest when it purchased the Navajo Mine adjacent to the Plant. Appellants' Opening Brief at 8, *Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. Ariz. July 29, 2019) (No. 17-17320) (document 17).

procedural requirements necessary to obtain Board review. *City of Palmdale*, 15 E.A.D. at 705 (citing *Christian Cty.*, 13 E.A.D. at 459).

I. *Petitioners Fail to Demonstrate that the Region Clearly Erred When Regulating the Plant's Cooling Water Intake Structure and When Addressing Its Obligations under CWA Section 316(b) and the Endangered Species Act*

Petitioners allege that the Region erred in concluding that the Four Corners Power Plant employs a "closed-cycle recirculating system" and that such a system, in combination with the Pumping Plan developed as part of the ESA consultation process, constitutes the best technology available for minimizing adverse environmental impact ("BTA") standard under the CWA to reduce the amount of fish at all life stages injured or killed due to the operation of the cooling water intake structure ("CWIS") (impingement mortality and entrainment).[43] Pet. at 51-55, 69-70. As part of this challenge, Petitioners assert that APS has not complied with regulatory requirements pursuant to CWA § 316(b) regarding the submittal of application materials as required by 40 C.F.R. § 122.21(r). *Id.* at 68-69, 70. Finally, Petitioners argue that the Region failed to comply with the ESA when it issued the Permit for the Plant because, they allege, operation of the CWIS will adversely modify critical habitat for the Colorado pikeminnow and kill and injure Colorado pikeminnow and razorback sucker through impingement and entrainment. *Id.* at 63-68.

For the reasons set forth below, the Board denies review of Petitioners' challenges to the Region's compliance with CWA § 316(b), 33 U.S.C. § 1326(b), the regulations that implement CWA § 316(b) located at 40 C.F.R. pt. 125, subpt. J, and fulfillment of its ESA § 7 obligations.

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[43] A closed-cycle recirculating system means "a system designed and properly operated using minimized make-up and blowdown flows withdrawn from a water of the United States to support contact or non-contact cooling uses within a facility, or a system designed to include certain impoundments." 40 C.F.R. § 125.92(c). Closed-cycle recirculating systems include those "with impoundments of waters of the U.S. where the impoundment was constructed prior to October 14, 2014" and "impoundments constructed in uplands or not in waters of the United States." *Id.* § 125.92(c)(2).

Petitioners argue that the Four Corners Power Plant instead operates a "once through" cooling system. Pet. at 54-55. The term "once through" cooling means water passes through the system "in one or two passes for the purpose of removing waste heat." *See* 40 C.F.R. § 423.11(g).

1. *Petitioners Fail to Confront the Region's Response to Comments Regarding its Conclusion that APS Operates a Closed-Cycle Recirculating System*

Where a petition raises an issue that the permit issuer addressed in its response to comments document, a petitioner must "explain why the [permit issuer's] response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii); *see In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143, 170 (EAB 2006) ("[A] petitioner's failure to address the permit issuer's response to comments is fatal to its request for review."), *quoted in In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 100-01 (EAB 2013). Here, Petitioners fail to confront the Region's response to Petitioners' comments challenging the Region's conclusion that APS operates a closed-cycle recirculating system.

In their public comments on the draft permit, Petitioners stated that both the 2001 permit currently in effect for Four Corners Power Plant and the 2005 permit renewal application refer to the Plant as having a once through cooling system. *See* Petitioners' Comments at 34. More broadly, Petitioners stated that EPA had historically regulated the Plant's CWIS as a once through cooling system, and that the EPA should "reject APS's attempt to re-characterize its cooling system" from a once through system to a closed-cycle recirculating system. *Id.* at 34 (referring to Four Corners Power Plant's 1993 permit as well as a May 2012 inspection report that discussed once through cooling water being discharged to an effluent channel), 35.

The Region acknowledged in its Response to Comments that APS referred to Morgan Lake as a once through cooling system in earlier submittals, but also directed commenters to later corrections APS submitted that identified Morgan Lake as a "recirculated cooling water system" pursuant to 40 C.F.R. § 423.11(h). RTC at 48.[44] In addition, the Region responded that its "prior references" to Morgan Lake's status as a once through cooling system had "no impact" on whether Morgan Lake is a closed-cycle recirculating system pursuant to CWA § 316(b) and

[44] *See also* Letter from David Saliba, APS, to Nancy Yoshikawa, U.S. EPA, Re: Reconsideration of Classification of the APS Four Corners Power Plant under CWA 316(b) Rules (Nov. 29, 2006) (A.R. 1.1.g) (stating "the facility has a closed-cycle recirculating cooling system" with its intake on the San Juan River); Letter from David Saliba, APS, to Douglas Eberhardt, U.S. EPA, re: Permit Renewal Application; Corrections (May 4, 2007) (A.R. 1.1.j); Letter from David Saliba, APS, to Douglas Eberhardt, U.S. EPA, re: Permit Renewal Application; Corrections and Permit Change Requests (Nov. 17, 2009) (A.R. 1.1.k).

its implementing regulations. *Id.* The Region also cited to the relevant portions of 40 C.F.R. § 125.92(c) to illustrate that Morgan Lake meets the regulatory definition of a closed-cycle recirculating system. *See* RTC at 46-47; *see also* 40 C.F.R. § 125.92(c)(1) (explaining that a "closed-cycle recirculating system withdraws new source water (make-up water) only to replenish losses that have occurred due to blowdown, drift, and evaporation"); note 46 below (describing blowdown). Finally, the Region explained that the preamble to the rule implementing CWA § 316(b), 33 U.S.C. § 1326(b), made clear that "[i]mpoundments that are not constructed from a waters of the U.S. but do withdraw make-up water from waters of the U.S. can be closed-cycle recirculating systems subject to the requirements of [the 316(b)] rule, provided that withdrawal for make-up water is minimized." Final 316(b) Rule, 79 Fed. Reg. at 48,307, *quoted in* RTC at 47-48.

Petitioners fail to address, in any meaningful way, the Region's response to their comments regarding Morgan Lake's change in reference terms from a once through cooling system to a closed-cycle recirculating system pursuant to 40 C.F.R. § 125.92(c). *See, e.g., In re City of Taunton,* 17 E.A.D. 105, 111, 180, 182-83, 189 (EAB 2016) *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). Nor have they explained why the Region's response is clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii); *see also Evoqua Water Tech's*, 17 E.A.D. 795, 814-15 (EAB 2019). Although Petitioners cite to the definition of a closed-cycle recirculating system at 40 C.F.R. § 125.92(c) and allege that the Four Corners Power Plant's system fails to meet the "legal criteria for such a system," they do not explain why the Region's reliance on the regulatory definition to determine that the Plant operates a closed-cycle recirculating system is in error. *See* Pet. at 51. Without more, Petitioners cannot meet their burden to demonstrate review is warranted. *See* 40 C.F.R. § 124.19(a)(4)(i)-(ii).

Petitioners next argue that the Plant cannot operate a closed-cycle recirculating system because it does not reduce water withdrawals by ninety-five percent or more as discussed in the preamble to the final rule that implements CWA § 316(b), 33 U.S.C. § 1326(b). *See* Pet. at 53 (citing Final 316(b) Rule, 79 Fed. Reg. at 48,303). In their comments on the draft permit, Petitioners quoted the draft fact sheet statement that the Four Corners Power Plant uses a closed-cycle recirculating system that circulates "from approximately 1000 up to about 1700 million gallons a day" through Morgan Lake and argued that "[t]his finding has regulatory implications for both effluent limits and CWA Section 316(b) cooling water intakes." Petitioners' Comments at 34 & n.114. The Region responded to Petitioners' comment and explained that while the Plant withdraws, on average, 14.3 million gallons per day of water from the San Juan River, it circulates approximately 1,000 to 1,700 million gallons per day through its cooling water

system, so the Plant "is circulating approximately 70 to 119 times more water for cooling purposes than it withdraws from the San Juan River." RTC at 47 & nn.6-7 (explaining that the Four Corners Power Plant uses approximately one percent of the water that it would use if it operated a once through system).

To support their argument, Petitioners cite for the first time in this proceeding a report entitled *Pinnacle West Capital Corporation – Water 2018* that states that the Plant returns twenty percent of water used to the source and recycles the remaining eighty percent. Pet. at 53 & ex. 66 at 7 (Pinnacle West report); *see also* Region Resp. Br. at 42. However, the report was not presented to the Region in comments on the Permit and thus cannot be relied upon on appeal. *E.g.*, *In re Jordan Dev. Co., LLC*, 18 E.A.D. 1, 11, 21 (EAB 2019); *In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005).

The Region objects to Petitioners' reliance on this report because it was not presented during the public comment period. *See* Region Resp. at 42. The Region states that Petitioners mistakenly claim the report demonstrates that only eighty percent of the cooling water is recirculated because, in part, Petitioners misconstrue the impact of water returned to the San Juan River as blowdown on the analysis of whether the Plant operates a closed-cycle recirculating system. *See id.* (stating the "relevant numbers" to compare to determine whether a plant operates a closed-cycle recirculating system are "the amount of water withdrawn from the San Juan [River] compared to the amount the Permittee would need to withdraw if it had a once through cooling system"); *see also* note 46 below. Even if the report Petitioners cite was properly before us, the report and the Petitioners' argument based on it would fail to address the Region's response to comments because the amount of water returned to the San Juan River as blowdown is not relevant to whether the Plant operates a closed-cycle recirculating system pursuant to the regulations that implement CWA § 316(b).[45] *See* 40 C.F.R. § 124.19(a)(4)(ii);

[45] At oral argument, Petitioners stated that the Plant's cooling water system could not be a closed-cycle recirculating system because, while APS had admitted the Plant withdraws 14.3 million gallons per day from the San Juan River, the Permit authorizes APS to discharge up to 14.7 million gallons per day from the Plant. Oral Arg. Tr. at 82. Petitioners argued that "[w]hen you're withdrawing the same amount of water from a river that you're discharging back into it, that is, by definition, once[]through cooling." *Id.* The comparison Petitioners make between make-up water withdrawn and water discharged is not relevant here. *See* Region Resp. Br. at 42. Rather, it is the amount of water APS withdraws (here, on average 14.3 million gallons per day) versus the amount of water circulated through the Plant per day (approximately 1000 to 1700 million gallons per day)

Final 316(b) Rule, 79 Fed. Reg. at 48,326 (where make-up water is withdrawn from a freshwater source, a closed-cycle recirculating system can generally be deemed to minimize make-up and blowdown flows if it reduces actual intake flows (AIF) by 97.5 percent as compared to a once through cooling system); RTC at 47.

As noted above, the Region explained that the Plant uses approximately one percent of the water withdrawn from the San Juan River that it would use if it operated a once through cooling system. *See* RTC at 47. The Region concluded that the Plant operates a closed-cycle recirculating system "[c]onsistent with the preamble" to the rule implementing CWA § 316(b) because it utilizes an impoundment not constructed from a waters of the U.S. that withdraws make-up water from waters of the U.S. *See id.* at 48 (quoting Final 316(b) Rule, 79 Fed. Reg. at 48,307). Further, the Region concluded the Plant minimizes its withdrawal of make-up water, *see id.*, and explained that approximately ninety-nine percent of water withdrawn from the San Juan River "is used for cooling purposes and is reused multiple times." *Id.* at 47 (citing APS Comments); *see also* APS Comments at 9 (citing Authorization to Discharge under the NPDES, Arizona Public Service Co., NPDES Permit No. NN0000019, attach. D, Wastewater Flow Schematic (Apr. 30, 2019) (A.R. 20.d)), 10; Final Permit attach. D (same).

Petitioners do not address the Region's response to comments or explain why the Region's response demonstrates clear error. *See* 40 C.F.R. § 124.19(a)(4)(ii); *see, e.g.*, *City of Taunton,* 17 E.A.D., at 111, 180, 182-83, 189. Instead, in their petition for review Petitioners simply cite to the preamble of the final rule that implements CWA § 316(b), 33 U.S.C. § 1326(b), which states that "EPA expects that make-up water withdrawals are commensurate with the flows of a closed cycle cooling tower" and that a closed-cycle recirculating system is generally deemed to minimize make-up and blowdown flows if it reduces annual intake flows by 97.5 percent as compared to a once through cooling system. Pet. at 54 & nn.179 & 180 (citing Final 316(b) Rule, 79 Fed. Reg. at 48,307 and 48,326). Petitioners present no further information or argument that the Plant's cooling water system has not reduced actual intake flows by 97.5 percent as compared to a once through cooling system.[46] The record supports a conclusion that the Region considered the

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that indicates the Plant uses approximately one percent of water from the San Juan River that it would use if it were a once through system. *See id.* (citing RTC at 47).

[46] Petitioners allege that the Four Corners Power Plant's withdrawal of water for cooling purposes was not minimized because the withdrawal of make-up water is not limited to replenishing losses that have occurred due to blowdown, drift, and evaporation, but is also required to replenish losses due to the need to control total dissolved solids in

information APS submitted with its permit application and in subsequent correspondence, all of which is in the administrative record. *See* APS Comments at 9-11; Letter from David Saliba, APS, to Doug Eberhardt, U.S. EPA, re: NPDES Permit Renewal Application (Oct. 5, 2005) (A.R. 1) (attaching permit application); RTC at 47, 61. Petitioners have not identified any information in the record that calls the Permittee's representations or the Region's calculations and determination into question regarding the quantity of water withdrawn from the San Juan River or the quantity used for cooling purposes.

Petitioners have failed to demonstrate that the Region clearly erred when it determined that the Four Corners Power Plant operates a closed-cycle recirculating system.

2. *Petitioners Fail to Confront the Region's Response to Comments Regarding the Selection of Best Technology Available for Minimizing Adverse Environmental Impact ("BTA") Standards for Impingement Mortality and Entrainment*

Petitioners submitted comments on the draft permit that challenged the Region's determination that the Four Corners Power Plant's cooling water system, including its Cooling Water Intake Structure ("CWIS"), is a closed-cycle recirculating system that constituted BTA for impingement mortality and entrainment. *See* Petitioners' Comments at 40-44. The Region responded to Petitioners' comments explaining the basis for its selection of the closed-cycling recirculating system pursuant to the regulations implementing CWA section 316(b) (40 C.F.R. § 125.94(c) and (d)), and explaining that it also required the implementation of the Fish and Wildlife Service approved Pumping Plan pursuant to 40 C.F.R § 125.94(g). RTC at 58-60.

In their comments on the draft permit, Petitioners alleged that there was "no evidence" that the CWIS was equivalent to the BTA standard for entrainment required by the regulations that implement CWA § 316(b). Petitioners' Comments

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Morgan Lake. Pet. at 54 (Permittee discharges approximately 4.2 million gallons per day from Morgan Lake to No Name Wash to reduce total dissolved solids levels in the lake and "[t]hese discharges require pulling 24.5 million gallons per day of makeup water from the San Juan River"). The dissolved solids accumulate in recirculated cooling water, and facilities discharge a portion of the water to control the buildup of these solids, referred to as "blowdown." *See* Final 316(b) Rule, 79 Fed. Reg. at 48,326. Petitioners' argument is misplaced. Controlling total dissolved solids is achieved via blowdown. 40 C.F.R. § 423.11(j); *id.* § 401.11(p); *see also* Final 316(b) Rule, 79 Fed. Reg. at 48,326.

at 40-42. Petitioners also alleged that APS and EPA failed to comply with the CWIS-related application requirements set forth in 40 C.F.R. § 122.21(r). *See id.* at 42 (citing Memo from Deborah G. Nagle, U.S. EPA, re: CWA Section 316(b) Regulations for CWIS at Existing Facilities: NPDES Permitting Process When Federally-Listed Threatened and Endangered Species and/or Designated Critical Habitat Are or May Be Present, attach. A (Dec. 11, 2014) (A.R. 6.e)). Petitioners then included an email exchange between the Agency and APS wherein APS described the CWIS, including that the intake screens have an approximately 1-inch by 3-inch opening, and that approach velocities towards the screens are 0.38 feet per second. *Id.* at 43 (quoting E-mail from Michele Robertson, APS, to Gary Sheth, U.S. EPA, Re: Questions about Morgan Lake Intake (Aug. 8, 2014) (A.R. 2.d)). Petitioners commented that while maintaining an approach velocity below 0.5 feet per second would reduce impingement losses, it would not reduce entrainment, and that screens with a mesh size of less than 1/5 inch would reduce entrainment losses of fish eggs, larvae, and juveniles. *Id.* Finally, Petitioners commented "there is no evidence in the record * * * that EPA has requested the results of any fish impingement/entrainment studies, impacts on threatened or endangered species, or any intake structure alternatives from the [Plant's] owners." *Id.* at 44.

In its response to Petitioners' comments on this issue, the Region explained how its selection of a closed-cycle recirculating system was based upon 40 C.F.R. § 125.94(c) and (d) and was "consistent with the regulations for Section 316(b)." RTC at 59, *quoted in* Region Resp. Br. at 46. The regulations that implement CWA section 316(b) require that to meet the BTA standard for impingement mortality, a facility owner or operator must comply with one of seven alternatives enumerated in the regulations. *See* 40 C.F.R. § 125.94(c) (explaining the seven alternatives are listed in paragraphs (c)(1) through (c)(7)). In this instance, the Region stated that the Four Corners Power Plant operates a closed-cycle recirculating system pursuant to 40 C.F.R. § 125.94(c)(1). RTC at 59, *quoted in* Region Resp. Br. at 46. The Region explained that it also required that the Four Corners Power Plant implement the FWS-approved Pumping Plan pursuant to 40 C.F.R. § 125.94(g), which authorizes a permit issuer to include additional measures to protect federally-listed threatened and endangered species and designated critical habitat. RTC at 59. The Region determined that the BTA standard for impingement mortality at the Plant was the operation of a closed-cycle recirculating system combined with the FWS-approved Pumping Plan.[47] RTC at 59-60; *see also* Region Resp. Br. at

[47] Petitioners raise, for the first time on appeal, arguments that EPA clearly erred when it did not require the Four Corners Power Plant to operate a modified traveling screen pursuant to 40 C.F.R. § 125.94(c)(5) or to meet the impingement mortality performance

46, 47. Similarly, the Region determined that a closed-cycle recirculating system was appropriate in this instance as a site-specific determination for the Plant to comply with the BTA standard for entrainment pursuant to 40 C.F.R. § 125.94(d). RTC at 60; *see also* Final 316(b) Rule, 79 Fed. Reg. at 48,340 (concluding that "closed-cycle recirculating systems reduce entrainment (and impingement mortality) to the greatest extent and are the most effective performing technology"), *quoted in* RTC at 59. The Region incorporated the Pumping Plan approved by FWS to reduce the magnitude and types of entrainment of Colorado pikeminnow and razorback sucker as the BTA standard for entrainment pursuant to 40 C.F.R. § 125.94(g).[48] *See* RTC at 60 (citing Biological Opinion at 144).

The Region next responded to the Petitioners' comment that the Region had failed to obtain necessary site-specific studies and information related to the CWIS and that the Region could not rely on a provision in 40 C.F.R § 125.98(g) allowing it to proceed without requiring such information because the Permit was issued after a date set forth in a guidance memo. *See* Petitioners' Comments at 42. The Region explained that based on the regulatory language, because the Four Corners Power Plant permitting process was part of an ongoing permit proceeding that began prior to October 14, 2014, it was not necessary for it to require APS to submit certain information set forth in 40 C.F.R. § 122.21(r) prior to the Region selecting the

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standard pursuant to 40 C.F.R. § 125.94(c)(7). *See* Pet. at 69. Petitioners do not include a citation to the record to demonstrate that they or anyone else raised this issue below, and thus we decline to review it for the first time on appeal. *See* 40 C.F.R. §§ 124.19(a)(4)(ii), 124.13; *see, e.g.*, *In re BP Cherry Point*, 12 E.A.D. at 219.

[48] Petitioners also commented that the Region should include an enforceable permit term to reduce the Four Corners Power Plant's allowable water withdrawal by thirty percent to further mitigate impingement and entrainment losses, which are proportional to the amount of water withdrawn. Petitioners' Comments at 44-45. The Region responded to Petitioners' comment and explained that the Plant has reduced its average intake from the San Juan River to 14.3 million gallons per day and its maximum intake to 24.5 million gallons per day, the retirement of three units at the facility means there is no incentive to withdraw more cooling water than is necessary, and the Pumping Plan helps to minimize impingement and entrainment. *See* RTC at 61. Petitioners do not address the Region's response to comments when they challenge the Region's decision not to include an enforceable limitation on water withdrawals in the petition for review, and without more, Petitioners cannot meet their burden to demonstrate that review of this issue is warranted. *See, e.g.*, *Pio Pico,* 16 E.A.D. at 100-101 (citing cases) (petitioner must "explain *why* the permit issuer's response to petitioners' comments during the comment period is clearly erroneous or otherwise warrants consideration").

closed-cycle recirculating system in conjunction with the Pumping Plan as BTA. 40 C.F.R. § 125.98(g); RTC at 59 (explaining that the guidance memo Petitioners cite does not preclude EPA from relying on the ongoing permit proceeding provision at 40 C.F.R. § 125.98(g)); Region Resp. Br. at 45-46 (same).

In their petition for review, Petitioners first posit another new argument with respect to impingement: that the Permit is "legally defective" because it does not set a compliance date for meeting the BTA impingement mortality standard. Pet. at 56 (quoting Final 316(b) Rule, 79 Fed. Reg. at 48,322) (existing facility must meet impingement mortality standard requirements "as soon as practicable" after final permit is issued). As this is a new argument that was reasonably ascertainable but not presented during the public comment period, the Board will not consider it. *See* 40 C.F.R. § 124.19(a)(4)(ii); *see also In re BP Cherry Point*, 12 E.A.D. at 219; above note 47.

Petitioners next repeat their argument from the comments that while the Permit requires submission of a Pumping Plan, *see* Final Permit at 12, pt. I.B.3, there is no evidence in the record that EPA considered site-specific data or other information that would allow EPA to determine a "de minimis rate of impingement currently exists" allowing EPA to exempt the Plant from additional impingement controls. Pet. at 56. These arguments do not address or confront the information contained in the Region's response to Petitioners' comments. In fact, the record shows that APS chose to comply with the BTA standard for impingement mortality by operating a closed-cycle recirculating system. *See, e.g.*, RTC at 46-47. The facility's operation of the closed-cycle recirculating system obviates the need for a future compliance date to comply with the BTA standard for impingement mortality. And, a de minimis rate of impingement pursuant to 40 C.F.R. § 125.94(c)(11) applies only in limited circumstances where rates of impingement are "so low" that "additional impingement controls may not be justified." This is not the case at the Plant and neither APS nor the Region claim otherwise. Therefore, Petitioners' argument here is inapposite. Finally, the Region explained in its Response to Comments that EPA incorporated the Pumping Plan and the additional measures required therein as BTA pursuant to 40 C.F.R. § 124.94(g), and that "by implementing the Pumping Plan, APS has minimized impingement and entrapment losses."[49] RTC at 60, 61; *see also* Region Resp. Br. at 47 (citing

[49] In comments on the draft permit, APS explained that it had implemented the Pumping Plan, approved by the Service, to minimize impingement and entrainment of fish at all stages of life at the San Juan River intake system. *See* APS Comments at 9; RTC at 106. APS explained first that the CWIS intake operates two independent pump trains with separate intake screens and suction sumps, and that by connecting the suction sumps

Biological Opinion at 144; Letter from Rick Williamson, Office of Surface Mining Reclamation & Enf't, U.S. Dep't of Interior, to Wally Murphy, U.S. FWS, re: Amendment to Four Corners Power Plant/Navajo Mine Energy Project Biological Assessment 3 (Mar. 13, 2015) (A.R. 7.a) ("Amended Biological Assessment")).

With respect to entrainment, the petition for review simply repeats many of Petitioners' comments on the draft permit with respect to the BTA standard for entrainment. *Compare* Petitioners' Comments at 41 *with* Pet. at 56-57, *and* Petitioners' Comments at 42 *with* Pet. at 57-58, *and* Petitioners' Comments at 42-44 *with* Pet. at 58-60. Petitioners do not address the Region's response regarding its site-specific determination that a closed-cycle recirculating system and the Pumping Plan meet the BTA standard for entrainment pursuant to 40 C.F.R. § 125.94(d) and (g). *See* RTC at 59 (citing Final 316(b) Rule, 79 Fed. Reg. at 43,340, which explains that "EPA concluded that closed[-]cycle recirculating systems reduce entrainment (and impingement mortality) to the greatest extent and are the most effective performing technology"). Without more, Petitioners cannot demonstrate that review is warranted. *See* 40 C.F.R. § 124.19(a)(4)(i)-(ii) (setting forth petition content requirements, including the requirement to address the permitting authority's response to comments by explaining why the response is clearly erroneous or otherwise warrants review); *see also City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review). Petitioners failed to do so here.

Petitioners' arguments that the administrative record lacks data and information regarding fish impingement and entrainment similarly fall short

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APS reduced screen-approach and through-screen velocities by up to fifty percent during one-train operation, which APS will maintain the majority of the time since the closure of Units 1, 2, and 3. APS Comments at 9 (noting it had already reduced intake flow velocity to 0.38 feet per second). Second, APS "is implementing strategic pump outages" at certain times of year to minimize inadvertent take of fish eggs and larvae, including when stocking of Colorado pikeminnow occurs upstream, or the Service determines Colorado pikeminnow are spawning upstream. *Id.* Third, APS commissioned an engineering investigation to determine optimal intake screen opening size which determined that the current screen size openings are optimal. *Id.* Finally, APS has agreed to fund "substantial recovery actions" in the San Juan River basin to optimize habitat for endangered fish species, including funding a fish passage at the APS weir, monitoring and managing fish habitat, and funding studies to assist in recovery and adaptive management. *Id.* at 9-10; *see* RTC at 106 (citing Biological Opinion at 146-148).

because they do nothing more than repeat Petitioners' comments regarding entrainment, and they neither confront the Region's Response to Comments nor explain why the Region erred when it determined BTA standards for impingement mortality and entrainment without requiring APS to submit information set forth in 40 C.F.R. § 122.21(r) prior to permit issuance.[50] 40 C.F.R. § 124.19(a)(4)(ii); *see, e.g.*, *In re Evoqua Water Tech's, LLC*, 17 E.A.D. 795, 814-15 (EAB 2019) (citing cases); *In re Pio Pico Energy Ctr.*, 16 E.A.D. at 100-101; *see also* Pet. at 68-69. In sum, Petitioners have not met their burden to demonstrate that the Region clearly erred when it determined that the closed-cycle recirculating system and Pumping Plan constitute the best technology available for minimizing adverse environmental impact ("BTA") standard for impingement mortality and entrainment pursuant to the regulations that implement CWA section 316(b).

3. *Petitioners Fail to Demonstrate that the Region Clearly Erred in Fulfilling its Obligation to Comply with the Endangered Species Act*

The Biological Opinion, issued by FWS on April 8, 2015, concluded that upon review of the current status of the Colorado pikeminnow and the razorback sucker, the environmental baseline of the action area, the effects of the proposed Project (including the Conservation Measures), and the cumulative effects, "it is our biological opinion that implementation of the [Four Corners Power Plant] and [Navajo Mine Energy Project], as proposed, is not likely to jeopardize the continued existence of the Colorado pikeminnow and the razorback sucker." U.S. FWS, New Mexico Ecological Services Field Office, *Endangered Species Act – Section 7 Consultation Biological Opinion, Four Corners Power Plant and Navajo Mine Energy Project* 133 (Apr. 8, 2015) (A.R. 7.i) ("Biological Opinion"); *see also id.* at 135. As explained above in note 9, the Biological Opinion included an incidental take statement that authorized takes provided that the coordinating federal agencies adhered to the reasonable and prudent measures ("RPMs") the Service considered necessary to minimize the impact of the takes. ESA § 7(b)(4)(C)(ii), 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R § 402.02; Biological Opinion at 138 (explaining that

[50] The Board notes that the Region did modify the draft permit to address various concerns raised by Petitioner. For example, the draft permit in this matter required APS to submit the required information under 40 C.F.R. § 122.21(r) during the next permit cycle, but the Region modified the proposed permit so that APS must submit the information required under 40 C.F.R. § 122.21(r) within two years of the effective date of the Permit. *See* Final Permit at 13, pt. I.B.3.i.; RTC at 59 (stating that if, based on the new information APS will submit pursuant to section 122.21(r), the Region deems it necessary to require additional controls, the Region could reopen the Permit pursuant to Section III.B).

the RPMs are "non-discretionary" and must be implemented so that they become "binding conditions of any grant or permit" issued by any of the federal action agencies); *see also* Fact Sheet at 11-12. The RPMs delineate responsibilities for each of the federal action agencies (or APS, as applicable) depending on each entity's authority and the actions proposed for each RPM. *See* Fact Sheet at 11-12. EPA incorporated two RPMs into the NPDES Permit at issue here: 1) the CWIS Pumping Plan, *see* Part VI.I.2 above, and 2) sufficiently sensitive sampling protocols primarily for mercury and selenium, and a longer term effort to "identify appropriate protocols for evaluating fish tissue concentration and water column values." *Id.* at 12; Biological Opinion at 144, 148.

a. *Petitioners Fail to Confront the Region's Response to Comments Regarding Alleged Violations of the ESA or Otherwise Demonstrate Clear Error*

Petitioners submitted comments on the draft permit that challenged various aspects of the Region's compliance with the ESA, including the Region's reliance on, and failure "to address fatal legal flaws in," the Biological Opinion and that the Service's determination that operation of the CWIS will result in impingement mortality and entrainment that will jeopardize Colorado pikeminnow and razorback sucker and adversely modify their critical habitat. Petitioners' Comments at 46, 55, 67; *see also* RTC at 63, 79, 93; *see generally* Petitioners' Comments at 46-71. The Region responded to the ESA-related comments in its Response to Comments, including discussing the validity of the Biological Opinion and how the adoption of the reasonable and prudent measures will address impacts from the operation of the CWIS. *See* RTC at 63-98.

In their petition for review, Petitioners repeat the claim that the Region failed to comply with the ESA, with a focus on the impacts of impingement and entrainment and the need for closed-cycle or dry cooling technology. *See generally* Pet. at 61-68. In its response brief, the Region explained that it had responded in detail to the Petitioners' ESA-related comments in the Response to Comments, and it identified specific relevant portions of its responses. Region Resp. Br. at 48-49; *see* RTC at 67-68 (Biological Opinion development process), 95 (entrainment/impingement), 97-98 (closed-cycle recirculating system). In fact, the Region argues that the Petitioners did nothing more than repeat their comments on the draft permit with "*very* minimal abridgement" and that they fail to meet the requirements for specificity in 40 C.F.R. § 124.19(a)(4)(ii) by failing to explain why the response was clearly erroneous or otherwise warrants review. Region Resp. Br. at 49 (emphasis in original).

The record in this case demonstrates that the Region responded to Petitioners' comments in the Response to Comments, dedicating a large portion of that document to Petitioners' ESA-related concerns. *See* RTC at 66-68, 95, 97-98; *see generally* RTC at 63-98. Upon review of the petition, the Petitioners' comments, the Response to Comments, and other relevant parts of the administrative record in this case, it is evident that the petition largely just copies language directly from Petitioners' public comments. *Compare* Pet. at 61-63 *with* Petitioners' Comments at 46-47, *and* Pet. at 64-65 *with* Petitioners' Comments at 67-69, *and* Pet. at 65-68 *with* Petitioners' Comments at 70-71.[51] Petitioners did add two new paragraphs to the petition that include a quote from the *Federal Register* discussing impingement mortality and entrainment impacts on populations of threatened and endangered species and a reference to several conclusions from the Biological Opinion regarding potential adverse effects of the Project. *See* Pet. at 63 (second paragraph quoting the *Federal Register* and third paragraph quoting the Biological Opinion did not appear in Petitioners' Comments). But neither of these paragraphs confront the Region's explanations in the Response to Comments. "The Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit." *In re City of Taunton*, 17 E.A.D. 105, 111 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019); *see also In re City of Pittsfield*, NPDES Appeal No. 08-19, at 11-13 (EAB Mar. 4, 2009) (Order Denying Review), *pet. for review denied*, 614 F.3d 7 (1st Cir. 2010).

Even if Petitioners had confronted the Region's responses to their comments on this issue, the Board would deny this claim. With respect to the Region's substantive obligations under the ESA to ensure that its actions are not likely to

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[51] For example, Petitioners argue that operation of the CWIS will adversely modify critical habitat for Colorado pikeminnow and kill and injure adult, juvenile and larvae Colorado pikeminnow and the razorback sucker due to the risk of injury and death from impingement and entrainment. *Compare* Pet. at 64-65 *with* Petitioners' Comments at 67-69. Petitioners further allege that considering the current status of the fish, "including an environmental baseline of jeopardy" due to mercury and selenium contamination, "*any* impingement or entrainment at intake structures will jeopardize the continued existence of the Colorado pikeminnow and razorback sucker," and state that EPA and FWS must instead require "reasonable and prudent alternatives" pursuant to 50 C.F.R. § 402.14(i)(1)(ii), such as closed-cycle or dry cooling, that Petitioners allege "would avoid the likelihood of jeopardizing the continued existence of listed species and/or avert the destruction or adverse modification of critical habitat." *Compare* Pet. at 65-68 *with* Petitioners' Comments at 69-70.

jeopardize listed species or destroy or adversely modify critical habitat, the Region states that the record demonstrates that it "carefully reviewed the Final [Biological Opinion] in light [of] the Petitioners' Comment Letter, and has responded to those comments." *See* Region Resp. Br. at 49 (citing RTC at 63-98). The Region maintains that its reliance on the Biological Opinion was neither arbitrary nor capricious. *Id.* The record supports the Region's reliance on the Biological Opinion as appropriate. *See, e.g.*, *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 487 (EAB 2002).

Despite the Service's finding that the proposed Project "is not likely to jeopardize the continued existence of the Colorado pikeminnow and the razorback sucker," Biological Opinion at 133, Petitioners argue that "[c]onsidered alongside the current status of the fish, including an environmental baseline of jeopardy from mercury and selenium contamination, *any* impingement or entrainment" due to operation of the CWIS "will jeopardize the continued existence of the Colorado pikeminnow and razorback sucker." Pet. at 65. The Petitioners' arguments are misplaced. Petitioners appear to confuse the concept of environmental baseline with what they refer to as "the current status of the fish," and whether a listed species or its designated critical habitat will be jeopardized by a federal agency action.[52] Petitioners describe the "current status" of the Colorado pikeminnow and razorback sucker as "including an environmental baseline of jeopardy" due to mercury and selenium contamination. Pet. at 64, 65. Despite Petitioners' statement to the contrary, there is no "environmental baseline of jeopardy" for the Colorado pikeminnow or razorback sucker. *See* 84 Fed. Reg. 44,976, 44,987 (Aug. 27,

[52] "Environmental baseline" includes "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions [that] are contemporaneous with the consultation in process." 50 C.F.R. § 402.02.

The definition of "environmental baseline" was amended by rule effective October 28, 2019. *See* Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976, 44,978 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 50,333 (Sept. 25, 2019) (delaying effective date of the rule until October 28, 2019); *see also* above note 7. The portion of the "environmental baseline" definition quoted here was not amended and thus the language remained the same.

2019).[53] It is the federal agency action, here the proposed Project, that is either "likely" or "not likely" to jeopardize the continued existence of an endangered species or destroy or adversely modify critical habitat, not the conditions that exist for that species or critical habitat prior to that agency action. *See* ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.02; 84 Fed. Reg. at 44,987.

Here, the Service found that the proposed Project was not likely to jeopardize the continued existence of the Colorado pikeminnow and the razorback sucker, *see* Biological Opinion at 133, and thus, despite Petitioners' statement to the contrary, the Service was not required to offer reasonable and prudent alternatives to the proposed Project. *See* Pet. at 65-68; APS Response Br. at 42; 50 C.F.R. § 402.14(h)(2) ("A '*jeopardy*' biological opinion shall include reasonable and prudent alternatives, if any." (emphasis added)). In any event, Petitioners' claim that the Service must require installation of closed-cycle or dry cooling technology as a reasonable and prudent alternative to the proposed Project is superfluous because the Four Corners Power Plant already operates a closed-cycle cooling system. *See* above Part VI.I.1. Petitioners have not met their burden to demonstrate that the Region clearly erred in relying on the Service's Biological Opinion, or presented other reasons to demonstrate that review is warranted with respect to Petitioners' ESA arguments.[54] *See, e.g.*, *Pyramid Lake Paiute Tribe of Indians v. Dep't of Navy*, 898 F.2d 1410, 1416 (9th Cir. 1990).

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[53] The preamble to this 2019 rulemaking explained that, among others, the term "jeopardize the continued existence of" is in the plain language of ESA section 7(a)(2), and thus refers to a determination made about the effect of a federal action, not "about the environmental baseline for the proposed action or about the pre-action condition of the species." 84 Fed. Reg. at 44,987.

[54] As explained above in note 11, Petitioners' lawsuit challenging the Biological Opinion in federal court was dismissed. *See Diné Citizens Against Ruining Our Environment v. U.S. Bureau of Indian Affairs*, No. CV-16-08077-PCT-SPL, 2017 WL 4277133, at *1 (D. Ariz. Sept. 11, 2017), *aff'd* 932 F.3d 843 (9th Cir. Ariz. July 29, 2019), *reh'g en banc denied*, No. 17-17320 (Dec. 11, 2019), *cert. denied* ___S. Ct.___ (2020 WL 3492672) (June 29, 2020).

For the reasons explained above, we deny review of Petitioners' challenges to EPA's compliance with CWA § 316(b), 33 U.S.C. § 1326(b), and the Endangered Species Act.[55]

VII. *CONCLUSION*

For the foregoing reasons, the Board denies the petition for review.

So ordered.

[55] We have considered all of the allegations in the Petition and we deny review as to all of them, whether or not they are specifically discussed in the opinion.