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

In Re:	)	
Four Corners Power Plant	)	**NPDES Appeal No. 19-06**
NPDES Renewal Permit: NN0000019	)	
Arizona Public Service Company (Permittee)	)	

ARIZONA PUBLIC SERVICE COMPANY'S SURREPLY TO PETITIONERS' CONSOLIDATED REPLY

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I. Introduction

The Arizona Public Service Company (APS), permittee for NPDES Permit No. NN0000019 (2019 Permit or Permit) for the Four Corners Power Plant (FCPP or Plant), files this surreply to Petitioners' Consolidated Reply Brief to EPA and APS' Response Briefs and to NTEC's Amicus Brief (Reply). Docket Index #24.

As demonstrated in APS's Response to Petition for Review (APS Response), Docket Index #8, and EPA Region 9's Response to the Petition for Review (EPA Response), Docket Index #11, the Region's Permit conditions and determinations were based on clear, straightforward analysis and a reasonable application of the NPDES regulations to the FCPP permit record. Petitioners' Reply attempts to muddy the water by introducing a number of new issues and baseless arguments that are not properly before the Environmental Appeals Board (EAB or Board). *See* 40 C.F.R. § 124.19(c)(2) ("Petitioner may not raise new issues or arguments in the reply."). These new issues and arguments are rife with factual and legal inaccuracies, and serve only to obfuscate the Region's reasoned determinations. As permitted by the Board, Docket Index #29, APS files this surreply to address these new issues and arguments and to assist the Board in resolving the disputed claims.

II. Many of Petitioners' Reply Arguments Fail to Meet the Procedural Requirements for EAB Review

The Region reasonably set the terms and conditions of the Permit, taking into account the concerns Petitioners raised in their previous EAB challenge and during the comment period. In their Reply, Petitioners again include arguments that fail to grapple with or address the Region's responses or the record, and for which review should be denied. Both EPA's and APS's Responses detailed arguments in the Petition that did not comply with 40 C.F.R.

§ 124.19(a)(4)(ii), and some of those are repeated in Petitioners' Reply,[1] but APS's surreply focuses on the new arguments. In the sections below, APS identifies where Petitioners' new arguments fail to provide citations to the relevant sections of the Agency's RTC or explain why they are clearly erroneous or otherwise warrant review, and therefore have failed to meet the procedural requirements of 40 C.F.R § 124.19(a)(4)(ii).

In addition, because they were not raised in comments before the Agency, Petitioners are precluded from now asserting all of the new arguments that were included in their Reply, which are discussed in more detail in the following sections. *See* 40 C.F.R. § 124.13 (commenters must raise "all reasonably ascertainable issues and submit all reasonably *available arguments* supporting their position") (emphasis added). The Reply neither demonstrates that Petitioners (or any other party) raised these arguments during the public comment period nor explains why these issues were not required to be raised under § 124.13. Accordingly, for all new arguments Petitioners included in their Reply, review should be denied.

III. The Region Reasonably Determined that Morgan Lake Is a Non-Jurisdictional Waste Treatment System

APS and the Region explained in their Responses that the Region's determination that Morgan Lake is a "waste treatment system" (WTS) is consistent with EPA's longstanding interpretation that steam electric cooling ponds qualify as WTSs and that an obsolete parenthetical in the pre-2015 regulations referencing cooling ponds does not prevent the exclusion's application. APS Response at 14-16 (citing Memorandum from Robert Perciasepe,

[1] For example, Petitioners again argue that the Region did not conduct an independent determination of the proper "best available technology economically achievable" (BAT) applicability date, Reply at 19-21, but they again ignore EPA's description of its independent review in the Response to Comments. *See* Response to Comments Document, APS Four Corners Power Plant, NPDES Permit No. NN0000019 at 16-18 (final Sept. 30, 2019) (RTC), Attachment 3 to APS's Response; Administrative Record (AR) #26.d. As to this issue and elsewhere, Petitioners time and again fail to explain why the Region's response is clearly erroneous or otherwise warrants review.

Assistant Adm'r, Office of Water, EPA, to W. Ray Cunningham, Dir., Water Mgmt. Div., EPA, "Water of the United States" Determination for a Proposed Cooling Pond Site in Polk County, Florida (Dec. 13, 1993) (1993 Perciasepe Memo), Attachment 18 to APS's Response; AR #29); EPA Response at 20-24 (same).

Petitioners argue in their Reply that, if EPA wanted to include "cooling ponds" within the WTS exclusion, it should have promulgated amended regulations. Reply at 9. In fact, as APS and EPA explained in their Responses, EPA and the U.S. Army Corps of Engineers (Corps) (together, agencies) did just that with their 2015 Waters of the United States (WOTUS) Rule, which was in effect at the time of the 2019 Permit's issuance. *See* 80 Fed. Reg. 37,054, 37,097 (June 29, 2015) (2015 Rule) (eliminating the cooling pond parenthetical at 40 C.F.R. § 122.2, which the agencies did not consider to be a substantive change). Likewise, the agencies' 2019 WOTUS Rule, which was recently signed and finalized, explicitly defines "waste treatment system" to include cooling ponds, "codify[ing] the agencies' longstanding practice," and characterizes the deletion of the obsolete cooling ponds parenthetical in the pre-2015 regulations as a "ministerial" change. 84 Fed. Reg. 4154, 4192, 4193, 4211-12 (Feb. 14, 2019) (Proposed Rule); Corps & EPA, The Navigable Waters Protection Rule: Definition of "Waters of the United States"; Final Rule, at 273, 336-37 (pre-publication version signed Jan. 23, 2020) (2019 Final Rule), https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf, Attachment 1.

In addition to repeating several arguments from its Petition, the Reply raises several new arguments related to the WTS exclusion that are not properly before the Board and fail to demonstrate that the Region's determination that Morgan Lake is not jurisdictional is clearly erroneous or otherwise warrants review. APS addresses each of these arguments in turn.

A. Morgan Lake Performs Waste Treatment

Petitioners, for the first time, argue that Morgan Lake is not a WTS because it "provides *no treatment* and thus was *not* designed to meet any treatment requirements of the Clean Water Act [CWA]." Reply at 9-11. Petitioners' arguments are unavailing because the record demonstrates that Morgan Lake dissipates heat and controls total dissolved solids (TDS), which is a well-recognized form of waste treatment, and because the Region reasonably determined that Morgan Lake is "designed to meet the requirements of the Clean Water Act." 40 C.F.R. § 122.2 (2015).

The Region's determination that Morgan Lake is not a WOTUS was governed by the WOTUS definition at 40 C.F.R. § 122.2 (2015), which provides that "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the] CWA … are not waters of the United States."[2]

While the 2015 Rule and the pre-2015 regulations do not define "waste treatment," contrary to Petitioners' new assertion, Reply at 10-11, it is well understood that dissipating heat is considered "waste treatment." *See, e.g., Commonwealth ex rel. Va. State Water Control Bd. v. Blue Ridge Envtl. Def. League, Inc.,* 694 S.E.2d 290 (Va. Ct. App. 2010), *aff'd,* 720 S.E.2d 138 (Va. 2014) (per curiam) (confirming that the Virginia State Water Control Board properly applied the waste treatment exclusion to a purpose-built waste heat treatment lake constructed in WOTUS in 1972); 79 Fed. Reg. 48,300, 48,303, 48,307 (Aug. 15, 2014) (stating in the preamble to EPA's 2014 § 316(b) Rule that "[t]he purpose of cooling water withdrawals is to dissipate that portion of the heat that is a by-product of industrial processes that facilities have not used and

[2] As noted above and in APS's Response, Morgan Lake would also qualify for the WTS exclusion both under the pre-2015 WOTUS regulations, which are in effect now, 84 Fed. Reg. 56,626 (Oct. 22, 2019), and the new WOTUS regulations recently finalized. *See* APS Response at 7.

therefore view as waste heat" and that the cooling ponds used as part of this process "may qualify for the waste treatment exclusion found in the definition of a [WTS] at 40 CFR 122.2"). Indeed, in the 1993 Perciasepe Memo, EPA found that the WTS exclusion can be interpreted "as encompassing all steam electric cooling ponds," thereby finding that ponds that dissipate heat provide waste treatment. *See* 1993 Perciasepe Memo at 4-5.[3] In addition, both the 2015 and 2019 WOTUS regulations recognize cooling ponds as waste treatment features.[4]

As the Region stated in the RTC, Fact Sheet, and EPA Response, Morgan Lake performs "treatment" by dissipating heat from the FCPP and controlling the buildup of TDS. *See, e.g.,* RTC at 42 ("Morgan Lake is a man-made cooling pond that was constructed in uplands 'to serve as part of the [FCPP's] recirculating cooling water system, providing both a reliable supply of cooling water and ***waste heat treatment***.'") (emphasis added); *id.*at 42 ("As an artificial cooling pond designed and constructed to be used as treatment for the FCPP's waste heat …."); National Pollutant Discharge Elimination System Permit Fact Sheet at 3 (Sept. 2019) ("APS primarily discharges in order to regulate total dissolved solids ("TDS") build up in Morgan Lake.") (Fact Sheet), Attachment 2 to APS's Response; AR #26.c; EPA Response at 21.[5] As EPA's Response

[3] Petitioners again mischaracterize the 1993 Perciasepe Memo as addressing only a non-relevant, fact-specific issue, Reply at 8, but EPA's Response appropriately explains that the Memo's plain language demonstrates that it served a broader purpose and can be applied to other steam-electric cooling ponds, such as Morgan Lake. *See* EPA Response at 23 n.10; 1993 Perciasepe Memo at 4-5.

[4] *See* 80 Fed. Reg. at 37,099 (explaining that certain cooling ponds "are subject to the waste treatment system exclusion" and will "remain excluded under the [2015] [R]ule."); 84 Fed. Reg. at 4211; 2019 Final Rule at 273, 336-37 ("codify[ing] the agencies' longstanding practice" by defining "waste treatment system" to "include[] 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 (or eliminating such discharge).").

[5] Throughout this proceeding, including in their Reply, Petitioners fail to look at the totality of the record and the basis for the Region's decision. Instead, they rely on selective statements plucked from the record and ignore later documents that do not support their arguments. For example, Petitioners' argument that Morgan Lake does not provide waste treatment largely points to APS's 2005 NPDES application to argue that APS stated that Morgan Lake provided no treatment. Reply at 11. But APS's revised application, submitted in 2013, describes the treatment of Morgan Lake as "closed-cycle recirculated cooling water pond." APS Revised Permit App. Sch. 2C

states, the record demonstrates that Morgan Lake is properly serving its treatment purpose as discharge monitoring reports confirm that there have been no observed exceedances of temperature limits for both monthly average and daily maximum limits for at least nine years. *See* EPA Response at 21 (citing Discharge Monitoring Reports, AR #6.3); *see also* EPA, Enforcement and Compliance History Online, *Detailed Facility Report* (report generated Feb. 10, 2020) (the FCPP detailed facility report that is accessed through the ECHO link provided by the Region in AR #6.3), Attachment 3.

B. The Region Reasonably Determined that Morgan Lake Satisfies the WTS Exclusion's "Designed to Meet the Requirements of the Clean Water Act" Provision

Likely because they cannot support their assertion that Morgan Lake is not performing treatment, Petitioners conflate the inquiry of whether a feature performs treatment with the WTS exclusion's requirement that such features are "designed to meet the requirements of the [CWA]." Puzzlingly, Petitioners now suggest that Morgan Lake does not satisfy the "designed to meet the requirements of the [CWA]" provision because they allege Morgan Lake is not performing treatment that is designed to protect downstream receiving waters. *See* Reply at 10-11. A WTS may be designed to meet the requirements of the CWA where, for example, it 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); *see also* RTC at 45 ("[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"). The inclusion of a feature (such as a cooling pond) in an NPDES-permitted treatment system indicates that treatment will be

(Feb. 15, 2013), AR #2.f.3, Attachment 2. Petitioners ignore the revised application and again "ignore[] the subsequent developments in the agency's long-term effort to characterize the decades-old man-made Morgan Lake" and the response provided by the Region on this issue. RTC at 43.

conducted within that system to meet requirements imposed on discharges from that system to downstream waters. *See City of Healdsburg,* 496 F.3d at 1002 (citing 45 Fed. Reg. 48,620 (July 21, 1980)) ("The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds.").

The 2019 Permit, like the 2001 Permit before it, sets requirements for discharges of treated wastewater from Morgan Lake to downstream waters. For example, Morgan Lake is designed to help control TDS concentrations. As the RTC notes, the 2019 Permit:

> require[s] the applicant to monitor TDS discharges from Morgan Lake's Outfall 001 into No Name Wash; if monitoring shows that elevated concentrations of TDS would impair the beneficial uses of the receiving water or would cause acute environmental, health or other impacts, EPA may set an appropriate numeric limit under the Permit's re-opener clause.

RTC at 32. APS's 2001 permit had similar provisions. *See* APS 2001 Permit at 9, Attachment 6 to APS's Response; AR #28.b. The Region appropriately determined that Morgan Lake, an artificial cooling pond designed and constructed to treat FCPP's waste heat prior to discharge, which is incorporated into the FCPP NPDES permit as part of the plant's treatment system, satisfies the WTS exclusion's "designed to meet the requirements of the [CWA]" provision. RTC at 42.

C. The Region's Reasonable Finding that Morgan Lake Was Constructed in Uplands Further Supports But Is Not Necessary for Application of the WTS Exclusion

As part of "the agency's long-term effort to characterize" Morgan Lake and determine how it should be evaluated under the CWA, the Region collected historic information on Morgan Lake's construction and performed site visits to gather current information. *Id.* at 43. As part of its evaluation, the Region made a finding that "Morgan Lake is a man-made water body constructed wholly in dry upland areas, and which did not impound any existing water of the United States." Memorandum from Gary Sheth, EPA Region 9, to Administrative Record for

NPDES Permit NN0000019 and NPDES Permit NN0028193, "Morgan Lake Status" (July 20, 2017) (2017 Sheth Memo), Attachment 9 to APS's Response; AR #14.c; RTC at 42-43. Petitioners mischaracterize the Region's finding that Morgan Lake is not a WOTUS as "conclusive[ly] rel[ying]" on an "'uplands' exemption." Reply at 5, 12. They further allege, for the first time, that in finding that Morgan Lake was constructed in uplands, the Region failed to apply an unspecified "approved methodology" requiring "evidence of hydric soils." *Id.* at 5, 12-13. Petitioners' claims are unfounded and unavailing for a number of reasons.

Contrary to Petitioners' characterization, the Region's determination that Morgan Lake is not jurisdictional is based on its conclusion that, as "an artificial cooling pond designed and constructed to be used as treatment for the FCPP's waste heat, Morgan Lake is a waste treatment system." RTC at 42; Fact Sheet at 2 n.1. The determination that Morgan Lake was constructed in uplands further supports—but is not necessary for—the Region's application of the WTS exclusion here. As APS's Response noted, APS Response at 14, the WTS exclusion has a long history, and parts of it have become obsolete via later EPA rulemaking and guidance. In addition to the cooling pond parenthetical, discussed in the beginning of Section III above, the other obsolete sentence is language that EPA formally suspended (and, as a result, made legally ineffective) that would have suggested that WTS features must be man-made bodies of water which neither were originally created in WOTUS nor resulted from impoundments of WOTUS. *See* 45 Fed. Reg. 48,620 (July 21, 1980), Attachment 4; *see also* APS Response at 14 n.8.[6] Although that suspended language is no longer in effect,[7] and Morgan Lake was created prior to

[6] The WTS provision in the pre-2015 WOTUS regulations (*see, e.g.*, 40 C.F.R. § 122.2 (2014)) and the 2015 Rule (40 C.F.R. § 122.2 (2015)), both contain a note stating that this language was suspended. The 2019 Final Rule removes the suspended language from the WTS provision altogether. *See* 2019 Final Rule at 336-37.

[7] Since 1980, EPA, the States, and reviewing courts have properly recognized that nothing in the law or the agencies' regulations precludes the application of the WTS exclusion to systems created before the CWA was

the CWA, Petitioners' Comments on the 2019 Draft FCPP Permit, AR #20.1.a, argued that Morgan Lake is not an excluded WTS because it "resulted from the impoundment of waters from the San Juan River, a water of the United States" and "was not constructed wholly in uplands." Petitioners' Comments at 32, 33. In response, the Region explained that information it reviewed demonstrates that Morgan Lake was created in uplands. RTC at 43 (citing the 2017 Sheth Memo and supporting documents).

Although it was not necessary for the Region's determination that Morgan Lake is a WTS, the Region reasonably determined that Morgan Lake was created in uplands. While the pre-2015 WOTUS regulations and 2015 WOTUS Rule do not define "upland," the 2019 Final Rule defines "upland" as "any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) … and does not lie below the ordinary high water mark or the high tide line …" of a jurisdictional water, 2019 Final Rule at 337, which is consistent with the agencies' longstanding interpretation.[8] The Region's uplands finding was based on its review of topographical maps of

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enacted, the lawful construction of a WTS in an impounded portion of otherwise jurisdictional waters, or the use of such systems once constructed. *See, e.g.,* 45 Fed. Reg. at 48,620 (suspending language regarding creation in or by impounding WOTUS because it was "overly broad"); Memorandum from Jeffrey G. Miller, Acting Assistant Adm'r for Enforcement, EPA, to The Adm'r, EPA, "Suspension of portion of definition of 'Waters of the United States' in Consolidated Permit Regulations – ACTION MEMORANDUM" (July 15, 1980), http://www.epa.gov/npdes/pubs/owm560.pdf, Attachment 5 (noting that inclusion of language prohibiting features that were created in or by impounding WOTUS from qualifying for the WTS exclusion "[i]f read literally, … could require many power plants and oil refineries (among other industries) to apply for NPDES permits for discharges into their ash ponds and treatment lagoons" and noting that EPA "did not intend this result."); 63 Fed. Reg. 51,164, 51,183 (Sept. 24, 1998) (EPA's approval of Texas' NPDES program acknowledges "nothing in CWA § 402 or EPA's implementing regulations *per se* prohibits using impounded portions of naturally occurring surface waters as waste treatment systems."); *Commonwealth ex rel. Va. State Water Control Bd.,* 694 S.E.2d at 300 (holding that WTS exclusion properly applied to waste treatment facility constructed in WOTUS in 1972).

[8] *See, e.g.,* Corps, *Corps of Engineers Wetlands Delineation Manual* at A13 (Jan. 1987), https://www.nae.usace.army.mil/Portals/74/docs/regulatory/JurisdictionalLimits/wlman87.pdf; 84 Fed. Reg. at 4188 ("The term upland has been used in [WOTUS] program implementation for at least a decade following the agencies' *Rapanos* Guidance and thus is familiar to the regulated community and field staff."). Even the case cited by Petitioners, *In re The Hoffman Group*, CWA Appeal No. 89-2, 1990 WL 657313, at *10 (EAB Nov. 19, 1990), recognizes this well-established definition.

the area containing Morgan Lake, pictures of the area from 1961 before Morgan Lake was created, and the down-gradient zone extending to the Chaco Wash, which demonstrate that the area in which Morgan Lake was created was dry land, not wetlands or areas below the ordinary high water mark of a jurisdictional water. RTC at 43; 2017 Sheth Memo.[9] It is also supported by the fact that "Morgan Lake was created by pumping water from the San Juan River and … would dry up and cease to exist if APS ceased replenishing it with water from the San Juan River." RTC at 43.

Petitioners' argument that Morgan Lake is jurisdictional because it has a hydrologic connection to other WOTUS, Reply at 12-13, is similarly unavailing because the WTS exclusion does not require hydrologic isolation from jurisdictional waters. Morgan Lake, by design, takes in water from the San Juan River, provides treatment for waste heat generated by FCPP, and then discharges a portion of the recirculated cooling water (*i.e.*, blowdown) to No Name Wash, which is connected to the Chaco River. Fact Sheet at 2-3. Indeed, it is expected that many WTS features would be connected to and require a § 402 NPDES permit for discharges into WOTUS. *See City of Healdsburg,* 496 F.3d at 1001. Nor does an artificial hydrologic connection created by the construction of Morgan Lake and maintained through pumping change the fact that Morgan Lake was constructed in dry uplands. *See* RTC at 43.

[9] Again, Petitioners selectively rely on documents from the record while ignoring subsequent documents and the Region's RTC addressing those documents. Petitioners try to make much of a 2005 Letter from EPA to APS regarding CWA § 316(b) (2005 316(b) Letter) stating that Morgan Lake was created from a dry wash and suggest that statement means that Morgan Lake was not created in uplands. Reply at 12. The Region specifically addressed this 2005 316(b) Letter in its RTC, explaining that Petitioners read too much into the 2005 316(b) Letter, which "did not, however, purport to be making any kind of specific site evaluation or jurisdictional determination, nor did it consider whether the lake was a jurisdictional 'water of the United States.'" RTC at 43. While the Region based its permit decision on the totality of the record, including the Region's subsequent evaluation of Morgan Lake and how it was constructed, Petitioners fail to grapple with the Region's response and continue to present an incomplete characterization of the documents in the record. *Id.*

For all of these reasons, Petitioners' new arguments again fail to show that the Region's determination that Morgan Lake is an excluded WTS feature not subject to CWA jurisdiction[10] is clearly erroneous or otherwise warrants review.

IV. The Region's Determination That FCPP Is a Closed-Cycle Recirculating System Appropriately Focused on Whether the System Minimizes Withdrawals

At base, the inquiry as to whether a facility operates a "closed-cycle recirculating system" under EPA's § 316(b) regulations is an evaluation of the efficiency of the cooling system ("how well a system recycles intake water before replacing it with new withdrawals") and, in particular, whether the system "minimizes the withdrawal of water for cooling purposes" relative to a once-through cooling system. *See* 40 C.F.R. § 125.92(c); 79 Fed. Reg. at 48,326-27.

In their Reply, Petitioners argue for the first time that FCPP does not operate a closed-cycle system because "[t]he majority of total diverted water must be lost to causes other than evaporation." Reply at 28, 29. In an attempt to shift focus away from the key inquiry—minimization of water withdrawn compared to a once-through system—Petitioners make baseless assertions about FCPP's water loss and introduce new percentages of diverted water that Petitioner speculates is "likely to be accounted for by evaporative losses." *Id.* at 29-30.[11] Petitioners' new arguments, as with those in the Petition, are without merit and fail because the Region reasonably determined that FCPP is a closed-cycle recirculating system.

[10] Petitioners also argue that the Region failed to undertake a jurisdictional determination under some unspecified "approved methodology." Reply at 13. The Region's determination was that, consistent with applicable regulations, Morgan Lake is not jurisdictional. The Region provided a reasoned explanation for its determination. *See* 2017 Sheth Memo; RTC 42-45.

[11] Petitioners ignore the data provided in the administrative record that was the basis for the Region's determination and instead seek to introduce evaporation rate data from a reservoir that is hundreds of miles from the FCPP site. *See* Reply at 29 n.69. That data, which is not relevant to the closed-cycle recirculating system inquiry, is not properly before the Board.

As defined by 40 C.F.R. § 125.92(c), 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" *or* demonstrates "that make-up water withdrawals attributed specifically to the cooling portion of the cooling system have been minimized." In the RTC, the Region methodically explained how it arrived at its determination that FCPP is a closed-cycle recirculating system. Although not required, the Region found that FCPP actually fulfills both requirements. RTC at 46-47. The Region reasonably relied on the data and updated information submitted by APS about the quantity of water used in its operations. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 623 (D.C. Cir.) (per curiam), *on reh'g en banc*, 671 F. App'x 822 (D.C. Cir. 2016), and *on reh'g en banc in part*, 671 F. App'x 824 (D.C. Cir. 2016) (EPA conclusion that data is sufficient receives an "extreme degree of deference"); *Kennecott Greens Creek Mining Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 954-55 (D.C. Cir. 2007) ("extreme degree of deference" provided to agency evaluation of "data within its technical expertise").[12] Based on that data, the Region performed its own calculations to evaluate whether FCPP minimizes make-up water withdrawals as compared to once-through cooling systems. RTC at 47.

Because APS withdraws on average 14.3 million gallons per day (MGD) of water from the San Juan River, but circulates approximately 1,000 to 1,700 MGD through Morgan Lake, the Region determined that "FCPP uses only approximately 1 percent of the water from the San Juan River that it would use if it were a once through system." *Id.* The following calculation supports the 1 percent figure:

[12] Ignoring the Region's RTC, Petitioners again suggest that a statement in APS's 2005 application means that FCPP does not meet the definition of closed-cycle recirculating system. The Region acknowledged that there were inconsistent statements on this issue in the past and provided a reasoned explanation for its position in the RTC. RTC at 46-48. The Region's determination that FCPP operates a closed-cycle recirculating system was made by evaluating the totality of the information provided about the facility during the application process, and by determining that the system qualifies as a closed-cycle system under 40 C.F.R. § 125.92(c).

- **14.3 MGD** [FCPP withdrawal from San Juan] **divided by 1,700 MGD** [high end approximation of amount of water circulated through Morgan Lake], **x 100 = 0.84%**
- **14.3 MGD** [FCPP withdrawal from San Juan] **divided by 1,000 MGD** [low end approximation of amount of water circulated through Morgan Lake], **x 100 = 1.43%**

See id. By comparison, if the FCPP were a once-through system that did not reuse water multiple times for cooling purposes, it would withdraw an amount much closer to 1,000 to 1,700 MGD to circulate through the facility for cooling purposes. Because FCPP is a closed-cycle cooling system that continually recycles cooling water and withdraws only to replenish that which is lost due to blowdown, drift, and evaporation, it withdraws only approximately 1 percent of the water from the San Juan River that it would use if it were a once-through system, the Region reasonably determined that FCPP minimizes withdrawals as required by 40 C.F.R. § 125.92(c).

Petitioners, also for the first time, argue that the Region failed to present a "water balance" analysis to demonstrate that FCPP operates as a closed-cycle cooling system. Reply at 30-31. However, calculation of total evaporative losses, rainfall runoff additions, and blowdown discharges as compared against water diversions from the San Juan River—all of which would be necessary for such a "water balance" analysis—would reveal very little, if anything, as to whether the FCPP operates a closed-cycle cooling system. This analysis would show only the ultimate destination (*i.e.*, blowdown as opposed to evaporative loss) for the approximately 14.3 MGD of water withdrawn from the San Juan River.[13] Such an analysis would not account for the 1,000 and 1,700 MGD that FCPP actually recirculates for cooling purposes, which are quantities that are between 70 and 118 times greater than what is diverted from surface water resources.

[13] As APS's Response explains, the 2018 Carbon Disclosure Project (CDP) Report cited by Petitioners, Reply at 29, is irrelevant for similar reasons. *See* APS Response at 38 n.25 (noting that the 2018 CDP report to which Petitioners cite, which is largely focused on the Plant's water discharge and re-entry (instead of its recirculation system), does not analyze the efficiency of the cooling system for purposes of CWA § 316(b)).

See RTC at 47. As stated earlier, the critical analysis concerns how much water is withdrawn from the San Juan versus the quantity used for cooling purposes, not a balancing of the minimized water amount withdrawn from the San Juan.

Petitioners' new arguments seek to distract the Board with suggestions that new data regarding the Plant's water loss is somehow necessary for a closed-cycle determination, Reply at 29, but they fail to demonstrate that the Region's determination that FCPP is a closed-cycle recirculating system or the calculations that support that determination are erroneous or otherwise warrant review.

V. Petitioners' Water Quality Standards Arguments Are Not Properly Before the Board

Petitioners allege that the Region's findings in support of the Permit are *per se* erroneous because Morgan Lake does not have federally-approved water quality standards. Reply at 5 n.7. Petitioners' new argument is a thinly-veiled attempt to seek the Board's review of CWA section 303 water quality standards decisions. As discussed throughout EPA's and APS's Responses, the Region reasonably determined that Morgan Lake and No Name Wash are not WOTUS, and, as such, federal water quality standards are neither required nor appropriate pursuant to the CWA. APS Response at 20-26; EPA Response at 25. Petitioners' new formulation of their water quality standards argument essentially asks the Board to find that any permit involving a water that is not subject to established water quality standards is "clearly erroneous." This illogical proposition has no basis in the CWA or EPA's NPDES regulations and is contrary to CWA § 402(a)(1)(B).

As discussed at length in the RTC, in the absence of federally approved water quality standards, EPA permit writers must rely on "'best professional judgment'" to determine the appropriate targeted levels of protection. RTC at 9. Here, the Region reasonably relied on the

Navajo Nation water quality standards for the "downstream" Chaco River as a reference tool for defining the likely best targets for numeric and narrative goals that should be used in determining impacts to Upper No Name Wash. *See* EPA Response at 25-26. The Board does not have jurisdiction to review the lack of federal water quality standards for Morgan Lake. *Id.* (citing *In re City of Hollywood, Florida*, 5 E.A.D. 157, 175 (EAB 1994)).

VI. Conclusion

The Board should deny review for new arguments raised in Petitioners' Reply. Even with those new arguments, however, Petitioners fail to meet the Board's procedural requirements and have failed to demonstrate the Region's permit decisions are based on clearly erroneous findings of fact or conclusions of law, or otherwise warrant review. Accordingly, APS respectfully requests that the Board deny the Petition for Review.

Respectfully submitted,

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Dated: February 12, 2020

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This brief complies with the 7,000 word limitation for reply briefs found at 40 C.F.R. § 124.19(d)(3). *See* 40 C.F.R. § 124.19(d)(1)(iv).

Dated: February 12, 2020

/s/ Kerry L. McGrath
Kerry L. McGrath

TABLE OF ATTACHMENTS

Attachment	Document
1	Corps & EPA, The Navigable Waters Protection Rule: Definition of "Waters of the United States"; Final Rule (pre-publication version signed Jan. 23, 2020)
2	APS Revised Permit Application Schedule 2C (Feb. 15, 2013), AR #2.f.3
3	EPA, Enforcement and Compliance History Online, *Detailed Facility Report* (report generated Feb. 10, 2020)
4	EPA, Consolidated Permit Regulations; Suspension of Portion of Final Rule; 45 Fed. Reg. 48,620 (July 21, 1980)
5	Memorandum from Jeffrey G. Miller, Acting Assistant Administrator for Enforcement, EPA, to The Administrator, EPA, "Suspension of portion of definition of "Waters of the United States" in Consolidated Permit Regulations – ACTION MEMORANDUM (July 15, 1980)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ARIZONA PUBLIC SERVICE COMPANY'S SURREPLY TO PETITIONERS' CONSOLIDATED REPLY was served via U.S. Postal Service, first class mail, and e-mail this 12th day of February, 2020, upon the persons listed below:

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