

**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 RESPONSE TO
PETITION FOR REVIEW**

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I. Introduction

Pursuant to 40 C.F.R. § 124.19(b)(3), the permittee, Arizona Public Service Company (APS), provides this Response to the Dine' Citizens Against Ruining the Environment, et al. (Petitioners) Petition for Review (Petition) of National Pollutant Discharge Elimination System (NPDES) Permit No. NN0000019 for the Four Corners Power Plant (FCPP or Plant), Docket Index #1, which was issued by the U.S. Environmental Protection Agency (EPA or Agency) Region IX (Region) on September 30, 2019 (2019 Permit or Permit), Attachment 1.

The Environmental Appeals Board (EAB or Board) should deny Petitioners' request for review of the 2019 Permit. 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. Petitioners largely ignore the Region's robust record and response to comments, which support the Region's determinations, including (without limitation): the determination that Morgan Lake is not a "water of the United States" (WOTUS) and, as such, the Region is not required to regulate discharges *into* or set water quality standards for Morgan Lake; the applicability date for effluent limitations governing bottom ash transport water discharges; and the determination that the 2019 Permit complies with Clean Water Act (CWA) § 316(b) and the Endangered Species Act (ESA). Across the board, Petitioners fail to demonstrate that the Permit terms and conditions 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.

II. Factual Background

A. Facility Description

FCPP provides electrical power primarily to utilities in Arizona and New Mexico. 2019 Permit Fact Sheet, at 2 (Sept. 2019) (2019 Fact Sheet), Attachment 2. The Plant is located near

Fruitland, New Mexico, within the Navajo Nation, “and is partially owned and operated by APS on behalf of itself as well as the Salt River Project Agricultural Improvement and Power District, Navajo Transitional Energy Company, LLC (NTEC), Public Service Company of New Mexico, and Tucson Electric Power Company.” *Id.* Following the closure of three units in 2013, FCPP now has two operational units, Units 4 and 5, and has a capacity of 1540 megawatts (MW). *Id.*

The cooling water for Units 4 and 5 comes from an adjacent cooling pond, the 1,200-acre Morgan Lake. *Id.* FCPP operates a closed-cycle recirculating system, circulating from approximately 1,000 to 1,700 million gallons of water per day (MGD) through Morgan Lake. *Id.* at 3. Morgan Lake withdraws an average of 14.3 MGD of water from the San Juan River, *id.* at 2, “as make-up water to replenish losses that have occurred due to blowdown, drift, and evaporation within Morgan Lake and the cooling system.” *Id.* at 9. Approximately 99 percent of the water withdrawn from the San Juan River is reused for cooling purposes. Response to Comments Document, APS Four Corners Power Plant, NPDES Permit No. NN0000019 at 47 (final Sept. 30, 2019) (RTC), Attachment 3. Without these withdrawals from the San Juan River, which travel through a two-mile pipeline to Morgan Lake, this cooling pond would dry up and cease to exist. *Id.* at 43. In this respect, Morgan Lake functions to store cooling water for the FCPP, while also treating and storing water prior to blowdown through an outfall channel. APS Comments on Proposed NPDES Permit NN0000019 for FCPP at 1 (July 1, 2019).

The intake structure on the San Juan River consists of two 10-foot by 10-foot intake bays, placed perpendicularly to the flow of the river. *Id.* at 9. The intakes are screened with approximately 1-inch by 3-inch openings. *Id.* The intake system is equipped with a weir and a channel with a gate, providing the ability to control water depths at the intake location. 2019 Fact Sheet at 9.

As a result of ESA § 7 consultation between the U.S. Fish and Wildlife Service (FWS), EPA, and the Office of Surface Mining Reclamation and Enforcement (OSMRE), FWS issued a Biological Opinion for the FCPP and Navajo Mine Energy Project (Apr. 8, 2015) (2015 BO), Attachment 4. In accordance with the 2015 BO, APS has implemented an FWS-approved Pumping Plan to minimize impingement and entrainment of fish, fish larvae, and fish eggs at the San Juan intake system, which has resulted in major changes to the San Juan River intake system. *See* 2015 BO at 144.

FCPP has its own domestic treatment package plant with capacity of 30,000 gallons per day (GPD). 2019 Fact Sheet at 3. Chemical metal cleaning and flue gas desulfurization (FGD) wastewater is sent to a series of two lined ash ponds. *Id.* Underflow from Units 4 and 5, metal cleaning wastes, and sanitary wastewater effluent from the package plant are combined before being sent to the ash ponds. *Id.* The two ash ponds operate in series. *Id.* The first is a single-lined pond where solids settle and floatables are removed and sold for revenue. *Id.* The effluent from the single-lined pond is sent through a siphon drain system downhill to the double-lined pond. *Id.* The double-lined pond serves as a retention basin holding the effluent before it is pumped for desulfurization reuse. *Id.* To comply with federal Coal Combustion Residual (CCR) regulatory requirements, APS must initiate closure of the ash ponds by October 31, 2020. *See* 40 C.F.R. pt. 257, subpt. D (CCR Rule). The FCPP also has an extensive seepage intercept system, construction of which was completed in 2013, that captures and eliminates groundwater seepage flow before seeps emerge and enter surface water. APS Comments at 12.

B. NPDES Permitting for FCPP

FCPP received its first NPDES permit in 1983. Attachment 5. The permit was reissued in April 2001, with the discharge point at the blowdown outfall from Morgan Lake into No Name Wash. Attachment 6. APS filed a timely application for renewal on October 5, 2005,

Attachment 7, and the permit was administratively extended. In response to an EPA request in February 2013, APS Comments at 2, APS submitted a revised application that contained information on current operations at the time, a description of the planned shutdown of Units 1, 2, and 3, and an analysis of likely impacts on surface water discharges to be regulated under a renewed NPDES permit. Attachment 8. The Region requested and APS provided topographical maps of the area containing Morgan Lake and the downgradient zone extending to the Chaco Wash, as well as photographs of the area that now contains Morgan Lake, taken during its construction. The Region issued a July 20, 2017 Memorandum to the Administrative Record for NPDES Permit NN0000019 [APS's NPDES permit for FCPP] and NPDES Permit NN0028193 [NTEC's NPDES permit for the Navajo Mine] (2017 Sheth Memo), Attachment 9, which confirmed that Morgan Lake is not a WOTUS but instead "a man-made water body constructed wholly in upland areas, and which did not impound any existing [WOTUS]." *Id.* at 1. EPA issued a final permit on June 12, 2018, but withdrew it in December 2018 after it was appealed to the EAB. 2019 Fact Sheet at 1.

After the withdrawal, the Region required APS to submit detailed information regarding applicability dates for "best available technology economically achievable" (BAT) limits. *See* NPDES Effluent Limitation Guideline[s] Compliance Project Summary, dated April 4, 2019 (Project Summary), Attachment 10. APS's submittal outlined its plans for three projects: (1) closure of the pond that receives bottom ash transport water (BATW); (2) construction of a new system to manage BATW,¹ and (3) development of a closed-loop BATW system to meet the

¹ The CCR Rule requires that FCPP cease sending BATW to the combined waste treatment pond by October 31, 2020 and initiate closure of the pond within 30 days later. Project Summary at 2. As a result, FCPP needs to build alternative BATW holding and treatment facilities, which will be complete by the second quarter of 2020. *Id.* at 3.

2015 rule’s BAT limits. *Id.* at 2-4. APS also explained why December 31, 2023 was “the soonest” the closed-loop system could be implemented. *Id.*

On May 30, 2019, the Region published a proposed permit and draft fact sheet for public comment, Attachments 11, 12, and issued a final permit on September 30, 2019. Under the 2019 Permit, Outfall 001 discharges from Morgan Lake into No Name Wash through a blowdown structure at the base of the cooling pond’s dam. 2019 Permit at 1. FCPP mostly discharges in order to regulate total dissolved solids (TDS) built up in Morgan Lake. APS Comments at 2. Those discharges are intermittent, with an average of four days per week of discharge throughout the course of the year. *Id.* at 3. The other three discharges authorized by the 2019 Permit are from internal outfalls: 01A (Condenser Cooling Water Discharge), 01B (Chemical Metal Cleaning Wastewater, which is not currently in use), and 01E (Combined Waste Treatment Pond Discharge). 2019 Permit at 5, 10-11.

III. Legal Background

A. Clean Water Act

Absent an NPDES permit issued under 33 U.S.C. § 1342, the CWA prohibits the “discharge of any pollutant,” *id.* § 1311(a), defined as “any addition of any pollutant to navigable waters from any point source,” *id.* § 1362(12). The CWA further defines “navigable waters” to mean “the waters of the United States, including the territorial seas.” *Id.* § 1362(7).

1. “Waters of the United States”

The WOTUS definition has a complex history. EPA and the U.S. Army Corps of Engineers (Corps) (together, the Agencies) have issued various regulations and guidance documents over the years, creating much confusion as to which standards apply and which features on the landscape qualify as WOTUS. *See, e.g.*, 40 C.F.R. § 122.2 (1988); 40 C.F.R. § 122.2 (2015).

The reach of WOTUS jurisdiction is informed by Supreme Court precedent. Most recently, in the fractured *Rapanos* decision, the plurality found that WOTUS jurisdiction extends only to “relatively permanent ... water[s].” See *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality). Justice Kennedy set forth a different test for evaluating whether wetlands are WOTUS, focusing on the “significant nexus” between adjacent wetlands and navigable waters. *Id.* at 767 (Kennedy, J., concurring).²

The Agencies have grappled with how to apply their WOTUS regulations in light of Supreme Court precedent. Following *Rapanos*, the Agencies issued a 2008 guidance document, which allowed for jurisdiction if either *Rapanos* test is satisfied. EPA & Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*, at 4-6 (revised Dec. 2, 2008), <https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents> (2008 *Rapanos* Guidance), Attachment 13. In 2011, the Agencies took comment on a “Draft Guidance on Identifying Waters Protected by the Clean Water Act,” 76 Fed. Reg. 24,479 (May 2, 2011); however, this guidance was never finalized nor applied, and was later withdrawn.³

In 2015, the Agencies issued a final rule amending portions of the WOTUS regulations (adopting Justice Kennedy’s concurrence test in *Rapanos*), only to later have that regulation rescinded through a subsequent rulemaking, which has yet to take effect. 80 Fed. Reg. 37,054

² Circuit courts differ in application of the *Rapanos* decision. The Ninth Circuit has held that Justice Kennedy’s opinion is controlling. *United States v. Robertson*, 875 F.3d 1281, 1289 (9th Cir. 2017), *cert. granted, judgment vacated on other grounds*, 139 S. Ct. 1543 (2019). The Tenth Circuit has thus far avoided determining which approach applies.

³ See Amanda Palleschi, *Agencies Float CWA Jurisdiction Rule But Drop Plan for Interim Guide*, InsideEPA.com (Sept. 18, 2013), <https://insideepa.com/inside-epa/agencies-float-cwa-jurisdiction-rule-drop-plan-interim-guide>, Attachment 14, (EPA spokeswoman “confirmed that the guidance would be withdrawn from interagency review”).

(June 29, 2015) (2015 Rule). While various federal district courts enjoined the 2015 Rule, including within New Mexico,⁴ Morgan Lake, which is within the Navajo Nation, was not subject to an order enjoining the 2015 Rule. Two district courts have found that the 2015 Rule is unlawful and remanded to the Agencies. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019). Nonetheless, when the Region issued the 2019 Permit, the 2015 Rule was in effect and applied to Morgan Lake.

The Agencies' recently-issued 2019 Repeal Rule (effective December 23, 2019) will repeal the 2015 Rule and reinstate the pre-2015 regulations as informed by applicable agency guidance documents (i.e., 2008 *Rapanos* Guidance) and Supreme Court decisions. Now, the Agencies are in the process of promulgating a new WOTUS definition, which would replace the 2015 Rule and the pre-2015 regulations. *See* 84 Fed. Reg. 4154 (Feb. 14, 2019) (2019 Proposed WOTUS Rule).

Regardless of the confusion of the various iterations of WOTUS regulations, litigation, and guidance, one constant is the exclusion of waste treatment system (WTS) features from the WOTUS definition. The WTS exclusion applied in the pre-2015 regulations, 40 C.F.R. § 122.2 (2014); it applies under the 2015 Rule, 80 Fed. Reg. at 37,114; and it would apply under the Agencies' new Proposed Rule, if finalized, *see* 84 Fed. Reg. at 4211.

2. Water Quality Standards

CWA § 303(c) requires states to establish water quality standards to protect beneficial uses of the receiving water. 33 U.S.C. § 1313(c). When state-specific water quality standards have not been developed or approved by EPA, EPA must propose and/or promulgate standards for a state until state standards are ultimately adopted and approved. *Id.* § 1313(c)(4)(A); 40

⁴ *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

C.F.R. § 131.5(a)-(b). EPA has discretion to establish water quality standards “in any case where the Administrator determines that a revised or new standard is necessary to meet [CWA] requirements.” 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. §§ 131.5(b), 131.22(b).

State water quality standards under EPA-authorized CWA programs generally do not apply on Indian reservations. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998); *see also* 81 Fed. Reg. 66,900, 66,901-02 (Sept. 29, 2016). Instead, water quality standards for Indian reservation waters are established through 33 U.S.C. § 1377(e), under which a tribe interested in establishing water quality standards must obtain “Treatment in the Same Manner as a State” (TAS) authority from EPA. Tribes with TAS designation are authorized to adopt and submit water quality standards to EPA for approval. 33 U.S.C. § 1377(e).

3. Effluent Limitations

The CWA requires EPA to develop national technology-based effluent limitations guidelines (ELGs) and standards. *Id.* § 1311(b)(1)(A). In 2015, EPA revised the steam electric ELGs, including those related to BATW. 80 Fed. Reg. 67,838 (Nov. 3, 2015) (2015 ELG Rule). The rule did not change the “best practicable control technologies currently available” (BPT) provisions for BATW, which set numeric limits for total suspended solids (TSS) and oil and grease. 40 C.F.R. § 423.12(b)(4). As to “best available technology economically achievable” (BAT), which represents the higher level of control for direct dischargers such as FCPP, the rule established a “no discharge” limit for BATW, with very limited exceptions. *Id.* § 423.13(k)(1)(i). Using a number of factors, NPDES permitting authorities are to determine the “as soon as possible” date (or applicability date) for compliance with the new BAT limits within the specified date range of November 1, 2020 to December 31, 2023. 40 C.F.R. § 423.11(t); 82 Fed. Reg. 43,494 (Sept. 18, 2017) (postponing the earlier date but leaving the later date intact).

EPA recently proposed amendments to the 2015 ELG Rule, including a discharge allowance for recirculating BATW systems. 84 Fed. Reg. 64,620 (Nov. 22, 2019).

4. Section 401 Water Quality Certification

Under 33 U.S.C. § 1341, a federal agency cannot permit an activity that may result in a discharge to WOTUS, including a Federally-issued NPDES permit, until the state or authorized tribe where the discharge originates has granted or waived § 401 water quality certification. The certification decision is based, in part, on the project's compliance with water quality standards. *Id.* § 1341(a)(2); 40 C.F.R. § 124.53(e). The certification procedures applicable to NPDES permits are governed by 40 C.F.R. Part 124, Subpart D. *See In re Ketchikan Pulp Co.*, 6 E.A.D. 675 (EAB 1996).

EPA provides § 401 certification in cases where a state or interstate agency has no certification authority, 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 131.5(c), and typically acts as the certifying authority on tribal lands when the tribe lacks certification authority. EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 7 (2010), <https://archive.epa.gov/epa/cwa-401/clean-water-act-section-401-water-quality-certification-handbook-2010.html>, Attachment 15.

5. Navajo Nation TAS for CWA §§ 303 and 401

In 2006, the Navajo Nation obtained TAS authority from EPA to administer its water quality standards program and for the purposes of water quality certifications. *See* EPA Region IX, *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) (2006 TAS Decision Document), Attachment 16. The Navajo Nation subsequently adopted Navajo Nation Water Quality Standards (Navajo Nation WQS) in 2007. 2019 Fact Sheet at 5. In its TAS application, the Navajo Nation expressly requested that the area leased for the FCPP

(including Morgan Lake) be excluded from TAS recognition. 2006 TAS Decision Document at 2.⁵ As a result, EPA retained responsibility for Morgan Lake, under CWA §§ 303(c) and 401.

6. Nonpoint Source Pollution

The CWA controls pollution of navigable waters through point source permitting and nonpoint source pollution management programs. Under the CWA, a “point source” is “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). “All other sources of pollution are characterized as ‘nonpoint sources,’” *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008), and do not require an NPDES permit, *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 406 (4th Cir. 2018) (hereinafter, *Dominion*). Instead, nonpoint source pollution is addressed by state management programs, 33 U.S.C. § 1329(b)(1); *see also id.* § 1251(a)(7), and other federal statutes, including the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.* RCRA specifically “covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater.” *Dominion*, 903 F.3d at 411.

7. CWA § 316(b) Requirements for Cooling Water Intake Structures

CWA § 316(b) authorizes EPA to 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). EPA’s “Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase 1 Facilities” (§ 316(b) Rule), sets forth requirements for existing facilities that use cooling water intake structures to withdraw greater than 2 MGD from WOTUS. 79 Fed.

⁵ The leased area includes No Name Wash (or No Name Arroyo, as described in the Navajo Nation’s 2005 clarification letter, Attachment 17), but No Name Wash was not expressly mentioned in the TAS Decision Document, likely because it is not a listed water body in the Navajo Nation WQS.

Reg. 48,300 (Aug. 15, 2014). The § 316(b) Rule directs the NPDES permit writer to establish the “best technology available” (BTA) to minimize impingement (entrapment against intake structure or screen) and entrainment (entering the intake structure) of aquatic organisms.

EPA’s § 316(b) Rule does not set a national BTA for entrainment. Instead, the permit writer is instructed to make a site-specific determination. 40 C.F.R. § 125.94(d). EPA recognized that “closed-cycle recirculating systems reduce entrainment (and impingement mortality) to the greatest extent and are the most effective performing technology.” 79 Fed. Reg. at 48,340. Operation of a “closed-cycle recirculating system” can satisfy BTA for entrainment. *See* 40 C.F.R. § 125.94(d). As to impingement mortality, EPA’s § 316(b) Rule sets forth seven compliance options for BTA, one of which is operation of a “closed-cycle recirculating system.” *See id.* § 125.94(c)(1). Operation of a closed-cycle recirculating system is an “essentially pre-approved technolog[y] requiring no demonstration or only a minimal demonstration that the flow reduction and control measures are functioning as EPA envisioned.” 79 Fed. Reg. at 48,321.

The permit writer may establish additional § 316(b) control measures, monitoring requirements, and/or reporting requirements to protect Federally listed species and critical habitat, including, for example, measures identified by FWS. *See* 40 C.F.R. § 125.94(g).

B. Endangered Species Act

ESA § 7(a)(2) requires that a federal action agency, “in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of ... [listed] species or result in the destruction or adverse modification of [critical habitat].” 16 U.S.C. § 1536(a)(2). If an action “may affect listed species or critical habitat,” the action agency and FWS must enter into formal consultation, during which FWS will: evaluate the current status of listed species or critical habitat (and environmental baseline); evaluate the effects of the action on listed species or

critical habitat; add the effects of the action and cumulative effects to the environmental baseline; and formulate an opinion on whether the action is likely to jeopardize listed species or result in adverse modification of critical habitat. 50 C.F.R. § 402.14(g).

IV. Standard of Review

The petitioner bears the burden of demonstrating that the Region based the permit decision on a “clearly erroneous” finding of fact or conclusion of law, or that the Board should exercise its discretion to review “an important policy matter” or an exercise of discretion by the Region. 40 C.F.R. § 124.19(a)(4). The petition must identify the contested permit condition or other specific challenge to the permit and clearly set forth, with legal and factual support, petitioner’s contentions for why the decision should be reviewed. *Id.* “[M]ere allegations of error” are not enough to warrant review. *See In re City of Attleboro*, 14 E.A.D. 398, 422, 431, 443 (EAB 2009).

The Board has consistently denied review of petitions that fail to “provide a citation to the relevant comment and response and explain why the Regional Administrator’s response to the comment was clearly erroneous or otherwise warrants review.” 40 C.F.R. § 124.19(a)(4)(ii); *see In re Certainteed Corp.*, NPDES Appeal No. 15-01, 2015 WL 10091224, at *11 (EAB May 7, 2015). A “petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations.” *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005).

V. Argument

A. Many of Petitioners’ Arguments Fail to Meet Procedural Requirements for EAB Review

After considering a robust record, the Region issued a well-reasoned permit and fact sheet and addressed all comments in a detailed Response to Comments (RTC) document.

Nevertheless, Petitioners do not grapple with or address the Region’s responses or the rest of the record and instead restate nearly verbatim several of the same arguments from their comments. For such arguments, Petitioners do not provide citations to the relevant sections of the Agencies’ RTC or explain why they are clearly erroneous or otherwise warrant review. Accordingly, as APS identifies throughout the sections below, many of Petitioners’ arguments have failed to meet the procedural requirements of 40 C.F.R § 124.19(a)(4)(ii), and review should be denied.

B. The Region Reasonably Determined That Morgan Lake Is Not a WOTUS

The Region appropriately determined that the point of discharge for the 2019 Permit is the discharge *from* Morgan Lake because Morgan Lake is not a WOTUS. The Region explained that, “[a]s an artificial cooling pond constructed wholly in uplands, Morgan Lake falls within the waste treatment system exclusion of from the definition of ‘waters of the United States.’” 2019 Fact Sheet at 2 n.1. Petitioners’ arguments that the Region should have treated Morgan Lake as a WOTUS are unavailing.

The Region’s determination that Morgan Lake is not a WOTUS in the 2019 Permit was governed by the regulatory definition of WOTUS set forth in the NPDES regulations at 40 C.F.R. § 122.2 (2015), as informed by Supreme Court precedent.⁶ Under these authorities, each of Petitioners’ WOTUS arguments fail. Morgan Lake is not a “traditional navigable water,” nor is it a jurisdictional tributary, and Petitioners’ arguments to the contrary are based on an obsolete, draft guidance document that never went into effect.⁷ Even if Morgan Lake did fit into either of these WOTUS categories, it would be excluded from jurisdiction because it qualifies as a “waste

⁶ Although the 2019 Repeal Rule (effective December 23, 2019) will repeal the 2015 Rule and reinstate the pre-2015 regulations, 84 Fed. Reg. 56,626 (Oct. 22, 2019), the 2015 Rule applied to Morgan Lake at the time of the 2019 Permit’s issuance, and is still in effect.

⁷ See discussion *supra* § III(A)(1).

treatment system,” the exclusion for which is present in both the pre-2015 regulations and the 2015 Rule. Accordingly, Petitioners fail to demonstrate that the Region’s conclusion on Morgan Lake’s jurisdictional status is clearly erroneous or otherwise warrants review.

1. Morgan Lake Is Excluded From Jurisdiction Under the Waste Treatment System Exclusion

Under either the pre-2015 regulations or the 2015 Rule, the result is the same: Morgan Lake does not qualify as a WOTUS because it falls under the longstanding WTS exclusion. The NPDES regulations’ WOTUS definition, 40 C.F.R. § 122.2 (2019), provides: “Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA ... are not waters of the United States.”

The WTS exclusion has a long history, and parts of it have become obsolete via later EPA rulemaking and guidance.⁸ Most relevant for Morgan Lake, the pre-2015 regulations’ WTS provision contained a cooling pond parenthetical—“(other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition)”—that is obsolete. Over 30 years ago, EPA withdrew the technology-based cooling pond regulations and accompanying definition that the parenthetical references. *See* 47 Fed. Reg. 52,290 (Nov. 19, 1982). And EPA has made it clear that cooling ponds can be and often are excluded as WTS components. *See* Memorandum from Robert Perciasepe, Assistant Adm’r, Office of Water, EPA, to W. Ray Cunningham, Dir., Water Mgmt. Div., EPA, “Waters of the United States” Determination for a

⁸ For example, EPA formally suspended (and, as a result, made legally ineffective) a sentence suggesting that WTS features must be manmade 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). Even if the suspended language was in effect, it would not preclude Morgan Lake from qualifying for the WTS exclusion because, as the Region concluded, “Morgan Lake is a man-made water body constructed wholly in upland areas, and which did not impound any existing Water of the United States.” 2017 Sheth Memo at 1.

Proposed Cooling Pond Site in Polk County, Florida, at 4-5 (Dec. 13, 1993),

<https://www3.epa.gov/npdes/pubs/owm0099.pdf> (1993 Perciasepe Memo), Attachment 18.

The 1993 Perciasepe Memo noted that, given the removal of the cooling pond regulations referenced in the WTS provision, the WTS provision was ambiguous, and there was confusion as to whether steam-electric cooling ponds could be excluded from the WOTUS definition. *Id.* at 4.

The 1993 Perciasepe Memo emphasized the discretion that EPA has in making determinations for NPDES decisions concerning such features, and stated,

[W]hile it would be appropriate to regulate as “waters of the United States” a steam electric cooling pond based on an actual or potential connection to interstate commerce, *you also have the option, given the deletion of the steam electric cooling pond definition, of interpreting the waste treatment system exclusion as encompassing all steam electric cooling ponds.*

Id. at 4-5 (emphasis added). As contemplated in the 1993 Perciasepe Memo, the Region, in its discretion, found that the WTS exclusion encompasses Morgan Lake, a steam electric cooling pond.

The Region’s determination is consistent with the Agencies’ recent practice and interpretations. The 2015 Rule eliminated the cooling pond parenthetical in 40 C.F.R. § 122.2, which EPA did not consider to be a “substantive change[.]” 80 Fed. Reg. at 37,097. The preamble to the 2015 Rule explained that certain cooling ponds (those that are part of an NPDES-permitted system and were either created pursuant to a § 404 permit or prior to the enactment of the CWA) “are subject to the waste treatment system exclusion” and will “remain excluded under the [2015] Rule.” *Id.* at 37,099.⁹ The Agencies have indicated their intent to continue to preserve the WTS exclusion, which extends to cooling ponds, going forward. 84

⁹ Indeed, under the 2015 Rule, Morgan Lake also would be excluded as a cooling pond that was created in dry land. 80 Fed. Reg. at 37,098 (including on its list of excluded waters “[a]rtificial, constructed lakes or ponds created by excavating and/or diking dry land such as . . . cooling ponds . . .”). The Agencies noted that many cooling ponds are already “currently excluded from jurisdiction” under the WTS exclusion. *Id.* at 37,099.

Fed. Reg. at 4211 (2019 Proposed Rule would clarify that WTS “includ[es] lagoons and treatment ponds (such as settling or cooling ponds).”).

Recognizing Morgan Lake, a man-made cooling lake that was constructed for the purpose of dissipating heat from the Plant, 2019 Fact Sheet at 2, as an excluded WTS feature is consistent with the purpose of the WTS exclusion. The WTS exclusion was intended to exempt waters that are incorporated into an NPDES permit as part of a treatment system, including (but not limited to) holding ponds, cooling ponds, and closed-cycle lagoons. *See* 44 Fed. Reg. 32,854, 32,858 (June 7, 1979); *In re Borden, Inc./Colonial Sugars*, 1 E.A.D. 895, 910-11 (EAB 1984). As the Ninth Circuit has recognized, “The [WTS] exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds.” *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001–02 (9th Cir. 2007). Imposing NPDES requirements at the discharge point *from* Morgan Lake into No Name Wash ensures that FCPP is not subject to an arbitrary requirement to meet effluent standards for discharges into its own closed system treatment pond.

Finally, Petitioners’ claim that the Region failed to evaluate whether Morgan Lake was “‘designed to meet the requirements of the CWA,’” Petition at 29, fails because the Region’s RTC plainly states that a WTS satisfies that requirement where, as here, “discharges from the system meet the requirements of CWA section 402.” RTC at 45.

For all of these reasons, the Region reasonably determined that Morgan Lake is not a WOTUS because it is excluded under the WTS provision.

2. Morgan Lake Is Not a Traditional Navigable Water

Although the Board need not address whether Morgan Lake could otherwise fall within one of the categories of WOTUS, Morgan Lake is not a “traditional navigable water” (TNW).

EPA’s NPDES regulations—under the 2015 Rule and pre-2015 regulations—provide that WOTUS include “waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce[.]” 40 C.F.R. § 122.2. This category of waters is sometimes referred to as TNWs. In *Rapanos*, both the plurality and Justice Kennedy’s formulation of jurisdictional waters under the CWA were based on what they referred to, respectively, as “traditional interstate navigable waters” and “navigable waters in the traditional sense.” *Rapanos*, 547 U.S. at 742 (plurality); *id.* at 779 (Kennedy, J., concurring). The TNWs to which the plurality and Justice Kennedy refer are unmistakably clear from the cases they cite—*The Daniel Ball*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). This well-established case law defines TNWs as waters that: (1) are navigable-in-fact and (2) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce. *See The Daniel Ball*, 77 U.S. at 563. Over the years, this traditional test has been expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), and that are susceptible for use with reasonable improvements, *see Appalachian Elec. Power Co.*, 311 U.S. at 407-10. The TNWs, as understood by the *Rapanos* plurality and concurring opinions, are waters used to transport goods in interstate commerce. *See, e.g., United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993) (canal used in the past as shipping route for coal and other commodities is jurisdictional TNW). They are not so broad as to include any water feature that can float a boat.

Petitioners point to no historic use of Morgan Lake in interstate commerce.¹⁰ Instead, they claim that public recreation, which in some cases involves fishing tournaments and license sales, amount to “extensive interstate commerce.” Petition at 22-23. Although the test for TNWs is more narrow than an inquiry as to whether an activity has “substantial effects” on interstate commerce under the third prong of the Commerce Clause,¹¹ the recreational activities that occur on Morgan Lake likely would not even satisfy the broad “substantial effects” commerce clause standard. *See In re Borden Inc./Colonial Sugars*, 1 E.A.D. at 907 n.26 (“[E]vidence of an occasional interstate traveler who engages in recreational fishing or hunting on the wetlands would be an insufficient basis[,] standing alone, to establish commerce clause jurisdiction.”). As the Region noted in its RTC on the 2018 Permit, Attachment 19 at 15-16, the boating and fishing uses of Morgan Lake “appear[] to be incidental” and “do[] not provide a sufficient nexus to interstate commerce.” Accordingly, Morgan Lake is not a TNW.

3. Morgan Lake Is Not a Jurisdictional Tributary

Relying heavily on the 2011 Draft Guidance that has never been in effect, Petitioners allege that Morgan Lake is a jurisdictional tributary because “it is a man-made lake that is part of a tributary system that flows directly or indirectly into traditional navigable waters or interstate water [sic].” Petition at 24. Although the Board need not address the issue, Morgan Lake is not a jurisdictional tributary under either the 2015 Rule or pre-2015 regulations, both of which must be interpreted consistent with the Supreme Court’s *Rapanos* decision.

¹⁰ Nor could they, given that Morgan Lake was constructed wholly in uplands to serve as a cooling pond for FCPP. *See* 2017 Sheth Memo at 1; RTC at 42.

¹¹ Congress’ authority to regulate navigable waters derives from its power to regulate the “channels of interstate commerce” under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. 1 (1824); *see also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (“channels of interstate commerce” are one of three areas of Commerce Clause authority).

Although the pre-2015 regulations did not define “tributary,” the 2015 Rule defines “tributary” as “a water that contributes flow, either directly or through another water” to a TNW, interstate water, or territorial sea, and “is characterized by the presence of the physical indicators of a bed and bank[] and an ordinary high water mark.” 40 C.F.R. § 122.2(3)(iii) (2015). The 2015 Rule purports to implement Justice Kennedy’s *Rapanos* “significant nexus” standard, but merely categorically asserts that all waters that meet its tributary definition “have a significant nexus” to navigable waters. 80 Fed. Reg. at 37,058. The 2015 Rule’s broad “tributary” definition and application of the significant nexus standard have been called into question by the one court that has reviewed the substantive provisions of the rule, which found that it “allows the Agencies to regulate waters that do not bear any effect on the ‘chemical physical, and biological integrity’ of any navigable-in-fact water,” “is similar to the one invalidated in *Rapanos*, and it carries with it the same concern that Justice Kennedy had there.” *See Georgia v. Pruitt*, 326 F. Supp. at 1365.

Applying Justice Kennedy’s “significant nexus” test faithfully would not require a finding that Morgan Lake is a jurisdictional tributary. As Justice Kennedy articulated, a feature has a “significant nexus” when it, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Justice Kennedy repeatedly cautioned that “remote,” “insubstantial,” “speculative,” or “minor” flows are insufficient to establish a significant nexus, *id.* at 778, 780, 781, and agreed with the *Rapanos* plurality that a mere hydrologic connection between a feature and a TNW is not sufficient to establish jurisdiction. *Id.* at 739-40 (plurality); *id.* at 784 (Kennedy, J., concurring).

Morgan Lake is fully integrated into plant operations and is, for the most part, isolated from the natural hydrological system. Morgan Lake’s “water levels are managed in real time” through occasional releases from Morgan Lake to No Name Wash at Outfall 001. RTC at 30. Indeed, in the absence of pumping from the San Juan River, “Morgan Lake would dry up and cease to exist” very quickly. *See id.* at 43. Under Justice Kennedy’s “significant nexus” test, the occasional releases managed by FCPP are not sufficient to establish a significant nexus between Morgan Lake and No Name Wash (or the Chaco River).¹²

For these reasons, Petitioners’ argument that Morgan Lake is a jurisdictional tributary has no merit.

4. Morgan Lake is Not Subject to the Navajo Nation’s WQS

To support their WOTUS argument, Petitioners incorrectly assert that Morgan Lake is subject to the Navajo Nation’s WQS. *See* Petition at 21-22. As discussed in Section III.A.5, *supra*, the Navajo Nation’s WQS do not apply to Morgan Lake. *See also* RTC at 8. The Navajo Nation expressly requested that Morgan Lake (and the associated No Name Wash) be excluded from TAS recognition. *Id.* Accordingly, EPA retained responsibility for Morgan Lake and upper No Name Wash under both CWA §§ 303(c) and 401. As discussed in Section V.E. *infra*, the Region appropriately used Navajo Nation’s WQS for the “downstream” Chaco River as a reference tool. 2019 Fact Sheet at 5; RTC at 9.

¹² Likewise, application of the *Rapanos* plurality would not require a finding that Morgan Lake is a jurisdictional tributary. The plurality would include as WOTUS “only relatively permanent, standing or flowing bodies of water,” but not include tributaries “whose flow is ‘coming and going at intervals ... broken, fitful.’” *Rapanos*, 547 U.S. at 732 n.5 (plurality). Therefore, the occasional, controlled releases from Morgan Lake to No Name Wash are not sufficient to demonstrate jurisdiction.

Petitioners also incorrectly assert that the 2019 Permit violates anti-backsliding provisions of the CWA by failing to regulate discharges into Morgan Lake. *See* Petition at 29.¹³ Morgan Lake is not a WOTUS, and, as such, discharges into Morgan Lake need not comply with the CWA. Furthermore, anti-backsliding provisions are triggered only when permit effluent limitations are revised to be “less stringent than the comparable effluent limitations in the previous permit.” 33 U.S.C. § 1342(o); 40 C.F.R. § 122.44(1)(2). Here, the 2019 Permit regulates TDS in the same manner as the prior permits. 2019 Fact Sheet at 4-5. Neither the 2001 Permit nor the 2019 Permit include effluent limits on TDS. Both permits require the same baseline monitoring at Outfall 0001.

For all of these reasons, the Region reasonably determined that Morgan Lake is not a WOTUS, and the Board should find that Petitioners fail to demonstrate that determination should be reviewed.

C. Petitioners’ Claims that the Region Failed to Adopt Water Quality Standards or Conduct an Impairment Analysis Are Meritless and Outside the Scope of this Proceeding

Petitioners raise two claims that are outside the scope of this proceeding: (1) that the Region failed to set water quality standards for Morgan Lake and No Name Wash; and (2) that the Region was required to undertake an impairment analysis under CWA § 303(d) for Morgan Lake, No Name Wash, the Chaco River, and the San Juan River, and consequently failed to set more stringent effluent limitations as part of a total maximum daily load (TMDL). *See* Petition Issues 3 & 7 at 31-35, 48-49. Water quality standards, lists of impaired waters, and TMDLs would be developed separately from this NPDES permit process.

¹³ Petitioners make anti-backsliding arguments several times throughout the Petition, *see* Petition at 4, 25 n.107, 29, and EPA addressed each in the RTC, *see* RTC at 32, 33, 45, 48.

The Board's rules expressly require that a petition "identify *the contested permit condition or other specific challenge to the permit decision* and clearly set forth, with legal and factual support, petitioner's contentions for why *the permit decision should be reviewed*." 40 C.F.R. § 124.19(a)(4)(i) (emphases added). Because the adoption of water quality standards and development of TMDLs are not conditions of the permit or permit decisions, these issues are not justiciable before the Board; the proper forum for these challenges is in federal district court under the Administrative Procedure Act (APA). *See In re City of Hollywood, Fla.*, 5 E.A.D. 157, 175-76 (EAB 1994) ("The only recognized avenue for challenge to the substance of EPA's actions taken with respect to state submissions [under CWA § 303] is a suit for judicial review under the [APA]."). On numerous occasions, the Board has dismissed petitions in whole or in part because the petitions raised issues that are properly justiciable before a federal court, not in a forum concerning a permit challenge. *See, e.g., In re Teck Cominco Alaska Inc., Red Dog Mine*, 11 E.A.D. 457, 484 (EAB 2004). In particular, on the adoption of water quality standards, the Board has stated, "threshold issues pertaining to whether the Agency may have erred in approving the standard in the first instance are necessarily beyond our jurisdiction. Our jurisdiction is limited to reviewing whether the Region, as permit issuer, included a condition in the permit that properly implements the standard." *In re City of Hollywood, Fla.*, 5 E.A.D. at 175-76 (internal quotation marks and citations omitted). Accordingly, these are not properly part of this NPDES permit proceeding, and review should be denied.

Even if these claims were properly before the Board, they fail. First, the Region's authority in this circumstance is discretionary because the Navajo Nation WQS do not apply to Morgan Lake and No Name Wash, *see* Section III.A.5, *supra*, and there is no mandatory duty to promulgate federal water quality standards. 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. § 131.5(b).

Second, Petitioners' meritless impaired water argument conflates the process of developing impaired water lists and TMDLs pursuant to CWA § 303(d) with the separate and distinct process of issuing a particular NPDES permit. Pursuant to 40 C.F.R. § 122.44(d)(1)(vii)(B), and, as detailed in the RTC, a NPDES permit must include effluent limitations that are consistent with the assumptions and requirements of any waste load allocation that is part of an approved TMDL. Here, neither the Navajo Nation nor EPA has developed a list of impaired waters or TMDLs for the No Name Wash or the Chaco River. Accordingly, no additional permit conditions were required. *See* RTC at 55.

D. The Region Is Not Required to Impose Effluent Limitations on Discharges Into Morgan Lake

Because Morgan Lake is not a WOTUS, the Region is not required to establish TDS effluent limitations for discharges from FCPP to Morgan Lake as a matter of law. 33 U.S.C. §§ 1311(b)(1)(A), 1342(a)(1); 40 C.F.R. § 125.3. Here, the Region appropriately evaluated the discharges from Morgan Lake into No Name Wash, and imposed monitoring requirements on TDS discharges from Outfall 001 into No Name Wash. 2019 Permit at 3-4. As the Region explained, if monitoring shows that elevated TDS concentrations would impair beneficial uses of the receiving water, or would cause acute environmental, health, or other impacts, the Region may set an appropriate numeric limit under the 2019 Permit's reopener clause. *Id.*; RTC at 32. Further, the Region was not required to impose additional or more stringent water quality-based effluent limitations, such as Navajo Nation numeric TDS standards for livestock watering, on discharges *into* Morgan Lake because, as discussed below, there are no water quality standards applicable to Morgan Lake. *See* 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d).

Ignoring the Region's explanation as to why the privately negotiated lease agreement between the FCPP owners and the Navajo Nation is not relevant and does not establish water

quality standards for any purpose under the CWA, *see* RTC at 31-33, Petitioners rely on the lease provisions to argue that the 2019 Permit is defective for failing to impose TDS effluent limits and monitoring requirements for discharges into Morgan Lake. *See* Petition at 31. As explained in Section III.A.5, *supra*, the Navajo Nation explicitly excluded the leasehold from its request for TAS recognition and EPA has carried that “carve out” into the approval of the Navajo Nation’s WQS.

E. The Region Exercised Best Professional Judgment in Setting Permit Requirements

As it has discretion to do in the absence of applicable federally-approved water quality standards, the Region used its best professional judgment (BPJ) to determine applicable standards and effluent limitations for FCPP discharges. This approach is authorized by CWA § 402(a)(1), which provides that EPA “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.” 33 U.S.C. § 1342(a)(1); *see also* 40 C.F.R. § 122.43(a). EPA is therefore permitted to exercise BPJ in order to carry out the provisions related to water pollution prevention and has “considerable flexibility in establishing permit terms and conditions.” *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006) (internal quotation marks and citation omitted).

Under this statutory and regulatory framework, the Region permissibly used its BPJ to establish permit conditions appropriate for FCPP’s discharges into receiving waters that have no federal water quality standards. Petitioners ignore and fail to address the Region’s RTC, which provides:

[T]he permit writer has 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 Morgan Lake and the upper No Name Wash. ... [T]hese Chaco River – the downstream receiving waters – water quality standards are a legitimate adjacent jurisdictional assessment of scientifically-based measures that would protect the uses in Morgan Lake and upper No Name Wash.

RTC at 9; 2019 Fact Sheet at 5. The Board traditionally assigns a heavy burden to petitioners seeking review of issues that are technical in nature. *See, e.g., In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). Petitioners have not met their burden to demonstrate that EPA’s exercise of BPJ is clearly erroneous.

F. The Region’s Reasonable Potential Analysis Was Proper

A permit writer has a “significant amount of flexibility in determining whether a particular discharge has a reasonable potential to cause an excursion above a water quality criterion.” 54 Fed. Reg. 23,868, 23,873 (June 2, 1989). As the Board has explained, “[N]othing in the CWA, its implementing regulations, or Board precedent” prescribes the type of modeling or causation analysis a permit writer must perform to determine the existence of reasonable potential. *In re City of Taunton Dep’t of Pub. Works*, 17 E.A.D. 105, 147 (EAB 2016).

Petitioners largely copy and paste their reasonable potential analysis (RPA) claims from their comments without addressing or identifying deficiencies in the Region’s responses in violation of 40 C.F.R § 124.19(a)(4)(ii).¹⁴ Moreover, many of Petitioners’ RPA claims rest on the false premise that the 2007 Navajo Nation Surface WQS (and the related designated uses and effluent limits) apply to Morgan Lake. *See* Section III.A.4, *supra*.¹⁵ In any event, Petitioners’ RPA claims, Petition at 36-42, are without merit. The Region conducted a robust RPA and

¹⁴ Petitioners’ assertion that “[t]he use of inappropriate detection limits violates the terms of the 2001 NPDES Permit for the FCPP, the permit in affect [sic] at the time the [R]PA [sic] was performed,” Petition at 38, should be denied review because compliance with the 2001 NPDES Permit is not before the Board.

¹⁵ Petitioners also argue that EPA failed to adopt a fish consumption rate as a water quality criterion for Morgan Lake. *See* Petition at 42. As explained in Section V.C., this argument is not properly before the EAB, and the Region is not required to set water quality standards for Morgan Lake.

appropriately determined that new or revised water quality-based permit limitations were not needed in the permit. *See* Memorandum from Gary Sheth, EPA Region IX, to Administrative Record for NPDES Permit NN0000019, “Reasonable Potential Analysis for NPDES Permit NN0000019,” at 1-2 (Nov. 10, 2014) (NN0000019 RPA), Attachment 20. The administrative record contains more than enough data and facility-specific information to justify the Region’s permitting decision. For example, the Region reviewed five years of APS’s Data Monitoring Reports (DMRs) for all limits established in the permit, which indicated that effluent limits and internal outfall limits for whole effluent toxicity were *not* exceeded. *Id.* at 1-2. The Region reviewed reports for inspections conducted at FCPP, which confirmed the DMR findings that permit limits were *not* exceeded. *Id.* at 2. The Region found no basis for changing the existing water quality-based effluent limitations. *Id.* The Region also compared additional data concerning pollutants present in the effluent with the Navajo Nation WQS (which, the Region points out, are substantially similar to federally recommended criteria for priority pollutants), and found that the levels of pollutants detected in the effluent “were sufficiently below Navajo Nation standards and EPA criteria for such pollutants, indicating the lack of reasonable potential of these pollutants to exceed applicable criteria in the effluent.” *Id.*; RTC at 53.

From this collective information, the Region, in its broad discretion, properly determined that the discharges from FCPP do not have a reasonable potential to cause or contribute to an exceedance of water quality standards. NN0000019 RPA at 2; RTC at 53. While Petitioners might prefer that EPA employ a different test method¹⁶ or analysis, they fail to demonstrate that the Region’s RPA was clearly erroneous.

¹⁶ For example, contrary to Petitioners’ assertions, the Region was not required to employ a specific test method detection limit, *see* Petition at 37-38, or rely upon U.S. Geological Survey temperature data for the Chaco River, *see id.* at 42.

G. The Region Appropriately Waived § 401 Water Quality Certification

Petitioners argue that the Region's § 401 water quality certification waiver is arbitrary and capricious because EPA did not adopt either the Navajo Nation's or federal water quality standards for Morgan Lake and No Name Wash. *See* Petition at 49-50. Several reasons explain why Petitioners are incorrect.

First, as stated in Section V.C., the Region has no duty to designate water quality standards for Morgan Lake and No Name Wash. Second, the Region appropriately waived certification in the § 401 waiver letter it issued with the 2019 Permit. *See* Letter from Michael B. Stoker, Reg'l Adm'r, EPA Region IX, to Neal Brown, Dep't Manager, APS, "Section 401 of the Clean Water Act Water Quality Certification Waiver for the Four Corners Power Plant" (Sept. 30, 2019), Attachment 21. As stated by the Region:

Where EPA is both the certifying authority under Section 401 and the NPDES permitting authority under Section 402, and where the purpose of both the certification and the permit is to protect water quality, EPA believes it is appropriate to meet its obligations under Section 401 by waiving the certification requirement.

Id. at 2. Further, the Region's process for waiving certification was reasonable because the Part 124 regulations do not dictate any procedure that EPA must follow when it acts as the certifying agency.¹⁷ For all of these reasons, the Region appropriately waived § 401 water certification.

H. Review of Petitioners' Argument Regarding NTEC is Not Warranted

Petitioners are precluded from arguing that EPA must require NTEC to waive sovereign immunity as co-owner of the FCPP because Petitioners did not raise the allegation in comments

¹⁷ Although APS believes that the certification requirements set forth at 40 C.F.R. Part 121 do not apply to NPDES permits (and the Region agrees, RTC at 112), out of an abundance of caution, APS formally requested that EPA, as the agency with CWA § 401 water quality certification jurisdiction, either certify that the discharges to be authorized by the 2019 Permit will not violate applicable water quality standards, or waive certification. Letter from Jeffrey Jenkins, APS, to Mr. Tomás Torres, Dir., Water Div., EPA Region IX (Mar. 27, 2019), Attachment 22. APS provided all of the application materials describing the project and its impacts to the Region. RTC at 111.

before the agency. *See* 40 C.F.R. § 124.13 (commenters must raise “all reasonably ascertainable issues and submit all reasonably available arguments supporting their position”). The Petition does not comply with the mandates of 40 C.F.R. § 124.19(a)(4)(ii) as it neither demonstrates that Petitioners (or any other party) raised this argument during the public comment period nor explains why these issues were not required to be raised under § 124.13. As Petitioners acknowledge, Petition at 50, NTEC acquired its ownership interest in FCPP in July 2018, approximately a year before the close of the public comment period. Therefore, this issue was “reasonably ascertainable” at the time of public comment and is not subject to review.

Petitioners’ argument is also wrong as a matter of law. EPA has no obligation to require waiver of sovereign immunity for tribal permittees because Congress has expressly abrogated tribal sovereign immunity in the CWA. The CWA citizen suit provision allows suit against “any person.” 33 U.S.C. § 1365(a)(1). The CWA defines “person” to include “municipality,” which expressly includes “an Indian tribe or an authorized Indian tribal organization.” *Id.* § 1362(4), (5). Federal courts have thus construed the CWA citizen suit provision to allow suit against Indian tribes. *See Deschutes River Alliance v. Portland Gen. Elec. Co.*, 323 F. Supp. 3d 1171, 1185 (D. Or. 2018); *Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608, 609-10 (D. Ariz. 1993).

I. The Applicability Date for Bottom Ash Transport Water Limits is Justified

Petitioners make several claims related to the 2015 ELG Rule and its applicability dates, all of which are belied by the record. In the 2015 ELG Rule, EPA determined that the technologies a facility would use to meet the new BAT limits for BATW may not be “available and achievable” before December 31, 2023. 2015 ELG Rule RTC at 8-128 (Sept. 2013), <https://www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-6469>; 40 C.F.R. § 423.11(t).

The permitting authority sets applicability dates on a site-specific basis because it “is in the best position to decide exactly when within that implementation period particular technologies are available for plants, in light of a consideration of certain factors” set forth in 40 C.F.R. § 423.11(t), including: (1) time the facility would need to plan, design, procure, and install equipment to comply with the limit; (2) changes being made at the facility to comply with other regulations, including the CCR Rule; and (3) “other factors as appropriate.” 80 Fed. Reg. at 67,854, 67,883; 2015 ELG Rule RTC at 8-129.

Ignoring the analysis provided by the Region, RTC at 16-18, and thereby failing to comply with the requirements of 40 C.F.R. § 124.19(a)(4)(ii), Petitioners claim the Region did not conduct an independent determination of the proper applicability date, and did not adequately document its determination. Petition at 43. Neither assertion is correct. As the permitting authority, it was in the Region’s discretion to decide the appropriate applicability date for BATW limits, using factors set forth in the 2015 ELG Rule. As the record demonstrates,¹⁸ this is exactly what the Region did.

The Region independently weighed the § 423.11(t) factors, considering information supplied by both APS and Petitioners. As to § 423.11(t)(1), the Region reviewed APS’s proposed schedules for constructing the BATW holding and treatment system. *See* RTC at 17. It also evaluated APS’s plans for sequencing the three projects (closure of the existing pond, construction of a new BATW holding and treatment system, and construction of the closed-loop BATW system) because of “construction access limitations that arise from the existence of significant plant infrastructure in this area” and determined the sequencing was warranted. *Id.*

¹⁸ Petitioners’ contention that the Region failed to document its decision in the fact sheet is without merit. EPA recommends that the permitting authority provide its justification either “in the fact sheet or administrative record for the permit.” 80 Fed. Reg. at 67,883. Since the RTC is clearly part of the administrative record, the Region complied with EPA’s recommendation.

As to § 423.11(t)(2), the Region understood that “APS is currently making substantial changes to how the plant’s waste is handled in order to address the CCR [R]ule,” noting that FCPP intends to stop sending CCR and non-CCR wastestreams to the combined waste treatment pond by October 31, 2020. *Id.*

Although the Region found the first two factors were sufficient to support a December 31, 2023 applicability date, the Region found that § 423.11(t)(4)—“[o]ther factors as appropriate”—provided further support because the date selected “may allow APS to know if the [regulatory] requirements change before it begins construction and implementation of its closed loop recycling system.” *Id.* This is appropriate, because EPA intends that permittees avoid incurring costs to comply with portions of the 2015 ELG Rule that are under reconsideration. 82 Fed. Reg. at 43,496, 43,498.

The Region also considered the Petitioners’ comments. Addressing the claim that FCPP could construct a zero-discharge BATW system within 24 months, the Region cited “the complexity of the design, construction and operation of” the plant, “as well as the sequencing of construction necessary to comply with the CCR [R]ule,” as reasons why Petitioners’ 24-month estimate did not impact the Region’s evaluation. RTC at 18. The Region further found Petitioners’ examples of two facilities that had received November 1, 2020 applicability dates were irrelevant because “[t]he factors in 40 CFR 423.11(t) are site specific.” *Id.* Petitioners fail to demonstrate that the Region’s determination is clearly erroneous.

J. The Region Appropriately Declined to Set BPJ Limits for Legacy BATW

According to Petitioners, EPA arbitrarily “refuses” to set BPJ BAT limits for “legacy” BATW—BATW generated prior to the selected applicability date (here December 31, 2023)—“despite the fact that currently there are no applicable ELGs.” Petition at 44. First, it is incorrect that legacy BATW is not subject to any ELGs. The BPT effluent limitations, established by EPA

in 1982, apply to legacy BATW. 40 C.F.R. § 423.12(b)(4). These daily maximum and monthly average limits for TSS and oil and grease ensure that much of the pollutant loading attributable to BATW will be removed before it is discharged.

When the Fifth Circuit vacated and remanded “the portions of the [2015 ELG] rule regulating legacy wastewater and combustion residual leachate,”¹⁹ EPA’s 1982 regulatory determination *not to establish BAT limits* for BATW was reinstated as a matter of law. *See, e.g., Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.”). Therefore, no BPJ determination is appropriate.

EPA guidance demonstrates that § 125.3(c)(3) does not authorize permit writers to establish BPJ limits simply because EPA has elected not to set a specific effluent limitation for a given pollutant, if the Agency considered, and made a determination regarding the specific waste stream in question. EPA, NPDES Permit Writer’s Manual, EPA-833-K-10-001, Ch. 5, sections 5.1.1, 5.2.3 (Sept. 2010), <https://www.epa.gov/npdes/npdes-permit-writers-manual>, (EPA’s NPDES Permit Writer’s Manual). In particular, EPA’s NPDES Permit Writers’ Manual at 5-45 identifies four situations that merit case-by-case BPJ limits, only one of which is only *possibly* relevant— “[w]hen effluent guidelines are available for the industry category, but no effluent guidelines requirements are available for the pollutant of concern[.]” But EPA’s NPDES Permit Writer’s Manual cautions: “The permit writer should make sure that the pollutant of concern is not already controlled by the effluent guidelines and was not considered by EPA when the Agency developed the effluent guidelines.” *Id.* at 5-46.

¹⁹ *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1004 (5th Cir. 2019).

In the 1982 steam electric ELG rule, EPA conducted a thorough analysis of BATW, including a comprehensive review of its pollutants of concern and the possible technologies available to treat it. *See* EPA, Development Document for Final Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Steam Electric Point Source Category at 141-88, 398-438, (Nov. 1982), Attachment 23. “EPA seriously considered proposing further control beyond BPT on the discharge of fly and bottom ash transport water from existing facilities,” 45 Fed. Reg. 68,328, 68,328 (Oct. 14, 1980), and examined: (1) dry transport; (2) partial to complete recirculation of BATW; and (3) precipitation. *Id.* at 68,338. But, after a thorough review of BATW pollutants and possible technologies “in view of the waste characteristics and costs of control options” and because the existing BPT limits imposed “adequate control methods,” EPA proposed no further controls beyond BPT limits. *Id.* This EPA determination remains in force today and negates any need for a BPJ determination.

Recent case law also indicates that BPJ limits are not appropriate in this case. In *Louisville Gas & Electric Co. v. Kentucky Waterways Alliance*, 517 S.W.3d 479 (Ky. 2017), for example, the Supreme Court of Kentucky overturned lower court decisions holding that BPJ limits were required for discharges of FGD scrubber blowdown from a new source. The court held:

The EPA’s Guideline-issuing responsibility under the Act includes the duty to “identify . . . the degree of effluent reduction attainable through the application of the best control measures and practices.” 33 U.S.C. § 1314(b)(2)(A). If the Administrator finds, as he did in the 1982 Guideline, that no meaningful reduction of a given pollutant is possible with current technology, then the lack of a [technology-based effluent limit] for that pollutant does not mean that the unregulated pollutant was unaddressed by or outside the scope of the Guideline.

Id. at 488-89. *See also In re Tenn. Clean Water Network v. Tenn. Dep’t of Env’t and Conservation*, Case No. WPC10-0116, Doc. No. 04.30-110315A, at 5 (Tennessee Dep’t of Env’t & Conservation, Dec. 17, 2013) (concluding the existing 1982 ELG applied for steam electric

discharges, including BATW, and a BPJ analysis was therefore not required); *Nat. Res. Def. Council v. Pollution Control Bd.*, 37 N.E.3d 407, 413-14 (Ill. App. Ct. 2015) (BPJ controls for mercury not necessary where EPA clearly considered potential discharges of mercury in establishing the ELG for low volume waste and determined that no further technology or limits were necessary to satisfy the BAT standard). Because EPA’s 1982 determination that BAT limits for BATW are not warranted is in effect by operation of law, it would be inappropriate for the Region to render any BPJ determination.

Finally, the Region correctly determined that BPJ BAT limits are not warranted for FCPP. As the Region points out, it determined that the “as soon as possible” date for retrofitting zero discharge of BATW at FCPP is December 31, 2023. RTC at 22-23. It is impossible for FCPP to construct an alternative treatment system for its legacy BATW prior to that time, especially considering the ongoing construction to meet CCR Rule deadlines. The Region also states that, if it were to undertake a BPJ analysis, “it is likely that analysis would result in limitations equal to those in the final Permit” and cites the CWA § 304(b)(2)(B) factors of costs, age of equipment, process changes, and other factors as making it “unlikely EPA would impose more stringent limitations in the final permit ... were it to use BPJ.” *Id.* at 22, 23. Petitioners fail to demonstrate that the Region’s determination is clearly erroneous or otherwise warrants review.

K. Petitioners’ Challenges Regarding Ash Ponds Are Without Merit

Ignoring the analysis provided in the Region’s RTC, *id.* at 26-27, and thereby failing to comply with the requirements of 40 C.F.R. § 124.19(a)(4)(ii), Petitioners claim that the 2019 Permit is defective because it “fails to require permitting for seepage from the coal ash ponds into the Chaco River watershed” and that the Permit’s Seepage Monitoring and Management Plan (Seepage Plan) is deficient. Petition at 45, 47-48. These claims fail because the coal ash

ponds are not “point sources,” there is no evidence of a definitive connection between the water in any seeps and the coal ash disposal areas, and the Permit’s robust Seepage Plan is designed to address any seepage at FCPP.

1. The NPDES Program Does Not Regulate Alleged Pollution from Nonpoint Sources

As an initial matter, the ash ponds at the FCPP facility are not “point sources” subject to regulation under the NPDES program. Congress defined “point source” as “any discernible, confined and discrete conveyance.” 33 U.S.C. § 1362(14). “Conveyance” is the definition’s operative term, *see id.*, and it “evoke[s] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.” *United States v. Plaza Health Labs. Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). The very nature of the FCPP ash ponds is inconsistent with the definition of “point source” as they do not “convey” anything from one place to another, but instead *hold* accumulated coal ash and effluent. 2019 Fact Sheet at 3.

Even assuming alleged percolation of pollutants through the bottom of the ash ponds and into groundwater could be conceived as “conveyance,” it still would not be a “*discernible, confined and discrete* conveyance.” 33 U.S.C. § 1362(14) (emphases added). Rather, any alleged seepage from ash ponds would be diffuse *nonpoint* source pollution, which is regulated under other parts of the CWA (*see, e.g., id.* § 1329) and other federal programs like RCRA and EPA’s coal ash regulations (*see, e.g.,* 40 C.F.R. §§ 257.90-257.98). *See Dominion*, 903 F.3d at 412 (ash ponds are not “conveyances,” and “diffuse seepage” from ash ponds does not qualify as “discharges from a point source”).²⁰

²⁰ For example, FCPP is subject to the CCR Rule, which governs the operation and closure of coal ash impoundments, including obligations to monitor groundwater quality and undertake any necessary corrective action.

To be sure, discharges into navigable waters can *originate* from an ash pond or other treatment facility, but the constructed *outfall*, not the ash pond, is the point source requiring the NPDES permit. Here, as the Region has explained (and Petitioners do not dispute), “there is no *discrete outfall* from the fly ash ponds” at FCPP. RTC at 24 (emphasis added).²¹ As a result, the alleged discharges that Petitioners challenge are not from a “point source” and are not subject to the NPDES program.

2. The NPDES Program Does Not Regulate *Potential* Discharges

Even assuming the ash ponds could qualify as “point sources,” Petitioners have not shown that they “discharge ... any pollutant *to* navigable waters.” 33 U.S.C. § 1362(12) (emphasis added). As the Region explained, “a definitive connection between the water in the seeps and the wet fly ash disposal areas has not been established.” RTC at 27. Rather, Petitioners’ claim that water from the ash ponds is entering surface water via groundwater is based upon “speculation,” *id.* at 26, and a mischaracterization of inspection reports. Petitioners rely heavily on a 2012 EPA inspection report, which merely indicates “the ponds . . . have a *potential* to discharge to Waters of the U.S. through subsurface leaching.” EPA, Navajo Nation Compliance Evaluation Inspection, at 5 (May 8, 2012), Attachment 24 (emphasis added).²² According to the Region, there are “several potential sources for the water in seeps,” including

40 C.F.R. § 257.1(a). APS has complied and continues to comply with these regulations, and Petitioners do not claim otherwise.

²¹ Similarly, Petitioners’ argument that a separate water quality certification was required for construction of the intercept system, Petition at 50, fails because the relevant discharge from the facility was authorized by the FCPP NPDES permit.

²² Likewise, Petitioners’ claim that a 2007 EPA inspection report “revealed seepage from the FCPP coal ash disposal facilities” is not true. Petition at 45. That report merely states that “seeps were noted *in the past* by Navajo EPA staff,” and, in any event, does not attribute any seeps to the coal ash ponds. EPA-Region IX, Water Division, NPDES Compliance Evaluation Inspection Report, at 5 (Oct. 4, 2007), Attachment 25 (emphasis added). Indeed, Petitioners provide no support for their claim that “seeps have been ... documented to be emanating from the ... coal ash facilities.” Petition at 45.

“other sub-surface sources of water” like Morgan Lake and the “nearby upslope irrigated agriculture.” RTC at 27. But the CWA “gives the EPA jurisdiction to regulate and control only *actual* discharges—not *potential discharges*.” *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (emphasis added). Accordingly, even if the ash ponds could qualify as point sources, Petitioners’ claim that pollutants from the ash ponds are “discharged” to navigable waters is “not supported by the available data.” RTC at 26.²³

3. The Seepage Management and Monitoring Plan Fully Addresses Any Potential Seepage

Although available data does not demonstrate an NPDES regulated discharge from the ash ponds, the 2019 Permit contains a robust plan designed to “determine the source of and pollutants in seepages below all ash ponds that receive or received coal combustion residue either currently or in the past.” 2019 Permit at 16. At a minimum, the Seepage Plan must: (1) identify any seeps within 650 meters down gradient of the ponds; (2) conduct sampling of any seepages for certain coal ash constituents; (3) provide information about the number and range of flows observed; and (4) provide information about exceedances of applicable human health and environmental standards. *Id.* In addition, if the Plan identifies a potential for a discharge covered under the NPDES program, the Permit includes a reopener provision that would allow for the appropriate permitting response. *Id.* The Permit also requires that APS continue to operate its seepage intercept system, which has been successful in capturing and eliminating seeps before they could enter any surface water. *See, e.g.*, Letter from Neal Brown, APS, to Rick

²³ On November 6, 2019, the Supreme Court heard argument in *Hawai‘i Wildlife Fund v. County of Maui*, No. 18-260 (U.S.), a case addressing the issue of whether a point source discharge to groundwater that conveys pollutants to surface water is covered by the NPDES program. The EAB need not address this issue here because (1) the coal ash ponds are not “point sources,” Section V.K.1, *supra*; (2) there is no evidence of a definitive connection between the seeps and the coal ash disposal areas, Section V.K.2, *supra*; and (3) the Permit’s Seepage Plan fully addresses any seepage, Section V.K.3, *infra*.

Williamson, Mgr., Indian Program Branch, Program Supp. Div., W. Region, Office of Surface Mining, at 3-4 (Apr. 3, 2013), Attachment 26; RTC at 27.

Petitioners concede that the 2019 Permit “contains ... conditions to deal with the ... [alleged] seepage ... at the FCPP,” Petition at 46, and their objections to the Seepage Plan have no merit.²⁴ As the Region explained, the Seepage Plan reflects the Region’s “best professional judgment,” 2019 Fact Sheet at 8, and is designed to manage and “determine the source of and pollutants in seepages below all ash ponds that receive or received coal combustion residue,” 2019 Permit at 16. That technical judgment deserves deference. *See In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, 2008 WL 782613, at *9 (EAB Mar. 19, 2008). The data from ongoing monitoring of seeps suggest that there is no need for additional requirements at this time. *See* RTC at 27.

For all these reasons, the Board should reject Petitioners’ challenges regarding the ash ponds and the Seepage Plan.

L. The 2019 Permit Complies with CWA § 316(b) and the ESA

1. FCPP is a Closed-Cycle Recirculating System

Petitioners fail to demonstrate that the Region’s determination that FCPP is a closed-cycle recirculating system is clearly erroneous. The Region reasonably determined that FCPP uses a “closed-cycle recirculating system,” which is a system that “passes cooling water through the condenser and other components of the cooling system and reuses the water for cooling multiple times.” 40 C.F.R. § 125.92(c). A closed-cycle system “withdraws new source water

²⁴ Petitioners’ argument is heavily based on factual inaccuracies. For example, Petitioners claim that the Seepage Plan is deficient because the “timeframe” to construct the seepage intercept system is not specified in the 2019 Permit, Petition at 47, but that system has already been constructed and, as noted, is capturing and eliminating seeps. Likewise, Petitioners argue that the plan should require a “full suite” of water quality sampling for any seeps. Petition at 47. But that is precisely what the plan does—APS must “[c]onduct sampling ... of seepages for boron, mercury, nickel, selenium, uranium, zinc and total dissolved solids.” 2019 Permit at 16.

(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.” *Id.* A closed-cycle system can include a facility with cooling towers or a system of impoundments. *Id.*

FCPP operates a system that uses minimized make-up and blowdown flows withdrawn from the San Juan River, a WOTUS, to support cooling uses within the facility. *See* Wastewater Flow Schematic, 2019 Permit Attachment D. FCPP’s system withdraws make-up water to replenish losses that have occurred due to blowdown, drift, and evaporation within Morgan Lake and the cooling system. APS Comments at 9. Cooling water passes through the FCPP condenser and other components of the cooling system and is reused for cooling multiple times. *Id.*; 2019 Permit Attachment D. APS withdraws 14.3 MGD from the San Juan River, but circulates approximately 1,000 to 1,700 MGD through the FCPP. APS Comments at 9; 2019 Permit Attachment D. As the Region calculated, that means that approximately 99 percent of the water withdrawn from the San Juan River is recirculated for cooling purposes and that FCPP withdraws less than 1 percent of the water that it would if it were a once-through system. RTC at 47.²⁵

While the regulation defining “closed-cycle recirculating system” does not include a requirement for a specific percentage of withdrawal reduction, § 125.92(c); 79 Fed. Reg. at 48,326 (“EPA has removed the numeric levels of the metrics as a threshold”), EPA notes that “[c]losed-cycle cooling can reduce water withdrawals by at least 95 percent, compared to once-

²⁵ Ignoring the figures and calculations included in the 2019 Permit record, Petitioners cite to a 2018 CDP (formerly the Carbon Disclosure Project) Report for the Pinnacle West Capital Corporation to argue that FCPP only recirculates 80 percent of its cooling water. Petition at 53. The CDP Report, 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). If it did, it would have evaluated (as the Region did) the reduction of water withdrawn from the San Juan River as compared to a once-through cooling system.

through cooling[.]” 79 Fed. Reg. at 48,303. FCPP well exceeds that percentage. Petitioners argue that withdrawal from San Juan River is not *solely* to “replenish losses that have occurred due to blowdown, drift, and evaporation” because the discharge from Morgan Lake is mainly to control TDS, and that, as a result, the Region was required to determine that withdrawals for cooling purposes are not minimized. Petition at 54-55. But control of TDS is part of blowdown.²⁶ And, although Petitioners fail to grapple with the Region’s evaluation, the Region did find that withdrawals were minimized, noting that FCPP uses only approximately 1 percent of the water that it would use if it were a once-through system, and reasonably concluding, “APS minimizes make up water withdrawals for cooling purposes.” RTC at 47-48, 61. Finally, because Morgan Lake was constructed in uplands in 1961 (prior to the CWA), *see* 2017 Sheth Memo, “no documentation of a section 404 or other permit is required.” 40 C.F.R. § 125.92(c)(2).

Accordingly, the Region appropriately found that the FCPP’s system falls squarely within the “closed-cycle recirculating system” definition.

2. The Region Reasonably Determined that the Closed-Cycle System and Pumping Plan are BTA

The Region reasonably determined FCPP’s closed-cycle system and Pumping Plan constitute the BTA for minimizing impingement and entrainment pursuant to EPA’s CWA § 316(b) regulations.²⁷ As Petitioners note, Petition at 51, a determination that the facility operates a closed-cycle system means that only a minimal showing is required to support the

²⁶ *See, e.g.*, 79 Fed. Reg. at 48,326 (“Discharge of a portion of the [recirculated cooling] water (called ‘blowdown’) is used to control the buildup of [dissolved] minerals.”).

²⁷ Petitioners attempt to impose a heightened requirement to “attain the maximum reduction” in impingement and entrainment, Petition at 59, 60, but that is not the standard under EPA’s regulations, which require the permit writer to determine the “best technology available for minimizing adverse environmental impact.” 40 C.F.R. § 125.94.

permit writer's BTA determination. 79 Fed. Reg. at 48,321 (Operation of a closed-cycle recirculating system is an “essentially pre-approved technolog[y] requiring no demonstration or only a minimal demonstration that the flow reduction and control measures are functioning as EPA envisioned.”).

EPA's regulations provide that operation of a closed-cycle system can satisfy BTA for entrainment, 40 C.F.R. § 125.94(d), and is one of the compliance options set forth that can satisfy BTA for impingement, *id.* § 125.94(c)(1). EPA recognized in its 2014 rulemaking that “closed-cycle recirculating systems reduce entrainment (and impingement mortality) to the greatest extent and are the most effective performing technology.” 79 Fed. Reg. at 48,340. Here, the Region evaluated the information provided by APS and the 2015 BO's robust analysis of impingement and entrainment at FCPP, and reasonably determined that FCPP's existing closed-cycle system, recognized by EPA as the most effective performing technology, is BTA for entrainment and impingement. 2019 Permit at 12-13; 2019 Fact Sheet at 9; RTC at 58-60. Going even further than the § 316(b) Rule requires, the Region imposed several additional requirements, including two measures identified in the 2015 BO—implementation of the Pumping Plan and sufficiently sensitive sampling methods for mercury and selenium—and additional monitoring requirements. 2019 Permit at 12-13.²⁸ Petitioners have not shown that the Region's BTA determination is clearly erroneous or otherwise warrants review.

²⁸ Petitioners also assert, without support or acknowledgement of the Region's RTC, that the 2019 Permit should place a cap on water intake from the San Juan River. Petition at 60. As the Region explained, FCPP has reduced its average intake rate from the San Juan River to 14.3 MGD and its maximum intake to 24 MGD, and there is no need to cap the intake of water. RTC at 61.

3. The Region had Ample Information for its § 316(b) BTA Determination and Reasonably Required Submission of § 122.21(r) Reports within 2 Years

For permits like FCPP's, which were applied for before October 14, 2014 and issued after October 14, 2014, the permit writer may make a BTA determination without requiring the facility to submit the studies and information required in 40 C.F.R. § 122.21(r). *See* 40 C.F.R. § 125.98(g). EPA's regulations contemplate that, for such "[o]ngoing permitting proceedings," the permit writer should require submittal of information necessary under 40 C.F.R. § 122.21(r) in the subsequent permit renewal. *See id.* § 125.98(b)(6). Because APS's permit application was submitted in 2013, the Region could have allowed FCPP until its next renewal application to submit the application materials. Instead, in response to Petitioners' concerns, the Region modified the Proposed Permit to require APS to submit the § 122.21(r)(1)-(8) information within 2 years of the effective date of the 2019 Permit. 2019 Permit at 13; RTC at 59.

For purposes of this permit cycle, the 2015 BO and its supporting analyses provide a robust evaluation of potential environmental effects related to the intake structure, including entrainment and impingement information, which the Region drew upon for its BTA determination. RTC at 60. Petitioners fail to explain why that information is insufficient to support the Region's BTA determination.

4. The Permit Complies with the ESA

Petitioners' arguments that the 2019 Permit fails to comply with the ESA and that EPA/FWS must require a specific type of closed-cycle cooling, Petition at 61-68, are based upon a fundamental misunderstanding of ESA requirements, EPA's § 316(b) regulations, and the 2015 BO. As described in the Permit and Fact Sheet, the Region has fulfilled its ESA § 7 consultation obligations and faithfully implemented EPA's § 316(b) requirements.

EPA consulted with FWS as part of the OSMRE and EPA consultation for the FCPP and Navajo Mine Energy Project (also commonly discussed as the 2015 Lease Renewal), which explicitly included the FCPP NPDES permit action. 2015 BO at 26-27, 124. The 2015 BO evaluated impingement and entrainment at the FCPP intake. *Id.* at 109-113. Although Petitioners incorrectly characterize the 2015 BO’s findings as “jeopardy and adverse modification findings,” *see, e.g.*, Petition at 63, the 2015 BO actually determined that, with the conservation measures, the lease action (including the FCPP NPDES permit renewal) “is *not likely to jeopardize* the continued existence of the Colorado pikeminnow and the razorback sucker.” 2015 BO at 133 (emphasis added).²⁹ Because FWS did not find jeopardy or adverse modification, contrary to Petitioners’ suggestions, Petition at 65-68, FWS was not required to identify “reasonable and prudent alternatives” to the proposed action. *See* 50 C.F.R. § 402.14(h)(2).

Instead, the 2015 BO appropriately required implementation of various “reasonable and prudent measures” (RPMs), *id.* § 402.14(i)(1)(ii), including RPM 2, which requires implementation of a Pumping Plan to “minimize entrainment and impingement losses of Colorado pikeminnow and razorback sucker through measures taken at the APS cooling water intakes.” 2015 BO at 150. To implement the BO, and consistent with 40 C.F.R. § 125.94(g), the Region incorporated the Pumping Plan and the additional measures therein into the 2019 Permit. 2019 Permit at 12-13. The measures APS has already taken pursuant to the Pumping Plan,

²⁹ Petitioners also mistakenly suggest that Colorado pikeminnow and razorback sucker have a “jeopardy” environmental baseline, Petition at 64, but the “jeopardy” concept does not apply to the pre-action condition of the species. *See* 84 Fed. Reg. 44,976, 44,987 (Aug. 27, 2019) (The Services recently reiterated their longstanding position that the ESA and regulations “do not contain any provisions under which a species should be found to be already (pre-action) in an existing status of being ‘in jeopardy[,]’ ‘in peril,’ or ‘jeopardized’ by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for [jeopardy or adverse modification].”).

including implementation of strategic pumping outages during stocking and spawning periods and a reduction in intake flow velocity, have resulted in major changes to the San Juan River intake system. APS Comments at 9; RTC at 61.

As discussed above, FCPP already employs a closed-cycle recirculating system. FWS, which consulted on EPA's § 316(b) Rule, is well aware of the benefits of various technology options for minimizing impingement and entrainment. *See* 79 Fed. Reg. at 48,380. FWS, in its expertise, determined that FCPP, including operation of the weir and intake, would not jeopardize listed species or result in adverse modification. 2015 BO at 133. The Region appropriately incorporated the conservation measures identified in the 2015 BO as part of the 2019 Permit. While Petitioners may prefer that FCPP install a different type of closed-cycle system, neither the CWA nor the ESA (or their respective implementing regulations) mandate such a requirement.

The Region appropriately set BTA for FCPP as operation of the closed-cycle system and implementation of the Pumping Plan. The Board should deny review of Petitioners' claims, which are based on a misunderstanding of the facts and law and fail to demonstrate that the Region's determinations were erroneous.

VI. Conclusion

Petitioners fail to meet the Board's procedural requirements and have failed to demonstrate the Region's permit decisions are clearly erroneous or otherwise warrant review. Accordingly, APS respectfully requests that the Board deny the Petition for Review.

Respectfully submitted,

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Dated: December 18, 2019

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This brief complies with the 14,000 word limitation found at 40 C.F.R. § 124.19(d)(3).

See 40 C.F.R. § 124.19(d)(1)(iv).

Dated: December 18, 2019

/s/ Kerry L. McGrath

Kerry L. McGrath

TABLE OF ATTACHMENTS

Attachment	Document
1	EPA Region IX, Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NN0000019 (signed Sept. 30, 2019)
2	National Pollutant Discharge Elimination System Permit Fact Sheet (Sept. 2019)
3	EPA Region IX, Response to Comments Document, APS Four Corners Power Plant, NPDES Permit No. NN0000019 (final Sept. 30, 2019)
4	U.S. Fish and Wildlife Service, Endangered Species Act – Section 7 Consultation Biological Opinion, Four Corners Power Plant and Navajo Mine Energy Project, New Mexico (Apr. 8, 2015)
5	EPA Region IX, Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NM0000019 (signed May 20, 1983)
6	EPA Region IX, Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NM0000019 (signed Apr. 3, 2001)
7	Letter from David L. Saliba, Fossil Plant Manager, APS, to Doug Eberhardt, Chief, Permits Issuance Section, EPA Region IX, re: NPDES Permit Renewal Application #NM0000019 (Oct. 5, 2005)
8	Letter from David C. Bloomfield, Four Corners Site Manager, APS, to David Smith, Manager, NPDES Permits Office, EPA Region IX, re: NPDES Permit Renewal Application NN0000019; By EPA's Request (Feb. 15, 2013)
9	Memorandum from Gary Sheth, EPA Region IX, to the Administrative Record for NPDES Permit NN0000019 and NPDES Permit NN0028193, re: Morgan Lake Status (July 20, 2017)
10	NPDES Effluent Limitation Guideline Compliance Project Summary, APS, Four Corners Power Plant (rev'd Final Apr. 4, 2019)
11	EPA Region IX, Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. NN0000019, (undated Draft) (published May 30, 2019)

Attachment	Document
12	National Pollutant Discharge Elimination System Permit Fact Sheet (undated Draft) (published May 30, 2019)
13	EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in <u>Rapanos v. United States & Carabell v. United States</u> (revised Dec. 2, 2008)
14	Amanda Palleschi, <i>Agencies Float CWA Jurisdiction Rule But Drop Plan for Interim Guide</i> , InsideEPA.com (Sept. 18, 2013)
15	EPA, <i>Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes</i> (2010)
16	EPA Region IX, <i>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</i> (Jan. 20, 2006)
17	Letter from Stephen B. Etsitty, Director, Navajo Nation EPA, to Wayne Nastri, Regional Administrator, EPA Region IX, re: Clarification Regarding the Navajo Nation’s Application for Eligibility to Establish Water Quality Standards under the Clean Water Act (Oct. 31, 2005)
18	Memorandum from Robert Perciasepe, Assistant Administrator, Office of Water, EPA, to W. Ray Cunningham, Director, Water Management Division, EPA, re: “Waters of the United States” Determination for a Proposed Cooling Pond Site in Polk County, Florida (Dec. 13, 1993)
19	EPA Region IX, Response to Comments Document, APS Four Corners Power Plant, NPDES Permit No. NN0000019 (undated) [2018]
20	Memorandum from Gary Sheth, EPA Region IX, to Administrative Record for NPDES Permit NN0000019, re: Reasonable Potential Analysis for NPDES Permit NN0000019 (Nov. 10, 2014)
21	Letter from Michael B. Stoker, Regional Administrator, EPA Region IX, to Neal Brown, Department Manager, Environmental Operations, Arizona Public Service Company, re: Section 401 of the Clean Water Act Water Quality Certification Waiver for the Four corners Power Plant (Sept. 30, 2019)
22	Letter from Jeffrey Jenkins, Plant Manager, Four Corners Power Plant, APS, to Tomás Torres, Director, Water Division, EPA Region IX, re: Water Quality Certification for Renewal of Four Corners NPDES Permit No. NN0000019 (Mar. 27, 2019)

Attachment	Document
23	EPA, Development Document for Final Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Steam Electric Point Source Category (Nov. 1982) (Excerpt)
24	EPA Navajo Nation Compliance Evaluation Inspection (May 8, 2012)
25	EPA Region IX, Water Division, NPDES Compliance Evaluation Inspection Report (Oct. 4, 2007)
26	Letter from Neal Brown, APS, to Rick Williamson, Manager, Indian Program Branch, Program Support Division, Western Region, Office of Surface Mining, re: Four Corners Power Plant Groundwater, Surface Water, and Water Level Data (Apr. 3, 2013)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ARIZONA PUBLIC SERVICE COMPANY'S RESPONSE TO PETITION FOR REVIEW was served via e-mail this 18th day of December, 2019, upon the persons listed below:

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