

TABLE OF CONTENTS

- I. INTRODUCTION..... 1
- II. STATUTORY AND REGULATORY BACKGROUND..... 1
- III. FACTUAL AND PROCEDURAL BACKGROUND 3
 - A. Permit History 3
 - B. Monitoring, Recordkeeping, Reporting Requirements..... 6
 - C. Tribal Consultation 7
 - D. Public Participation..... 8
 - E. Uinta Basin Ozone Studies 10
- IV. SCOPE AND STANDARD OF REVIEW 12
- V. ARGUMENT..... 14
 - A. The Board Should Deny Review of Two Claims Based on Technical Comments Identified in Petitioner’s Appendix B..... 14
 - 1. The Board should deny review of claims concerning CO₂ emissions from the Bonanza Plant 14
 - a) Review should be denied because no commenter raised the issue during the public comment period. 15
 - b) Review should be denied because the Petition fails to adequately state a claim..... 17
 - 2. The Board should deny review of claims concerning the imposition of a lifetime coal consumption limit at the Bonanza Plant 17
 - a) Review should be denied because the Petition fails to adequately state a claim..... 18
 - b) Review should be denied because Petitioner has not demonstrated clear error..... 19
 - B. The Board Should Deny Review Because the EPA’s Action is Consistent with Relevant Executive Orders and EPA Policies Related to Environmental Justice 20
 - 1. The EPA’s title V permit renewal will not result in impacts to surrounding communities 21
 - 2. The Region’s demographic screening assessment and Environmental Justice considerations sufficiently addressed Petitioner’s EJ comments..... 25
 - 3. The Region was not obligated to conduct further analysis and does not have authority to require the remedies the Tribe seeks. 27
 - C. Tribal Consultation 32
 - 1. The Board should deny review of the Tribal consultation claims because Petitioner failed to comply with Board rules by not citing to the EPA’s Response to Comments document..... 33
 - 2. The EPA conducted Tribal consultation consistent with EO 14096..... 34

D.	The EPA’s Resource Conservation and Recovery Act (RCRA) Inspection Report.....	36
1.	The Board should deny review of the Tribe’s claim regarding the RCRA inspection report because the inspection is not relevant to the CAA title V Permit.	37
2.	The Region appropriately avoided improper commingling of the CAA title V permit review and RCRA compliance evaluation.	38
3.	The EPA’s RCRA inspection procedures were consistent with the general trust responsibility between the U.S. and Tribes.....	39
4.	The EPA’s RCRA inspection procedures were consistent with relevant EPA policies. .	39
VI.	CONCLUSION.....	41

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arizona v. Navajo Nation</i> , 599 U.S. 555 (2023)	36, 39
<i>Bethlehem Steel Corp. v. U.S. EPA</i> , 638 F.2d 994 (7th Cir. 1980)	38
<i>El Paso Nat. Gas Co. v. United States</i> , 750 F.3d 863 (D.C. Cir. 2014)	39
<i>Hopi Tribe v. U.S. EPA</i> , 851 F.3d 957 (9th Cir. 2017)	36
<i>In re AES Puerto Rico L.P.</i> , 8 E.A.D. 324 (EAB 1999)	32
<i>In re Archer Daniels Midland Co.</i> , 17 E.A.D. 380 (EAB 2017)	13
<i>In re Ash Grove Cement Co.</i> , 7 E.A.D. 387 (EAB 1997)	24
<i>In re Avenal Power Center, LLC</i> , 15 E.A.D. 384 (EAB 2011)	23, 24
<i>In re Beeland Group, LLC, Beeland Disposal Well #1</i> , 14 E.A.D., 189 (EAB 2008)	24, 33
<i>In re Chemical Waste Management</i> , 6 E.A.D. 66 (EAB 1995)	23
<i>In re Desert Rock Energy Company, LLC</i> , 14 E.A.D. 484 (EAB 2009)	35
<i>In re Dominion Energy Brayton Point, L.L.C.</i> , 12 E.A.D. 490 (EAB 2006)	14
<i>In re Ecoelectrica, L.P.</i> , 7 E.A.D. 56 (EAB 1997)	24
<i>In re Energy Answers Arcibo, LLC</i> , 16 E.A.D. 294 (EAB 2014)	32
<i>In re Envotech</i> , 6 E.A.D. 260 (EAB 1996)	23
<i>In re Evoqua Water Technologies LLC</i> , 17 E.A.D. 795 (EAB 2019)	13
<i>In re General Electric Company</i> , 4 E.A.D. 358 (EAB 1992)	23
<i>In re General Electric Company</i> , 17 E.A.D. 434 (EAB 2018)	13
<i>In re Guam Waterworks Auth.</i> , 15 E.A.D. 437 (EAB 2011)	13
<i>In re Indeck-Elwood, LLC</i> , 13 E.A.D. 126 (EAB 2006)	13

<i>In re Knauf Fiber Glass, GMBH,</i> 9 E.A.D. 1 (EAB 2000)	24, 32
<i>In re Marine Shale Processors, Inc.,</i> 5 E.A.D. 751 (Mar. 1995).....	38
<i>In re Peabody W. Coal Co.,</i> 12 E.A.D. 22 (EAB 2005).....	34
<i>In re Penneco Envtl. Solutions, LLC,</i> 17 E.A.D. 604 (EAB 2018).....	33
<i>In re Prairie State Generating Co.,</i> 13 E.A.D. 1 (EAB 2006).....	32
<i>In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.,</i> 15 E.A.D. 470 (EAB 2012).....	32
<i>In re Shell Offshore Inc., Kulluk Drilling Unit & Frontier Discoverer Drilling Unit,</i> 13 E.A.D. 357 (EAB 2007).....	24
<i>In re Shell Offshore, Inc.,</i> 15 E.A.D. 536 (EAB 2012).....	32
<i>In re Sierra Pacific Industries,</i> 16 E.A.D. 1 (EAB 2013).....	31
<i>In re Stonehaven Energy Mgmt., LLC,</i> 15 E.A.D. 817 (EAB 2013).....	34
<i>In re Veolia Es Technical Solutions, L.L.C.,</i> 18 E.A.D. 194 (EAB 2020).....	3, 37
<i>In re Westborough,</i> 10 E.A.D. 297 (EAB 2002).....	33
<i>Morongo Band of Mission Indians v. FAA,</i> 161 F.3d 569 (9th Cir. 1998)	36, 39

Statutes

42 U.S.C. § 7601(d).....	2
42 U.S.C. § 7661(a).....	2
42 U.S.C. § 7661a(a).....	1
42 U.S.C. § 7661a(b).....	
42 U.S.C. § 7661a(d)(3).....	2
42 U.S.C. § 7661b.....	6
42 U.S.C. § 7661c(a).....	2, 37
42 U.S.C. § 7661c(c).....	2
42 U.S.C. §§ 7661 to 7661f.....	1

Regulations

40 C.F.R. part 49.....	5
40 C.F.R. part 60.....	7
40 C.F.R. part 71.....	2, 3, 4, 12
40 C.F.R. part 75.....	6
40 C.F.R. part 257, subpart D.....	20, 37, 41
40 C.F.R. § 64.4.....	

40 C.F.R. § 70.2	37
40 C.F.R. § 71.11	8
40 C.F.R. § 71.11(d).....	3
40 C.F.R. § 71.11(g).....	3
40 C.F.R. § 71.11(i) and (j).....	3
40 C.F.R. § 71.11(i)(2)(ii).....	6
40 C.F.R. § 71.11(l).....	13
40 C.F.R. § 71.11(l)(1).....	12, 13
40 C.F.R. § 71.2	2
40 C.F.R. § 71.5(a)(1)(iii).....	5
40 C.F.R. § 71.6(a)(1).....	20, 29
40 C.F.R. § 71.6(a)(3)(i)(A).....	2
40 C.F.R. § 71.6(a)(3)(i)(B).....	2
40 C.F.R. § 71.6(a)(3)(ii).....	6
40 C.F.R. § 71.6(c)(1).....	6
40 C.F.R. § 71.7(c)(1)(i).....	3
40 C.F.R. § 71.7(c)(3).....	6
40 C.F.R. § 124.13(a).....	16
40 C.F.R. § 124.19	13
40 C.F.R. § 124.19(a).....	1, 13
40 C.F.R. § 124.19(a)(4)(i).....	17, 18
40 C.F.R. § 124.19(a)(4)(ii).....	13, 15, 17, 33
40 C.F.R. § 124.19(b)(3).....	1
40 C.F.R. § 124.19(d)(3).....	41

Other Authorities

45 Fed. Reg. 33290 (May 19, 1980).....	13
78 Fed. Reg. 27220 (May 9, 2013).....	31
80 Fed. Reg. 65292 (Oct. 26, 2015).....	10
Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).....	passim
Executive Order 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023).....	passim
<i>In re Monroe Elec. Generating Plant Entergy La.,</i> Order Partially Granting and Partially Denying Petition for Objection to Permit, 27 (EPA Adm’r, June 11, 1999).....	38
<i>In re Onyx Env’tl Services,</i> Order Partially Denying and Partially Granting Petition for Objection to Permit, 4 (EPA Adm’r, Feb. 1, 2006).....	38

TABLE OF ATTACHMENTS

Att	AR Doc #	Date	Description
A	3	Undated	Statement of Basis for Draft Permit No. V-UO-000004-2019.00, Deseret Generation and Transmission Co-operative Bonanza Power Plant (EPA-R08-OAR-2019-0350-0006)
B	19	12/4/2023	Air Pollution Control Permit to Operate Title V Operating Permit Program at 40 CFR Part 71 for Deseret Generation and Transmission Co-operative Bonanza Power Plant (EPA-R08-OAR-2019-0350-0016)
C	26	12/4/2023	Deseret Bonanza Power Plant Clean Air Act (CAA) Title V Permit Renewal Response to Comments (EPA-R08-OAR-2019-0350-0023-attachment 2)
D	35	8/30/2023	Meeting invitation re: Consultation - Ute Tribe-EPA R8 re: Deseret/Bonanza Activity
E	37	8/30/2023	Meeting Agenda re: Ute Tribe and EPA Region 8 – Consultation re: Deseret Bonanza Permit Modification
F	38	8/30/2023	Slides re: Ute Business Committee – EPA Region 8 Tribal Consultation
G	55	9/22/2020	Meeting invitation re: EPA-U&O Business Committee Consultation
H	56	9/22/2020	Draft Agenda for Ute Business Committee-EPA Region 8 Meeting: Pre-Consultation for Deseret Bonanza Power Plant Air Permit Renewal and Informational Session on Watershed Restoration Project
I	57	1/12/2021	Meeting invitation re: Ute Tribe/EPA Call
J	58	1/12/2021	Draft Agenda for Ute Tribe/EPA Informational Meeting on Current Issues
K	41	9/11/2023	Deseret Bonanza Power Plant Clean Air Act (CAA) Title V Permit Renewal Draft Response to Comments (EPA-R08-OAR-2019-0350-0022)
L	10	2/8/2021	Email from Lohitaksha Rao, EPA, re: Notice of Public Comment Period – Draft Title V Operating Permit on the Uintah and Ouray Indian Reservation (EPA-R08-OAR-2019-0350-0011)
M	13	2/9/2021	Webpage Public Notice: Draft Title V Operating Permit: Deseret Power Electric Cooperative - Bonanza Power Plant (EPA-R08-OAR-2019-0350-0014)
N	16	2/28/2021	Proposed Clarifications to Draft Deseret Bonanza Title V Permit Posted to Regulations.gov by Deseret Power (EPA-R08-OAR-2019-0350-0013-attachment 1)
O	17	3/22/2021	Letter from Luke Duncan, Ute Indian Tribe, to EPA re: Comments on Title V Operating Permit: Deseret Power Electric Cooperative - Bonanza Power Plant (EPA-R08-OAR-2019-0350-0015-attachment 1)

P	18	10/10/2023	Ute Indian Tribe of the Uintah and Ouray Reservation Comments on U.S. Environmental Protection Agency Response to Comments on the proposed Title V Operating Permit: Deseret Power Electric Cooperative - Bonanza Power Plant (EPA-R08-OAR-2019-0350-0019)
Q	54	3/1/2014	Final Report: 2013 Uinta Basin Winter Ozone Study, Full Document
R	2	Undated	Draft Air Pollution Control Permit to Operate Title V Operating Permit Program at 40 CFR Part 71 for Deseret Generation and Transmission Co-operative Bonanza Power Plant (EPA-R08-OAR-2019-0350-0009)
S	48	5/4/2011	EPA Policy on Consultation and Coordination with Indian Tribes
T	47	4/17/2007	EPA Memorandum from Walker Smith re: Transmittal of the Questions and Answers on the Tribal Enforcement Process
U	46	1/17/2001	EPA Memorandum from Steve Herman re: Transmittal of the Final Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy
V	49	10/17/2022	Email from Linda Jacobson, EPA, to Bart Powaukee, Ute Tribe, re: EPA RCRA Inspection of the Bonanza Power Plant during the week of Oct 24, 2022
W	51	10/18/2022	Letter from Suzanne Bohan, EPA, to Shaun Chapoose, Ute Indian Tribe, re: Inspection Coordination Letter for Resource Conservation and Recovery Act (RCRA) Inspections on the Uintah & Ouray Reservation

I. INTRODUCTION

The Deseret Generation and Transmission Cooperative (Deseret) owns and operates the Bonanza Power Plant (Bonanza or the “Bonanza Plant”), a 500-megawatt, coal-burning energy generating unit. The Bonanza Plant is a major source under the Clean Air Act and subject to the title V operating permit provisions at Sections 501 to 507 of the CAA. 42 U.S.C. §§ 7661 to 7661f. The Bonanza Plant is located in Indian country within the Uintah & Ouray Indian Reservation (Reservation) of the Ute Indian Tribe (Tribe or Petitioner). The U.S. Environmental Protection Agency Region 8 (Region or “the EPA”) is the operating permit issuing authority because the Bonanza Plant is located in Indian country and because the Tribe is not approved for treatment as a state (TAS, or treatment in a similar manner as a state) to implement the title V operating permit program. On December 4, 2023, the Region issued a renewed title V permit (the “Permit”) for the Bonanza Plant. On January 3, 2024, the Tribe filed a Notice of Appeal with this Environmental Appeals Board (EAB or Board) seeking review of the Permit pursuant to 40 C.F.R §§ 71.11(l) and 124.19(a). On February 23, 2024, Deseret joined this permit appeal with the filing of a Notice of Appearance pursuant to 40 C.F.R. § 124.19(b)(3).

For the reasons set forth below, Region 8 respectfully requests that the EAB deny review of the Permit because the issues raised in the Notice of Appeal do not meet the threshold procedural requirements for Board review and do not demonstrate that Region 8’s permit decision was clearly erroneous or otherwise warrants review.

II. STATUTORY AND REGULATORY BACKGROUND

The Clean Air Act requires major sources of air pollutants to obtain and comply with a title V permit.¹ In most cases, States and localities are the title V permit issuing authority.²

¹ CAA § 502(a), 42 U.S.C. § 7661a(a).

² CAA § 502(b), 42 U.S.C. § 7661a(b).

However, where a State lacks environmental civil regulatory jurisdiction, such as in Indian country on the Reservation, the EPA is the permit-issuing authority unless a Tribe obtains treatment in a manner similar to States for the title V operating permitting program.³ The regulations governing the development and issuance of federal operating permits are contained at 40 C.F.R. part 71.

Title V permits authorize operation of major sources,⁴ but the permits themselves do not directly establish substantive emission reduction requirements for permitted facilities beyond those found in requirements already applicable to the facility. Instead, title V permits incorporate enforceable emission limitations and standards, schedules of compliance, reporting requirements and other conditions “necessary to assure compliance with applicable requirements” of the CAA.⁵ The regulatory definition of “applicable requirement” identifies thirteen categories of standards and requirements established under the CAA, which, if they apply to a source, must be incorporated into the title V permit.⁶ Additionally, title V permits must include “inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.”⁷ As this Board has explained, the EPA undertakes a three-step process for establishing monitoring requirements in title V permits:

First, the permitting authority must incorporate into the permit all monitoring requirements already contained in applicable requirements. 40 C.F.R. § 71.6(a)(3)(i)(A). Second, the permitting authority must add periodic monitoring requirements to the permit if the applicable requirements do not already require periodic monitoring. *Id.* § 71.6(a)(3)(i)(B).

³ See CAA §§ 502(d)(3) and 301(d), 42 U.S.C. §§ 7661a(d)(3) and 7601(d).

⁴ Specifically, CAA § 501(a), 42 U.S.C. § 7661(a), prohibits the operation of a major source except in compliance with the terms of a title V operating permit.

⁵ CAA § 504(a), 42 U.S.C. § 7661c(a).

⁶ 40 C.F.R. § 71.2.

⁷ CAA § 504(c), 42 U.S.C. § 7661c(c).

Third, the permitting authority must supplement the permit with additional monitoring requirements if the periodic monitoring requirements contained in applicable requirements are not sufficient to assure compliance. *Id.* § 71.6(c)(1).⁸

The EPA is required to incorporate applicable requirements that have been established under other CAA authorities; in contrast, the EPA has some discretion in determining pursuant to CAA section 504(c) what additional monitoring is necessary to assure compliance with applicable requirements.

The procedures governing the EPA's issuance of federal title V permits are contained in 40 C.F.R. part 71; permit renewals are subject to the same procedural requirements as initial permit issuance.⁹ When it prepares a draft renewal permit, the EPA must provide public notice and comment, and an opportunity for a hearing.¹⁰ Commenters are obligated to "raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period."¹¹ After the close of the public comment period, the EPA must issue a final permit decision, as well as a response to comments that briefly describes and responds to all significant comments received.¹²

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Permit History

On February 4, 1981, the EPA issued an initial CAA Prevention of Significant Deterioration (PSD) permit to Deseret to construct two 400-megawatt coal-fired electric generation units at the Bonanza Plant. After the EPA approved the State of Utah's PSD permit program in the early 1990s, Utah issued its own PSD permit for the single boiler and revised it to

⁸ *In re Veolia Es Technical Solutions, L.L.C.*, 18 E.A.D. 194, 196 (EAB 2020).

⁹ 40 C.F.R. § 71.7(c)(1)(i).

¹⁰ 40 C.F.R. § 71.11(d).

¹¹ 40 C.F.R. § 71.11(g).

¹² 40 C.F.R. § 71.11(i) and (j).

upgrade the capacity of the boiler to operate at 500 megawatts. In late 1997, as a result of a federal court decision, the EPA re-asserted federal civil regulatory jurisdiction over the Bonanza Plant. The EPA issued an updated PSD permit for the single boiler on February 2, 2001, which replaced the 1981 PSD permit and incorporated controls from the Utah-issued permit. On August 30, 2007, the EPA issued a PSD permit for a modification to the existing plant to add a 110-megawatt waste coal-fired unit (WCFU). That permit was appealed (EAB Appeal No. PSD 07-03) and remanded to the EPA, and the EPA has taken no further action regarding the WCFU project.

On December 5, 2014, in accordance with the requirements of the CAA title V Operating Permit Program at 40 C.F.R. part 71, the EPA issued an initial title V operating permit for the Bonanza Plant with an effective date of January 7, 2015, and an expiration date of January 7, 2020. Sierra Club and WildEarth Guardians filed a petition for review of the initial title V permit (EAB Appeal Nos. CAA 15-01 & CAA 15-02) and Deseret intervened in the proceeding. The parties entered into the Board's alternative dispute resolution (ADR) process and the appeal was dismissed in early 2016 pursuant to a settlement agreement among all parties. The final settlement agreement, dated December 23, 2015, included, among other terms, a commitment by Deseret to submit, and commitment by the EPA to process, an application for a minor NSR permit containing: 1) new NO_x controls and emission limits, 2) a coal consumption cap of 20,000,000 short tons of coal, and 3) a contingent release from the coal consumption cap in the event Deseret either installs and operates selective catalytic reduction technology, or through some other means, achieves continuous compliance with a NO_x emission limit of 0.05 lb/MM Btu 12-month rolling average.

On February 11, 2016, in accordance with the 2015 settlement agreement, the EPA issued a permit pursuant to the provisions of the federal Minor New Source Review (MNSR) Permit Program at 40 C.F.R. part 49 to reduce emissions of nitrogen oxides (NO_x) by authorizing the replacement of existing low-NO_x burners (LNB) with new LNBS and the installation of overfire air (OFA). The MNSR permit incorporated the new NO_x emissions control requirements and emissions limitations, as well as the coal consumption cap described in the 2015 settlement agreement. On April 14, 2016, Deseret requested an administrative permit amendment to the initial title V permit to incorporate the terms and conditions of the MNSR permit and to update the responsible official and tribal contact in the permit. On September 23, 2016, the EPA issued the amended title V operating permit, with the same permit expiration date as in the initial title V permit. On May 9, 2019, Deseret submitted a timely title V renewal application for the Bonanza Plant in accordance with 40 C.F.R. § 71.5(a)(1)(iii). The Region then prepared a draft renewal title V permit containing the same requirements for controlling air pollutant emissions as the previous permit, including limits for particulate matter, sulfur dioxide, and NO_x and rigorous monitoring, compliance certification, and reporting requirements. The draft renewal title V permit also contained the terms of the 2015 settlement agreement, including the requirement to install and operate low-NO_x burners and a coal consumption cap of 20,000,000 short tons for the period from January 1, 2020, through the end of service (unless Deseret chooses instead to install post-combustion controls and meet a lower NO_x limit). On February 9, 2021, the Region provided public notice of the draft renewal title V permit for a 30-day comment period, which closed March 11, 2021.

On December 4, 2023, based on the information provided in Deseret's title V permit renewal application, subsequent application updates and public comments on the draft permit,

the EPA issued the Permit for the Bonanza Plant, effective January 3, 2024. The EPA issued two response to comments (RTC) documents with its final permit decision - a brief RTC addressing comments raised by Deseret and the Tribe (Summary RTC) and a longer RTC (Final Tribal RTC), described in greater detail below, addressing the Tribe's collected comments. The Tribe filed its timely petition for review with the Board on January 3, 2024, thus staying the effective date of the Permit pursuant to 40 C.F.R. § 71.11(i)(2)(ii). Deseret may continue to operate Bonanza under the terms of the prior permit during the EAB appeal process and through any judicial review of subsequent final action.¹³

B. Monitoring, Recordkeeping, Reporting Requirements.

Section 504(c) of the CAA requires that each title V permit set forth “inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.” Further, 40 C.F.R. § 71.6(c)(1) requires that title V permits contain “compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the permit terms and conditions of the permit.” There are also several specific provisions in Part 71 addressing these other types of requirements, such as 40 C.F.R. § 71.6(a)(3)(ii) on recordkeeping. The statement of basis describes the applicable requirements that serve as the basis for the Permit's monitoring requirements, including performance specifications for monitoring equipment and quality assurance procedures for continuous emissions monitoring from 40 C.F.R. part 60, Attachment A, Doc. 3, AR 00148; compliance assurance monitoring (CAM) requirements taken from Bonanza's CAM plan developed pursuant to 40 C.F.R. § 64.4, *Id.*, AR 00149-00150; and specifications, testing procedures and conversion procedures for continuous emissions monitoring from 40 C.F.R. part

¹³ 40 C.F.R. § 71.7(c)(3), 42 U.S.C. § 7661b.

75. *Id.*, AR 00151-00152. The monitoring and reporting requirements drawn from these applicable requirements are extensive, with unit-specific monitoring, recordkeeping and reporting requirements contained in Sections III to XII of the Permit. Additionally, Section XIII.B of the Permit establishes generally applicable recordkeeping requirements, and Section XIII.C requires semi-annual reporting of “all reports of any required monitoring” under the Permit. Attachment B, Doc. 19, AR 00267-00269. As the Region explained in the Final Tribal RTC, the air program scrutinized the Permit’s monitoring, compliance certification, recordkeeping and reporting requirements and found them to be sufficient to assure compliance with the terms and conditions of the Permit. Attachment C, Doc. 26, AR 00425.

C. Tribal Consultation

The EPA held two government-to-government consultation meetings with the Tribe regarding the title V permit renewal application. Attachment D, Doc. 35, AR 00501-00502; Attachment E, Doc. 37, AR 00505; Attachment F, Doc. 38, AR 00506-00511. In addition, the EPA held another two informational meetings with the Tribal government. Attachments G-J, Docs 55-58, AR 00981-00985. The two Tribal consultation meetings were held with members of the Tribe’s Business Committee – the Tribe’s elected governing body – on August 30, 2023, and September 20, 2023. The EPA shared the Draft Tribal RTC with the Tribe shortly before the consultation meeting on August 30, 2023. Attachment D, Doc. 35, AR 00501-00502; Attachment K, Doc. 41, AR 00515-00547. The two informational meetings were held with members of the Tribe’s Business Committee and other Tribal government representatives on September 22, 2020, and January 12, 2021. These informational meetings were important opportunities for

coordination with the Tribe but did not constitute Tribal consultation under the EPA's Tribal consultation policy.¹⁴

D. Public Participation

In addition to government-to-government Tribal consultation, the EPA provided the opportunity for public participation required by 40 C.F.R. § 71.11. Notification emails regarding the opportunities to comment and to participate in the public hearing on the proposed draft permit were sent to the Tribal contacts and the EPA's Reservation-specific listserv list on February 8, 2021. Attachment L, Doc. 10, AR 00171. The EPA also published a public notice of opportunities to comment on the proposed permit and to participate in the public hearing on the agency's website on February 9, 2021. Attachment M, Doc. 13, AR 00175-00177.¹⁵ At the Tribe's request, the EPA held a public hearing on March 11, 2021. Deseret submitted minor comments in the docket at regulations.gov (Attachment N, Doc. 16, AR 00182) prior to the hearing and Deseret representatives joined the hearing but did not make additional comments during the hearing. No members of the general public attended the hearing or submitted comments. The Tribe did not attend the hearing. Eleven days after the close of the public comment period on March 11, 2021, the Tribe submitted a comment letter (March 2021 letter).

The Tribe's March 2021 letter asserted that the Tribe and its members continue to experience serious health issues attributable to poor air quality on the Reservation, and that Bonanza has had deleterious impacts on vegetation and wildlife on Tribal lands in the surrounding area. Attachment O, Doc. 17, AR 00184. The Tribe asserted that, "Federal law

¹⁴ The EPA issued the Permit in this case on December 4, 2023. The EPA, therefore, conducted its Tribal consultation process with the Tribe consistent with the agency's then-applicable *Policy on Consultation and Coordination with Indian Tribes* (May 4, 2011). On December 7, 2023, the EPA issued its *Policy on Consultation with Indian Tribes*. Upon issuance, the December 7, 2023 policy superseded the 2011 policy in effect when the permitting action took place. See <https://www.epa.gov/tribal/consultation-tribes#consultation-policy>.

¹⁵ Region 8 makes all air-related public notices available at <http://www.epa.gov/caa-permitting/caa-permit-public-comment-opportunities-region-8>.

requires the EPA to protect the [Tribe] from having to shoulder a disproportionate share of the adverse environmental impacts caused by the Bonanza Plant.” *Id.* The Tribe further stated that the federal government’s trust responsibility to the Tribe obligates the EPA to mitigate and prevent harmful impacts from the Bonanza plant. The Tribe discussed the EO 12898 directives to federal agencies to identify and address “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States” *Id.* The Tribe then quoted extensively from its comment letter on the 2015 settlement agreement. In the quoted comments, among other points, the Tribe specifically raised concerns about the Bonanza Plant’s nitrogen oxide (“NOx”) emissions and its contribution to ozone formation in the Uinta Basin. *Id.*, AR 00185-00186. The Tribe stated that it “supports the lifetime limit on coal consumption” at Bonanza contained in the settlement agreement. *Id.* The Tribe also stated that another way to redress environmental injustice is to establish a trust fund to promote cleaner air for Tribal members. *Id.*, AR 00187-00188. After providing the extensive block quote from its 2015 comments, the Tribe then stated that it stands behind the comments and continues to look to its federal trustee to ensure critical protections are implemented, including establishing a trust fund. *Id.*

The EPA prepared a draft response to comments (Draft Tribal RTC) document to address the comments raised in the Tribe’s March 2021 letter. Even though not required, the Draft Tribal RTC was shared with the Tribe on August 30, 2023, before the August 30, 2023 and September 20, 2023 Tribal consultations described above. On October 10, 2023, the Tribe submitted a letter with comments regarding the Draft Tribal RTC document (October 2023 letter). In the October 2023 letter, the Tribe reiterated the comments provided in the March 2021 letter. Attachment P, Doc. 18, AR 00190-00191. The Tribe also commented on the Draft Tribal RTC, critiquing the

Region's responses on air quality, groundwater, and vegetation and wildlife. *Id.*, AR 00191-00193. The Region reviewed the Tribe's comments on the Draft Tribal RTC document and prepared a final Tribal RTC (Final Tribal RTC) document¹⁶ to address the comments in the Tribe's March 2021 and October 2023 letters before issuing the Permit on December 4, 2023.

E. Uinta Basin Ozone Studies

Ozone is not emitted directly from sources like other pollutants subject to a National Ambient Air Quality Standard (NAAQS). It is formed in the atmosphere through chemical reactions between the precursor pollutants NOx and volatile organic compounds (VOC) in the presence of sunlight and under certain meteorological conditions.¹⁷ The Uinta Basin is a winter ozone area, where high ozone concentrations are dependent on seasonal stagnant conditions associated with snow cover and strong temperature inversions, and on the bowl-like topography of the Basin. The EPA designated portions of the Uinta Basin as a Marginal nonattainment area for the 2015 ozone NAAQS. Uintah County has not been designated nonattainment for any other NAAQS pollutant.

Utah DEQ has led a multi-year study of winter ozone in the Uinta Basin bringing together researchers from county, state, and federal entities, industry organizations, and universities from across the U.S. and Canada. Extensive field studies were carried out in the Uinta Basin each winter from 2011 to 2014, and summaries and complete reports for each year are available from the Utah DEQ, including the "2013 Uinta Basin Ozone Study Final Report" (2013 Study) that is available to the public on the State of Utah's website¹⁸ and that was

¹⁶ The Region notes for the Board that when it issued the Permit, it sent separate letters to Deseret and the Tribe containing the Final Tribal RTC. Both sets of correspondence were included in the docket and, as a result, identical copies of the Final Tribal RTC appears twice in the administrative record at Document 23 and Document 26. For purposes of this Response, all citations to the Final Tribal RTC are to the copy sent to the Tribe, which is Document 26 in the AR and Attachment C to this Response.

¹⁷ See 80 Fed. Reg. 65292, 65299-300 (Oct. 26, 2015).

¹⁸ Available at <https://deq.utah.gov/air-quality/uinta-basin-ozone-studies-ubos>.

referenced in Region 8's Final Tribal RTC. The 2013 Study included numerous measurements designed to evaluate the possible contribution of the Bonanza Plant to winter ozone, including vertical profile measurements within and above the inversion layer using balloons, and aircraft measurements that flew through the power plant plume. The 2013 Study explained that aircraft measurements near the Bonanza Plant "encountered a layer of enhanced CO, CO₂ and NO₂ but with no enhancement in [methane] and slightly depleted [ozone] at an altitude of 1800 – 1900 meters above sea level. This composition of trace gas levels was a clear indication of transit through the Bonanza Plant plume. Visual identification of the plume, the altitude of the plume based on the stack height and plume rise, and its composition were clear indicators that the plume had risen through the strong inversion layer. There was also no sign of mixing of the plume from above the inversion back downward to the surface where it could contribute to ozone production within the geographical boundaries of the study." Attachment Q, Doc. 54, AR 00789.

The 2013 Study concluded that the "Bonanza power plant plume does not appear to contribute any significant amount of nitrogen oxides or other contaminants to the polluted boundary layer during ozone episodes; the thermally buoyant Bonanza plume was observed to rise upwards from the 183 m (600 ft) stack and penetrates through the temperature inversion layer. As a result, emissions from the Bonanza plant are effectively isolated from the boundary layer in which the high ozone concentrations occur." *Id.*, AR 00644, AR 00682. The 2013 Study also concluded:

- 1) VOC and NO_x are the primary ozone precursors and oil and gas exploration and production are the predominant sources of ozone precursors in the Uinta Basin. *Id.*, AR 00644.

2) VOC concentrations in the Basin are extremely high during ozone episodes due to large amounts of VOC emissions and limited ventilation under a strong temperature inversion.

Id.

3) Due to the isolating effects of the inversion layer, any proposed emission reduction strategy at the Bonanza Plant is unlikely to have any effect on wintertime ground-level ozone episodes in the Uinta Basin. *Id.*, AR 00648, AR 00687-00688.

Finally, the 2013 Study indicates that, while there is natural variability in weather in the Basin, the conditions that lead to winter ozone episodes are likely to continue. The 2013 Study found that, “Analyses of data from 1950-2012 indicates that ozone conducive conditions occur on at least some days during about half of all winter seasons, and ozone levels characteristic of a severe season such as the 2010-2011 season can be expected to occur approximately 20% of the time (an average of one in five seasons) given the level of precursor emissions characteristic of the past three seasons.” *Id.*, AR 00662.

IV. SCOPE AND STANDARD OF REVIEW

The petition seeks review of Region 8’s issuance of an operating permit under 40 C.F.R. part 71. Under 40 C.F.R. § 71.11(l)(1), any person who commented on the draft permit “may petition the Environmental Appeals Board to review any condition of the permit decision.” The petition must include “a statement of the reasons supporting that review, including a demonstration that any issues raised were raised during the public comment period,” unless doing so was impracticable or the grounds for objection arose later, and must show that the challenged conditions are based on either “(i) [a] finding of fact or conclusion of law which is

clearly erroneous; or (ii) [a]n exercise of discretion or an important policy consideration” that the Board should review.¹⁹

The Board grants review “only sparingly,” and “most permit conditions should be finally determined at the Regional level.”²⁰ In reviewing challenges to part 71 permits, pursuant to 40 C.F.R. § 71.11(l), the Board applies the standard of review for permits cited in 40 C.F.R. § 124.19. Under these procedures, a petitioner seeking to challenge a permit must first establish that threshold procedural requirements have been satisfied, including timeliness, standing, and issue preservation.²¹ To establish that it has preserved an issue for appeal, a petitioner must show that it raised the issue “with reasonable specificity” during the comment period.²²

In addition to satisfying the threshold requirements, the petition must identify the contested permit conditions or other specific challenges, and must “clearly set forth, with legal and factual support, petitioner’s contentions for why the permit decision should be reviewed.”²³ The petitioner must explain why the permitting authority’s response to those objections is clearly erroneous or otherwise warrants review.²⁴ Under this standard, the Board reviews the administrative record to determine whether the Region exercised its “considered judgment” in making a permit decision and will not “find clear error simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter.”²⁵ On matters that are

¹⁹ 40 C.F.R. § 71.11(l)(1); 40 C.F.R. § 124.19(a)(4)(ii).

²⁰ Consolidated Permit Regulations, 45 Fed. Reg. 33290, 33412 (May 19, 1980).

²¹ *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006).

²² *Id.* at 143.

²³ 40 C.F.R. § 124.19(a)(4)(i); see *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 382-83 (EAB 2017) (part 124 proceeding) (“Petitioner’s failure to specifically identify the Region’s response to comments and to explain why the Region’s response was clearly erroneous or otherwise warrants review is, alone, grounds for denying the petition for review on this issue.”); see also 40 C.F.R. § 71.11(l)(1) (requiring, among other things, that petition include statement of statement of reasons supporting review).

²⁴ *Indeck-Elwood*, 13 E.A.D. at 143; see *In re Guam Waterworks Auth.*, 15 E.A.D. 437, 444 (EAB 2011) (“to show clear error, the petitioner must specifically state its objections to the permit and explain why the permit issuer’s previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review”).

²⁵ *In re Evoqua Water Technologies LLC*, 17 E.A.D. 795, 799-800 (EAB 2019) (quoting *In re General Electric Company*, 17 E.A.D. 434, 446 (EAB 2018)).

fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, so long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record.²⁶

V. ARGUMENT

The Board should deny the petition for review of the Permit for the reasons outlined below.

A. The Board Should Deny Review of Two Claims Based on Technical Comments Identified in Petitioner's Appendix B

Petitioner provides a table in Appendix B to its petition that it describes as a summary of the Tribe's technical comments on the Permit and the EPA's responses. Petitioner asserts that this table is incorporated into its Petition as if it had fully argued it in the body of the document.

Petition at 15. But two of the five issues outlined in Appendix B are not clearly addressed in the body of the Petition. These two issues are Petitioner's comment in the first row of Appendix B addressing carbon dioxide ("CO₂") emissions from the Bonanza Plant, Petition at 29, and Petitioner's comment in the fifth row of Appendix B addressing imposition of a lifetime limit on coal consumption at the Bonanza Plant. Petition at 30. The EPA addresses each of these two issues immediately below. The remaining three issues are addressed elsewhere in this Response.

1. The Board should deny review of claims concerning CO₂ emissions from the Bonanza Plant

The first row of the chart in Appendix B states that the Tribe commented that the Bonanza Plant emits approximately 3.5MM tons of CO₂/year. Under the column titled "CROSS-REFERENCE (March 2021 Comments)," the petition provides the following citation: "Sec. II. P. 2." The first row includes the following statement in the column titled "ERRONEOUS/ABUSE

²⁶ See *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 510, 561-62 (EAB 2006) (discussing deference accorded to Region's technical decisions).

OF DISCRETION:” “Abuse of discretion and inconsistent with Trust duties to ignore disproportionate impact/ cumulative effect on Tribal lands.” The body of the petition offers no additional explanation or discussion of CO₂ emissions either as it pertains to controls or monitoring required under the Permit or as it pertains to the impact of those emissions on Tribal lands. For the reasons outlined below, to the extent the first row of Appendix B asserts a claim, it should be dismissed.

a) Review should be denied because no commenter raised the issue during the public comment period.

The Board should deny review of claims pertaining to CO₂ emissions from the Bonanza Plant because Petitioner has not met the basic threshold requirement of “demonstrat[ing], by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing).”²⁷ The EPA has reviewed the Tribe’s March 2021 letter and its October 2023 letter and can find no reference to CO₂ emissions from the Bonanza Plant. Nor can the EPA find any reference to CO₂ emissions from the Bonanza Plant in the comments provided by the permittee. No commenter raised the issue at the public hearing held in March 2021. The cross-reference Petitioner provides appears to be a reference to Section II, page 2 of the EPA’s Final Tribal RTC. Attachment C, Doc. 26, AR 00425. That section of the Final Tribal RTC, which is fully titled “II. Permitting Background,” describes the overall process the EPA undertook to issue the Permit and the paragraph containing references to CO₂ emissions is describing the emissions controls included in the Permit. Thus, it appears that Petitioner is pointing to the EPA’s own response to comments as evidence that this issue was raised during the public comment period.

²⁷ 40 C.F.R. § 124.19(a)(4)(ii).

Petitioner was obligated under 40 C.F.R. § 124.13(a) to “raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period.” The issue of CO₂ emissions from the Bonanza Plant were reasonably ascertainable and Petitioner had ample opportunity to raise any concerns or comments about CO₂ emissions during the public comment period. The EPA publicly noticed the draft renewal permit and draft statement of basis on February 9, 2021. Both documents address CO₂ monitoring equipment and requirements at the Bonanza Plant, Attachment R, Doc. 2, AR 00047, Attachment A, Doc. 3, AR 00139, and the statement of basis provides Deseret’s estimate of several of the plant’s emitting units potential to emit (PTE) pollutants, including carbon dioxide. *Id.*, AR 00143. Moreover, the EPA shared its Draft Tribal RTC with the Tribe on September 11, 2023, in preparation for Tribal consultation, which included the EPA’s discussion of CO₂ within the context of its permitting background. Even after specifically inviting further comment from the Tribe on this document, the Tribe offered no comments addressing CO₂. In both of its comment letters the Tribe did describe the Bonanza Plant’s history of emitting “high levels of coal pollution into the air at the expense of the health, safety, and well-being of tribal members and communities,” Attachment O, Doc. 17, AR 00184, AR 00186, Attachment P, Doc. 18, AR 00190, but the substance of both letters focused on controlling NO_x and VOC emissions from the plant to limit impacts to tribal members and air quality within Uinta Basin, with no mention of the impacts from CO₂ emissions or additional controls for CO₂. As a result, the Tribe failed to meet its basic obligation under section 124.13(a) to “raise all reasonably ascertainable issues and submit all reasonably available arguments supporting [its] position.”

Having failed to raise the issue of CO₂ emissions in any of its comments, Petitioner cannot now point to the EPA’s mention of CO₂ emissions in a discussion of the permit issuance

process to demonstrate, as required under 40 C.F.R. § 124.19(a)(4)(ii), that the issue was raised during the public comment period. For this reason, the Board should deny review of this claim.

b) Review should be denied because the Petition fails to adequately state a claim.

The Board should also deny review of claims pertaining to CO₂ emissions from the Bonanza Plant because Petitioner has not identified its challenge with the specificity required by Board regulation and case law. “[A] petition for review must identify the ... 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.”²⁸ Here, the Petition contains only a general statement: “Abuse of discretion and inconsistent with Trust duties to ignore disproportionate impact/ cumulative effect on Tribal lands.” This may constitute a challenge to the permit decision, but it lacks any discussion of law or facts explaining the nature of the challenge and supporting why the permit decision should be reviewed. Because Petitioner has not provided even the most basic information to support its claim, review should be denied.²⁹

2. The Board should deny review of claims concerning the imposition of a lifetime coal consumption limit at the Bonanza Plant

The fifth row of the chart in Appendix B states that the Tribe commented that “EPA should impose a lifetime limit on coal use at the Bonanza Plant.” Under the column titled “CROSS-REFERENCE (March 2021 Comments),” the Petition provides no citation for this comment. However, the EPA notes that the Tribe’s March 2021 letter stated its support for a lifetime limit on coal consumption. Attachment O, Doc. 17, AR 00185. The fifth row of the chart states the following under the heading “ERRONEOUS/ABUSE OF DISCRETION:” “Given

²⁸ 40 C.F.R. § 124.19(a)(4)(i).

²⁹ To the extent Petitioner’s broad references to “coal pollution” in its comment letters may be construed as comments on the need for an analysis of disproportionate impacts and cumulative effects of CO₂ emissions on Tribal lands, EPA responds to Petitioner’s broader cumulative impacts claims below in Section V.B.2.

disproportionate impact of the Plant, the 3.5 million tons/year of CO₂ emitted, and the growth of new technologies, the EPA must consider limitations on coal use as part of its trust duty and environmental justice prerogatives.” For the reasons outlined below, to the extent the fifth row of Appendix B asserts a claim, it should be dismissed.

a) Review should be denied because the Petition fails to adequately state a claim.

The Board should deny review of claims pertaining to a lifetime coal consumption cap at the Bonanza Plant because Petitioner has not identified a specific challenge to the Region’s permit decision as required by 40 C.F.R. § 124.19(a)(4)(i). The Tribe’s March 2021 comment letter included a statement in support of a lifetime coal consumption limit at the Bonanza Plant. *Id.* That statement was pulled from the Tribe’s 2015 comment letter in support of a settlement agreement in which Region 8, Deseret and two environmental petitioners agreed to establish a coal consumption cap of 20,000,000 short tons for the period from January 1, 2020, through the end of service at the Bonanza Plant. The coal consumption cap included a contingent release from the cap if Deseret installs and operates Selective Catalytic Reduction (SCR) for NO_x control at Unit 1 prior to December 31, 2029, and Unit 1 achieves and continuously complies with a NO_x emission limit of 0.05 lb/MMBtu on a 12-month rolling average. That coal consumption cap and contingent release was included in condition I.D of the MNSR permit issued to the Bonanza Plant on February 11, 2016, and is therefore included in Section XI.B. of the Permit. This condition of the Permit provides, “Subject to the [contingent release] provisions of Section XI.B.3. below, for the period from January 1, 2020, through End of Service of Unit 1, coal consumption at the Plant shall not exceed 20,000,000 short tons of coal.” Attachment B, Doc. 19, AR 00254.

The Petition states, “EPA must consider limitations on coal use as part of its trust duty and environmental justice prerogatives.” This argument disregards that a 20,000,000 short ton coal consumption limit is included in the Permit because it is an applicable requirement drawn from an existing MNSR permit. The Petitioner offers no further information to explain why the Region’s consideration and inclusion of the coal consumption cap constitutes clear error or an abuse of discretion. The EPA lacks the authority under the CAA title V provisions to develop permit conditions unless those conditions are necessary to assure compliance with applicable requirements of the CAA. To the extent Petitioner asserts that the Region committed clear error by not including additional limitations on coal use in the Permit, that argument must fail because Petitioner has not identified any applicable requirements that would serve as basis for the EPA to include such additional limitations. Because Petitioner has not provided even the most basic information to support its claim, review should be denied.

b) Review should be denied because Petitioner has not demonstrated clear error.

To the extent that Appendix B could be construed as a challenge to the contingent release provision (which allows Deseret to avoid the lifetime coal consumption cap) without accompanying measures to address coal combustion residuals (CCRs), the Board should deny review. *See* Petition at 24. Specifically, the Tribe has not identified an applicable requirement that has been established pursuant to the CAA that would serve as the basis for modifying the existing lifetime coal consumption cap and contingent release. The coal consumption cap and contingent release incorporated in Section XI.B of the Permit are taken from the 2016 MNSR permit issued to the Bonanza Plant. The MNSR permit condition includes no provisions to address the environmental impacts of CCRs, which are not regulated under the Clean Air Act or

its permitting programs.³⁰ The MNSR condition meets the definition of an applicable requirement because it is a condition of a “preconstruction permit[] issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act” that applies to the Bonanza Plant. The EPA is required to incorporate the coal combustion cap and contingent release conditions into the Bonanza Plant’s title V permit pursuant to CAA § 504(a) and 40 C.F.R. § 71.6(a)(1), which it has done. The EPA lacks the authority under the CAA title V provisions to develop permit conditions, such as measures to address CCRs, unless those conditions are necessary to assure compliance with applicable requirements of the CAA or to assure compliance with the permit terms.³¹ Because it has not identified any applicable CAA requirements addressing CCRs, the Tribe has not demonstrated clear error in the EPA’s permitting decision, and the Board should deny review.

B. The Board Should Deny Review Because the EPA’s Action is Consistent with Relevant Executive Orders and EPA Policies Related to Environmental Justice

Petitioner asserts that the EPA failed to comply with Executive Orders 12898³² and 14096,³³ the EPA’s environmental justice (EJ) policies, and Tribal trust obligations. While Tribal

³⁰ Coal combustion residuals are regulated comprehensively to address various environmental impacts pursuant to the Resource Conservation and Recovery Act under the Coal Combustion Residuals Rule, 40 C.F.R. part 257, subpart D – Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments.

³¹ See *infra*, Section V.D.1.

³² Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, directs each federal agency, to the greatest extent practical and permitted by law, to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (hereinafter “EO 12898”).

³³ Executive Order 14096, *Revitalizing Our Nation’s Commitment to Environmental Justice for All*, supplements EO 12898 and directs each federal agency, “as appropriate and consistent with applicable law: to identify, analyze, and address disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns” and to take other actions, including identifying, analyzing, and addressing “historical inequities, systemic barriers, or actions related to any Federal regulation, policy, or practice that impair the ability of communities with environmental justice concerns . . .;” and “where available and appropriate, consider adopting or requiring measures to avoid, minimize, or mitigate disproportionate

interests in this matter raise EJ concerns that are intertwined with the EJ considerations described in this section, the federal government’s trust relationship with federally-recognized Tribal governments raises unique and distinct legal and policy considerations that are addressed in Section D below. This section addresses Petitioner’s EJ claims.

As an initial matter, the EOs specified by Petitioner include express language explaining that they do not create legally justiciable or enforceable obligations.³⁴ While Petitioner’s brief does not identify specific EPA policies with which it alleges the Agency failed to comply with respect to its analysis of EJ considerations, the Agency’s EJ policies also do not create legally enforceable obligations. The EOs and the EPA’s EJ policies do, however, establish important policy priorities for the executive branch and the Agency. The EPA properly considered and addressed the EJ concerns raised by Petitioner, consistent with these policies.

1. The EPA’s title V permit renewal will not result in impacts to surrounding communities.

The Region considered EJ in its decision-making process as reflected in the Final Tribal RTC, which includes responses to the Tribe’s EJ comments. Attachment C, Doc. 26, AR 00424-00456. The Region’s first step in considering EJ was to assess whether, and to what extent, renewal of the facility’s title V permit would potentially impact surrounding communities, including on the Reservation. Due to the health impacts associated with elevated ozone levels, in

and adverse human health and environmental effects (including risks) and hazards of Federal activities on communities with environmental justice concerns, to the maximum extent practicable, and to address any contribution of such Federal activities to adverse effects – including cumulative impacts of environmental and other burdens – already experienced by such communities . . .” Exec. Order No. 14096, 88 Fed. Reg. 25251, 25253-54 (Apr. 21, 2023) (hereinafter “EO 14096”).

³⁴ EO 12898 states: “This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.” EO 12898, 59 Fed. Reg. at 7632-33. EO 14096 states: “This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.” EO 14096, 88 Fed. Reg. at 25261.

considering the potential EJ implications of this action, the Region focused on the ozone nonattainment status in this portion of the Uinta Basin and whether the emissions authorized in the underlying permits could contribute to high ozone levels, and particularly to wintertime ozone. The Region explained that it considered using a photochemical grid model and cited the peer-reviewed literature and EPA documentation explaining that photochemical models have performed poorly in the Uinta Basin with large negative bias for ozone and VOCs compared to measure ambient concentrations. Attachment C, Doc. 26, AR 00432. Thus, the Region relied on the 2013 Study in the Basin that used instrumentation and analog studies as opposed to computer-based modeling when reviewing the localized ozone concerns. As discussed above, the Region reviewed the 2013 Study, which concludes that the plume from the Bonanza Plant pierces the inversion layer in the Uinta Basin and, as a result, emissions from plant are “effectively isolated from the boundary layer in which the high ozone concentrations occur.” Attachment Q, Doc. 54, AR 00644-00645. Based on this finding, the Region explained that emissions from the Bonanza Plant do not contribute significantly to the wintertime ozone issues in the Uinta Basin. Attachment C, Doc. 26, AR 00431-00433. As a result, the Region concluded that renewal of the title V permit will not result in air quality impacts to the surrounding communities.³⁵

The EAB has consistently afforded deference to Regions in their technical assessments of the probable dispersion of pollutants through various media into the surrounding communities as

³⁵ The Region is taking action outside of this permit to address ozone concerns. The Final Tribal RTC explains that within the Uinta Basin, approximately 98% of VOC emissions are from existing oil and natural gas operations. The document provides information on the EPA’s 2022 U&O Federal Implementation Plan that establishes new rules that are expected to reduce VOC emissions from certain new, modified, and existing oil and natural gas facilities on Indian country lands within the Reservation. The EPA’s U&O FIP is expected to reduce adverse health and environmental effects due to reduced exposure to elevated ground level ozone and air toxics resulting from the anticipated reduction of ozone-forming VOC emissions. Attachment C, Doc. 26, AR 00431-00434. The analysis concludes that the regulation of oil and gas sources is the most effective way to address ozone-related air quality concerns in the Uinta Basin.

“precisely the kind of issue that the Region, with its technical expertise and experience is best suited to decide.”³⁶ The Board also affords deference to Agency determinations of which technical data should be considered in environmental justice analyses as long as the rationale is supported in the record.³⁷ More specifically, the Board has deferred to a Region’s technical reasons for rejecting both data and modeling demonstrations in an environmental justice analysis for a minor source permit application. *In re Avenal Power Center, LLC*, 15 E.A.D. 384, 402-403 (EAB 2011).

Here, the Region has determined that the evidence supports a conclusion that emissions from the Bonanza Plant do not contribute to localized wintertime ozone concentrations and will not result in air quality impacts to surrounding communities. Petitioner disagrees, asserting that the historic data is not predictive of future stability of the inversion and that reliance on the inversion layer to trap emissions is not protective. However, Petitioner did not in its comments, and does not now, present any specific information contradicting the methodology or conclusions in the 2013 Study or supporting a different conclusion.³⁸ Petitioner takes issue with the date of the study but does not provide information to counter the EPA’s explanation in the Final Tribal RTC that it is appropriate to continue to rely on the 2013 Study because, while the intensive field

³⁶ *In re Chemical Waste Management*, 6 E.A.D. 66, 80 (EAB 1995) (“As explained above, the Region can and should consider a claim of disproportionate impact in the context of its health and environmental impacts assessment under the omnibus clause at section 3005(c)(3) of RCRA. The proper scope of a demographic study to consider such impacts is an issue calling for a highly technical judgment as to the probable dispersion of pollutants through various media into the surrounding community. This is precisely the kind of issue that the Region, with its technical expertise and experience, is best suited to decide. See *In re General Electric Company*, 4 E.A.D. 358, 375 (EAB 1992) (“The Region’s selection of a method is the kind of technical decision that is best decided on the Regional level, and absent some compelling circumstance, we are inclined to defer to it.”). In recognition of this reality, the procedural rules governing appeals of permitting decisions place a heavy burden on petitioners who seek Board review of such technical decisions.”). See also, *In re Envotech*, 6 E.A.D. 260, 283 (EAB 1996) (quoting *In re Chemical Waste Management of Indiana*).

³⁷ See e.g., *In re Avenal Power Center, LLC*, 15 E.A.D. 384, 402 (EAB 2011).

³⁸ Petitioner also asserts that due to climate change, EPA cannot assume that historic climate properties will remain stable and unchanging but did not raise this issue in its comments; nor does Petitioner include any specifics on how climate change would affect the factual information underpinning the conclusions in the 2013 Study.

studies were conducted in 2012 and 2013, the meteorological conditions that cause high ozone episodes have not changed, and it is expected that the plume from Bonanza continues to remain above the inversion layer during the persistent, strong inversion layers that cause ozone episodes in the Uinta Basin. Attachment C, Doc. 26, AR 00432. Moreover, as described above, the 2013 Study concluded that a wintertime inversion layer is both an underlying cause of ground ozone and the reason the Bonanza plume does not contribute to ground ozone. If future weather conditions prevent an inversion layer from forming, as the Tribe suggests, no ground ozone would form. The Tribe offers no information or explanation why the potential for inversion instability therefore means the 2013 Study is unreliable, nor does it offer any information or explanation why such inversion instability means EPA's technical conclusions are incorrect.

The EAB has denied review of EJ challenges to permits for which the permitting program reasonably determined that no communities with EJ concerns would be affected by the action, and therefore no disproportionate adverse effects would occur due to the permitting action.³⁹ Here, the Region reasonably determined that emissions from the underlying permits housed in the Permit do not have the potential to affect local communities due to the height of the boiler stack and plume relative to the Uinta Basin's persistent wintertime inversion layer. Thus, the EPA concluded that the renewal of the title V permit would not result in localized air pollutant emissions that could potentially have adverse impacts on communities surrounding the facility,

³⁹ See *eg.*, *In re Avenal Power Center, LLC*, 15 E.A.D. 384 (EAB 2011), *In re Beeland Group, LLC, Beeland Disposal Well #1*, 14 E.A.D., 189 (EAB 2008), *In re Shell Offshore Inc., Kulluk Drilling Unit & Frontier Discoverer Drilling Unit*, 13 E.A.D. 357 (EAB 2007), *In re Knauf Fiber Glass, GMBH*, 9 E.A.D. 1 (EAB 2000), *In re Ecoelectrica, L.P.*, 7 E.A.D. 56, 69 (EAB 1997) (“[Petitioner] makes no specific showing, for instance, that (contrary to the Region’s conclusion) *the facility* would have a disproportionately high and adverse human health or environmental impact on a low-income population, nor does it even explain how or why an examination of additional data would be expected to reveal such an impact”) (emphasis provided), *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 414 (EAB 1997) (“In light of the Region’s conclusion that the minority and/or low income populations identified are outside the area principally impacted by Ash Grove emissions, it was not unreasonable to choose not to generate a quantitative risk estimate applicable to those populations.”).

including communities with EJ concerns. Despite the lack of potential impacts to surrounding communities, the Region nevertheless prepared an analysis of the specific issues raised by Petitioner, including EJ concerns. Petitioner has not demonstrated clear error or an abuse of discretion in the Region's decision, and the Board should deny review of this challenge.

2. The Region's demographic screening assessment and Environmental Justice considerations sufficiently addressed Petitioner's EJ comments.

As part of its development of the Draft and Final Tribal RTC documents, and to consider the Tribe's EJ concerns by better understanding the environmental and health conditions in nearby communities, the Region generated three EJScreen Reports. Petitioner asserts that it is erroneous and an abuse of discretion for the Region to utilize EJScreen rather than conduct an analysis of conditions on the Reservation. Petitioner states that EJScreen is "a generic nationwide model that may not be representative of actual conditions," and that "it does not take into account the unique situation of Indian reservations and its [sic] population." Petition at 29.

As an initial matter, the Board should deny review of this claim because Petitioner did not raise it in its October 2023 letter commenting on the Draft Tribal RTC that utilized this approach. Attachment K, Doc. 41, AR 00515-00547. Additionally, the Region's use of the EJScreen tool does not constitute clear error or an abuse of discretion. EJScreen is the EPA's environmental justice mapping and screening tool that provides the EPA with a nationally consistent dataset and approach for combining environmental and demographic socioeconomic indicators.⁴⁰ It is not a static template or generic model but rather provides demographic, socioeconomic, and environmental information for a specified geographic area. The Region

⁴⁰ U.S. ENV'T PROT. AGENCY, *What is EJScreen?*, <https://www.epa.gov/ejscreen/what-ejscreen> (last visited Dec. 15, 2023).

prepared an initial EJScreen Report for a five-mile radius around the Bonanza Plant and found zero population. The Region prepared a second EJScreen Report at a ten-mile radius and again found zero population. Thus, the Region did not identify any population in the immediate vicinity of the facility. The Region then expanded the screen to the entire Census Block Group (blockgroup FIPS code 490479402011) which covers approximately 2,626 square miles around the facility and is located entirely within the boundaries of the Reservation with a population base of 411 people. Attachment C, Doc. 26, AR 00427-00428, 00442-00456. As set forth in the EJ Analysis, this third Report indicated that communities within the census block group in which Bonanza is located may be disproportionately impacted by total pollution, non-pollution, and climate change burdens. Attachment C, Doc. 26, AR 00430.

To address the Tribe's comments, the Region prepared analysis beyond this screening that included discussion of the permitting background; Tribal consultation and public participation processes; analysis of the Tribe's EJ concerns, including information on environmental and socioeconomic indicators, health disparities, critical service gaps, climate impacts; and assessment of impacts to the additional resources of concern identified by the Tribe. Attachment C, Doc. 26, AR 00424-00456. The Region concluded that renewal of the title V permit would not result in impacts to air quality,⁴¹ groundwater,⁴² vegetation and wildlife,⁴³ or cultural resources.⁴⁴

⁴¹ Attachment C, Doc. 26, AR 00430-00434.

⁴² "Thus, while Bonanza's CCR units and the North Evaporation Pond may contribute to elevated concentrations of regulated constituents in nearby groundwater and Bonanza's cumulative environmental burden to the surrounding community, the EPA concludes that the proposed title V permit will have no effect on groundwater." Attachment C, Doc. 26, AR 00434-00436.

⁴³ "The EPA does not expect the proposed action [sic] renewing the Deseret Bonanza title V permit will affect wildlife or vegetation. As indicated in the air quality section of this analysis, given Bonanza's high stack height at 600 feet, the air pollutant emissions from this facility are not expected to impact air quality in the localized area and thus would not result in localized dispersion of pollutants to terrestrial resources. Furthermore, this permit does not authorize new construction or other activities that might introduce impacts to wildlife or vegetation in the area surrounding the facility, including on Indian country lands." Attachment C, Doc. 26, AR 00436-00439.

⁴⁴ "Because the activities authorized by the EPA permit are not expected to involve any new ground disturbance, this project does not have the potential to cause effects on historic properties, if any are present." Attachment C, Doc. 26, AR 00439.

With respect to climate change, the Region identified the CO2 emissions associated with the facility that contribute incrementally to climate change, stated that the Permit does not regulate GHG emissions, and discussed climate change impacts in overburdened communities generally.⁴⁵

Petitioner's assertion that the EPA recognized that, "Ute Indian Tribal communities may be disproportionately impacted by emissions from the Bonanza Plant" (Petition at 17) (emphasis provided) is inaccurate. While acknowledging that the community in the census block group may be experiencing disproportionate burdens with respect to some of the conditions and resources described in the analysis, the Region concluded the Permit would *not* contribute to such impacts because the emissions associated with the underlying permits would not result in localized dispersion of pollutants. Attachment C, Doc. 26, AR 00440. This rationale applies to the Tribe's cumulative impacts assertions as well: while the Region does not dispute that the population on the Reservation may be experiencing disproportionate adverse environmental and health impacts, this title V permit renewal action does not contribute to such impacts and thus does not result in cumulative impacts. Attachment C, Doc. 26, AR 00430-00440. The Board should deny review of Petitioners' claim that the Region erroneously disregarded disproportionate impacts and cumulative effects on Tribal lands and related cumulative effects claims.

3. The Region was not obligated to conduct further analysis and does not have authority to require the remedies the Tribe seeks.

Petitioner asserts that the EPA failed to comply with the EO 14096 provision that Petitioner characterizes as requiring the EPA to evaluate additional disproportionate burdens on Tribes and cumulative impacts to the public health of EJ communities (Petition at 16-17); the EO

⁴⁵ "As noted in the permitting background, the facility emits approximately 3.5 million tons of CO2 per year. While the EPA's CAA title V permit does not regulate GHG emissions, the facility's GHG emissions contribute incrementally to climate change." Attachment C, Doc. 26, AR 00430 at fn. 30, 00428-00430.

14096 provision that describes the importance of Tribal consultation (Petition at 18-19); the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples* and EO 12898 that Petitioner describes as requiring the EPA to consider traditional ecological knowledge⁴⁶ (Petition at 18); and the EO14096 provision Petitioner describes as requiring that the EPA take into account historic inequities in communities with EJ concerns (Petition at 18-19).⁴⁷

The Final Tribal RTC does discuss the cumulative impacts to air quality from oil and gas development, and to groundwater, wildlife and vegetation, climate change, and cultural resources; the Tribal consultation process; the public participation process; and the permitting history, including the settlement agreement that arose from past litigation. The Region did not prepare expanded analysis on these or other topics because the Region determined that the title V permit renewal action would not result in localized air quality impacts. Given the Region's technical determination that its action would not impact surrounding communities, including any communities with EJ concerns, neither the EOs nor the Agency's EJ or Tribal policies obligate the Region to prepare further analysis of these issues. The Region's analysis of EJ considerations is thus consistent with the relevant EOs and Agency policies.

⁴⁶ Petitioner asserts that an EPA website "cites [EO 12898] to require EPA to consider 'traditional ecological knowledge' in its science and policy decision-making." Petition at 18. But that website does not refer to EO 12898. Instead, it references the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*. See <https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples>. Moreover, the website states that this policy "encourages, as appropriate and to the extent practicable and permitted by law," the integration of traditional ecological knowledge in the EPA's decision making (emphasis added). Contrary to Petitioner's claim, it does not "require" such integration nor does EO 14096 establish requirements as characterized above by Petitioner.

⁴⁷ As an initial matter, the Region notes that Petitioner failed to raise in its October 2023 comments any claim of inconsistency with EO 14096 or that the specified issues were inadequately analyzed or considered pursuant to this EO or other referenced Orders and policies. Regardless, neither EO 14096 nor the other EOs and Agency policies related to EJ or the federal trust responsibility direct the Region to conduct an analysis or arrive at a decision that differs from what the Region prepared and finalized based on the pertinent facts and circumstances in this permitting action.

Petitioner requests that the Region impose requirements through the Permit to reduce air emissions to further Tribal self-governance, environmental, and health protection in light of cumulative and disproportionate impacts affecting the Tribe, and in consideration of traditional ecological knowledge; to reduce emission levels at Bonanza to compensate for the cumulative effects of other facilities; to take action to address cumulative impacts either through the Permit or other compensatory enforcement; and to require mitigation measures, including but not limited to, tree planting, funding to address health impacts, and other actions such as a trust fund or a mechanism to channel the monetary value of fines and penalties towards air quality mitigation. As described above, CAA § 504(a) and its implementing regulation at 40 C.F.R. § 71.6(a)(1), require the EPA to develop title V operating permit conditions necessary to assure compliance with applicable requirements of the CAA, as well as to impose monitoring and recordkeeping requirements necessary to assure compliance with the permit terms. The Region did not identify title V statutory or regulatory authorities to impose the conditions and requirements Petitioner seeks, nor did Petitioner identify any applicable requirements that could authorize these proposed remedies.

The Executive Orders cited by the Tribe do not supplement CAA legal authorities. EO 12898 directs each agency to make achieving EJ part of its mission “to the extent practical and permitted by law,” *see supra* note 32, and EO 14096 directs each agency “as appropriate and consistent with applicable law,” *see supra* note 33, to take certain measures as set forth in the EO. With respect to EO 12898 and the EPA’s EJ policies generally, the EAB, in reviewing an EPA CAA Prevention of Significant Deterioration permit noted:

Neither the Executive Order nor EPA policy statements, however, amend EPA’s statutory or regulatory requirements and obligations. The Executive Order emphasizes that all of its

directives to agencies are to be implemented “[t]o the greatest extent practicable and permitted by law.” Exec. Order 12,898 § 1-101. Further, the Order concludes by stating that “[t]his order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.” Id. § 6-609. EPA also recently explained that its environmental justice policies are discretionary actions that do not amend substantive law: EPA [policies] are not an interpretation of environmental statutes, nor do they add to or change interpretations of statutory obligations regarding permitting contained in existing regulations. They create no legal obligations and in no way change the legal landscape of the EPA permitting process. To the contrary, the only legal requirements applicable to EPA regional offices and permit applicants throughout the permitting process are those contained in the EPA’s environmental statutes, implementing regulations, the Administrative Procedure Act, applicable anti-discrimination laws and other applicable statutes and regulations. 78 Fed. Reg. at 27221.⁴⁸

EO 14096 includes similar language to the EO 12898 provisions cited by the EAB. *See supra* note 34.

The EAB should decline review because although the Region concluded that the Permit would not result in localized air pollutant emissions that could potentially have adverse impacts on communities surrounding the facility, including communities with EJ concerns, it nevertheless prepared analysis sufficient to address the EJ concerns raised by Petitioner. The Board should reject Petitioner’s claim that the Region must now prepare expanded analysis.

⁴⁸ *In re Sierra Pacific Industries*, 16 E.A.D. 1, 26 (EAB 2013) (citing, “EPA Activities to Promote Environmental Justice in the Permit Application Process,” 78 Fed. Reg. 27220 (May 9, 2013)).

Furthermore, the Region does not have the authority through the Permit to impose additional air pollution reduction requirements, require tree planting as a mitigation measure, or establish a monetary fund as requested by the Petitioner.

With respect to the Tribe's request for funding to address air impacts on the Reservation, the Final Tribal RTC encourages the Tribe to apply, as appropriate, for environmental justice grants available through the EPA Office of Environmental Justice, includes a link to the EPA website on the availability of EJ grants, funding, and technical assistance as well as reference to the Region 8 Tribal Resource Center, and includes a specific offer from the Region 8 Children's Health, Equity, and EJ Branch to meet with Tribal government representatives to discuss potential EJ funding opportunities. Attachment C, Doc. 26, AR 00439. Thus, while the Region did not identify CAA title V authorities to require the establishment of a fund as the Tribe requested, the Region provided information on available EJ grant funding and an offer for further assistance in understanding the potential grant funding opportunities.

In response to the Tribe's concerns about air emissions and noncompliance events, as discussed above, the Region determined that the Permit's monitoring, compliance certification, recordkeeping, and reporting requirements were sufficient to assure compliance with the terms and conditions of the permit. The Final Tribal RTC document provides the steps for the Tribe to regularly access monitored emissions data online and offers program assistance in accessing the data. The document also references the EPA's Enforcement and Compliance History Online database, which hosts information on the Bonanza Plant's compliance with federal environmental statutes. Attachment C, Doc. 26, AR 00440.

With respect to public engagement, the EAB has held that Regions have discretion to determine the appropriate public participation for an action but need not go beyond the

regulatory public participation requirements.⁴⁹ In this case, despite the absence of any population in the immediate vicinity of the facility, at the Tribe's request, the Region went beyond the minimum requirements and exercised its discretion to hold a public hearing on the permitting action. No members of the general public submitted comments or attended the public hearing. Thus, the Region appropriately exercised its discretion to provide an enhanced public engagement opportunity under the facts and circumstances of this action. Petitioner's claims regarding Tribal consultation are distinct from the public engagement process and are addressed below.

C. Tribal Consultation

The Petition appears to argue that the EPA failed to conduct adequate Tribal consultation under EO 14096 because (1) the EPA did not hold enough consultation meetings with Petitioner, and (2) the EPA did not revise the Permit as requested by Petitioner. *See* Petition at 17-18. As a threshold matter, the Board should deny review of the Petitioner's arguments due to procedural deficiencies. Moreover, EO 14096 does not create legally enforceable obligations. In addition, the Board should deny review on the merits because the EPA conducted Tribal consultation consistent with EO 14096, holding two government-to-government Tribal consultation meetings with Petitioner to receive and consider Petitioner's input before issuing the Permit. Further, EO 14096 does not specify a minimum number of consultations to satisfy Tribal consultation, and does not require the EPA to make permit revisions requested during Tribal consultation. Consequently, the Petitioner's Tribal consultation arguments are without merit.

⁴⁹ *See e.g., In re AES Puerto Rico L.P.*, 8 E.A.D. 324 (EAB 1999); *In re Knauf Fiber Glass, GMBH*, 9 E.A.D. 1 (EAB 2000) (*Knauf II*); *In re Prairie State Generating Co.*, 13 E.A.D. 1 (EAB 2006); *In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, 15 E.A.D. 470 (EAB 2012); *In re Shell Offshore, Inc.*, 15 E.A.D. 536 (EAB 2012); *In re Energy Answers Arecibo, LLC* 16 E.A.D. 294 (EAB 2014).

1. The Board should deny review of the Tribal consultation claims because Petitioner failed to comply with Board rules by not citing to the EPA’s Response to Comments document.

It is not enough for a petitioner to rely on previous statements of its objections during the administrative process, such as comments on a draft permit. It must demonstrate why the permit issuer’s response to those objections is clearly erroneous or otherwise warrants review.⁵⁰ “If the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to §124.17, then petitioner must provide a citation to the relevant comment and explain why the... response was clearly erroneous or otherwise warrants review.”⁵¹

Here, the Petitioner’s Tribal consultation arguments do not cite to the EPA’s Final Tribal RTC. The Petition itself does not contain any citations to the EPA’s Final Tribal RTC document. Further, Appendix B to the Petition includes citations to a handful of the EPA’s responses to comments, but makes no citations related to the Petitioner’s Tribal consultation arguments. As a result, the Board should deny review of the Petitioner’s Tribal consultation arguments for these procedural deficiencies. Alternatively, as explained below, the Board should deny Petitioner’s claims on the merits.

⁵⁰ See 40 C.F.R. § 124.19(a)(4)(ii).

⁵¹ 40 C.F.R. § 124.19(a)(4)(ii); *see, e.g., In re Westborough*, 10 E.A.D. 297, 305, 311-312 (EAB 2002); *In re Penneco Envtl. Solutions, LLC*, 17 E.A.D. 604, 609 (EAB 2018); *In re Beeland Grp., LLC*, 14 E.A.D. 189, 196 (EAB 2008); *see also In re Stonehaven Energy Mgmt., LLC*, 15 E.A.D. 817, 823 (EAB 2013) (“Consequently, the Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit.” (citations omitted)); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) (“[P]etitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations.”).

2. The EPA conducted Tribal consultation consistent with EO 14096.

The Petition appears to argue that the EPA failed to conduct adequate Tribal consultation under EO 14096 because (1) the EPA did not hold enough consultation meetings with Petitioner, and (2) the EPA did not revise the Permit as requested by Petitioner. The EPA disagrees.⁵²

First, the administrative record demonstrates that the EPA held two government-to-government Tribal consultation meetings with Petitioner, which included elected members of the Tribe's Business Committee, as well as two additional informational meetings with the Tribal government.⁵³ *See supra* Section III.C., "Tribal Consultation." Further, the Petition acknowledges that the EPA held four meetings. Petition at 17. Petitioner nevertheless argues that four meetings is not sufficient to satisfy EO 14096. But EO 14096 does not require any specific or minimum amount of Tribal consultation meetings.

The Tribe also argues that the consultation and informational meetings do not constitute "collaboration" or "meaningful engagement" as stated in EO 14096. Not only did the EPA conduct consultation consistent with the Tribal consultation provision of EO 14096, the EPA provided "meaningful engagement" with the Tribe as outlined in the EO, "providing timely opportunities for members of the public to share information or concerns and participate in decision-making processes" and "seeking out and encouraging the involvement of persons and communities potentially affected by Federal activities by ... providing notice of and engaging in outreach to communities or groups of people who are potentially affected and who are not regular participants in Federal decision-making."⁵⁴ As described above in Section III.D., "Public

⁵² As an initial matter, and as described above in Section V.B. concerning Environmental Justice, EO 14096 does not create legally enforceable obligations. Nevertheless, the EPA acted consistently with the EO in conducting its Tribal consultation process.

⁵³ The EPA conducted its Tribal consultation process in this permit action pursuant to its 2011 *Policy on Consultation and Coordination with Indian Tribes*. However, Petitioner does not argue that the EPA acted inconsistently with that policy.

⁵⁴ Exec. Order No. 14096, 88 Fed. Reg. at 25254.

Participation,” the EPA provided notice of public comment opportunities by sending emails to the Region’s Tribal contacts and Reservation-specific listserv list, and by posting notice on the EPA’s website. The EPA went beyond the minimum notice requirements by exercising its discretion to hold a public hearing on the permitting action⁵⁵, at Petitioner’s request, and also by sharing the Draft Tribal RTC with Petitioner.

Just as in *In re Desert Rock Energy Company, LLC*,⁵⁶ Petitioner’s argument “at most, suggest[s] that a disagreement exists between the participants about the scope of the consultation and not about whether consultation in fact occurred.” *Desert Rock* involved a claim that the EPA failed to consult with a Tribe in a Clean Air Act permitting matter. The Board in *Desert Rock* determined that the EPA’s evidence of discussions with the Tribe were sufficient. *Id.* Consistent with the *Desert Rock* decision, the Board should deny review of Petitioner’s claim that two Tribal consultation meetings and two additional informational meetings is not enough to satisfy the Tribal consultation and meaningful engagement provisions of EO 14096.

Second, EO 14096 does not require the EPA to revise the Permit as requested by Petitioner. Petitioner does not cite any provision of the EO in support of its argument. Nor could it because no such provision exists. Petitioner’s conclusory argument has no support within the text of EO 14096. It is also worth noting that the EPA issued a Final Tribal RTC document, which included a lengthy response to Petitioner’s environmental justice comments. Attachment C, Doc. 26, AR 00426-00439. The EPA did not ignore Petitioner’s concerns. Rather, it addressed those concerns, and explained its reasoning for not revising the Permit as requested by Petitioner.

⁵⁵ The public hearing was held on March 11, 2021, and was held virtually on MS Teams, due to the COVID-19 pandemic.

⁵⁶ *In re Desert Rock Energy Company, LLC*, 14 E.A.D. 484, 500-01 (EAB 2009).

Consequently, the EPA conducted Tribal consultation consistent with EO 14096, and the Board should deny review of Petitioner’s Tribal consultation claims.⁵⁷

D. The EPA’s Resource Conservation and Recovery Act (RCRA) Inspection Report

The Tribe argues that the EPA’s issuance of a Bonanza Plant RCRA inspection report after approval of the Permit “undermines the government-to-government consultation process and violates the EPA’s trust responsibility” because “the Tribe did not have an opportunity to raise the issues identified in the report during the comment period or otherwise prior to the EPA’s final approval of the Title V permit renewal.” Petition at 23-24. The Board should deny review of this claim, as the EPA’s RCRA enforcement evaluations were irrelevant to the Permit, avoided improper commingling of Agency functions, and were conducted consistent with the general trust responsibility and relevant EPA policies.

⁵⁷ Additionally, and contrary to Petitioner’s claims, the EPA acted consistently with the general trust responsibility between the United States government and federally recognized Tribes. The EPA recognizes and is committed to upholding the general trust responsibility to Tribes. The EPA acts consistently with the general trust responsibility by implementing the statutes it administers. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (absent specific requirements imposed by law, an agency’s general trust responsibility to Tribes “is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”). Here, the EPA acted consistently with the general trust responsibility by implementing the title V operating permit program in compliance with the Clean Air Act. *See also Arizona v. Navajo Nation*, 599 U.S. 555, 565–66 (2023) (“To be sure, this Court’s precedents have stated that the United States maintains a general trust relationship with Indian tribes.... [But] unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, this Court will not ‘apply common-law trust principles’ to infer duties not found in the text of a treaty, statute, or regulation.”) (citations omitted). The Tribe also did not identify any legal authority concerning a legal obligation to consult as part of the general trust responsibility. However, the Board need not address this issue, as the EPA consulted with the Tribe multiple times and considered their interests, as summarized above. *See, e.g., Hopi Tribe v. U.S. EPA*, 851 F.3d 957, 960 (9th Cir. 2017) (“EPA ... consult[ed] with the ...Tribe Therefore, regardless of the scope of enforceability of any duty to consult on part of the EPA, the EPA surely complied.”).

1. The Board should deny review of the Tribe’s claim regarding the RCRA inspection report because the inspection is not relevant to the CAA title V Permit.

The EPA’s RCRA inspection report is not relevant to the CAA title V permitting process.⁵⁸ The October 2022 inspection evaluated Bonanza’s compliance with RCRA regulations governing the management and disposal of coal combustion residuals, which are a solid waste managed in surface impoundments and landfills.⁵⁹ The EPA implements the RCRA solid waste regulations by performing compliance evaluations and, when appropriate, taking enforcement actions against noncompliant facilities.

In contrast, title V of the CAA requires each major source of emissions to obtain an operating permit that includes enforceable emission limitations and standards “as are necessary to assure compliance with applicable requirements of [the CAA].”⁶⁰ There is no authority under the CAA title V permitting process to impose substantive conditions outside the CAA’s “applicable requirements.”⁶¹ The EPA’s regulations define “applicable requirement[s]” to include only certain provisions of the CAA.⁶² Requirements that are not based on the CAA are not applicable requirements with which a title V permit must assure compliance. The solid waste regulations of RCRA are therefore not applicable requirements under CAA title V, and the Permittee’s compliance with RCRA regulations is beyond the scope of issues that the EPA can

⁵⁸ Coal-fired power plants are complex facilities that EPA regulates under several statutes. Burning coal generates airborne pollutants (such as NO_x, SO_x, and particulate matter) regulated under the CAA, coal combustion residuals regulated as solid waste under RCRA, wastewater regulated under the Clean Water Act, and more. Given the many statutes implicated and EPA’s limited, media-specific authority under those statutes, matters involving different media at one facility are routinely handled by separate EPA divisions with separate subject-matter expertise.

⁵⁹ See 40 C.F.R. part 257, subpart D.

⁶⁰ 42 U.S.C. § 7661c(a).

⁶¹ See *In re Veolia Es Technical Solutions, L.L.C.*, 18 E.A.D. 194, at 196 (EAB 2020).

⁶² 40 C.F.R. § 70.2.

address through its title V authority.⁶³ Because the Petition fails to identify a contested title V permit condition or CAA applicable requirement relevant to RCRA solid waste management and disposal, the Board should deny the Tribe's claim related to the RCRA inspection and need not address the Tribe's other arguments.

2. The Region appropriately avoided improper commingling of the CAA title V permit review and RCRA compliance evaluation.

The Tribe claims that the EPA should have reopened the comment period over a year after its closure so that the Tribe could discuss RCRA compliance and potential enforcement issues not relevant to the Permit. The EPA is careful to avoid improper commingling of agency functions. The EPA exercises both quasi-adjudicative (permitting) and quasi-prosecutorial (enforcement) authority, and improper commingling of these authorities raises due process concerns for regulated entities.⁶⁴ Even the appearance of improper influence between the Agency's separate functions could erode the public's trust in the EPA's decision-making. The EPA therefore takes great pains to "maintain a wall of separation between the enforcement action and the permitting proceeding."⁶⁵

Here, the Region properly treated CAA permitting and RCRA compliance (and potential enforcement) as separate matters. The Region's timeline for assigning technical and legal staff to review RCRA inspection findings and transmit the inspection report was not influenced by the CAA title V permit review and should not have been. Similarly, it would be improper for the

⁶³ See, e.g., *In re Monroe Elec. Generating Plant Entergy La.*, Order Partially Granting and Partially Denying Petition for Objection to Permit, 27 (EPA Adm'r, June 11, 1999), https://www.epa.gov/sites/production/files/2015-07/documents/ccaw_ord.pdf ("RCRA requirements are not applicable requirements of the Act."); *In re Onyx Env't'l Services*, Order Partially Denying and Partially Granting Petition for Objection to Permit, 4 (EPA Adm'r, Feb. 1, 2006), https://www.epa.gov/sites/default/files/2015-08/documents/onyx_decision2004.pdf ("[O]bjections by U.S. EPA to a title V permit are limited to noncompliance with applicable requirements under the Act. . . . U.S. EPA may not object to the issuance of a title V permit on the basis of the omnibus provision in RCRA.")

⁶⁴ See *Bethlehem Steel Corp. v. U.S. EPA*, 638 F.2d 994 (7th Cir. 1980).

⁶⁵ *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751 (Mar. 1995).

Region to deny or delay a CAA title V permit renewal based on RCRA noncompliance. Any Tribal arguments to the contrary lack merit.

3. The EPA’s RCRA inspection procedures were consistent with the general trust responsibility between the U.S. and Tribes.

As described above, “unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset,” courts “will not ‘apply common-law trust principles’ to infer duties not found in the text of a treaty, statute, or regulation.”⁶⁶ And “although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”⁶⁷ The EPA’s RCRA inspection procedures are consistent with the general trust responsibility when the EPA acts consistently with RCRA, as “generally applicable statutes—*e.g.*, RCRA and the Clean Water Act—do not establish a conventional fiduciary relationship.”⁶⁸

Petitioner has not identified any specific legal authority for the proposition that the general trust responsibility sets a legal standard for when the EPA sends Tribes RCRA inspection reports regarding non-Tribal facilities in Indian country. The Region’s RCRA inspection procedures in this case were consistent with RCRA and its implementing regulations, so they did not violate the general trust responsibility.

4. The EPA’s RCRA inspection procedures were consistent with relevant EPA policies.

The Region’s RCRA inspection procedures—including finalization and transmittal of the report to the Tribe—were consistent with applicable EPA policies in effect at that time. The 2011

⁶⁶ *Arizona v. Navajo Nation*, 599 U.S. at 566.

⁶⁷ *Morongo Band of Mission Indians*, 161 F.3d at 574.

⁶⁸ *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 899 (D.C. Cir. 2014).

EPA *Policy on Consultation and Coordination with Indian Tribes* states: “Primary guidance on civil enforcement matters involving [T]ribes can be found in ‘Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy,’ and ‘Questions and Answers on the Tribal Enforcement Process.’” Attachment S, Doc. 48, AR 00593. These documents explain that the EPA “should generally notify the [T]ribal government in advance of visiting a facility in the [T]ribe’s Indian country, and offer the [T]ribe an opportunity to coordinate further with EPA regarding the inspection where practicable.” Attachment T, Doc. 47, AR 00575. Further and as a matter of policy, the EPA generally notifies Tribal governments of anticipated enforcement cases and offers to consult prior to taking those enforcement actions.⁶⁹ Attachment U, Doc. 46, AR 00558-00559.

Here, the Region acted consistently with policies and guidance, which are not enforceable by the Tribe,⁷⁰ by notifying the Tribe prior to visiting the Reservation to perform the October 2022 RCRA inspection. On October 17, 2022, the Region sent the Tribe an email “to provide you notice of an upcoming EPA inspection of the Bonanza Power Plant that will commence on October 24, 2022.” Attachment V, Doc. 49, AR 00596. The email was followed by an October 18, 2022 letter to the Tribe’s Chairman explaining the inspection was “to assess compliance with the Coal Combustion Residual rule requirements of 40 C.F.R. part 257 subpart D,” inviting Tribal staff to participate in the inspection, and offering entrance and exit briefings to the Chairman and Tribal Natural Resources Director. Attachment W, Doc. 51, AR 00598-00599. The Tribe did not respond to the Region’s communications, participate in the inspection, or accept the

⁶⁹ “EPA communications with the tribal government may be constrained by the need to preserve the confidentiality of enforcement sensitive or confidential business information.” Attachment T, Doc. 47, AR 00575.

⁷⁰ While the Petitioner’s brief does not identify specific EPA policies with which it alleges the agency failed to comply, the applicable EPA’s Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy is not enforceable. It specifies that: “This guidance is not intended to create any right or trust responsibility enforceable in any cause of action by any party against the United States, its agencies, offices or any other person.” Attachment U, Doc. 46, AR 00568.

Region's offer of briefings before and after the inspection to discuss the purpose and initial findings of the RCRA inspection. No EPA guidance or policy required consultation on this matter between the time of the October 2022 RCRA inspection and the time this Petition was filed, and the Region remains committed to notifying the Tribe of anticipated enforcement cases and to offering consultation prior to initiating an enforcement action. Therefore, the Region's RCRA inspection procedures were consistent with applicable policies and guidance, which are not enforceable by the Tribe, and the Board should deny review of this claim.

VI. CONCLUSION

For all the reasons provided above, the Board should deny review of the Deseret Bonanza title V permit.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(3), the undersigned attorneys certify that this Response to the Petition for Review does not exceed 14,000 words.

Respectfully submitted,

Everett Volk
Office of Regional Counsel, EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-M
Denver, CO 80202
303-312-7290
volk.everett@epa.gov

Matthew Castelli
Office of Regional Counsel, EPA Region 8
303-312-6491
castelli.matthew@epa.gov

Randall H. Cherry
Office of Regional Counsel, EPA Region 8
303-312-6566
cherry.randall@epa.gov

Paul Logan
Office of Regional Counsel, EPA Region 8
303-312-6854
logan.paul@epa.gov

Kimi Matsumoto
Office of Regional Counsel, EPA Region 8
303-312-6875
matsumoto.kimi@epa.gov

Noah Stanton
Office of Regional Counsel, EPA Region 8
303-312-6163
stanton.noah@epa.gov

Of Counsel:
Jonathan Binder
EPA Office of Enforcement and Compliance
Assurance

Adriane Busby
EPA Office of General Counsel

Melina Williams
EPA Office of General Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW in the matter of *Deseret Generation and Transmission Co-operative Bonanza Power Plant, CAA* Appeal No. 24-01, was filed electronically with the Environmental Appeals Board's E-filing system and served by email on the following persons on March 22, 2024:

Attorney for the Petitioner

Michael W. Holditch
Jane W. Gardner
Attorney for the Petitioner
Patterson Earnhart Real Bird & Wilson LLP
1900 Plaza Drive
Louisville, CO 80027
Tel: 303-926-5292
Fax: 303-926-5293
mholditch@nativelawgroup.com
jgardner@nativelawgroup.com

Attorney for the Permittee

Makram B. Jaber
Partner
McGuireWoods LLP;
888 16th Street N.W.
Suite 500
Black Lives Matter Plaza
Washington, DC 20006
Tel: 202-857 2416
Mobile: 202-213 6404
Fax: 202-828 3356
mjaber@mcguirewoods.com

Everett Volk
Office of Regional Counsel, EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-M
Denver, CO 80202
303-312-7290
volk.everett@epa.gov