IN RE DESERET GENERATION AND TRANSMISSION CO-OPERATIVE BONANZA POWER PLANT

CAA Appeal No. 24-01

ORDER DENYING REVIEW

Decided September 10, 2024

Syllabus

The Ute Indian Tribe of the Uintah and Ouray Reservation petitions for review of the renewal of a Clean Air Act ("CAA") Title V operating permit issued by U.S. Environmental Protection Agency Region 8 to Deseret Generation and Transmission Co-operative for the Bonanza Power Plant, a coal-fired power plant located on the Uintah and Ouray Reservation. The Tribe contends that the Region failed to address the Tribe's concerns about the health and environmental impacts of the Plant and acted contrary to Executive Orders and EPA policies regarding environmental justice, the federal trust responsibility, and EPA's policy concerning tribal consultation. In addition, the Tribe asserts that EPA abused its discretion and violated its trust responsibility by not providing the results of an investigation identifying potential non-compliance with coal combustion residual requirements under the Resource Conservation and Recovery Act ("RCRA") until after the CAA Title V permit was issued.

Held: The Tribe has not demonstrated that review is warranted on any of the grounds presented. Therefore, the Board denies the petition for review in all respects.

(A) The Tribe has not identified any clear error or abuse of discretion or demonstrated that review is otherwise warranted with respect to the renewal of the Title V permit. Title V permits incorporate and assure compliance with substantive emissions limitations established under other provisions of the CAA, referred to as applicable requirements. Applicable requirements for federal operating permits are defined in 40 C.F.R. part 71 and include most standards and requirements promulgated under the CAA. The Tribe's petition does not argue that the permit is inconsistent with Title V of the CAA, the requirements of part 71, or that it fails to require Deseret to take any additional or different actions required by the CAA or part 71.

(B) The Tribe has not met its burden to show that the Region's environmental justice analysis was clearly erroneous, an abuse of discretion, or that the permitting decision otherwise warrants review. When reviewing permit challenges based on

environmental justice, the Board evaluates whether the permit issuer reasonably considered the contested issues and explained how it exercised the discretion it has within the confines of existing law. Here, the Region appropriately evaluated the environmental justice implications of the permitting action and explained how it exercised the limited discretion it had under Title V. The Region evaluated the impact of the Bonanza Plant on the surrounding community using information from a variety of sources and concluded that 1) air emissions from the plant did not significantly contribute to impacts from high ozone, and 2) the adverse impacts of high ozone were more effectively addressed by other means.

(C) The Tribe has not demonstrated clear error, an abuse of discretion, or that review is otherwise warranted with respect to the Agency's trust responsibility in renewing the Title V permit. The Tribe makes general allegations that the Region failed to fulfill its trust responsibility to preserve tribal assets but does not point to any legal authority that creates a conventional trust relationship with regard to air. In the absence of a conventional trust relationship, an agency fulfills its general trust responsibility by complying with the statutes and regulations it is entrusted to implement. The Region fulfilled its general trust responsibility by complying with the requirements of the CAA and 40 C.F.R. part 71.

(D) Regarding the consultation issue, the Tribe has not demonstrated that it met the threshold requirements for Board review because the Tribe fails to confront the Region's response to comments by demonstrating it is clearly erroneous or otherwise warrants review. Even if the Board were to reach the merits of this issue, the Board would deny review because the Region followed EPA's policy on Tribal consultation and the 2023 Executive Order on environmental justice which addresses Tribal consultation. The Region provided for meaningful engagement by sharing information and seeking the Tribe's input throughout the permit renewal process.

(E) Because RCRA requirements are outside the scope of this Title V permit, the Tribe has failed to demonstrate clear error or that review is otherwise warranted with respect to the RCRA investigative report. The RCRA investigation report and potential violations identified in the report are based on RCRA requirements, which are outside the scope of a Title V permit. None of the RCRA regulations cited in the report are "applicable requirements" for purposes of a Title V permit. And the Region fulfilled the general trust responsibility in this matter by implementing the Title V permit program regulations in compliance with the CAA.

In addition, the Board notes erroneous statements in the record made by the Region regarding appeal procedures and motions for reconsideration. While not affecting this decision, the Board observes that the Region should ensure that correct appeal information is provided and parties have correct information regarding motions for reconsideration.

Before Environmental Appeals Judges Wendy L. Blake, Mary Kay Lynch, and Ammie Roseman-Orr.

Opinion of the Board by Judge Lynch:

I. *STATEMENT OF THE CASE*

The Ute Indian Tribe of the Uintah and Ouray Reservation petitions for review of the renewal of a Clean Air Act Title V operating permit issued by U.S. Environmental Protection Agency Region 8 to Deseret Generation and Transmission Co-operative for the Bonanza Power Plant. The Bonanza Plant is a coal-fired power plant located on the Uintah and Ouray Reservation. EPA Region 8 is responsible for issuing the Title V permit for the Bonanza Plant because the Tribe does not have an approved CAA Title V operating permit program. The Tribe contends that the Region failed to address the Tribe's concerns about the health and environmental impacts of the Plant and acted contrary to Executive Orders and EPA policies regarding environmental justice, the federal trust responsibility, and EPA's policy concerning tribal consultation. In addition, the Tribe asserts that EPA abused its discretion and violated its trust responsibility by not providing the results of an investigation identifying potential non-compliance with coal combustion residual requirements under the Resource Conservation and Recovery Act until after the CAA Title V permit was issued.

For the reasons explained below, we conclude that the Tribe has not identified any clear error or exercise of discretion that warrants review with respect to the renewal of the Title V permit. The Region appropriately evaluated the environmental justice implications of the permitting action, fulfilled its trust responsibilities, and consulted with the Tribe in accord with the relevant Executive Orders and policies. Additionally, we find that the Tribe's issue with respect to the RCRA inspection report is outside the scope of this Title V permit renewal.

II. *LEGAL FRAMEWORK*

A. *Title V of the Clean Air Act*

Under Title V of the Clean Air Act ("CAA"), a major source of air pollutants must obtain a permit to operate. CAA § 502(a), 42 U.S.C. § 7661a(a). The permit must include emissions limitations and standards, a schedule of compliance, monitoring requirements, and other conditions "necessary to assure compliance with applicable requirements of this chapter." CAA § 504(a), 42 U.S.C. § 7661c(a). Applicable requirements include standards provided for in EPA-promulgated or -approved implementation plans, terms and conditions of preconstruction permits, and other standards promulgated under the CAA.

40 C.F.R. § 71.2. Title V permits must also include "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." CAA § 504(c), 42 U.S.C. § 7661c(c). Thus, the "Title V permit program 'incorporates and ensures compliance with substantive emissions limitations established under other provisions of the Act * * * but [] does not independently establish its own emission standards.'" *In re MPLX*, 18 E.A.D. 228, 230 (EAB 2020) (alterations in original) (quoting *In re Veolia ES Tech. Sols., L.L.C.*, 18 E.A.D. 194, 196 (EAB 2020)), *pet. for review voluntarily dismissed*, No. 20-9633 (10th Cir. Feb. 13, 2023); *see also Ohio Pub. Interest Research Grp., Inc. v. Whitman*, 386 F.3d 792, 794 (6th Cir. 2004) ("Title V does not impose new obligations; rather, it consolidates pre-existing requirements into a single, comprehensive document for each source, which requires monitoring, record-keeping, and reporting of the source's compliance with the Act." (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(3), (c)(1))).

Title V permits are issued for a fixed term up to five years. CAA § 502(b)(5)(B), 42 U.S.C. § 7661a(b)(5)(B); *Veolia*, 18 E.A.D. at 197. Permit expiration terminates the permittee's right to operate unless a timely and complete renewal application has been submitted. 40 C.F.R. § 71.7(c)(1)(ii). A permit renewal is subject to the same procedural requirements as the original permit, 40 C.F.R. § 71.7(c)(1)(i), and the renewal permit must include emissions limitations and other conditions necessary to assure compliance with applicable requirements, *see* CAA § 502(b)(5)(C), 42 U.S.C. § 7661a(b)(5)(C); 40 C.F.R. § 71.7(a)(1)(iv); *see also Veolia*, 18 E.A.D. at 196-97.

B. *Federal Operating Permit in Indian Country*

The CAA contemplates that most Title V permits will be issued by state or local permitting authorities. CAA § 502(b), (d), 42 U.S.C. § 7661a(b), (d). The Act requires states to submit to EPA a permit program under state or local law or interstate compact. CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1). Congress also authorized EPA to treat tribes as states. CAA § 301(d)(1), 42 U.S.C. § 7601(d)(1). Requirements for these state operating permit programs are established in 40 C.F.R. part 70. Tribes have the same right as a state to seek approval of a Title V permit program under part 70. *In re Peabody Western Coal Co.*, 15 E.A.D. 524, 526 (EAB 2012), *pet. for review dismissed for improper venue*, No. 12-1423 (D.C. Cir. Mar. 12, 2013), *pet. for review vol. dismissed*, No. 12-73395 (9th Cir. June 6, 2013).

If a state, local, or eligible tribal government does not have an approved Title V operating permit program under part 70, EPA is required to administer a federal Title V program in that jurisdiction. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). The requirements for the federal Title V program are set forth in

40 C.F.R. part 71. Part 71 programs for Indian country are specifically addressed in 40 C.F.R. § 71.4(b). The part 71 program for Indian country became effective on March 22, 1999. 40 C.F.R. § 71.4(b)(2).

III. *FACTUAL AND PROCEDURAL HISTORY*

A. *The Bonanza Plant*

Deseret operates the Bonanza Power Plant on Indian country lands within the Uintah and Ouray Indian Reservation in northeastern Utah. Region 8, U.S. EPA, *Statement of Basis for Draft Permit No. V-UO-000004-2019.00, Deseret Generation and Transmission Co-operative Bonanza Power Plant* 1 (A.R. 3) ("Statement of Basis"). The Bonanza Plant is a coal-fired electric generating unit. *Id*. at 2. Coal is delivered to the Plant by train and is crushed and pulverized before being fed into the main boiler. *Id.*[1] The boiler produces steam, which powers a turbine to generate electricity. *Id.*

The Bonanza Plant's emissions controls include systems to limit particulates, sulfur dioxide ("SO_2"), and nitrogen oxides ("NO_x"). *Id.* at 3. The Plant uses a baghouse system to remove ash from the boiler flue gas to control particulate emissions. *Id.* SO_2 emissions are controlled using a wet limestone scrubber system. *Id.* Finally, NO_x is reduced by use of low NO_x burners that combust less of the nitrogen in the coal. *Id.* at 4. Emissions from the main boiler are released through the main boiler stack, which is 600 feet tall. *Id.*

B. *The Bonanza Plant's Permitting History*

Before the Bonanza Plant was constructed, EPA determined the Plant would be subject to prevention of significant deterioration ("PSD") permitting under the CAA and issued a PSD permit for the initial construction of the Bonanza Plant in 1981, and that permit was updated and re-issued in 2001. *Id.* at 9.[2] A year after

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[1] The Plant also includes an auxiliary boiler for use during shutdowns and for cold unit starts, which currently uses fuel oil and may use natural gas in the future. Statement of Basis at 2.

[2] A PSD permit is required prior to construction or modification of a "major emitting facility" in areas designated as in "attainment" or "unclassifiable" with respect to national ambient air quality standards. CAA §§ 161, 165, 169(1), (2)(C), 42 U.S.C. §§ 7471, 7475, 7479(1), (2)(C); *see also In re Palmdale Energy, LLC*, 17 E.A.D. 620, 623-24 (EAB 2018), *pet. for review vol. dismissed sub nom. Ctr. for Bio. Diversity v. EPA*,

the effective date of the part 71 federal operating permit program for Indian country, Deseret submitted an initial Title V permit application to EPA. *Id.* at 15. EPA issued the Title V permit to Deseret in December 2014. U.S. EPA Region 8's Response to Petition for Review 4 (Mar. 22, 2024) ("EPA Resp. Br.").

Sierra Club and WildEarth Guardians filed petitions for review of the initial Title V permit with the Board. Sierra Club Petition for Review, *In re Deseret Power Electric Cooperative Bonanza Power Plant*, CAA Appeal Nos. 15-01 & 15-02 (Jan. 7, 2015) ("Sierra Club Petition for Review"); WildEarth Guardians Petition for Review of a Clean Air Act Part 71 Permit to Operate, *In re Deseret Power Electric Cooperative Bonanza Power Plant*, CAA Appeal Nos. 15-01 & 15-02 (Jan. 7, 2015) ("WildEarth Guardians Petition for Review"). Petitioners asserted that the Plant had been operating out of compliance with the CAA because 1) it had completed a "ruggedized rotor" project in 2000 that significantly increased NO_x emissions without obtaining a new PSD permit, and 2) it had been operating at higher heat input (coal consumption) rates than had been represented to EPA. WildEarth Guardians Petition for Review at 8-9; Sierra Club Petition for Review at 3-4. Deseret intervened in the case and the parties agreed to participate in the Board's alternative dispute resolution program. EPA Resp. Br. at 4. The Tribe did not move to intervene in the case and was not a party.

As a result of the alternative dispute resolution process, the parties entered into a settlement agreement. *See* Settlement Agreement, *In re Deseret Power Electric Cooperative, Bonanza Power Plant*, CAA Appeal Nos. 15-01, 15-02 (Dec. 23, 2015) ("Settlement Agreement") (filed as attachment 2 to the Petitioner's Brief in this matter and as attachment 1 to the Notification of Provisional Settlement in the 2015 appeals). The Settlement Agreement required Deseret to submit an application for a minor new source review ("MNSR") permit for the Plant. *Id*. at 4.[3]

No. 19-70340 (9th Cir. Mar. 6, 2020). In 2007, Deseret received another PSD permit to construct a new waste-coal-fired electric generating unit at the Bonanza Plant. *In re Deseret Power Electric Cooperative*, 14 E.A.D. 212, 215 (EAB 2008). Sierra Club filed a petition for review of the permit, and the Board remanded the permit in part to the Region. *Id.* at 215-16. EPA states that it took no further action related to the waste-coal-fired unit, U.S. EPA Region 8's Response to Petition for Review 4 (Mar. 22. 2024), and it does not appear from the record that the waste-coal-fired unit was ever constructed, *see* Statement of Basis at 2, 5-7.

[3] The minor new source review program in Indian country is a Federal Implementation Plan that establishes a pre-construction permitting program for

The application was to include a request for permit terms that 1) require installation and operation of low-NO_x burners and overfire air technology,[4] 2) impose emissions limits for NO_x, and 3) impose a coal consumption cap of 20,000,000 short tons of coal from January 1, 2020, through the end of service. *Id*. at 2, 4-6. The Agreement required installation of the low-NO_x burners and overfire air technology by 2016 if the Region issued the MNSR permit by the end of 2015, or by 2018 if the Region issued the MNSR permit on or after January 1, 2016. *Id*. at 4. The coal consumption cap could be released if Deseret applies for and receives approval to install selective catalytic reduction technology for NO_x emissions reduction, installs and operates selective catalytic reduction, and achieves and continuously complies with a lower NO_x emission limit. *Id*. at 2, 6-8.

The Agency published the Settlement Agreement for notice and comment pursuant to CAA section 113(g), 42 U.S.C. § 7413(g), and the Tribe submitted comments on it. *See id*. at 3-4; Comments of the Ute Indian Tribe on the Environmental Protection Agency's Proposed Settlement Agreement for the Operation of the Bonanza Power Plant within the Uintah and Ouray Indian Reservation (Nov. 24, 2015) ("Comments on Settlement") (attached to the Petitioner's Brief as attachment 1). The Tribe stated that it "generally supports and agrees with the objective of the Agreement." Comments on Settlement at 1. The Tribe's comments also noted that the Agreement should require Deseret to install pollution controls by 2016 rather than 2018. *Id*. The Tribe further commented that it suffered disproportionate impacts from pollution from the plant and that the Agreement should address these impacts by establishing a trust fund to promote cleaner air for tribal members. *Id*. at 3-4. No such trust fund was included in the final Agreement. Ute Indian Tribe of the Uintah and Ouray Reservation, Petitioner's Brief 9-10 (Jan. 3, 2024) ("Pet."); *see generally* Settlement Agreement. In the Petition filed in this case, the Tribe states that "[m]ost of the Tribe's comments [on the Agreement] were rejected." Pet. at 9.

In accordance with the Agreement, Deseret applied for a synthetic MNSR permit containing the agreed-upon provisions, which the Region issued on February 11, 2016. *See* Statement of Basis at 10; Region 8, U.S. EPA, *Air Pollution*

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construction or modification of minor sources of air pollution or minor modifications of major sources of air pollution in Indian country. *See* CAA § 110(a)(2)(C), 42 U.S.C. § 7410(a)(2)(C); 40 C.F.R. § 49.151(b)(1).

[4] The low-NO_x burners and the overfire air combustion control system are intended to reduce NO_x emissions. *See* Statement of Basis at 10.

Control Permit to Operate Title V Operating Permit Program at 40 CFR Part 71 for Deseret Generation and Transmission Co-operative Bonanza Power Plant 55 (Dec. 4, 2023) (A.R. 19) ("Final Permit"). Deseret then requested an amendment of the Title V permit to incorporate the terms of the MNSR permit. EPA Resp. Br. at 5. The Region issued the amended Title V permit in September 2016. *Id.* This permit was not appealed to the EAB.

C. *The Title V Permit Renewal and Tribal Consultation*

In 2019, Deseret applied for renewal of the Title V permit. *Id*. In July of 2020, the Region contacted the Chairman of the Tribe and offered an opportunity to consult on the Title V permit renewal. Letter from Carl Daly, Acting Dir. Air and Radiation Div., EPA Region 8, to Luke Duncan, Chairman, Ute Indian Tribe Bus. Comm. (July 28, 2020) (A.R. 32) (offering consultation on draft renewal permit for Bonanza Plant). The Tribe responded in August 2020, and the Region proposed a consultation and communication schedule including consultation with the Tribe before and after the public comment period. Letter from Carl Daly, Acting Dir. Air and Radiation Div., EPA Region 8, to Luke Duncan, Chairman, Ute Indian Tribe Bus. Comm. (Sept. 21, 2020) (A.R. 33) (offering draft consultation and communication schedule concerning Bonanza Plant). In September 2020, the Region held a pre-consultation meeting with the Tribe to discuss the permit renewal. Email from Jason Deardorff, EPA Region 8, to Luke Duncan, Chairman, Ute Indian Tribe Bus. Comm., et al. (Sept. 15, 2020 16:28 MT) (A.R. 55) (inviting members of Ute Tribe to pre-consultation meeting); 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 (Sept. 22, 2020) (A.R. 56). The Region also held another informational meeting with the Tribe before releasing the draft permit for public comment. Email from Katie Frayler, Patterson Earnhart Real Bird & Wilson LLP to Carl Daly, Acting Dir. Air and Radiation Div., EPA Region 8 et al. (Jan. 7, 2021) (A.R. 57) (inviting members of Ute Tribe to meeting); Draft Agenda for Ute Tribe/EPA Informational Meeting on Current Issues (Jan. 12, 2021) (A.R. 58).

The Region issued a draft permit in February 2021 and provided opportunities for public comment on the draft. Public Notice: Draft Title V Operating Permit: Deseret Power Electric Cooperative – Bonanza Power Plant, https://wcms.epa.gov/caa-permitting/draft-title-v-operating-permit-deseret-power-electric-cooperative-bonanza-power-plant (Feb. 9, 2021) (A.R. 13). The notice of the draft permit provided for written comments to be submitted until March 11, 2021. *Id.* In addition, at the Tribe's request, the Region held a virtual public hearing on the draft permit on March 11, 2021. *Id.*; Letter from Luke Duncan,

Chairman, Ute Indian Tribe Bus. Comm., to Carl Daly, Acting Dir. Air and Radiation Div., EPA Region 8, at 1 (Oct. 14, 2020) (Pet. attach. 3). The Tribe submitted written comments on March 22, 2021. Letter from Luke Duncan, Chairman, Ute Indian Tribe Bus. Comm., to Federal Title V Coordinator, EPA Region 8 (Mar. 22, 2021) (A.R. 17) ("Ute Tribe Comments") (providing comments on Deseret's draft Title V permit). In its comments, the Tribe stated that "its members continue to experience serious health issues attributable to poor air quality on the Reservation." *Id.* at 1. The Tribe further alleged that "the Bonanza Plant has had deleterious impacts on vegetation and wildlife on tribal lands in the surrounding area." *Id.* The Tribe asserted that the federal government's trust responsibility to the Tribe obligates the EPA "to mitigate and prevent harmful impacts" from the Bonanza Plant. *Id.* The comments referenced an Executive Order on environmental justice and then quoted at length from the Tribe's comment on the proposed Settlement Agreement. *Id.* at 1-5. Even though the comments were submitted after the close of the comment period, the Region states that it exercised its discretion to consider the comments. Deseret Bonanza Power Plant Clean Air Act (CAA) Title V Permit Renewal Response to Comments 3 n.10 (Dec. 4, 2023) (A.R. 26) ("Resp. to Cmts.").

In addition to considering the Tribe's written comments on the draft renewal permit, the Region shared draft responses to the comments with the Tribe and engaged in consultation before issuing the renewal permit. The Region shared a draft of the response to comments document with tribal representatives the day before the first consultation meeting, which took place on August 30, 2023. Electronic meeting invitation from Kimberly Varilek, Dir. Tribal Affairs Branch, EPA Region 8, to Ute Tribe representatives (meeting date Aug. 30, 2023) (A.R. 35) (scheduling meeting about Deseret Title V permit and attaching draft response to comment document). Following the first consultation meeting, the Region sent the draft response to comments to the Chairman of the Ute Business Committee with a request to submit any written recommendations on the draft. Email from Adrienne Sandoval, Dir. Air and Radiation Div., EPA Region 8, to Julius Murray, Chairman, Ute Bus. Comm. (Sept. 11, 2023) (A.R. 39) (transmitting draft response to comments document); Letter from Adrienne Sandoval, Dir. Air and Radiation Div., EPA Region 8, to Julius Murray, Chairman, Ute Bus. Comm. (Sept. 11, 2023) (A.R. 40) (sending draft response to comments document); Deseret Bonanza Power Plant Clean Air Act (CAA) Title V Permit Renewal Draft Response to Comments (Sept. 11, 2023) (A.R. 41) ("Draft Resp. to Cmts."). The Region and the Tribe participated in a second consultation meeting on September 20, 2023. *See* Letter from Adrienne Sandoval, Dir. Air and Radiation Div., EPA Region 8, to Julius Murray, Chairman, Ute Bus. Comm. 1 (Dec. 4, 2023) (A.R. 24). Following the second meeting, the Tribe submitted comments on the Region's draft response to

comments document. *See* 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 (Oct. 10, 2023) (A.R. 18) ("Ute Comments on Draft Resp. to Cmts."); Email from Mitch Holditch, Patterson Earnhart Real Bird & Wilson LLP, to Suman Kunwar, EPA Region 8 (Oct. 12, 2023) (A.R. 45) (transmitting Ute Tribe's comments on draft response to comments).

The Region issued the final permit on December 4, 2023, and notified Deseret and the Tribe of the issuance of the final permit. Letter from Adrienne Sandoval, Dir. Air and Radiation Div., EPA Region 8, to Tyler Esplin, Envtl. Superintendent, Deseret Generation and Transmission Co-operative (Dec. 4, 2023) (A.R. 22) ("Deseret Notice"); Letter from Adrienne Sandoval, Dir. Air and Radiation Div., EPA Region 8, to Julius Murray, Chairman, Ute Bus. Comm. (Dec. 4, 2023) (A.R. 24) ("Tribe Notice"); *see* Final Permit. The Region explained that it issued two response to comments documents with its final permit decision: a brief summary response addressing comments submitted by Deseret and the Tribe, and a more detailed response to the Tribe's comments. EPA Resp. Br. at 6; *see also* Resp. to Cmts.; EPA Responses to Public Comments on the Draft Air Quality Permit for the Bonanza Power Plant (Dec. 4, 2023) (included as Enclosure 1 to A.R. 22).

The final permit incorporated requirements from the initial Title V permit, the 2015 Settlement Agreement, and the 2016 MNSR permit. The permit includes emission limitations for particulate matter, SO_2, and NO_x. Final Permit at 16-17. The permit also requires Deseret to install and operate low-NO_x burners and over-fire air technology and imposes a coal consumption cap in accordance with the MNSR permit. *Id*. at 55-57. The permit includes monitoring and reporting requirements to assure compliance with emissions limitations. *Id*. at 19-26, 48-49, 57-28.

IV. *PRINCIPLES GOVERNING BOARD REVIEW*

Board review of a Title V permit is governed by 40 C.F.R. § 124.19. *See* 40 C.F.R. § 71.11(*l*)(1) (providing that permit decisions issued under part 71 can be appealed under 40 C.F.R. § 124.19). The Board exercises its authority to review permit appeals "only sparingly," adhering to the agency's view that most permit conditions should be determined at the permit issuer level. *MPLX*, 18 E.A.D. at 234 (quoting Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

In considering a petition for review, the Board first considers whether the petitioner has met threshold procedural requirements, including whether an issue has been preserved for review. *Id.* at 235. To satisfy the issue preservation requirement, the petitioner must demonstrate that the issues and arguments raised in the petition were raised during the comment period or during a public hearing on the draft permit. *Id.* The issue must also have been raised with sufficient clarity to enable the permit issuer to provide a meaningful response. *In re Gen. Elec. Co.*, 18 E.A.D. 575, 607 (EAB 2022), *pet. for review denied sub nom. Housatonic River Initiative v. EPA*, No. 22-1398 (1st Cir. July 25, 2023). If the permit issuer has responded to issues raised in comments, the petitioner cannot rely on a restatement or citation of its comments but must explain why the permit issuer's response is clearly erroneous or otherwise warrants review. *See id.* If the petitioner meets these threshold requirements, the Board will consider the substance of the petitioner's arguments. *In re Evoqua Water Techs. LLC*, 17 E.A.D. 795, 799 (EAB 2019).

Under 40 C.F.R. § 124.19, the petitioner has the burden of demonstrating that review is warranted. *Id.* The Board will ordinarily deny a petition for review unless the petitioner demonstrates that the permitting decision is 1) based on a clearly erroneous finding of fact or conclusion of law, or 2) involves an exercise of discretion that warrants review. *See MPLX*, 18 E.A.D. at 234.

"When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised 'considered judgment' in issuing the permit." *Id.* at 235. The Board will not find clear error based merely on a difference of opinion or alternative theory regarding the permit issuer's technical decisions. *Evoqua*, 17 E.A.D. at 799-800.

"When reviewing a permit issuer's exercise of discretion, the Board applies an abuse of discretion standard. The Board will uphold a permit issuer's reasonable exercise of discretion if the decision is 'cogently explained and supported in the record.'" *Id*. at 800 (citations omitted).

V. *ANALYSIS*

In its petition for review of the Title V permit renewal, the Tribe argues that the Region's decision to issue the renewal without new measures to mitigate environmental harms or promote air quality on the reservation is irreconcilable with its trust responsibility to the Tribe and its obligations to address environmental justice. Pet. at 13. The Tribe argues that, as a result, EPA's action is arbitrary, capricious, an abuse of discretion, and not in accordance with applicable law. *Id*.

The Region argues that the environmental harms raised by the Tribe were either not caused by the Bonanza Plant or were outside the scope of a Title V permit, and that its actions complied with applicable Executive Orders, policies, and its trust responsibilities. EPA Resp. Br. at 20, 22, 30-31, 34-35, 37, 39. Deseret argues that the petition should be dismissed for one primary reason—that the Tribe does not assert, let alone demonstrate, that the permit fails to comply with Title V. Response of Deseret Generation and Transmission Co-operative to Petition for Review 10 (Mar. 22, 2024) ("Deseret Resp. Br.").

Accordingly, we first consider whether the Tribe identified any clear error, abuse of discretion, or other aspect of the permitting decision that warrants review with respect to the requirements of Title V and 40 C.F.R. part 71. Next we consider the Tribe's arguments with respect to environmental justice, the trust responsibility, and tribal consultation. We then consider the Tribe's argument regarding the Resource Conservation and Recovery Act ("RCRA") inspection report. For the reasons explained below, we conclude that the Tribe failed to meet threshold procedural requirements with respect to some of its arguments and that the Tribe has not demonstrated that the Region's decision was clearly erroneous, an abuse of discretion, or otherwise warrants review. In addition, we address erroneous statements the Region made about the appeal procedures to clarify the requirements.

A. *The Tribe Fails to Identify Clear Error or Abuse of Discretion in the Region's Renewal of the Title V Permit, or to Demonstrate That Review Is Otherwise Warranted Under Title V of the Clean Air Act*

Title V of the CAA "does not itself establish substantive emission reduction requirements." *Veolia*, 18 E.A.D. at 196. Title V permits incorporate and ensure compliance with substantive emissions limitations established pursuant to other parts of the CAA, referred to as applicable requirements. *Id.* Applicable requirements for federal operating permits are defined in part 71 and include most standards and requirements promulgated under the CAA. *Id.* at 196 n.2; *see also* 40 C.F.R. § 71.2.

The Tribe's petition does not argue that the permit is inconsistent with Title V of the CAA, the requirements of part 71, or that it fails to require Deseret to take any additional or different actions required by the CAA or part 71. *See generally* Pet. The record shows that the Region fully explained its permitting decision and compliance with CAA Title V and part 71. *See* Statement of Basis at 8-18. And the Tribe has not demonstrated that the Region's issuance of the permit renewal was clearly erroneous, an abuse of discretion, or otherwise warrants review with respect to Title V of the CAA.

The focus of the Tribe's petition is its alleged violations of Executive Orders on environmental justice, the federal government's trust responsibilities, and EPA's environmental justice and consultation policies. Pet. at 13.[5] We now turn to address those arguments.

B. *The Tribe Fails to Demonstrate Clear Error, Abuse of Discretion, or That Review Is Otherwise Warranted with Respect to the Environmental Justice Analysis*

When reviewing permit challenges based on environmental justice, the Board evaluates whether the permit issuer reasonably considered the contested issues and explained how it exercised the discretion it has within the confines of existing law. The agency has recognized that it has limited discretion to address environmental justice issues in the Title V permitting context, as discussed further below. Many of the arguments in the petition are centered on the Tribe's allegation that the Region failed to fulfill its duties under the 2023 Executive Order on environmental justice. We will first discuss the 2023 Executive Order and the Board's precedent on environmental justice. Then we turn to the Tribe's challenges to the Region's permitting decision based on the 2023 Executive Order and the agency's environmental justice policies. We conclude that the Region appropriately evaluated the environmental justice implications of the permitting action and explained how it exercised the limited discretion it had under Title V.

1. *Background on Environmental Justice*

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," ("1994 Executive Order") provides that "[t]o the greatest extent practicable and permitted by law * * * each Federal agency shall 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

[5] In its reply, the Tribe suggests that the environmental justice policies and trust responsibilities are included in the "applicable requirements" for the Title V permit. *See* Petitioner's Reply Brief 4 (Apr. 22, 2024) ("Reply Br."). This argument comes too late. *See In re Panoche Energy Ctr., LLC*, 18 E.A.D. 818, 848 (EAB 2023) (stating that "a petitioner may not raise new issues or arguments in the reply brief"), *pet. for review denied*, No. 23-1268 (9th Cir. June 18, 2024). Even if we were to consider the Tribe's argument, we would deny review because the definition of "applicable requirement" in 40 C.F.R. § 71.2 is limited to requirements under the CAA.

minority populations and low-income populations." Executive Order 12898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).

Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All," ("2023 Executive Order") builds upon this framework. Executive Order 14096, 88 Fed. Reg. 25,251 (Apr. 21, 2023). The 2023 Executive Order reiterates that "each agency should make achieving environmental justice part of its mission." *Id*. at 25,253. It further states that "[e]ach agency shall, as appropriate and consistent with applicable law * * * 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." *Id.* Federal activities are "any agency * * * action that affects or has the potential to affect human health and the environment" and "may include agency actions related to * * * permitting." *Id.*

The 2023 Executive Order also requires each agency "as appropriate and consistent with applicable law" to "identify, analyze, and address historical inequities, systemic barriers, or actions related to any Federal regulation, policy, or practice that impairs the ability of communities with environmental justice concerns to achieve or maintain a healthy and sustainable environment"; to "provide opportunities for the meaningful engagement of persons and communities with environmental justice concerns who are potentially affected by Federal activities"; and to "continue to engage in consultation on Federal activities that have Tribal implications and potentially affect human health or the environment." *Id.* at 25,253-54.

While the Board has not yet considered the 2023 Executive Order in the context of an appeal, it has reviewed several challenges to permit actions based on the 1994 Executive Order. The Board has recognized that EPA is committed to achieving environmental justice. *In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 326 (EAB 2014), *pet. for review dismissed as untimely sub nom. Sierra Club de P.R. v. EPA*, 815 F.3d 22 (D.C. Cir. 2016). The Board has also recognized that agencies are required to implement the Executive Order consistent with existing law. *In re Jordan Dev. Co., L.L.C.*, 18 E.A.D. 1, 9 (EAB 2019); *In re Muskegon Dev. Co.,* 17 E.A.D. 740, 744 (EAB 2019) ("*Muskegon I"*); *In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 398 (EAB 2011), *vacated & remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014). The Board has found that the Region cannot deny or condition a permit based on environmental justice considerations where the permittee has demonstrated full compliance with the

statutory and regulatory requirements. *Muskegon I*, 17 E.A.D. at 754; *In re Envotech, L.P.*, 6 E.A.D. 260, 280 (EAB 1996). The 1994 Executive Order therefore does not dictate a particular outcome in permitting actions but gives the agency discretion within the confines of existing law. *Jordan*, 18 E.A.D. at 9; *Muskegon I*, 17 E.A.D. at 744. Further, the Board has held that in the context of a PSD permit, the environmental justice analysis "need not consider emissions that are beyond the scope of the permit action." *Energy Answers*, 16 E.A.D. at 326. In this case, the statutory and regulatory scheme is Title V of the CAA, and the discretion is limited as explained below.

When reviewing environmental justice claims in the permitting context, the Board considers what discretion the agency has in the context of the particular permitting scheme and whether the permit issuer has explained how it exercised that discretion. *See Muskegon I*, 17 E.A.D. at 756. For example, in *Muskegon I*, petitioner raised concerns about the impacts of an underground injection control ("UIC") permit on the low-income population in the surrounding area. *Id.* at 754. In the context of that permit, the Board identified areas in which the Region had discretion to implement the Executive Order on environmental justice. *Id.* The permit issuer, EPA Region 5, conducted an environmental justice review and identified that 56% of the local population was low-income. *Id.* at 755. However, the Board found that Region 5 failed to explain whether it considered the screening results in its permitting decision or how it chose to exercise its discretion under the permitting scheme. *Id.* at 756. The Board therefore remanded the permit to the Region with instructions to provide an explanation and take further action, if appropriate, based on that explanation. *Id.*

In contrast, the Board has denied review of permitting decisions where the permit issuer explained in its response to comments how the environmental justice analysis impacted the permitting decision. *See Jordan*, 18 E.A.D. at 16-17; *see also In re Muskegon Dev. Co.,* 18 E.A.D. 88, 99 (EAB 2020) (*"Muskegon II*"); *Energy Answers,* 16 E.A.D. at 331-35. In *Jordan*, another UIC case, the Region's response to comments explained how the Region exercised its limited discretion with respect to the commenter's environmental justice concerns. The Region stated that it had considered environmental justice concerns in designing public outreach and comment opportunities. *Jordan*, 18 E.A.D. at 14. Further, the Region explained in its response to comments how the permit was sufficient to protect sources of drinking water and public health regardless of the composition of the surrounding community. *Id*. at 16. The Board concluded the Region did not err or abuse its discretion by declining to conduct further analysis under its UIC omnibus authority to impose additional conditions where necessary to protect underground sources of drinking water. *Id.* at 17. The Board has similarly denied review of CAA permits

when the agency conducted an environmental justice analysis in response to comments and exercised "considered judgment" in reaching a permitting decision. *Avenal*, 15 E.A.D. at 402; *see also Energy Answers*, 16 E.A.D at 331; *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 404 (EAB 2007), *pet. for review denied sub nom. Alaska Wilderness League v. EPA*, 727 F.3d 934 (9th Cir. 2013).

The principles articulated in these precedents continue to apply with respect to the 2023 Executive Order. As noted, the 2023 Executive Order retains the constraint in the 1994 Executive Order that action to address environmental justice concerns be consistent with applicable law; it does not dictate a particular outcome in permitting actions but gives the agency discretion within the confines of existing law. 88 Fed. Reg. at 25,253.[6] Therefore, as in cases applying the 1994 Executive Order, we determine what discretion the agency had under the permitting scheme—here, Title V of the CAA—and then consider whether the Region exercised considered judgment and explained whether and how it exercised its discretion to address the environmental justice issues raised by the Tribe.

EPA has described its discretion to consider environmental justice in Title V permits in a guidance document that identifies specific authorities available to EPA. U.S. EPA Office of General Counsel, EPA Legal Tools to Advance Environmental Justice (May 2022) ("EJ Legal Tools").[7] This guidance was informed by a number of Executive Orders that establish federal executive policy

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[6] In its reply brief, the Tribe contests EPA's argument that the environmental justice policies are unenforceable. Reply Br. at 9-10. While the Region acknowledges that the Executive Orders "establish important policy priorities for the executive branch and the Agency," EPA Resp. Br. at 21, the Executive Order specifically states that it is "not intended to, and does not, create any right or benefit * * * 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," 88 Fed. Reg. at 25,261. And the Executive Order, by its own terms, requires that the agency take action only to the extent "appropriate and consistent with applicable law." *Id.* at 25,253. The Region argues that it addressed the environmental justice concerns raised by the Tribe consistent with these policies. As discussed below, we agree.

[7] The Tribe also references an earlier EPA memorandum dated December 2000 about authorities to address environmental justice in permitting. Reply Br. at 4 n.6 (citing Memorandum from Gary S. Guzy, General Counsel, EPA, to Steven A. Herman, Assistant Administrator, EPA et al. (Dec. 1, 2000)). With respect to the issues raised in the petition, the 2000 memorandum is consistent with the 2022 EJ Legal Tools document and does not affect the analysis in this decision.

on environmental justice and equity. *Id.* at 3. The EJ Legal Tools document "identifies where EPA's authorities mandate or provide the agency with discretion to consider the environmental justice-related impacts of its actions." *Id.* at 4. The guidance recognizes that Title V does not authorize new substantive emission controls, but can provide opportunities for the public to ensure all applicable requirements and conditions necessary to assure compliance are included in the permit:

> Because title V generally does not authorize the direct imposition of substantive emission control requirements, title V permitting does not appear to be an effective mechanism for establishing new, substantive control requirements to address environmental justice considerations regarding impacts on or participation by communities with environmental justice concerns. The title V process, however, can allow public participation to serve as a motivating factor for applying closer scrutiny to a title V source's compliance with applicable CAA requirements. By providing significant public participation opportunities, title V can serve as a vehicle by which citizens can raise environmental justice considerations that arise under other provisions of the CAA. Communities can use the title V process to help ensure that each title V permit contains all of a source's applicable requirements, and other conditions necessary to assure the source's compliance with those requirements.

Id. at 49. When EPA is the permit issuer under part 71, "EPA can exercise the legal authorities discussed above to promote meaningful public involvement and ensure that title V permits contain adequate provisions to assure compliance with applicable requirements." *Id.* at 51.[8]

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[8] The Region specifically acknowledges in its brief that for each Title V permit "EPA has some discretion in determining pursuant to CAA section 504(c) what additional monitoring is necessary to assure compliance with applicable requirements." EPA Resp. Br. at 3. The Region explained that the statement of basis for the Bonanza Plant permit describes the applicable requirements that are the basis for the monitoring requirements in the permit, describes the monitoring requirements as extensive, and concludes the monitoring requirements are sufficient to assure compliance with the terms and conditions of the permit. EPA Resp. Br. at 6-7; *see also* Statement of Basis at 4, 13-17.

2. *Challenges to the Environmental Justice Analysis*

The Tribe asserts that the Region failed to "reasonably consider" the environmental justice issues it raised, and that the Region's action is irreconcilable with its obligation to address various environmental justice concerns, and is arbitrary, capricious, an abuse of discretion, and otherwise inconsistent with federal law. Pet. at 13, 20. We first address the Tribe's challenge to the Region's environmental justice analysis with respect to carbon dioxide emissions and conclude that the Tribe has not met the important threshold requirement to raise issues first in comments on the draft permit. We then address the Tribe's assertion that the Region dismissed its other comments related to environmental justice on improper grounds. The challenges to the Region's environmental justice analysis include the Tribe's allegations that the Region failed to evaluate disproportionate and cumulative impacts, improperly relied on historic data regarding emissions, failed to acknowledge tribal cultural values, failed to take into account historic inequities, and failed to consider other impacts of continued coal consumption. We address each of the challenges below and conclude that EPA's permit decision is consistent with the Executive Orders and EPA policies related to environmental justice.

a. *Carbon Dioxide Emissions*

The Tribe states that the "Bonanza Plant emits approximately 3.5 [million] tons of CO2/year" and that it is an "[a]buse of discretion and inconsistent with Trust duties to ignore disproportionate impact/cumulative effect on Tribal lands." Pet. at 29. The Region responds that the Board should deny review of this issue because a) the Tribe failed to raise the issue of CO_2 emissions in its comments and b) the Tribe "fails to adequately state a claim." EPA Resp. Br. at 16-17. As a threshold matter, we consider first whether the Tribe raised the issue of CO_2 emissions in its comments with sufficient specificity to preserve the issue for review and conclude that it did not. We further conclude that, even if it had preserved the issue, the Tribe failed to show that the Region clearly erred or abused its discretion by omitting CO_2 emissions requirements from the permit.

The Board denies review of issues not properly preserved. *See MPLX*, 18 E.A.D. at 243-44. In response to the Region's argument that the issue of CO_2 emissions was not raised in the Tribe's comments, the Tribe asserts that it did raise CO_2 emissions, just not with the "magic words" the Region thinks it should have used. Reply Br. at 6-7. The Tribe cites statements in its comments that the Bonanza Plant emits "high levels of air pollution into the air" and "high levels of coal pollution into the air at the expense of the health, safety, and well-being of tribal members and communities" and government documents state that coal-fired power

plant emissions contain CO_2, among other pollutants. *Id*. at 7. The Tribe further commented that "the plant emits more than 3.5 million tons of air pollution" and this could only have been understood as a reference to CO_2 emissions. *Id.* We find that these general references to coal and air pollution in the comments do not raise the CO_2 issue with sufficient specificity.

To preserve an issue for review, the commenter must raise it with sufficient specificity to ensure that the permit issuer has the first opportunity to correct any problems with the draft permit. *See Gen. Elec. Co.*, 18 E.A.D. at 636. This is an important requirement because the comment must be clear enough that the permit issuer can consider it in issuing the permit decision. Here, the Tribe's comments did not raise the issue of CO_2 emissions with sufficient specificity to apprise the Region of the Tribe's specific concern. As the Region points out, there is no reference to CO_2 emissions in either the Tribe's comments on the draft permit or the Tribe's comments on the draft response to comments document. *See* EPA Resp. Br. at 15; *see also* Ute Comments on Draft Resp. to Cmts.; Ute Tribe Comments. The references to "coal pollution" and "air pollution" could have been interpreted as general references to other pollutants specifically referenced in the comments, such as NO_x. Indeed, one of the statements the Tribe references suggests just that. The full sentence referencing 3.5 million tons of air pollution states, "Each year, the plant emits more than 3.5 million tons of air pollution from a 600-foot smokestack, including approximately one third of the NO_x in the Uintah Basin." Ute Tribe Comments at 4. It is unclear how the Region should have read this as a comment on the CO_2 emissions.[9] Because the Tribe did not raise the CO_2 issue with sufficient specificity, we deny review of that issue.

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[9] In its reply brief, the Tribe cites the Board's 2008 decision remanding the PSD permit for the Bonanza Plant for the proposition that any error in failing to articulate the CO_2 issue is fairly deducible from the record and should be read into the Tribe's comments. Reply Br. at 8 (citing *In re Deseret Power Elec. Coop.*, 14 E.A.D. 212 (EAB 2008) ("*Deseret I"*)). The Tribe misconstrues this precedent. In *Deseret I*, in the context of deciding whether the administrative record was complete, the Board stated that "[i]n rare cases, the Board has allowed a [permit issuer's] rationale to be supplemented on appeal where the missing explanation was fairly deducible from the record. More typically, the Board has remanded the case." 14 E.A.D. at 225 (internal citations omitted). The Board went on to reject the Region's arguments based on documents not identified in the record and cited to cases explaining that "allowing the permit issuer to supply its rationale after the fact, during the briefing for an appeal, does nothing to ensure that the original decision was based on the permit issuer's 'considered judgement' at the time the decision was

Even if we were to consider the Tribe's argument regarding CO_2 emissions, we would conclude that the Region has not clearly erred or exercised discretion in a manner that warrants review. The only argument the Tribe offers is that the Region's failure to consider CO_2 emissions in the Title V permit is an "[a]buse of discretion and inconsistent with the Trust duties to ignore disproportionate impact/cumulative effect on Tribal lands." Pet. at 29. The Tribe has not identified in either its comments or the petition how the Region could have addressed CO_2 emissions in the context of this Title V permit renewal. As discussed above, the Region's discretion with regard to environmental justice was limited to providing opportunities for public participation and provisions to assure compliance with permit terms. With respect to CO_2 emissions, the Tribe has not identified any clear error or exercise of discretion in the permit renewal that warrants Board review.

b. *Disproportionate and Cumulative Impacts*

We next consider the Tribe's challenge to the Region's consideration of disproportionate and cumulative impacts. Pet. at 16-17. Contrary to the Tribe's argument, the Region did not ignore disproportionate and cumulative impacts from the Title V permit. Instead, the Region evaluated the impact of the Bonanza Plant on the surrounding community using information from a variety of sources and concluded that 1) air emissions from the plant did not significantly contribute to impacts from high ozone, and 2) the adverse impacts of high ozone were more effectively addressed by other means. The Tribe has not demonstrated that the Region's decision in this regard was clearly erroneous, an abuse of discretion, or otherwise warrants review.[10]

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made." *Id.* at 225-26, 239 (quoting *In re Conocophillips Co.*, 13 E.A.D. 768, 785 (EAB 2008)). Here, the Tribe did not apprise the Region of its CO_2 concern in a manner the Region could consider. We decline to review this in the first instance on appeal.

[10] As an initial matter, the Region argues that the Tribe failed to preserve two of its arguments for review by failing to raise them after the Region shared a draft of the response to comments with the Tribe. EPA Resp. Br. at 25, 28 n.47 (arguing objections to EJScreen and alleged inconsistencies with 2023 Executive Order were not preserved). We note that the Region's argument differs from a typical failure to preserve claim in that the Region asserts the Tribe should have raised the objection in its comments on the draft response to comments, whereas a failure to preserve typically arises when a petitioner fails to raise objections during the comment period on a draft permit. *See MPLX*, 18 E.A.D. at 243-44. In any event, we need not decide whether the Region is correct because we

Here, the Region conducted an extensive environmental justice analysis using a combination of EPA's EJScreen tool and other sources to evaluate disproportionate and cumulative impacts. The Region first evaluated environmental and demographic factors using EJScreen. When both a five- and ten-mile radius from the Bonanza Plant showed no residential population, the Region expanded the area to include the entire census block group encompassing an area of 2,626 square miles, all within the boundaries of the Uintah and Ouray Indian Reservation. Resp. to Cmts. at 4-5. The EJScreen analysis identified that the population of the census block group is disproportionately low income, people of color, and limited in English proficiency. *Id.* at 5. Based on EJScreen, the Region also identified health disparities and critical service gaps in the block group. *Id.*

The Region next considered climate impacts using both EJScreen and other sources. EJScreen showed an elevated risk of both wildfires and flooding in the census block group compared to the rest of the United States. *Id.* at 5-6. The Region also consulted a drought mapping tool and the Fourth National Climate Assessment, which indicated that drought and intensifying heat disproportionately impact some tribal nations. *Id.*

The Region further considered air quality impacts from the Bonanza Plant using information specific to the Uinta Basin. The Region concluded that the ozone metric in EJScreen, summertime average ozone, did not reflect the wintertime ozone issues experienced in the Uinta Basin. *Id.* at 7. Accordingly, the Region looked at data from air quality monitors in the Uinta Basin to compare to national percentiles. *Id.* at 7-8. The Region further explained that EPA had designated the Uinta Basin as being in nonattainment for the ozone national ambient air quality standards and had developed a Federal Implementation Plan specific to the Uintah and Ouray Indian Reservation to address air quality concerns. *Id.* at 8. The Region also evaluated recent ozone monitoring data concluding that the area remains in nonattainment status. *Id.*

Because of the ozone issues, the Region evaluated the impact of the Bonanza Plant on ozone formation. In its response to comments, the Region explained that it considered evaluating the air quality impacts from the Bonanza Plant using a photochemical grid model. *Id*. at 9. The Region ultimately rejected that approach because those models had performed poorly in the Uinta Basin. *Id.*

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conclude below that the Region's environmental justice analysis was consistent with the 2023 Executive Order and agency policies.

The Region explained that the models underestimated ozone and volatile organic compounds ("VOCs") compared to measured concentrations because of uncertainties about emission of VOCs from oil and gas operations in the Basin. *Id.* Therefore, the Region relied on research that used field measurements, including the 2013 Uinta Basin Ozone Study, rather than modeling to evaluate the ozone concerns. *Id.*; Environ Int'l Corp., *Final Report: 2013 Uinta Basin Winter Ozone Study* (Mar. 2014) (A.R. 54) ("2013 Ozone Study").

The 2013 Ozone Study used measurements from aircraft, balloons, and remote sensing to address whether the Bonanza Plant was contributing ozone precursors during high ozone events. *See* Resp. to Cmts. at 9; 2013 Ozone Study at 8-37. The 2013 Ozone Study found that wintertime ozone production in the Basin, when there is snow on the ground, occurred in a shallow boundary layer capped by a temperature inversion at about 1600 to 1700 meters above sea level, which is ground level in the Uinta Basin. 2013 Ozone Study at 8-43 to 8-44. Ozone precursors emitted below the inversion could contribute to ozone production. *Id.* While many oil and gas well sources of precursors were below the inversion layer, the Bonanza Plant's plume rose above the inversion layer because the top of the stack is above 1700 meters and the plume generally rises to 1900 to 2200 meters. *Id.* at 8-37, 8-43. The 2013 Ozone Study concluded that the Bonanza Plant "was not a major source of ozone precursors in the shallow surface inversion layer during high ozone events in the winter of 2013." *Id.* at 8-46.

Based on the 2013 Ozone Study, the Region explained in its response to comments that the emissions from the Bonanza Plant were not significantly contributing to the ozone impacts in the surrounding communities.

> [T]he emissions from Bonanza were injected above the height of the inversion layer, meaning that they will not be well-mixed with the * * * air below, which is where the ozone forms in the Basin. By contrast, it is more probable that the inversion layer traps oil and gas emissions in the Basin, such as from the wells, pipelines, and compressor stations, which have much lower stack heights (typically 10 meters at most). These lower-level emissions do not have the height, velocity, or temperature to escape the inversion layer.

Resp. to Cmts. at 9. The Region concluded that "while the contribution of ozone-forming emissions from Bonanza is not zero," given the 600-foot stack height, inversion layer height, and the plant's contribution of a small percentage of the total VOC emissions in the Basin, "we do not believe that Bonanza emissions

significantly contribute to the wintertime ozone issues in the Uinta Basin." *Id.* at 10. Accordingly, the Region states 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, including communities with [environmental justice] concerns." EPA Resp. Br. at 24-25.

While the Region concluded that the Bonanza Plant's emissions and renewal of the Title V permit were not a significant factor, and would not result in localized air quality impacts, the Region went on to explain how it was addressing the Tribe's concerns about ozone outside of the Title V permit. Resp. to Cmts. at 10-11; *see also* EPA Resp. Br. at 22 n.35. The Region explained that the winter ozone issues are more likely caused by trapped emissions from oil and gas operations in the Basin, which contribute 98% of the VOC emissions in the Basin. Resp. to Cmts. at 9-11. To address those emissions, the Region explained that the Federal Implementation Plan for the Uintah and Ouray Reservation establishes new rules that are expected to reduce VOC emissions from oil and gas operations by 27%. *Id.* at 10-11. The Region further stated that "EPA believes that regulation of oil and gas sources is the most effective way to address ozone-related air quality concerns in the Uinta Basin." *Id.* at 11.

c. *Reliance on Historic Data for Inversion*

We next address the Tribe's challenge to the Region's reliance on the 2013 Ozone Study in its environmental justice analysis. Pet. at 18. For the reasons provided below, the Tribe fails to demonstrate that this issue warrants review.

Where the permit issuer has responded to an issue raised in comments, the petitioner must "confront" that response, by citing to the response and explaining why the response is clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii). Thus, it is not enough for the petition to restate objections raised in its comments. *Gen. Elec. Co.*, 18 E.A.D. at 607.

The Region discussed the ozone study in the draft response to comments, which the Region gave the Tribe to provide an opportunity to comment on prior to issuance of the final permit. *See* Draft Resp. to Cmts. at 9. In responding to this draft document, the Tribe asserted that "EPA's reliance on a decade-old ozone study to analyze air quality impacts with no accompanying emissions data specific to the Bonanza Plant is not adequate to support its sweeping conclusion that there will be no impact to wintertime ozone on the Reservation." Ute Comments on Draft Resp. to Cmts. at 3. In the Region's final response to comments, it added a sentence responding to the Tribe's comment, stating that:

> While the intensive field studies were conducted a decade ago in 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.

Resp. to Cmts. at 9.

The Tribe fails to meaningfully address the Region's response in the petition for review. Although the Tribe references the Region's response, it merely states that it "does not agree" with the Region's conclusion, describes the study as being based on "historic data," and asserts that "[d]ue to our rapidly changing climate, one cannot assume that historic climate properties will remain stable and unchanging." Pet. at 18. But a mere difference of opinion or different theory is not sufficient to prove the Region clearly erred. *See In re Ariz. Pub. Serv. Co.*, 18 E.A.D. 245, 251, 308 (EAB 2020) (finding bare allegation that cooling system failed to meet legal criteria for closed-cycle system was insufficient to confront response because petitioner did not explain how Region erred), *appeal docketed sub nom. Dine' Citizens Against Ruining the Env't v. EPA*, No. 21-70139 (9th Cir. Jan. 22, 2021); *In re Springfield Water & Sewer Comm'n*, 18 E.A.D. 430, 505-06 (EAB 2021) (finding statement "without support or citation" that permit requirement provided no added benefit was insufficient to confront response). Because the Tribe failed to explain or provide any support for its theory that the inversion would not continue, it has not met its obligation to confront the Region's response. *See* Pet. at 18. The failure to confront the Region's response is fatal to the Tribe's argument on this issue.

Moreover, the Tribe's failure to confront the Region's response "leave[s] us with a record that supports the Region's approach." *In re City of Lowell*, 18 E.A.D. 115, 166 (EAB 2020) (quoting *In re Westborough*, 10 E.A.D. 297, 311 (EAB 2002)). The Tribe argues that the Region erred in relying on the 2013 Ozone Study's conclusion that the temperature inversion prevents the Bonanza Plant's emissions from significantly contributing to the winter ozone issue because climate change may affect the inversion in the future. This is fundamentally a technical determination, and the petitioner has a particularly heavy burden to demonstrate error. *See In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *see also In re Chemical Waste Management*, 6 E.A.D. 66, 80 (EAB 1995). "Clear error or abuse of discretion in a permit issuer's technical determination cannot be 'established simply because petitioners document a difference of opinion or an alternate theory.'" *Panoche,*18 E.A.D. at 821 (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *pet. for review denied sub nom. Penn Fuel*

Gas, Inc. v. EPA, 185 F.3d 862 (3d Cir. 1999)). Of course, the permit issuer's rationale must be explained and supported by the record. *Id*.

In this case, the record shows that the Region duly considered competing technical opinions and explained its rationale. *See id.* at 847; *NE Hub Partners*, 7 E.A.D. at 568. In response to the Tribe's comments, the Region explained that "the meteorological conditions that cause high ozone episodes have not changed" and that the Bonanza plume is expected to stay above the inversion layer. Resp. to Cmts. at 9. The Tribe has offered no evidence to support its theory that the temperature inversion has changed. In the absence of any contradictory evidence in the record, the Board concludes the Region duly considered this issue and provided a reasoned explanation for its decision.

d. *Tribal Cultural Values*

The Tribe's next challenge to the Region's environmental justice analysis is that the Region, in contravention of the 2023 Executive Order, did not acknowledge Tribal cultural values, including "a profound, spiritual respect for elders (who have become ill likely attributable to local air pollution)" and "reverence for the natural environment." Pet. at 18. Because the record indicates that the Region did duly consider these cultural values in its environmental justice analysis, we deny review on this ground.

In support of its argument, the Tribe references a 2014 EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples. EPA, Environmental Justice for Tribes and Indigenous Peoples, https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples (last visited Sept. 10, 2024).[11] That Policy includes seventeen principles for promoting environmental justice in working with tribes. EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples (July 24, 2014). One of those principles provides that "[t]he EPA encourages, as appropriate and to the extent practicable and permitted by law, the integration of Traditional Ecological Knowledge into the

[11] In its Petition, the Tribe cites to an EPA website, which it says "cites the 1994 EO to require EPA to consider 'traditional ecological knowledge' in its science and policy decision-making." Pet. at 18. The website in question refers not to the 1994 Executive Order, but to the 2014 EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples. EPA, Environmental Justice for Tribes and Indigenous Peoples, https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples (last visited Sept. 10, 2024).

Agency's environmental science, policy, and decision-making processes, to understand and address environmental justice concerns and facilitate program implementation." *Id.* at 3. The agency's policy does not require the incorporation of traditional ecological knowledge, but "encourages" integrating such knowledge when legally permissible.

Here, the Region did consider the Tribe's cultural values in its environmental justice analysis. The Region acknowledged the Tribe's comments asserting that ground-level ozone was a major health concern, particularly for elders. Resp. to Cmts. at 3. As discussed previously, the Region assessed sources of ground-level ozone and concluded that oil and gas operations in the Basin, not the Bonanza Plant, were the major contributors of ozone precursors. *See* Part V.B.2.b, above.

The Region also gave due consideration to the Tribe's concerns about groundwater impacts of the permit renewal. The Region explained that the Coal Combustion Residuals Rule establishes requirements for management of coal combustion residuals, including requirements to address the risk of groundwater contamination. Resp. to Cmts. at 11. The Region reviewed the available groundwater monitoring data, which indicated that constituents from coal combustion residuals exceeded background levels and have increased. *Id.* at 12. The Region noted that Bonanza attributed the changes in groundwater chemistry to the North Evaporation Pond. *Id.* While the Region acknowledged uncertainty about the impacts on groundwater from the North Evaporation Pond, the Region did not "shrug its shoulders" and conclude it could not assess environmental harm. Pet. at 30. Instead, the Region concluded that renewing this Title V permit would not result in contamination of groundwater because the activities allowed by the permit have no effect on groundwater. Resp. to Cmts. at 12-13. In particular, 1) the air emissions addressed by the Title V permit would not impact local groundwater, and 2) the Title V permit does not authorize any discharge to surface or groundwater. *Id*. at 12.

The Region further considered the Tribe's concerns about the permit's effect on wildlife and vegetation and again concluded that the Title V permit would not have an impact. The Region reviewed several data sources to identify vegetation and wildlife in the area surrounding the plant, including information from the Tribe regarding endangered and threatened species and species of special concern. Resp. to Cmts. at 13-15. The Region concluded that the permit would not affect vegetation or wildlife because the permit does not authorize new construction or other activities that would introduce new impacts and, as discussed previously,

the air emissions are not expected to have a local effect given the stack height. *Id.* at 16.

Finally, the Region considered the Tribe's claims about the Title V permit renewal's impacts on cultural resources and historic properties. *Id*. The Region determined that the Title V permit renewal at issue would not adversely impact those resources because the activities authorized by the permit would not involve any new ground disturbance and would therefore not affect historic properties. *Id.*

The Region's analysis duly considered the Tribe's cultural values with respect to elders and the natural environment. The Tribe has not demonstrated otherwise. As such the Tribe has not met its burden to show that the Region's environmental justice analysis was clearly erroneous, an abuse of discretion, or that the permitting decision otherwise warrants review.

e. *Historic Inequities*

The Tribe further asserts that the Region did not take into account "historic inequities" affecting environmental justice communities, including that the Bonanza Plant "operated for many years without a permit." Pet. at 18. The Tribe states that Deseret made major modifications to the Bonanza Plant in 2000 that significantly increased emissions without the required permit. *Id.* This was among the allegations raised in the 2015 petition challenging the initial Title V permit. Sierra Club Petition for Review, at 5. As explained above, that case was resolved through the 2015 Settlement Agreement, which required Deseret to seek a permit including the requirement to install and operate low-NO_x burners and overfire air technology, limits on NO_x emissions, and a coal consumption cap that could be released contingent on the installation of selective catalytic reduction technology for NO_x reduction. Resp. to Cmts. at 2. These terms were incorporated into the 2016 MNSR permit, an amendment to the first Title V permit, and the final renewal permit that is the subject of this petition. EPA Resp. Br. at 5; *see also* Final Permit at 55-57. The Region addressed the permitting history in the response to comments. *See* Resp. to Cmts. at 1-2. The Region further evaluated the permit terms and determined that the renewal permit has sufficient monitoring, compliance certification, and reporting requirements to assure compliance with applicable requirements. *Id*. at 2. The Tribe does not identify any applicable requirement that the current permit renewal fails to incorporate, *see* 40 C.F.R. § 71.2 (defining "applicable requirement"), or explain how the Region was otherwise authorized under applicable law to address the alleged past non-compliance in this permit renewal.

The Tribe also argues that the "Plant should be required to take mitigation measures, including but not limited to, tree planting, funding to address health impacts, [and] other action such as [a] future trust fund." Pet. at 29; *see also id*. at 10. As discussed above, the Region's discretion to address environmental justice concerns in the context of a Title V permit is limited: the Region can provide expanded opportunities for public participation and additional terms as needed to assure compliance with applicable requirements as defined in Title V. *Veolia*, 18 E.A.D. at 196; *see also* EJ Legal Tools at 49. The Board has declined to review environmental justice concerns that fall outside the scope of a permitting decision. *See Energy Answers*, 16 E.A.D. at 326; *Jordan*, 18 E.A.D. at 11. None of the terms the Tribe seeks concern public participation or conditions to assure compliance with applicable requirements. Further, Executive Order 14096 calls for the agency to address historic inequities "as appropriate and consistent with applicable law." 88 Fed. Reg. at 25,253. The applicable law governing Title V permits does not give the agency discretion to require tree planting or a trust fund in a Title V permit. *See* CAA § 504(a); 42 U.S.C. § 7661c(a) (limiting scope of Title V permits to applicable requirements of the CAA).

Accordingly, we deny review of the claim that the Region failed to consider historic inequities in its environmental justice analysis.

f. *Coal Consumption Limit*

The final challenge to the Region's environmental justice analysis concerns the Tribe's comment that "EPA should impose a lifetime limit on coal use at the Plant." Pet. at 30; *see also id*. at 22 (noting that current limit is subject to conditional release). Both the Region and Deseret argue that review should be denied because EPA lacks authority to impose additional coal consumption limits.[12]

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[12] The Region and Deseret also assert procedural reasons that review should be denied. EPA Resp. Br. at 18; Deseret Resp. Br. at 26. Contrary to their arguments, the Tribe did challenge the coal consumption limit in its petition. Specifically, the Tribe stated 1) "[o]f particular concern to the Tribe, and raised repeatedly in comments and discussions with EPA, is the fact that the current Permit imposes no limits on how much coal the Bonanza Plant can burn, so long as they install scrubbers," Pet. at 22, and 2) "[g]iven disproportionate impact of the Plant, the 3.5 million tons/year of CO2 emitted, and the growth of new technologies, EPA must consider limitations on coal use as part of its trust duty and environmental justice prerogatives," *id*. at 30. And the Tribe commented on the need for a limit on coal consumption. Ute Tribe Comments at 2-3. As explained above,

Deseret Resp. Br. at 26; EPA Resp. Br. at 18-20. We conclude that the Tribe has not demonstrated clear error, an abuse of discretion, or other basis for review of the coal consumption limit.

As stated above, a Title V permit must incorporate applicable requirements, including terms and conditions of preconstruction permits. 40 C.F.R. §§ 71.2, 71.6(a)(1). The coal consumption limit negotiated as part of the 2015 Settlement Agreement was incorporated into a MNSR permit issued in 2016. Statement of Basis at 10. The requirements of the MNSR permit, including the lifetime coal consumption limit and the contingent release provisions, are included in the renewal of the Title V permit. Final Permit at 55-57. The Tribe does not identify any authority under the CAA or the Executive Orders and policies on environmental justice that would authorize EPA to include a more stringent limit on coal consumption. Accordingly, we deny review of this issue.

C. *The Tribe Fails to Demonstrate Clear Error, Abuse of Discretion, or That Review is Otherwise Warranted with Respect to the Trust Responsibility*

The Tribe argues that the agency failed to fulfill its "federal Indian trust responsibilities" Pet. at 15. The Region recognizes and reiterates the Agency's commitment to upholding the general trust responsibility between the United States government and federally recognized tribes. It maintains that EPA acts consistently with the general trust responsibility by implementing the statutes it administers. EPA Resp. Br. at 36 n.57 (citing *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) and *Arizona v. Navajo Nation*, 599 U.S. 555, 565-66 (2023)). The Region avers that it it acted consistently with the general trust responsibility by implementing the Title V operating permit program in compliance with the CAA. *Id.* We agree.

It is well settled that the United States "maintains a general trust relationship with Indian Tribes." *Arizona*, 599 U.S. at 565. The Supreme Court held that while the courts have recognized a general trust relationship in the federal government's relationship with tribes, "Congress may style its relations with the Indians a trust without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is limited or bare compared to a trust relationship between private parties at common law." *Id.* at 565-66 (quoting *U.S. v. Jicarilla Apache Nation,*

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however, the Tribe fails to meet its burden to demonstrate error, an abuse of discretion, or other basis for review of the coal consumption limit.

564 U.S. 162, 174 (2011)). Thus, "unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, th[e] Court will not 'apply common-law trust principles' to infer duties not found in the text of a treaty, statute, or regulation." *Id*. at 566 (quoting *Jicarilla*, 564 U.S. at 178).

It has also been established that in the absence of a conventional trust relationship, an agency fulfills its general trust responsibility by complying with the statutes and regulations it is entrusted to implement. *Morongo Band of Mission Indians*, 161 F.3d at 574 ("[A]lthough 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."); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) ("[A]dequate procedures were provided by the Clean Air Act and the EPA regulations to fulfill [the United States' trust] responsibility [to tribes].")

Here, the Tribe makes general allegations that the Region failed to fulfill its trust responsibility to preserve tribal assets and that "[c]lean air must be considered a fundamental tribal asset," but the Tribe does not point to any legal authority that creates a conventional trust relationship with regard to air. Pet. at 14. The Tribe made similar arguments recently before a U.S. District Court in the context of the management of water resources, and those arguments were rejected. *Ute Indian Tribe of the Uintah & Ouray Indian Rsrv. v. United States Dep't of Interior*, No. 2:21-CV-00573-JNP-DAO, 2023 WL 6276594, at *1 (D. Utah Sept. 26, 2023). In *Ute Indian Tribe*, the Tribe asserted trust duties related to the management of water resources under several treaties and statutes. *Id.* at *4. The U.S. District Court of the District of Utah concluded that "none of these treaties or acts creates a 'conventional' trust relationship by express language sufficient to allow this court to impose common-law trust obligations on the federal government." *Id.* at *5. The Tribe has not identified, and we are not aware of, any legal authority that would lead us to conclude that a conventional trust relationship exists with respect to air resources.

The Region fulfilled its general trust responsibility by complying with the requirements of the CAA and 40 C.F.R. part 71. *See Nance*, 645 F.2d at 711. As discussed in Part V.A. above, the Tribe has not identified any applicable requirements that the Region failed to include in the renewal permit. The Region explained the applicable requirements and how they were incorporated into the permit and concluded that the permit contained sufficient testing, monitoring, recordkeeping, and reporting provisions to assure compliance. Statement of Basis at 8-18; Resp. to Cmts. at 17. Furthermore, the Region complied with the

procedural requirements of the CAA and provided additional opportunities to comment based on the Tribe's request.[13]

The Region's action here met and fulfilled its general trust responsibility.[14] The Tribe has not demonstrated clear error, an abuse of discretion, or that review is otherwise warranted with respect to the Agency's trust responsibility in renewing the Title V permit.

D. *The Tribe Fails to Demonstrate Clear Error, Abuse of Discretion, or That Review is Otherwise Warranted with Respect to Tribal Consultation*

The Tribe argues that the Region's meetings with the Tribe were "inadequate to satisfy government-to-government consultation requirements" and references the 2023 Executive Order on environmental justice. Pet. at 17. The Tribe asserts that four meetings in four years was not sufficient and that these meetings were "check the box" exercises rather than opportunities for collaboration and meaningful engagement. *Id.* Because the Tribe failed to confront the Region's response to comments on this issue and the Region's consultation with the Tribe was consistent with the applicable Executive Orders and the agency's consultation policies, we deny review.

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[13] The Tribe also ties its arguments on consultation and the RCRA inspection report to the trust responsibility. As discussed in Part V.D. below, the Region followed the agency's consultation policy during the Title V permit renewal. *See Hopi Tribe v. U.S. EPA*, 851 F.3d 957, 960 (9th Cir. 2017) (rejecting argument that EPA violated a duty to consult stemming from the trust relationship where EPA did in fact consult with tribe). And as noted in Part V.E., the RCRA investigation report and any potential violations identified therein are based on RCRA requirements and are outside the scope of a Title V permit renewal. In any event, the Tribe has not identified a legal basis for a conventional trust relationship and the Region fulfilled its general trust relationship by complying with the CAA.

[14] In its reply, the Tribe argues that the reference to "existing law" in the 1994 Executive Order on environmental justice includes not only the requirements of the CAA, but also the agency's trust responsibility to the Tribe. Reply Br. at 5 (citing *Muskegon*, 18 E.A.D. at 106). This argument is raised for the first time in the Tribe's reply and is therefore too late. 40 C.F.R. § 124.19(c)(2); *Panoche*, 18 E.A.D. at 849; *In re City of Keene*, 18 E.A.D. 720, 746 (EAB 2022). Even if we were to consider the Tribe's argument, we would deny review because the Region has fulfilled its trust responsibility here, as explained above.

The 2023 Executive Order on environmental justice requires federal agencies, "as appropriate and consistent with applicable law" to "continue to engage in consultation on Federal activities that have Tribal implications and potentially affect human health or the environment, pursuant to Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments)." 88 Fed. Reg. at 25,253, 25,254. To implement Executive Order 13175, EPA developed a policy for consultation with Tribes. U.S. EPA, *EPA Policy on Consultation and Coordination with Indian Tribes* 2 (May 4, 2011) (A.R. 48) ("Tribal Consulation Policy").[15] EPA's Tribal Consultation Policy provides guiding principles, including that "EPA recognizes and works directly with federally recognized tribes as sovereign entities" and that "EPA ensures the close involvement of tribal governments and gives special consideration to their interests whenever EPA's actions may affect Indian country or other tribal interests." *Id.* at 3-4.

According to the Tribal Consultation Policy, tribal consultation at EPA involves four phases: identification, notification, input, and follow up. *Id.* at 4-5. In the identification phase, EPA identifies activities that have potential implications for tribes and may be appropriate for consultation. *Id.* at 4. In the notification phase, EPA notifies affected tribes of the activity. The notification should "include[] sufficient information for tribal officials to make an informed decision" about whether to continue with consultation and should be provided early enough in the process for the tribe to provide meaningful input. *Id*. at 4-5. In the input phase, tribes provide input to EPA, which may be through written communication, phone calls, meetings, or other interactions. *Id.* at 5. Finally, in the follow up phase,

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[15] EPA issued a revised policy on tribal consultation on December 7, 2023. U.S. EPA, *EPA Policy on Consultation with Indian Tribes* (Dec. 7, 2023). As noted by the Region, however, that policy was issued after the permit was issued on December 4, 2023. EPA Resp. Br. at 8 n.14. The Region properly relied on the policy in place at the time it issued the permit. *See Ariz. Pub. Serv. Co*., 18 E.A.D. at 264. Furthermore, the revised consultation policy states:

> This Policy does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. It is not binding and does not create a right or benefit, substantive or procedural, enforceable at law or in equity, against the agency, its officers or employees, or any other person.

U.S. EPA, *EPA Policy on Consultation with Indian Tribes* 9 (Dec. 7, 2023).

EPA provides feedback to the tribes involved in the consultation regarding how their input was considered in the final action. *Id.*[16]

Regarding the consultation issue, the Tribe has not demonstrated that it met the threshold requirements for Board review. As discussed in Part IV. above, under 40 C.F.R. § 124.19(a)(4)(ii), if the petition raises an issue the Region addressed in response to comments, the petitioner must explain why the response was clearly erroneous or otherwise warrants review. *See Gen. Elec. Co.*, 18 E.A.D. at 607. Here, the Tribe fails to explain how the Region's response is clearly erroneous or otherwise warrants review. *See* Pet. at 17-18, 29-30; EPA Resp. Br. at 33. We therefore deny review.

Even if we were to reach the merits of this issue on the record before us, we would deny review because the Region followed EPA's policy on Tribal consultation and the 2023 Executive Order. In accordance with the policy, the Region identified renewal of the permit as an activity with implications for the Ute Tribe and notified the Tribe of the opportunity for consultation early in the permitting process. *See* Letter from Carl Daly, Acting Dir. Air and Radiation Div., EPA Region 8, to Luke Duncan, Chairman, Ute Indian Tribe Bus. Comm. 1 (July 28, 2020) (A.R. 32). The notification letter provided that the Region was "offering an opportunity to consult" on the permit renewal, provided a contact person for the consultation process, and noted that in addition to offering government-to-government consultation, the Region planned to coordinate with the Tribe's Air Quality Program Director. *Id.* The Region held two informational meetings with the Tribe prior to the comment period on the draft renewal permit. *See* Email from Jason Deardorff, EPA Region 8, to Luke Duncan, Chairman, Ute Indian Tribe Bus. Comm. et al. (Sept. 15, 2020 16:28 MT) (A.R. 55); 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 (Sept. 22, 2020) (A.R. 56); Email from Katie Frayler, Patterson Earnhart Real Bird & Wilson LLP to Carl Daly, Acting Dir. Air and Radiation Div., EPA Region 8 et al. (Jan. 7, 2021) (A.R. 57); Draft Agenda for Ute Tribe/EPA Informational Meeting on Current Issues (Jan. 12, 2021) (A.R. 58). The Region also held a public hearing during the comment period at the Tribe's request. *See* Letter from Carl Daly, Acting Dir. Air and Radiation Div., EPA Region 8, to Luke Duncan, Chairman, Ute Indian Tribe Bus. Comm. (Jan. 7, 2021) (A.R. 34)

[16] The Presidential Memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation) sets out similar procedures.

(proposing to hold hearing in response to request from Ute Tribe); Resp. to Cmts. at 3.

As explained in Part III.C. above, in addition to considering the Tribe's comments on the draft permit, the Region held two consultation meetings with the Tribe after the close of the comment period. *See* Electronic meeting invitation from Kimberly Varilek, Dir. Tribal Affairs Branch, EPA Region 8, to Ute Tribe representatives (meeting date Aug. 30, 2023) (A.R. 35) (scheduling first post-comment-period consultation); Ute Tribe and EPA Region 8 – Consultation re: Deseret Bonanza Permit Modification, Updated Proposed Agenda (Aug. 30, 2023) (A.R. 37); Tribe Notice at 1 (referring to second post-comment-period consultation). The Region provided a draft response to comments to the Tribe prior to the first post-comment-period consultation and subsequently reviewed the Tribe's comments on that draft. Tribe Notice at 1. In its letter notifying the Tribe of the issuance of the final permit, the Region explained that it was including a final response to comments addressing the Tribe's comments on the permit renewal. *Id*. at 2. Thus, the Region received input and provided feedback on how the Tribe's input was considered. *See* Tribal Consultation Policy at 5.

The Board has previously rejected claims of inadequate consultation. In *In re Shell Offshore, Inc.*, the Board concluded that the Region satisfied its obligation to consult, noting that the Region had 1) sent a letter and fact sheet inviting Native Villages to initiate consultation, 2) widely distributed information about the permit, 3) held an informal question and answer session followed by a public hearing, and 4) stated in the response to comments that it fully considered issues raised by the Native Villages before issuing the final permit. 13 E.A.D. 357, 402-03 (EAB 2007). In *In re Desert Rock Energy Company, LLC*, the permittee argued that the Region failed to adequately consult with the Navajo Nation before requesting a voluntary remand of the permit. 14 E.A.D. 484, 500 (EAB 2009). The Region stated that it had an "ongoing dialogue" with the Nation including discussion of the possibility that the Region might change its position in the appeal. *Id.* at 500-01. In that case, the Board observed that the permittee's arguments, "at most, suggest that a disagreement exists between the participants about the scope of the consultation and not about whether consultation in fact occurred." *Id.* at 501.

Like in *Desert Rock*, the Tribe here does not dispute that consultation occurred. Rather, the Tribe contests the adequacy of the consultation, arguing that the four meetings were not sufficient and that the Region did not make the changes the Tribe requested. There is no particular number of meetings required or requirement for a particular outcome of consultation. *See* Tribal Consultation

Policy at 7 ("There is no single formula for what constitutes appropriate consultation * * *.").

The Tribe attempts to distinguish *Desert Rock,* arguing that the tribe in *Desert Rock* failed to provide a standard for the sufficiency of the consultation, and that the standard in this case is "defined by the federal trust responsibility and the 2023 [Executive Order]." Pet. at 23. The Tribe simply does not demonstrate that the trust responsibility required the Region to make the changes requested by the Tribe.[17] As discussed in Part V.C. above, the Region fulfilled its general trust responsibility by complying with the requirements of the CAA. Further, the record demonstrates that the Region's consultation with the Tribe on the permit renewal is consistent with the 2023 Executive Order. The facts in this case contradict the Tribe's characterization of the consultation as a mere "check the box" exercise. Pet. at 23. And, as the facts detailed above demonstrate, it was more than "ordinary public comment." *Id.* The Region provided for meaningful engagement by sharing information and seeking the Tribe's input throughout the permit renewal process and the Region went beyond the minimum requirements by holding a public hearing and sharing a copy of the draft response to comments with the Tribe. *See* EPA Resp. Br. at 34-35; Resp. to Cmts. at 3.

Because the Tribe has not demonstrated that the Region's actions were inconsistent with the 2023 Executive Order on environmental justice, the Executive Order on tribal consultation, EPA's policy on tribal consultation, or its general trust responsibility, we deny review on this issue.

E. *The Tribe's Allegations Regarding the RCRA Investigation Report Are Beyond the Scope of this Title V Permit Challenge*

The Tribe asserts that the Region abused its discretion and violated its trust responsibilities by failing to notify the Tribe, before the Title V permit was issued, of the results of a separate EPA investigation that identified potential violations of coal combustion residual ("CCR") requirements under RCRA. Pet. at 23-24.

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[17] The Tribe asserts that the Region overstates the holding of *Arizona v. Navajo Nation* to conclude that there is no obligation to consult with the Tribe under the general trust responsibility. Reply Br. at 15. We do not read this to be the Region's argument. Although the Region noted that the Tribe "did not identify any legal authority concerning a legal obligation to consult as part of the general trust responsibility," it argued that the Board need not reach this issue because the Region did consult with the Tribe. EPA Resp. Br. at 36 n.57.

Because the investigation, including its results, were outside the scope of a Title V permit, we deny review.

In October 2022, the National Enforcement Investigations Center ("NEIC") conducted a RCRA investigation at the Bonanza Plant. Pet. attach. 9 at 3. Prior to the investigation, the Region notified the Tribe of the upcoming inspections and invited tribal officials to participate. Email from Linda Jacobson, RCRA Inspector, EPA Region 8, to Bart Powaukee, Ute Tribe et al., (Oct. 17, 2022 10:18 am MT) (A.R. 49) (providing notice of NEIC inspection); Letter from Suzanne Bohan, Dir., EPA Region 8 Enforcement and Compliance Assurance Div., to Shaun Chapoose, Chairman, Ute Indian Tribe (Oct. 18, 2022) (A.R. 51) (seeking to coordinate dates for RCRA inspections). The Tribe did not participate in the inspection. EPA Resp. Br. at 40-41.

Following completion of the investigation, the NEIC issued a report, which was signed on December 21, 2022. NEIC Civil Investigation Report, Deseret Power – Bonanza Power Plant 1 (Dec. 21, 2021) ("NEIC Report") (filed as attachment 9 to the Petitioner's Brief). The NEIC Report identified six observations of possible non-compliance, all of which related to CCR requirements under RCRA. NEIC Report at 11-25. The NEIC Report was provided to the Tribe on December 12, 2023, which was after the Title V permit in this case was issued. Pet. at 23.

The NEIC Report and potential violations identified in the Report are based on RCRA requirements, which are outside the scope of a Title V permit. As discussed previously, a Title V permit must incorporate applicable requirements of the CAA and contain sufficient monitoring, reporting, and recordkeeping requirements to assure compliance with those CAA requirements. *See* CAA § 504(a), 42 U.S.C. § 7661c(a). None of the RCRA regulations cited in the NEIC Report are "applicable requirements" for purposes of a Title V permit. *See* 40 C.F.R. § 71.2 (defining applicable requirement); *In re Onyx Envt'l Servs.*, Petition No. V-2005-1, Order Partially Denying and Partially Granting Petition for Objection to Permit 4 (Adm'r Feb. 1, 2006) (finding that EPA could not object to issuance of a Title V permit on the basis of the omnibus provision of RCRA); *In re Monroe Elec. Generating Plant*, Petition No. 6-99-2, Order Partially Granting and Partially Denying Petition for Objection to Permit 27 (Adm'r June 11, 1999) ("RCRA requirements are not applicable requirements of the [Clean Air] Act"); *see also* Clean Air Act Operating Permit Program; Petition for Objection to Proposed State Operating Permit for Monroe Electrical Generating Plant Entergy Louisiana, Inc.; Monroe, Ouachita Parish, Louisiana, 64 Fed. Reg. 44,009 (Aug. 12, 1999).

The Tribe also asserts that the Region's failure to provide the RCRA investigation report before the Title V permit was issued violated the Agency's general trust responsibility. As discussed in Part V.C. above, the Region fulfilled the general trust responsibility in this matter by implementing the Title V permit program in compliance with the CAA and its regulations. Because RCRA requirements are outside the scope of this Title V permit, the Tribe has failed to demonstrate clear error or that review is otherwise warranted with respect to the RCRA investigative report.

F. *Erroneous Statements Made by the Region Regarding Appeal Procedures and Motions for Reconsideration.*

In the course of reviewing the record in this matter, the Board observed that the Region made erroneous statements in the record regarding appeal procedures before the Board. While these statements do not affect this decision, we note them here in order to ensure that 1) the correct appeal information is provided going forward, and 2) the parties have the correct information regarding motions for reconsideration.

First, the Region misstated the timeframe for filing an appeal in the notice of the final permit. The letters providing notice of the final permit stated that "[a] petition to the Environmental Appeals Board (EAB) must be filed within 30 days *of receipt* of this final permit action." Deseret Notice at 2 (emphasis added); Tribe Notice at 2. This is not accurate. A petition for review must be filed "within 30 days after the Regional Administrator *serves notice* of the issuance" of a final permit decision. 40 C.F.R. § 124.19(a)(3) (emphasis added). While service and receipt may occur on the same day, that is not necessarily the case. *See id.* §§ 71.11(m) (adding three days to computation of time period running from date of service by mail), 124.19(i) (providing that service by mail is complete upon mailing). Here, the notice appears to have been served electronically, and the Tribe timely filed its petition. Nonetheless, providing correct information about the time for filing appeals is of critical importance to the administrative process. The Region should take steps to ensure that accurate information about the appeals procedure is provided in the future.

Second, the Region's statement of basis misstated the Board's procedures for granting review and motions for reconsideration. The Statement of Basis states that "[t]he EAB will issue an order either granting or denying the petition for review, within a reasonable time following the filing of the petition" and that "[p]ublic notice of the grant of review will establish a briefing schedule for the appeal and state that any interested person may file an amicus brief." Statement of Basis at 21. While this was the procedure for an appeal under part 71 in the past,

the current regulation provides that permit decisions under part 71 are subject to the appeal procedures in 40 C.F.R. § 124.19. 40 C.F.R. § 71.11(*l*)(1); Federal Operating Permits Program, 61 Fed. Reg. 34,202, 34,249 (July 1, 1996). Under 40 C.F.R. § 124.19, the Board does not issue an order granting review prior to briefing and the briefing schedule is set forth in section 124.19(a)-(c). Further, the Statement of Basis incorrectly states that "[m]otions for reconsideration shall be directed to the Administrator rather than the EAB." Statement of Basis at 21. The regulation governing motions for reconsideration provides that such motions "must be directed to * * * the Environmental Appeals Board" and that motions for reconsideration "directed to the Administrator * * * will not be considered." 40 C.F.R. § 124.19(m). Any motion for reconsideration must be filed in accordance with this regulation.

VI. *CONCLUSION*

For the reasons stated above, the petition for review is denied.[18]

So ordered.

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