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

In re:	
Desert Rock Energy Company, LLC	PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06
PSD Permit No. AZP 04-01	

EPA REGION 9's MOTION FOR VOLUNTARY REMAND

INTRODUCTION

Region 9 moves for a voluntary remand of the Final Prevention of Significant Deterioration ("PSD") Permit issued to the Desert Rock Energy Company ("DREC") in order to allow Region 9 the opportunity to reconsider its actions on several issues before the Environmental Appeals Board ("EAB" or "Board") in this matter. Region 9 submits this motion in lieu of a surreply brief. After reviewing the issues in this matter and a related EPA rulemaking addressing the PSD requirements for particular matter less than 2.5 micrometers ($PM_{2.5}$), the Administrator's office has stayed a portion of the $PM_{2.5}$ rule applicable to this permit and requested that Region 9 reconsider several parts of its permitting decision for the Desert Rock Energy Facility ("DREF"). Given the number of the issues in the appeal that Region 9 seeks to reconsider and the prior withdrawal of a portion of the permitting record by Region 9, a complete remand of the Final PSD Permit and administrative record will promote efficiency in the Agency's decision-making and potentially enable Region 9 to resolve several disputed issues.

BACKGROUND AND SUMMARY OF ISSUES

Region 9 issued a final PSD permit to DREC on July 31, 2008. Four Petitions for Review and one Amicus Brief were filed at various times until October 2008. Region 9 submitted its Response Brief on January 8, 2009, responding to all issues raised in the Petitions except the issue of whether the permit must contain an emissions limit for carbon dioxide. On the latter issue, Region 9 withdrew the portion of the PSD permit's Response to Comments that explained the Region's basis for not evaluating carbon dioxide emissions in the BACT analysis.[1] DREC and Dine Power Authority ("DPA") also filed briefs responding to the Petitions on January 8, 2009. Pursuant to this Board's Order dated January 22, 2009, and subsequent extensions, Petitioners filed Reply Briefs on February 20, 2009, and DREC and DPA filed Surreply Briefs on March 21, 2009. Additional parties also filed amicus briefs.

Petitioners in this case have raised multiple issues for consideration by the Board. For example, Petitioners have alleged error in various aspects of the Best Available Control Technology ("BACT") and air quality analyses supporting the permit, and they also raised concerns about the integration of the PSD permitting analysis with reviews required under other laws. The BACT issues include the use an emissions limitation for particular matter less than 10 micrometers ("PM_{10}") as a surrogate for a $PM_{2.5}$ limitation, the Region's decision not to identify a coal-gasification process called integrated gasification combined cycle ("IGCC") technology as an option at Step 1 of the BACT

[1] Region 9 published a public notice on January 22, 2009 requesting comments on a revised Statement of Basis addressing this issue. The public comment period on that portion of the PSD permitting decision closed on March 25, 2009.

analysis, and the impact of the case-by-case Maximum Achievable Control Technology ("MACT") analysis for hazardous air pollutant on the BACT analysis for pollutants regulated under the PSD program. The air quality issues involve concerns regarding the record demonstrating compliance with the National Ambient Air Quality Standards ("NAAQS") for $PM_{2.5}$ and ozone, and the PSD permit increments for sulfur dioxide. Other issues in this matter concern the timing of the final PSD permitting decision in relation to a consultation under section 7(a)(2) of the Endangered Species Act and the case-by-case MACT analysis under section 112(g) of the Clean Air Act. In addition, the Petitioners have questioned the sufficiency of the additional impacts analysis for the DREF, which includes an analysis of impacts on soils, vegetation and visibility.

On March 13, 2009, this Board granted Region 9's request to file a Surreply Brief by April 27, 2009 in order to afford EPA officials appointed since the recent Presidential inauguration an adequate opportunity to consider the issues raised in this appeal and the positions previously advocated by EPA offices in briefs to the EAB. As discussed in Region 9's request for an extension to file a surreply, on January 26, 2009, Lisa P. Jackson was sworn in as the Agency's Administrator after the inauguration of President Barack H. Obama on January 20, 2009. Since that time, the Administrator and her advisers have been reviewing many of the Agency's policies under the Clean Air Act and other statutes.

As part of this review, on April 24, 2009, the Administrator issued a stay of a regulation addressing the PSD requirements for $PM_{2.5}$ that Region 9 applied in this action. Letter from Lisa P. Jackson to Paul R. Cort, Earthjustice (April 24, 2009) [Exhibit A]. Specifically, the Administrator granted a petition for reconsideration and a

request for a stay of the "grandfathering" provision adopted as part of the Agency's rulemaking entitled Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers, 73 Fed. Reg. 28321 (May 16, 2008). In this action, EPA adopted 40 C.F.R. 52.21(i)(1)(xi), which authorized EPA Regions and delegated state permitting authorities to continue using PM_{10} as a surrogate to comply with the PSD requirements for $PM_{2.5}$ for certain PSD permit applications that were pending at the time. Except for these grandfathered PSD permit applications, in the May 16, 2008 notice, EPA otherwise ended use of the surrogate policy under the Federal PSD program regulations at 40 C.F.R. § 52.21. In her letter granting reconsideration of parts of this rule and staying 40 C.F.R. § 52.21(i)(1)(xi), the Administrator stated that EPA intends to propose repealing the grandfathering provision because it was not adopted with proper notice and an opportunity for public comment and is no longer substantively justified. Region 9 relied on this grandfathering provision to support issuing its final permit decision based on a showing that Desert Rock's emissions would not cause or contribute to a violation of the PM_{10} NAAQS, with no corresponding analysis with respect to the $PM_{2.5}$ NAAQS. AR 120 at pp. 76-77.

Furthermore, in conjunction with the ongoing consultation under section 7(a)(2) of the ESA regarding the Desert Rock project, the United States Fish and Wildlife Service ("FWS") informed Region 9 on February 26, 2009 that it has "determined that mercury may be adversely affecting the [endangered] Colorado pikeminnow, as well as contributing to numerous fish consumption advisories on the Navajo Nation, Arizona, Colorado, Utah, and New Mexico." Letter from Wally Murphy, FWS New Mexico Ecological Services Field Office to Deborah Jordan, EPA Region 9 Air Division Director

(Feb. 26, 2009) [Exhibit B]. In addition, the FWS said "atmospheric deposition of mercury with subsequent transfer is believed to be one of the most significant loading pathways to the mercury content of piscivorous fish." *Id.* The FWS indicated that it was considering "sources and deposition of mercury" and "source-attribution information regarding atmospheric deposition and transport" to determine potential effects to endangered species. The proposed Desert Rock project is among the sources of mercury under consideration by the FWS. Although DREC has provided various estimates of its potential mercury emissions, DREC has not submitted its application for a case-by-case MACT determination under section 112(g) of the Clean Air Act. This application, when submitted, will provide a more definitive analysis of mercury emissions and potential reductions. Thus, the precise amount of mercury emissions that would be added to this area from the Desert Rock project remains uncertain at this time.

After reviewing the issues before the Board in this matter during the 45-day period of extension granted by the Board, the Administrator's office has requested that Region 9 reconsider its permitting decision with respect to the following issues: (1) the use of PM_{10} as a surrogate to satisfy the PSD requirements for $PM_{2.5}$; (2) the consideration of integrated gasification combined cycle (IGCC) in the BACT analysis; (3) the issuance of the final permit decision before completing the consultation under section 7(a)(2) of the ESA; (4) the issuance of the final PSD permit decision before completing the case-by-case MACT analysis for hazardous air pollutants under CAA section 112(g); and (5) the sufficiency of the additional impacts analysis for the DREF.

Region 9 respectfully requests that the Board remand the Final PSD Permit and administrative record for reconsideration and development of additional information by

Region 9. In the alternative, EPA requests this Board to withdraw or amend its Order dated January 22, 2009 granting review of the pending Petitions for Review so that Region 9's Air Division Director can withdraw the Final PSD Permit pursuant to the authority set forth in 40 C.F.R. § 124.19(d).

ARGUMENT

A. The Board's Regulations and Administrative Efficiency Support Remanding the PSD Permit for EPA to Reconsider Important Policy Matters.

The regulations at 40 C.F.R. §124.19(d) provide that the Regional Administrator may withdraw a PSD permitting decision to reconsider the decision or issue a new draft PSD permit until such time as the Board "grants or denies review." This regulation allows a Regional Administrator to reconsider policy decisions or correct errors in its permit. Furthermore, in promulgating 40 C.F.R. Part 124, EPA stated that "most permit conditions should be finally determined at the Regional level" and therefore the power of review will only be employed "sparingly." *See* 45 Fed. Reg. 33,412 (May 19, 1980); *accord In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Accordingly, the Board typically defers to regional permitting authorities in its review of permit appeals, especially on matters of a technical nature. *See, e.g., In re Three Mountain Power, LLC*, 10 E.A.D. 39, 54 (EAB 2001).

To promote efficiency in resolving permit appeals, the Board has adopted a practice of resolving the majority of its cases based on the petitioner's brief and the permitting authority's response without ordering further briefing. EAB Practice Manual at 30-31. This means that the Board issues its final decision on the merits of the arguments simultaneously with granting or denying review. However, the Board may instead grant review, establish a briefing schedule, notify other interested parties of the

opportunity to file briefs, and then issue a decision based on the petition as well as the later filed briefs. *Id.* at 30.

In this case, the Board issued an Order on January 22, 2009, granting review and ordering further briefing. That Order, however, did not provide any decision on the merits of the arguments presented in the Petitions for Review. Had the Board not granted review, Region 9's Air Division Director would have had the authority to notify the Board of a decision to withdraw the PSD permit for further consideration pursuant to 40 C.F.R. § 124.19(d).

The regulations, EAB Practice Manual, and EAB precedent have not established a procedure for the Agency to reconsider its permitting decision after the Board has granted review but before it has reached a final decision on the merits of the arguments. A review of federal case law, however, strongly supports granting voluntary remand in such a case. It is generally within the court's equitable power to remand an agency decision for reconsideration without completing judicial consideration when the agency has so requested. *See, e.g., Ford Motor Co., v. NLRB*, 305 U.S. 364, 373 (1939); *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983). A voluntary remand promotes the fundamental principle that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. General Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)). Judicial economy is also promoted by allowing an agency to reconsider its decision if there are new facts, additional record material or evolving agency policy. *See Ethyl Corp. v. Browner*, 989

F.2d 522, 524 & n. 3 (D.C. Cir. 1993) (allowing EPA's opposed motion for voluntary remand).

Some courts have noted that "[t]he more complex question, however, involves a voluntary remand request associated with a change in agency policy or interpretation." *SKF USA Inc. v. U.S.*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Where the change in agency policy or interpretation is one to which the Agency is afforded deference, the voluntary remand is appropriate. The *SKF* court stated:

> Where there is no step one *Chevron* issue, we believe a remand to the Agency is required, absent the most unusual circumstances verging on bad faith. Under *Chevron*, agencies are entitled to formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'"

Id. at 1029-1030 (citation to *Chevron* omitted). This practice allows the agency "to assess 'the wisdom of its policy on a continuing basis.'" *Id.* at 1030 (quoting *Chevron*). Thus, voluntary remand is favored because "[u]nder the *Chevron* regime, agency discretion to reconsider policies does not end once the agency action is appealed." *Id.*

B. Region 9 Seeks to Reconsider Several Issues in this Appeal Based on Recent Developments.

Based on the issues discussed below, Region 9 requests that the Board issue a complete remand of the Final PSD Permit and administrative record to enable the Region to reconsider several important policy issues and take further action to request additional information from the applicant and DPA. Given the number of issues pending in this appeal that the Region seeks to reconsider, it is most efficient at this point for the Board to remand this entire matter back to Region 9 so that the Region may ensure consistency between all permit conditions and the record in this matter after reconsidering the issues discussed below.

1. Region 9 Requests the Opportunity to Reconsider its Decision to Satisfy the PSD Requirements for $PM_{2.5}$ By Using PM_{10} as Surrogate.

Due to the stay of 40 C.F.R. 52.21(i)(1)(xi) that the Administrator signed on April 24, 2009, Region 9 requests the opportunity to reconsider the adequacy of the Final PSD Permit and administrative record in demonstrating compliance with the PSD requirements for $PM_{2.5}$ applicable under 40 C.F.R. § 52.21. Given the Administrator's stated intent to propose repealing the grandfathering provision, it now appears unlikely that the current administrative record will be sufficient to establish compliance with the PSD requirements for $PM_{2.5}$. Thus, Region 9 needs to consult with DREC regarding additional analyses necessary to demonstrate that the source will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS and to establish a BACT emissions limitation for $PM_{2.5}$ in the permit. Therefore, Region 9 requests a voluntary remand so that it may reconsider its approach for demonstrating that this permit complies with the PSD requirements for $PM_{2.5}$ applicable under the existing regulations.

2. Region 9 Requests the Opportunity to Reconsider its Decision to Issue the Final PSD Permit Prior to Completing Consultation Under the ESA and Prior to Considering a Case-By-Case MACT Standard for Hazardous Air Pollutants.

As discussed in prior briefs submitted in this matter, Region 9 issued the Final PSD Permit before the Agency had completed the consultation required under Section 7(a)(2) of the ESA or the review required under section 112(g) of the Clean Air Act for a case-by-case MACT determination. With regard to the ESA, Region 9 included a permit condition preventing commencement of construction until completion of the ESA process, including completion of consultation with FWS. Region 9 also communicated in the record its commitment to completing the section 112(g) determination before actual

construction begins. Region 9 indicated that it could, if necessary, adjust the PSD permit terms based on these additional reviews of the project to address any conclusions from the ESA consultation or address any inconsistencies with the PSD permit terms and the control methods required under the distinct requirements of section 112(g) of the Clean Air Act. AR 120 at 172; AR 121 at 22-23.

Since July 2008, a Biological Assessment prepared on behalf of the Bureau of Indian Affairs ("BIA") has been submitted to FWS as part of the ESA consultation process. The Biological Assessment did not project that mercury emissions from the Desert Rock project would likely adversely affect any listed fish species. However, the FWS has stated in a letter to Region 9, dated February 26, 2009, regarding the Desert Rock project ESA consultation that its own analysis has led it to determine that mercury emissions may be adversely affecting the endangered Colorado pikeminnow, as well as contributing to numerous fish consumption advisories in the Four Corners area. Mercury emissions therefore appear to be a significant concern to FWS in the context of the Desert Rock project ESA consultation.

At the time the permit was issued in 2008, Region 9 did not have a clear indication of the nature of the FWS's concerns about project impacts on endangered species associated with mercury and it was thought that the information before Region 9 was adequate. However, the concerns expressed in the February 2009 FWS letter have increased the likelihood that the ESA consultation will lead to an amendment to the permit application or a modification of the PSD permit terms as a result of the increased potential that a project modification will be needed to address ESA concerns. Furthermore, while the Biological Assessment includes assumptions about the mercury

emissions from the project, additional detail about the amount and nature of those emissions will be provided when EPA receives an application for a case-by-case MACT determination with a proposed level of mercury control and information about the mercury control equipment. *See* 40 C.F.R. § 63.43(e). The applicant has yet to submit such an application.

In consultation with the Administrator's office, Region 9 has concluded that these associated issues -- the FWS's stated concerns, the implications of additional mercury emissions in an area serving as critical habitat for fish species listed as endangered under the ESA and already subject to numerous fish consumption advisories, and the inter-relatedness of the case-by-case MACT determination with analyses conducted pursuant to the ESA consultation -- are of sufficient importance to reconsider Region 9's decision to conduct the PSD permit review, ESA consultation, and section 112(g) review on separate timetables. Region 9, therefore, requests that the Board remand the permit to Region 9 so that it may coordinate the completion of these processes in light of recent developments.

a. ESA Considerations

In light of the concerns expressed by the FWS regarding mercury emissions, and after further reviewing the EAB's *Indeck-Elwood* opinion and a more recent EAB Order in another matter, Region 9 believes it is no longer efficient or prudent under the circumstances surrounding this permit to request that the EAB proceed with its review of this permit prior to the conclusion of the ESA consultation covering the permit. Region 9 does not believe there is any ESA or other legal deficiency in the permit condition that ensured construction would not commence until the ESA process concluded. However,

the Region has concluded that it is no longer advisable to proceed with a PSD permit containing such a condition under the circumstances of this case.

In the *Indeck-Elwood* matter, both the EAB and the EPA program office noted that any necessary ESA consultations should "ordinarily" be concluded prior to issuance of the final federal PSD permit by the EPA Region or delegated state acting on EPA's behalf, but the EAB still found that EPA could proceed with issuing a "final" permit prior to completion of such a consultation, so long as the Agency still had the opportunity "to analyze the situation and, as necessary, specify protective conditions for inclusion in the permit." *In re Indeck-Elwood LLC*, PSD Appeal No. 03-04, slip op. at 113 (EAB Sept. 27, 2006). The Board then found that because finality of the *Indeck-Elwood* permit was postponed pending the outcome of the EAB appeal, EPA retained sufficient authority to make any changes to the permit that might be necessary as a result of the ESA consultation. Accordingly, the Board determined that the completion of the ESA consultation during the course of the permit appeal satisfied ESA legal requirements. *Id.* at 114. For the Desert Rock permit, Region 9 relied on this part of the *Indeck-Elwood* decision, among other things, to support issuance of a final PSD Permit prior to completion of the ESA consultation. Under the circumstances existing in July 2008, EPA Region 9 concluded that the need to resolve litigation under the Clean Air Act concerning the timing of the PSD permit decision outweighed the advantages of completing ESA consultation prior to a final permit decision. As described above, in an effort to satisfy ESA legal requirements, the Region included a condition in the permit prohibiting any on-the-ground impacts pending conclusion of the ESA process. PSD Permit AZP 04-01, Condition II.A.

In its *Indeck-Elwood* decision, the Board noted that addressing ESA considerations early in the permit review process would provide EPA with "more flexibility to make, and to implement suggested ESA-related modifications" in the final permit. *Indeck-Elwood*, slip op. at 111-12 (internal quotations omitted). In the decision, the EAB further observed that information generated during the ESA process could be used "as part of the record supporting the permit decision," ensuring that ESA-related information that is also relevant to other aspects of the PSD permitting analysis, such as the BACT determination or the soils and vegetation analysis, would be available to protect against permitting decisions based on inadequate information. *Id.* at 112. Finally, the Board noted that early resolution of ESA obligations would be advantageous to permit applicants, avoiding a disconnected process that might cause delays in the permitting or appeal action. *Id.* at 112 n. 153.

In a separate matter involving a permit for a Shell Oil project on the outer continental shelf, EPA Region 10 included a condition on ESA compliance similar to the one contained in the Desert Rock permit (OCS Minor Permit No. R10OCS-AK-07-01, Condition 28). That permit was also appealed to the EAB. An Order by the EAB in that case implied that Region 10's approach of issuing the final permit conditioned on subsequent completion of the ESA process could introduce uncertainties in the permit appeal process that could result in delays in issuance of an effective permit. The Board noted that because the provision contained in the Shell permit may have allowed for almost any permit condition to be modified to address the outcome of the ESA consultation, including conditions already subject to the EAB appeal, it was unclear

whether the permit was ripe for EAB review. *See* Order Requiring Clarification, *In Re Shell Offshore Inc.*, OCS Appeal Nos. 08-01, 08-02, & 08-03 (Aug. 19, 2008).[2]

Similarly, in the context of the Desert Rock permit appeal, Petitioners have raised concerns regarding potential inefficiencies and wasted efforts should the EAB process an appeal of a "final" permit that remains conditioned upon, and subject to modification based on, the outcome of an ongoing ESA consultation process. See, e.g., State of New Mexico's Petition for Review and Supplemental Brief (filed Oct. 2, 2008) at 17-18. This concern raises the same potential inefficiencies implied by the EAB in its Order questioning the ripeness of the Shell permit.

Given the FWS's concern about mercury emissions in the context of the ESA consultation for the DREF, Region 9 now believes that the possibility of the need for project modifications to address ESA concerns has increased. Although, pursuant to section 112(b)(6) of the CAA, hazardous air pollutant emissions are not addressed in PSD permits, the effects of such emission may nevertheless be considered effects of the PSD permit authorization under the ESA. ESA-related project modifications have the potential to affect EPA's PSD permit requirements for the DREF through (1) potential project changes that may affect EPA's BACT determination; (2) potential project

[2] In the Shell matter, Region 10 did not ultimately need to address the Board's questions regarding ripeness because the ESA consultation on that action was completed prior to the deadline for the Region's response to the EAB Order. With regard to Desert Rock, irrespective of any potential ripeness issue – the merits of which are not addressed in this Motion – Region 9 has determined as a matter of policy that the circumstances warrant seeking a voluntary remand to allow the ESA process to conclude, thus avoiding any potential waste of resources or duplicative efforts should the permit conditions or permit application ultimately change.

changes not associated with BACT that nevertheless may result in amendments to the applicant's PSD permit application;[3] or (3) both of these considerations.

Uncertainties surrounding the ultimate PSD permit requirements for the Desert Rock facility therefore raise questions regarding the utility of the expenditure of resources toward finalizing the PSD permit or processing an appeal prior to conclusion of ESA compliance. At this point, Region 9 believes it would be an inefficient use of EPA resources (including EAB resources) to proceed with permitting in a manner that may effectively require portions of the permit to be subject to public comment and appeal to the EAB twice – once before the ESA consultation is complete and once again if permit requirements are changed as a result of the completed consultation. Thus, Region 9 requests that the Board remand this matter so that Region 9 may consider the issues raised in the ESA consultation before finalizing the PSD permit and proceeding with any review by the EAB.

b. Section 112(g) Considerations

Although the PSD permitting requirements are distinct from the requirements to establish limitations on hazardous air pollutant (HAPs) under section 112 of the CAA, Region 9 recognizes that there is likely a benefit to completing BACT determinations under the PSD permitting program at the same time as section 112(g) case-by-case MACT determinations for HAPs. In addition, because determining the precise mercury emissions levels from the Desert Rock project may inform analysis and decision-making

[3] Permit applicants may, for instance, agree to amend permit applications as a mechanism for providing their formal agreement to adhere to reasonable and prudent measures to minimize the impacts of incidental take or to pursue reasonable and prudent alternatives, developed through ESA consultation, to avoid jeopardy or the destruction or adverse modification of critical habitat.

relevant to the ESA consultation process, Region 9 prefers at this point to realize the benefits of completing all related processes on a coordinated timetable.

Consistent with recent case law interpreting section 112, case-by-case MACT determinations must include an examination of all factors affecting emissions, including control technology. While multiple factors are considered, both BACT and case-by-case MACT determinations involve an evaluation of emission control methods, and the control approach chosen under one program may well have an effect on the appropriate control approach chosen under the other program.

Region 9 initially concluded the administrative record did not demonstrate that coordination of these reviews was necessary or that conducting the reviews at different times would significantly compromise either action. However, based on the current circumstances and further consultation with EPA headquarters staff, Region 9 recognizes that conducting these reviews simultaneously is preferable to ensure consistency between the two analyses and promote efficiency in permit processes. While there remains uncertainty over the interaction of the PSD BACT and case-by-case MACT requirements, Region 9 has been persuaded that there is a greater likelihood of an overlap than previously understood. This justifies taking greater care to ensure that the PSD permit conditions are coordinated with the case-by-case MACT analysis.

A determination that a specific method of emission control is BACT or MACT for the same source under either program may result in changes to a source's design or operational parameters, and these changes in turn may have an effect on the method of emissions control chosen under the other program. In some cases, what may constitute MACT for a particular source will result in co-control of nonhazardous pollutants to as

great a degree as, or greater than, what a BACT analysis might lead to, while in others, MACT-level emission reduction practices could have a significant impact on the efficiency of certain control options under consideration for BACT, thus changing the outcome of a BACT analysis. For instance, a BACT analysis for sulfur dioxide may result in one level of control absent MACT considerations, but a 112(g) MACT standard for hydrogen chloride could result in a more stringent level of control that could conflict with or supersede the BACT control strategy. Similarly, MACT for emissions of mercury could impose additional control requirements that may not have been planned for during the BACT analysis process. Conversely, controls that are required to meet a BACT limit for a criteria pollutant may also meet or help to meet a MACT limit for one or more HAPs. For example, a BACT limit for sulfur dioxide ("SO_2") might help a plant meet a MACT level for acid gas HAPs. Evaluating these control approaches together should result in a more efficient planning and permitting process, and may even result in one control strategy that meets both requirements.

Although this is not a mandatory requirement under EPA regulations at this time, federal PSD and section 112(g) regulations do not preclude Region 9 from completing a PSD BACT analysis at the same time as a case-by-case MACT analysis and coordinating these analyses. For the reasons discussed above, Region 9 requests a voluntary remand so that it may integrate the two analyses to the extent possible, while also being careful to recognize the distinct legal standards that govern each determination. Such integration can minimize disputes over the establishment of appropriate methods of emissions control and associated emissions limits and can also save additional time if the processes for establishing the limits are coordinated.

3. Region 9 Requests the Opportunity to Reconsider its Decision to Issue the Final PSD Permit Without Considering Integrated Gasification Combined Cycle Technology in the BACT Analysis.

At the time of its Final PSD Permit issuance and in its Response Brief on appeal, Region 9 determined that it was precluded under headquarters policy from evaluating IGCC technology as part of BACT analysis for this facility. Region 9 has consulted with the Administrator's office during the 45-day extension the Board granted in this matter. Administrator Jackson does not support a policy that would preclude permitting authorities from exercising their discretion to evaluate this option. While the Agency has not previously required consideration of IGCC in the BACT analysis for such sources, permitting authorities conducting a top-down BACT analysis as part of the review of an application to construct a new coal-fired electric generating unit have the discretion under existing EPA interpretations to list IGCC technology as a potentially applicable control technique at Step 1 of the analysis and complete the remaining steps of the top-down process. Therefore, rather than continue to contest this issue on appeal, Region 9 prefers at this point to reconsider the scope of its BACT analysis for this facility.

The administrative record for the Final PSD Permit shows that Region 9 initially requested information from the applicant regarding IGCC technology. The applicant submitted two reports in 2005. AR 27; AR 34. After December 2005, Region 9 did not pursue the analysis of IGCC before making its Final PSD Permit decision.

At that time, EPA headquarters began expressing the view that IGCC technology need not be listed at step 1 of a BACT analysis for a coal-fired generating unit on the grounds that this technology would fundamentally redefine such a source. EPA first communicated this view in a December 13, 2005, response from the Director of the

Office of Air Quality Planning and Standards to an inquiry from a consulting firm in Colorado. In an agreement to settle litigation over this response, EPA clarified that the December 13, 2005 response was not a final agency action and had no legally binding effect. Settlement Agreement and Notice of Consent to Settlement Agreement, *NRDC v. EPA*, Case No. 06-1059 (D.C. Cir. 2006); 71 Fed. Reg. 61771 (Oct. 19, 2006).

Nevertheless EPA continued to hold the view reflected in the December 2005 letter and elected not to include the IGCC option in advanced steps of the top-down BACT analysis for a permit issued by Region 8 to the Deseret Power Electric Cooperative in August 2007 and the Desert Rock permit at issue in this case. The EAB remanded the Deseret Power permit to Region 8 for further analysis on other grounds in November 2008. *In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008). As a result of the EAB's order in the Deseret matter and this appeal of the Desert Rock permit, neither of these permitting decisions has become final or effective. Under 40 C.F.R. 124.19(f), final Agency action does not occur on permits appealed to the EAB until the EAB issues a decision denying review, the EAB issues a decision on the merits of an appeal without a remand, or remand proceedings are completed.

The Administrator and EAB have generally recognized that the decision about whether to include a lower polluting process in the list of potentially-applicable control options compiled at Step 1 of the top-down BACT analysis is a matter within the discretion of the PSD permitting authority. *See, e.g., In Re Knauf Fiber Glass*, 8 E.A.D. 121, 136 (EAB 1999); *In the matter of Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 100 & n.9 (EAB 1992); *In the Matter of: Old Dominion Electric Cooperative, Clover,*

Virginia, 3 E.A.D. 779, 793 (Adm'r 1992). In the *Hawaiian Commercial* case, the Board wrote that "the permitting authority is entitled to wide latitude in how broad a BACT analysis it wishes to conduct." 4 E.A.D. at 100. Furthermore, in the *Knauf Fiber Glass* matter, the Board observed that "[t]he permitting authority may require consideration of alternative production processes in the BACT analysis when appropriate." 8 E.A.D. at 136.

Under EPA's established interpretation of the Clean Air Act, PSD permitting authorities have some discretion to identify the circumstances under which they may or may not eliminate inherently lower pollutant processes from consideration in the BACT analysis on the grounds that such an option would fundamentally redefine the proposed source. Individual permitting authorities have the discretion to conduct a broader BACT analysis that reflects consideration of alternative production processes when appropriate. *See, In Re Knauf Fiberglass GmbH*, 8 E.A.D. at 136. For example, the Illinois EPA elected to evaluate IGCC in the BACT analysis for the Prairie State facility while at the same time determining that it was not necessary to make the applicant evaluate using an alternative source of coal because that option would fundamentally redefine the applicant's proposal to construct an electric generating unit on the same site as a dedicated 30-year supply of coal. *In re Prairie State Generating Company*, PSD Appeal No. 05-05, slip op. at 35-36 (EAB Aug. 24, 2006).

Region 9 is not seeking to change EPA's longstanding policy that the BACT analysis should not be used to fundamentally redefine the proposed source and the Agency's interpretation that the Clean Air Act provides some discretion for a permitting authority to decline to evaluate such options in detail as part of the BACT review.

Rather, in the case of this permit application, Region 9 prefers at this point to reconsider its decision not to evaluate IGCC as a BACT option for this project.

Technology that enables the United States to use its appreciable reserves of coal in an environmentally sustainable manner is critical to achieving the goals of the PSD Program and maintaining compliance with the NAAQS by reducing conventional air pollutants. The thermal performance of IGCC technology (efficiency and heat rate) is better than subcritical and comparable to supercritical pulverized coal plants in commercial operation today. IGCC can also produce better environmental performance in other ways. For example, today's IGCC facilities are projected to emit half the criteria pollutant emissions (e.g., nitrogen oxides, sulfur dioxide, and particulate matter), use half as much water, and produce only 50 percent as much solid waste when compared to conventional coal electric generating units. However, use of IGCC technology generally requires higher capital investments than conventional subcritical and supercritical pulverized coal plants.[4]

Considering IGCC beyond step 1 of the top-down BACT analysis does not necessarily require selection of IGCC as BACT in any particular permit review or preclude elimination of the IGCC technology at steps 2-4 of the top-down process. However, based on the Administrator's clarification that permitting authorities have discretion in this area, Region 9 seeks to more thoroughly consider PSD in the BACT analysis for this new coal-fired electric generating unit so that IGCC can compete on a level playing field with other coal-fired power generation technologies, creating

[4] "Final Report, Environmental Footprints and Costs of Coal-Based Integrated Gasification Combined Cycle and Pulverized Coal Technologies," EPA-430/R-06/006, July 2006 at ES-2; Cost and Performance Baseline for Fossil Energy Plants Desk Reference, DOE/NETL-2007/1282, May 2007.

incentives for improving the environmental performance and reducing the overall cost of future coal-fired power generation technologies.

The EAB recently addressed the analysis that a permitting authority should complete in assessing whether an option would redefine the proposed source. *Prairie State Generating Company*, slip op at 35-36. As discussed in the *Prairie State* decision, "the permit issuer must discern which design elements are inherent to [the applicant's] purpose, articulated for reasons independent of air quality permitting, and which design elements may be changed to achieve pollutant emissions reductions without disrupting the applicant's basic business purpose for the proposed facility." *Id.* at 30. Although there are significant differences in the equipment design between IGCC and other coal-fired electric generating technologies, this factor alone need not be dispositive if the record shows that the IGCC process would not fundamentally change or disrupt the applicant's purpose for constructing the proposed source. Since the EAB rejected the view that an electric generating facility's purpose must be viewed as broadly as "the production of electricity, from coal," *id.* at 32, the fact that IGCC technology uses the same fuel (coal) to produce the same end product (electricity) is not necessarily dispositive either. The EAB has recognized that it is appropriate for a permitting authority to "distinguish between electric generating stations designed to function as 'base load' facilities and those designed to function as 'peaking' facilities, and that this distinction affects how the facility is designed and the pollutant emissions control equipment that can effectively be used by the facility." *Id.* (citing *In re Kendall New Century Dev.*, 11 E.A.D. 40, 50-52 & n. 14 (EAB 2003)). Furthermore, the EAB has reasoned that, "when evaluating a permit applicant's assertion that a design element is

fundamental, the permit issuer should consider whether the facts underlying the assertion are better considered within the framework of steps 2 through 5 of the top-down method, rather than grounds for excluding redesign at step 1." *Prairie State*, slip op. at 30 n. 23. For example, the EAB noted that "cost savings generally is not a sufficient purpose or objective that would justify treating a design element as basic or fundamental" because cost is a factor at Step 4 of the BACT analysis. *Id.* Likewise, the EAB said that "the business objective of avoiding risk associated with new, innovative or transferable control technologies is not treated as a basic design element, but instead is considered under step 2 of the top-down method." *Id.* Thus, permitting authorities should consider all such factors based on the record in each case when assessing whether the IGCC technology would fundamentally alter the purpose that the permit applicant seeks to achieve with its proposed source or the basic design of the facility. *See In re Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02, slip. op. at 26-28 (EAB Feb. 18, 2009) (finding inadequate record support for conclusion that an option would redefine the proposed source).

EPA Region 9 seeks a voluntary remand in this matter so that it may reconsider its decision to exclude IGCC from further analysis in the top-down BACT review for the Desert Rock project with these factors in mind.

4. Region 9 Requests the Opportunity to Reconsider its Decision to Issue the Final PSD Permit Based on its Additional Impacts Analysis.

Finally, the additional impacts analysis supporting the Final PSD Permit relied heavily on an analysis based on the EPA's 1980 document entitled "A Screening Procedure for the Impacts of Air Pollution Source on Plant, Soils, and Animals." AR 120 at 150. After further review of the EAB's analysis of this document in the *Indeck-*

Elwood matter, Region 9 has been persuaded that additional evaluation of site-specific conditions is warranted to strengthen compliance with section 52.21(o) of the applicable regulations.

As the EAB observed, the screening method that was issued in 1980 for assessing impacts to soils and vegetation ("Screening Procedure") has limitations. In particular, the analysis provided in the Screening Procedure may, in some cases, be incomplete and preliminary, and may not provide definitive results. The guidance can only be used to screen for potential effects caused by concentrations of the pollutants in the ambient air for only seven pollutants because, at the time the guidance was developed, there were only sufficient data for those seven pollutants (sulfur dioxide, ozone, nitrogen oxide, carbon monoxide, sulfuric acid, ethylene, and fluorine). Furthermore, the EAB observed that "the species sensitivity data in the 1980 Screening Procedure are [close to thirty years old] and primarily rely upon crop and tree species, not other native species." *Indeck-Elwood*, slip op. at 45.

In addition, the EAB discussed that the 1980 Screening Procedure is not the most recent guidance by the Agency with respect to the additional impacts analysis and appeared to adopt many of the principles reflected in the 1990 Draft NSR Workshop Manual. The NSR Workshop Manual states that with respect to the soils and vegetation analysis, such analysis "should be based on an inventory of the soils and vegetation types found in the impact area." *Indeck*, slip op. at 46. This "inventory" is a "list of the soils and vegetation types indigenous to the impact area." *Id.* The inventory "may be available from conservation groups, State agencies, and universities," and "should

include all vegetation with any commercial or recreational value." *Id.* The Board noted an example in the Manual that suggests the applicant should:

> determine the sensitivities of the plant species listed in the inventory to the applicable pollutants that would be emitted from the facility and compare this information to the estimates of pollutant concentrations calculated in the air quality modeling analysis (conducted pursuant to 40 C.F.R. § 52.21(m)) in order to determine whether there are any local plant species that may potentially be sensitive to the facility's projected emissions. For those plants that show potential sensitivity, a more careful examination would be conducted.

Id. Based on this, the EAB concluded that the NSR Workshop Manual contemplates the development of site-specific information that goes beyond the scope of the simple screening under the 1980 Screening Procedure.

The EAB stopped short of suggesting that the 1980 Screening Procedure no longer has viability on its own. The Board explained that its decision in *Indeck* "stands only for the proposition that reliance on the Screening Procedure may be insufficient in the face of site-specific concerns that plainly call the adequacy of that analysis into question." *Indeck*, slip op. at 46 n.66. Region 9 requests a voluntary remand so that it may consider site-specific concerns more carefully and ensure the permit complies with the additional impacts analysis requirements.

C. In the Alternative, Region 9 Requests that the Board Withdraw Its Grant of Review to Enable Region 9 to Withdraw the Final PSD Permit.

If the Board had not granted review of the Petitions prior to deciding the merits of the arguments on appeal, Region 9 would have authority to notify the Board and parties that it is withdrawing the Final PSD Permit to develop additional information consistent with the issues discussed above under 40 C.F.R. § 124.19(d). The apparent intent of that provision is to allow the permitting authority the opportunity to reconsider its permitting

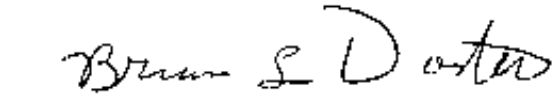
decision based on concerns identified by Petitioners. Since the Board has granted review and section 40 C.F.R. 124.19(d) is not expressly applicable, Region 9 has filed this motion to request leave from the Board to reconsider its permitting decision rather than seeking to withdraw the permit and notifying the parties. However, in the event that the Board does not agree with Region 9 that remand is the appropriate procedure under the circumstances, Region 9 requests, in the alternative, that the Board withdraw or amend its grant of review to enable Region 9 to withdraw the Final PSD Permit.

CONCLUSION

For the foregoing reasons, Region 9 respectfully requests this Board to grant this motion for voluntary remand of the Final PSD Permit and administrative record to Region 9 to request additional information and reconsider several issues associated with permitting the Desert Rock project. In the alternative, Region 9 requests the Board to withdraw or amend its January 22, 2009 Order to allow Region 9 to notify the Board and parties that Region 9 is withdrawing the Final PSD Permit and administrative record pursuant to 40 C.F.R. 124.19(d).

Dated: April 27, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Motion for a Voluntary Remand were served on the following persons by U.S. Mail:

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April 27, 2009

Joseph Lapka

Exhibit A

EPA Region 9's Motion for Voluntary Remand

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

APR 24 2009

Mr. Paul R. Cort
Earthjustice
426 17th Street, 5th Floor
Oakland, California 94612

Dear Mr. Cort:

The U.S. Environmental Protection Agency (EPA) has considered the petition you submitted on February 10, 2009, on behalf of the Sierra Club and the National Resources Defense Council asking the Agency to reconsider:

- specific provisions in the final EPA rule entitled Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), 73 Fed. Reg. 28321 (May 16, 2008); and
- the January 14, 2009 letter from then Administrator Stephen L. Johnson denying your July 15, 2008 petition for reconsideration of this rule.

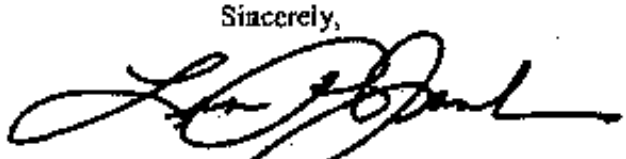
The specific provisions of the May 16, 2008 rule for which you have requested EPA reconsideration include (1) the transition schedule and interim requirements for the prevention of significant deterioration (PSD) programs in SIP-approved states; (2) the grandfathering provision concerning the continued use of the PM_{10} Surrogacy Policy in the federal PSD regulations at 40 CFR 52.21(i)(1)(xi); (3) the transition period for addressing condensable particulate matter emissions; and (4) the preferred interpollutant trading ratios under the nonattainment area NSR program.

Under the authority of section 307(d)(7)(B) of the Clean Air Act, EPA grants the February 10 petition for reconsideration in order to allow for public comment on each of the four issues raised in your petition. To respond to your February 10 petition, the Agency plans to publish a notice of proposed rulemaking in the Federal Register in the near future. As part of this notice, the Agency intends to propose to repeal the grandfathering provision on the grounds that it was adopted without prior public notice and is no longer substantially justified in light of the resolution of the technical issues with respect to $PM_{2.5}$ monitoring, emissions estimation, and air quality modeling that led to the PM_{10} Surrogacy Policy in 1997. At this time, the Agency has not determined any specific action to be proposed concerning the other three issues raised in your petition.

Further, under the authority granted by section 307(d)(7)(B) of the Clean Air Act, I hereby stay 40 CFR 52.21(i)(1)(xi) (the grandfathering provision under the federal PSD program) for three months pending reconsideration. A stay pending reconsideration is justified for the reasons discussed above, that this provision was adopted without prior public notice and is no longer substantially justified in light of the resolution of the technical issues with respect to $PM_{2.5}$ monitoring, emissions estimation, and air quality modeling that led to the PM_{10} Surrogacy Policy in 1997.

We appreciate your comments and interest in this important matter.

Sincerely,



Lisa P. Jackson

cc: David S. Baron, Earthjustice

Exhibit B

EPA Region 9's Motion for Voluntary Remand

United States Department of the Interior

FISH AND WILDLIFE SERVICE
New Mexico Ecological Services Field Office
2105 Osuna NE
Albuquerque, New Mexico 87113
Phone: (505) 346-2525 Fax: (505) 346-2542

February 26, 2009

Deborah Jordan, Director
Region 9 Air Division (Mailstop: AIR-1)
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105

Dear Ms. Jordan:

The U.S. Fish and Wildlife Service (Service) and the U.S. Bureau of Indian Affairs (BIA) have entered into consultation under the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.) on the proposed Desert Rock Energy Project on the Navajo Nation in San Juan County, New Mexico. Through our analysis we have determined that mercury may be adversely affecting the Colorado pikeminnow, as well as contributing to numerous fish consumption advisories on the Navajo Nation, Arizona, Colorado, Utah, and New Mexico. We invite the EPA to review the biological assessment and the environmental baseline and to provide any additional input relative to your expertise regarding the sources and deposition of mercury and its bioaccumulation in the critical habitat of endangered species, especially that of the Colorado pikeminnow, an endangered piscivorous fish of the Colorado River Basin. Moreover, atmospheric deposition of mercury with subsequent transfer is believed to be one of the most significant loading pathways to the mercury content of piscivorous fish. Therefore source-attribution information regarding atmospheric deposition and transport and fate models are needed to determine the relative importance of different sources of mercury and selenium in the San Juan River Basin and its potential effects to endangered species, especially Colorado pikeminnow and razorback sucker. We request the EPA provide any additional information on the processes governing mercury's behavior in the atmosphere including the emissions inventories and fate and transport of mercury in the San Juan River Basin and to endangered species and critical habitats in the action area.

If you have any questions, please contact me or David Campbell at 505/761-4745.

Sincerely,

Wally Murphy
Field Supervisor

cc:
Director, Navajo Nation Department of Fish and Wildlife, Navajo Nation, Window Rock, AZ
Director, Navajo Nation Environment Department, Window Rock, AZ
Director, New Mexico Department of Game and Fish, Santa Fe, New Mexico
NEPA Coordinator, Bureau of Indian Affairs, Navajo Regional Office, Gallup, NM (Attn: H. Yazzie)
Manager, Regulatory Division, U.S. Army Corps of Engineers, Albuquerque, NM
Field Manager, Farmington Field Office, Bureau of Land Management, Farmington, NM
Director, Air Division, Region 9, Environmental Protection Agency, Environmental Review Office, San Francisco, CA (Attn: G. Rios/J. Lapka)
Manager, Region IX, U.S. Environmental Protection Agency, Environmental Review Office, San Francisco, CA (Attn: K. Vitulano)
Regional Director, Region 2, U.S. Fish and Wildlife Service, Albuquerque, NM (Attn: ES/ARD)
Regional Director, Region 6, U.S. Fish and Wildlife Service, Lakewood, CO (Attn: ES/ARD)
Native American Liaison, Region 2, U.S. Fish and Wildlife Service, Albuquerque, NM (Attn: J. Early)
Native American Liaison, Regional Director, Region 6, U.S. Fish and Wildlife Service, Lakewood, CO (Attn: K. Greenwood)
Field Supervisor, U.S. Fish and Wildlife Service, Ecological Services Field Office, Grand Junction, CO
Field Supervisor, U.S. Fish and Wildlife Service, Ecological Services Field Office, Salt Lake City, UT
Field Supervisor, U.S. Fish and Wildlife Service, Ecological Services Field Office, Phoenix, AZ