

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

**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)	
)	
)	

[Decided September 24, 2009]

REMAND ORDER

*Before Environmental Appeals Judges Kathie A. Stein,
Charles J. Sheehan, and Anna L. Wolgast.*

IN RE DESERT ROCK ENERGY COMPANY, LLC

PSD Appeal Nos. 08-03, 08-04, 08-05 & 08-06

REMAND ORDER

Decided September 24, 2009

Syllabus

On July 31, 2008, United States EPA Region 9 (“Region”) issued a final prevention of significant deterioration (“PSD”) permit (“Permit”) to Desert Rock Energy Company, LLC (“Desert Rock”) pursuant to section 165 of the Clean Air Act (“CAA”), 42 U.S.C. § 7475. The Permit authorizes Desert Rock to construct a new 1,500-megawatt coal-fired electric generating facility approximately twenty-five miles southwest of Farmington, New Mexico.

In the fall of 2008, four different parties filed timely petitions for review of the Permit with the Environmental Appeals Board (“Board”). On April 27, 2009, the Region filed a motion for voluntary remand with the Board, requesting that the Board remand the entire Permit back to it so that it can reconsider its action on several issues that Petitioners raised. Three participants, including Desert Rock, oppose the motion.

Held: The Board remands the Permit on two independent grounds. The Board first concludes that it is appropriate to grant the Region’s motion for voluntary remand. The Board also concludes that, based on the administrative record, the entire Permit should be remanded to the Region at this time with respect to one overarching issue related to the Region’s best available control technology (“BACT”) analysis.

(1) *Board’s Determination Concerning the Region’s Motion for Voluntary Remand.* The Board concludes that it is appropriate to grant the Region’s motion for voluntary remand for several reasons. The Board first concludes that the Region’s motion is not prohibited by the part 124 regulations because the regulations neither constrain a region from requesting a voluntary remand after the Board grants review nor proscribe the Board from granting a voluntary remand at any time. Moreover, a contrary result would unnecessarily hamper the Board in its adjudication of permit appeals. The Board further concludes that, under the facts and circumstances of this case, granting the Region’s motion for voluntary remand at this time is warranted. The Region has shown good cause for its motion and granting the motion would best serve the interests of administrative and judicial efficiency. The Region asserts that some, if not all, issues it wishes to reconsider may result in changes to the Permit’s conditions, including conditions that prompted the Board to grant review of the permit. Additionally, this Permit review is already bifurcated because of a prior stay of the carbon dioxide issue. Furthermore, because the Board has substantial concerns with the Region’s approach to its Endangered Species Act

compliance in this matter and because this is one of the issues the Region intends to revisit, the Board finds that voluntary remand is particularly appropriate in this case. Finally, as explained in (2) below, one of the issues the Region wishes to reconsider is an issue on which the Board concludes, on independent grounds, that remand of the entire permit is appropriate.

The Board rejects Desert Rock's, Diné Power Authority's, and American Coalition for Clean Coal Electricity's arguments against remand, which include claims that the motion is made in bad faith, or at a minimum, is frivolous, claims that the motion violates CAA section 165(c), 42 U.S.C. § 7475(c), claims that the Region has violated its trust responsibilities, claims that the Region is denying Desert Rock equal protection, and claims that granting the motion would violate due process principles.

(2) *Board's Determination Concerning the Region's IGCC Analysis.* The Board concludes, based upon a review of the administrative record, that the Permit should be remanded in its entirety because the Region abused its discretion in declining to consider integrated gasification combined cycle ("IGCC") as a potential control technology in step 1 of its BACT analysis for the facility. Although the Region has broad discretion in determining whether imposition of a control technology would "redefine the source," the Board concludes that, based on the administrative record for this case, the Region's analysis is inadequate for two reasons. First, the Region did not provide a rational explanation of why IGCC would redefine the source, especially when the applicant itself had indicated in its initial application that IGCC was a technology that could be considered for the facility (i.e., could satisfy its business purpose), thereby suggesting that IGCC would not redefine the source. Second, the Region failed to adequately explain its conclusion in light of previously issued federal permits at similar facilities in which IGCC had been considered as a BACT step 1 production process and had not been considered a "redefinition of the source." The Board concludes that remand of the Permit in its entirety on this ground is warranted because reconsideration of the issue could have overarching impacts on the rest of the Region's analysis.

***Before Environmental Appeals Judges Kathie A. Stein,
Charles J. Sheehan, and Anna L. Wolgast.***

Opinion of the Board by Judge Stein:

On April 27, 2009, Region 9 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") filed a motion for voluntary remand of the final prevention of significant deterioration ("PSD") permit that is the subject of the above-captioned petition for review. *See generally* EPA Region 9's Motion for Voluntary Remand

(“Mot. for Vol. Remand”). Several participants in this matter, including the permittee, oppose the motion, while several others support it. For the reasons articulated in Part III.A of this Order, the Environmental Appeals Board (“Board” or “EAB”) concludes that it is appropriate to grant the Region’s motion for voluntary remand. In addition, as described in Part III.B, the Board concludes, on independent grounds, that the entire Permit should be remanded to the Region at this time with respect to one overarching issue related to the Region’s best available control technology (“BACT”) analysis. Accordingly, the Board remands the entire Permit to the Region.

I. CASE HISTORY

On July 31, 2008, pursuant to section 165 of the Clean Air Act (“CAA”), 42 U.S.C. § 7475, the Region issued a final PSD permit to Desert Rock Energy Company, LLC (“Desert Rock”)¹ for the construction of Desert Rock Energy Facility (“Facility”), a new 1,500-megawatt coal-fired electric generating facility proposed to be located approximately twenty-five miles southwest of Farmington, New Mexico. *See* Administrative Record (“A.R.”) 122, at 1 (U.S. EPA, Region 9, Prevention of Significant Deterioration Permit, Number AZP 04-01 (July 31, 2008)) [hereinafter Permit]. The Region serves as the permitting authority because the proposed facility will be located within the Navajo Indian Reservation, and the Navajo Nation lacks an EPA-approved tribal PSD permitting program.

In the fall of 2008, four different parties filed timely petitions for review of Desert Rock’s Permit under 40 C.F.R. § 124.19(a). Specifically, the Board received petitions from Diné Care,

¹ STEAG Power, LLC (“Steag”) submitted the original PSD application proposing the Desert Rock Energy Facility. A.R. 120, at 2 (EPA Responses to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Desert Rock Energy Facility (July 31, 2008)). In September of 2004, Steag sold the rights to the project to Post Oak Power, LLC, a subsidiary of Sithe Global Power, LLC (“Sithe”). *Id.* Several years later, in 2007, Post Oak Power assigned the permit application and all other rights to the project to the current permittee, Desert Rock, another subsidiary of Sithe. *Id.*; *see also* Permit at 1.

Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (“NGO Petitioners”); the State of New Mexico (“New Mexico”); Center for Biological Diversity (“CBD”); and Ms. Leslie Glustrom. Together, the four petitions raise a significant number and a wide variety of issues.

During the course of this permit appeal, the Board granted several motions to participate and, pursuant to 40 C.F.R. § 124.19(c), provided a period in which any interested party could file an amicus curiae brief. *See* Order Granting Review, Staying the Carbon Dioxide BACT Issue, and Granting Motions to File Amicus/Nonparty Briefs and Motions to File Reply Briefs (“Order Granting Review”) at 7-8 (Jan. 22, 2009). Consequently, besides the four Petitioners and the Region, the following seven participants have also filed various response, amicus curiae, and/or nonparty briefs in this case: the Navajo Nation, Desert Rock (the permittee), the National Parks Conservation Association, the Diné Power Authority (“DPA”), the New Mexico Building and Construction Trades Council, Physicians for Social Responsibility, and the American Coalition for Clean Coal Electricity (“ACCCE”).²

On January 22, 2009, the Board granted review of the Permit pursuant to 40 C.F.R. § 124.19(c). In the Order Granting Review, the Board stayed one of the issues raised by two Petitioners – the question of whether or not to impose limitations on emissions of carbon dioxide. Order Granting Review at 4-5. Because the Region had withdrawn the portion of its permit decision related to carbon dioxide emissions, the Board stayed this issue pending the Region’s final determination on it. *Id.* The Board also established a schedule for the filing of briefs on appeal, including the filing of surreply briefs by the Region, Desert Rock, and DPA. *See id.* at 7.

On April 27, 2009, the Region filed a motion for voluntary remand with the Board in lieu of filing its surreply brief. In its motion,

² ACCCE filed its request to participate in response to the Region’s motion for voluntary remand.

the Region requests the Board grant it a voluntary remand, or alternatively, the Board withdraw or amend the Order Granting Review to enable the Region to unilaterally withdraw the Permit. *See* Mot. for Vol. Remand at 25-26. Desert Rock, DPA, and ACCCE filed oppositions to the Region's request. *See* Desert Rock's Response to EPA Region 9's Motion for Voluntary Remand ("DR Opp'n Br."); DPA's Opposition to EPA Region 9's Motion for Voluntary Remand ("DPA Opp'n Br."); ACCCE's Brief in Opposition to EPA Region 9's Motion for Voluntary Remand ("ACCCE Opp'n Br."). NGO Petitioners and CBD (collectively "Conservation Petitioners") filed a joint brief in support of the voluntary remand motion. *See* Conservation Petitioners' Response in Support of EPA's Motion for Voluntary Remand ("Cons. Pet'rs Resp."). In addition, the Region, New Mexico, and Conservation Petitioners filed reply briefs responding to the arguments Desert Rock, DPA, and ACCCE raised in their opposition briefs. *See* EPA Region 9's Reply to Oppositions to Motion for Voluntary Remand ("Reg. Reply") at 15; State of New Mexico's Reply in Support of EPA's Motion for Voluntary Remand ("NM Reply") at 3; Conservation Petitioners' Reply to Desert Rock and ACCCE Regarding the EPA's Motion for Voluntary Remand ("Cons. Pet'rs Reply"). Briefing on the remand motion concluded on June 29, 2009.³

II. ISSUES

The first issue the Board must decide is whether it is appropriate to grant the Region's motion for voluntary remand. To do so, the Board looks at whether the Region has set forth good cause for granting its request.

³ Subsequent to the final briefing, ACCCE requested the Board to take notice of a recent Georgia decision. *See* ACCCE's Motion to Take Notice of Supplemental Authority at 1 & Ex.1 (attaching copy of *Longleaf Energy Assocs. v. Friends of the Chattahoochee, Inc.*, Nos. A09A0387 & A09A0388, 2009 WL 1929192 (Ga. Ct. App. July 7, 2009)). Conservation Petitioners responded to this motion with a brief of their own. *See* Conservation Petitioners' Response to ACCCE's Motion Regarding Supplemental Authority. The Board takes administrative notice of the decision.

In addition, the Board considers a second issue: whether it should remand the Permit on the ground that the Region should have considered integrated gasification combined cycle (“IGCC”) as a potential control technology in step 1 of its BACT analysis. More specifically, the Board examines whether, based on the administrative record, the Region abused its discretion in concluding that IGCC “redefines the source” and thus need not be included in BACT step 1.

III. ANALYSIS

A. *The Board’s Consideration of the Region’s Motion for Voluntary Remand*

As noted, the first issue before the Board is whether it is appropriate to grant the Region’s motion for voluntary remand. The Board first describes the Region’s rationale for its request. The Board then considers Desert Rock’s, DPA’s, and ACCCE’s arguments that the part 124 regulations prohibit the Region from filing and the Board from granting a motion for voluntary remand at this stage of the permit appeal. Finally, after concluding that the regulations do authorize the Region to file and the Board to entertain such a motion during this stage of the permit proceedings, the Board considers the merits of the Region’s motion.

1. *The Region’s Rationale for Voluntary Remand*

In its motion, the Region requests that the Board remand the entire Permit back to it so that it can reconsider its action on several issues that Petitioners raised.⁴ Mot. for Vol. Remand at 1. More

⁴ As noted above, *see supra* Part I, the Region requests, in the alternative, that the Board withdraw or amend the Order Granting Review to enable the Region to withdraw the Permit. Mot. for Vol. Remand at 25-26. The Region explains that part 124 authorizes unilateral withdrawal of a PSD permit prior to the Board’s issuance of an order granting review. *Id.* at 25 (citing 40 C.F.R. § 124.19(c)). Thus, according to the Region, if the Board withdraws its Order Granting Review, the Region would then be able to unilaterally withdraw the permit. Because the Board is remanding the Permit, neither the
(continued...)

specifically, the Region states that it seeks a remand because “the Administrator’s office has requested that Region 9 reconsider its permitting decision with respect to” five issues: (1) using PM_{10} (particulate matter with a diameter of 10 micrometers or less) as a surrogate to satisfy PSD requirements for $PM_{2.5}$ (particulate matter with a diameter of 2.5 micrometers or less); (2) issuing its final permit decision before completing consultation under section 7(a)(2) of the Endangered Species Act (“ESA”); (3) issuing its final permit decision before completing the case-by-case maximum achievable control technology (“MACT”) analysis for hazardous air pollutants under CAA section 112(g); (4) failing to consider IGCC technology in step 1 of its analysis of BACT; and (5) heavily relying on a 1980 screening document in performing its additional impacts analysis for the Facility. *Id.* at 5, 23. The Region requests a remand of the entire Permit and associated administrative record for reconsideration, arguing that a complete, rather than partial, remand of the Permit “will promote efficiency in the Agency’s decision-making and potentially enable Region 9 to resolve several disputed issues.” *Id.* at 1.

The Region first explains that the Administrator recently issued a stay of the regulation addressing the $PM_{2.5}$ PSD requirements that Region 9 applied in this action.⁵ *Id.* at 3; *see also id.* Ex. A (Letter from Lisa P. Jackson, Administrator, U.S. EPA, to Paul R. Cort, Earthjustice (Apr. 24, 2009)). The Administrator also has stated that the Agency

⁴(...continued)

Region’s alternative request nor Desert Rock’s arguments about this alternate process are addressed. *See* DR Opp’n Br. at 12-13.

⁵ The $PM_{2.5}$ regulation in question is found at 40 C.F.R. § 52.21(i)(1)(xi) (2008). *See* Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), 73 Fed. Reg. 28,321 (May 16, 2008). The Agency’s administrative stay of the grandfathering provision was published and became effective on June 1, 2009. *See* Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), 74 Fed. Reg. 26,098, 26,098 (June 1, 2009). The Agency recently published a final rule staying the grandfathering provision for nine months. *See* Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$); Final Rule to Stay the Grandfathering Provision for $PM_{2.5}$, 74 Fed. Reg. 48,153 (Sept. 22, 2009).

intends to propose repealing the grandfather provision in the rule, which allows PM₁₀ to be used as a surrogate to comply with the PM_{2.5} PSD requirements for certain permit applications that were pending when EPA issued the rule. Mot. for Vol. Remand at 4; *see also id.* Ex. A (mentioning plans to repeal the PM_{2.5} grandfather provision). The Region argues that, because it based its final permit decision for PM_{2.5} on this 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}.”⁶ Mot. for Vol. Remand at 9; *see also id.* at 4; A.R. 120, at 77 (EPA Responses to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Desert Rock Energy Facility (July 31, 2008)) [hereinafter RTC] (relying on 40 C.F.R. § 52.21(i)(1)(xi)).

The Region next explains its concerns about the ESA and MACT issues, which it argues are interconnected. First, the Region states that it issued the Permit “before the Agency had completed the consultation required under Section 7(a)(2) of the ESA.” Mot. for Vol. Remand at 9. To address this deficiency, the Region included a permit condition prohibiting construction at the Facility until the Region notifies the permittee that EPA has completed its consultation obligations under the ESA.⁷ *Id.*; *see also* Permit at 2 (Condition II.A). According to the Region, after issuance of its permit decision in July 2008, the federal agencies involved in permitting the Desert Rock project sent a Biological Assessment (“BA”) to the United States Fish and Wildlife Service (“FWS”) as part of the ongoing consultation process under ESA section 7(a)(2) regarding the Desert Rock project.⁸ Mot. for Vol.

⁶ Significantly, two of the Petitioners challenged the Region’s PM_{2.5} analysis. *See* NGO Petitioners’ Supplemental Brief at 201-15; NM Petition for Review and Supplemental Brief at 56-64.

⁷ Three of the Petitioners challenged this condition. *See* NGO Pet’rs Suppl. Br. at 280-87; NM Suppl. Br. at 7-18; CBD Petition at 5-32.

⁸ The BA was “prepared on behalf of the Bureau of Indian Affairs (‘BIA’).” Mot. for Vol. Remand at 10. BIA acts as the lead agency in the consultation process with
(continued...)

Remand at 10. Recently, on February 26, 2009, presumably in response to the BA, FWS informed the Region 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.” *Id.* at 10; *see also id.* Ex. B (Letter from Wally Murphy, FWS New Mexico Ecological Services Field Office, to Deborah Jordan, EPA Region 9 Air Division Director (Feb. 26, 2009)). The Region states that “[m]ercury emissions therefore appear to be a significant concern to FWS in the context of the Desert Rock project ESA consultation.” Mot. for Vol. Remand at 10. The Region asserts that the recent FWS concerns “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” to address ESA concerns. *Id.*

Moreover, the Region explains that it plans to provide additional details about the mercury emissions to FWS, but that this additional information will be sent only after it receives an application from Desert Rock for a case-by-case MACT determination.⁹ *Id.* at 10-11. The Region believes that these associated ESA and MACT issues “are of sufficient importance to reconsider [its] decision to conduct the PSD permit review, ESA consultation, and section 112(g) review on separate timetables.” *Id.* at 11. Finally, the Region explains that “after further reviewing the EAB’s *Indeck-Elwood* opinion and a more recent EAB Order in another matter, [it] 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

⁸(...continued)

FWS for the Desert Rock project. RTC at 169.

⁹ Although Desert Rock previously provided estimates of the mercury emissions, it did not submit a detailed analysis with the PSD application. *See* Mot. for Vol. Remand at 9-10. The applicant typically calculates such estimates in connection with the MACT application, which, in this case, the Region had not required prior to issuance of the PSD permit. *See id.* at 9-10, 12, 14. Two Petitioners challenged the Region’s decision not to require the case-by-case MACT analysis in conjunction with the PSD permit. NGO Pet’rs Suppl. Br. at 125-52; NM Suppl. Br. at 35-41.

consultation covering the permit.” *Id.* at 11. For these reasons, the Region requests that the Board remand the permit so it can “coordinate the completion of these processes.” *Id.*

The Region also requests remand to reconsider the scope of its BACT analysis for the Facility. *Id.* at 18. More particularly, the Region seeks to reconsider its decision to issue the Permit without considering IGCC technology in the BACT analysis it performed.¹⁰ *Id.*; *see also* RTC at 13-20 (explaining why IGCC was not considered). The Region states that the Administrator “does not support a policy that would preclude permitting authorities from exercising their discretion to evaluate this option.” Mot. for Vol. Remand at 18. Thus, the Region “prefers to reconsider the scope of its BACT analysis” for Desert Rock “rather than continue to contest this issue on appeal.” *Id.*

Lastly, the Region requests that the Board remand the Permit in order to give the Region an opportunity to reconsider its additional impacts analysis. *Id.* at 23-25. The Region explains that, in performing the analysis, it heavily relied on a 1980 Agency document entitled “A Screening Procedure for the Impacts of Air Pollution Sources on Plants, Soils, and Animals.” *Id.* at 23; *see also* RTC at 150 (discussing additional impacts analysis). The Region states that, “after further review of the EAB’s analysis of this document in the *Indeck-Elwood* matter, [it] has been persuaded that additional evaluation of site-specific conditions is warranted to strengthen compliance with section 52.21(o) of the applicable regulations.” Mot. for Vol. Remand at 23-24.

2. Part 124 Does Not Prohibit a Voluntary Remand

Several participants contend that EPA’s part 124 regulations prohibit permit issuers from requesting and/or the Board from granting motions for voluntary remand after the Board grants review, an argument the Region and Petitioners emphatically reject. *Compare* DR Opp’n Br.

¹⁰ At the time it issued the Permit, the Region concluded that IGCC would “redefine the source” and thus did not include it as a potentially available control technology in step 1 of the BACT analysis. *See* RTC at 13.

at 9-11 (“The Board cannot grant EPA Region 9 permission to do what 40 C.F.R. Part 124 prohibits.”), DPA Opp’n Br. at 1, 7-8,¹¹ and ACCCE Opp’n Br. at 4 (“EPA is prohibited by regulation from withdrawing the permit the agency previously issued.”) with Reg. Reply at 15 (“This regulation does not expressly permit or exclude the relief requested by [the Region] – leave of the EAB to reconsider disputed issues after the EAB has granted review.”), NM Reply at 3 (“A region’s inability to *unilaterally* withdraw the permit after review has been granted does not translate * * * into a bar on a region’s ability to seek or the Board’s ability to grant leave to withdraw the permit.”), and Cons. Pet’rs Resp. at 5-8.

The participants’ dispute centers on section 124.19, which prescribes the procedures for PSD permit appeals. Notably, section 124.19 contains only a sole reference to withdrawals, voluntary remands, and/or reconsiderations of a permit decision by a region after a petition has been filed. It states:

The Regional Administrator, at any time prior to the rendering of a [Board] decision * * * to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn.

40 C.F.R. § 124.19(d).

As the participants acknowledge, this provision explicitly allows the Region to *unilaterally* withdraw a permit decision (or portion thereof) *prior* to the Board’s grant of review. *See, e.g., In re San Jacinto River Auth.*, NPDES Appeal No. 07-19, at 3 (EAB Mar. 28, 2008) (Order Dismissing Petition for Review) (explaining, in an unpublished final

¹¹ DPA states that “it joins in the arguments set forth in the briefing herein by its co-developer, Desert Rock.” DPA Opp’n Br. at 1. Accordingly, where DPA does not specifically address an issue, the Board will assume without further citation that all arguments made by Desert Rock are also made by DPA.

order, that region need only notify Board and other parties prior to withdrawing all or a portion of the permit); *In re Wash. Aqueduct Water Treatment Plant*, NPDES Appeal No. 03-07, at 2 (EAB Dec. 15, 2003) (Order Dismissing Petition for Review) (explaining, in an unpublished final order, that motion for remand of permit conditions was unnecessary where region had withdrawn those portions of permit). The regulations, however, do not address a region's authority to request withdrawal, voluntary remand, and/or reconsideration *after* the Board issues an order granting review of the permit but *before* the Board issues a final decision.¹² See 40 C.F.R. pt. 124; see also EAB Practice Manual at 38 (June 2004), available at <http://www.epa.gov/eab/pmanual.pdf> ("There are no regulatory requirements for motions filed in permit proceedings under part 124 (except for the requirements in section 124.19(g) governing motions for reconsideration)."). Moreover, section 124.19(d) only addresses a region's authority to take action, not the Board's.

The participants interpret this part 124 regulatory silence differently. The Region, New Mexico, and Conservation Petitioners read the regulation to implicitly allow permit issuers to file a motion requesting voluntary remand after the Board has granted review, which the Board, in its discretion, may grant.¹³ Mot. for Vol. Remand at 6-8, 25; Cons. Pet'rs Resp. at 5; NM Reply at 3. Desert Rock, DPA, and ACCCE, on the other hand, read the regulatory text in starker terms: not only to prohibit the unilateral withdrawal of the permit by the region after a grant of review, but to prohibit any type of withdrawal, voluntary remand, or reconsideration, unilateral or otherwise by the Region. DR Opp'n Br. at 7-8, 9-11; ACCCE Opp'n Br. at 4-5. Thus, Desert Rock, ACCCE, and DPA all essentially contend that the Board's hands are tied, and it has no discretion to remand the Permit to the Region following a

¹² The Board addresses this issue solely in the context of a *grant* of review because, when the Board *denies* review of a permit, the permit decision becomes the final agency action. See 40 C.F.R. § 124.19(f)(1).

¹³ See, e.g., Cons. Pet'rs Resp. at 5 ("Until the Board has made a final determination on a permit appeal, it has broad discretion within the administrative review process to remand permits, allow the Region to withdraw all or part of a permit, or to refer permit appeals to the Administrator.").

grant of review, short of rendering a decision on the merits. DR Opp'n Br. at 7; ACCCE Opp'n Br. at 4-5.

The Board disagrees with the interpretations advanced by Desert Rock, DPA, and ACCCE, which, if adopted, would unnecessarily hamper the Board in its adjudication of permit appeals. A limit on the Region's unilateral authority does not translate into a bar on the Board's exercise of discretion. More fundamentally, the regulations do not in any way prohibit the Board from granting a voluntary remand at any time. The Board reaches this conclusion based both on the regulatory text as well as several additional considerations.

First, the Board has broad discretion to grant a voluntary remand, and nothing in section 124.19(d) narrows its discretion. As the Board has previously explained, "[a] voluntary remand is generally available where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit." *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, at 6 (EAB May 20, 2004) (Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioners' Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review) [hereinafter *Indeck-Elwood* 2004 Stay Order]. Indeed, the Board, "at it[s] discretion, has granted voluntary remands independent of Section 124.19(d)" on several occasions. *Id.* at 5 (citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 563 n.14 (EAB 1998); *In re GMC Delco Remy*, 7 E.A.D. 136, 138, 169, 170 (EAB 1997)); *see also In re City of Hollywood*, 5 E.A.D. 157, 170, 176-77 (EAB 1994) (granting region's remand request on two issues); *cf. In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11, 1990 WL 324099 (Adm'r July 3, 1990) (Order on Motion for Stay) (granting permit issuer's motion for a stay following issuance of an order granting review).¹⁴ Part 124 does not contain any language proscribing

¹⁴ Desert Rock argues that *NE Hub*, *GMC*, and *Indeck* are not on point because, in those cases, "the permitting authority's withdrawal of the permit appears to have come before the Board rendered a decision granting or denying review, which is entirely (continued...)

the Board's general authority to grant voluntary remands, nor does section 124.19(d) limit the Board's discretion to consider a remand motion. Therefore, the mere fact that the permit issuer files a voluntary remand motion after the Board has issued an order granting review does not determine whether the motion can be granted.¹⁵

¹⁴(...continued)

consistent with section 124.19(d) and not at all the case here.” DR Opp'n Br. at 10 n.3. The Board disagrees that these cases are irrelevant to the remand issue. Desert Rock's description of the three cases overlooks the critical facts. In *NE Hub*, while the remand occurred prior to the order denying review, the significant fact is that the permit issuer requested a voluntary remand, which the Board, in its discretion, granted. See 7 E.A.D. at 563-64 (describing case background); see also *In re NE Hub Partners, L.P.*, UIC Appeal Nos. 97-1 & 97-2, at 1-3 (EAB May 30, 1997) (Remand Order) (considering remand request) [hereinafter *NE Hub Remand Order*]. At that time, section 124.19(d) did not contain the language authorizing unilateral withdrawals, see discussion in text *infra*, nor did the regulations mention voluntary remands. See 40 C.F.R. § 124.19(d) (1997). The Board in no way suggested that a voluntary remand request was impermissible under the regulations because the regulations did not explicitly authorize such a request. Similarly, in *GMC*, the permit issuer requested a voluntary remand on one issue, which the Board granted. 7 E.A.D. at 169-70. Again, the Board did not in any way indicate that such a motion was impermissible even though the regulations did not explicitly authorize such a motion. Furthermore, the Board granted the voluntary remand request simultaneously with its grant of review, not before it, as Desert Rock suggests. *Id.* Finally, the fact that the participants in *Indeck* submitted their remand motions prior to the Board's order granting review is unimportant. The key points in that case are that the Board (1) specifically found that a voluntary remand “independent of Section 124.19(d)” was permissible and (2) considered the participants' remand motions, ultimately denying them *on their merits*. See *Indeck-Elwood 2004 Stay Order* at 5. Thus, just as the Board explains in the above text, the Board's order in *Indeck* indicates that the timing of a voluntary remand request is irrelevant to the Board's authority to entertain such a motion.

¹⁵ Desert Rock argues that granting the Region's motion would essentially give the Board the authority to modify *any* of the procedures and requirements in part 124. DR Opp'n Br. at 11. Desert Rock's argument is flawed because the Board is not *modifying* any part 124 procedures or requirements here. The Board is merely interpreting section 124.19's silence on this issue in a manner consistent with the terms of part 124 and its purpose. See, e.g., *In re Heritage Env't'l Servs., Inc.*, RCRA Appeal No. 93-8, 1994 WL 544238 (EAB Aug. 3, 1994) (Order Dismissing Appeal) (summarizing, where regulation was silent on issue, case law interpreting the part 124 “filed by” date as meaning the date petition is received by Board rather than date it is postmarked by petitioner); see generally EAB Practice Manual at 26-42 (providing more (continued...))

Second, the history of the section 124.19(d) language is consistent with the Board's reading of the permit regulations. This history suggests that the 2000 amendment to section 124.19 – which added the regulatory text at issue in this case – was solely intended to give regions unilateral authority to withdraw permits. In the preamble to the proposed rule, the Agency explained that: “In practice, EPA has withdrawn and reissued permits under all statutes prior to decisions of the EAB as well as prior to ALJ decisions.”¹⁶ Amendments to Streamline the NPDES Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,281 (Dec. 11, 1996) (proposed rule). The Agency therefore proposed to add the new regulatory text to “clarify” that regions “may withdraw and reissue any NPDES, RCRA, UIC, and PSD permit (or a contested condition thereof) prior to a decision of the EAB to grant or deny review.” *Id.* The preamble in no way suggests that this additional regulatory text was intended to limit or change the Board's customary practice of allowing permit issuers to file motions either for remands or for stays of the proceedings. *E.g., In re NE Hub Partners, L.P.*, UIC Appeal Nos. 97-1 & 97-2, at 3 (EAB May 30, 1997) (Remand Order)

¹⁵(...continued)

detailed guidance for filing permit appeals than section 124.19 provides). As noted above, the Board has granted motions for voluntary remand in other cases, even though part 124 does not specifically address whether permit issuers may move for a voluntary remand or whether the Board may grant them. *See, e.g., NE Hub Remand Order* at 3; *GMC*, 7 E.A.D. at 136. Ironically, under Desert Rock's narrow reading of the regulations, the Board would be unable to review Desert Rock's opposition brief because the regulations do not explicitly allow opposition briefs to be filed. The Board does not believe Desert Rock's view of the regulations to be a fair reading or interpretation of section 124.19.

¹⁶ The Agency added the language allowing unilateral withdrawal of permits by regions to section 124.19(d) in a final rule issued on May 15, 2000. *See* Amendments to Streamline the NPDES Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,911 (May 15, 2000). That rulemaking combined the National Pollutant Discharge Elimination System (“NPDES”) permit procedural regulations with the procedural regulations under other environmental permit programs administered by EPA, including the PSD program. Because the Agency did not receive comments on the proposed regulatory text, the Agency finalized the language with no further explanation of the provision. *See id.* at 30,901. Thus, the proposed rule preamble discussion provides the Agency's only explanation for the regulation.

(1997 order granting region's motion for voluntary remand); *GMC*, 7 E.A.D. at 170 & n.71 (1997 order granting voluntary remand); *cf. Columbia Gulf*, 1990 WL 324099 (1990 order granting motion requesting stay so that permit issuer could reexamine its analysis and/or supplement the record).¹⁷

Third, as the Board has often stated, Agency policy favors allowing the Region to make permit condition decisions rather than the Board. *E.g., In re Dominion Energy Brayton Point, LLC*, NPDES Appeal No. 07-01, slip op. at 9 (EAB Sept. 27, 2007), 13 E.A.D. at ___, *appeal rendered moot by settlement*, No. 07-2059 (4th Cir. Dec. 17, 2007); *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 472 (EAB 2004); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). The preamble to the part 124 regulations articulates this principle, stating that "most permit conditions should be finally determined at the Regional level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re BP Cherry Point*, 12 E.A.D. 209, 217 (EAB 2005); *In re Cardinal FG Co.*, 12 E.A.D. 153, 160 (EAB 2005). This is one of the reasons the Board often remands a permit to the permit issuer rather than making a decision on the merits when the Board finds error in the permit decision. *See, e.g., Teck Cominco*, 11 E.A.D. at 496 (remanding a second issue to the permit issuer rather than reaching its merits where the Board had already decided to remand the permit on other grounds); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 140-41, 175 (EAB 1999) (remanding one issue to allow permit issuer to further develop its rationale and a second issue to place rationale in administrative record); *City of Hollywood*, 5 E.A.D. at 166-68 (remanding several additional issues for further consideration by the permit issuer in light of remand on another issue); *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 508-09 (EAB 2006) (explaining that Board typically either sustains a permit decision or remands it to the permit issuer).

¹⁷ ACCCE claims that allowing remand would establish "new grounds" for permit issuers to reconsider permits and thus "harm" ACCCE's members. ACCCE Opp'n Br. at 14. As the Board has already concluded, granting the Region's request would not break new ground. Thus, ACCCE's claim of harm is unpersuasive.

Granting a permit issuer's request for a voluntary remand so it may amend its permit decision is clearly consistent with this policy. Moreover, allowing for remand requests makes sense in light of the purpose of the administrative appeals process, which is to ensure that the agency fully considers the relevant issues and makes a sound, reasoned final decision.

Finally, requiring a permit issuer to request a voluntary remand from the Board after the Board has granted review but before it issues a final decision makes sense from a judicial and administrative efficiency standpoint. It allows the Board to decide whether, after the Board has granted review and performed a substantial review of the case, it would be more appropriate for the Board to issue a final decision on the merits or grant the voluntary remand request. Thus, for example, in cases where significant time has passed following the submission of final briefs by all the parties, the Board may be in a position to issue a final decision at the time of a request for voluntary remand. *See Indeck-Elwood* 2004 Stay Order at 9 & n.16 (noting that a stay – rather than a remand – was appropriate where the Board had already “made considerable headway in its examination of the record”). On the other hand, where the request is made by the permit issuer shortly after the grant of review, the Board may determine it more appropriate to grant the motion for voluntary remand.

From a procedural standpoint, requiring the Region to seek permission from the Board for a voluntary remand in cases where the Board has already granted review is similar to the practice in federal courts. If a federal agency seeks to reconsider an action that has been appealed to a federal court, the agency cannot unilaterally withdraw its decision but must instead move the court to either remand the matter or stay the case pending the agency's reconsideration. *E.g., B.J. Alan Co. v. ICC*, 897 F.2d 561, 563 n.1 (D.C. Cir. 1990); *Anchor Line Ltd. v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir.), *cert. denied*, 370 U.S. 922 (1962); *see also SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029-30 (Fed. Cir. 2001) (listing three scenarios in which an agency may want to reconsider its decision and thus seek remand). The federal courts have recognized the wisdom of granting remand motions because it allows an

agency to correct its mistakes, thereby promoting good government and judicial efficiency. *See, e.g., Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) (allowing agency to reconsider and reissue relevant NEPA documents would conserve resources of the judiciary and the parties); *SKF*, 254 F.3d at 1029-30 (noting that, where an agency requests voluntary remand in connection with a change in agency policy or interpretation, while the “court need not necessarily grant such a remand request, remand may conserve judicial resources”); *B.J. Alan*, 897 F.2d at 563 n.1 (explaining that the D.C. Circuit has “recognized that ‘[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to federal courts’” (quoting *Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978))). Similarly, it would be highly inefficient for the Board to issue a final ruling on a permit when the Agency is contemplating changes to that permit. *See Indeck-Elwood 2004 Stay Order* at 8; *see also In re Multitrade Ltd. P’ship*, 3 E.A.D. 773, 777 (Adm’r 1992) (remanding matter to permit issuer rather than reviewing petitions because it was the “more responsible (and hopefully expeditious) course” where permittee planned to request permit amendments).

In sum, the Board concludes that the part 124 regulations do not prohibit the Region from requesting a voluntary remand following the Board’s grant of review. Nor do they prohibit the Board from granting a voluntary remand motion. To the contrary, such authority advances the Board’s task of fairly and efficiently adjudicating permit appeals. The Board next examines whether it is appropriate to grant the Region’s request in this case.

3. *It Is Appropriate to Grant the Region’s Motion*

Desert Rock, DPA, and ACCCE also challenge the appropriateness of granting the Region’s motion for voluntary remand. Their arguments against remand range from asserting that the Region fails to show cause for its motion, ACCCE Opp’n Br. at 7-12, to claiming that the motion is made in bad faith, or at a minimum, is frivolous, DR Opp’n Br. at 16-26; ACCCE Opp’n Br. at 12-13, to raising

other issues, such as due process and equal protection claims, statutorily-based claims under CAA section 165(c), and claims of trust responsibility violations, *e.g.*, DR Opp'n Br. at 11-42; ACCCE Opp'n Br. at 7-13; DPA Opp'n Br. at 4-8. As discussed in more detail below, the Board disagrees with these three participants and concludes, in light of the Region's rationale for requesting the remand, the Board's analysis of the Region's ESA compliance activities, and the current posture of this permit appeal, that a remand is appropriate.

a. *The Region's Motion is Meritorious, Not Frivolous or in Bad Faith*

The Region's rationale for its motion justifies granting remand in this case. As a general matter, the Board typically grants a motion where the movant shows good cause for its request and/or granting the motion makes sense from an administrative or judicial efficiency standpoint. *Compare, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 to -06, at 3-5 (EAB Aug. 21, 2008) (Order Granting Desert Rock's Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues) (discussing merits of extension of time motion and judicial efficiency considerations) *and Columbia Gulf*, 1990 WL 324099 (granting joint motion of permit authority and applicant for stay of proceedings rather than region's request for remand because movants' argument was rational and conducive to administrative efficiency) *with Indeck-Elwood 2004 Stay Order* at 6, 16 (denying remand where basis for request was flawed and judicially inefficient). More specifically, the Board generally grants voluntary remand motions "where the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision before reissuing the permit." *Indeck-Elwood 2004 Stay Order* at 6; *see also NE Hub Remand Order* at 2 (noting that the region was proposing to issue new permit decisions if the remand motion was granted); *GMC*, 7 E.A.D. at 169 (explaining that the region would incorporate new language into the permit on remand).

Similarly, the federal courts tend to liberally grant agency motions for remand where an agency seeks to reconsider its prior decision. *See Pellissippi Parkway*, 375 F.3d at 417 (“[V]oluntary remand is appropriate even without a change in the law or new evidence * * *.”); *SKF*, 254 F.3d at 1029-30 (explaining that “an agency may request a remand (without confessing error) in order to reconsider its previous position” or “because it believes that its original decision is incorrect on the merits and wishes to change the result” and that federal court has discretion over whether or not to grant either type of request); *Sw. Bell Tel. Co. v. FCC*, 10 F.3d 892, 896 (D.C. Cir.) (noting that court had granted agency’s request for voluntary remand “to permit FCC to give further consideration to the matters addressed”), *cert. denied*, 512 U.S. 1204 (1993); *Wilkett v. ICC*, 710 F.2d 861, 863 (D.C. Cir. 1983) (noting that federal court had granted an agency request for remand “for the purpose of reconsideration” and that agency ultimately reached same conclusion); *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (explaining that agencies have “inherent authority to reconsider their own decisions” and noting that such reconsideration may, in some instances, lead to a different result). As Desert Rock and ACCCE note, however, federal courts may deny remand motions where the request is frivolous or in bad faith. *SKF*, 254 F.3d at 1029; *see e.g., Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998). Likewise, there is ample room within the Board’s standard for the Board to deny a motion should it conclude that bad faith or frivolousness were the driving force for the Region’s request.

In its motion, the Region discusses several issues it proposes to reconsider on remand. *See Mot. for Vol. Remand* at 8-25. The Region also indicates that its reconsideration of some, if not all, of these issues may necessitate changes in some terms of the Permit. *Id.* For instance, the Region requests remand so that “it may coordinate the completion of” the PSD permit review, ESA, and section 112(g) MACT determination. *Id.* at 11. The Region represents that there is a likelihood that the Permit’s terms will change as a result of FWS’s concerns about

mercury emissions.¹⁸ *Id.* at 14-15. Likewise, the Region explains that it is requesting remand to “reconsider its decision not to evaluate IGCC as a BACT option for this project.” *Id.* at 21. This, too, may lead to reissuance of the permit, issuance of an amended response to comments document, and/or issuance of an amended draft permit.

Based on the above statements, which indicate that the Region indeed “wishes to reconsider some element[s] of the permit decision before reissuing the permit” and may “make a substantive change to one or more permit conditions,” the Board finds that, contrary to Desert Rock’s and ACCCE’s arguments, the Region has shown good cause for requesting a remand. *Indeck-Elwood 2004 Stay Order* at 6. Thus, for these reasons alone, the Board concludes that remand is appropriate.

Furthermore, the Board granted review in this case because it had substantial concerns with several conditions of the Permit, concerns with some of the very issues the Region is planning to reconsider on remand. The Board provides an analysis of one of these problematic issues – the Region’s compliance with the ESA and its reliance on Condition II.A to do so – in Part III.A.3.c of this opinion. The Board also concludes, based on its own review of the administrative record, that it is appropriate to remand the case at this time on one ground: the Region’s failure to consider IGCC in step 1 of the BACT analysis. *See infra* Part III.B. For these two reasons, the Board disagrees with Desert Rock’s and ACCCE’s arguments that the Region has no real cause to request the remand and that the Region’s request is in bad faith, or at the

¹⁸ The Board discusses the ESA issue further *infra* Part III.A.3.c.

very least, is frivolous.¹⁹ DR Opp'n Br. at 16-26; ACCCE Opp'n Br. at 5-13.

Finally, the already partially bifurcated status of the case lends further support for remand. In January, the Board stayed one issue raised by Petitioners so that the Region could “prepare a new statement of basis addressing the issue of whether the permit should contain an emissions limitation for carbon dioxide, provide notice of the revised statement, and provide an opportunity for comment.” Order Granting Review at 3 (quoting Region’s Notice of Partial Withdrawal of Permit at 3); *see also* discussion of procedural history *supra* Part I. Judicial and administrative efficiency considerations weigh on the side of remanding the entire case so that, if the Region concludes that permit reissuance is necessary on multiple grounds, it may reissue the permit only once. Furthermore, it is important for the Region to have the opportunity on remand to consider the permit as a whole so that it may evaluate the impact of changing one permit condition on any other impacted conditions.

b. *The Board Rejects Other Grounds for Denying Remand*

Before turning to the Board’s concerns with the ESA issue, the Board first considers and rejects the other arguments DPA, Desert Rock, and ACCCE raise against granting the Region’s motion.

¹⁹ ACCCE’s arguments against remand, at least in part, appear to rely on an assumption that the Permit “was properly issued” by the Region. *See, e.g.*, ACCCE Opp’n Br. at 3, 6, 12; *see also* DR Opp’n Br. at 3, 21, 25 (arguing that there was no error in the permitting decision). In light of our discussion above and in Part III.A.3.c, it is obvious that the Board has concerns with the Permit. Moreover, as the Board also mentions above and discusses in Part III.B *infra*, the Board has found the Permit to be inadequate. The Board also interprets the Region’s statements that it is requesting remand to reconsider its ESA obligations and its additional impacts analysis after “further reviewing” *Indeck* to indicate, at least in part, that the Region believes its original decision was incorrect on the merits. *See* Mot. for Vol. Remand at 11, 23. ACCCE’s, and Desert Rock’s, arguments on this point are therefore unpersuasive.

(i) *DPA's Trust Responsibility Argument*

DPA argues that the Region should have consulted the tribe prior to requesting a remand and has therefore “flouted” its trust responsibilities. DPA Opp’n Br. at 7; *see also id.* at 4 (“Denial of th[e] motion is further compelled by EPA’s utter disregard of its government-to-government obligations to consult on such matters with the tribal interests in this proceeding.”). DPA further argues that the Agency has failed to follow various Agency policies and procedures concerning interactions with tribal governments, which, for example, require the Agency to “coordinate and consult meaningfully with [t]ribes to the greatest extent practicable for agency actions that may affect the tribes.” *Id.* at 6 (quoting Office of Policy, Economics, and Innovation, U.S. EPA, EPA-233-B-03-002, *Public Involvement Policy of the U.S. Environmental Protection Agency* 5 (May 2003)), available at <http://www.epa.gov/publicinvolvement/pdf/policy2003.pdf>. Although DPA does not identify a standard against which the Board should review its argument in the context of the Region’s request for remand, the Board reads DPA’s claim as suggesting, akin to the arguments the Board addressed in the previous section, that the Region’s conduct somehow constitutes grounds for denying the Region’s motion. *See supra* Part III.A.3.a.

While it is far from clear that the Board even has jurisdiction to review DPA’s claim, without deciding this question, the Board concludes that, based on the facts and circumstances described here, DPA has not shown conduct on the part of the Region that could constitute grounds for denying the motion.²⁰ While DPA claims that EPA “filed its motion with no prior tribal consultation whatsoever,” DPA Opp’n Br. at 5,²¹ the

²⁰ As noted in Part III.A.3.a, the Board reviews all motions, such as the Region’s motion, to see whether the movant shows good cause. Here, the Board considers whether DPA’s allegations somehow deprive the Region of the good cause the Board found it had demonstrated.

²¹ *See also* DPA Opp’n Br. at 7 (“[H]igh-level political appointees (as well as one EPA staff attorney in the case), have been meeting with various Petitioners – and *not* (continued...)”)

Region states that there *has* been an ongoing dialogue between the Agency and the Navajo Nation about the Permit. Reg. Reply at 8-10. The Region's brief documents at least two conversations during the relevant time period between the Administrator and the President of the Navajo Nation. *See id.* Ex. B (calendar printout of scheduled meetings, talking points for meeting), Ex. C (Letter from Dr. Joe Shirley, President, Navajo Nation, to Lisa Jackson, Adm'r, EPA 1 (Apr. 28, 2009) (mentioning prior conversation in April 2009)). Thus, any suggestion by DPA that the Region failed to consult with the tribe at all on this issue is inconsistent with the Region's documentary evidence. Rather than evincing any bad faith or inappropriate conduct on the part of the Region, DPA'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: the Region believes the Agency's discussions with the Navajo Nation President that included mention of the "possibility that Region 9 might change one or more of its positions in the appeal" and its call to the tribe on the date the remand request was submitted were sufficient, *id.* at 10, whereas DPA believes the Region should have provided the Navajo Nation with advance notice of the Region's plan to file a motion for remand, DPA Opp'n Br. at 4-5, 7. For the foregoing reasons, DPA has failed to demonstrate that the Region's actions provide grounds for denying the Region's motion. The Board emphasizes that it respects the government-to-government relationship between the Navajo Nation and EPA and is confident that the Region will continue to appropriately include the tribe during the remand stage.²²

(ii) *Desert Rock's Section 165(c) Argument*

Desert Rock argues that the Region's motion for a voluntary remand is a "clear violation" of section 165(c) of the CAA and that the

²¹(...continued)
the Navajo * * *").

²² Of course, the Board itself cannot individually meet with a tribe during the pendency of a case as this would be a prohibited *ex parte* communication.

Region should not be allowed to “snatch the PSD permit away from the Board right before a decision on the merits.” DR Opp’n Br. at 13. Section 165(c) of the Act states that “[a]ny completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.” 42 U.S.C. § 7475(c).

As an initial matter, nothing in section 165(c) prohibits the Board from granting a motion for voluntary remand. To the extent Desert Rock is arguing that the Region’s actions are barred by section 165(c), it is not clear from this record that the application is, in fact, “completed” within the meaning of section 165(c).²³ Even if Desert Rock is challenging the Region’s failure to act as set forth in section 165(c), the Board would not have jurisdiction to adjudicate the claim. *See* CAA § 304(a), 42 U.S.C. § 7604(a) (granting district courts of the United States the jurisdiction to compel nondiscretionary agency action unreasonably delayed).

Moreover, as described in this decision, the Board has concluded, *on the merits*, that at least one critical aspect of the Region’s permit decision *was* an abuse of discretion, and it is therefore remanding the Permit on this ground. *See infra* Part III.B; *see also supra* Part III.A.3.c. The Board is doing so at this time to speed up the process so that the parties will have the benefit of the Board’s analysis on remand. The Board therefore does not find it necessary to address this argument further.

²³ The time frame in section 165(c) runs from the date the Region receives a “completed application.” 42 U.S.C. § 7475(c). The Region contends that the application “is not currently complete under regulations currently in effect.” *See* Reg. Reply at 16. The Region may also find that additional ESA-MACT or IGCC information is necessary to ensure it has sufficient information to make a final permit decision. *See* Mot. for Vol. Remand, Ex. B at 1 (letter from FWS to Region stating that “source attribution data” are needed for ESA analysis).

(iii) *Desert Rock's Constitutional Challenges*

Desert Rock also challenges the Region's request for remand on both equal protection and due process grounds. DR Opp'n Br. at 35-42 (equal protection), 42-45 (due process). Desert Rock first asserts that the Region's motion for voluntary remand "constitutes an attempt to intentionally administer a facially neutral statute – the Clean Air Act – unequally against Desert Rock" in violation of the equal protection principles inherent in the due process clause of the Fifth Amendment of the U.S. Constitution. *Id.* at 35. Desert Rock also claims that a remand would effectively withdraw its Permit without hearing or review in violation of due process. DR Opp'n Br. at 42.

As a preliminary matter, constitutional challenges to statutes and Agency regulations are rarely entertained in the context of a permit appeal. *See In re USGen New England, Inc.*, 11 E.A.D. 525, 560-61 (EAB 2004) (Interlocutory Order Dismissing Motion for Evidentiary Hearing), *appeal dismissed for lack of juris. sub nom. Dominion Energy Brayton Point, LLC, v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *In re City of Irving*, 10 E.A.D. 111, 124 (EAB 2001); *see also In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 557-58 (EAB 1998) (explaining that Board rarely considers constitutional challenges in penalty enforcement context); *In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997) (same). The Board, however, will consider constitutionally-based challenges to the *manner* in which a statute or regulation has been applied. *Ocean State*, 7 E.A.D. at 558; *In re Gen. Elec. Co.*, 4 E.A.D. 615, 627-36 (EAB 1993); *see also Irving*, 10 E.A.D. at 124 (acknowledging general rule). Because Desert Rock is essentially questioning the manner in which the Region applied the CAA and the applicable regulations in the context of this permit decision rather than challenging the constitutionality of the statutes or regulations themselves, the Board considers Desert Rock's two constitutional claims in turn below.

(a) *The Region Has Not Denied Desert Rock Equal Protection*

First, according to Desert Rock, the Region is unequally administering the CAA, treating Desert Rock differently than other “similarly situated” PSD applicants with no rational basis. DR Opp’n Br. at 36. Specifically, Desert Rock asserts that the Region’s motion for voluntary remand “constitutes intentionally unequal treatment of Desert Rock” as compared to three other prospective (or recent) coal-fired power plant PSD applicants: one that received a final PSD permit from the Georgia Department of Natural Resources, one that received a permit from the Louisiana Department of Environmental Quality, and one that received a permit from the Florida Department of Environmental Protection.²⁴ *Id.* at 37-38. Although Desert Rock admits that “the

²⁴ Under the CAA and associated regulations, a PSD program, or portions thereof, may be administered within a state (not including Indian Reservations) in one of three ways. *In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999). First, EPA may run the program pursuant to a “Federal Implementation Plan” under part 52. *See* CAA §§ 109-110, 165, 168, 42 U.S.C. §§ 7409-7410, 7475, 7478; 40 C.F.R. part 52; *Milford*, 8 E.A.D. at 673. Second, EPA can delegate its authority to operate the PSD program to the state. *Milford*, 8 E.A.D. at 674. In such cases, the state issues PSD permits as federal permits on behalf of the Agency. 40 C.F.R. § 52.21(u); *see also* discussion of Illinois delegated program *infra* Part III.B.3.a. Third, if a state PSD program meets certain applicable (generally minimum) requirements of federal law, EPA can approve the state’s program and such program is incorporated into the state’s overall State Implementation Plan (“SIP”). *See* CAA §§ 110, 116, 161, 42 U.S.C. §§ 7410, 7416, 7471; 40 C.F.R. § 51.166; *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir.) (containing lengthy history of SIP provision and explaining federal and state roles and responsibilities in SIP process), *modified on reh’g*, 116 F.3d 499 (1997); *Milford*, 8 E.A.D. at 673. In this last circumstance, the state conducts PSD permitting under its own authority, and its PSD requirements, although similar to the federal requirements, may differ. Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual 1* (draft Oct. 1990) (“NSR Manual”); *see also Virginia v. EPA*, 108 F.3d at 1406-10; *Milford*, 8 E.A.D. at 673; *In re Carlton, Inc.*, 9 E.A.D. 690, 692-93 (EAB 2001) (noting that state-issued permits, and even state requirements in a federal PSD permit, may only be challenged under state law) (citing cases); *In re Sutter Power Plant*, 8 E.A.D. 680, 690 (EAB 1999) (explaining that the Board may only review permit conditions implementing the federal PSD program, not those related to state or local requirements); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161 (EAB 1999) (same). The third scenario applies (continued...)

permitting agencies in the three permitting cases are not EPA,” it argues that, because all the permits were issued under the CAA (by these three approved states), EPA could “force equal treatment” by seeking a “SIP Call” under another provision of the statute.²⁵ *Id.* at 38 (citing 42 U.S.C. § 7410(k)). Notably, Desert Rock does not mention or compare itself to any recent federal PSD applicants or refer to any recent federally issued PSD permits.²⁶

Desert Rock’s claim is essentially a “class of one” equal protection claim, in other words, a claim that it “has been ‘irrationally singled out,’ without regard to any group affiliation, for discriminatory treatment.” *United States v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008) (quoting *Engquist v. Ore. Dep’t of Agric.*, 128 S.Ct. 2146, 2153 (2008)). Generally, under equal protection jurisprudence, in order to establish a “class of one” claim, a party must show that it has intentionally been treated differently than others with whom it is “similarly situated.”²⁷

²⁴(...continued)

to the Georgia, Louisiana, and Florida PSD permits that Desert Rock references.

²⁵ Under section 110 of the CAA, EPA may make what is known as a “SIP Call,” where it requires a state to revise its program to correct a “substantially inadequate” SIP. CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5); *accord Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006); *see also In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 457 n.9 (discussing a SIP Call issued by EPA). Notably, Desert Rock does not specify precisely what the SIP Call it believes the Agency should have issued would have entailed, except that it would have “force[d] equal treatment of these issues throughout the United States.” DR Opp’n Br. at 38. Without an explanation of the contents of such a SIP call, Desert Rock’s vague arguments lack force.

²⁶ Ironically, the Region’s statements that it wants to reconsider its Permit decision in light of the *Indeck* permit decision, *see* Mot. for Vol. Remand at 11-13, 23-24, which was a *federally* issued PSD permit, *see Indeck*, slip op. at 4, 13 E.A.D. at ___, suggests the reverse of Desert Rock’s claim: that the Region may seek to treat Desert Rock equally to other similarly situated coal-fired power plants. In addition, as the Board discusses in Part III.B *infra*, reconsideration of IGCC in step 1 of the BACT analysis would be consistent with two federally issued PSD permits.

²⁷ In addition, a party must show that there is no rational basis for the government’s differential treatment. *E.g., Engquist*, 128 S.Ct. at 2153; *Olech*, 528 U.S. (continued...)

E.g., Engquist, 128 S.Ct. at 2153; *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Leib v. Hillsborough County Pub. Transp. Comm'n*, 558 F.3d 1301, 1306-07 (11th Cir. 2009); *Moore*, 543 F.3d at 896. Desert Rock fails to make such a showing.

First of all, as Desert Rock admits, EPA did not issue the other three permits; instead, those permits were issued by states operating under approved programs. DR Opp'n Br. at 37. Thus, Desert Rock's "class of one" equal protection claim is atypical in that, although its claim does contain an underlying comparison between different sovereigns's actions, it does not per se challenge and compare decisions made by one governmental entity. Desert Rock's claim instead primarily relies upon the rather unique premise that it may challenge one governmental entity's failure to require other sovereigns to make identical decisions and/or exercise their discretion in the same manner as the first, where the laws and regulations of the sovereigns are not necessarily identical and the decisions involve the exercise of discretion. *See supra* note 24. Desert Rock has not cited any authority to support its argument. Notably, comparing two different decisionmakers's actions has generally been found to be inappropriate in the equal protection context. *E.g., Moore*, 543 F.3d at 897 (concluding that comparison between decisions of federal and state prosecutors "simply does not raise equal protection concerns"); *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002) (finding no demonstration of similarly-situated individuals where comparison was, among other things, between decisions of two different zoning Board panels); *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994) ("When different decision-makers are involved, two decisions are rarely 'similarly situated in all relevant respects.'"). Consequently, to the extent Desert Rock attempts to challenge the Region's PSD decision on equal protection grounds merely because it is different than the decisions of the three state permitting authorities, the Board rejects it.

²⁷(...continued)

at 564; *Leib*, 558 F.3d at 1306-07. Because the Board concludes that Desert Rock fails to make the required showing that it has been intentionally treated differently from others similarly situated, the Board does not address the second issue.

Furthermore, the Supreme Court has explained that, with respect to government actions “which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments,” the principles underlying equal protection are “not violated when one person is treated differently from others.” *Engquist*, 128 S. Ct. at 2154; *accord Leib*, 558 F.3d at 1307; *see also Moore*, 543 F.3d at 897-98. This is because “treating like individuals differently is an accepted consequence of the discretion granted.” *Engquist*, 128 S. Ct. at 2154. “In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that [government] officials are entrusted to exercise.” *Id.* Such is the case here. The very nature of the analyses required by the PSD permitting process necessitates that permit issuers – EPA Regions and other approved governmental entities – make numerous subjective individualized assessments and discretionary decisions in their consideration and issuance of PSD permits. *See, e.g.*, 40 C.F.R. § 52.21 (c)-(p) (containing requirements for various analyses to be performed, including the analysis of ambient air increments, source impacts, additional impacts, and visibility). Thus, PSD permitting decisions clearly fall within the category of government actions that the Supreme Court has concluded do not trigger equal protection concerns. For this reason alone, Desert Rock’s claim must fail.

Moreover, even if the Board were to accept Desert Rock’s underlying premise that a “class of one” equal protection claim may successfully be raised in the context of EPA’s failure to require states issuing permits under somewhat different frameworks acting within their own discretion to make identical determinations to EPA’s, Desert Rock has failed to demonstrate how the three applicants it cites are indeed “similarly situated.” While Desert Rock baldly asserts that these applicants are similar, it has identified no factual evidence in the record to support its claim.²⁸ Thus, Desert Rock’s “class-of-one challenge never

²⁸ Some limited information about the Georgia proposed facility and permit is included in the *Longleaf Energy Associates v. Friends of the Chattahoochee, Inc.*, Nos. A09A0387 & A09A0388, 2009 WL 1929192 (Ga. Ct. App. July 7, 2009), decision (continued...)

gets off the ground.” *Moore*, 543 F.3d at 898 (dismissing defendant’s “class of one” claim where defendant failed to provide any detailed factual information comparing himself with his coconspirators); *see also*, e.g., *Leib*, 558 F.3d at 1307 (dismissing class-of-one claim where the “complaint makes only the barest conclusory assertion” and “complete[ly] lacks factual detail regarding the ‘similarly situated’ requirement”).

(b) A Voluntary Remand Does Not Violate Due Process

Desert Rock’s due process claim – that a voluntary remand would effectively withdraw the Permit without hearing or review in violation of due process principles – is equally unavailing. Desert Rock’s arguments seemingly rely on its erroneous belief that the permit is already “final.”²⁹ *See* DR Opp’n Br. at 44 & n.6 (arguing that EPA “has already issued a ‘final’ PSD permit to Desert Rock,” thereby implicating the due process clause). The regulations state that a Region’s final permit decision is not “final agency action” where a petition for review has been filed with the Board. *See* 40 C.F.R. § 124.19(f)(1); *accord In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 66 (EAB 1994). In fact, when a Region’s final permit decision is appealed, the permit does not become final agency action until either (1) the Board denies review, (2) the Board issues a decision on the merits that does not

²⁸(...continued)

discussed *infra* Part III.B.3.e. This information is in no way sufficient to determine whether the Georgia facility, as a factual matter, is similarly situated.

²⁹ As Desert Rock explains, to establish a due process claim, a petitioner must establish three things: (1) it has “a life, liberty, or property interest protected by the Due Process Clause”; (2) it was deprived of that protected interest within the meaning of the Due Process Clause; and (3) the government did not afford it adequate procedural rights prior to depriving it of that protected interest. DR Opp’n Br. at 42 (relying on *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000)). Therefore, in order to successfully make its argument, Desert Rock must first demonstrate that it, in fact, has a property interest protected by the Due Process Clause. Desert Rock’s arguments thus hinge on its assertion that the Region’s (non-final) permit decision is that constitutionally protected property interest and that it was deprived of that interest.

include a remand, or (3) the remand procedures are completed and the remand order did not require appeal of the remand decision to exhaust administrative remedies. 40 C.F.R. § 124.19(f)(1)(i)-(iii). Here, none of these three circumstances have occurred; thus, the permit is not yet final. Consequently, any arguments that rely on the “final” nature of the permit – such as Desert Rock’s due process arguments – are inapposite.³⁰ Desert Rock, therefore, has not demonstrated that the Region’s motion deprives it of an interest protected by the Due Process Clause.

(iv) *Desert Rock’s and ACCCE’s “New Policy” Claims*

Finally, the Board notes that, in several places, Desert Rock argues that the Region may not change the Permit based on new, or future, policy. *See, e.g.*, DR Opp’n Br. at 8-9, 11-12, 18-20, 29-35. ACCCE raises similar concerns about the Region’s rationale for requesting remand to reconsider PM_{2.5} and IGCC. ACCCE Opp’n Br. at 8-10. At this stage, however, the Board cannot predict what the Region may, or may not, do on remand nor is it appropriate for the Board to provide a legal opinion on the merits of these theoretical outcomes. As the Board has noted in similar situations, “[t]o do so before the Region has actually relied on the theory in issuing the permit would, in effect, be offering an advisory opinion.” *In re Mille Lacs Wastewater*

³⁰ Desert Rock’s reliance on *In re General Electric Co.*, 4 E.A.D. 615 (EAB 1993), is groundless. That case focused on the proper procedures to handle future revisions to a RCRA permit that would be final at the time of the revisions. *See id.* at 628-29. Here, any potential revisions will be made before the permit is final.

Several of ACCCE’s arguments also appear to rely on its belief that the permit is “final.” *See, e.g.*, ACCCE Opp’n Br. at 13 (referring to the permit as “final”). Consequently, these arguments are baseless as well. In a similar vein, ACCCE also mistakenly analogizes the permit process to a rulemaking. *See* ACCCE Opp’n Br. at 7-12. There are significant differences between the two administrative processes. The most important difference is the fact that, again, the Region’s final permit decision is not final agency action where, as here, that permit is pending review by the Board. *See* 40 C.F.R. § 124.19(f)(1). Thus, arguments that the Region, in reconsidering its non-final permit decision, “should be held to same standard of review that any agency is when it decides to rescind a [final] rule,” ACCCE Opp’n Br. at 7, are unconvincing.

Treatment Fac. & Vineland Sewage Lagoons, NPDES Appeal No. 01-16, at 12 (EAB Sept. 3, 2002) (Order Denying Review in Part and Remanding in Part); *In re Cavenham Forest Indus., Inc.*, 5 E.A.D. 722, 731 n.15 (EAB 1995) (declining to provide advisory opinion); *In re Multitrade Ltd. P'ship*, 3 E.A.D. 773, 777 (Adm'r 1992) (declining to speculate on outcome of planned permit changes that had not yet been made). Consequently, these arguments do not persuade the Board to deny the Region's remand request.

c. *The Region's ESA Compliance Strategy Raises Concerns the Board Cautioned Against in Indeck*

As the Board stated above, *see supra* Part III.A.3.a, it has serious concerns with the Region's past ESA compliance strategy for the Desert Rock Permit. The Region issued the Desert Rock Permit prior to completing the consultation required by ESA section 7(a)(2).³¹ *See supra* Part III.A.1. In an attempt to address this deficiency, the Region included a condition in the Permit that, among other things, prohibits Desert Rock from beginning construction at the Facility until the Region notifies the permittee that the Region has met its ESA responsibilities. *See* Permit at 2 (Condition II.A); *see also* Mot. for Vol. Remand at 9. Specifically, the Condition states:

Construction under this permit may not commence until EPA notifies the Permittee that it has satisfied any consultation obligations under Section 7(a)(2) of the

³¹ It is unclear from the participants' briefs whether the Region (or lead agency BIA) had truly even "initiated" consultation, as that term is meant under the ESA and its implementing regulations, at the time the Region issued the Permit. *Compare* NGO Suppl. Br. at 284 and CBD Petition at 5, 7 with Region's Response at 114-15; *see also* A.R. 80, at 1 (Letter from Timothy DeAsis, Acting Regional Director, BIA, to Jennifer Fowler-Propst, Field Supervisor, FWS (Apr. 30, 2007) (requesting formal consultation)); A.R. 82, at 1 (Letter from Wally Murphy, Supervisor, N.M. Ecological Field Services Field Office, FWS, to Regional Director, Navajo Regional Office, BIA (July 2, 2007) (stating that the FWS had not yet received all the necessary information to initiate formal consultation)). Whether or not consultation had begun at the time the permit was issued does not affect our discussion, especially now that it appears that some form of consultation has been initiated.

Endangered Species Act with respect to issuance of the permit. EPA shall have the power to reopen and amend the permit, or request that the Permittee amend its permit application, to address any alternatives, conservation measures, reasonable and prudent measures, or terms and conditions deemed by EPA to be appropriate as a result of the ESA consultation process.

Permit at 2 (Condition II.A); *see also* Mot. for Vol. Remand at 9. In its most recent motion, the Region admits that FWS has recently concluded that the Permit may “adversely affect” at least one endangered species, indicating that the required ESA consultation is still ongoing. Mot. for Vol. Remand at 10. Based on these facts and in light of ESA requirements and Board precedent, the Board has significant concerns about the Region’s inclusion of Condition II.A in the Permit. The Board therefore believes the Region’s action requesting remand on this ground is well-taken. Because of the significance and complexity of this issue, the Board reviews it in some detail below to assist the Agency on remand and in other permit cases.

(i) *Relevant ESA Statutory and Regulatory Provisions*

Congress enacted the ESA in 1973 to provide for the conservation of endangered and threatened fish, wildlife, and plants and their natural habitats. ESA § 2, 16 U.S.C. § 1531. In order to accomplish this goal, the statute requires the Secretaries of the Interior and Commerce to determine which species are endangered or threatened – i.e., to make a “list” of such species – and to designate the critical habitat for such listed species.³² ESA § 4(a), 16 U.S.C. § 1533(a).

³² The two secretaries generally share responsibilities under the ESA. *See* ESA § 3(15), 16 U.S.C. § 1532(15) (definition of “Secretary”); 50 C.F.R. § 402.01(b); ESA Consultation Regulations, 51 Fed. Reg. 19,926, 19,926 (June 3, 1986). More particularly, the Secretary of the Interior acts through the U.S. Fish and Wildlife Service (“FWS”) to implement ESA requirements with respect to terrestrial species, whereas the Secretary of Commerce, through the National Oceanic and Atmospheric Administration’s
(continued...)

The ESA also imposes a number of substantive and procedural obligations on all federal agencies, including EPA. *See, e.g.*, ESA § 7(a)(1), (a)(2), 9(a)(1), (a)(2), 16 U.S.C. § 1536(a)(1), (a)(2), 1538(a)(1), (a)(2); *see also* 50 C.F.R. § 402.06(a). Of particular relevance is section 7(a)(2), which requires that:

Each federal agency shall, in consultation with and with assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species * * *.

ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Significantly, the definition of agency “action” is broad and includes “the granting of licenses, contracts, leases, easements, rights-of-way, [or] *permits*.” 50 C.F.R. § 402.02 (emphasis added); *accord Env'tl. Prot. Info. Ctr. (“EPIC”) v. Simpson Timber Co.*, 255 F.3d 1073, 1075 (9th Cir. 2001); *In re Indeck-Elwood, LLC*, PSD Appeal 03-04, slip op. at 94 (EAB Sept. 27, 2006), 13 E.A.D. at __; *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 428 & n.34 (EAB 1997); *In re Dos Republicas Res. Co.*, 6 E.A.D. 643, 649 (EAB 1996). Thus, section 7(a)(2) imposes a substantive duty on federal agencies to ensure that none of their actions – including the issuance of a permit – is likely to jeopardize listed species or destroy or adversely modify the critical habitat of such species. *See* 51 Fed. Reg. at 19,926; *see also Indeck*, slip op. at 94-95, 13 E.A.D. at __; *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 485 (EAB 2002); *Dos Republicas*, 6 E.A.D. at 649, 666.

³²(...continued)

National Marine Fisheries Service, handles responsibilities for marine species. 50 C.F.R. § 401.01(b); 51 Fed. Reg. at 19,926. Because the species at issue in this case are not marine species, this opinion will use the term “FWS” or “Service” hereinafter when referring to the duties or responsibilities of the “Secretary” or the “Service[s].”

To assure that agencies meet this substantive obligation, section 7(a)(2) also imposes a procedural duty on federal agencies – to consult with FWS prior to engaging in a discretionary action that “may affect listed species or critical habitat.”³³ 50 C.F.R. § 402.14(a); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995); *Indeck*, slip op. at 95, 13 E.A.D. at ___. If the agency determines that its proposed action, such as issuing a permit, may affect a listed species or its critical habitat, then formal consultation is required, with limited exceptions seemingly not relevant here.³⁴ 50 C.F.R. § 402.14(a); *Indeck*, slip op. at 96-97, 13 E.A.D. at ___. For certain types of projects, the agency engaging in a federal “action” must prepare a biological assessment (“BA”) and submit it to FWS, although agencies may voluntarily prepare a BA even when it is not required. ESA § 7(c)(1), 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12, .14(c)(5); *Phelps Dodge*, 10 E.A.D. at 486 & n.23; *Dos Republicas*, 6 E.A.D. at 666 & n.68.

³³ As the Board explained in *Indeck*, “[t]he term ‘may affect’ is broadly construed by FWS to include ‘[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,’ and is thus easily triggered.” Slip op. at 96, 13 E.A.D. at __ (quoting 51 Fed. Reg. at 19,926). Additionally, as the Board emphasized in *Indeck*, the ESA implementing regulations indicate that an agency should review its actions “‘at the earliest possible time’ to determine whether the low ‘may affect’ threshold is met,” thereby triggering the need “to initiate some type of consultation.” *Indeck*, slip op. at 98, 13 E.A.D. at __ (quoting 50 C.F.R. § 402.14(a)); *see also* 50 C.F.R. § 402.11(b) (mentioning “early consultation”).

³⁴ The regulations list several exceptions, including the possibility that, through the informal consultation process or as a result of the preparation of a biological assessment, the federal agency may, with the written concurrence of the Service, conclude that its action will not likely adversely affect listed species or critical habitat. 50 C.F.R. § 402.14(b)(1)-(2); *see also Indeck*, slip op. at 97 & n.136, 13 E.A.D. at __; *Ash Grove*, 7 E.A.D. at 429. In addition, if the agency determines that its proposed action will have “no effect” on any federally-listed species or critical habitat, the federal agency need not formally consult with the Service, and the section 7 process terminates. 50 C.F.R. § 402.14(a); *Indeck*, slip op. at 97 n.134, 13 E.A.D. at __; *Phelps Dodge*, 10 E.A.D. at 486. From the Region’s recent motion, it appears that none of these options is applicable here. *See* Mot. for Vol. Remand at 10 (noting that a Biological Assessment has been prepared and that the FWS has stated that there may be adverse effects).

Upon conclusion of the agencies' formal consultation, FWS prepares a biological opinion evaluating the potential effect of the action on the protected species. ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(l); *Phelps Dodge*, 10 E.A.D. at 487; *Dos Republicas*, 6 E.A.D. at 653 n.40, 666. If FWS finds jeopardy or adverse modification to critical habitat, it recommends reasonable and prudent alternatives to the action agency's proposed action that can be taken by the action agency or applicant and that would not violate section 7(a)(2). ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A); *Phelps Dodge*, 10 E.A.D. at 487; *see also Dos Republicas*, 6 E.A.D. at 654 & n.43. On the other hand, if the Service's biological opinion concludes that the proposed activity is not likely to jeopardize an endangered or threatened species or adversely modify critical habitat, the proposed action is generally permitted. *E.g.*, *EPIC*, 255 F.3d at 1076; *see also Dos Republicas*, 6 E.A.D. at 653 & n.40, 668-69. Even in the case of a "no jeopardy" biological opinion by the Service, FWS still may provide discretionary, non-binding conservation recommendations, which the action agency may consider and implement in its final action.³⁵ 50 C.F.R. § 402.14(g)(6), (j), .15; *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998). Finally and most importantly, "[a]fter meaningful consultation" with the Service, it is the federal agency who "possesses the ultimate decisionmaking authority to determine whether it may proceed with an action." *Pac. Rivers Council v. Thomas*, 936 F.Supp. 738, 744 (D. Idaho 1996); *accord* 50 C.F.R. § 402.15; *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1049 (1st Cir. 1982); *Phelps Dodge*, 10 E.A.D. at 487; *Dos Republicas*, 6 E.A.D. at 666 n.69.

Significantly, once consultation with FWS is initiated, ESA section 7(d) also applies to the federal action agency and the permit applicant. Section 7(d) prohibits both entities from "mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or

³⁵ For a more detailed discussion of the consultation and post-consultation process, *see Phelps Dodge*, 10 E.A.D. at 485-88, and *Dos Republicas*, 6 E.A.D. at 649, 652-58 & nn.40-43, 666-74.

implementation of any reasonable and prudent alternative measures.” ESA § 7(d), 16 U.S.C. § 1536(d); *accord* 50 C.F.R. § 402.09; *Indeck*, slip op. at 98, 13 E.A.D. at ___.

(ii) *Indeck and the Question of the Appropriate Timing of Consultation*

In 2004, before the final Desert Rock Permit was issued, the Board, in *Indeck*, considered several ESA issues in the PSD permitting context, including the proper timing of any required consultation. Slip op. at 109-14, 13 E.A.D. at ___. In that case, petitioners claimed that Region 5 had failed to comply with the ESA by initiating consultation with FWS after the Region had issued a final decision. *See id.* at 103-04 & nn.143-44, 13 E.A.D. at ___. While the permit was on appeal before the Board, Region 5 and FWS initiated and completed an informal consultation,³⁶ and no action was taken with respect to the permit as a result of the ESA consultation process. *Id.* at 100-101, 13 E.A.D. at ___. Notably, the Permit at issue in *Indeck* did not contain a condition similar to that in the present case.

In considering the *Indeck* petitioners’ ESA issues, the Board discussed, at length, the question of *when* the Agency must comply with ESA requirements. The Board stated:

[W]hile neither the ESA nor its implementing regulations specify when the consultation process needs to be completed vis-à-vis the associated agency action, the statute does prohibit an agency from, “mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures,” after

³⁶ The Region concluded that *Indeck*’s permit was “not likely to adversely affect” any federally-listed species or the designated habitat of such species. *Indeck*, slip op. at 100, 13 E.A.D. at ___. FWS concurred in writing with this conclusion, thereby completing the informal consultation. *Id.*

consultation with the Service is initiated. ESA § 7(d), 16 U.S.C. § 1536(d). In the ordinary course, the issuance of a final PSD permit would appear to be the point at which the permitting agency has irretrievably committed itself with respect to the discrete act of permitting a given activity. Accordingly, to avoid violating this requirement, the Agency should complete the ESA process prior to the issuance of the final permit. This ensures that, if FWS recommends any changes to the permit during the consultation process or, alternatively, if EPA decides to add or amend permit conditions based on any information or findings that arise during the ESA consultation process, such changes may be implemented in the final PSD permit.

Indeck, slip op. at 110-11, 13 E.A.D. at ___ (footnotes and citations omitted). Consequently, the Board concluded that it would “expect ESA consultation [to] ordinarily be completed, *at the very latest, prior to issuance of the permit* and, optimally, prior to the comment period on the permit, where the flexibility to address ESA concerns is the greatest.” *Id.* at 114, 13 E.A.D. at ___ (emphasis added); *see also Ash Grove*, 7 E.A.D. at 429. In other words, *the ESA process should be completed at the time a region issues its final permit decision.*³⁷

The Board in *Indeck*, however, did determine that there was one exception to this general timing rule. Because the permitting regulations effectively postpone “final agency action” when a final permit decision is appealed, *id.* at 111 n.150, 112-13; *see* 40 C.F.R. § 124.19(f)(1), if the ESA process is completed during the appeal, “there [still] remains legal

³⁷ The Board emphasizes this statement because permit conditions have been included in more than one recently issued final permit suggesting that regions have not consistently followed the Board’s *Indeck* decision. The Region also made this observation in its motion. *See* Mot. for Vol. Remand at 13-14.

capacity to adjust the terms of the permit.”³⁸ *Indeck*, slip op. at 113, 13 E.A.D. at __. Thus, in this special situation, as a “technical matter,” the completion of an ESA consultation during an appeal “me[ets] minimum standards.” *Id.* at 112.

While recognizing that this exception applied under the circumstances in *Indeck*, the Board pointed out that “[b]y all appearances, had an appeal not been taken, and consultation not been undertaken during the pendency of this appeal, this permit would have gone final in dereliction of legally binding ESA requirements.” *Indeck*, slip op. at 114, 13 E.A.D. at __; *see also Ash Grove*, 7 E.A.D. at 429. The Board emphasized that the Region’s approach to meeting its ESA requirements was problematic, stating that “an ESA compliance strategy that acknowledges ESA only in the event of an appeal is not a compliance strategy at all, in that it would tolerate an ESA violation whenever an appeal is not taken.” *Indeck*, slip op. at 114, 13 E.A.D. at __; *see also id.*, slip op. at 113 n.154, 13 E.A.D. at __ (“[W]aiting to consult as late as during the pendency of a PSD appeal * * * is prudentially inadvisable.”).

(iii) *The Region’s Approach to ESA Compliance Here*

In this case, in issuing the final permit, the Region appears to have taken one more step down the slippery slope the Board cautioned against in *Indeck*. Not only did the Region issue its permit decision without completing consultation, it issued the Permit with a condition essentially declaring that ESA requirements had not been met at the time the permit was issued, with the intention of relying on future permit modifications to “fix” or “re-do” the Permit, if changes were found to be necessary. The Board believes the Region’s reliance upon this condition and its past ESA compliance strategy for the Desert Rock permit in general raise significant concerns.

³⁸ In other words, if changes are necessary based on the consultation, the permit can be remanded to the region to implement the needed modifications.

The Board concludes that a condition like the one included in the Desert Rock Permit does not obviate the concerns the Board highlighted in *Indeck*. In *Indeck*, the Board specifically stated that reliance on the permit modification process to change an already-issued permit is problematic because “[t]he fact that a permit once issued may subsequently be amended does not diminish the irretrievable nature of the decision to issue the permit as amendments are discrete actions independent from the decision to issue the permit in the first instance.” *Indeck*, slip op. at 111 n.151, 13 E.A.D. at ___. This statement strongly cautioned against relying on a later permit amendment to meet the ESA requirements for the permit’s initial issuance – the very strategy the Region planned to follow in this case.

Second, by deferring its ESA compliance until some uncertain time after permit issuance and relying on a permit condition to allow it to “redo” the permit later to meet any ESA requirements found to be necessary, the Region arguably turned the statute on its head. Although the federal courts’ approach to after-the-fact ESA compliance is not entirely consistent,³⁹ the Ninth Circuit, in two cases with facts and circumstances similar to those in the present case, found a strategy like the Region’s to be flawed and violative of the ESA.

In *Conner v. Burford*, 848 F.2d 1441, 1454-55 (9th Cir. 1988), cert. denied sub nom. *Sun Exploration & Prod. Co. v. Lujan*, 489 U.S. 1012 (1989), the Bureau of Land Management issued leases prior to the FWS’s preparation of a comprehensive biological opinion covering the effects of leasing and post-leasing activities, but included stipulations in the leases that essentially provided that future restrictions might be necessary based on the federal agency’s future examination of ESA impacts. The Ninth Circuit concluded that this strategy – which it termed an “incremental-step consultation” – was an attempt “to carve out a judicial exception to ESA’s clear mandate that a comprehensive biological opinion * * * be completed before initiation of the agency action.” *Id.* at 1455. The court declined “this invitation to amend the ESA.” *Id.* The Court also noted that “[s]ection 7(d) does not amend

³⁹ See *infra* note 40.

section 7(a) to read that a comprehensive biological opinion is not required before the initiation of agency action so long as there is no irreversible or irretrievable commitment of resources. Rather, section 7(d) clarifies the requirements of 7(a), ensuring that the status quo will be maintained during the consultation process.” *Id.* at 1455 n.34 (citation omitted); *see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995) (reaffirming statements made in *Conner*); *Pac. Rivers Council v. Thomas*, 873 F.Supp. 365, 371 (D. Idaho 1995) (reiterating *Conner*).

Similarly, in *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998), a case even more analogous to the situation here, the Bureau of Reclamation issued water contracts that contained a clause allowing “contract modification pursuant to environmental review.” Defendants argued that even if the contracts constituted an “irreversible and irretrievable commitment of resources,” the contractual savings clause “prevented the foreclosure of reasonable and prudent alternatives, and, therefore, § 7(d) was not violated.” *Id.* at 1128. The Ninth Circuit disagreed, concluding: “We do not think an agency should be permitted to skirt the procedural requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts.” *Id.* Consequently, the Court held that rescission of the contracts was an appropriate remedy.⁴⁰ *Id.* at 1129; *see also Pac. Rivers*

⁴⁰ Other courts have concluded, also in a non-PSD context, that a delayed ESA strategy did not violate sections 7(a) and/or 7(d) of the ESA. *See, e.g., N. Slope Borough v. Andrus*, 642 F.2d 589, 610-11 (D.C. Cir. 1980) (allowing oil and gas lease sales to proceed under the Outer Continental Shelf Lands Act (“OCSLA”) despite incomplete consultation over all future impacts), *aff’ing in part, rev’ing in part*, 486 F.Supp. 332 (D.D.C. 1980); *Wyo. Outdoor Council v. Bosworth*, 284 F.Supp.2d 81, 90-93 (D.D.C. 2003) (concluding that consultation need not be initiated, and thus challenge was not yet ripe, where agency issued oil and gas lease but retained authority under agency regulations and lease stipulations to preclude partial or full use of leased property if required by agency’s later ESA consideration; lessee, in next stage of process, was required to submit application to conduct surface-disturbing activity on property); *No Oilport! v. Carter*, 520 F.Supp. 334, 364-66 (W.D. Wash. 1981) (concluding that issuance of right-of-way permit prior to completion of biological assessment did not violate the ESA where permit restricted initiation of construction until the agency issued
(continued...)

Council v. Thomas, 936 F.Supp. 738, 746-51 (D. Idaho 1996) (declining to allow the U.S. Forest Service to take an action for which it was currently in consultation with the Service based on the agency's 7(d) conclusion that it would comply with 7(d)). *But see Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 82 F.Supp.2d 1070, 1080 (D. Ariz. 2000) (explicitly disagreeing with the *Pacific Rivers* decision).

A third concern the Board raises about a permit with a condition like Condition II.A is that, should the permit indeed become "final agency action" prior to completion of consultation as the terms of the condition intend,⁴¹ the very fact that the permit is "final" will likely impact the consultation process with the Service, who may unsurprisingly assume that modifications to the permit would be difficult to implement.⁴² The *Houston* court remarked on this very problem when

⁴⁰(...continued)

a Notice to Proceed and the notice was conditioned on compliance with the ESA). Significantly, several courts have suggested that the reasoning in *North Slope* and other OCSLA cases was based on the nature of the statute under which the agency was operating, which itself included an incremental step approach. *Conner v. Burford*, 848 F.2d at 1455-57; *Nat'l Wildlife Fed'n v. Brownlee*, 402 F.Supp.2d 1, 10 n.15 (D.D.C. 2005). Thus, the relevance of OCSLA-based cases, and any other cases in which the underlying statute and regulations require the agency to take an incremental step approach, in the CAA/PSD context is questionable. Moreover, because the Board is part of the agency, it is in a different position than the federal courts and can obviate the problem of mooted issues and remedies by ensuring that ESA obligations are completed prior to permit issuance and that any necessary consultation is meaningful.

⁴¹ Such a permit becoming "final agency action" presupposes that either (1) the permit is not appealed or (2) the Board denies review of the permit despite the inclusion of the condition in the permit.

⁴² *Indeck* presented different facts. In *Indeck*, the Board disagreed with petitioners' arguments that "FWS's ability to suggest modifications to the permit was curtailed because the consultation occurred after the permit had been issued and that the integrity of the consultation process was thus compromised." *Indeck*, slip op. at 113 n.156, 13 E.A.D. at ___. In that case, however, the Service had explicitly stated that it stood by both the informal consultation process that had taken place and the conclusions that had been made during that process. *Id.* Moreover, in *Indeck* the consultation occurred while the appeal was ongoing and before the permit became final agency action.

(continued...)

it held that rescission was appropriate even though the FWS had ultimately issued a ‘no jeopardy’ Biological Opinion after the issuance of the contracts, stating that “if the Biological Opinion had been rendered before the contracts were executed, the FWS would have had more flexibility to make, and the [action agency] to implement, suggested modifications to the proposed contracts.” 146 F.3d at 1129; *cf. In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 407 n.63 (EAB 2004) (“We do not believe that after-the-fact permits always reflect what the [agency] would have initially granted * * * because the after-the-fact permit may have been issued as a part of a negotiation or settlement between the regulatory agencies and the ‘permittee.’”). The Ninth Circuit further explained: “Even where there is a ‘no jeopardy’ Biological Opinion, the Service may make non-binding conservation recommendations. 50 C.F.R. § 402.14(g)(6), (j). The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal.” *Houston*, 146 F.3d at 1129.

Based on the aforementioned reasons, the Board wholeheartedly agrees that the Region should reconsider its ESA compliance strategy for the Permit, including its reliance on Condition II.A.⁴³ In light of this conclusion, granting the Region’s voluntary remand request is more than appropriate here. The Board acknowledges, however, that it does have the discretion to instead stay the case and await the Region’s completion

⁴²(...continued)

Additionally, the consultation in *Indeck* was an informal one, whereas the present consultation is apparently formal, *see supra* note 31, which increases the likelihood that FWS may provide the Agency with reasonable and prudent alternatives, or at least non-binding conservation measures. Finally, our rationale here is also based on Condition II.A’s underlying premise that the permit will be *final agency action* at the time the biological opinion is drafted and modifications to the permit are implemented. The current situation, therefore, more closely resembles the circumstances in *Houston* rather than those in *Indeck*.

⁴³ The Board also notes that it is far from clear how, or under what authority, the Region would accomplish an uncharted and after-the-fact PSD permit modification such as that envisioned by Condition II.A or, moreover, whether any such permit modification would trigger the need for public comment.

of its ESA compliance activities, as was essentially done in *Indeck*.⁴⁴ *Indeck-Elwood* 2004 Stay Order at 6-8; *cf. Anchor Line Ltd. v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir.) (explaining that agency may either move for a remand or request a stay when it seeks to reconsider its action), *cert. denied*, 370 U.S. 922 (1962). The Board declines to stay the case rather than remand for two reasons.

First, *Indeck* was based on exceptional circumstances that explained, in large part, the belated ESA compliance: in that case the Region had not initiated consultation prior to IEPA's issuance of the permit because there had been a question about whether, as a legal matter, the ESA requirements even applied to a permit issued by a delegated state. *See Indeck*, slip op. at 104-05, 13 E.A.D. at __. After IEPA's issuance of *Indeck*'s permit, the Agency concluded that they did apply. *Id.* at 102, 105. Here, there is no such exceptional reason for failure to complete consultation in a timely fashion, and *Indeck* was decided long before the Region issued the Desert Rock Permit.⁴⁵ In this

⁴⁴ Because any amendments to the Permit that the Region deems necessary as a result of the consultation and compliance with its ESA obligations could potentially impact any aspect of the Permit, it is appropriate to grant a remand of the entire Permit on ESA grounds. *See Indeck-Elwood 2004 Stay Order* at 8 (explaining that it is impossible to predict which conditions of the permit might change as a result of the ESA consultation process).

⁴⁵ The participants acknowledge that Desert Rock filed a complaint in federal district court alleging that the Region had failed to make a timely PSD permit decision. *E.g.*, DR Opp'n Br. at 2; Cons. Pet'rs Reply at 5 n.8. Under some circumstances, the fact that an applicant filed a complaint in federal district court alleging improper delay in issuing the permit might be considered an exceptional circumstance. The Board, however, declines to so conclude under the facts of this particular case. As indicated by our discussion above, it is perplexing why the ESA process took so long here and why neither the Agency nor the applicant moved the formal consultation process along earlier. *See infra* note 46 and accompanying text.

case, the Region – and the applicant⁴⁶ – have had several years to initiate and conclude the ESA process.

In addition, here, unlike in *Indeck*, FWS has indicated that there may well be adverse effects, apparently resulting in a formal consultation, not an informal one.⁴⁷ As noted earlier, in *Indeck*, the FWS did not recommend changes to the permit. *See slip op.* at 113, 13 E.A.D. at __. The fact that the Region and FWS are undergoing formal consultation in this case renders it more likely that the present consultation will result in modifications to the Permit. Should the Permit be stayed and should modifications be needed, the Board would have to remand the Permit at a later date anyway. Thus, the Board, in its discretion, believes it is appropriate to grant the Region’s remand request at this time.

4. *Summary of Conclusions Regarding Voluntary Remand Motion*

In sum, the Board concludes that 40 C.F.R. § 124.19(d) neither constrains a region from requesting a voluntary remand after the Board grants review nor proscribes the Board from granting a voluntary remand at any time. Consequently, the Region’s motion for voluntary remand is not prohibited. The Board further concludes that, under the facts and circumstances of this case, granting the Region’s motion for voluntary remand at this time is warranted. The Region has shown good cause for its motion, explaining that it wishes to reconsider some elements of its permit decision and representing that it may make changes to one or more permit conditions. Moreover, because the Board has substantial

⁴⁶ While responsibility for ESA compliance rests on the Agency’s shoulders, as the Board noted in *Indeck*, the statute and regulations authorize the applicant to play a proactive role in the process. For example, the regulations provide that “[i]f a prospective applicant has reason to believe that the prospective action may affect listed species or critical habitat, it may request the Federal agency to enter into early consultation with the Service.” 50 C.F.R. § 402.11(b).

⁴⁷ *See supra* note 31, referring to BIA letter to FWS requesting formal consultation.

concerns with the Region's approach to ESA compliance and because this is one of the issues the Region intends to revisit, the Board believes voluntary remand is particularly appropriate in this case. Additionally, as explained below, one of the issues the Region wishes to reconsider is an issue on which the Board concludes, on independent grounds, that remand of the entire permit is appropriate. Based on these factors, the Board concludes that granting the motion would best serve the interests of administrative and judicial efficiency.

B. Independent Grounds for Remand of the Entire Permit: the Region's IGCC Analysis

In addition to the Board's determination that granting the Region's motion for voluntary remand is appropriate, the Board finds independent grounds for remanding the entire Permit. The Board granted review in this matter, in part, because upon a preliminary review of the issues, the Board had very significant concerns about certain aspects of the Permit. The Region's IGCC analysis was one of the issues about which the Board was most concerned.⁴⁸ Upon review of the

⁴⁸ Three Petitioners – New Mexico, NGO Petitioners, and Ms. Glustrom – challenged the Region's BACT analysis, contending that the Region made numerous errors in setting the BACT limits for several pollutants at the Facility. *E.g.*, N.M. Pet. for Review and Suppl. Br. at 18-30; NGO Suppl. Br. at 72-124; Glustrom Pet. for Review at 11-37. The first two, New Mexico and NGO Petitioners, specifically questioned the Region's failure to consider IGCC under step 1 of the BACT analysis. N.M. Suppl. Br. at 18-22; NGO Suppl. Br. at 72, 75-78; Cons. Pet'rs Reply Br. at 1-5. More specifically, New Mexico and NGO Petitioners claimed that IGCC would provide "the maximum degree of emissions reductions for several of the air pollutants emitted by [the Desert Rock Facility]." NGO Suppl. Br. at 102; *see also* N.M. Suppl. Br. at 17. They argued that sections 165(a)(4) and 169(3) of the Act require EPA to consider "production processes and available methods" including "fuel cleaning" and "innovative fuel combustion techniques" in the BACT analysis and that IGCC falls squarely within the meaning of those terms. NGO Suppl. Br. at 72, 75-78; N.M. Suppl. Br. at 18-22. Petitioners pointed to the legislative history of the term "innovative fuel combustion process," in support of their arguments. N.M. Suppl. Br. at 19-20; 21-23; NGO Suppl. Br. at 94-97; Cons. Pet'rs Reply Br. at 2. Petitioners also challenged the Region's application of the "redefinition of the source" policy in this case. New Mexico argued that the Region's determination that IGCC would redefine the source is clearly erroneous (continued...)

administrative record, the Board concludes that the record inadequately supports the Region's decision not to consider IGCC in step 1 of its BACT analysis. Neither additional briefing nor further argument would resolve the problems the Board has identified in the record.⁴⁹

Furthermore, because the Region's IGCC determination is essentially a BACT step 1 issue, reconsideration of the issue could have overarching impacts on the rest of the Region's BACT analysis and consequently on a number of the Permit conditions.⁵⁰ While the Board could require the Region to file its final surreply brief, hold oral argument, complete final review of all approximately thirteen issues raised by Petitioners, and *then* remand the permit, the Board believes it appropriate in this case to remand the permit at this time based on this critical issue. Such a step should ultimately provide a speedier resolution of the Desert Rock permitting process. Moreover, because the Board's review of the carbon dioxide issue has been stayed pursuant to the Board's January 22, 2009 Order and because of the direction on remand related to the ESA issue highlighted in Part III.A.3.c, judicial efficiency would best be served in this case by remanding the entire permit rather than sending it back in a piecemeal fashion or alternatively issuing stays in a piecemeal fashion.⁵¹

⁴⁸(...continued)

and "bad policy," N.M. Suppl. Br. at 20, and stretches the "redefine the source" principle beyond Board precedent, *id.* at 24. NGO Petitioners similarly asserted that the Region's position is contrary to law and "disregards the statutory limits on EPA's discretion as affirmed by the courts." NGO Suppl. Br. at 78; *accord* Cons. Pet'rs Reply Br. at 1-5.

⁴⁹ Two parties requested oral argument. *See* State of New Mexico's Petition for Review and Request for Oral Argument at 2, 4-5; Desert Rock's Response to Petitions for Review at 275.

⁵⁰ Notably, Petitioners raised a number of other BACT-related issues. *See, e.g.*, NGO Suppl. Br. at 112-24, 152-90.

⁵¹ The Board emphasizes that its action should not be read to suggest that the Board has concluded that there are no other problems with the Permit. Instead, because resolution of this particular issue – the consideration of IGCC in the Region's BACT
(continued...)

In considering this issue, the Board first outlines its standard of review in permit appeal cases. The Board next describes the statutory and regulatory requirements for BACT as well as the method permit issuers often use to determine BACT. The Board then generally describes IGCC. Next, the Board describes the history of the “redefining the source policy,” which the Region relied on to exclude IGCC from further consideration as BACT. Finally, the Board analyzes the Region’s consideration of IGCC under the statutes, regulations, policy, and Board precedent.

1. *Standard of Review*

Part 124 contains the procedures governing both the Agency’s processing of permit applications and appeals of those permitting decisions. *See generally* 40 C.F.R. pt. 124. In reviewing a permit under part 124 for which it has granted review, the Board looks at whether the permit issuer based the permit on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 124.19(a)(1); *In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03, slip op. at 20 (EAB Nov. 13, 2008), 14 E.A.D. at __; *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 509 (EAB 2006); *In re Inter-Power of N.Y., Inc.*, 5 E.A.D. 130, 144 (EAB 1994). In addition, in its discretion, the Board may evaluate

⁵¹(...continued)

analysis – could impact multiple Permit conditions, the Board considered it first.

Mindful of the time-sensitive nature of PSD permitting and in order to expedite any future review of the Permit, the Board encourages the Region on remand to reexamine several other aspects of its permitting decision to ensure that the administrative record adequately supports its decision. In particular, the Region may want to examine the basis for its determination that emissions from the facility will not cause or contribute to an exceedance of the ozone NAAQS. The Board suggests that the Region ensure that it adequately responds to comments about the actual monitored ozone levels in the area as well as comments regarding the flaws in the model EPA used and that it clearly explains its rationale for relying on a model that appears inconsistent with actual monitoring data. The Region may also want to reexamine the record supporting its visibility determination to ensure that the Federal Land Managers did not make any findings of adverse impacts and to ensure that any permit conditions the Region relies upon to support its visibility determinations are enforceable.

whether the permit issuer abused its discretion or may review important policy considerations. 40 C.F.R. § 124.19(a)(2); *Dominion*, 12 E.A.D. at 509; *Deseret*, slip op. at 20, 14 E.A.D. at __; *see also, e.g., In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 454 (EAB 1992) (remanding permit based on abuse of discretion); *In re Chem. Waste Mgmt.*, 2 E.A.D. 575, 577 (Adm'r 1988) (granting review and remanding case to region based on policy considerations on issue involving region's exercise of discretion). As a preliminary procedural matter, the Board requires that a petitioner describe each objection it is raising and explain why the permit issuer's response to the petitioner's comments during the comment period is clearly erroneous or otherwise warrants consideration (e.g., is an abuse of discretion). *E.g., Deseret*, slip op. at 20, 14 E.A.D. at __; *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *Indeck*, slip op. at 23, 13 E.A.D. at __.

A petitioner challenging an issue that is fundamentally technical in nature bears a particularly heavy burden because the Board generally defers to the permit issuer on questions of technical judgment. *E.g., Dominion*, 12 E.A.D. at 510; *Peabody*, 12 E.A.D. at 33. Nevertheless, the Board has stated that BACT determinations, which are generally technical in nature, are one of the most critical elements in the PSD permitting process and thus "should be well documented in the record, and any decision to eliminate a control option should be adequately explained and justified." *Indeck*, slip op. at 11, 13 E.A.D. at __ (citing *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 131 (EAB 1999)); *accord In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 442 (EAB 2005); *In re Gen. Motors, Inc.*, 10 E.A.D. 360, 363 (EAB 2002). Consequently, in evaluating a BACT determination on appeal, the Board looks at whether the determination "reflects 'considered judgment' on the part of the permitting authority," as documented in the record. *Knauf*, 8 E.A.D. at 132; *accord In re Masonite Corp.*, 5 E.A.D. 551, 566-69 (EAB 1994) (analyses incomplete); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997); *GSX Servs.*, 4 E.A.D. at 454. The Board has remanded permits where the permit issuer's BACT analyses were incomplete or the rationale was unclear. *E.g., Knauf*, 8 E.A.D. at 134, 140 (BACT rationale unclear); *Masonite*, 5 E.A.D. at 566-69 (BACT analyses incomplete); *see also In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568

(EAB 1998) (noting that the Board will not hesitate to order a remand on a technical issue “when a Region’s decision * * * is illogical or inadequately supported by the record”); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-19 (EAB 1977) (remanding RCRA permit limits where region’s ultimate choice did not follow logically from its chosen method, a method which region had discretion in selecting); *Austin Powder*, 6 E.A.D. at 720 (remanding RCRA permit where rationale unclear); *GSX Servs.*, 4 E.A.D. at 454 (remanding RCRA permit because, even though establishing the permit term was an exercise of discretion, record did not “reflect the ‘considered judgment’ necessary to support the region’s determination”).

2. *Overview of PSD Legal Requirements and the “Top Down” Method*

Congress enacted the PSD provisions of the CAA as part of the 1977 amendments to the Act. *In re BP Cherry Point*, 12 E.A.D. 209, 213 (EAB 2005). The PSD provisions govern air pollution in certain areas, called “attainment” areas, where the air quality meets or is cleaner than the national ambient air quality standards, as well as in unclassifiable areas that are neither attainment or “non-attainment.” CAA §§ 160-69, 42 U.S.C. §§ 7470-79; see *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 541 (EAB 1999). The statutory PSD provisions are largely carried out through a regulatory process that requires new major stationary sources in attainment (or unclassifiable) areas, such as Desert Rock, to obtain preconstruction permits pursuant to CAA § 165, 42 U.S.C. § 7475. See 40 C.F.R. § 52.21; *Rockgen*, 8 E.A.D. at 541; *Knauf*, 8 E.A.D. at 123.

The CAA and Agency PSD regulations require, as part of the preconstruction review process, that new major stationary sources and major modifications of such sources employ the “best available control technology,” or BACT, to minimize emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). The statute defines the BACT requirements as follows:

The term “best available control technology” means an emission limitation based on the maximum degree of

reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

CAA § 169(3), 42 U.S.C. § 7479(3); *accord* 40 C.F.R. § 52.21(b)(12) (similar regulatory definition). As the Board recently explained in *In re Northern Michigan University* (“*NMU*”), the BACT definition requires permit issuers to “proceed[] on a case-by-case basis, taking a careful and detailed look, attentive to the technology or methods appropriate for the particular facility, [] to seek the result tailor-made for that facility and that pollutant.” PSD Appeal No. 08-02, slip op. at 12 (EAB Feb. 18, 2009), 14 E.A.D. at __ (citations and quotations omitted). BACT is therefore a site-specific determination that results in the selection of an emission limitation representing application of control technology or methods appropriate for the particular facility. *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 15 (EAB Aug. 24, 2006), 13 E.A.D. at __, *aff’d sub. nom Sierra Club v. U.S. EPA*, 499 F.3d 653 (7th Cir. 2007); *In re Cardinal FG Co.*, 12 E.A.D. 153, 161 (EAB 2005); *In re Three Mountain Power, L.L.C.*, 10 E.A.D. 39, 47 (EAB 2001); *Knauf*, 8 E.A.D. at 128-29; *see also In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 8 (EAB Jan. 28, 2008), 13 E.A.D. at __.

In determining BACT emission limits for the Desert Rock Permit, the Region utilized the “top-down method,” *see* RTC at 13-21, which is described in an EPA manual that provides guidance to permit issuers reviewing new sources under the CAA. *See* Office of Air Quality Planning & Standards, U.S. EPA, *New Source Review Workshop Manual 1* (draft Oct. 1990) (“*NSR Manual*”). Permit issuers often use

the NSR Manual's "top-down" method to perform their BACT analyses, as the Region did in this case. Notably, the NSR Manual is not a binding Agency regulation and consequently strict application of the methodology described in it is not mandatory nor is it the required vehicle for making BACT determinations. *E.g.*, *NMU*, slip op. at 12, 14 E.A.D. at ___; *Prairie State*, slip op. at 7 n.2, 13 E.A.D. at ___; *Knauf*, 8 E.A.D. at 129 n.13. Nevertheless, because it provides a framework for determining BACT that assures adequate consideration of the statutory and regulatory criteria, it has guided state and federal permit issuers, as well as PSD permit applicants, on PSD requirements and policy for years. *E.g.*, *NMU*, slip op. at 12, 14 E.A.D. at ___; *Cardinal*, 12 E.A.D. at 162; *see also In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 183 (EAB 2000) ("This top-down analysis is not a mandatory methodology, but it is frequently used by permitting authorities to ensure that a defensible BACT determination, involving consideration of all requisite statutory and regulatory criteria, is reached."). The NSR Manual summarizes the top-down method for determining BACT as follows:

[T]he top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent -- or "top" -- alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case.

NSR Manual at B.2; *accord Prairie State*, slip op. at 16, 13 E.A.D. at ___; *see also NMU*, slip op. at 13, 14 E.A.D. at ___.

The NSR Manual's recommended top-down analysis employs five steps. NSR Manual at B.5-.9; *see also NMU*, slip op. at 14-15, 14 E.A.D. at ___ (summarizing steps); *Prairie State*, slip op. at 17-18, 13 E.A.D. at ___ (same); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 84 (EAB 1998) (same). Of particular relevance here is step 1, in which the

applicant (and the permitting authority) initially identifies all potentially available control alternatives, or in more specific terms, “*all* control options with *potential* application to the source and pollutant under evaluation.” NSR Manual at B.10 (emphasis added). The NSR Manual lists three general categories of potentially applicable control alternatives: (1) inherently lower emitting processes and/or practices; (2) add-on controls; and (3) combinations of the two. *Id.* The BACT analysis should include a consideration of potentially applicable control techniques from all three. *Id.*

Regarding the scope of the step 1 analysis, as the Manual explains, “[a]pplicants are expected to identify *all demonstrated and potentially applicable* control technology alternatives.” *Id.* at B.11 (emphasis added). Thus, “[t]he control alternatives should include not only existing controls for the source category in question, but also (through technology transfer) controls applied to similar source categories and gas streams, and innovative control technologies.” *Id.* at B.5. “Technologies employed outside the United States” should also be considered. *Id.* The Manual lists a number of information resources that applicants should consider in performing the BACT step 1 analysis, including other federal, state, and local new source review permits. *Id.* at B.11. Thus, the BACT step 1 analysis is intended to be very broad, leading to the development of a comprehensive list of control options. *In re ConocoPhillips Co.*, PSD Appeal No. 07-02, slip op. at 28 (EAB June 2, 2008), 13 E.A.D. at __; *Knauf*, 8 E.A.D. at 130. The Board has previously held that failure to consider all potentially applicable control options is grounds for remand. *See, e.g., Knauf*, 8 E.A.D. at 140-41; *In re Hibbing Taconite Co.*, 2 E.A.D. 838, 842-43 (Adm’r 1989); *see also Prairie State*, slip op. at 19-37, 13 E.A.D. at __ (applying step 1).

In the second step, the permit issuer eliminates “technically infeasible” options from those identified as potentially available at step 1. NSR Manual at B.7. This step involves first determining for each technology whether it is “demonstrated,” in other words, whether it has been installed and operated successfully elsewhere on a similar facility. *Id.* at B.17. If it has not been demonstrated, the permit issuer

then performs a somewhat more difficult analysis: whether the technology is both “available” and “applicable.” *Id.* at B.17-.22. Technologies identified in step 1 as “potentially” available, but that are neither demonstrated nor found after careful review to be both available and applicable, are eliminated under step 2 from further analysis. *Id.*; *see e.g., Prairie State*, slip op. at 44-49, 13 E.A.D. at ___ (reviewing step 2 analysis); *Cardinal*, 12 E.A.D. at 163-168 (same); *Steel Dynamics*, 9 E.A.D. at 199-202 (same).

In step 3, the permit issuer ranks the remaining control technologies and then lists them in order of control effectiveness for the pollutant in question, with the most effective alternative at the top. NSR Manual at B.7, .22. A step 3 analysis includes making determinations about comparative control efficiency among control techniques employing different emission performance levels and different units of measure of their effectiveness. *Id.* at B.22-25; *Newmont*, 12 E.A.D. at 459-64 (evaluating challenge to step 3 analysis).

In the fourth step of the analysis, the permitting authority considers energy, environmental, and economic impacts and confirms the top alternative as appropriate or determines it to be inappropriate. NSR Manual at B.8-9, .26-.53. Thus, it is in this step that issues surrounding the relative cost effectiveness of the alternative technologies are considered. *Id.* at B.31-46. The purpose of step 4 is to either validate the suitability of the top control option identified or provide a clear justification as to why that option should not be selected as BACT. *Id.* at B.26; *see also Prairie State*, slip op. at 49-59, 13 E.A.D. at ___ (considering the application of step 4); *Three Mountain Power*, 10 E.A.D. at 42 n.3 (evaluating environmental impacts); *Steel Dynamics*, 9 E.A.D. at 202-07, 212-13 (remanding permit because cost-effectiveness analysis under step 4 was incomplete).

Finally, under step 5, the permit issuer selects the most effective control alternative not eliminated in step 4. NSR Manual at B.9, .53. BACT is set as an emissions limit for a specific pollutant that is appropriate for the selected control method. *Id.* at B.53-.54; *see also*

NMU, slip op. at 15, 14 E.A.D. at __ (explaining five-step process); *Prairie State*, slip op. at 18, 13 E.A.D. at __ (same).

3. *The Region Abused Its Discretion in Concluding that IGCC “Redefines the Source”*

In its final determination for the Desert Rock Permit, the Region did not consider an integrated gasification combined cycle or, as previously defined, “IGCC,” system as a potentially available control technology in step 1 of its BACT analysis. *See* RTC at 13 (specifically stating that the Region declined to perform a detailed evaluation of IGCC “at or beyond step 1 of the top-down BACT process”). Instead, the Region considered the technology as an “alternative” under another PSD provision, section 165(a)(2), 42 U.S.C. § 7475(a)(2).⁵² *See id.* at 10-11, 13-21 & app. A. The Region explained its rationale for considering IGCC under the alternatives provision rather than the BACT provision in its Response to Comments document, stating that it retains discretion not to list options in step 1 of the BACT analysis that it believes would fundamentally “redefine” the proposed source and that IGCC would “redefine the source” proposed by the applicant. *Id.* at 13-20.

As an initial matter, in order to determine whether the Region appropriately declined to consider IGCC under its BACT analysis for the Desert Rock Permit, it is important to understand two underlying concepts: (1) how IGCC generally works and (2) what is meant by “redefining the source.”

a. *Description of IGCC and History of Its Applicability*

In a typical pulverized coal (“PC”) combustion-based electric generating facility, such as that proposed for the Facility, coal is burned

⁵² CAA section 165(a)(2) requires that the proposed permit be subject to a public hearing “with opportunity for interested persons * * * to appear and submit written or oral presentations on the air quality impact of such source, *alternatives thereto*, control technology requirements, and other appropriate considerations[.]” CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2) (emphasis added).

to create heat, which is used to boil water, creating steam that drives a steam turbine power generator. See A.R. 120.10, at 2-10 to -154 (U.S. EPA, EPA-430/R-06-006, *Final Report, Environmental Footprints and Costs of Coal-Based Integrated Gasification Combined Cycle and Pulverized Coal Technologies* (2006)) [hereinafter *EPA 2006 Report on IGCC and PC Technologies*]; DR Resp. at 55. IGCC, on the other hand, is a dual electric-power-generating system. See *EPA 2006 Report on IGCC and PC Technologies* at 2-4. It too uses coal, but in an initial “gasification” part of the process, the coal is chemically converted into a synthetic gas (“syngas”). *Id.*; *Christian County*, slip op. at 3, 13 E.A.D. at ___. The syngas is cleaned to remove various pollutants, such as particulate matter, mercury, sulfur compounds, ammonia, and other acid gases, and is then burned in a gas turbine to generate electric power.⁵³ *EPA 2006 Report on IGCC and PC Technologies* at 2-4; *Christian County*, slip op. at 3, 13 E.A.D. at ___. Heat is recovered from the gas turbine and the gasification process and is then used to produce additional power using a steam turbine. *EPA 2006 Report on IGCC and PC Technologies* at 2-4; *Christian County*, slip op. at 3, 13 E.A.D. at ___. Thus, as the Board explained in *Prairie State*, “IGCC is not simply an add-on emissions control technology,” but instead requires a differently designed power block. Slip op. at 35, 13 E.A.D. at ___.

IGCC has been considered a potentially applicable control technique under step 1 of BACT for coal-fired electric generating plants in at least two PSD permits that the Board has reviewed. In 2005, the Illinois Environmental Protection Agency (“IEPA”) – which issues PSD permits under a delegation of authority from Region 5 – found IGCC to be a potentially applicable control technique for two pollutants, SO₂ and NO_x, for a proposed mine-mouth, coal-fuel powered generating plant.

⁵³ Notably, the EPA Report states that “it is generally accepted that the IGCC system, by removing most pollutants from the syngas prior to combustion, is capable of meeting more stringent emission standards than PC technologies.” *EPA 2006 Report on IGCC and PC Technologies* at 2-4; see also *Christian County*, slip op. at 19, 13 E.A.D. at ___ (comparing emissions for sulfur dioxide). The Report further remarks that “[i]t is also generally accepted that IGCC costs are higher and more uncertain than for PC plants, because PC technology has been demonstrated at many more facilities.” *EPA 2006 Report on IGCC and PC Technologies* at 2-4.

See id. at 5-6, 45, 13 E.A.D. at ___. In its permit determination for the Prairie State Generating Station, IEPA explained that it had considered IGCC as a potentially applicable control technique under step 1 of BACT because it had concluded “that IGCC is a production process that can be used to produce electricity from coal, that IGCC is a technically feasible production process, and that * * * it qualifies as an alternative emission control technique that must be fully addressed in the BACT demonstration for the proposed plant.” *Id.* at 35 n.30, 13 E.A.D. at ___ (citation and quotations omitted). Ultimately, however, because IEPA concluded that IGCC had not been shown to achieve greater emission reductions than the technology proposed by the applicant, it did not select IGCC as BACT for the Prairie State Generating Station. *Id.* at 35, 45-47, 13 E.A.D. at ___. Thus, in that case, IGCC was included in the BACT analysis but was dismissed from further BACT consideration at step 2.

In the second case, *In re Christian County Generation, LLC*, IEPA – again acting under a delegation of authority from Region 5 – once more considered IGCC as a potentially applicable control technology in BACT step 1 for a proposed coal-fired generating plant, the Taylorville Energy Center. *See slip op.* at 2-4, 13 E.A.D. at ___. In fact, in that case, after consideration of IGCC in all five steps of the BACT analysis, IGCC was ultimately *selected as BACT* for the facility. *See id.* at 3, 18-19, 13 E.A.D. at ___.

Because IEPA issues PSD permits under a delegation of authority from EPA, these two permits are considered EPA-issued under federal law.⁵⁴ As the preamble to the Agency’s permitting regulations explains, “[f]or the purposes of Part 124, a delegate State stands in the shoes of the Regional Administrator * * * [and] must follow the procedural requirements of Part 124. * * * A permit issued by a delegate is still an ‘EPA-issued permit’ * * *.” *Consolidated Permit Regulations*,

⁵⁴ Significantly, as explained in Part III.B.2 *supra*, the NSR Manual suggests that applicants review recently issued federal PSD permits, such as the permit at issue in *Christian County*, when “identify[ing] all demonstrated and potentially applicable control technology alternatives.” NSR Manual at B.11.

45 Fed. Reg. 33,290, 33,413 (May 19, 1980); *accord Prairie State*, slip op. at 5 n.1, 13 E.A.D. at __ (“Permits issued by states acting with delegated authority are considered EPA-issued permits.”); *Indeck*, slip op. at 105, 13 E.A.D. at __ (“Where EPA delegates administration of the federal PSD program, the delegate state implements the substantive and procedural aspects of the federal PSD regulations on behalf of EPA * * * [thereby] stand[ing] in the shoes of EPA, and the permit remains a federal action * * *.” (quoting EPA’s Offices of Air and Radiation and of General Counsel)); *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 701 n.1 (EAB 2001); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996); *see also* 40 C.F.R. § 124.41 (definitions applicable to federal PSD permits).

b. “Redefinition of the Source”

“‘Redefining the source’ is a term of art described in the NSR Manual,” *Knauf*, 8 E.A.D. at 136, although the concept predates the 1990 manual, *see, e.g., Hibbing*, 2 E.A.D. at 843 & n.12; *In re Pennsauken County*, 2 E.A.D. 667, 673 (Adm’r 1988). As the Board explained in *Knauf*, “[t]he Manual states that it is legitimate to look at inherently lower-polluting processes in the BACT analysis, but EPA has not generally required a source to change (i.e., redefine) its basic design.” 8 E.A.D. at 136 (citing NSR Manual at B.13). The Board further explained that, while “it is not EPA’s policy to require a source to employ a different design, redefinition of the source is not always prohibited. This is a matter for the permitting authority’s discretion.” *Id.* The NSR Manual explains the concept as follows:

Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. * * * However, there may be instances where, in the permit authority’s judgment, the consideration of alternative production processes is warranted and appropriate for consideration in the BACT analysis. * * * In such cases, the permit agency may require the

applicant to include the inherently lower-polluting process in the list of BACT candidates.

In some cases, a given production process or emissions unit can be made to be inherently less polluting * * * . In such cases the ability of design considerations to make the process inherently less polluting must be considered as a control alternative for the source.

NSR Manual at B.13-14; *see also Prairie State*, slip op. at 23, 33, 13 E.A.D. at __ (discussing same provisions).

In the earliest case referring to the “redefinition of the source” concept, the Administrator denied a petition urging the Agency to require use of existing power plants in lieu of the proposed source, a municipal waste combustor, because the Administrator concluded petitioner was essentially “redefining the source.” *Pennsauken*, 2 E.A.D. at 673. The Administrator stated that, while “imposition of the conditions may, among other things, have a profound effect on the viability of the proposed facility as conceived by the applicant, the conditions themselves are not intended to redefine the source.” *Id.* Consequently, he concluded that “permit conditions defining the emissions control systems ‘are imposed on the source *as the applicant has defined it*’ and [] ‘the source itself is not a condition of the permit.’” *Prairie State*, slip op. at 29, 13 E.A.D. at __ (quoting *Pennsauken*, 2 E.A.D. at 673 (emphasis added)). As the Administrator further elaborated in a later case: “[t]raditionally, EPA has not required a PSD applicant to redefine the fundamental scope of its project.” *Hibbing*, 2 E.A.D. at 843 (citing *Pennsauken*); *accord In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 793 n.38 (Adm’r 1992).

More recently, the Board has discussed the application and scope of the “redefining the source” policy in two cases: *Prairie State* and *NMU*. In fact, in *Prairie State* – a case in which participants’ arguments bear a marked resemblance to the ones raised here – the Board painstakingly analyzed the history, basis, and application of the

“policy”⁵⁵ and its relationship to the statutory BACT provisions. Slip op. at 19-37, 13 E.A.D. at ___. Rather than repeat the entire analysis here, the Board merely summarizes its relevant key points.

In *Prairie State*, as in this case, petitioners challenged the permit issuer’s failure to consider an alleged potential control option in step 1 of the BACT analysis. Petitioners there argued that IEPA’s failure to consider low-sulfur coal at step 1 violated the statutory BACT definitional requirement that “clean fuels” be considered. *Id.* at 21, 13 E.A.D. at ___.⁵⁶ In response, IEPA took the same position the Region is taking here – that “it did not abuse its discretion in relying upon the ‘redefining the source doctrine’ when it concluded that consideration of [the option at issue] would redefine the proposed source and, therefore, may be eliminated from further consideration at step 1.” *Id.* at 23, 13 E.A.D. at ___.

In *Prairie State*, the Board provided a lengthy discussion of the basis behind the Agency’s longstanding “redefining the source policy,” explaining that the “policy” resolves ambiguity found in the statutory text of CAA sections 165 and 169.⁵⁷ *See id.* at 23-30, 13 E.A.D. at ___.

⁵⁵ While often referred to as a “policy,” as discussed below, it is clear from the description in *Prairie State* both before the Board and on appeal to the Seventh Circuit that the policy is really an agency interpretation of ambiguous statutory provisions.

⁵⁶ As noted above, the statute defines BACT as “an emission limitation” achievable by “application of production processes and available methods, systems, and techniques, *including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques* for control of each such pollutant.” CAA § 169(3), 42 U.S.C. § 7479(3) (emphasis added). Notably, “clean fuels” is one of the terms listed in the BACT definition’s “production processes and available methods, systems, and techniques” along with “innovative fuel combustion techniques” and “fuel cleaning,” the statutory terms New Mexico and Conservation Petitioners relied upon in their petitions. Replacing *Prairie State* petitioners’ “clean fuels” references with the other two listed terms – “fuel cleaning” and “innovative fuel combustion techniques” – would essentially yield the same arguments raised by New Mexico and NGO Petitioners.

⁵⁷ Consequently, Petitioners’ argument that certain terms in sections 165 and 169 “require” consideration of a specific technology under BACT, *e.g.*, NGO Suppl. Br. (continued...)

This ambiguity arises from several statutory words and phrases, including but not limited to the fact that the BACT definition's requirement to consider the "application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques" cannot be read in isolation from the requirement that the "proposed facility" be "subject to" BACT.⁵⁸ *Id.* at 29, 13 E.A.D. at __; *see also id.* at 21-30 & nn.15, 19, 22, 13 E.A.D. at __. The Board also noted that Congress designed the PSD program as a permitting program in which the permit applicant initiates the process. *See id.* at 28-29, 13 E.A.D. at __. The Board concluded that the heart of the parties' debate in *Prairie State* was not whether "Congress intended the permit applicant to have the prerogative to define certain aspects of the proposed facility that may not be redesigned through application of BACT," but where the "proper demarcation between those aspects of a proposed facility that are subject to modification through the application of BACT and those that are not" should be drawn. *Id.* at 26, 13 E.A.D. at __. In other words, the question the Board decided in *Prairie State* was not whether the Agency may interpret the CAA PSD provisions to contain a limit on redefining

⁵⁷(...continued)

at 88; NM Suppl. Br. at 18, is somewhat misplaced because such an argument implicitly fails to recognize the fact that those terms are subject to the Agency's interpretation, which refines their meaning (i.e., the redefining the source policy). *See Sierra Club*, 499 F.3d at 655. For this reason, rather than debating the meaning of the ambiguous terms, the discussion in the text focuses on the policy itself and its applicability here.

⁵⁸ Other sources of ambiguity in the CAA include section 165(a)(2)'s separate listing of "alternatives" and "control technology requirements," which indicates a distinction between the two concepts. *See Prairie State*, slip op. at 21-29 & nn. 15, 22, 13 E.A.D. at __; *see also Sierra Club*, 499 F.3d at 655 (noting that requiring the consideration of certain hypothetical "clean fuels" under BACT, such as the redesign of a coal-fired plant into a nuclear one, would "stretch the term 'control technology' beyond the breaking point and collide with the 'alternatives' provision of the statute"); RTC at 14-16 (same). Additionally, the BACT definition explicitly requires a "case-by-case" determination, suggesting that an across-the-board application of a control technology would not be appropriate. CAA § 169(3), 42 U.S.C. § 7479(3).

the source, but rather how such an interpretation should properly be applied.⁵⁹

On appeal, the Seventh Circuit generally agreed with this analysis. The Court acknowledged the ambiguity in the statute, particularly referring to the CAA's requirement that a "proposed facility" must have the "best available control technology" and that "clean fuels" be considered and also noted that a separate provision from the one requiring adoption of BACT directs EPA to consider "alternatives" suggested by interested persons. *Sierra Club v U.S. EPA*, 499 F.3d 653, 654-55 (7th Cir. 2007). Based on this ambiguity, the Court deferred to the Agency, stating that "[r]efining the statutory definition of 'control technology' – 'production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques' – to exclude redesign is the kind of judgment by an administrative agency to which a reviewing court should defer." *Id.* at 655. The Court thus concluded that "the crucial question [is] where control technology ends and a redesign of the 'proposed facility' begins."⁶⁰ *Id.*

c. *The Proper Test for Redesign*

In this case, the real debate centers around the same fundamental question raised in *Prairie State*: when does the imposition of a control

⁵⁹ Thus, in *Prairie State*, the Board did not explicitly address the statutory interpretation debate over the meaning of "clean fuels" in the BACT definition.

⁶⁰ The Seventh Circuit concluded that EPA, as the author of the underlying distinction, should draw the dividing line "within reason," but also implied that an interpretation that would read "clean fuels" entirely out of the statute would be questionable. *Sierra Club*, 499 F.3d at 655-56; *see also NMU*, slip op. at 27 ("Clean fuels may not be 'read out' of the Act merely because their use requires 'some adjustment' to the proposed technology." (quoting *Sierra Club*, 499 F.3d at 656)). The Seventh Circuit also noted that this question "require[s] an expert judgment." *Sierra Club*, 499 F.3d at 656. The Court further observed that such a question is "one of degree and the treatment of differences of degree in a technically complex field with limited statutory guidance is entrusted to the judgment of the agency that administers the regulatory scheme rather than to courts of generalist judges." *Id.*

technology require enough of a redesign of the proposed facility that it strays over the dividing line to become an impermissible redefinition of the source? More specifically, did the Region correctly conclude that imposition of IGCC would so substantially alter the purpose or basic design of Desert Rock's proposed facility that it should be considered a redefinition of the source?

The Board articulated the proper test to be used to answer that question in *Prairie State*. As the Board explained there, the permit applicant initially “defines the proposed facility’s end, object, aim, or purpose – that is the facility’s basic design,”⁶¹ although the applicant’s definition must be “for reasons independent of air permitting.”⁶² *Prairie State*, slip op. at 29, 30 n.23, 13 E.A.D. at __; *accord NMU*, slip op. at 26 & n.28, 14 E.A.D. at __. The inquiry, however, does not end there. The permit issuer (here, the Region) should take a “hard look” at the applicant’s determination in order to discern which design elements are inherent for the applicant’s purpose and which design elements “may be changed to achieve pollutant emissions reductions without disrupting the applicant’s basic business purpose for the proposed facility,” while keeping in mind that BACT, in most cases, should not be applied to regulate the applicant’s purpose or objective for the proposed facility. *Prairie State*, slip op. at 30, 33-34, 13 E.A.D. at __; *accord NMU*, slip op. at 26-27, 14 E.A.D. at __.

⁶¹ Regarding the meaning of the term “design,” the Board in *Prairie State* explained that “[a]s a practical matter, ‘design,’ understood as a schematic drawing showing the means to an end, and ‘design,’ used to identify the end, object, or purpose, are inherently intertwined.” Slip op. at 28, 13 E.A.D. at __. Thus, “[t]he permit applicant’s schematic design can be presumed to be directed at accomplishing the permit applicant’s purpose or basic design for the proposed facility.” *Id.*

⁶² Thus considerations such as cost savings or avoidance of risks associated with new, innovative, or transferable technologies would generally not justify treating a proposed facility’s design element as basic or fundamental. *Prairie State*, slip op. at 30 n.23, 13 E.A.D. at __; *NMU*, slip op. at 26 n.28, 14 E.A.D. at __. These factors, however, could be considered elsewhere in the BACT analysis, for example at step 2 or 4. See *Prairie State*, slip op. at 30 n.23, 13 E.A.D. at __ (citing examples); see also further discussion *infra*.

To determine whether the Region properly concluded that IGCC would redefine the source in this case, keeping in mind that the Region has broad discretion on this issue, the Board first looks at the administrative record to see how the applicant defined its “goal, objectives, purpose, or basic design” for the proposed Facility in its application. The Board then looks at whether the Region took a “hard look” at the applicant’s stated purpose to determine which design elements were inherent to the applicant’s basic purpose or objective and which elements could be changed to achieve pollutant emissions reductions without disrupting the purpose. Based on the current administrative record, the Board concludes that the Region abused its discretion in declining to consider IGCC in step 1 of the BACT analysis for the Desert Rock Facility.

d. *Treatment of IGCC in the Administrative Record*

Looking at the initial application, it is clear, and telling, that the applicant itself believed that IGCC was consistent with the proposed facility’s purpose, objective, or basic design. In its 2004 application, the then-applicant Steag stated that its proposed project was the construction of “a mine-mouth coal-fired power plant on Navajo Nation land.” A.R. 6, at 2-2. It further stated that “[f]our technologies may be considered for a new large coal fueled power plant * * * : pulverized coal combustion (sub-critical steam production); pulverized coal combustion (supercritical steam production); circulating fluidized bed (CFB) combustion; and *Integrated Gasification Combined Cycle (IGCC)*.” *Id.* at 2-2 (emphasis added). A few pages later, the applicant rejected IGCC as an option because it “is not currently an available or commercially viable technology for a 1,500 MW commercial coal-fired power plant.” *Id.* at 2-4. Thus, at the time of the initial application in 2004, the applicant’s rationale for not considering IGCC appears to have been its “unavailability” and its lack of commercial viability.⁶³

⁶³ The former, if supported by the administrative record and withstanding the permit issuer’s “hard look,” would be a legitimate reason to exclude IGCC from BACT step 1. See NSR Manual at B.5; *Prairie State*, slip op. at 29-34, 13 E.A.D. at ___. The
(continued...)

Significantly, the applicant does not suggest that IGCC would somehow be outside the fundamental scope of its project; in fact, by listing IGCC as a possible technology to implement its project, it actually indicates the reverse.⁶⁴ While the applicant may have backtracked on these initial statements at some point,⁶⁵ this does not change the fact that it originally listed IGCC as a potential technology that could be used to meet the proposed facility's basic business objective.⁶⁶

The Region, in its Ambient Air Quality Impact Report ("AAQIR") – the document the Region developed as the statement of basis and fact sheet for the proposed permit and which included the Region's initial BACT analysis for the Facility, *see* A.R. 46, at 6-35 – similarly noted that the applicant proposed to construct a "1,500 [MW] mine-mouth, coal-fired power plant," *id.* at 1. The Region explained that the proposed permit would allow use of two supercritical pulverized coal boilers for the Facility. *Id.* at 2. As part of its BACT analysis, the Region first considered a number of add-on control technologies to the supercritical pulverized coal boilers for each regulated pollutant. *See, e.g., id.* at 8-15 (considering four potentially applicable add-on control technologies for NO_x). In addition, the Region separately considered whether an alternate technology for combusting coal – CFB combustion

⁶³(...continued)

latter, however, is more properly considered a BACT step 2 or 4 issue, depending on whether its viability is questionable from a technical feasibility standpoint or an economic/cost standpoint. *See* NSR Manual at B.7-.9; *see also* discussion *infra*.

⁶⁴ Although the Board does not understand how, based on such statements in the application, the Agency found that IGCC would be redefining the source, the Board continues its analysis in the interest of completeness.

⁶⁵ It is unclear when Desert Rock first took its revised position that IGCC would redefine the source; at a minimum, however, Desert Rock has consistently taken this position during the appeal process. *E.g.,* DR Opp'n Br. at 21; DR Resp. to Petitions at 49, 51.

⁶⁶ As noted above, the new rationale is subject to scrutiny to determine whether it is "independent of air quality permitting."

– was potentially applicable.⁶⁷ *Id.* at 32-35. The Region concluded that CFB was not “an appropriate technology for the project” and would “result in higher emissions than the Facility as proposed.”⁶⁸ *Id.* at 35. Finally, the Region noted that it had not included IGCC as an alternate technology to a pulverized coal boiler in its BACT step 1 analysis because IGCC “would fundamentally change the basic design of the proposed source” and “would be redefining the source.” *Id.* The Region did not, however, address either of the reasons the applicant had relied on to ultimately exclude IGCC from consideration, i.e., its availability (or lack thereof) or its commercial viability, nor did the Region explain why IGCC would be redefining the source when the application had suggested the reverse.

In response to the proposed permit and AAQIR, several commenters questioned the Region’s failure to consider IGCC as part of the BACT analysis. *See* RTC at 12 (listing numerous comments on this issue). Some commenters noted that the technology was now “available.” RTC at 12. In fact, a group of environmental organizations, including the seven NGO Petitioners, submitted a comment that pressed for the use of IGCC and “provided [its] own BACT evaluation of the availability, feasibility, cost, emission rates, and other environmental impacts of IGCC.” RTC at 21. Moreover, that same commenter argued that the Region’s determination that IGCC redefined the source at the Desert Rock facility ran counter to the Board’s “favorable consideration” of IGCC in *Prairie State*. A.R. 66, at 21-22 & n.38.

⁶⁷ The Region explained that it had not included the CFB analysis in the pollutant-by-pollutant portion of its BACT assessment “because an applicant must choose either a pulverized coal boiler or CFB for all pollutants.” A.R. 46, at 32.

⁶⁸ The Region also looked at, to some degree, sub-critical pulverized coal combustion. *See* A.R. 46, at 32 tbl.12 (including emissions for sub-critical PC). Therefore, in the BACT step 1 analysis in its AAQIR, the Region considered three of the four technologies the applicant listed in its application as potential technologies, at least to some degree. IGCC was the only technology the applicant listed that the Region failed to consider.

Responding to these comments in its Final Permit determination, the Region stated that it “does not agree that the [CAA] requires a detailed evaluation of IGCC for the proposed facility, at or beyond step 1 of the top-down BACT process.” RTC at 13. Thus, as noted earlier, instead of analyzing IGCC under BACT step 1, the Region continued to consider IGCC as an “alternative” under section 165(a)(2), 42 U.S.C. § 7475(a)(2).⁶⁹ *Id.*; *see also id.* app. A at 220, 224-26 (Region’s consideration of IGCC as an “alternative”). The Region stated that it had not “been persuaded to change [its] view that this alternative process would redefine the source proposed by the applicant and thus need not be listed as a potentially applicable control option at step 1.” *Id.* at 13. The Region explained that, in its view, IGCC “would fundamentally change the nature of the proposed major source as it would change the basic design of the equipment Sithe proposed to install.” *Id.* at 19. The Region also analogized the design changes that would be necessitated by IGCC to those in previous Board and Administrator cases in which “redefining the source” was relied upon to exclude consideration of the use of a different type of electric generating facility as BACT. *Id.* at 19 (referring to *In re SEI Birchwood, Inc.*, 5 E.A.D. 25 (EAB 1994) (noting in dicta that petitioner’s preference for natural gas over coal did not demonstrate clear error by the delegated state permitting authority); *In re Old Dominion Elec. Coop.*, 3 E.A.D. 779 (Adm’r 1992)). Finally, the Region argued that “the core process of gasification at an IGCC facility

⁶⁹ The level of analysis in a permit issuer’s consideration of a technology under the alternatives provision, CAA section 165(a)(2), is not necessarily identical to the level of analysis that the permit issuer would undertake for the same technology under the BACT provision, CAA section 165(a)(4). For example, while the consideration of a technology as part of the BACT analysis may be quite extensive under the NSR Manual guidelines, under the PSD alternatives provision, “the extent of the permitting authority’s consideration and analysis of alternatives need be no broader than the analysis supplied in public comments.” *Prairie State*, slip op. at 39, 13 E.A.D. at ___ (quotation omitted); *see also id.* at 41-43, 13 E.A.D. at ___ (discussing petitioner’s argument about the permit issuer’s alternatives discussion of “need” for facility).

is fundamentally different than operating a boiler” and thus would require “different types of expertise to operate.”⁷⁰ *Id.* at 19-20.

Significantly, the Region failed to address several critical questions in its consideration of IGCC and its BACT step 1 analysis. First, the Region did not take a “hard look” to see how Desert Rock defined its project in order to discern which design elements were inherent to that purpose and which design elements could be changed to achieve pollutant emission reductions without disrupting Desert Rock’s basic business purpose. If it had followed the analytical framework the Board outlined in *Prairie State*, it would have seen that, at least in its initial application, Desert Rock admitted that IGCC was a “technolog[y] that may be considered for a coal fueled power plant,” such as its proposed facility.⁷¹ A.R. 6, at 2-2.

Second, the Region did not explain in its BACT analysis how IGCC could be considered as a “potentially available control technology” under step 1 of the BACT analysis for two other EPA-issued permits (i.e., federal permitting decisions) at similar facilities – the Christian County coal-fired electric generating plant and the Prairie State mine-mouth, coal-fired electric generating station – but was not likewise considered by the Agency at the Desert Rock Facility, which is proposed to be a mine-mouth, coal-fired electric generating station.⁷² Nor did the

⁷⁰ This latter argument is particularly weak in the PSD context. Even where add-on control technologies are required, such technology may require different expertise than the applicant originally planned in its proposed facility. The mere fact that different expertise may be required does not eliminate a technology from BACT step 1. Indeed, if such a factor is considered in the BACT analysis, it may be best considered in step 4.

⁷¹ Again, at that time, the applicant took the position that IGCC, while theoretically feasible, was not currently available. A.R. 6, at 2-2, 2-4.

⁷² The Region did attempt to distinguish its determination from that of other states that have concluded that IGCC is a “potentially available control technology” for coal-fired steam electric generating facilities by arguing that, because the decision of where to draw the line is discretionary, “[s]tate decisions as to how to conduct a BACT analysis do not necessarily set the bar for EPA.” RTC at 20. The Region, however, did
(continued...)

Region explain why use of IGCC was considered “redefining the source” at the coal-fired electric generating plant proposed for Desert Rock when it had not been a “redefinition of the source” at two earlier EPA-permitted coal-fired electric generating plants.

While it is true that each BACT analysis is a case-by-case determination, when a technology has been considered a “potentially available control technology” at otherwise seemingly similar facilities in previous permitting actions, one would expect some explanation as to why the previously “potentially available control technology” is no longer potentially available at the latest facility. *See* NSR Manual at B.11 (stating that “[a]pplicants are expected to identify all demonstrated and potentially applicable control technology alternatives,” including federal new source review permits), B.35 (“Consistency in the approach to decision-making is a primary objective of the top-down BACT approach.”); *Indeck*, slip op. at 79-80, 13 E.A.D. at __ (“[T]he existence of a similar facility with a lower emissions level creates an obligation for [the permit applicant] to consider or document whether that same emissions limit can be achieved at [the] proposed facility.”); *In re Inter-Power of NY, Inc.*, 5 E.A.D. 130, 135 (EAB 1994) (“In determining the most stringent control option, the proposed source is required to look at other recently permitted sources.”); *see also NMU*, slip op. at 21, 14 E.A.D. at __ (questioning the permit issuer’s passing over BACT emission limits from the most similarly situated facility without any justification).⁷³ This is particularly so since, at the time the

⁷²(...continued)

not provide any factual information in its Response to Comments that would distinguish the various coal-fired power plants. *See id.* Interestingly, the Region went on to note that “because Illinois administers the Federal PSD program under a delegation agreement with EPA Region V, Illinois must act in a manner consistent with EPA’s interpretation of the Clean Air Act and controlling regulations.” *Id.* at 20-21. The Region has not asserted that Illinois’s actions regarding the Prairie State and Christian County facilities were inconsistent with the CAA and applicable regulations.

⁷³ This should not be read to imply or suggest an absolute rule that once a technology is considered BACT, it always must be BACT. Typically, however, once a technology qualifies as “a potentially applicable control option” at a certain type of
(continued...)

Region issued the permit, IGCC had actually been selected as the emission control technology to be implemented at the Christian County facility. *See Christian County*, slip op. at 3, 18-19, 13 E.A.D. at ___.

Similarly, while a permit issuer has broad discretion in determining whether or not an alternative production process would “redefine the source,” where a permit issuer concludes that a particular technology is not a “redefinition of the source” at one facility, if it later decides that the particular technology does “redefine the source” at a similar facility, it should provide some rational explanation justifying the differential treatment. As the Board has stated on a number of occasions, the BACT analysis is one of the most critical elements of the PSD permitting process and thus must be well documented in the administrative record. *Indeck*, slip op. at 80, 13 E.A.D. at ___; *Knauf*, 8 E.A.D. at 131; *Steel Dynamics*, 9 E.A.D. at 224. There may be a factual distinction between the three facilities justifying the different outcomes, but such distinction is not articulated in the record at all, much less to the standard required. *See Steel Dynamics*, 9 E.A.D. at 224 (requiring a greater degree of explanation, clearly documented in the record, where limits proposed to be imposed on a facility differ from fifteen other comparative facilities).

Furthermore, arguments about the technical viability or the economics of IGCC at the proposed facility are inapplicable at stage 1 of the BACT analysis.⁷⁴ *See, e.g.*, DR Resp. 65-69. As the Board noted in

⁷³(...continued)

facility, it should remain “potentially applicable” thereafter for similar facilities without some distinguishing rationale otherwise. *See* NSR Manual at B.11 (expecting applicants to identify in step 1 all demonstrated and potentially applicable control technology alternatives, including those in federal, state, and local new source review permits). Moreover, the fact that a technology is considered in BACT step 1 does not mean that it would ultimately be considered BACT for that facility.

⁷⁴ In its response to the Petitions, Desert Rock contended that Petitioners’ arguments “are not material to the outcome” of a BACT determination for the Facility “because IGCC is not a feasible business venture and would be worse for the environment.” DR Resp. at 65. Desert Rock explained that it, as well as the original
(continued...)

Prairie State, neither of these factors justify treating a design element as basic or fundamental. Slip op. at 20 n.23, 13 E.A.D. at __; *see also NMU*, slip op. at 26 n.28, 14 E.A.D. at __. The business objective of avoiding risk associated with new, innovative or transferable control technologies and the technical feasibility of such technologies should instead be considered under step 2 of the top-down method. NSR Manual at B.18 (“A source would not be required to experience extended time delays or resource penalties to allow research to be conducted on a technique. Neither is it expected that an applicant would be required to experience extended trials to learn how to apply a technology on a totally new or dissimilar source type.”). Similarly, cost is generally considered later, at step 4. NSR Manual at B.8, B.26-45; *Steel Dynamics*, 9 E.A.D. at 202-07; *see also In re Masonite Corp.*, 5 E.A.D. 551, 564 (EAB 1994); *Inter-Power*, 5 E.A.D. at 135-36, 145-50 & n.33 (considering cost effectiveness issue after all control options selected); *Hibbing*, 2 E.A.D. at 843 (requiring consideration of burning natural gas, rather than petroleum coke, in the BACT analysis notwithstanding the greater cost of natural gas). A permit issuer, therefore, when evaluating whether an applicant’s purpose or design of a facility would be substantially altered by application of a particular technology, should consider whether the facts underlying such 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.

e. *Other Court Decisions Concerning IGCC*

In connection with this IGCC BACT issue, several participants cite recent cases in which state courts have also looked at whether IGCC should be considered in the BACT analysis. *See, e.g.*, D.R. Surreply at 4 (referring to *Blue Skies Alliance v. Tex. Comm’n on Env’tl. Quality*,

⁷⁴(...continued)

parent company Steag, submitted a number of documents to the Region regarding IGCC’s technical feasibility at the site, *id.* at 65-57 & n.34, and that these documents demonstrate that IGCC would be infeasible, *id.* at 67-69.

283 S.W.3d 525 (Tex. App. 2009)); Cons. Reply at 3 n.6 (same);⁷⁵ ACCCE's Mot. to Take Notice of Suppl. Authority at 1 & Ex.1 (attaching copy of *Longleaf Energy Assocs. v. Friends of the Chattahoochee, Inc.*, Nos. A09A037 & A09A0388, 2009 WL 1929192 (Ga. Ct. App. July 7, 2009)); Cons. Pet'rs Resp. to ACCCE's Mot. Regarding Suppl. Authority at 1 (same). Both cases involve state court review of state-issued permits. As such, these cases are not binding on the Board. The Board did, however, consider both courts' analyses in reviewing this issue but did not find that those courts' rejection of IGCC in a BACT step 1 evaluation persuaded it to change its view.

In *Blue Skies*, the Court of Appeals for the Seventh District of Texas analyzed the Texas statutory definition of BACT, which, because the federal definition is incorporated by reference into the state definition, is identical to the CAA BACT definition. 283 S.W.3d at 534 & n.7. The Texas Court of Appeals concluded that "the BACT definition clearly provides that only those control technologies that can be *applied* to the *proposed* major source be considered in the BACT analysis." *Id.* at 535 (emphasis in original). According to the court, "the only control technologies that must be considered in a BACT analysis are those control technologies that can be *incorporated into or added to* the facility as proposed by the applicant," *id.* (emphasis added), and because the court found that there was no evidence that IGCC is "a process that could be applied to the pulverized coal power plant proposed" by the applicant, the court concluded that IGCC need not be considered as BACT, *id.* at 537. In so concluding, the court relied on an extremely narrow definition of the terms "applied" and "application."⁷⁶

⁷⁵ The participants actually cited *Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality*, No. 07-07-0306-CV (Tex. App. Jan. 29, 2009). On April 14, 2009, however, after the participants had filed their briefs citing the case, the Texas Court of Appeals withdrew its January 29, 2009 opinion and issued an opinion in its place. *Blue Skies*, 283 S.W.3d at 528. The discussion below refers solely to the second opinion.

⁷⁶ The term "application" has several definitions, including "employment as a means: specific use" as in "the [application] of certain new techniques" as well as "the act of laying on or of bringing into contact." Webster's Third New International (continued...)

See id. at 534-37. In fact, under the Texas Court of Appeal’s reading of the statute, only add-on controls – because, according to the court, only these could be *applied* to the proposed source – could be considered BACT.⁷⁷ This reading is inconsistent with the language, purpose, and legislative history of the CAA as well as EPA’s longstanding interpretation and practice. Thus, the Board respectfully disagrees with the Texas Court of Appeal’s statutory analysis and its conclusion based on its interpretation of the statute.⁷⁸

More recently, the Georgia Court of Appeals held that the Superior Court had “erred by ruling *as a matter of law* that the CAA required consideration of IGCC technology in the BACT analysis” for

⁷⁶(...continued)

Dictionary at 105 (1993). The word “apply” similarly has several definitions, including “to make use of as suitable, fitting, or relevant,” “to put to use esp[ecially] for some practical purpose,” “to use for a particular purpose or in a particular case,” “to put into effect,” and “to place in contact: * * * lay or spread on: overlay * * * : superpose.” *Id.* at 105. While the Texas court appears to have relied on the latter definitions of these words (i.e., “the laying on” or “superposing”), which, notably, are the much narrower definitions, the Board believes it more appropriate to rely on the other, broader definitions (i.e., “employment as a means” and “specific use” and “make use of as suitable, fitting, or relevant”). This broader reading is more consistent with the Agency’s longstanding interpretation of the statutory term “application,” as evidenced by the 1990 NSR Manual’s description of BACT step 1 as including both “inherently lower emitting processes and/or practices” and “add-on controls.” *See supra* Part III.B.2 (citing NSR Manual at B.10); *Knauf*, 8 E.A.D. at 129 (explaining that BACT analysis involves considering add-on control technology as well as inherently lower polluting processes).

⁷⁷ *See supra* note 76.

⁷⁸ The court also placed significant emphasis on the *proposed* source. *See, e.g., Blue Skies*, 283 S.W.3d at 534, 535. In so doing, the Texas court appears to implicitly rely on the applicant’s planned design without taking a “hard look” at which design elements are truly inherent for the applicant’s purpose and which elements may be changed. *See id.* at 534-37. Thus, the Texas court’s analysis is also inconsistent with the approach the Board outlined in *Prairie State* regarding permissible redesigns of facilities. Slip op. at 30, 33-34, 13 E.A.D. at __; *see also* NMU, slip op. at 26-27, 14 E.A.D. at __. The Board respectfully disagrees with the court’s analysis for this additional reason as well.

a proposed coal-fired power plant.⁷⁹ *Longleaf Energy*, 2009 WL 1929192, at *6 (emphasis added). The Superior Court had determined, based on its interpretation of the CAA and a regulation describing types of electric utility steam generating units, that “the CAA mandated consideration of IGCC technology in the BACT analysis.”⁸⁰ *Id.* at *5 (emphasis added). In its decision, the Georgia Court of Appeals rejected the Superior Court’s statutory and regulatory interpretation because the lower court had ignored the “redefining the source” policy and because EPA, in 2009, had amended the regulation upon which it had based its interpretation, eliminating the “relied-upon portion of the regulation.” *Id.* at *6. Significantly, the Georgia Court of Appeals noted that the Superior Court had not reviewed the administrative record evidence concerning the redesign of the power plant that would be necessitated by IGCC. *Id.* at *5.

Because the Georgia Court of Appeal’s holding on the IGCC BACT issue is based on a statutory interpretation question that was not raised in the present matter, that court’s analysis is inapplicable here. Furthermore, neither the Georgia Court of Appeals nor the Superior Court specifically focused on whether the administrative record supported the agency’s and the ALJ’s determination that IGCC would

⁷⁹ The Superior Court had invalidated an air quality permit issued by the Environmental Protection Division (“EPD”) of the Georgia Department of Natural Resources pursuant to the Georgia SIP and upheld by an administrative law judge (“ALJ”) following an evidentiary hearing under the state’s Administrative Procedure Act. *Longleaf Energy*, 2009 WL 1929192, at *2. The EPD and the ALJ had not considered IGCC because both had determined that IGCC would redefine the design of the proposed PC power plant. *Id.* at *5. The permit at issue in this case is one of the permits to which Desert Rock refers in its equal protection argument. *See supra* Part III.A.3.b(iii)(a).

⁸⁰ Based on language contained in a former EPA regulation, 40 C.F.R. § 60.41Da (2008), the Superior Court had concluded that the proposed power plant was the same type of “major emitting facility” within the meaning of the CAA no matter whether it was a PC plant or an IGCC plant, and thus, according to the court, the CAA mandated that IGCC be considered in the BACT analysis. *See* 2009 WL 1929192, at *5-6.

redefine the source.⁸¹ *See id.* at *5-6. The Board’s analysis in *Prairie State, NMU*, and today’s decision emphasize that such an analysis of the underlying administrative record is an essential component of a supportable BACT decision that a proposed control technology redefines the source.

4. *Summary of Conclusions Regarding the Region’s IGCC Analysis*

In sum, while the Region has broad discretion in determining whether imposition of a control technology would “redefine the source,” the Board concludes that, based on the administrative record for this case, the Region’s analysis is inadequate for two reasons. First, the Region did not provide a rational explanation of why IGCC would redefine the source, especially when the applicant itself had indicated in its initial application that IGCC was a technology that could be considered for such a facility (i.e., could satisfy its business purpose), thereby suggesting that IGCC would not redefine the source. *See Prairie State*, slip op. at 30-34, 13 E.A.D. at __ (describing proper analysis for concluding that a redesign is impermissible); *Knauf*, 8 E.A.D. at 139-42 (remanding permit because permit issuer had failed to take sufficiently hard look at design issues). Second, the Region failed to adequately explain its conclusion in light of previously issued federal permits at similar facilities in which IGCC had been considered as a BACT step 1 production process and had not been considered a “redefinition of the source.” *See NMU*, slip op. at 66 (“[A]ny contention that particular fuel choices or related factors would improperly ‘redefine the source’ must be thoroughly explained and supported * * *.”); *see also Knauf*, 8 E.A.D. at 140 (remanding BACT issue where Board could not tell, “based on the record information and arguments made on appeal,” whether a particular control technology and associated limit selected truly qualified as BACT); *Masonite*, 5 E.A.D. at 566-69 (remanding PSD permit because region’s BACT analyses were incomplete); *In re Austin Powder Co.*,

⁸¹ It is possible that, on remand, the Superior Court may reexamine the IGCC question to determine whether the administrative record supports the conclusion that IGCC was an impermissible redesign of the proposed source. *See id.* at *5-6, 11.

6 E.A.D. 713, 720 (EAB 1997) (remanding permit because region's rationale was unclear); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 454 (EAB 1992) (remanding permit because, even though establishing the permit term was an exercise of discretion, record did not "reflect the 'considered judgment' necessary to support the region's determination"). The Board therefore finds that the Region abused its discretion here, based on the current administrative record, and concludes that the Permit should be remanded on this ground so that the Region may either provide a further explanation for its determination that IGCC would "redefine the source" consistent with this decision or reconsider IGCC under step 1 of its BACT analysis. *See, e.g., Austin Powder*, 6 E.A.D. at 720 (remanding permit so that region could either clarify its basis or change permit condition). Because a new step 1 BACT determination could have widespread impacts on the entire Permit, the Board concludes it is appropriate to remand the Permit in its entirety on this ground.⁸²

⁸² Although it is not necessary in this Remand Order to reach the issue of whether the CAA section 169 statutory language requires consideration of IGCC, a question that was raised by New Mexico and the NGO Petitioners, the Board notes that the legislative history of the "innovative fuel combustion techniques" language suggests there may be some outer limits to the "redefining the source policy." During the 1977 debate, Senator Huddleston proposed additional, clarifying language to the committee's proposed section 169 language – the insertion of "innovative combustion techniques" after the word "treatment." He stated:

The definition in the committee bill of best available control technology indicates a consideration for various control strategies by including the phrase "through application of production processes and available methods systems, and techniques, including fuel cleaning or treatment." And I believe it is likely that the concept of BACT is intended to include such technologies as low Btu gasification and fluidized bed combustion. But, this intention is not explicitly spelled out, and I am concerned that without clarification, the possibility of misinterpretation would remain.

It is the purpose of this amendment to leave no doubt that in determining best available control technology, all actions taken by the fuel user are to be taken into account – be they the purchasing or production of fuels which may have been cleaned or up-graded through chemical treatment, gasification, or liquefaction; use of

(continued...)

IV. CONCLUSION

Based on the foregoing, the Board remands the Permit on two independent grounds. The Board first concludes that it is appropriate to grant the Region's motion for voluntary remand. The Board also concludes that, based upon a review of the administrative record, the entire Permit should be remanded to the Region because the Region abused its discretion in declining to consider IGCC in step 1 of the BACT analysis for the Facility. Accordingly, the Board REMANDS the Permit to the Region in its entirety, and PSD Appeal Nos. 08-03, 08-04, 08-05, and 08-06 are DISMISSED. The dismissal of Appeal Nos. 08-03 through 08-06 is without prejudice to the filing of new petitions for review with the Board pursuant to 40 C.F.R. § 124.19 by Petitioners following the Region's issuance of a final permit decision on remand.⁸³

⁸²(...continued)

combustion systems such as fluidized bed combustion which specifically reduce emissions and/or the post-combustion treatment of emissions with cleanup equipment like stack scrubbers.

123 Cong. Rec. S9421, 9435 (1977) (statement of Sen. Huddleston) (emphasis added), *reprinted in* Comm. on Env't and Pub. Works, 95th Cong., Legislative History of the Clean Air Act Amendments of 1977, at 1054 (1978). This clarification of the statutory terms was accepted.

Based on Senator Huddleston's clarification and his explanation of the addition of the language "innovative combustion techniques" to CAA section 169, it appears that the amendments were intended to broaden the definition of BACT so that actions such as the production of gas from coal via gasification would generally be considered in the BACT analysis. While the "redefining the source policy" may play a role in determining on a case-by-case basis what technologies should be considered in a BACT analysis for a facility, as the Seventh Circuit intimated in *Sierra Club v. EPA*, an interpretation that would completely read a statutory term out of the BACT definition would be questionable. *Sierra Club*, 499 F.3d at 656; *see also NMU*, slip op. at 27 (acknowledging the Seventh Circuit's language in *Sierra Club*).

⁸³ In any petitions for review filed after the Region's issuance of a new permit decision, Petitioners will be able both to reassert objections already raised in their current petitions and to assert objections based on any changes made to the permit decisions on remand. Persons other than Petitioners, on the other hand, will only be able to petition
(continued...)

An appeal of the Region's decision on remand is required to exhaust administrative remedies. 40 C.F.R. § 124.19(f)(1)(iii).

So ordered.

⁸³(...continued)

the Board for review of the new permit decision to the extent of any changes made on remand. *See* 40 C.F.R. § 124.19(a).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order in the matter of Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03, 08-04, 08-05, & 08-06 were sent to the following persons in the manner indicated:

By Inter-Office Mail:

Brian L. Doster
Kristi M. Smith
Elliott Zenick
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
Fax: (202) 564-5603

By Pouch Mail:

Deborah Jordan
Director, Air Division (AIR-3)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901
Fax: (415) 947-3579

Ann Lyons
Office of Regional Counsel
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901
Fax: (415) 947-3570

By First Class Mail:

Seth T. Cohen
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
Fax: (505) 827-4440
(505) 222-9006

Leslie Barnhart
Eric Ames
Special Assistant Attorneys General
New Mexico Environment Department
P.O. Box 26110
Santa Fe, NM 87502-6110
Fax: (505) 827-1628

Janette K. Brimmer
EarthJustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Fax: (206) 343-1526

Anne Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
Fax: (617) 624-0230

Colin O'Brien
Natural Resources Defense Council
1200 New York Ave., NW, Suite 400
Washington, DC 20005
Fax: (202) 289-1060

Vickie Patton
Deputy General Counsel
Environmental Defense Fund
2334 N. Broadway
Boulder, CO 80304
Fax: (303) 440-8052

John Barth
P.O. Box 409
Hygiene, CO 80533
Fax: (303) 774-8899

Leslie Glustrom
4492 Burr Place
Boulder, CO 80303

Amy R. Atwood
Public Lands Program
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Fax: (503) 283-5528

Jeffrey R. Holmstead
Richard Alonso
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington DC 20006
Fax: (202) 857-4812
Fax: (202) 857-4824

Stephanie Kodish
Clean Air Counsel
National Parks Conservation Association
706 Walnut Street, Suite 200
Knoxville, TN 37902

Douglas C. MacCourt
Michael J. Sandmire
AterWynne, LLP
1331 NW Lovejoy
Portland, OR 97209-2785
Fax: (503) 226-0079


Louis Denetsosie, Attorney General
D. Harrison Tsosie, Deputy Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Old Club Building
Window Rock, AZ 86515
Fax: (928) 871-6177

Kristen Welker-Hood, DSC MSN RN
Director of Environment and Health Progs.
Physicians for Social Responsibility
1875 Connecticut Ave., N.W.
Suite 1012
Washington, D.C. 20009
Fax: (202) 667-4201

Justin Lesky
Law Office of Justin Lesky
8210 La Mirada Place NE Suite 600
Albuquerque, NM 78109

Paul M. Seby
Marian C. Larsen
Moye White LLP
1400 16th Street #600
Denver, CO 80202
Fax: (303) 292-4510

Dated: SEP 24 2009


Annette Duncan
Secretary