

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In RE: Desert Rock Energy Corporation, LLC)
PSD Permit Number AZP 04-01) PSD Appeal No. 08-03, 08-04, 08-05 and 08-06
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**REPLY BRIEF OF LESLIE GLUSTROM
DESERT ROCK ENERGY AIR PERMIT
FEBRUARY 13, 2009**

Petitioner Leslie Glustrom hereby files this short reply to the response briefs which address the Petition to Review filed by Petitioner Glustrom in the above captioned proceeding related to the issuance of a Prevention of Significant Deterioration (“PSD”) permit by Region 9 of the United States Environmental Protection Agency (“EPA”) on July 31, 2008 to Desert Rock Energy Company, LLC (“Desert Rock Energy”) for the Desert Rock Energy Facility (“Desert Rock” or “DREF”). The Permit authorizes construction of a 1500 Megawatt (“MW”) coal-fired power plant on the Navajo Reservation between Farmington and Ship Rock, New Mexico.

In Response Briefs filed on January 8, 2009, counsel for EPA Region 9 and Desert Rock Energy Company provided what the United States Supreme Court in *Massachusetts v. EPA* referred to as a “laundry list of reasons...” for not complying with a “clear statutory command.” (*Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) at 1462.) In the present case, the statutory duty of EPA is clear. The Congress has spoken directly to the issue of using available methods, systems and techniques to reduce air pollution. Despite the clear intent of Congress, the EPA has failed to consider the important techniques of Concentrating Solar Power for reducing pollution from electric generating power plants.

As the U.S. Supreme Court has clearly stated,

“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”
(*Chevron U.S.A. v Natural Res. Def. Council*, 467 U.S. 837 at 842-3)

In the present matter, the intent of Congress is clear and the EPA is statutorily mandated to comply with the clear language of the Clean Air Act. EPA did not comply in issuing the BACT permit for the Desert Rock facility and the permit must be remanded

I. The Clean Air Act Clearly Calls for Best Available Control Technology to Achieve the Maximum Degree of Reduction of Pollutants Subject to Regulation and to Consider Production Processes and Available Methods Systems and Techniques

When enacting the Clean Air Act, Congress clearly stated that Best Available Control Technology (“BACT”) determinations are to consider “production processes and available methods, systems, and techniques” in order to achieve the “maximum degree of reduction of each pollutant....” (42 U.S.C. § 7479 (3)). The evidence in the record makes it clear that Concentrating Solar Power technologies are “available methods, systems and techniques” that when used will lead to large reductions in air pollution. Preventing air pollution was identified by Congress as a “primary goal” of the Clean Air Act. (42 U.S. C. §7401 (c)).

As discussed at great length in Petitioner Glustrom’s Petition for Review, materials submitted during the comment period for the Desert Rock air permit established that Concentrating Solar Power can be used as either a stand alone technology or in a “fuel (and therefore pollution) saver” mode. Every pound of steam that is made using Concentrating Solar Power techniques will reduce air pollution and help achieve the intent of Congress to achieve the “maximum degree of reduction of each pollutant subject to regulation....” (42 U.S. C. § 7479 (3)).

II. EPA Clearly Failed to Consider Concentrating Solar Power Technologies as Part of the BACT Analysis for the Desert Rock Air Permit

In its Response Brief, EPA provides a litany of arguments claiming that it provided a “reasoned response to comments,” but EPA fails to address the issue of considering Concentrating Solar Power technologies as part of the BACT analysis for this permit. (See EPA Response Brief, pages 54-58). The issue of analyzing Concentrating Solar Power technologies as part of the BACT analysis was discussed at length in Petitioner Glustrom’s Petition to Review (See Glustrom Petition to Review, pages 28-38.) EPA’s Response Brief fails to respond to these arguments. The Response Brief of Desert Rock is even more sparse, (despite the “brief” being 275 pages long) and also failed to address any of the substantive issues raised by Petitioner Glustrom in her Petition for Review.

THEREFORE, the record is clear. The EPA failed to consider Concentrating Solar Power technologies in the BACT analysis for the Desert Rock power plant, and a failure to do so is to fail to implement the clear intent of Congress to achieve the maximum degree of reduction of pollution. Consequently, the EAB should exercise its oversight authority and remand the permit to the EPA for compliance with the clear meaning and intent of the Clean Air Act.

Respectfully submitted this 13th day of February 2009 by:

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing REPLY BRIEF OF LESLIE GLUSTROM by US First Class Mail on the following persons this 13th day of February 2009:

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