

# **EXHIBIT 10**

DINE' CITIZENS AGAINST RUINING OUR ENVIRONMENT  
SAN JUAN CITIZENS ALLIANCE  
ENVIRONMENTAL DEFENSE FUND  
WESTERN RESOURCE ADVOCATES  
NATURAL RESOURCES DEFENSE COUNCIL  
SIERRA CLUB  
WILDEARTH GUARDIANS  
ENVIRONMENT COLORADO  
CLEAN AIR TASK FORCE

April 25, 2008

**BY ELECTRONIC MAIL, FAX and U.S. MAIL**

Wayne Nastri, EPA Region 9 Regional Administrator (415) 947-3588 fax  
Gerardo Rios, EPA Region 9 Air Permitting Chief  
Deborah Jordan, EPA Region 9  
Joseph Lapka, EPA Region 9 Air Permitting  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Email: [nastri.wayne@epa.gov](mailto:nastri.wayne@epa.gov)  
[desertrockairpermit@epa.gov](mailto:desertrockairpermit@epa.gov)  
[Lapka.joseph@epa.gov](mailto:Lapka.joseph@epa.gov)  
[R9AirPermits@epa.gov](mailto:R9AirPermits@epa.gov)  
[Jordan.Deborah@epa.gov](mailto:Jordan.Deborah@epa.gov)

**RE: Request to withdraw EPA's qualified determination of completeness for the Desert Rock PSD permit application and Request to Deny Final PSD Permit**

Dear Messrs Nastri and Lapka:

The purpose of this letter is to request that: 1) EPA Region 9 withdraw its May 21, 2004 qualified determination that the Desert Rock Energy Company LLC ("DREP") Clean Air Act ("CAA") Section 165 Prevention of Significant Deterioration ("PSD") permit application was "administratively complete"; and, 2) EPA Region 9 deny the Desert Rock Energy's PSD permit application and not issue a final permit at this time.

**Background**

By means of background, the regulations at 40 C.F.R. §52.21 and 40 C.F.R. §124.3 require a PSD permit applicant to submit accurate and complete information to the EPA necessary for a comprehensive assessment of its permit

application. On February 22, 2004 DREP submitted a PSD permit application to EPA Region 9 for the proposed construction of a 1,500 MW coal-fired power plant to be located on Navajo lands in northwest New Mexico. DREP supplemented its application on May 7, 2004 by submitting additional information regarding project emissions, best available control technology, and air modeling and impact analyses. On May 21, 2004, without any public notice or public comment, EPA Region 9 issued a qualified determination that Desert Rock Energy's PSD permit application was "administratively complete." However, in doing so, EPA Region 9 stated "it is possible that we will need clarifying information on one or more parts of the application before we can issue a draft permit." See, *EPA Region 9's May 21, 2004 letter to DREP*. EPA Region 9's May 21, 2004 letter goes on to state "if you should ...submit new information indicating a significant change in project design, ambient impact or emissions, this determination of completeness may be revised." *Id.*

DREP submitted additional supplemental data and information in January, March and June 2006. On July 19, 2006 EPA Region 9 issued a draft PSD permit for the Desert Rock Energy facility. On September 15, 2006 the National Park Service issued a written comment letter on the draft DREP permit in its role as the federal land manager for nearby national parks and Class I airsheds. The undersigned groups, either collectively or individually, submitted written comment letters regarding this draft permit on at least the following dates: November 13, 2006, October 4, 2007, October 9, 2007, and March 4, 2008. In addition, on August 24, 2007 and July 23, 2007, EPA Region 9 and the New Mexico Environment Department, respectively, submitted to the Bureau of Indian Affairs ("BIA") comments on the Draft Environmental Impact Statement ("DEIS") for the Desert Rock Energy Facility that are relevant to the draft PSD permit. As will be outlined in more detail below, the DREP PSD permit application and draft permit do not contain comprehensive and accurate information. As such, they cannot be deemed "complete" and the EPA determination to the contrary was arbitrary and capricious. We request that EPA withdraw its May 21, 2004 determination of completeness and deny DREP's permit application.

**The DREP permit application and draft permit are not complete or accurate.**

*National Park Service Comments*

On September 15, 2006 the National Park Service ("NPS") issued a comment letter on EPA's draft DREP PSD permit. In its comment letter, the NPS identified serious deficiencies in both the DREP permit application and the draft permit. For example, the NPS has found the following deficiencies:

- DREP and EPA's cumulative increment analysis relies on inadequate and improper information and the underlying analysis is flawed. Until this is corrected, the EPA may not issue a valid final PSD permit;
- DREP and EPA's cumulative visibility analysis relies on inadequate and improper information and the underlying analysis is flawed. Until this is corrected, the EPA may not issue a valid final PSD permit;

- DREP and EPA’s nitrogen and sulfur deposition analysis relies on inadequate and improper information. There has been no site-specific analysis quantifying the impacts on nearby national parks and Class I areas. Until this is corrected, the EPA may not issue a valid final PSD permit.

To the best of our knowledge, none of these deficiencies have been rectified to the satisfaction of the NPS. To the extent that any of these issues result in significant changes to the underlying permit analysis, a new completeness finding should be issued and the public should be provided an opportunity for review and comment.

*Conservation Group Comments*

The undersigned conservation groups have also submitted extensive comments outlining significant deficiencies with the DREP permit application and draft permit. For example, the conservation groups have found the following deficiencies:

- DREP and EPA have failed to perform an MACT analysis under CAA Section 112(g), failed to set MACT emission limits, and failed to require MACT pollution control technology for all hazardous air pollutants to be emitted from DREP. *See, March 4, 2008 comment letter.* Until this is corrected, the EPA may not issue a valid final permit, and the absence of this analysis independently renders the permit application incomplete.
- DREP and EPA have failed to conduct a BACT analysis for CO<sub>2</sub> and other greenhouse gases despite the ruling in *Massachusetts v. EPA* and existing regulation of GHGs under CAA § 821 and under EPA’s emissions regulations for municipal waste landfills (40 C.F.R. Part 60). *See, October 9, 2007 comment letter.*
- DREP and EPA’s cumulative increment analysis relies on inadequate and improper information and the underlying analysis is flawed. Until this is corrected, the EPA may not issue a valid final PSD permit. *See November 13, 2006 comment letter.*
- DREP and EPA’s cumulative visibility analysis relies on inadequate and improper information and the underlying analysis is flawed. Until this is corrected, the EPA may not issue a valid final PSD permit. *See November 13, 2006 comment letter;*
- DREP and EPA’s nitrogen and sulfur deposition analysis relies on inadequate and improper information. There has been no site-specific analysis quantifying the impacts on nearby national parks and Class I areas. Until this is corrected, the EPA may not issue a valid final PSD permit *See November 13, 2006 comment letter.*
- To date, EPA has failed to complete the required consultation under the Endangered Species Act. Completion of this process is necessary before a final permit can be issued, as the consultation process is specifically intended to ensure that the relevant “agency action” (here issuance of a PSD permit) will not adversely impact protected species. The permit conditions themselves serve as

the mechanism for limiting species impacts, so if those conditions are fixed before consultation is complete the consultation is rendered meaningless.

- The DEIS has not adequately addressed the impacts of coal combustion wastes (CCW) that will be generated by DREP, which are an additional collateral impact of the PSD permit that has been entirely unaddressed by the BACT analysis in the draft PSD permit. Past enforcement action by EPA and existing water quality monitoring data from mines document serious water pollution impacts from existing CCW disposal operations in the Four Corners region that will be expanded by the construction of DREP.

To the best of our knowledge, none of these deficiencies have been rectified, and these deficiencies individually and in the collective render DREP's permit application incomplete and substantively inadequate.

*EPA REGION 9 and NMED Comments on the DEIS*

As the Conservation Groups described at length in their October 4, 2007 comments on the draft PSD permit, EPA is required to coordinate its PSD permit review with BIA's required preparation of an environmental impact statement for the Desert Rock Energy Facility, and must consider in its PSD review all information and analyses developed in connection with the EIS that are relevant to the proposed PSD permit, including comments submitted by EPA, NMED and others. EPA submitted comments on the DEIS on August 24, 2007, NMED submitted comments on the DEIS on July 23, 2007, and others, including the Conservation Groups, submitted comments on the DEIS that point to a number of glaring deficiencies in the analyses supporting and the terms of the draft PSD permit. Among other things, the comments of EPA and NMED pointed out:

- EPA has failed to require and Sithe has not performed air quality modeling for PM 2.5 emissions – this fact alone renders the permit application incomplete;
- DREP's PM-10 modeling is flawed;
- Sithe has failed to conduct modeling and analysis of impacts of the plant's emissions on already high ozone levels in the area;
- Analyses developed to support the draft permit fail to adequately account for emissions from oil and gas operations in the area;
- The draft permit fails to require limitations on emissions of mercury and other hazardous air pollutants.

To the best of our knowledge none of these deficiencies have been rectified, and these deficiencies individually and in the collective render DREP's permit application incomplete and substantively inadequate.

### *Lack of Mitigation Agreements*

Moreover, despite the fact that the NPS has concluded that DREP will cause adverse impacts to air quality related values, to date neither EPA nor DREP has made available to the public signed and enforceable mitigation agreements. It appears that there may be signed mitigation agreements between Desert Rock Energy Company, the Navajo Nation, and perhaps other parties. These mitigation agreements are necessary to ensure adverse impacts will be minimized and mitigated. Failure to release such information to the public renders DREP's permit application incomplete.

### *State of New Mexico's Consultation with the Navajo Nation*

As the Conservation Groups described in their October 4, 2007 comments on the draft PSD permit, on August 20, 2007 the Governor of New Mexico requested formal government-to-government consultation between the State of New Mexico and the Navajo Nation regarding the proposed Desert Rock Energy Facility. EPA may not issue a PSD permit until the consultation is completed. Further, if EPA proceeds to process the requested permit it must consider and allow the public the opportunity to review and comment on all information, analyses or alternatives developed in connection with the consultation. Failure to release such information to the public renders DREP's permit application incomplete.

### **Conclusion**

For the reasons stated above, the undersigned conservation groups believe that EPA's "completeness" determination was arbitrary and capricious. The undersigned groups request that EPA Region 9 withdraw its May 21, 2004 completeness determination and deny DREP's PSD permit application. If EPA intends to grant DREP's permit, the undersigned organizations request a meeting with the Regional Administrator and/or Administrator Johnson, prior to any final agency action, to discuss the serious concerns referenced in this letter.

Thank you for your attention to this matter.

Sincerely yours,

s/ Dailan J. Long  
Dailan J. Long, Organizer  
Dine CARE  
PO Box 7692  
Newcomb, NM 87455  
(505) 801-0713  
[dailan.jake@gmail.com](mailto:dailan.jake@gmail.com)

*Supplemental comment letter and attachment submitted on the behalf of:*

Mike Eisenfield  
Staff Organizer  
San Juan Citizens' Alliance  
108 North Behrend, Suite I  
Farmington, NM 87401  
(505) 325-6724  
[mike@sanjuancitizens.org](mailto:mike@sanjuancitizens.org)

Vickie Patton  
Deputy General Counsel  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304  
(303) 440-4901  
[vpatt@edf.org](mailto:vpatt@edf.org)

Steve Michel  
Energy Program Senior Attorney  
Western Resource Advocates  
2260 Baseline Road, Suite 200  
Boulder, CO 80302  
(505) 995-9951  
[smichel@westernresources.org](mailto:smichel@westernresources.org)

Patrice Simms  
Senior Project Attorney at Law  
Natural Resources Defense Council  
1200 New York Ave., NW, Suite 400  
Washington, D.C. 20005  
(202) 289-2437  
[psimms@nrdc.org](mailto:psimms@nrdc.org)

Rob Smith  
Southwest Regional Director  
Sierra Club  
202 E. McDowell RD., Suite 277  
Phoenix, AZ 85004  
[rob.smith@sierraclub.org](mailto:rob.smith@sierraclub.org)

Robert Ukeiley  
Energy & Climate Director  
WildEarth Guardians  
312 Montezuma Ave., Suite A  
Santa Fe, NM 87501  
[rukeiley@igc.org](mailto:rukeiley@igc.org)

Environment Colorado  
Pam Kiely  
1536 Wynkoop St., Suite 100  
Denver, CO 80202  
(303) 573-3871  
[pkiely@environmentcolorado.org](mailto:pkiely@environmentcolorado.org)

Jeff Stant  
Director, PPW Project-Safe Disposal Campaign  
Clean Air Task Force  
217 South Audubon Road  
Indianapolis, IN 46219  
(317) 359-1306  
[jefferystant@sbcglobal.net](mailto:jefferystant@sbcglobal.net)