

**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)	
)	

DESERT ROCK ENERGY COMPANY'S RESPONSE TO PETITIONS FOR REVIEW

Jeffrey R. Holmstead
Jason B. Hutt
Richard Alonso
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-828-5800
Facsimile: 202-223-1225
jeff.holmstead@bgllp.com
richard.alonso@bgllp.com

Attorneys for Desert Rock Energy Company, LLC

Jeremiah P. Sheehan
Sithe Global Power, LLC
245 Park Avenue, 38th Floor
New York, NY 10167
Telephone: 212-351-0030
Facsimile: 212-351-0002
Sheehan@sitheglobal.com

Attorney for Desert Rock Energy Company, LLC

TABLE OF CONTENTS

	Page
MAJOR DEFINED TERMS.....	I
INTRODUCTION	1
SUMMARY OF ARGUMENTS.....	5
STANDARD OF REVIEW	13
ARGUMENT.....	15
I. BACT IS NOT REQUIRED FOR CO2 BECAUSE IT IS NOT SUBJECT TO REGULATION UNDER THE CLEAN AIR ACT.....	15
A. The Johnson Memorandum Definitively Establishes that CO2 is Not a Pollutant Subject to Regulation Under the Clean Air Act	19
1. The Johnson Memorandum Presents a Clear Agency Interpretation of The Phrase "Subject To Regulation."	19
2. As A Formal Agency Interpretation, Any Deviation from The Position Taken In The Johnson Memorandum Would Require Notice and Comment Rulemaking	20
B. The Desert Rock Administrative Record Also Shows that EPA Has Understood "Subject To Regulation" as Requiring Actual Control of Emissions of a Pollutant	21
1. The Desert Rock Administrative Record is More Detailed than the Deseret Administrative Record, and Clearly States EPA's Position.....	21
2. The ANPR Clearly States that the Phrase "Emissions Subject To Regulation" Requires Actual Control of Such Emission.....	24
C. The Agency's Interpretation, As Established by the Johnson Memorandum and Validated by the Desert Rock Administrative Record, Is Reasonable and Not Clearly Erroneous.....	27
1. The Agency's Interpretation Conforms With Congressional Intent	27
a. Administrative Burdens	28
b. Small Sources.....	29
2. The Agency's Interpretation Reflects The Practical Necessity of Excluding Greenhouse Gases from PSD Review	31
3. The Johnson Memorandum and the ANPR Are Consistent With EPA's Historical Practice	32

TABLE OF CONTENTS
(continued)

	Page
D. The EAB Should Defer to EPA's Interpretation of the Phrase "Subject To Regulation."	34
1. The Interpretation Established in the Johnson Memorandum Is Germane To This Proceeding.....	36
2. Even Absent The Johnson Memorandum's Interpretation, the Desert Rock Administrative Record Provides Evidence of Clear Agency Intent To Exclude CO2 From the PSD Program, to Which the Board Should Defer	38
E. Petitioners Have Not Shown that CO2 is Regulated, as that Phrase is Interpreted by EPA.....	38
1. Petitioners' Contention that the Plain Meaning of "Subject To Regulation" Requires a CO2 BACT Analysis was Rejected by the EAB in Deseret	40
2. Other Arguments Raised by Petitioners Have Been Briefed in Other Cases At Least One of Which Is Still Pending Before the EAB and Must Fail Because They Do Not Comport with EPA's Interpretation of "Subject To Regulation."	40
a. Section 821's Monitoring and Reporting Requirements do not Equate to "Regulation" Under the CAA	40
b. The Delaware State Implementation Plan.....	42
3. New Arguments Raised by Petitioners Do Not Support Petitioners' Assertion that CO2 Is Regulated.....	46
a. Congress's 2008 Appropriations Legislation Does Not Make CO2 Subject to Regulation	47
b. No Endangerment Finding Has Been Made with Respect to CO2	47
II. EPA REGION 9 PROPERLY FOUND THAT CONSIDERATION OF IGCC IN THE BACT ANALYSIS WOULD AMOUNT TO RE-DEFINING THE PERMITTED FACILITY	49
A. EPA Has Wide Discretion Regarding Whether to Consider IGCC as a Control Option in a BACT Determination	49
B. As Explained in the Record, EPA's Finding that IGCC Should Not be Considered as a Control Option for a Pulverized Coal Power Plant is Based upon Sound Judgment and is Neither Clearly Erroneous Nor an Abuse of EPA's Recognized Discretion	55

TABLE OF CONTENTS

(continued)

	Page
1. The Physical and Business Differences Between a PC Boiler and an IGCC Plant is Evidence that EPA Region 9 Did Not Abuse its Discretion in Finding that an IGCC Plant is Not a Similar Source as Compared with a PC Boiler	55
2. The Design Changes Between an IGCC and a PC Boiler are Well Within the Parameters of Past Application of the Redesign Policy by the EAB.....	59
3. EPA's Decision to Classify IGCC as a Different Source under the "Redesign Policy" is Clearly Explained and Supported by the Administrative Record.....	62
C. EPA's Application of its "Redesign Policy" to Exclude IGCC from its BACT Determination Does Not Write Out the Phrases "Production Process" and "Innovative Fuel Combustion Techniques" from the Statutory Definition of BACT Nor Does it Stall the Technology Forcing Aspects of the BACT Process	64
D. Petitioners' Arguments Are Not Material to the Outcome of the BACT Determination of the Proposed Boilers at Desert Rock Because IGCC is Not a Feasible Business Venture at the Desert Rock Project and Would Be Worse for the Environment.....	65
III. PETITIONERS ARE USING COLLATERAL IMPACTS IN A DISINGENUOUS MANNER TO RE-INTRODUCE IGCC INTO THE BACT ANALYSIS	69
A. Petitioners Have Failed to Show that Evaluation of Collateral Impacts Would Have Led to the Selection of a Different BACT	71
B. CO2 Emissions Are Not a Local or Source-Specific Issue that Must Be Analyzed Under the Collateral Impacts Analysis	73
C. Petitioners Fail to Show that the Costs of Regulating CO2 Emissions Are Currently Within the Range of Costs Being Borne By Similar Sources	78
D. Petitioners Fail to Show that Consideration of the Endangered Species Act Consultation and Environmental Justice Issues Under the Collateral Impacts Clause Would Yield a Different Result.....	82
IV. EPA WAS NOT REQUIRED TO ASSESS THE IMPACT OF CASE-BY-CASE MACT BEFORE ISSUING THE PSD PERMIT	84
A. Petitioners Lack Standing to Raise Arguments Regarding the Role of a Case-By-Case MACT Analysis in the Development of a PSD Permit.....	84

TABLE OF CONTENTS

(continued)

	Page
B. Conducting a BACT Analysis as Part of the PSD Permitting Process Does Not Require a Source to Prepare Concurrently a Case-By-Case MACT Analysis	91
V. EPA REGION 9 COMPLETED A THOROUGH BACT DETERMINATION FOR NOX AND SO2 THAT IS CLEARLY REFLECTED IN THE ADMINISTRATIVE RECORD	93
A. EPA Region 9 Performed a Complete BACT Analysis for NOX and SO2 Consistent with the Well-Established Top-Down, 5-Step, BACT Process.....	94
B. NGO Petitioners were Afforded Proper Public Notice and Comment of EPA Region 9's BACT Determination and They Participated Fully in Development of the BACT Emissions Rates	102
C. The Desert Rock Energy Project's NOx Optimization Plan is Legal	105
1. A Public Comment Period Was Not Required to Include a NOX Optimization Plan in the Final PSD Permit	105
2. The EAB Has Consistently Upheld the Legality of Optimization Plans and Has Found that Such Plans Do Not Delay Implementation of BACT.....	110
VI. EPA REGION 9'S STARTUP AND SHUTDOWN BACT EMISSION LIMITATIONS WERE PROPERLY ESTABLISHED AND JUSTIFIED IN THE ADMINISTRATIVE RECORD	112
VII. THE PSD PERMIT APPLICATION EXCEEDED THE PSD MODELING REQUIREMENTS FOR OZONE AIR AMBIENT IMPACT ANALYSES.....	115
A. The Desert Rock Application Exceeded Any PSD Requirements to Show that the Desert Rock Project will Not Cause or Contribute to Ozone Levels	116
1. The Desert Rock Application Met the PSD Ambient Air Quality Analysis Requirements for Ozone	117
2. EPA Reasonably Relied upon the NM Demonstration to Determine the Desert Rock Project would Not Cause or Contribute to a Violation of the Ozone NAAQS	119
B. The Scheffe Table is A Useful and An Appropriate Tool to Use for Ozone Impact Analysis.....	125
C. The Monitored Data Petitioners Reference is Untimely and Not Sufficient to Demonstrate Desert Rock will "Cause or Contribute to" an Ozone Violation	126

TABLE OF CONTENTS
(continued)

	Page
1. A New Ozone Standard is Not Automatically Imposed Upon a PSD Permit Applicant	127
2. Petitioners' Untimely Submission of Additional Monitoring Data Does Not Provide Substantial New Information that Merits Consideration or Would Change the Permitting Decision	132
3. 2007 Actual Ozone Levels are Lower than the 2007 Modeled Ozone Levels	139
VIII. THE DESERT ROCK PERMIT COMPLIES WITH EXISTING REQUIREMENTS REGARDING PM2.5	140
A. EPA Region 9 Appropriately Determined that Desert Rock's PSD Permit Complies with the Requirements to Utilize PM10 as a Surrogate for PM2.5.....	143
B. By Requesting that the EAB Review EPA's Rulemaking, Petitioners Seek Action that is Beyond the Board's Jurisdiction	143
C. NGO Petitioners' Public Notice and Comment Challenges of the Final PM2.5 Rule in this Proceeding Are Not Material.....	145
D. Deference to EPA's Decision is Appropriate Because EPA Made a Technical Determination Regarding How to Comply with the PM2.5 NAAQS	149
IX. EPA REGION 9 COORDINATED WITH THE FLMS TO PROTECT CLASS I AREAS FROM VISIBILITY IMPACTS, AND SATISFIED ALL REQUIREMENTS RELATED TO THE PROTECTION OF VISIBILITY	151
A. EPA Region 9 Met and Exceeded the CAA Requirements for Notification to the Federal Land Managers and Consideration of the Federal Land Managers' Comments.....	153
B. For the Cumulative Visibility Analysis Claim, Petitioners Have Failed to Either Provide New Comments to Counter EPA's Response to Comments or Prove Error in those Responses	158
1. The NGO Petitioners Have Relied Upon an NPS Model that is Not in Accord with EPA Guidance	159
2. A Cumulative Analysis for Visibility is not Required either for the Visibility Analysis or to Supplement the SO2 Cumulative Analysis	162
C. The Mitigation Agreement Was Not a Remedy to the Desert Rock Permit.....	166

TABLE OF CONTENTS

(continued)

	Page
D. Desert Rock's Optional Modeling Assured the FLMs that the Project would not Impede Regional Haze Rate of Progress	171
X. THE ADMINISTRATIVE RECORD CLEARLY SHOWS THAT DESERT ROCK HAS SATISFIED ALL REQUIREMENTS RELATING TO PSD INCREMENTS	175
A. EPA Region 9 Properly Used "Significant Impact Levels" (SILs) to Identify the Class I Areas For Which a Full Cumulative PSD Increment Analysis Was Necessary	178
B. EPA Properly Approved Conservative Baseline Assumptions Used in the SO ₂ Cumulative Analysis	182
1. EPA's Additional Modeling Incorporated the NAAQS SO ₂ Emission Limits and Confirmed that the Desert Rock Project Would Not Exceed the Class I Increment	184
2. The Baseline Concentrations were Properly Determined Relative to the SO ₂ Minor Source Baseline Dates	186
C. EPA's Additional Modeling Scenarios that Confirm Desert Rock Emissions Do Not Exceed the PSD Increment Did Not Need to Undergo Notice and Comment	193
XI. EPA PROPERLY ASSESSED THE IMPACTS OF THE DESERT ROCK PROJECT ON ENVIRONMENTAL JUSTICE COMMUNITIES AND MEANINGFULLY RESPONDED TO COMMENTS REGARDING ENVIRONMENTAL JUSTICE	195
A. EPA Met Its Obligations Under the Environmental Justice Executive Order	196
1. Using Population Data and Air Emissions Data, EPA Properly Concluded that the Proposed PSD Permit Would Not Result in a Disproportionately High and Adverse Effect on Human Health or the Environment in Low-Income or Minority Population Areas.	198
B. This Board's Precedent Supports the Conclusion that the Proposed PSD Permit Would Not Result in a Disproportionately High and Adverse Effect on Human Health or the Environment in Low-Income or Minority Population Areas Where NAAQS are Satisfied	201
C. EPA Meaningfully Responded to those Specific Issues Regarding Environmental Justice that Apply to the PSD Permitting Process	204

TABLE OF CONTENTS

(continued)

	Page
1. EPA's Soil and Vegetation Analysis Was Proper and EPA Therefore Properly Responded to Environmental Justice Concerns Regarding Impacts on Agriculture and Pastoral Communities.....	204
2. Concerns Regarding Mercury and Water Resource Consumption Are Beyond the Scope of EPA's Environmental Justice Analysis in the PSD Permitting Process	212
a. Petitioners Misstate the BACT Collateral Impact Analysis and, in Any Event, the Sole BACT Alternative, IGCC, Was Appropriately Excluded from the BACT Analysis as Redefining the Source	212
b. IGCC Is Not a Cost-Effective Method to Control Mercury Emissions and Would Not Decrease Consumption of Water Resources Compared to the Proposed Desert Rock Project	214
3. Concerns Regarding the Implications of Public Health Services and Physical Infrastructure Are Beyond the Scope of EPA's Environmental Justice Analysis in the PSD Permitting Process and, in Any Event, No Such Concerns Are Present Here.....	216
XII. EPA'S ISSUANCE OF A CONDITIONED PSD PERMIT DOES NOT VIOLATE THE AGENCY'S ENDANGERED SPECIES ACT OBLIGATIONS.....	220
A. NGO Petitioners' Challenge to EPA's Role Relates Directly to the Sufficiency of the Consultation which Is Beyond EAB's Jurisdiction, and, Alternatively, EPA's Role as Cooperating Agency Is Reasonable.....	223
1. The Substantive Decision to Name the BIA as the Lead Agency for ESA § 7 Consultation Is Not Within the Jurisdiction of this Board.....	223
2. Alternatively, EPA's Role In The ESA § 7 Consultation Is Reasonable	226
a. The Designation of the BIA as the Lead Agency is Well Within the Discretion of the Federal Agencies Involved	226

TABLE OF CONTENTS
(continued)

	Page
b. EPA Appropriately Defined the "Particular Action" Being Evaluated as the Construction and Operation of the Desert Rock Project, Not Merely the Issuance of the PSD Permit	230
B. ESA § 7(D) was not Violated when EPA Issued a Conditioned PSD Permit Before the Completion of a Desert Rock Project Project-Wide ESA Consultation Because the Permit does not Authorize Construction that Might Affect Listed Species, and EPA Retained the Authority to Amend the Permit Based on the Results of ESA Consultation	238
1. The Sequence of the ESA § 7 Consultation Does Not Affect the Validity of the PSD Permit Here Because There is No Final Agency Action	240
2. EPA's Issuance of a Conditioned PSD Permit Was Subject Only to ESA § 7(d) Constraints Because the Agencies Had Initiated Informal Consultation by the Time of EPA's Action.....	243
3. The Services' Guidance on ESA § 7 Consultation Confirms that ESA § 7(d) Does Not Bar the Issuance of Such a Conditioned Permit Prior to the Completion of Project-Wide ESA Consultation.....	246
4. There Is No ESA § 7(d) Violation Under the Relevant Case Law	247
5. The Practical Limitations of the Desert Rock Project Preserve the Integrity of the Consultation Process and Conserve Resources Pending Conclusion of the ESA § 7 Consultation	250
6. NGO Petitioners' Position Impermissibly Assumes that EPA and FWS Will Not Fulfill Their Future ESA Duties.....	253
7. EPA Has Appropriately and Reasonably Balanced Its Obligations Under the CAA and the ESA	254
8. The Cases Cited by Petitioners Are Distinguishable, or at Least Are Contrary to the Above-Described Majority View in the Courts.....	257
XIII. EPA HAS COORDINATED ITS PSD PERMITTING PROCESS WITH THE DESERT ROCK PROJECT'S NEPA PROCESS TO THE MAXIMUM EXTENT FEASIBLE AND REASONABLE, AND DID NOT CLEARLY ERR IN ISSUING THE PSD PERMIT PRIOR TO CONCLUSION OF THE NEPA PROCESS	264

TABLE OF CONTENTS
(continued)

	Page
A. The Record Reflects Coordination of the NEPA Process and the PSD Permitting Process	265
B. EPA Is Not Required to Conduct the PSD Permit Process "In Parallel" With the NEPA Proceeding, Nor Is EPA Required to Wait to Issue the PSD Permit Until After the NEPA Process is Complete	266
C. 40 C.F.R. § 52.21 Is an Inappropriate Avenue by which to Challenge the Substance of EPA's PSD Permit Determination	270
XIV. EPA REGION 9 ADEQUATELY RESPONDED TO PETITIONER GLUSTROM'S COMMENTS, AND WAS NOT OBLIGATED TO CONSIDER CONCENTRATING SOLAR POWER AS PART OF THE BACT ANALYSIS FOR THE DESERT ROCK PERMIT.....	273
CONCLUSION.....	274
REQUEST FOR ORAL ARGUMENT	275

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Alabama Power v. Costle</i> , 636 F.2d 323 (D.C. Cir. 1980).....	28, 29, 30, 34
<i>Amoco Prod. Co. v. Village of Gambell</i> , 480 U.S. 531 (1987).....	260
<i>Bays' Legal Fund v. Browner</i> , 828 F. Supp. 102 (D. Mass. 1993).....	250
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	222, 259
<i>Center for Biological Diversity v. National Highway Traffic Safety Admin.</i> , 538 F.3d 1172 (9th Cir. 2008).....	80
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	36, 257
<i>Citizens for Clean Air v. EPA</i> , 959 F.2d 839 (9th Cir. 1992).....	80, 82
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971).....	253
<i>City of Sausalito v. O'Neill</i> , 386 F.3d 1186 (9th Cir. 2004)	246
<i>Conner v. Burford</i> , 848 F.2d 1441 (9th Cir. 1986).....	passim
<i>Conservation Law Found. v. Andrus</i> , 623 F.2d 712 (1st Cir. 1979).....	248, 253
<i>Defenders of Wildlife v. EPA</i> , 420 F.3d 946 (9th Cir. 2005)	234
<i>Desert Rock Energy Co., LLC v. EPA</i> , No. 4:08-cv-872 (S.D. Tex.).....	256
<i>Environmental Defense v. Duke Energy Corp.</i> , 127 S. Ct. 1423 (2007)	35, 254, 255
<i>Environmental Protection Info. Ctr. v. Pacific Lumber Co.</i> , 229 F. Supp. 2d 993 (N.D. Cal. 2002).....	244
<i>Farmers Telephone Co. v. FCC</i> , 184 F.3d 1241 (10th Cir. 1999).....	27
<i>FCC v. Schreiber</i> , 381 U.S. 279 (1965).....	253
<i>First Am. Discourt Corp. v. Commodity Futures Trading Commission</i> , 222 F.3d 1008 (D.C. Cir. 2000)	147
<i>Forest Conservation Council v. Espy</i> , 835 F. Supp. 1202 (D. Id. 1993).....	249
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976).....	237
<i>Lane County Audubon Soc. v. Jamison</i> , 958 F.2d 290 (9th Cir. 1992).....	239

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	222, 259
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)	17, 24
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	255, 267
<i>Nat'l Ass'n of Home Builders v. Defenders of Wildlife</i> , 127 S. Ct. 2518 (2007)	passim
<i>Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005)	257
<i>Nat'l Wilderness Institute v. U.S. Army Corps of Engineers</i> , 2005 WL 691775 (D.D.C. March 23, 2005).....	passim
<i>Nat'l Wildlife Fed'n v. Burlington Northern RR</i> , 23 F.3d 1508	261
<i>Nat'l Wildlife Fed'n v. National Park Service</i> , 669 F. Supp. 384 (D. Wyo. 1987).....	247
<i>Natural Res. Def. Council v. EPA</i> , No. 08-1250 (D.C. Cir., filed July 15, 2008)	145, 147, 148
<i>Natural Res. Def. Council v. Houston</i> , 146 F.3d 1118 (9th Cir. 1998)	passim
<i>Ness Inv. Corp. v. U.S. Dep't of Agric.</i> , 512 F.2d 706, (9th Cir. 1975)	228
<i>Nevada v. Dep't of Energy</i> , 457 F.3d 78, 90 (D.C. Cir. 2006).....	246
<i>No Oilport! v. Carter</i> , 520 F. Supp. 334 (W.D. Wash. 1981)	247
<i>North Slope Borough v. Andrus</i> , 642 F.2d 589 (D.C. Cir. 1980)	248, 251, 253, 254
<i>NRDC v. EPA</i> , 279 F.3d 1180 (9th Cir. 2002).....	147
<i>Old Ben Coal Co. v. Director</i> , 62 F.3d 1003 (7th Cir. 1995)	43, 90, 136
<i>Oregon Natural Res. Council v. Allen</i> , 476 F.3d 1031 (9th Cir. 2007)	226
<i>Pacific Coast Fed'n of Fishermen's Ass'ns v. Gutierrez</i> , 2008 WL 2223070 (E.D. Cal. 2008)	249
<i>Pacific Rivers Council v. Thomas</i> , 30 F.3d 1050 (9th Cir. 1994).....	245, 249, 261, 263
<i>Paralyzed Veterans of Am. v. D.C. Arena, L.P.</i> , 117 F.3d 579 (D.C. Cir. 1997)	21
<i>Platte River Whooping Crane Trust v. FERC</i> , 962 F.2d 27 (D.C. Cir. 1992)	261
<i>Rodriguez v. United States</i> , 480 U.S. 522 (1987)	261

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Shalala v. Guernsey Memorial Hosp.</i> , 514 U.S. 87 (1995)	21
<i>Shell Offshore Inc. v. Babbitt</i> , 238 F.3d 622 (5th Cir. 2001).....	20, 33, 202
<i>Sierra Club v. Federal Energy Regulatory Commission</i> , 754 F.2d 1506 (9th Cir. 1985)	262
<i>Sierra Club v. Marsh</i> , 816 F.2d 1376 (9th Cir. 1987)	233, 235, 242
<i>Sierra Club v. Prairie State Generating Co.</i> , 499 F.3d 653 (7th Cir. 2007)	59
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944).....	36
<i>Southwest Center for Biological Diversity v. U.S. Forest Service</i> , 307 F.3d 964 (9th Cir. 2002)	251
<i>State of New Jersey v. EPA</i> , 517 F.3d 574 (D.C. Cir. 2007)	88, 89
<i>Syncor Int'l Corp v. Shalala</i> , 127 F.3d 90 (D.C. Cir. 1997)	21
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994).....	27
<i>Thomas v. Peterson</i> , 753 F.2d 754 (9th Cir. 1985).....	261, 263
<i>Tribal Village of Akutan v. Hodel</i> , 869 F.2d 1185 (9th Cir. 1989).....	passim
<i>TVA v. Hill</i> , 437 U.S. 153 (1978).....	254, 260, 261
<i>Union Elec. Co. v. EPA</i> , 427 U.S. 246 (1976).....	46
<i>Vermont v. Thomas</i> , 850 F.2d 99 (2d Cir. 1988)	44
<i>Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council</i> , 435 U.S. 519 (1978)	82
<i>Village of False Pass v. Clark</i> , 733 F.2d 605 (9th Cir. 1984)	248, 253, 258
<i>Washington Toxics Coalition v. EPA</i> , 413 F.3d 1024 (9th Cir. 2005).....	261, 264
 Administrative Decisions	
<i>In re AES Puerto Rico L.P.</i> , 8 E.A.D. 324 (EAB 1999)	passim
<i>In re Amoco Oil Co.</i> , 4 E.A.D. 954 (EAB 1993)	116, 117, 215
<i>In re Arecibo & Aguadilla Regional Wastewater Treatment Plants</i> , 12 E.A.D. 97 (EAB 2005)	80, 96, 115

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>In re Ash Grove Cement Co.</i> , 7 E.A.D. 387, 403 (EAB 1997)	147
<i>In re BP Cherry Point</i> , 12 E.A.D. 209 (EAB 2005)	passim
<i>In re Bradwood Landing LLC/NorthernStar Energy LLC</i> , 124 FERC ¶ 61,257 (Sept. 18, 2008)	280
<i>In re Broward County</i> , 6 E.A.D. 705 (EAB 1993)	80
<i>In re Cardinal FG Co.</i> , 12 E.A.D. 153 (EAB 2005)	92, 166
<i>In re Carlota Copper Co.</i> , 11 E.A.D. 692, 786 (EAB 2004)	151, 155
<i>In re Chem-Sec. Sys., Inc.</i> , 2 E.A.D. 804 (EAB 1989)	116, 215
<i>In re Christian County Generation, LLC</i>	passim
<i>In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility</i> , 12 E.A.D. 235 (EAB 2005)	117, 215
<i>In re City of Moscow</i> , 10 E.A.D. 135 (EAB 2001)	167
<i>In re City of Phoenix, Arizona Squaw Peak and Deer Valley Water Treatment Plants</i> , 9 E.A.D. 515, 531 (EAB 2000)	100, 115, 152
<i>In re Columbia Gulf Transmission Co.</i> , 2 E.A.D. 824 (Adm'r 1989)	passim
<i>In re Commonwealth Chesapeake Corp.</i> , 6 E.A.D. 764 (EAB 1997)	13, 14, 213, 239
<i>In re ConocoPhillips Co.</i> , PSD Appeal 07-02 (EAB June 2, 2008)	passim
<i>In re D.C. Water & Sewer Authority</i> , slip. op. NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12 (EAB 2008)	165
<i>In re Deseret Electric Power Cooperative</i> , PSD Appeal No. 07-03 (EAB Nov. 13, 2008) ..	passim
<i>In re Dominion Energy Brayton Point, LLC</i> , 12 E.A.D. 490 (EAB 2006)	passim
<i>In re Ecoeléctrica, L.P.</i> , 7 E.A.D. 56 (EAB 1997)	218, 219, 223, 224
<i>In re Encogen Cogeneration Facility</i> , 8 E.A.D. 244 (EAB 1999)	94, 207
<i>In re Gen. Motors Corp.</i> , 5 E.A.D. 400, 405 (EAB 1994)	149
<i>In re Genesee Power Station</i> , 4 E.A.D. 832 (EAB 1993)	77, 236

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>In re GSX Services of S. Carolina, Inc.</i> , 4 E.A.D. 451 (1992).....	117, 215
<i>In re Hadson Power 14-Buena Vista</i> , 4 E.A.D. 258 (EAB 1992)	passim
<i>In re Hawaiian Commercial & Sugar Co.</i> , 4 E.A.D. 95 (EAB 1992)	57, 58, 60, 61
<i>In re Hibbing Taconite Co.</i> , 2 E.A.D. 838 (Adm'r 1989)	68
<i>In re Hillman Power Co., L.L.C.</i> , 10 E.A.D. 673 (2002).....	76, 77, 83, 236
<i>In re Howmet Corp.</i> , PSD Appeal No. 05-04 (EAB May 24, 2007)	38, 39
<i>In re Indeck Elwood, LLC</i> PSD Appeal No. 03-04 (EAB 2006)	passim
<i>In re Inter-Power of N.Y., Inc.</i> , 5 E.A.D. 130 (EAB 1994)	passim
<i>In re Kawaihae Cogeneration Project</i> , 7 E.A.D. 107 (EAB 1997)	passim
<i>In re Keene Wastewater Treatment Plant</i> , NPDES Appeal No. 07-18 (EAB Mar. 19, 2008)	passim
<i>In re Kendall New Century Development</i> , 11 E.A.D. 40 (EAB 2003)	61, 109
<i>In re Knauf Fiber Glass GmbH</i> , 9 E.A.D. 1 (EAB 2000).....	passim
<i>In re Knauf Fiber Glass, GmbH</i> , 8 E.A.D. 121 (EAB 1999).....	13
<i>In re Knauf Fiber Glass, GmbH</i> , 9 E.A.D. 1 (EAB 2000).....	13
<i>In re Lazarus Inc.</i> , 7 E.A.D. 318 (EAB 1997)	39
<i>In re Masonite Corp.</i> , 5 E.A.D. 551 (EAB 1994).....	109, 130, 140
<i>In re Maui Elec. Co.</i> , 8 E.A.D. 1 (EAB 1998))	80, 96, 116
<i>In re Mecklenburg Cogeneration L.P.</i> , 3 E.A.D. 492 (Adm'r 1990)	81
<i>In re NE Hub Partners, L.P.</i> , 7 E.A.D. 561 (EAB 1998)	150, 167
<i>In re New England Plating</i> , 9 E.A.D. 726 (EAB 2001).....	80, 96, 116
<i>In re Newmont Nevada Energy Investment</i> , 12 E.A.D. 429 (EAB 2005).....	passim
<i>In re Old Dominion Electric Cooperative</i> , 3 E.A.D. 779 (EAB 1992).....	passim

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>In re Peabody Western Coal Co.</i> , 12 E.A.D. 22, (EAB 2005)	167, 206
<i>In re Pennsauken County, New Jersey Resource Recovery Facility</i> , 2 E.A.D. 768 (EAB 1989)	122
<i>In re Prairie State Generating Company, LLC</i> , PSD Appeal No. 05-05 (EAB Aug. 24, 2006)	passim
<i>In re RockGen Energy Center</i> , 8 E.A.D. 536 (EAB 1999)	122
<i>In re Russell City Energy Center</i> , PSD Appeal No. 08-01 (EAB July 29, 2008)	161
<i>In re SEI Birchwood, Inc.</i> , 5 E.A.D. 25 (EAB 1994)	57
<i>In re Sequoyah Fuels Corp.</i> , NPDES Appeal No. 91-12 (EAB Aug. 31, 1992)	80
<i>In re Shell Offshore, Inc.</i> , OCS Appeals 07-01 and 07-02 (EAB Sept. 14, 2007)	223, 224
<i>In re St. Lawrence County Solid Waste Auth.</i> , PSD Appeal No. 90-9 (Adm'r July 27, 1990)	153
<i>In re Steel Dynamics, Inc.</i> , 9 E.A.D. 165 (EAB 2000)	passim
<i>In re Sutter Power Plant</i> , 8 E.A.D. 680 (EAB 1999)	96, 155
<i>In re Teck Cominco Alaska Inc.</i> , 11 E.A.D. 457 (EAB 2004)	167
<i>In re Terra Energy Ltd.</i> , 4 E.A.D. 159 (EAB 1992)	84
<i>In re the Matter of Multitrade Limited Partnership</i> , 4 E.A.D. 24 (EAB April 29, 1992)	189
<i>In re Thermalkem, Inc.</i> , 3 E.A.D. 355 (EAB 1990)	passim
<i>In re Three Mountain Power, LLC</i> , 10 E.A.D. 39 (EAB 2001)	15
<i>In re Tondu Energy Co.</i> , 9 E.A.D. 710 (EAB 2001)	38, 114, 161, 207
<i>In re Woodkiln, Inc.</i> , 7 E.A.D. 254 (EAB 1997)	161
<i>In re World Color Press, Inc.</i> , 3 E.A.D. 474 (EAB 1990)	passim
<i>In re Zion Energy, LLC</i> , 9 E.A.D. 701 (EAB 2001)	13, 14

TABLE OF AUTHORITIES
(continued)

Page

Statutes

15 U.S.C. § 793(c)(1).....	277
16 U.S.C. § 1536(a)	232, 246
16 U.S.C. § 1536(b)	233, 246
16 U.S.C. § 1536(b)(1)	256
16 U.S.C. § 1536(d)	passim
42 U.S.C. § 7473(b)	195
42 U.S.C. § 7407(d)	141
42 U.S.C. § 7410(a)(1).....	141
42 U.S.C. § 7410(k)	49, 50
42 U.S.C. § 7411	48
42 U.S.C. § 7412.....	48
42 U.S.C. § 7412(b)	93, 101, 103
42 U.S.C. § 7416.....	48
42 U.S.C. § 7475.....	165, 166, 179
42 U.S.C. § 7475(a)	passim
42 U.S.C. § 7475(d)(2)	164
42 U.S.C. § 7475(e)	216
42 U.S.C. § 7479.....	225
42 U.S.C. § 7491(b)	184
42 U.S.C. § 7502(b)	141
42 U.S.C. § 7602(q)	48

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
42 U.S.C. § 7607(b)	157
5 U.S.C. § 551(5)	22
5 U.S.C. § 701	240
5 U.S.C. § 706	258
 Other Authorities	
<i>Air Quality Modeling Analysis for the San Juan Early Action Ozone Compact: Base Case and Future Case Modeling at 1-1 (Jan. 29, 2004)</i>	<i>125</i>
<i>Ambient Monitoring Guidelines for Prevention of Significant Deterioration</i>	<i>123</i>
<i>Department of the Interior Preliminary Technical Comments on the Desert Rock Prevention of Significant Deterioration Permit Application, at 6</i>	<i>195</i>
<i>EPA, Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM_{2.5} and Regional Haze (Apr. 2007)</i>	<i>125</i>
<i>EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program</i>	<i>passim</i>
<i>ESA § 7 Consultation Handbook, 2.2(B), p. 2-7</i>	<i>252</i>
<i>Expert Report of Matt Haber, Best Available Control Technologies for the Baldwin Generating Station, Baldwin, Illinois) (2002).....</i>	<i>99</i>
<i>Gerald E. Emison, Director, Office of Air Quality Planning and Standards, Implementation of North County Resource Recovery PSD Remand (Sept. 22, 1987)</i>	<i>27</i>
<i>Houck, The "Institutionalization of Caution" under § 7 of the Endangered Species Act: What To Do When You Don't Know, 12 ENVTL L. REP. (ENVT'L L. INST.) 15001 (April 1982)</i>	<i>256</i>
<i>Memorandum from Gerald A. Emison, Director, to Thomas J. Maslany, Director, Air Management Division, Regarding Air Quality Analysis for Prevention of Significant Deterioration (PSD) (July 5, 1988).....</i>	<i>128, 129</i>
<i>Memorandum from John S. Seitz, Interim Implementation New Source Review Requirements for PM_{2.5} (Oct. 23, 1997)</i>	<i>147</i>

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
Memorandum from Office of General Counsel, <i>EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting</i> , p. 12 (Dec. 1, 2000)	209
New Source Review (NSR) Archives, Technical Information	82
Steven A. Benson, entitled <i>SCR Catalyst Performance in Flue Gases Derived from Subbituminous and Lignite Coals</i> ,	111
U.S. EPA Office of Air Quality Planning and Standards, New Source Review Workshop Manual (Draft Oct. 1990)	passim
White Paper 2 – Guidance for Improving Implementation of the Operating Permits Program (Mar. 5, 1996)	98
 Regulations	
40 C.F.R. § 52.21(p)	passim
40 C.F.R. § 124.13	92, 97, 144
40 C.F.R. § 124.14	112, 201
40 C.F.R. § 124.14(a)	114, 202
40 C.F.R. § 124.17(b)	passim
40 C.F.R. § 124.18	23, 110
40 C.F.R. § 124.18(c)	140
40 C.F.R. § 124.19	23, 41
40 C.F.R. § 124.19	151
40 C.F.R. § 124.19(a)	13, 14, 97, 115
40 C.F.R. § 124.19(f)	140, 248
40 C.F.R. § 1501	240
40 C.F.R. § 1501.5	236, 244
40 C.F.R. § 1501.5(a)	240

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
40 C.F.R. § 1502.4	244
40 C.F.R. § 51.124(o)	50
40 C.F.R. § 51.308	180, 181, 183
40 C.F.R. § 51.308(d)	179
40 C.F.R. § 52.21	passim
40 C.F.R. § 52.21(b)	passim
40 C.F.R. § 52.21(c).....	158, 183
40 C.F.R. § 52.21(k)	124, 125, 129
40 C.F.R. § 52.21(o)	211, 214
40 C.F.R. § 52.21(s).....	273, 274
40 C.F.R. § 52.24(d)	138
40 C.F.R. § 63.43	99
40 C.F.R. § 63.43(c).....	99
40 C.F.R. § 70.7(h)	117
40 C.F.R. §§ 124.13	14
40 C.F.R. §§ 1501.5	236
40 C.F.R. §§ 51.123(o)	50
40 C.F.R. part 124.....	131
40 C.F.R. pt. 51, Ap. Y	180
40 C.F.R. pt. 51. Ap. W	passim
42 U.S.C. § 7475(d).....	165, 181, 182
42 U.S.C. § 7601(d)	137
50 C.F.R § 402.09.....	230

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
50 C.F.R. § 402.....	228
50 C.F.R. § 402.01(b)	234
50 C.F.R. § 402.02	239, 242, 243, 246
50 C.F.R. § 402.06.....	passim
50 C.F.R. § 402.07	passim
50 C.F.R. § 402.09	257
50 C.F.R. § 402.12	229
50 C.F.R. § 402.12(a).....	242, 243
50 C.F.R. § 402.13	250
50 C.F.R. § 402.13(a).....	228
50 C.F.R. § 402.14(a).....	228
50 C.F.R. § 402.14(b)	228, 229
50 C.F.R. § 402.14(c).....	229, 242, 243
50 C.F.R. § 402.14(d)	229, 252
50 C.F.R. § 402.14(e).....	229, 245, 246, 253
50 C.F.R. § 402.14(f)	229, 252
50 C.F.R. § 402.14(g)	229, 242, 243
50 C.F.R. § 402.14(h)	229, 243
50 C.F.R. § 402.14(i)	229
50 C.F.R. § 402.16.....	229, 267
 Federal Register	
43 Fed. Reg. 26,388 (June 19, 1978)	20, 23, 35, 232
43 Fed. Reg. 872 (Jan. 4, 1978)	276

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
45 Fed. Reg. 33,290 (May 19, 1980)	14
51 Fed. Reg. 19,926 (June 3, 1986)	246, 261, 290
51 Fed. Reg. 19,938 (June 3, 1986)	255, 256
52 Fed. Reg. 24,672 (July 1, 1987).....	166
52 Fed. Reg. 24,714 (July 1, 1987).....	169
59 Fed. Reg. 7,629 (Feb. 16, 1994)	217
61 Fed. Reg. 38,250 (July 23, 1996).....	23, 131, 201
62 Fed. Reg. 38,651 (July 17, 1997).....	145
62 Fed. Reg. 38,652 (July 18, 1997).....	157
67 Fed. Reg. 80,186 (Dec. 31, 2002).....	24
69 Fed Reg. 65,215 (Nov. 10, 2004).....	259
69 Fed. Reg. 23,951 (Apr. 30, 2004)	143
70 Fed. Reg. 12,005, (Mar. 10, 2005).....	258
70 Fed. Reg. 15,944 (Mar. 29, 2005).....	98
70 Fed. Reg. 25,162 (May 12, 2005)	136
70 Fed. Reg. 28,606 (May 18, 2005)	94
70 Fed. Reg. 39,104 (July 6, 2005).....	174, 180, 183, 184
70 Fed. Reg. 48,285 (August, 17, 2005).....	129
70 Fed. Reg. 65,984 (Nov. 1, 2005).....	159, 163, 164
70 Fed. Reg. 71,612 (November 29, 2005).....	144, 145
72 Fed. Reg. 20,586 (Apr. 25, 2007)	159
73 Fed. Reg. 28,321 (May 15, 2008)	159, 160, 162
73 Fed. Reg. 11,845 (March 5, 2008).....	50

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
73 Fed. Reg. 16,436 (March 27, 2008).....	141, 143, 144
73 Fed. Reg. 23,101 (April 29, 2008).....	50
 Bills and Resolutions	
3 SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 (Comm. Print Aug. 1978).....	81
H.R. 2764; Pub. L. 110-161	51, 55
S.252	81

MAJOR DEFINED TERMS

ANPR = Advanced Notice of Proposed Rulemaking
BA = Biological Assessment
BACT = Best Available Control Technology
BIA = Bureau of Indian Affairs
BLM = Bureau of Land Management
BO = Biological Opinion
CAA = Clean Air Act
CAMR = Clean Air Mercury Rule
CFB = Circulating Fluidized Bed
CO₂ = Carbon Dioxide
CSP = Concentrating Solar Power
EAB or Board = Environmental Appeals Board
EIS = Environmental Impact Statement
EPA = Environmental Protection Agency
ESA = Endangered Species Act
FWS = U.S. Fish and Wildlife Service
GHG = Greenhouse Gas
HAPs = Hazardous Air Pollutants
IGCC = Integrated Gasification Combined Cycle
MACT = Most Advanced Control Technology
NAAQS = National Ambient Air Quality Standards
NEPA = National Environmental Policy Act
NMFS = National Marine Fisheries Service
NSPS = New Source Performance Standard
NSR = New Source Review
PM = Particulate Matter
PM₁₀ = Particulate Matter with a diameter of 10 microns
PM_{2.5} = Particulate Matter with a diameter of 2.5 microns
PSD = Prevention of Significant Deterioration
SCR = Selective Catalytic Reduction
SIL = Significant Impact Levels

SIP = State Implementation Plan

SNCR = Selective Non-Catalytic Reduction

SO₂ = Sulfur Dioxide

INTRODUCTION

The Desert Rock Prevention of Significant Deterioration ("PSD") permit was issued on July 31, 2008 – more than 4 years after the Environmental Protection Agency ("EPA" or "the Agency") found that the permit application was complete, and more than 2 years after a draft permit was developed and issued for public comment. The review process for this permit involved years of studies and intra-agency, inter-agency, and tribal consultations, as well as an extended public comment period. Legal and technical experts from EPA Region 9 and EPA Headquarters considered every issue raised during the public comment period to ensure that the permit meets all applicable requirements. Later, they also considered and responded to certain late-filed comments that the NGO Petitioners submitted as much as a year after the comment period ended.¹ Ultimately, after more than 4 years of review, EPA Region 9 issued a final permit that imposes the most stringent emission limits for any coal-fired power plant in the United States (and, as far as Desert Rock Energy knows, for any such plant in the world) and also includes additional requirements, such as an obligation to purchase offsets for all the plant's sulfur dioxide ("SO₂") emissions, that go well beyond any statutory or regulatory requirements.

Despite these efforts, Petitioners claim to have found an astonishing number of legal flaws in the permit and the permitting process. The permit, they argue, must be remanded for more review, more process, and more delay. Most of the Petitioners have been very public in stating that they oppose the construction of any new coal-fired power plants, and that they are using all available means to block or delay the construction of any such plant. Of course, they have the right to express their views, but the Board should not allow them to abuse or misuse the

¹ "NGO Petitioners" consist of Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council ("NRDC"), San Juan Citizens' Alliance, Sierra Club and Wild Earth Guardians.

PSD permitting process. It was not intended to allow opponents of a project – no matter how committed and well funded they may be – to stop a project that meets the requirements established by Congress and EPA, or to delay it in the hope that it will eventually become uneconomic.

As the Board well knows, the PSD program was designed to strike a balance that allows for economic development while at the same time protecting human health, air quality, and sites of natural value. U.S. EPA Office of Air Quality Planning and Standards, New Source Review Workshop Manual (Draft Oct. 1990) at 3 ("NSR Manual"). The PSD regulations require that major new sources be reviewed prior to construction to ensure that they will use the "best available control technology" ("BACT") to limit their emissions of regulated air pollutants and that they will not cause or contribute to a violation of a national ambient air quality standard ("NAAQS") or the applicable PSD air quality increments. If a proposed project meets these requirements, it is entitled to receive a permit in a timely fashion.

In creating the PSD program, Congress expressly stated that it did not want the program to be misused as "a vehicle for inaction and delay." *See S. REP. NO. 94-717 at 23 (1976)*. In fact, Congress anticipated – and ultimately required by statute – that the process for developing a PSD permit be completed within one year after the submission of a complete permit application. CAA § 165(c), 42 U.S.C. § 7465(c). As a legal matter, this requirement is no less important – and no less binding on EPA – than any of the other statutory requirements of the PSD program, and Desert Rock Energy respectfully requests that the Board consider this requirement as it evaluates the arguments made by Petitioners in this case. Several of their arguments, if accepted, would make it impossible for EPA – or any other permitting agency – to issue a permit within the one-year timeframe prescribed by Congress. Desert Rock Energy has made every reasonable

effort to accommodate public comments and performed numerous time-consuming studies at the request of EPA, the National Park Service and the U.S. Forest Service, all of whom were seeking to address concerns raised by Petitioners. Desert Rock Energy not only complied with the protective requirements of the PSD permitting process, but has gone well beyond them in many respects. For its accommodation and responsible partnership with all the parties to the public comment process, Desert Rock Energy has been rewarded with these petitions. It is clear from Petitioners' voluminous briefs, as well as their public statements, that they would very much like to turn the PSD program into "a vehicle for inaction and delay." Desert Rock Energy urges the EAB not to allow this result.

In this case, the Board must also consider the federal government's trust obligation with respect to Indian tribes and the impacts of its actions on the Navajo Nation in particular. All Executive branch departments and agencies have been directed, by Executive Order, to "respect Indian tribal self-government and sovereignty² . . . and strive to meet the responsibilities that arise from the unique legal [trust] relationship between the Federal Government and Indian tribal governments" when taking actions that have tribal implications. Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). Pursuant to its trust relationship, the federal government is obligated to protect resources on tribal lands – not only by preventing exploitative misuse of those resources, but also by allowing them to be used to advance the interests of the beneficiary tribes.

² The right of Indian tribes to self-government and self-determination is well recognized. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) ("*Consultation and Coordination with Indian Tribal Governments*"); see also 25 C.F.R. Title V ("*Indian Self-Determination and Education Assistance Act*"). As domestic dependent nations under the protection of the United States, Indian nations retain fundamental inherent self-determination governance authority and responsibility over their territories, which authority extends to their right and ability to develop energy projects, in compliance with federal law. See 25 C.F.R. Title V.

Although Desert Rock Energy is the permit applicant in this case, the Desert Rock project was conceived entirely by the Navajo Nation. In light of the depressed economic conditions on the Navajo reservation (more than 50% of working-age Navajo are unemployed and Navajo per capita income is roughly \$7,400³) and the natural resources on tribal lands, the Navajo Nation created the Diné Power Authority ("DPA") to develop energy resources on Navajo land for the benefit the Navajo people and the promotion of economic development in the Navajo Nation.⁴ Through DPA, the Navajo Nation has been working for more than a decade to develop the Desert Rock Project. Because of the Navajos' respect for nature, DPA sought a partnership with a developer that would be "willing to push the environmental standards to a new high."⁵ After interviewing a number of potential developers, DPA selected Desert Rock Energy as the one that would best reflect tribal values and best address the economic needs of the Navajo Nation.

The Navajo Nation has spoken, resolutely, in support of the Desert Rock Project. The Navajo Nation Council voted 66-7 to issue the necessary leases, and the Eastern Agency Council, representing the 31 Navajo chapters located closest to the project, voted 96-0 to support it. As a result, there is no question that the Navajo government has exercised its right of self-determination to pursue the construction of the Desert Rock Project. The Navajo Nation has declared that the Desert Rock Project "is absolutely critical to the economic future of the Navajo Nation."⁶ President Joe Shirley, Jr., the Navajo Nation's elected leader, has sent several letters that are part of the public record, noting the importance of the project for the Navajo economy and for the government of the Navajo Nation. According to President Shirley, direct payments

³ AR 29.

⁴ Steven C. Begay, Testimony before the Senate Committee on Indian Affairs, Oversight Hearing on Indian Energy Development – Regaining Self-Determination Over Reservation Resources, May 1, 2008, at 2 (hereinafter *Begay Testimony*).

⁵ *Begay Testimony* at 3.

⁶ *Begay Testimony* at 3.

from the project will provide about one-third of the total annual operating budget for the government of the Navajo Nation, which loses more than \$5 million in tax revenue every *month* the permit is delayed.

As discussed in the many pages that follow, the Desert Rock PSD permit meets all applicable substantive requirement, and the process by which it was developed was fully consistent with all applicable procedural requirements. For these reasons, and in light of the federal government's trust obligation to the Navajo Nation and Congress's express desire that the PSD permit process not be used "as a vehicle for inaction and delay," Desert Rock Energy urges the Board to deny the Petitions for Review in this case.

SUMMARY OF ARGUMENTS

The issues on this appeal are not complicated. Though Petitioners have submitted voluminous pleadings that purport to raise ten different, "independent" reasons for vacating the PSD permit, they really offer only six, restated ten different ways. The six arguments involve: (1) regulation of CO₂, (2) EPA Region 9's BACT analysis, including the consideration of IGCC in such analysis, (3) consideration of the case-by-case MACT determination in the BACT analyses for NO_x and SO₂, (4) modeling issues, (5) coordination of the PSD program with other environmental requirements, and (6) environmental justice. Of those six arguments, four simply rehash well-settled law and only one could arguably be characterized as a new question for this Board when Petitioners filed their appeals. And that matter of first impression—whether the PSD regulations require EPA to regulate CO₂ emissions through its BACT analysis—has since been resolved by the *Deseret* decision and Administrator Johnson's December 18, 2008 Memorandum.

Regulation of CO₂. This argument has been effectively resolved by the *Deseret* decision and Administrator Johnson's December 18, 2008 Memorandum. Petitioners here offer no new compelling arguments beyond those advanced in the *Deseret* matter, and the deficiencies the Board found in the administrative record in *Deseret* are not present in the administrative record here. Here, the administrative record includes the Advanced Notice of Proposed Rulemaking confirming that EPA does not consider CO₂ to be a "regulated pollutant" for PSD permitting purposes. EPA's conclusion in this case, fully supported by the administrative record before this Board, has also been reinforced, and conclusively so, by Administrator Johnson's December 18, 2008 Memorandum, confirming EPA's position in light of the *Deseret* decision.

Consideration of IGCC. Petitioners argue that it was clear error for EPA to exclude IGCC technology at step one of the BACT analysis. Petitioners make this argument in the face of a clear, consistent string of Board decisions both affirming EPA's broad discretion in disregarding proposed control technology that would redefine the proposed source, and finding that the sort of fundamental redesigns that IGCC would require at the Desert Rock Project constitute such redefinition of the source. In any event, consideration of IGCC would not have had a material effect on the PSD permit because the many IGCC studies in the record demonstrate that IGCC was not a viable or cleaner technology in this case.

Despite the fact that their position is at odds with well-settled law, it is easy to see why Petitioners would seize upon IGCC (a technology which they have otherwise relentlessly challenged where IGCC is actually being deployed) in this appeal: it gives them a foothold to throw so many more arguments at the Board. According to Petitioners, the failure to consider IGCC had a cascading effect that created subsequent clear error in (1) EPA's collateral impact analysis, (2) EPA's NEPA analysis, (3) EPA's environmental justice analysis, and (4) EPA's

endangered species analysis. Because EPA did not commit clear error in the first instance by disregarding IGCC as redefining the source, these derivative arguments necessarily fail as well.

MACT Issue. Petitioners raise for the first time in this appeal an argument related to the regulation of HAPs, including mercury, alleging that a case-by-case MACT analysis must be conducted concurrently with the PSD permitting process. This argument can and should be disregarded by the Board because Petitioners failed to preserve the issue by timely comment during the public comment period. Even if the Board were to reach the merits of this issue, the Board would see that there is no provision in the CAA that requires that a case-by-case MACT determination be prepared concurrently with the development of the PSD permit. In fact, HAPs were expressly exempted from regulation under the PSD requirements in section 112(b)(6) of the Act and the Petitioners' argument must therefore fail.

BACT Issues. Petitioners challenge a bevy of technical determinations made during the PSD permitting process, including (1) how the NO_x and SO₂ emissions limits were set during the BACT analysis, (2) the start-up, shutdown and malfunction emissions limits set during the BACT analysis, and (3) whether PM₁₀ could be used as a surrogate for PM_{2.5}. In this category, Petitioners simply retread old arguments, unfortunately forcing this Board to retread its old decisions in validating those arguments.

In its BACT analysis, EPA Region 9 selected the top NO_x and SO₂ control options for the Desert Rock Project. To arrive at the appropriate BACT and emissions limits, EPA considered a huge volume of data derived from more than half a dozen similar sources. Petitioners' central complaint is, as discussed above, that EPA did not consider IGCC and sources utilizing IGCC during the BACT process. During the public comment period, Petitioners also requested that EPA Region 9 examine certain similar plants' operations and emissions levels. EPA Region 9

did so, and now Petitioners appeal on the basis that EPA Region 9's analysis came after the close of the public comment period. The issue Petitioners raise fails to present any detailed and specific description of error in EPA's response to the comments. Rather, Petitioners seek to force EPA into a position where, if it acknowledges and acts on comments made during the public comment process, it is subject to appeal, but if it disregards the comments, it is likewise subject to appeal.

Regarding EPA's analysis of PM_{2.5}, Petitioners' complaint has less to do with the analysis as it relates to the Desert Rock Project and more to do with EPA's grandfathering rule permitting certain sources, of which Desert Rock is one, to use PM₁₀ as a surrogate for PM_{2.5} due to the difficulty in estimating and modeling PM_{2.5} emissions. A challenge like this to EPA's rulemaking is beyond the Board's jurisdiction, and the appeal of a specific permit to challenge an agency-wide rule is inappropriate.

Modeling Issues. Petitioners likewise take issue with the regional haze modeling, and the PSD increment modeling. Similar to the BACT category, Petitioners simply retread old arguments, unfortunately forcing this Board to retread its old decisions invalidating those arguments.

Petitioners' challenge to EPA's ozone modeling relies on data derived from a monitor installed in 2006, two years after Desert Rock Energy's PSD permit application was deemed complete. In 2008, four years after Desert Rock Energy's PSD permit application was deemed complete, EPA's ozone modeling that the region was still within NAAQS, though ozone levels for that monitor were slightly higher. No causal connection has been drawn between emissions sources like the proposed Desert Rock Project and the increased ozone levels detected at that isolated data point. Petitioners make the unfounded assertion that this isolated data point is

sufficient to demonstrate clear error where EPA modeling (which relies on ozone concentration assumptions higher than the monitored levels) indicates that the Desert Rock Project will not violate the 8-hour ozone standard, which, incidentally, was established in 2008, four years after the Desert Rock Energy's PSD permit application was deemed complete.

Furthermore, the "remedy" desired by Petitioners here is equivalent to modeling that has already been done. Petitioners request remand so that ozone modeling can be conducted to assess the impacts of a small number of sources on ozone NAAQS attainment issues. The NM Demonstration includes 2007 and 2012 future case modeling with specific, source apportionment scenarios that demonstrate minimal impact on 8-hour ozone levels.

Aside from challenging substantive rules beyond this Board's jurisdiction, Petitioners even attack measures taken beyond what is required by the PSD permitting process. As required, EPA coordinated with the National Park Service and the U.S. Forest Service to protect Class I areas from adverse impacts on visibility, after which no adverse impact was found. Nonetheless, in an attempt to accommodate comments regarding the visibility analysis for the PSD permit, EPA and Desert Rock Energy entered into a memorandum of understanding implementing SO₂ reductions beyond those required to meet PSD requirements. In a tactic seen throughout their briefing, Petitioners attack this voluntary measure by asserting, without any demonstrated basis, that it would not remedy the adverse impact of SO₂ emissions on visibility. This argument, of course, presupposes an adverse impact that EPA did not find, hence the issuance of the PSD permit, and attacks a voluntary reduction made by Desert Rock Energy as an insufficient "remedy" to a problem that does not exist. There is no satisfying this sort of complaint, made again and again in the face of scientific determinations by EPA. Similarly, Petitioners attack a NO_x optimization plan designed to achieve a NO_x rate lower than the level that the comments

claimed represented BACT by arguing that Desert Rock Energy will simply falsify its data. EPA and Desert Rock Energy are faced not just with hypotheticals, but hypotheticals that presuppose fraudulent behavior. This is precisely why the PSD permitting process here has become interminable.

As with its challenge to the BACT analysis, Petitioners' approach to PSD increment determination would render the PSD permitting process an endless circle of procedure. EPA began with very conservative "significant impact levels" to identify Class I Areas, for which EPA then conducted full cumulative PSD increment analyses utilizing emissions assumptions that would overstate possible impacts by using inflated emissions levels and the "worst case scenario" for different load conditions. After EPA published its initial PSD increment analysis, Petitioners lodged comments proposing different emissions rates, and EPA ran the models again using the Petitioners' proposed emission rates, describing in the Response to Comments how those models also indicated that the Desert Rock Project satisfied every increment requirement. According to Petitioners, EPA should have subjected those new models to further public comment, at which point, one suspects, subsequent issues would be raised. This is needless where EPA's additional modeling did not change the substantive conclusion that the Desert Rock Project does not exceed the relevant PSD increments.

Coordination of the PSD Permitting Process with Other Environmental Requirements. In a trio of process arguments, Petitioners allege that EPA was required to coordinate the PSD permitting process with the MACT analysis, the endangered species consultation, and the NEPA process. On the MACT analysis argument, Petitioners fail to overcome the uncomfortable facts that coordination of the PSD permitting process with the case-by-case MACT is not required by any statute, regulation or case law, and hazardous air pollutants—the focus of the case-by-case

MACT—are expressly exempted from the PSD permitting process. Petitioners' position regarding coordination of the PSD permitting process and the ESA § 7 consultation process suffers from a similar lack of statutory or regulatory support, a problem compounded by the fact that this Board has acknowledged in *Indeck* that it has no jurisdiction to determine the sufficiency of the ESA § 7 consultation itself, which it would have to do to resolve Petitioners' baseless complaints. In any event, EPA and the permittee, well aware of their independent duties under the ESA, have ensured that no irretrievable or irreversible commitment of resources will occur before completion of the ESA § 7 consultation by conditioning the permit accordingly. On the final coordination argument, EPA did coordinate the PSD permitting process with the NEPA process to the maximum extent feasible and reasonable; Petitioners can only make an argument here by manufacturing a strict coordination standard—that the PSD permit process proceed "in parallel" with the NEPA process and that the PSD permit not be issued until the FEIS is issued—that is nowhere to be found in any statute, regulation or decision by this Board.

Environmental Justice. Petitioners use the rubric of environmental justice to shoehorn into their petitions a litany of generalized grievances that might possibly be associated, whether in truth or not, with the Desert Rock Project. Petitioners' arguments here disregard the limited focus of a PSD permit itself and the extensive environmental justice analysis conducted by both Desert Rock Energy and EPA. Most of Petitioners' environmental justice claims are irrelevant to the PSD permitting process itself, *i.e.*, focus on infrastructure concerns or alleged health effects are more appropriately considered in another process. As far as the air-quality related environmental justice considerations go, in the face of a well-reasoned analysis concluding that there is no adverse impact on any low-income minority population, Petitioners simply disagree without providing any demonstration of EPA's purported clear error, aside from trotting out the

hobby horse that consideration of IGCC would obviate Petitioners' concerns. This is deeply ironic, as Petitioners' appeals seek to prevent, under the guise of environmental justice, a low-income minority population from achieving economic advancement through the exploitation of local resources. Distilled to their essence, Petitioners' PSD-relevant environmental justice arguments are a backdoor challenge to the NAAQS themselves, grounded in a disbelief that the NAAQS are indicators of healthful air. Appeal of a specific permit is an inappropriate forum in which to air these arguments.

Petitioners add paper to their appeals by simply repeating as arguments to the Board comments, sometimes verbatim, made to EPA during the public comment period for the PSD permit, without any further explanation as to why EPA's Response to Comments failed to address the comment. Another reason that Petitioners' appeals are so voluminous that they do not bother limiting themselves to issues raised during the public comment period. Petitioners' BACT analysis, MACT, ozone, PM_{2.5}, regional haze and environmental justice arguments all suffer from one or both of these deficiencies. Desert Rock Energy would ask the Board to excuse some amount of repetitive language in its brief; there is a limited vocabulary for characterizing this error common to so many of Petitioners' otherwise disparate arguments.

This appeal has the unintended, but inevitable, consequence of hurting the Navajo Nation, the sovereign people that conceived of this project to ensure that "Navajo coal, water, land and labor will stay on the Navajo Nation to produce revenue for the Navajo people." AR 29 at 2. The Desert Rock Project has met the spirit and the letter of the PSD regulations, and continued delay grounded in frivolous appeals like the BACT, MACT, PM_{2.5}, ESA, NEPA and environmental justice arguments here is not only a waste of EPA's resources but a meaningful

detriment to the Navajo people. The passage of time caused by these appeals is a strategic victory for these Petitioners, but an unfair, and costly, defeat for everyone else.

STANDARD OF REVIEW

Review of a final Prevention of Significant Deterioration ("PSD") permit by the Environmental Appeals Board ("EAB" or "the Board") is not a matter of right, but rather, falls within the Board's discretion. A PSD permit will ordinarily not be reviewed unless it meets one of two factors: (i) it is based on a clearly erroneous finding of fact or conclusion of law, or (ii) it involves an "exercise of discretion [by the permit issuer] or an important policy consideration" which the Board believes, in its discretion, it should review. 40 C.F.R. § 124.19(a); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490 (EAB 2006); accord e.g., *In re Inter-Power of N.Y., Inc.*, 5 E.A.D. 130, 144 (EAB 1994); *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999) ("*Knauf I*"); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997). Absent such clear error or policy issue, the Board will generally defer to the permit issuer's judgment. *Inter-Power*, 5 E.A.D. at 144. Therefore, it is infrequent for the Board to grant review in a PSD permit appeal. *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 7 (EAB 2000) ("*Knauf II*").

The heavy burden of demonstrating that review is warranted rests on the petitioner. 40 C.F.R. § 124.19(a); *Commonwealth Chesapeake*, 6 E.A.D. at 769. In order to establish that the Board should grant review, the petitioner must "state the objections to the permit that are being raised for review, and . . . explain why the permit decision maker's previous response to those objections (*i.e.* the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review." *Commonwealth Chesapeake*, 6 E.A.D. at 769. Further, petitions for review must include "a demonstration that any issues being raised were raised during the public

comment period (including any public hearing) to the extent required by these regulations[.]" 40 C.F.R. §§ 124.13, 124.19(a).

The Board has not articulated how this general standard of review changes, if at all, once review of a PSD permit has been granted. *See generally In re Dominion Energy Brayton Point*, 12 E.A.D. at 508-11 (discussing standard of review in a final order after previously granting review of a National Pollutant Discharge Elimination System ("NPDES") permit). However, the Board acknowledges that its "power of review should be only sparingly exercised," as "most permit conditions should be finally determined at the [permit issuer's] level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord Zion Energy*, 9 E.A.D. at 705. Accordingly, the Board frequently defers to permit authorities in its review of permit appeals, absent a clear error of law or fact. *See In re Three Mountain Power, LLC*, 10 E.A.D. 39, 54 (EAB 2001).

ARGUMENT

I. BACT IS NOT REQUIRED FOR CO₂ BECAUSE IT IS NOT SUBJECT TO REGULATION UNDER THE CLEAN AIR ACT.⁷

As a result of recent developments, it has been clearly established by the U.S. Environmental Protection Agency ("EPA" or "the Agency"), through its interpretative statements as well as the Desert Rock administrative record, that carbon dioxide ("CO₂") is not subject to regulation under the Clean Air Act ("CAA" or "the Act"), and therefore BACT is not required for CO₂.

⁷ On January 7, 2009, EPA Region 9 filed a Notice of Partial Withdrawal of Permit, (the "Notice"), informing the Board that EPA Region 9 was thereby withdrawing section II.B.3.b (pages 25-27) of its Response to Public Comments and section 5 (pages 8-15) of its Responses to Late-Filed Public Comments. According to EPA Region 9, these portions of the Region's permitting decision contain EPA Region 9's basis for not including limitations on emissions of CO₂ in the permit. Although Desert Rock Energy is the holder of the permit, it had not been given any indication that EPA or EPA Region 9 was considering such an action, and it received the Notice by e-mail less than 24 hours before this Brief was due. Given the exceptionally short notice provided by EPA Region 9, Desert Rock Energy is still examining this Notice and its implications for the matter before the Board, and reserves the right to brief the Board further on the Notice. Based on a cursory review of the issues raised by the Notice, however, Desert Rock Energy questions its legality, particularly because EPA Region 9's determination on the CO₂ question is non-discretionary in light of the December 18, 2008 Memorandum from Administrator Johnson entitled *EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Program* (the "Johnson Memorandum") and given the resolution of *Desert Rock Energy Company, LLC and the Diné Power Authority v. EPA*, No. 4:08-CV-872 (S.D. Texas, filed Mar. 18, 2008). It is puzzling that EPA Region 9 would solicit public comment on an issue already decided by the EPA Administrator, especially in light of the statements in the Johnson Memorandum making it clear that the interpretation made therein on this precise issue is not subject to public comment. *Johnson Memorandum* at 2, 16. Moreover, EPA Region 9 purports to withdraw certain sections of its Response to Comments document "under the authority of 40 C.F.R. 124.19(d)," which only allows a permitting authority to withdraw portions of an actual permit – not a section of the administrative record. The proper approach for changing or supplementing the administrative record is to seek a voluntary remand, not to "withdraw" a section of the administrative record under 40 C.F.R. 124.19(d). In any event, regardless of the merits of the Notice, Desert Rock Energy believes that the Board may benefit from symmetrical briefing on the CO₂ issue, and so respectfully submits its arguments on the same.

In November 2008, the Board addressed and dismissed many of Petitioners' arguments on this issue and ruled that it is not clearly erroneous for EPA to use its discretion to interpret the phrase "each pollutant subject to regulation under the act," and for an EPA regional office to decline to treat CO₂ as subject to PSD Best Achievable Control Technology ("BACT") requirements.⁸ *In re Deseret Electric Power Cooperative*, PSD Appeal No. 07-03, slip op. at 20 (EAB Nov. 13, 2008) ("*Deseret*"). However, given the incomplete administrative record in that matter, *Deseret* left unresolved two remaining issues relating to whether a BACT analysis is required for CO₂: whether EPA has interpreted this phrase as requiring actual control of an emission, and (ii) if it has, whether that interpretation is clearly erroneous. On December 18, 2008, the EPA Administrator, Stephen L. Johnson (the "Administrator"), issued a reasoned memorandum in response to *Deseret* that definitively resolved those two questions. The Administrator interpreted the PSD permitting program requirements as excluding pollutants like CO₂ which are subject only to monitoring and reporting requirements, not actual control. All of the CO₂ BACT arguments raised by Petitioners in their briefs have been addressed either by the Board or the Agency, and it has been clearly established that a BACT is not required for CO₂, in a PSD permitting action. There are no remaining issues in controversy for the Board to review, and review must therefore be denied with respect to this issue.

The CAA requires anyone who wants to build a major new facility to obtain a PSD permit before beginning construction. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). PSD permits are required to contain BACT emissions limits for "each pollutant subject to regulation under the Act." *Id.* The meaning of this phrase has been a point of significant debate since the U.S.

⁸ See generally NGO Petitioners' Supp. Br., Section I.1.B.i.a–f (contending that the unambiguous plain meaning of sections 165 and 169 of the Clean Air Act is conclusive and requires BACT limits for CO₂).

Supreme Court ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that CO₂ is an "air pollutant" as defined under the Act. Litigants challenging PSD permits, including some of the present petitioners, have contended in multiple proceedings before the Board⁹ that existing monitoring and reporting requirements, which have been in place since 1993, unequivocally constitute "regulation" of CO₂, making it a "pollutant" that is "subject to regulation under the Act." As a result, they allege, section 165 of the Act demands a BACT limit for CO₂ in PSD permits. The EPA has consistently stated that section 165 is not as clear as these litigants contend, and requires interpretation. EPA has further contended that it has historically interpreted section 165 so that monitoring and reporting requirements do not equate to "regulation," because they do not impose actual control of emissions of that pollutant.

In November 2008, the Board weighed in on the debate with its *Deseret* opinion. In *Deseret*, the Board held that section 165 "is not so clear and unequivocal as to . . . dictate whether the [EPA] must impose a BACT limit for CO₂ in the permit[]" and, "by its terms, does not foreclose the . . . meaning suggested by [EPA Region 8 and the Permittee.]" *Deseret*, slip op. at 29, 33. However, the Board also found that, while such an interpretation was not foreclosed, the administrative record before it did not support the EPA Regional Office's view that the Agency had actually interpreted "subject to regulation" to require actual control either. *Id.* at 3. The primary shortcomings of the record the Board identified were that the Regional Office "did not identify in its response to comments any Agency document expressly stating that 'subject to regulation' has this meaning[.]" and that "the historical Agency statements the Region identified

⁹ See *In re Christian County Generation, LLC*, PSD Appeal No. 07-01; *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03; *In re Northern Michigan University*, PSD Appeal No. 08-02.

in its response to comments are [not] sufficiently clear and consistent articulations of an Agency interpretation[.]" *Id.* at 3, 37.

Building on the Board's *Deseret* opinion, the Administrator recently issued a memorandum, "*EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program*" (the "Johnson Memorandum"). Acknowledging the Board's concern that the *Deseret* record was insufficient to verify the Agency's adherence to any particular meaning underlying the PSD BACT requirements, the Johnson Memorandum formally establishes the Agency's interpretation of "regulated NSR pollutant" – which, by definition, includes "any pollutant subject to regulation under the Clean Air Act" – as comprising only those pollutants subject to actual control. *See Johnson Memorandum* at 1. The Johnson Memorandum answers EAB's in *Deseret* for an action of nation-wide scope by promulgating a universally applicable explanation of existing regulatory requirements that eliminates confusion in those cases with sparse records akin to the *Deseret* record, and resolutely establishing that "permits already under review [need not] require limitations on pollutants subject only to monitoring and reporting requirements." *Id.* at 16; *see also id.* at 2.¹⁰

The Johnson Memorandum and the strength of the Desert Rock administrative record (should the Board decline to consider the Johnson Memorandum when addressing the present petitions for review of the Desert Rock PSD Permit) reveal that all of Petitioners' arguments to the effect that BACT is required for CO₂ have been resolved. EPA has interpreted the phrase

¹⁰ Though issued after the Desert Rock PSD permit was granted, the clear statements of EPA interpretation and nationwide application of that interpretation directly inform the present debate (in a manner urged by the Board in *Deseret*). Section I.D.1, *infra*, discusses why the Board should consider and apply the Johnson Memorandum in its evaluation of Petitioners' CO₂ BACT arguments.

"subject to regulation" as excluding CO₂, and this interpretation as explained by the Johnson Memorandum and supported by the Desert Rock administrative record, is not erroneous. Because there are no longer any issues in controversy with respect to this issue, the Board must therefore deny review of this issue.

A. The Johnson Memorandum Definitively Establishes that CO₂ is Not a Pollutant Subject to Regulation Under the Clean Air Act.

1. *The Johnson Memorandum Presents a Clear Agency Interpretation of The Phrase "Subject To Regulation."*

The Johnson Memorandum is a formal, interpretative embodiment of what has consistently been EPA's historical practice of excluding from the PSD program CO₂ and other pollutants not subject to actual control. Answering the Board's call in *Deseret* for a clear Agency statement to guide the Board in pending cases such as the present appeal, the Johnson Memorandum explains that the existing regulatory requirements of the PSD program "exclude pollutants for which EPA regulations only require monitoring or reporting but . . . include each pollutant subject to either a provision in the [CAA] or regulation adopted by EPA under the [Act] that requires actual control of emissions of that pollutant." *Johnson Memorandum* at 1, 2; *see also Deseret*, slip op. at 64. This interpretation was based on the language and structure of the PSD regulations as well as significant policy considerations and a review of EPA's historical understanding of "regulated," which revealed that "as a matter of practice, EPA has not issued PSD permits containing emission limitations for pollutants that are only subject to monitoring and reporting requirements," nor has EPA made any statements or produced any documents inconsistent with this interpretation. In light of these considerations, and the thorough analysis undertaken by the Administrator in the Johnson Memorandum, this interpretation is neither

clearly erroneous nor contrary to the wording of the regulation. For a more detailed discussion of the reasonableness of this interpretation, see *infra*, Section I.D.

2. *As A Formal Agency Interpretation, Any Deviation from The Position Taken In The Johnson Memorandum Would Require Notice and Comment Rulemaking.*

In *Deseret*, EPA established, and the Board agreed, that in 1977 and 1978, EPA introduced an interpretation of the phrase "subject to regulation," as meaning "regulated under the Act." *Part 52 – Approval and Promulgation of State Implementation Plans*, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (the "1978 Preamble"); *Deseret*, slip. op. at 37-38. The interpretation did not go so far as to interpret what "regulated under the Act" meant. The *Deseret* administrative record referenced several documents, statements and decisions that EPA Region 8 said clearly linked the word "regulated" to EPA's purported agency definition of "actual control." The Board reviewed each of these citations and ultimately concluded that none of them contained a clear statement actually making that connection. Thus, the Board held that there was no evidence that EPA had actually considered the issue or offered a definitive interpretation either way. *Deseret*, slip op. at 35. The Johnson Memorandum provides that definitive interpretation.

The Johnson Memorandum explains how EPA interprets the phrase "subject to regulation" in both the statutory and regulatory text establishing the PSD program. The Administrator considered EPA's historical statements and conduct since 1977 to support the interpretation it sets forth: that "regulation" requires "actual control." See *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("existing practice" evidence of current interpretation of regulation). It is important to note that in setting forth this interpretation, the Administrator considered public comments received in pending discussions of greenhouse gases, but did not

solicit public comments specifically on its interpretation. Under the Administrative Procedures Act ("APA"), this is the Administrator's prerogative when issuing an interpretation that does not reverse an existing position of the agency.

As the Board recognized in *Deseret*, such an interpretation can only be changed – to the result Petitioners seek, or otherwise – through notice and comment rulemaking. See *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995); *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)(citing 5 U.S.C. § 551(5)); *Syncor Int'l Corp v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). Absent such a rulemaking, EPA's interpretation should stand as the definitive interpretation from which the APA prohibits deviation without proper notice and comment rulemaking.

B. The Desert Rock Administrative Record Also Shows that EPA Has Understood "Subject To Regulation" as Requiring Actual Control of Emissions of a Pollutant.

1. *The Desert Rock Administrative Record is More Detailed than the Deseret Administrative Record, and Clearly States EPA's Position.*

In further support of EPA Region 9's decision to issue the Desert Rock PSD Permit without CO₂ BACT analysis and to the extent that the Board does not consider the Johnson Memorandum in this matter, it should be noted that the Desert Rock administrative record does not have the same shortcomings as the *Deseret* record was found to have. Independent of the Johnson Memorandum, the Desert Rock administrative record clearly establishes that an EPA-wide understanding of the meaning of "subject to regulation" constrained EPA Regional Offices from imposing BACT limits for CO₂ in PSD permits, and that that constraint is entitled to deference from the Board.

The administrative record for a final PSD permit is comprised of the administrative record for the draft permit, all comments received during the public comment period, the

transcripts or tapes of hearings, and written materials submitted at hearings, the EPA's response to comments, other documents contained in the supporting file for the permit, "any documents cited in the response to comments," and the final permit. 40 C.F.R. §§ 124.17(b), 124.18. While documents are generally required to be added to the administrative record, "published materials which are generally available and which are included in the administrative record need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments." 40 C.F.R. § 124.19.

In *Deseret*, the public comment period lasted thirty days, during which time the EPA received one comment letter and one comment e-mail that expressed concerns with the draft permit and/or Statement of Basis. Only one additional letter expressing concern about the project was received by EPA after the close of the public comment period. The response to comments concerning the CO₂ issue spanned 5 pages (of 20). See Response to Public Comments on Draft Air Pollution Control PSD Permit to Construct for Permit No. PSD-OU-0002-04.00 (August 30, 2007) (available at <http://www.epa.gov/Region8/air/pdf/ResponseToComments.pdf>). After a review of the *Deseret* record, the EAB concluded that neither the response to comments nor any document referenced therein¹¹ pointed to a clear statement by EPA that it understood "subject to regulation" as requiring actual control of emissions.

¹¹ The *Deseret* record cited to the following sources of authority on EPA's interpretation: the 1978 Preamble; *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)*, 61 Fed. Reg. 38,250, 38,309-10 (proposed July 23, 1996) (the "1996 Regulations"); *Final Rule: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186, 80,230 (Dec. 31, 2002) (the "2002 Final Rule").

Because the Desert Rock permit was issued almost a year later than the *Deseret* permit, the Desert Rock administrative record is much stronger and presents new support and sources that the Board has not yet considered, as well as addresses the impact of intervening events. It also includes clear articulations of the Agency's considered position. The Desert Rock public comment period for the proposed permit lasted sixteen weeks, and included informal and formal public hearings. AR 120 at 1. Prior to the close of the public comment period on November, 13, 2006, EPA received 681 comment letters by mail, in person or via fax; 246 e-mails or letters submitted via e-mail; and 61 comments given by oral testimony at the formal hearings. EPA also accepted late comments received up to April 15, 2007, and responded to them in its supplemental response to comments. The Response to Comments exceeded 220 pages. AR 120 ("Response to Comments"). Three additional late comments were submitted on October 4 and October 10, 2007 and on March 4, 2008.¹² *See* AR 121 at 1. Because of events that had occurred after the close of the comment period, EPA exercised its discretion and responded to these later comments via a 23-page Supplemental Response to Comments ("Response To Late Comments"). *Id.* As a document prepared to address issues that arose after the close of the Desert Rock (and *Deseret*) comment period, the Response to Late Comments includes a more developed discussion about issues the Board felt were not fully developed in *Deseret*, such as the relationship of section 821 of the Clean Air Act Amendments of 1990 and the BACT requirements, and the historical consistency of EPA's interpretation of "subject to regulation."

The Desert Rock administrative record also cites to and incorporates sources of authority on EPA's understanding of the PSD program requirements that were not included in the *Deseret*

¹² Additional late comments were received after March 2008; however, EPA declined to consider them because they were untimely.

record, the most notable of which is EPA's "Advanced Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act" (EPA-HQ-OAR-2008-0318 (July 11, 2008), *available at* <http://www.epa.gov/climatechange/anpr.html> ("ANPR")). While not specifically enumerated as part of the administrative record, the ANPR was publicly available on EPA's website upon completion of the Desert Rock administrative record and was subsequently published in the Federal Register. *See* 73 Fed. Reg. 44,354 (July 30, 2008). It was explicitly cited in EPA Region 9's Response to Comments, which citation included a link where the public could access the ANPR. *See* AR 120 at 23. Release of the ANPR also included EPA press releases, and its issuance was widely reported within the environmental community and public press. Accordingly, the ANPR satisfies the criterion for inclusion in the administrative record pursuant to 40 C.F.R. § 124.17(b).

The ANPR is the Agency's formal response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, and is the first step in EPA's process for developing a regulatory program to address emissions of CO₂ and other greenhouse gases. *See e.g.*, ANPR at 1, 5, 74. Among other things, it contains a comprehensive discussion of EPA's options for regulating CO₂ under the CAA as well as of the significant issues that would be raised by such an effort. Significantly, the ANPR is a formal guidance document signed by the Administrator of the EPA that sets forth an EPA-wide position that the phrase "subject to regulation" requires actual control. *See e.g., id.* at 4-6, 89.

2. *The ANPR Clearly States that the Phrase "Emissions Subject To Regulation" Requires Actual Control of Such Emission.*

In *Deseret*, the Board faulted EPA Region 8 for not showing any clear statement from EPA connecting the meaning of the phrase "subject to regulation" to "actual control." *Deseret*, slip op. at 3, 36. The ANPR overcomes that shortcoming and is part of the Desert Rock record.

The ANPR is a formal rulemaking document published in the Federal Register and signed by the Administrator of the EPA.¹³ The ANPR is not Region-specific and applies throughout EPA Headquarters and all Regional offices. EPA prepared the ANPR for the purposes of considering the potential use of the Act to address global climate change, and to consider "the interrelationship of [Act] authorities and . . . how the various [Act] authorities would work or could work together if [greenhouse gas] controls were established under any provision of the [Act]." *ANPR* at 75. It is important to recognize that EPA did not seek comment on its position that greenhouse gases are not currently regulated under the Act, but instead sought comment on how CO₂ could potentially be regulated under the Act in the future. As discussed below, the ANPR represents another agency action of "nationwide scope" suggested by the EAB in its *Deseret* decision. *Deseret*, slip op. at 64. It further establishes a nationwide factual record on which the Agency's action is based and avoids addressing this highly complicated issue in individual permit proceedings, as suggested by the Board. *See id.*

As part of this review, EPA explicitly considered whether the Act presently requires regulation for CO₂ or other pollutants subject only to monitoring and reporting requirements. In concluding that it does not, the ANPR expresses EPA's long-held view that CO₂ is not subject to regulation under the CAA for PSD purposes: "EPA has historically interpreted the phrase 'subject to regulation under the Act' to describe air pollutants subject to CAA statutory provision or regulations that require actual control of emissions of that pollutant" and "has not previously interpreted the BACT requirement to apply to air pollutants that are only subject to requirements

¹³ References to the ANPR will be to the form of the document as cited in the Response to Comments and the Response to Late Comments: EPA-HQ-OAR-2008-0318 (July 11, 2008), available at <http://www.epa.gov/climatechange/anpr.html>. All references will be listed as *ANPR* at XXX. Please note, however, that the ANPR was subsequently published in the Federal Register, and can be found at 73 Fed. Reg. 44,354 (July 30, 2008).

to monitor and report emissions." *ANPR* at 165, 165 n.96.¹⁴ In accordance with this understanding that no pollutant subject to anything less than actual control is a "regulated pollutant" for PSD purposes, the ANPR also sets out, in clear language, "EPA's interpretation . . . that CO₂ is not a regulated pollutant under the Act." *Id.* at 89.¹⁵ This is the same interpretation that was articulated in the Johnson Memorandum.

¹⁴ See Gerald E. Emison, Director, Office of Air Quality Planning and Standards, *Implementation of North County Resource Recovery PSD Remand* (Sept. 22, 1987)(footnote on the first page – "A 'regulated pollutant,' or 'pollutant subject to regulation under the Clean Air Act,' is one which is addressed by a national ambient air quality standard, a new source performance standard, or is listed pursuant to the national emission standards for hazardous air pollutants program."). Though this memorandum issued before the 2002 Rulemaking introduced the defined term "regulated NSR pollutant" to replace the term "regulated pollutant," it still shows a clear articulation of EPA's understanding of the meaning of "subject to regulation" that has been consistent since the 1977 Clean Air Act Amendments.

¹⁵ While this is the clearest statement, in that it includes the word "interpretation," the ANPR emphasizes this point throughout. See *ANPR* at 164 ("EPA does not interpret the PSD program provisions to apply to greenhouse gases at this time, but any requirement to control CO₂ or other greenhouse gases promulgated by EPA under other provisions of the CAA would make parts of the PSD program applicable to any additional air pollutant(s) that EPA regulates in this manner."); *id.* at 165 ("PSD permits have not been required to contain BACT emissions limit [sic] for greenhouse gases because such gases (and CO₂ in particular) have not been subject to any CAA provisions or EPA regulations issued under the Act that require actual control of emissions."); *id.* at 166 ("[Greenhouse gases] would become regulated pollutants under the Act if and when EPA subjects greenhouse gases to control requirements under a CAA provision other than sections 112 and 211(o)."); *id.* at 472-73 ("The PSD program primarily applies to all pollutants for which a NAAQS is promulgated, but some of the substantive requirements of the PSD program also apply to regulated pollutants for which there is no NAAQS . . . Since there is currently no NAAQS for [greenhouse gases] and [greenhouse gases] are not otherwise subject to regulation under the CAA, the PSD program is not currently applicable to [greenhouse gases]."); *id.* at 476 ("As noted in Section IV, [greenhouse gases] are not currently subject to regulation under the Act, and therefore are not regulated NSR pollutants. However, if greenhouse gas emissions become subject to regulation under any of the stationary or mobile source authorities discussed above (except sections 112 and 211(o)), [greenhouse gases] could become regulated NSR pollutants."); and *id.* at 523 ("[T]he applicability of PSD is tied to whether a pollutant is subject to a control program under the Act.").

C. The Agency's Interpretation, As Established by the Johnson Memorandum and Validated by the Desert Rock Administrative Record, Is Reasonable and Not Clearly Erroneous.

A reasonable interpretation is one that "sensibly conforms to the purpose and wording of [the regulation]" and is not "plainly erroneous." *Farmers Telephone Co. v. FCC*, 184 F.3d 1241, 1247-48 (10th Cir. 1999) (citing *Rocky Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, 1123 (10th Cir. 1998), *cert. denied*, 143 L. Ed. 2d 51, 119 S. Ct. 1045 (1999) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513 (1994))). The Johnson Memorandum is a formal interpretation of the existing regulatory language of the PSD Program that considers both the language and structure of the PSD regulations, as well as significant policy concerns. The Desert Rock administrative record, particularly the ANPR, contains a contemporaneous discussion that touches on the same considerations, in much greater detail, and was available to EPA Region 9 at the time it issued the Desert Rock PSD permit. Some of the issues of particular concern to EPA Region 9 are congressional intent and the practical effects of including greenhouse gases in PSD review. Each of these considerations consistently supports the EPA Region 9's position that Congress did not compel inclusion of CO₂ in the PSD program by the passage of monitoring and recording requirements or otherwise, nor has EPA taken any action that would bring CO₂ within EPA's interpretation of that program's scope. Accordingly, this interpretation is neither clearly erroneous nor contrary to the wording of the regulation. *See generally Deseret*, slip op. at 33 (the wording of the PSD regulations "[do] not foreclose the . . . meaning suggested by [EPA Region 8 and Permittee], 'subject to control' (by virtue of regulation or otherwise).").

1. *The Agency's Interpretation Conforms With Congressional Intent.*

The Agency's interpretation – that the phrase "subject to regulation" requires actual control of a pollutant – conforms to an established Congressional intent to protect permitting

authorities from undue administrative burdens and to preclude minor sources like apartment buildings, large homes, schools and hospitals from obtaining PSD permits before construction.

a. Administrative Burdens

In *Alabama Power v. Costle*, the D.C. Circuit determined that Congress intended the administration of the PSD program to remain "reasonably in line with EPA's administrative capability." 636 F.2d 323, 354 (D.C. Cir. 1980). This would not be attainable if EPA were to interpret "subject to regulation" to include pollutants subject to anything but actual control, because the PSD program would be subject to an immediate¹⁶ and "unprecedented expansion of EPA authority that would have a profound effect on virtually every sector and touch every household in the land[.]" and would be quickly overwhelmed. *See ANPR* at 5 (emphasis added).

One consequence of subjecting uncontrolled pollutants to PSD BACT is that minor modifications and small changes in energy use would be subject to PSD requirements for the first time, because BACT limits apply to all sources that emit over 100-250 tons of a "regulated pollutant," a threshold which is not commonly exceeded for most regulated pollutants, but which is easily exceeded for CO₂. *Id.* at 478, 484. Another effect is that "regulation of smaller stationary sources that also emit greenhouse gases – such as apartment buildings, large homes, schools and hospitals" would be triggered because these small sources would also emit enough CO₂ to exceed the existing PSD emissions threshold. *Id.* at 5; *see also id.* at 482. EPA estimates that these effects would result in a ten-fold increase in the number of PSD permits required to be issued each year, yielding a jump in permits from 200-300 permits per year to more than 2,000-3,000 permits per year. *Id.* at 479. Even with advance notice, EPA notes, "an increase of this

¹⁶ The ANPR explains EPA's position that "[b]ecause PSD applies to all regulated pollutants except HAPs, EPA's interpretation of the Act is that PSD program requirements would become applicable immediately upon the effective date of the first regulation requiring [greenhouse gas] control under the Act." *ANPR* at 481.

magnitude over a very short time could overwhelm permitting authorities[,] and the permit system would not be able to keep up with demand. *Id.* at 512. The funds, time, and technical personnel resources of State and permitting authorities and EPA regional offices would be strained, and "permitting authorities may have to make significant programmatic changes to deal with the increased workload" *Id.* at 491. This is a result Congress sought to avoid when it crafted the PSD program. *Alabama Power*, 636 F.2d at 354 (noting that Congress crafted the PSD program thresholds so that "[t]he number of sources that meet these criteria, as [Congress] delineate[d] these are reasonably in line with EPA's administrative capability.") EPA's unwavering limitation of the phrase "subject to regulation" to pollutants that are actually controlled has maintained this congressional expectation. *See ANPR* at 508 (citing S. REP. NO. 95-127 at 97 (1977)). Accordingly, EPA's interpretation conforms to Congressional intent to limit undue administrative burdens.

b. Small Sources

Small sources heretofore excluded from the PSD program would also be affected by an interpretation of "regulation" as meaning anything else beyond actual control. As previously noted, the PSD program applies to all "major sources" of air pollutants, a threshold that is defined as a source that has the potential to emit more than 100 or 250 tons per year (depending on the source) of one or more regulated pollutants. *See* 40 C.F.R. § 52.21(b)(1)(i). EPA is unequivocal in expressing its certainty that small sources such as schools, hospitals, commercial office buildings and large homes come within this threshold as a result of their CO₂ emissions. *See ANPR* at 506-09. As a result, these small sources would be subject to PSD permitting requirements in the event CO₂ were deemed a regulated pollutant, either by express EPA

determination, or by virtue of the monitoring and reporting requirements currently applied to it. *See generally id.* at Sections VII.E.4 and 6.

Congress intended to exclude smaller sources due to the costs, uncertainties and inefficiencies that would fall to these small sources. As the D.C. Circuit concluded when it considered the intended breadth of the PSD program: "Congress was aware of the range of stationary sources that emitted pollution and did not envision that PSD would cover the large numbers of smaller sources [such as schools, hospitals, apartment buildings and large homes] within that inventory." *Alabama Power*, 636 F.2d at 353, 354 (citing a statement in the Congressional Record by Sen. Bartlett arguing that the PSD provisions should not cover "[s]chool buildings, shopping malls, and similar sized-facilities with heating plants of 250 million BTUs." 122 Cong. Rec. S. 12,775, 12,812 (daily ed. July 19, 1976) (statement of Sen. Bartlett)). This was motivated by a desire to restrict the PSD program to only "facilities which are financially able to bear the substantial regulatory costs imposed by the PSD provisions, and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air." *Alabama Power*, 636 F.2d at 353; *ANPR* at 488. Another motivation was to avoid the inefficiencies of permitting smaller sources, which is "generally less effective due to the fact that, while there are still administrative costs borne by the source and permitting authority, the environmental benefit of each permit is generally less than what results from permitting a larger source." *ANPR* at 483.

The *ANPR* offers support for the Administrator's contention in the Johnson Memorandum that the Agency has historically interpreted "subject to regulation" in a way that excludes these smaller sources from the PSD program. *See id.* Interpreting "subject to regulation" to require less than actual control of emissions, for which existing cutoffs do not

bypass small sources, would have the effect of extending the PSD to small sources, in contravention of Congressional intent. *Id.* at 484. However, interpreting the phrase in the manner EPA has historically done, and which the Johnson Memorandum formalizes, conforms to both the statutory language of the PSD program and conforms to Congressional intent.

2. *The Agency's Interpretation Reflects The Practical Necessity of Excluding Greenhouse Gases from PSD Review.*

The Agency's interpretation also reflects the practical need, and a Congressional intent, to exclude from PSD pollutants for which no control strategy has been developed. This category presently includes greenhouse gases. Congressional intent to exclude these pollutants can be seen by where Congress located the BACT limitation provisions within the Act. For example, the BACT requirement "appears in a [sic] section 165(a)(4) – a provision that requires actual controls on emissions [,]" and therefore, the Administrator has concluded, "it is reasonable to conclude that Congress intended EPA to apply such controls to the pollutants that are controlled under the other provisions of the Act." *Johnson Memorandum* at 13. Further, Congressional enactment of section 114(a) of the Act, which authorizes EPA to gather emissions data for various purposes "including informing decisions to establish controls on emissions" confirms "that Congress generally expected that EPA would gather emissions data prior to establishing plans to control emissions." *Id.* at 14.

Because "[t]he administration of emissions control programs under the Act requires reasoned decision-making that is often informed by review of emissions data[,]" the Johnson Memorandum emphasizes the need to view monitoring and reporting programs as something unique from regulation. *Id.* at 9. As a result, the position taken in the Johnson Memorandum, and emphasized as a repeated theme in the ANPR, is that greenhouse gases, which are currently subject only to monitoring and reporting, are not "subject to regulation" as contemplated by the

PSD program. The Administrator explains that "[r]equiring [BACT limits] automatically for pollutants that are only subject to data gathering and study would frustrate EPA's ability to accomplish several objectives of the [CAA]" and make the administration of the Act unmanageable. *Id.* This is because the Agency would, paradoxically, be compelled to "requir[e] emissions limitations under the PSD program while the Agency is still gathering information necessary to conduct research or evaluate whether to establish controls on the pollutant under other parts of the Act." *Id.* This would "frustrate the Agency's ability to gather information using section 114 and other authority and make informed and reasoned judgments about the need to establish controls or limitations on individual pollutants." *Id.* It would also "essentially dictate the result of the decision that the information is being gathered to inform (whether or not to require control of a pollutant)." *Id.* at 9-10.

Given the extensive debate in the ANPR about whether the CAA, or any other existing regulatory scheme, is an appropriate vehicle for controlling greenhouse gases, it is clear that the Agency feels it does not yet have enough information to make a reasoned judgment about whether, or how, to control or limit greenhouse gas emissions. To nevertheless require the imposition of BACT limits would run contrary to the Agency's open pursuit of information. To avoid this result, the Agency has interpreted the phrase "subject to regulation" as requiring actual control. This reasoned interpretation reflects the practical necessity of excluding from PSD review all pollutants for which the Agency has not yet made a reasoned judgment about how to appropriately limit.

3. *The Johnson Memorandum and the ANPR Are Consistent With EPA's Historical Practice*

As detailed in the preceding sections, the ANPR reiterates EPA's historical interpretation of the phrase "subject to regulation" through a factual record developed in an EPA-wide national

action, while the Johnson Memorandum formalizes this position as an Agency-wide interpretation. Both documents cite much of the same support as the administrative record developed in *Deseret*, but also consider a few additional materials, to demonstrate a seemingly continuous application of interpreting "subject to regulation" as requiring actual control of a pollutant. The ANPR also explains in greater detail than the Johnson Memorandum how EPA views each record's contribution to the Agency's interpretation, and implicitly acknowledges that even if a record does not explicitly contribute to this interpretation, it is not incompatible with the stated interpretation either.

In *Deseret*, EPA established, and the Board agreed, that in 1977 and 1978, EPA introduced an interpretation of the phrase "subject to regulation," as meaning "regulated under the Act." 1978 Preamble, 43 Fed. Reg. 26,388, 26,397; *Deseret*, slip. op. at 37-38. The *Deseret* administrative record referenced several documents, statements and decisions that EPA Region 8 said clearly linked the word "regulated" to EPA's purported agency definition of "actual control." The Board reviewed each of these citations and ultimately concluded that none of them contained a clear statement actually making that connection, and thus held that it had seen no evidence that EPA had actually considered the issue or offered a definitive interpretation either way. *Deseret*, slip op. at 35.

The interpretation suggested in the ANPR and promulgated in the Johnson Memorandum, explains how EPA interprets the phrase "subject to regulation" in both the statutory and regulatory text of the PSD program. Each document reviews EPA's statements in the Federal Register, its statements to the regulated community, and its conduct since 1977 to support the interpretation it sets forth: that "regulation" requires "actual control." See *Shell Offshore Inc.*, 238 F.3d at 629 ("existing practice" evidence of current interpretation of regulation). These

documents look at the legislative history of the Clean Air Act Amendments of 1978 and the 2002 rulemaking, which replaced the term "regulated pollutant" with a new defined term, "regulated NSR pollutant." These documents also looked at various Agency memoranda which, support – or, at least do not conflict with – such an interpretation. Further, the Johnson Memorandum reviewed other historical statements regarding the Agency's policy with respect to this statement, and looked at all prior PSD permits issued, none of which treated pollutants subject only to monitoring and reporting requirements as "regulated." The result of this review is an interpretation that meets all requirements for reasonableness. Thus, the interpretation is entitled to deference from the Board.

D. The EAB Should Defer to EPA's Interpretation of the Phrase "Subject To Regulation."

In 1980, the D.C. Circuit noted that "the only administrative task apparently reserved to the Agency in executing [the PSD program] is to identify those emission standards, standards of performance, and pollutants subject to regulation under the Act which are thereby comprehended by the Act." *Alabama Power*, 636 F.2d at 404. This discretion to determine which pollutants are subject to regulation was confirmed by the Board in *Deseret*, when it found that the phrase "subject to regulation" did not have a plain meaning that compelled CO₂ to be deemed a regulated pollutant, and also that "the statute is not so clear and unequivocal as to preclude Agency interpretation of the phrase 'subject to regulation under this Act,' and therefore does not dictate whether the Agency must impose a BACT limit for CO₂ in the Permit." *Deseret*, slip op. at 26.

The preceding discussion in this Section I has clearly shown that EPA has used its discretion to interpret formally the phrase "subject to regulation," via the Johnson Memorandum, and has thoroughly supported this interpretation in the ANPR. This interpretation serves to

include only those pollutants subject to actual control, and exclude those pollutants subject only to monitoring and reporting requirements. Further, the Desert Rock administrative record supports EPA's understanding that this has been an unwavering historical policy that has been consistently held since 1977. The Desert Rock administrative record provides more support for this understanding than the *Deseret* record did, and can support EPA Region 9's decisions independent of the Johnson Memorandum.

EPA's understanding that "subject to regulation" requires actual control of a pollutant is reasonable in light of the statutory and regulatory language; Congress' intended breadth of the PSD program; and practical, environmental, economic and political policy concerns – all of which are evident in the Johnson Memorandum and the Desert Rock administrative record. The Agency's interpretation is also reasonable—a conclusion made by the Board in *Deseret* when it acknowledged that EPA's interpretation was not precluded by the language of the PSD program. *Deseret*, slip op. at 33. Accordingly, the Board should deny review of the Permit and defer to the Agency's well-supported determination that the PSD permit issued to Desert Rock was not required to impose a BACT limit for CO₂. See *In re Howmet Corp.*, PSD Appeal No. 05-04, slip op. at 14 (EAB May 24, 2007); *In re Tondu Energy Co.*, 9 E.A.D. 710, 719 (EAB 2001); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 340 (EAB 1999); see also *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007) (providing that EPA had discretion in defining relevant CAA terms, in the context of implementing the PSD program, "by looking to the surroundings of the defined term.").

Though the Board does not give *Chevron*¹⁷ deference to Agency statutory interpretations, due to the fact that "the Board serves as the final decision-maker for the EPA," when an interpretation is supported by Agency rulings, statements and opinions that have been consistent over time, the Board does give a form of *Skidmore*¹⁸ deference to that position. *In re Lazarus Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997); *Howmet*, slip op. at 14. In the present case, the interpretation is supported by an interpretation issued by the Administrator, the lengthy consideration in the ANPR, and numerous statements and opinions by the Agency. Accordingly, the Board should defer to the interpretation that CO₂ is excluded from the PSD Program.

1. *The Interpretation Established in the Johnson Memorandum Is Germane To This Proceeding.*

Even though the Johnson Memorandum was issued after the Desert Rock PSD Permit, it is a formal interpretation, which the Administrator expressly applied to all future permits and permits currently under review, which directly addresses the Board's concerns in *Deseret*, inasmuch as it is a clear Agency statement that excludes greenhouse gases from the PSD program. It is a document that is consistent with the past practices of the Agency and that explains the same regulatory requirements that were in place when EPA Region 9 issued the Desert Rock PSD Permit. Further, as discussed previously, the Board has already held, in *Deseret*, that this interpretation is not clearly erroneous. Accordingly, the Board should defer to the Administrator's statements.

¹⁷ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

To the extent the Board has any hesitations about the applicability of the Johnson Memorandum to this appeal because it is not a part of the administrative record, the Board should elect to exercise its discretion and consider the memorandum in the same way the Board considered the effects of the Wegman and Cannon memoranda in *Deseret*, which memoranda were first discussed during briefing, and were not included in the administrative record. *See Deseret*, slip op. at 49-54.

Consideration of the Johnson Memorandum will reveal that EPA Region 9 did not commit any error that would warrant remand of the PSD permit on these grounds, and, further, that there are no remaining issues in controversy. The primary result of the Johnson Memorandum's interpretation is to exclude expressly greenhouse gases from the PSD program. This is the same Agency position that EPA Region 9 felt constrained by when it issued the Desert Rock PSD Permit. Because EPA Region 9 adhered to the same consistent Agency practice that the Johnson Memorandum formalized as an Agency interpretation, EPA Region 9 did not commit clear error in issuing the Desert Rock Permit. To the extent the Board does find any error with EPA Region 9's issuance of the permit – an unlikely conclusion for the reasons stated above and because of the strong Desert Rock administrative record that guided EPA Region 9's decision – such error is nothing more than harmless error. Remanding the permit for reconsideration with the benefit of the Johnson Memorandum's guidance would yield the same result that Petitioners are challenging: a permit without CO₂ BACT analysis. There are no arguments surrounding CO₂ and BACT on which Petitioners could obtain a different result than the present permit. Accordingly, because there are no remaining issues in controversy, and no reversible error on which the Board should grant review, the Board should deny Petitioners' Petitions For Review to the extent they urge BACT analysis for CO₂.

2. *Even Absent The Johnson Memorandum's Interpretation, the Desert Rock Administrative Record Provides Evidence of Clear Agency Intent To Exclude CO₂ From the PSD Program, to Which the Board Should Defer.*

Should the Board decline to consider the Johnson Memorandum for any reason, the Desert Rock administrative record demonstrates clear Agency practice and understanding that CO₂ should be excluded from the PSD Program. Thus, the Board should still defer to this understanding should it choose to review EPA Region 9's exclusion of CO₂ BACT limits in the Desert Rock PSD permit. Because this interpretation is not clearly erroneous, especially in light of the inclusion of the ANPR in the Desert Rock administrative record, the Board should defer to EPA Region 9's decision to decline to impose CO₂ BACT limits in accordance with this understanding. *See* 40 C.F.R. § 124.19.

E. Petitioners Have Not Shown that CO₂ is Regulated, as that Phrase is Interpreted by EPA.

To the extent that the Board does not consider the Johnson Memorandum and the ANPR, as incorporated into the Desert Rock administrative record, Petitioners' argument that a BACT analysis is required for CO₂ emissions must fail. Petitioners brief on this issue is largely a repetition of arguments already presented to this Board in a number of recent challenges, including *Deseret*.¹⁹ Petitioners have argued but failed to show that CO₂ is "subject to regulation" under the CAA for purposes of triggering PSD requirements (CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4)) and, hence, require BACT determinations because:

¹⁹ Arguments that CO₂ is "subject to regulation" under the CAA were made in *In re Christian County Generation*, PSD Appeal No. 07-01 (EAB Jan. 28, 2008) and *In re ConocoPhillips Co*, PSD Appeal No. 07-02 (EAB June 2, 2008), but were considered waived for purposes of appeal by the Board since these arguments were not first presented to the appropriate permitting authorities. *Christian County*, slip op. at 11-19; *ConocoPhillips*, slip op. at 44-51. The arguments were also made in *In re Northern Michigan University*, PSD Appeal No. 08-02, which is presently pending before the Board.

- The plain language of the CAA shows that the term "regulation" as used in section 165(a)(4) encompasses monitoring and reporting;
- Section 821 of Pub. Law 101-549, which requires certain facilities to monitor and report CO₂ emissions, makes CO₂ "subject to regulation" under the CAA;²⁰
- The Delaware State Implementation Plan ("SIP") provisions relating to CO₂ make this substance "subject to regulation" under the CAA;
- CO₂ is now subject to regulation under the CAA by virtue of Congress's 2008 Appropriations legislation requiring increased monitoring of CO₂; and
- CO₂ is subject to regulation under §111 and 202 of the CAA because the endangerment standard requiring regulation under these sections is effectively met.

The first argument was rejected in *Deseret*, when the Board ruled that the phrase "subject to regulation" does not have a plain meaning that compels EPA to impose CO₂ BACT limits in PSD permits. *Deseret*, slip op. at 2, 26. The second and third arguments have already been extensively briefed before the EAB and do not merit lengthy responses here. Thus, for the Board's benefit, Desert Rock will briefly address why each of these claims fails, and, where appropriate, it will cite to earlier briefs in other cases. The fourth and fifth arguments are new to this case, and have not been previously considered in any other proceedings. These arguments also fail to establish that CO₂ is "regulated," as that phrase is understood by the EPA agency-wide.

²⁰ Petitioners also contend that CO₂ emissions are "subject to regulation" because EPA promulgated regulations to implement Section 821 through 40 C.F.R. Part 75, and those regulations are enforceable under the CAA. This argument is immaterial to the ultimate question of whether section 821's monitoring and reporting requirements constitute "regulation," which, as Desert Rock explains in Section I.D.2.a, it does not. Because monitoring and reporting requirements do not equate to regulation, it does not matter whether those requirements are enforceable under the CAA or not.

1. *Petitioners' Contention that the Plain Meaning of "Subject To Regulation" Requires a CO₂ BACT Analysis was Rejected by the EAB in Deseret.*

Litigants have argued in various proceedings that "subject to regulation" has a plain meaning that compels CO₂ BACT limits. In *Deseret*, however, the Board concluded that "the statute is not so clear and unequivocal as to preclude Agency interpretation of the phrase 'subject to regulation under this act'" and therefore does not dictate whether the Agency must impose a BACT limit for CO₂ in the Permit. *Deseret*, slip op. at 26. The Board also ruled that "the statute by its terms does not foreclose the narrower meaning suggested by [EPA Region 8 and the Permittee], 'subject to control' (by virtue of a regulation or otherwise." *Id.* at 33. Accordingly, all of Petitioners' arguments made in support of the clear and unequivocal meaning of the phrase "subject to regulation" are contrary to the holding in *Deseret* and fail to establish that EPA's interpretation of the phrase "subject to regulation" is clearly erroneous.

2. *Other Arguments Raised by Petitioners Have Been Briefed in Other Cases At Least One of Which Is Still Pending Before the EAB and Must Fail Because They Do Not Comport with EPA's Interpretation of "Subject To Regulation."*

The following arguments have already been extensively briefed in prior cases, at least one of which is still pending. In order to assist the Board in this matter, and to avoid wasting the Board's time with unnecessary repetition, Desert Rock Energy will summarize what has been argued in these other cases.

a. Section 821's Monitoring and Reporting Requirements do not Equate to "Regulation" Under the CAA.

A key element of Petitioners' argument, as made in the present case as well as in *Deseret* and *Northern Michigan*, is that Section 821 of Pub. Law 101-549 is part of the CAA, so that the monitoring and reporting requirements thereunder make CO₂ subject to regulation under the Act. In *Deseret*, the Board's ruling rejected EPA's assertion that section 821 is not part of the CAA,

but deferred the question of whether section 821's monitoring and reporting requirements equate to "regulation" under the CAA, on the grounds that the litigants' positions were not firmly established at the time the *Deseret* permit issued. EPA's position is firmly established by the *ANPR* and the Johnson Memorandum. The Agency does not regard monitoring and reporting requirements as "regulation."

Section 821's monitoring and reporting requirements for CO₂ do not make CO₂ subject to regulation for PSD purposes just as it would not do so for oxygen, moisture, heat input or other emissions monitored and measured under the CAA. Petitioners concede that section 821 does not currently control CO₂ emissions.²¹ Further, recent legislative developments cannot support Petitioners either, as Congress still has not determined whether to regulate CO₂ under the CAA.²² Accordingly, Petitioners' arguments cannot overcome EPA's established, reasonable, and binding interpretation of "subject to regulation."

Moreover, Petitioners' argument contradicts the express language in the legislative history of section 821. Section 821 was not intended to be more than an information gathering provision, which is demonstrated by the very clear evidence that Congress considered and rejected establishing emission controls on CO₂ and other greenhouse gases in the CAA.²³

²¹ NGO Petitioners state: "Congress contemplated eventual control of CO₂ when it adopted section 821. . . ." NGO Petitioners' Supp. Br. at 39. By acknowledging that "eventual control" was contemplated, Petitioners concede that there is no actual control under section 821.

²² See *Northern Michigan NMU Br.* at 12, n.11 (citing the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007)). Section 210(b) of that statute, amends the CAA to add section 211(o)(12), provides that "[n]othing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 165) of this Act." *Id.*

²³ See *Northern Michigan NMU Br.* at 12, n.9 (explaining that the legislative history of the 1990 Clean Air Act Amendments shows that Congress specifically declined proposals that

Instead, Congress crafted section 821 to include only those substances that it expressly deemed "non-regulatory."²⁴ For each of these reasons, Petitioners' argument fails to show that EPA Region 9 clearly erred by concluding that section 821 does not subject CO₂ to regulation under the CAA.

b. The Delaware State Implementation Plan

Petitioners have improperly raised in this proceeding the argument that the Delaware SIP subjects CO₂ to regulation under the CAA. As an initial matter, Petitioners have waived this argument because they failed to preserve it for appeal. However, even if the Board were to reach the merits of Petitioners' argument, the Delaware SIP provisions do not render CO₂ "subject to regulation" as interpreted by EPA.

i. Petitioners Lack Standing to Raise this Argument Because It Was Never Raised in Comments.

Petitioners failed to preserve arguments regarding the Delaware SIP by not timely submitting any comments that even obliquely raise this issue. *In re Indeck Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 23 (EAB 2006). The Delaware SIP was presented to EPA Region 3 for consideration and review on November 1, 2007.²⁵ Thus, while the issue was not ripe for comment during the comment period for Desert Rock, it was reasonably ascertainable to any of the Petitioners – some of whose purposes are devoted exclusively to monitoring environmental issues such as this – as early as November 1, 2007. Petitioners could have submitted late comments on this issue to at least try to preserve the issue for EAB review, as some did with

would have required or specifically authorized regulatory limits on CO₂ or other greenhouse gas emissions for global climate change purposes); *see also Deseret* UARG Amicus Br. at 15-20.

²⁴ *See Northern Michigan* NMU Br. at 12, n.10; *Deseret* UARG Amicus Br. at 18-19.

²⁵ Letter from John A. Hughes, Sec'y Del. Dep't of Natural Res. & Envtl. Control, to Donald S. Welsh, Reg' Adm'r, EPA Region 3, Nov. 1, 2007, *available at* www.regulations.gov as Doc. No. EPA-R03-OAR-2007-1188-0002.

other issues raised in their present petitions. However, Petitioners did not submit a single comment to EPA raising this issue until July 31, 2008 – the same day EPA issued its responses to comments, including a supplemental response dedicated exclusively to responding to other late-filed comments of Petitioners.²⁶

"[A] litigant cannot simply sit back, fail to make good faith arguments and then, because of developments in the law, raise a completely new challenge." *In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 18 n.21 (EAB Jan. 2, 2008) (quoting *Old Ben Coal Co. v. Director*, 62 F.3d 1003, 1007 (7th Cir. 1995)). "To allow Petitioners to raise this issue at this stage would frustrate the Agency's important policy of ensuring predictability, efficiency, and finality in the permitting process by allowing the permit issuer the opportunity to address objections to the permit in the first instance." *In re ConocoPhillips Co.*, PSD Appeal 07-02, slip op. at 50 (EAB June 2, 2008). Because Petitioners waited until twenty months after the close of the public comment period to raise this issue, despite the fact that argument was reasonably ascertainable less than twelve months after the close of the public comment period, they cannot overcome the threshold issue of standing and this issue should be dismissed.

²⁶ The NGO Petitioners submitted supplemental comments on the proposed air permit on October 4, 2007, October 10, 2007, March 4, 2008, April 18, 2008, April 25, 2008 and June 17, 2008, and could have included comments regarding the Delaware SIP in any of the latter four comments. *See* EPA-R09-OAR-2007-1110-0062, Supplemental Comment Letter regarding Transmission of May 2008 "Scientific Assessment of the Effects of Global Change on the United States, A Report of the Committee on Environment and Natural Resources National Science and Technology Council" in support of November 13, 2006 comment letter, June 17, 2008 (acknowledging the submission of such comments by NGO Petitioners). EPA exercised its discretion and responded to the October 4 and October 10, 2007 letters as well as the March 4, 2008 letters because EPA determined that they addressed events that occurred after the comment period to which EPA felt obligated to respond. EPA decided not to respond to the April and June 2008 comments "because they were submitted more than seventeen months after the close of the comment period and the commenters could have been reasonably expected to submit them at the appropriate time during the comment period." AR 121 at 1.

ii. The Delaware SIP Provisions Do Not Make CO₂ Subject to Regulation.

Even if the Board were to reach the merits of Petitioners' argument, Petitioners' argument fails for several reasons. Petitioners contend that because Delaware has adopted in its SIP CO₂ controls aimed at meeting CAA requirements for conventional pollutants, namely emissions of precursors to ozone and fine particulates,²⁷ CO₂ is now subject to regulation under federal law. This argument is flawed for several reasons. First, one state's SIP provisions cannot impose on EPA an obligation to regulate all other states the same way. *See Vermont v. Thomas*, 850 F.2d 99, 102-04 (2d Cir. 1988) (States cannot, through inclusion of a standard in a SIP, impose that standard on upwind states). Rather, the SIP mechanics contemplate that EPA will establish rules based on the provisions of the CAA, and states will then implement those rules through their SIPs.

Second, the Act does not federalize all regulation of air pollution. Under section 116 of the Act, states generally are free to adopt additional air pollution regulations as a matter of state law, so long as such regulations are not "less stringent" than those set forth in the applicable SIP, an applicable federal new source performance standard under section 111 of the Act, 42 U.S.C. § 7411, or an applicable federal standard for emissions of hazardous air pollutants under section 112 of the Act, 42 U.S.C. § 7412, and do not involve one of the other exceptions (not relevant here) mentioned in the first sentence of section 116. CAA § 116; 42 U.S.C. § 7416. Thus, the only federally applicable portions of EPA Region-approved state regulations are those that "implement[]" the CAA. *See* CAA § 302(q), 42 U.S.C. § 7602(q) (defining the "applicable implementation plan" as "the portion (or portions) of the implementation plan, or most recent

²⁷ *See Northern Michigan NMU Br.* at 19, n.25.

revision thereof, which has been approved under section 110 of this Act, . . . and which implements the relevant requirements of this Act") (emphasis added).

Because CO₂ emission controls have not been established as relevant requirements of the Act, the Delaware regulations purporting to impose emission controls on CO₂ are not an applicable part of the Delaware SIP under the CAA. When Delaware submitted its SIP for review and approval, the State made clear that the CO₂ provisions were included solely as a matter of state law, and were not intended to be within the scope of the state's implementation plan.²⁸ Delaware acknowledged:

[i]t is correct that CO₂ is not a federally regulated pollutant, but the Environmental Protection Agency's (EPA) decision to not regulate CO₂ does not prohibit Delaware from regulating its CO₂ emissions. . . . The broad definition of "air contaminants" in the Delaware statute allows the Department to control pollutants which may not be controlled federally, such as CO₂, which, in this singular instance, makes Delaware laws more stringent than federal laws. The fact that EPA has not chosen to address CO₂ does not impact the Delaware statute.

AQM [Delaware Air Quality Management] Response Document to Comments Submitted on the Proposed Adoption of Regulation No. 1144 and the Proposed Amendment to Regulation No. 1102, at 3, Doc. No. EPA-R03-OAR-2007-1188-0002.7 (Dec. 6, 2005) (emphasis added).²⁹ Thus, the Delaware SIP is not an adequate vehicle that can subject CO₂ to regulation under the CAA.

The third reason this argument fails is that EPA Region 3's approval of the Delaware SIP does not mean that EPA has, for purposes of the PSD program, federally approved of Delaware's decision to regulate CO₂ at a state level. States are required to submit SIPs to EPA for approval. EPA reviews each SIP submission for completeness, and if the plan is complete, undertakes

²⁸ See *Northern Michigan NMU Br.* at 19.

²⁹ See also *Deseret UARG Supp. Br.*, Att. B; *Northern Michigan NMU Br.* at 19-20, n.26.

notice and comment rulemaking to determine whether it meets the requirements of the CAA. CAA § 110(k)(2); 42 U.S.C. § 7410(k)(2). EPA must approve a SIP submission that meets the minimum requirements of the Act. CAA § 110(k)(3); 42 U.S.C. § 7410(k)(3); 40 C.F.R. §§ 51.123(o)(1) - (2); 51.124(o)(1) - (2); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 265 (1976). EPA does not have any discretion to reject a complete SIP on any ground beyond that it fails to meet the minimum requirements of the Act. Thus, approval of a state SIP "is not a 'significant regulatory action'" *See* 73 Fed. Reg. 11,845, 11,846 (March 5, 2008); *accord* 73 Fed. Reg. 23,101, 23,102 (April 29, 2008). If the consequences of accepting the Delaware SIP – a duty over which EPA has little discretion – were as drastic as Petitioners now allege, SIP approval would have been a major federal action with a very significant impact. However, Petitioners misstate the impact of SIP approval. In reality, consistent with the CAA, EPA Region 3's action did not and could not make Delaware's state-law-only CO₂ provisions part of the CAA.

3. *New Arguments Raised by Petitioners Do Not Support Petitioners' Assertion that CO₂ Is Regulated.*

With these latter two arguments, Petitioners are again pointing to disparate and ill-fitting examples in a misguided attempt to create a massive, far-reaching and completely unintended emissions control regime for all sources of CO₂ over 100-250 tons per year. Ultimately, however, Petitioners still fail to demonstrate by these arguments that CO₂ is "subject to regulation" as interpreted by the EPA, an interpretation that is not clearly erroneous, and that is entitled to deference from the Board.

a. Congress's 2008 Appropriations Legislation Does Not Make CO₂ Subject to Regulation.

- i. The Appropriations Issue Was Never Raised in Comments, and thus Petitioners Lack Standing to Raise this Argument.

This is another issue that Petitioners have waived by failing to raise it properly during the comment period for the Desert Rock permit. The public comment period on the draft PSD permit for the Desert Rock Project was held from July 27, 2006 through November, 13, 2006. The *Fiscal Year 2008 Consolidated Appropriations Act*, H.R. 2764; Pub. L. 110-161 ("2008 Appropriations Act"), was enacted on December 26, 2007. NGO Petitioners submitted at least five comments³⁰ after the 2008 Appropriations Act was enacted, and never once raised this issue, even by passing reference. Accordingly, Petitioners have failed to raise this issue in any capacity with EPA, and thus do not have standing to raise the issue in this appeal.

- ii. The 2008 Appropriations Act Requiring Increased Monitoring of CO₂ Does Not Subject CO₂ to Regulation.

Even if the Board were to reach the merits of Petitioners' argument, the 2008 Appropriations Act simply calls for increased monitoring, which, for the same reasons discussed above with respect to every other monitoring and recording obligation Petitioners cite to, does not equate to "subject to regulation" under EPA's interpretation.

b. No Endangerment Finding Has Been Made with Respect to CO₂.

Petitioners have pieced together a variety of predictions and statements made by various EPA officials in a baseless effort to convince the Board that EPA has made an implicit endangerment finding on a national basis regarding CO₂ under Section 202(a) of the CAA. *See*

³⁰ As noted previously (*see* n.12, *supra*) EPA rejected all comments submitted after March 2008 (which included four of NGO Petitioners' comments) because they did not raise any significantly new intervening events, and "they were submitted more than seventeen months after the close of the comment period and the commenters could have been reasonably expected to submit them at the appropriate time during the comment period." AR 121 at 1.

generally NGO Petitioners' Supp. Br., Section I.1.D.iv. According to Petitioners, this undeclared "finding" is enough to subject CO₂ to regulation under the Act. *See id.* at Section I.1.D.i.

Petitioners could not be more wrong in their assessment. First, because endangerment findings trigger other duties and responsibilities throughout many inter-related sections of the CAA, implicit conclusions do not constitute endangerment findings by the Administrator. Second, and more critical, an endangerment finding alone is not enough to subject CO₂ to regulation.

Endangerment requirements call on the Administrator to "exercise his or her judgment regarding whether a particular air pollutant or source category causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare." *ANPR* at 160. EPA has explained that it views the phrase "in his or her judgment" to "call for the Administrator to make comparative assessment of risks and projections of future possibilities, consider uncertainties, and extrapolate from limited data." *Id.* at 173. Accordingly, to make a positive endangerment finding, the Administrator must balance the likelihood and severity of possible effects of a pollutant in exercising his or her judgment. *Id.* A positive endangerment finding is a prerequisite for regulation under any provision that has an endangerment test. *Id.* The positive finding itself does not constitute a regulation requiring actual control of emissions. *Id.* at 166. Rather, once an endangerment finding is made, EPA still needs to implement regulations. *Id.* at 74. Only then will the pollutant be subject to actual control.

A great deal of discussion in the ANPR is dedicated to the fact that the Administrator has not yet made such an endangerment finding, but is considering possibly doing so.³¹ Thus, the

³¹ *See, e.g.,* ANPR at 174-75, where EPA states:

The CAA does not define the concept "cause or contribute" and instead requires that the Administrator exercise his judgment when determining whether emissions

ANPR alone negates Petitioners' arguments that an implicit endangerment finding has been made. Without this prerequisite, there is no authorized regulation of greenhouse gases such as CO₂.

For the reasons stated above, Petitioners have failed to establish that EPA's interpretation of "subject to regulation," formalized by the Johnson Memorandum and supported by the Desert Rock administrative record, is clearly erroneous, nor that there is any policy matter over which the Board should exercise its discretion. Further, Petitioners cannot show that, in light of the Agency's formal interpretation that CO₂ is not a regulated pollutant, any different outcome from the current state of things would result were the Board to review the Desert Rock PSD Permit. Accordingly, the EAB should deny review of all issues raised by Petitioners regarding whether a CO₂ BACT limit must be imposed in the Desert Rock PSD permit.

II. EPA REGION 9 PROPERLY FOUND THAT CONSIDERATION OF IGCC IN THE BACT ANALYSIS WOULD AMOUNT TO RE-DEFINING THE PERMITTED FACILITY

A. EPA Has Wide Discretion Regarding Whether to Consider IGCC as a Control Option in a BACT Determination.

EPA's 1990 Draft New Source Review Manual recommends a standardized "top-down" process for BACT determinations. NSR Manual; *see Indeck*, slip op. at 10 (citing *Inter-Power*, 5 E.A.D. at 135). As the Board has repeatedly pointed out, the "top-down" BACT analysis is not mandatory, 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

of air pollutants cause or contribute to air pollution. As a result, the Administrator has the discretion to interpret "cause or contribute" in a reasonable manner when applying it to the circumstances before him. In sum, EPA invites comment on all issues relevant to making an endangerment finding, including the scientific basis supporting a finding that there is or is not endangerment under the CAA, as well as the potential scope of the finding (i.e., public health, welfare, or both).

reached. *See In re Prairie State Generating Company, LLC*, PSD Appeal No. 05-05, slip op. at 16 (EAB Aug. 24, 2006) ("Prairie State") (citing *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 183 (EAB 2000)). A "top-down" approach accomplishes this through the completion of five basic steps: (1) identifying all available control options for a targeted pollutant, (2) analyzing the technical feasibility of each control option, (3) ranking the feasible options in order of effectiveness, (4) evaluating the energy, environmental, and economical impacts associated with each option, and (5) selecting as BACT a pollutant emission limit that is achievable by the most effective control option that was not eliminated in a preceding step. NSR Manual at B-6.

The first step in a "top-down" analysis is to identify, for the emissions unit in question, all "available" control options. NSR Manual at B-5. Available control options are those air pollution control technologies or techniques with a practical potential for application to the emissions unit and the regulated pollutant under evaluation. *Id.* Air pollution control technologies and techniques include the application of production process or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of the affected pollutant. *Id.* The identification process should consider technologies employed outside of the United States. *Id.* In some circumstances, inherently lower-polluting processes are appropriate for consideration as available control alternatives. *Id.* The available control alternatives should include not only existing controls for the source category in question, but also controls applied to similar source categories and gas streams, and innovative control technologies. *Id.*

NGO Petitioners claim the BACT process requires evaluation of IGCC as a potentially lower-emitting production process and "innovative fuel combustion technique" when considering a permit application for a pulverized coal-fired power plant, such as Desert Rock. NGO

Petitioners' Supp. Br. at 72. However, permitting, financing, designing, constructing, and operating an IGCC power plant, amounts to a monumental and redefining change in the project scope as compared to the activities associated with a pulverized coal-fired power plant.

Accordingly, EPA was correct in concluding that IGCC would redefine the Desert Rock project and therefore in declining to consider IGCC in the BACT determination.

EPA and the EAB have recognized that there are limits on the degree to which a permitting authority can and should dictate the design and scope of a proposed facility through the BACT analysis. The NSR Manual states:

Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal-fired electric generator, have not been required by EPA as part of a BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product (in this case electricity). However, this is an aspect of the PSD permitting process in which [permitting authorities] have the discretion to engage in a broader analysis if they so desire.

NSR Manual at B-13 (emphasis added). This passage in the NSR Manual is referred to as EPA's "redesign policy" and has been implemented by EPA for some time. The EAB has upheld this policy of not redefining the sources of a proposed facility in many other PSD permitting proceedings and has stated that the NSR Manual "makes clear that the permitting authority is entitled to wide latitude in how broad a BACT analysis it wishes to conduct in this regard." *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 100 (EAB 1992).

For example, in *In re Old Dominion Electric Cooperative*, which involved a permit issued under federal PSD permitting regulations by the Commonwealth of Virginia (pursuant to a delegation of authority from EPA Region 3), the Administrator found no clear error in the Commonwealth's adherence to the "redesign policy" and subsequent rejection of a challenger's proposal to substitute one type of electric generating facility (fired by natural gas) for another

(coal-fired) on the grounds that such an alternative would redefine the source. 3 E.A.D. 779, 793-94 (Adm'r 1992); *see also In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 29 (Adm'r 1994) (rejecting a challenge based on EPA's failure to consider a natural gas-fired facility in place of the proposed 220-megawatt coal-fired electric generating facility).

Further, the same year it decided *Old Dominion Electric*, the Board also upheld the State of Hawaii's application of the "redesign policy" in excluding consideration of a different boiler type under step 1 of the "top down" BACT analysis. *Hawaiian Commercial*, 4 E.A.D. 95 (EAB 1992). In that case, the applicant requested a PSD permit covering the construction of a 30 MW Circulating Fluidized Bed ("CFB") Boiler, which was designed to burn three different types of fuels— coal, fuel oil and biomass — to preserve maximum operational flexibility. *Id.* at 95. The petitioner in the case argued that the EPA should have required the applicant to install a combined cycle facility fueled with low sulfur distillate or residual oil instead. *Id.* at 99. In its permitting decision, the State of Hawaii (acting under delegated authority), rejected this argument, reasoning that the State did not have the authority under the PSD regulations to define the type of boiler to be used, or even to require use of a specific type of equipment, fuel, or air pollution control device. *Id.* at 99 n.7. The Board agreed with the State's application of the "redesign policy," noting that the petitioner's choice of boiler and fuel would redefine the source. *Id.* at 100. In reaching this conclusion, the Board noted that the definition of BACT includes consideration of both clean fuels and air pollution control devices, and so the State did in fact have the authority to consider requiring specific equipment, fuel or air pollution control devices. *Id.* at 99 n.7. Nonetheless, the Board noted that that "the permitting authority is entitled to wide latitude in how broad a BACT analysis it wishes to conduct in this regard," and that the

petitioner had "provided no good reason for curtailing [the State's] discretion here nor [had] he shown that the State abused this discretion." *Id.* at 100.

Petitioners here attempt to distinguish *Old Dominion Electric* and *Hawaiian Commercial* as irrelevant to this proceeding because those cases involved petitioners seeking to replace a proposed coal-fired power plant with one burning an entirely different fuel. NGO Petitioners' Supp. Br. at 84 n.59. In making this argument, however, Petitioners overlook the main holdings of those cases, which are that permitting authorities have wide discretion in determining the scope of the available control technologies for a proposed facility.

Petitioners also ignore the EAB's ruling in *Inter-Power*, where the Board specifically determined that the redesign policy was applicable to two different types of coal-fired power plants. 5 E.A.D. at 146. In *Inter-Power*, the Commonwealth of Massachusetts challenged a PSD permit issued by EPA Region 2 for the construction of three CFB boilers in Halfmoon, New York, asserting that BACT for SO₂ should have been based on the BACT considered in a recently permitted pulverized coal power plant. *Id.* at 131-32. The Commonwealth had submitted a comment during the public notice and comment period on the draft *Inter-Power* permit arguing that a pulverized coal power plant at the Ware Cogen facility was similar to the proposed Halfmoon CFBs. *Id.* at 141. In response to this comment, EPA Region 2 explained that Ware Cogen was not a similar source because it was a pulverized coal power plant, not a coal-fired fluidized bed boiler facility. *Id.* at 141 n.19. The Board agreed with EPA Region 2, noting that "the Ware Cogen facility was not a coal-fired fluidized bed facility. Rather, it is a pulverized coal facility Therefore, the Region did not clearly err in not considering Ware

Cogen as a 'similar source'" even though the two sources each used coal as its primary fuel source.³² *Id.* at 146.

The EAB precedent established in *Old Dominion*, *Hawaiian Commercial* and *Inter-Power* squarely conflicts with NGO Petitioners' main argument as to IGCC. Thus, by their petition, NGO Petitioners are requesting that the EAB overturn its policy of recognizing a permitting authority's discretion in applying the redesign policy during BACT determinations between clearly different sources using different fuels, such as a coal-fired and natural gas-fired power plant, but also between different combustion types using the same fuel such as the difference between a pulverized coal facility and a coal-fired fluidized bed facility. In advancing this position, NGO Petitioners have focused on the fact that the Desert Rock Project will use the same fuel and will produce the same saleable product (electricity) as an IGCC plant. However, as clearly established in *Inter-Power* where coal was a common fuel for both the proposed technology and a proposed alternative technology that the Board found would redefine the source, and where each technology produced electricity, these two facts do not preclude application of the redesign policy nor do they require EPA to consider any specific factors when determining whether a different source category should be considered as a control option in a particular BACT determination.

³² As reflected in the Desert Rock administrative record, EPA Region 9 used its discretion and compared emissions reduction efficiencies from a coal-fired fluidized bed facility to those from Desert Rock even though it was not required to do so under the *Inter-Power* decision. *See* AR 46 at 32-35.

B. As Explained in the Record, EPA's Finding that IGCC Should Not be Considered as a Control Option for a Pulverized Coal Power Plant is Based upon Sound Judgment and is Neither Clearly Erroneous Nor an Abuse of EPA's Recognized Discretion.

Given the vast technical and physical differences between an IGCC plant and a pulverized coal-fired power plant, and the Board's established policy of granting permitting authorities wide discretion in determining the breadth of the BACT analysis it wishes to conduct for a permit application, the Petitioners are hard pressed to demonstrate to the Board that EPA committed clear error, abused its discretion or acted arbitrarily in finding that an IGCC plant is not similar to a pulverized coal-fired power plant. As previously stated by the Board, "[i]n order to obtain review of a permit issuer's decision not to conduct a broader BACT analysis that would include redefinition of the source, a petitioner must show a good reason in the circumstances of the case for curtailing the permit issuer's discretion or that the permit issuer abused this discretion." *In re Kendall New Century Development*, 11 E.A.D. 40, 52 n.14 (EAB 2003) (citing *Hawaiian Commercial*, 4 E.A.D. at 99-100).

1. *The Physical and Business Differences Between a PC Boiler and an IGCC Plant is Evidence that EPA Region 9 Did Not Abuse its Discretion in Finding that an IGCC Plant is Not a Similar Source as Compared with a PC Boiler.*

The differences between a pulverized coal-fired power plant and an IGCC plant are stark. AR 120.10 at Section 2 (discussing the differences between the processes). In a pulverized coal-fired power plant, coal is crushed or pulverized and then burned (oxidized) in a large boiler. The temperature in the boiler is relatively constant because pulverized coal burns at a more consistent rate than lump coal and the boiler is operated under minimal pressure. Water is routed through tubes within the boiler to produce steam. The steam is then routed to a turbine to produce electricity. The entire process is straight forward and simple.

In contrast, producing electricity through an IGCC plant is a completely different and complex process that is distinguishable from coal combustion. AR 120 at 19. Gasification is a chemical process widely used to make a variety of products within the chemical and fuels industries. As EPA notes in the Response to Comments, the IGCC process is more allied with the operation of a refinery or chemical plant than with a pulverized coal-fired power plant. AR 120 at 19-20. An IGCC plant does not burn coal to make electricity but rather, it converts the coal into a synthetic gas, or "syngas," which is comprised of carbon monoxide and hydrogen (CO and H₂), CO₂, a residue material ("slag"), and hydrogen sulfide. AR 120.10 at 2-4, 3-35. Syngas is created through a chemical process as opposed to a thermal destruction process. The conversion of coal to syngas is energy intensive and requires the operation of equipment distinct from that used to operate a pulverized coal-fired power plant. The syngas is then sent to combustion turbines that burn the syngas to generate electricity, similar to how natural gas-fired turbines operate. Before the syngas can be used in the turbines, however, all of the impurities, such as sulfur compounds, metals, alkalytes, ash, and ammonia must be removed to prevent corrosion of the turbines. AR 120.10 at 5-4. The removal of these impurities is similar to the processes employed at a refinery. The process operates under extremely high pressure (400 to 1000 psia) or extremely low temperatures. AR 120.10 at A-16. Temperatures throughout the IGCC process are not consistent and could vary from below freezing to up to 2500 °F. *Id.* An IGCC plant requires the continuous use of uncontrolled flares and disposal of the slag. AR 120.10 at 2-11. Furthermore, an IGCC plant cannot operate on a continuous basis with just coal as the primary feedstock, but it must have alternative fuels on-site, such as natural gas to address failures of the gasifiers and petcoke to supplement low quality coal. Historically, the U.S. operating IGCC units have supplemented their coal firing with 55% - 100% petcoke, or natural

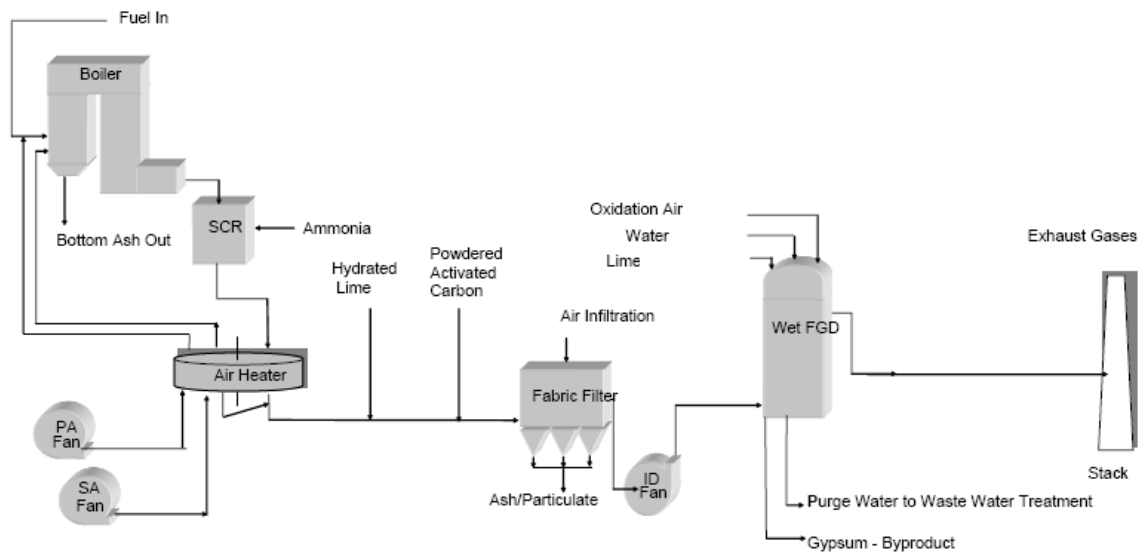
gas for the gas turbines. *See* AR 27 at 7-8, 13. Construction and operation of an IGCC plant therefore requires different equipment, operation and support facilities, and would require a complete redesign of the proposed Desert Rock Project from the bottom up. AR 120 at 19-20.

An IGCC plant is not only a different physical source in its design and operation, it is a different business venture altogether. There are many IGCC plants in the country such as Eastman Chemical (production of methanol, acetic acid, methyl acetate, etc. -Kingsport, TN) and Dakota Gasification Company (production of synthetic natural gas, chemicals and fertilizer - Beulah ND), and Coffeyville Resources (ammonia, fertilizer - Coffeyville, KS), but only two of them are currently used to make commercial electricity, the Wabash and Polk power plants. Moreover, the business of operating an IGCC plant is distinguishable because an IGCC plant produces by-products such as hydrogen, ammonia, methanol, and sulfur products that must be sold through separate service contracts in an area without a market or infrastructure for re-use or transportation of such IGCC byproducts. Unused concentrated chemical byproducts from the IGCC plant would have to be landfilled and treated as hazardous materials. None of these materials are by-products created through the operation of a pulverized coal-fired power plant. For example, the gasification process reactions at an IGCC plant are carried out in a chemically reducing environment, rather than an oxidative one; therefore, none of the feedstock sulfur is converted to sulfur dioxide. AR 120.10 at 2-6, 3-16. Instead, feedstock sulfur is converted primarily to hydrogen sulfide (a highly toxic chemical) and, to a minor degree, to carbonyl sulfide, compounds that are removed from the raw gas in gas treatment systems and converted to commercial grade sulfur or sulfuric acid. AR 120.10 at 2-6, 3-5 to 3-6. The hydrogen and carbon monoxide contained in the syngas product can be used as basic building blocks for a wide variety of chemicals, such as ammonia, methanol, acetic acid, or commercial grade hydrogen.

Whereas, a pulverized coal power plant using Desert Rock’s design creates high quality marketable byproducts with an existing infrastructure and competitive local market demand for Pozzolan Class F flash for cement enhancement or replacement, synthetic gypsum for building materials, and bottom ash for aggregate and roads. Each ton of Desert Rock’s flash and synthetic gypsum off-sets greenhouse gas emissions that would otherwise be created through other anthropogenic sources. Any byproducts not sold to market are permitted to be landfilled under existing regulations without being treated as a hazardous material.

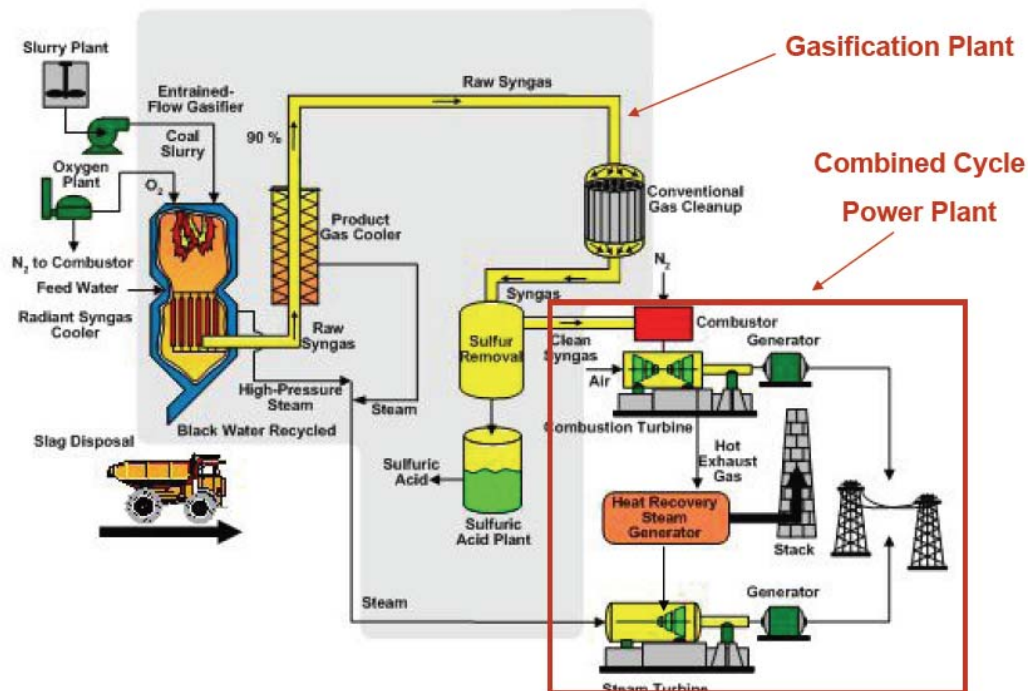
The two diagrams below demonstrate the process flow of pulverized coal-fired and IGCC plants and show that the two sources are completely different. Note that in the diagram for the pulverized coal boiler ("PC boiler"), the majority of components are pollution controls. The boiler island, where steam is produced, is only a fraction of the overall facility.

Diagram of PC Boiler Design



In contrast, IGCC plants, as detailed in the next diagram, look and operate nothing like a pulverized coal-fired power plant. IGCC plants have multiple processes that are not part of the design of pulverized coal boiler: vessels to handle different types of feeds, air separation units to ensure sufficient oxygen in the process, multiple gasifiers, gas cleanup and gas shift vessel, flare systems, and vessels to remove acid gases, including sulfur recovery units similar to those at refineries. See AR 120.10 at 2-3 to 2-17.

Diagram of IGCC Design



2. *The Design Changes Between an IGCC and a PC Boiler are Well Within the Parameters of Past Application of the Redesign Policy by the EAB.*

The Board and the U.S. Court of Appeals for the Seventh Circuit engaged in an extensive discussion of the necessity of the redesign policy in the *Prairie State* cases. *Prairie State*, slip op. at 26-44; *Sierra Club v. Prairie State Generating Co.*, 499 F.3d 653 (7th Cir. 2007) ("*Prairie State II*"). In *Prairie State*, the PSD permit applicant proposed a "mine-mouth" coal-fired

electrical generating plant designed to burn high-sulfur coal that was brought from the mine to the plant by conveyor belt. *Id.* at 21. Several interested parties, including the Petitioners, appealed Illinois EPA's decision to grant the PSD permit, arguing that Illinois EPA had to decide whether hauling low-sulfur coal from afar would be the best available means of controlling air pollution from the plant. *Id.* at 19.

The Illinois EPA (acting under a delegation of authority from the EPA) determined that consideration of low-sulfur coal, because it necessarily involved a fuel source other than the co-located mine, would require Prairie State to redefine the fundamental purpose or basic design of its proposed facility by obviating any need for the adjacent coal mine and modifying the plant's facilities for receiving coal. *Id.* at 21. Therefore, Illinois EPA determined that low-sulfur coal could appropriately be rejected from further BACT analysis at step 1 of the top-down BACT review method. *Id.* On appeal, the EAB granted the PSD permit because receiving coal from a distant mine would require Prairie State to reconfigure the plant as one that would not be co-located with a mine, and such a reconfiguration would constitute a redesign. *Id.* at 36-37.

In considering the *Prairie State* petitioners' appeal of the Board's decision, the Seventh Circuit observed that drawing a line "where control technology ends and a redesign of the 'proposed facility' begins" "is not obvious." *Prairie State II*, 499 F.3d at 655. The Court held that without some limit on what constitutes "control technology," the range of possible BACT technologies available would be endless and, indeed, would collide with the "alternatives" provision of the statute. *Id.* Any contrary conclusion would permit, for instance, the agency to order the applicant to redesign its plant as a nuclear plant rather than a coal-fired one.

The Seventh Circuit then described the change the *Prairie State* that petitioners sought as "fundamental" enough to constitute an equipment redesign:

Now it is true that a difference between this case and our nuclear hypothetical is that a plant designed to burn coal cannot run on nuclear fuel without being redesigned from the ground up, whereas Prairie State's proposed plant could burn coal transported to the plant from afar. But to convert the design from that of a mine-mouth plant to one that burned coal obtained from a distance would require that the plant undergo significant modifications—concretely, the half-mile-long conveyor belt, and its interface with the mine and the plant, would be superfluous and instead there would have to be a rail spur and facilities for unloading coal from rail cars and feeding it into the plant.

Id. (emphasis added).

Here, NGO Petitioners' formulation of the redesign policy misstates the holding of *Prairie State* and disregards the fact that the redesign policy focuses not only on the source's "basic design " but also on how that design relates to its "basic business purpose." As the Board stated in *Prairie State*:

[T]he permit issuer appropriately looks to how the applicant, in proposing the facility, defines the goals, objectives, purposes, or basic design for the proposed facility. Thus, the permit issuer must be mindful that BACT, in most cases, should not be applied to regulate the applicant's objective or purpose for the proposed facility, and therefore, the permit issuer must discern which design elements are inherent to that purpose, articulated for reasons independent of air quality permitting, and which design elements may be changed to achieve pollutant emissions reductions without disrupting the applicant's basic business purpose for the proposed facility.

Prairie State, slip op. at 30. Put another way, the EPA may exclude from the BACT determination any production process that would require "any fundamental change" to Desert Rock's "product, purpose or equipment." *In re Hibbing Taconite Co.*, 2 E.A.D. 838, 843 n.12 (Adm'r 1989) (emphasis added).

Held up to these standards, it is clear that considering IGCC as a control technology under BACT would require Desert Rock Energy to alter the fundamental design of the project – a result contrary to the EAB and the Seventh Circuit's reasoning. In fact, the changes that petitioners proposed to the permit in *Prairie State* are minor compared to the changes that would

be required if Desert Rock Energy were to build an IGCC plant instead of a pulverized coal-fired power plant. To modify the Desert Rock Energy's Project from a proposed pulverized coal-fired power plant to an IGCC plant would require a complete redesign of the facility from the ground up. As illustrated above, this redesign would amount to designing a completely different process similar to those processes used in a refinery or chemical plant and would resemble nothing like that of the permitted source. Simply to name a few: a 100-mile rail spur and a ten-mile pipeline would need to be built to bring auxiliary fuel to the site, the physical structure and process units would need to be completely designed from the ground up, combustion turbines would need to be constructed, and waste handling operations would resemble nothing like the current design involving completely different waste products, such as acids and hydrogen. Given the facts and design changes at issue in *Prairie State*, Region 9's find that IGCC at Desert Rock is not a similar source to a PC boiler is not even a close call.

3. *EPA's Decision to Classify IGCC as a Different Source under the "Redesign Policy" is Clearly Explained and Supported by the Administrative Record.*

The EPA engaged in a thoughtful analysis of the impact of IGCC on the basic purpose and design of the Desert Rock Project presented in Desert Rock Energy's PSD application. After considering the IGCC analysis made by Desert Rock Energy and by commenters during the public comment period and a variety of reports, articles and letters now contained in the record,³³ the EPA found that:

³³ See "Environmental Footprints and Costs of Coal-Based Integrated Gasification Combined Cycle and Pulverized Coal Technologies" (July 2006) (AR 120.10), Desert Rock Energy's "Integrated Gasification Combined Cycle Compared to the Desert Rock Energy Project" report (AR 27), "Desert Rock Energy's Desert Rock Energy Project Integrated Gasification Circulating Fluidized Bed Combustion" report (Sept. 2005) (AR 34), Ambient Air Quality Impact Report (July 26, 2006) (AR 46), an article by Douglas J. Smith entitled "IGCC Technology Continues to Develop" (AR 46.14).

With respect to the [Desert Rock P]roject proposed by [Desert Rock Energy], our assessment is that the application of the IGCC process would fundamentally change the nature of the proposed major source as it would change the basic design of the equipment Desert Rock Energy proposed to install. [Desert Rock Energy] has applied to construct a facility that fires pulverized coal in a boiler to generate steam to drive an electric turbine. An IGCC facility uses a chemical process to first convert coal into a synthetic gas and to fire that gas in a combined turbine [citing AR 120.10]. The combined cycle generation power block of an IGCC process employs the same turbine and heat recovery technology that is used to generate electricity with natural gas at other electric generation facilities. Thus, the combined cycle generation power block portion of the IGCC process is very similar to existing power generation designs that EPA has agreed would redefine the basic design of the source when an applicant proposed to construct a pulverized coal-fired boiler. *In re SEI Birchwood, Inc.*, 5 E.A.D. 25 (1994); *In the Matter of Old Dominion Electric Cooperative Clover, Virginia*, 3 E.A.D. 779 (Adm'r 1992). Furthermore, the core process of gasification at an IGCC facility is fundamentally different than operating a boiler. Coal gasification is more akin to technology employed in the refinery and chemical manufacturing industries than technologies generally in use in power generation (i.e., a controlled chemical reaction versus a true combustion process). Use of coal gasification technology would necessitate different types of expertise to operate the [Desert Rock Project] to produce the desired product (electricity). Thus, these fundamental differences in equipment design are sufficient to conclude that the IGCC process would redefine the proposed source.

AR 120 at 19-20.

Given the expansive administrative record, EPA's thorough response explaining its decision, and the clearly evident technical and operational differences between the two types of sources, EPA's finding that an IGCC plant should not be considered a control technology for a pulverized coal-fired power plant was not a result of clear error or an abuse of discretion, nor have NGO Petitioners shown that EPA's discretion should have been curtailed for any reason. Accordingly, EPA's exclusion of IGCC as BACT should be upheld, and review should be denied on this issue.

C. EPA's Application of its "Redesign Policy" to Exclude IGCC from its BACT Determination Does Not Write Out the Phrases "Production Process" and "Innovative Fuel Combustion Techniques" from the Statutory Definition of BACT Nor Does it Stall the Technology Forcing Aspects of the BACT Process.

NGO Petitioners insinuate that by excluding IGCC from the BACT determination, EPA has ignored key components of the statutory definition of BACT, or at least the technology forcing aspects of the BACT process. NGO Petitioners' Supp. Br. at 77-87. In making this argument, NGO Petitioners ignore the fact that there are various "production processes" and "innovative fuel combustion techniques" applicable to pulverized coal-fired power plants. Specifically, there are many types of PC boiler designs that impact emissions and that are properly considered in a BACT analysis for PC boilers. Pulverized coal boilers can vary in their firing type such as cyclone-fired or tangentially-fired; or their air movement utilizing forced draft or induced draft; or their steam pressure and temperature state of being subcritical, supercritical, or ultra-supercritical boilers. Given these options, Desert Rock Energy has proposed to build a state-of-the-art ultra-supercritical PC boiler and at the specific request of the EPA, Desert Rock Energy has included as overfire air for the control of NO_x, which is an innovative technology that pushes the design of PC boilers in the direction envisioned by the technology forcing aspects of the CAA. The proposed boilers will be one of the first ultra-supercritical PC boilers in the United States.

With regard to Desert Rock Project's PC boilers, the term "ultra-supercritical" refers to the steam power cycle. This terminology is used to differentiate the pressure and temperature conditions of the steam as compared to other types of coal plants with lower pressure and temperature conditions. The ultra-supercritical cycle is currently the most advanced steam

power cycle that engineers have been able to develop that is both economical and reliable.

Environmentally, it is the cleanest commercially viable coal technology currently available.

The advantage of using ultra-supercritical technology over other types of coal technology is that less energy is needed to convert the water used in the power generating process to steam. When compared to older technologies, ultra-supercritical power plants operate at increased efficiency and use less fuel, which in turn leads to lower emissions. For example, the average efficiency of an older coal plant is around 36-38%, while a newer super-critical plant can achieve an overall efficiency in the range of 43-45%, a twenty percent improvement. Each two percent increase in efficiency corresponds to approximately a 5% decrease in CO₂ production. EPA has recognized this advancement in PC boiler design in the administrative record. AR 120 at 70.

The above options, including Desert Rock Energy's chosen utilization of ultra-supercritical PC boilers, are the types of "production processes" and "innovative fuel combustion techniques" that should be evaluated in a BACT determination for a PC boiler. There is simply no evidence that, as NGO Petitioners argue, exclusion of IGCC from the BACT analysis somehow stalls the development of better control technologies. PC boiler process and combustion technologies continue to improve, and the Desert Rock Project demonstrates that the BACT process can and will force the technological progress needed and reduce emissions.

D. Petitioners' Arguments Are Not Material to the Outcome of the BACT Determination of the Proposed Boilers at Desert Rock Because IGCC is Not a Feasible Business Venture at the Desert Rock Project and Would Be Worse for the Environment.

Petitioners claim that EPA Region 9 categorically refused to consider IGCC in the Desert Rock permitting process. NGO Petitioner's Supp. Br. at 72-75. This assertion is not accurate.

See AR 27; 34; 46 at 35; 46.6; 46.8; 46.9 at 29; 46.10 at 3-4; 46.14.³⁴ As evident in the administrative record, EPA Region 9 specifically requested detailed "information from Desert Rock Energy regarding whether or not IGCC would be technically feasible using Navajo Nation coal from the BHP mine." AR 46 at 35.

STEAG AG, the original parent company of Desert Rock Energy, is the first companies in the world to construct and operate an IGCC power plant at the STEAG/Kellermann 163 MW plant in Lünen, Germany in 1972. Desert Rock Energy is very familiar with IGCC technology and actually considered IGCC early in the planning and design process of this business venture. After examining IGCC in the content of the primary purpose of the business venture – to develop power generation using the coal reserves on the Navajo lands as requested by the Navajo Nation³⁵ - Sithe determined that IGCC was not a feasible business option at the Desert Rock site

³⁴ The administrative record includes the following documents discussing and considering IGCC: Environmental Footprints and Costs of Coal-Based Integrated Gasification Combined Cycle and Pulverized Coal Technologies, EPA Report 430/R-06/006 (July 2006) (AR 46.6, AR 120.10), Sithe's Integrated Gasification Combined Cycle Compared to the Desert Rock Energy Project report (AR 27), Sithe's Desert Rock Energy Project Integrated Gasification Circulating Fluidized Bed Combustion report (Sept. 2005) (AR 34), Ambient Air Quality Impact Report (July 26, 2006) (AR 46), an article by Douglas J. Smith entitled "IGCC Technology Continues to Develop" (AR 46.14), a Draft Response to Comments from Federal Agencies, Newmont Energy NV (AR 46.10), a PSD Permit to Construct, Pre-Draft Statement of Basis, Deseret Power Electric Cooperative Bonanza Power Plant (May 19, 2006) (AR 46.9), and a BACT evaluation for Southern Illinois Clean Energy Center IGCC and Substitute Natural Gas Methanation Plant (Oct. 2004) (AR 46.8).

³⁵ In light of the depressed economic conditions on the Navajo reservation – more than 50% of working-age Navajo are unemployed, and Navajo per capita income is roughly \$7,412 – and the Navajo Nation's vast natural resources, the Navajo Nation has sought to develop energy resources on Navajo land for the benefit the Navajo people and the promotion of economic development in the Navajo Nation. See AR 29; Steven C. Begay, Testimony Before the Senate Committee on Indian Affairs, Oversight Hearing on Indian Energy Development – Regaining Self-Determination Over Reservation Resources, May 1, 2008, at 3. The Navajo Nation has pursued construction of the Desert Rock Project as one means of stimulating the Navajo economy through the use of Navajo coal and Navajo human resources. Best estimates suggest

given the quality of Navajo coal and the altitude of the site. *See* AR 27 at 3 ("At an elevation of 5,415 ft. an IGCC plant would generate significantly lower power output and significantly higher auxiliary load compared to a [super critical pulverized coal] plant"). Two documents in the administrative record detail Sithe Global's technical and financial responses to Petitioners' claims about IGCC at the Desert Rock, and EPA considered these responses in its Review of Desert Rock Energy's PSD application. AR 27; AR 34.³⁶ Sithe Global's analysis, as set out in these documents, concluded that no existing or anticipated IGCC design can be applied to Desert Rock given the quality of the coal to be used.³⁷ Any application of IGCC at Desert Rock would be unique, without operating history, and subsequently extremely expensive and therefore unfinanceable. Furthermore, as EPA recognized in its Response to Comments, it is well known and documented that elevation plays a deleterious effect on air moving equipment, such as compressors and turbines, due to the thinning of air and reduced atmospheric pressure when

that Navajo revenues from the Desert Rock Project will be up to \$50 million per year, half of which will come from the use of Navajo coal.

³⁶ NGO Petitioners allude to some "confidential" analysis relating to IGCC. NGO Petitioners' Supp. Br. at 102 n.72 (citing AR 113 at 90). Desert Rock Energy and Sithe Global are unaware of any such document or analysis. The document referenced in the email raised by NGO Petitioners is in the administrative record at AR 27. Petitioners are simply trying to conjure up some conspiracy theory where none exists.

³⁷ All of Petitioners' analysis relating to IGCC is based on eastern coal types, particularly bituminous Illinois #6 or Pittsburg #8 coal, rather than addressing the characteristics particular to Navajo coal. Bituminous Illinois #6 and Pittsburg #8 coal are hard coals with low ash content (9%) and a higher heating value ("HHV") of 12,000 Btu/lb or higher. In contrast, Navajo coal is a lower ranked, soft sub-bituminous type coal, with higher ash content (21% ash) and a heating value of 8,910 Btu/lb. In addition, Navajo coal has a high ash initial fusion temperature greater than 2600°F, as compared to the eastern coals that have a fusion temperature of 2300°F. Fusion temperature is the temperature at which the ash becomes soft to fluid, a necessity for gasification and formation of slag. Navajo coal also has a higher moisture content. The combination of these factors means that more heat and energy would be required to produce the same amount of megawatts from an IGCC power plant than from the proposed PC boilers. A Navajo Coal IGCC heat rate would be 14% higher than a Pittsburg #8 coal heat rate and 8% higher than an Illinois #6 coal heat rate. *See* AR 46.6.

compared to sea level operation. *See* AR 120 at 224-25; Air Liquide, Gasification at Elevation ASU Design Impact - Presentation at Workshop on Gasification Technologies, Denver, CO (Mar. 14, 2007) ("Air Liquide Report"). Most electric motors are designed to operate at altitudes up to 3,300 feet (at constant temperature). Air Liquide Report at 12. Above 3,300 feet, most motors are derated due to the reduced heat dissipation of the thin air. *Id.* Between 5,500-6,000 feet, the reduced rating of electric motors is approximately 6% of power. *Id.* IGCC equipment that would be impacted by atmospheric pressure includes, but is not limited to, distillation columns, heat exchangers, absorbers, and piping. *Id.* at 13. To mitigate the impact of the pressure drop, the size (or cross sectional area) of the equipment affected would need to be increased, *id.*, resulting in an extremely large and expensive facility as compared to other IGCC plants operating at lower altitudes. Additionally, turbine performance would be adversely impacted by the high elevation at Desert Rock. AR 27 at 8-9. Because a turbine is a constant speed machine, the volume of air is proportional to the air's density. AR 27 at 9. The thinner and less dense air at higher elevations results in a lower air flow through the turbine, thereby resulting in less lower power being output. Operation at a higher elevation will also reduce the capacity of the gas turbines at the Desert Rock Project by approximately 20%, which corresponds with a need to increase the megawatt generation and the plant size, by approximately 19%, to account for compounding auxiliary load and turbine derating.

From an environmental prospective, Desert Rock's ultra-supercritical pulverized coal plant sets new standards in permitted emission limits and expectations of power plant performance for the United States and the global coal fleet. The efficiency of the ultra-supercritical design is greater than the IGCC plant; therefore, the ultra-supercritical plant consumes less coal, processes less pollutants, and emits less CO₂ and other greenhouse gas

emissions. AR 27 at 5, 11. Page 5 of Sithe Global's "Integrated Gasification Combined Cycle Compared to the Desert Rock Energy Facility Project" report contains a chart comparing the permitted levels from the two operating and other permitted IGCC plants in the U.S. to the permitted levels of the Desert Rock boilers. AR 27 at 5. The permitted emission rates at Desert Rock are below those of permitted IGCC plants. *Id.* In addition, the water consumption rates associated with using IGCC at the Desert Rock site would range between 21,000 acre-ft/yr to 39,000 acre-ft/yr. In contrast the permitted water consumption rate at the Desert Rock Project's ultra-supercritical plant is 4,500 acre-ft/yr.

The conclusion to be drawn from this discussion is that NGO Petitioners' comments are not material to the validity of the Desert Rock PSD permit because utilization of IGCC is not a possible option at the Desert Rock Project. Vendors have never designed an operational IGCC plant that can overcome the coal characteristics and altitude issues applicable to the Desert Rock Project. Technical studies show that such operation is not even considered for these conditions. Furthermore, the water intake requirements and the end-of-day emission rates from an IGCC plant would be worse for the environment than the permitted ultra-supercritical PC boilers at Desert Rock. Given the technical expertise of EPA Region 9 and the supporting administrative record showing that EPA Region 9 considered IGCC, the Board should deny review of EPA Region 9's determination that IGCC is not an available control technology because of its many disadvantages at the Desert Rock site and its ultimate finding that IGCC should not be considered in the BACT analysis for the Desert Rock Project.

III. PETITIONERS ARE USING COLLATERAL IMPACTS IN A DISINGENUOUS MANNER TO RE-INTRODUCE IGCC INTO THE BACT ANALYSIS.

The fourth step of a BACT top-down analysis instructs "the permitting authority, on a case by case basis, [to take] into account energy, environmental, and economic impacts and other

costs" when determining whether an emission limitation is achievable. CAA § 169(3), 42 U.S.C. § 7479(3). This requirement is known as the collateral impacts clause. *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 683 (EAB 2002). The Board has stated that the collateral impacts clause "temper[s] the stringency of the technology impacts whenever one or more of the specified 'collateral' impacts – energy, environmental, or economic – renders use of the most effective technology [for controlling a particular PSD-regulated pollutant] inappropriate." *Id.* (citing *In re Columbia Gulf Transmission Co.*, 2 E.A.D. 824, 826 (Adm'r 1989)); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 116-17 (EAB 1997); *In re World Color Press, Inc.*, 3 E.A.D. 474, 479 (Adm'r 1990). The collateral impacts clause creates an exception to the general rule that unregulated pollutants are not part of the BACT analysis, which "applies whenever choosing one control technology over another for a regulated pollutant has the incidental effect of increasing or decreasing emissions of unregulated pollutants." *In re Genesee Power Station*, 4 E.A.D. 832, 848 (EAB 1993). Petitioners are attempting to distort the meaning and application of the collateral impacts clause and its excepted consideration of non-regulated pollutants in an attempt to force EPA to redesign the proposed Desert Rock facility into an IGCC facility.

The NGO Petitioners have attempted to reframe several of their unsuccessful arguments made elsewhere in their Supplemental Brief as a collateral impacts analysis argument. For example, as this brief demonstrates throughout, Petitioners failed to show that EPA erred in its BACT analysis by not selecting another technology to control Desert Rock's CO₂ emissions or to reduce the project's impacts on water resources, vegetation and soils, humans, plants, or animal life. Now, in their back door attempt to get IGCC considered as BACT, this time pursuant to the collateral impacts clause, Petitioners erroneously founded their collateral impacts discussion upon the presumption that IGCC is BACT technology. As explained in Section II, *supra*, IGCC

is not available BACT technology for Desert Rock because the use of IGCC is not a possible option. Furthermore, Petitioners have failed to present any evidence either in public comments to EPA or in their briefs that use of IGCC would in fact reduce CO₂ emissions, so Petitioners have not even established that the remedy they seek would address the CO₂ collateral impact they are alleging. *See* NGO Petitioners' Supp. Br. at 113 (citing Ex. 28 to NGO Petitioners' Supp. Br. at ¶¶ 56-59, which merely cites examples of studies that indicate that IGCC may be economically more attractive if carbon sequestration ever becomes commercially available and does not show conclusively that emissions are always lower from IGCC facilities). The permitted facility will actually have lower CO₂ emissions than an IGCC plant because the permitted facility would use less coal to make the same amount of electricity than that of an IGCC plant. Furthermore, the collateral impacts clause was meant to address local or source-specific concerns, yet the NGO Petitioners do not discuss any unique local considerations that would require the selection of a different BACT technology. Lastly, with respect to their argument that the project collaterally impacts endangered species, Petitioners fail to show that a separate collateral impacts analysis beyond the endangered species consultation being undertaken is required for issuance of a PSD permit. For these reasons, NGO Petitioners have not met their burden of proof that collateral economic, environmental and energy impacts compel the use of IGCC technology over the chosen ultra-supercritical PC boiler technology proposed by Desert Rock Energy, and thus, the Board should deny review of NGO Petitioners' challenges to the Desert Rock PSD permit related to the collateral impacts of the Desert Rock Project.

A. Petitioners Have Failed to Show that Evaluation of Collateral Impacts Would Have Led to the Selection of a Different BACT.

In arguing that EPA should have evaluated the collateral impacts of CO₂ emissions, Petitioners advance the incorrect position that selecting IGCC technology would produce lower

CO₂ emissions at the Desert Rock Project. NGO Petitioners' Supp. Br. at 112-13, 122-24; AR 66 at 12 n.30, 36. The Board has previously stated that when a Regional Office is evaluating a PSD permit application, it cannot redefine the design of the source by requiring the applicant to build a project different from the one proposed. *Prairie State*, slip op. at 20; see Section II, *supra* (discussing the reasons for rejecting IGCC technology as not available BACT technology for this project). However, NGO Petitioners' argument in favor of IGCC not only tries inappropriately to redefine the source through the collateral impacts clause, but it suffers from two further errors, in that the NGO Petitioner provide no support for any other control technology and IGCC would, in fact, create more CO₂ emissions than the Desert Rock Project as proposed.

The EAB should not entertain Petitioners' disingenuous and thinly veiled attempt to redefine the source by presenting this same BACT argument as a separate challenge to the collateral impacts of the source. Petitioners are trying to use the collateral impact clause to compel a complete separate alternative to the project, which is not the intended use of this clause. As the Board has recently noted, "section 165(a)(2) does not impose upon the Region a duty to conduct an analysis of 'alternatives' that were not identified by an interested person during public comment." *Deseret*, slip op. at 23.

Furthermore, by failing to mention any specific control technology other than IGCC in their comment letter with respect to assessing the collateral impacts of the project, Petitioners have waived any right to discuss the collateral impacts, if any, of other control technologies that might have been used at the Desert Rock facility.³⁸ The EAB has also provided clear precedent

³⁸ In fact, the use of the collateral impact analysis clause has minimal impact on the Desert Rock BACT determination because EPA Region 9 imposed the "top" BACT as identified in the analysis, which is the most stringent alternative and found no adverse environmental,

stating that a petition must present all of the issues in dispute with specificity. *See In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 117 (EAB 2005) ("Comments submitted during the comment period must be sufficiently specific. In evaluating whether to review an issue on appeal, this Board frequently has emphasized that the issue to be reviewed must have been specifically raised during the comment period.") (citing *In re New England Plating*, 9 E.A.D. 726, 732 (EAB 2001)(emphasis in original); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998)); *In re Broward County*, 6 E.A.D. 705, 709 (EAB 1993) (citing *In re Sequoyah Fuels Corp.*, NPDES Appeal No. 91-12, slip op. at 4 (EAB Aug. 31, 1992)). By failing to present any arguments relating to control technologies other than IGCC in their public comment letter, Petitioners have failed to meet the burden of showing "a compelling reason to believe [that there was] an erroneous permit determination – in other words, [that EPA Region 9's assessment] materially affected the quality of the permit determination" or that there was "clear error" in the BACT analysis that altered the permitting decision. *Prairie State*, slip op. at 58-59 (citing *In re Mecklenburg Cogeneration L.P.*, 3 E.A.D. 492, 494 n.3 (Adm'r 1990)). Accordingly, NGO Petitioners have not established any basis under which review of the collateral impacts issue is warranted, and the Board should therefore deny review of the Desert Rock PSD permit on these grounds.

B. CO₂ Emissions Are Not a Local or Source-Specific Issue that Must Be Analyzed Under the Collateral Impacts Analysis.

Even if the Board were to grant review of the collateral impacts issue, NGO Petitioners have not successfully shown in their petition that Congress intended to require the analysis of CO₂ as part of the collateral impacts analysis, and they have not even established that the

energy, or economic impacts associated with the controls. See Section V for a full discussion of the BACT analysis.

remedy they sought, IGCC, would have lower CO₂ emissions than the permitted source. The principal architect of the 1977 Clean Air Act Amendments, Senator Edmund S. Muskie, stated that the intent of the collateral impacts clause was to allow the reconsideration of BACT while giving thought to the local conditions affecting a particular application. *Columbia Gulf*, 2 E.A.D. at 827 (quoting Senate Debate on S. 252 (June 8, 1977), reprinted in 3 SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 at 729 (Comm. Print Aug. 1978)). Specifically, Senator Muskie explained:

One objection which has been raised to requiring the use of the best available pollution control technology is that a technology demonstrated to be applicable in one area of the country is not applicable at a new facility in another area because of difference [sic] in feedstock material, plant configuration or other reasons. For this and other reasons, the committee voted to permit emission limits based on best available technology on a case-by-case judgment at the State level.

Id.

Consistent with this legislative intent, the Board has clarified that "the primary purpose of the collateral impacts clause . . . is to allow use of a less effective control technology when source-specific energy, environmental or economic impacts or other costs constrain a source from using a more effective technology." *World Color Press*, 3 E.A.D. at 479 (emphasis added). In order to serve this purpose, "the collateral impacts clause operates primarily as a safety valve whenever unusual circumstances specific to the facility make it appropriate to use less than the most effective technology." *Id.* at 478-79 (emphasis added) (noting also that "the collateral impacts clause focuses on specific local impacts which constrain a particular source from using the most effective control technology"). NGO Petitioners have entirely ignored the intentionally limited application of the collateral impacts clause to source specific, localized impacts by failing to present any evidence indicating that Desert Rock itself presents any specific or unusual

circumstances that require special consideration of CO₂ emissions when other local facilities have not been required to conduct a similar CO₂ analysis as part of their collateral impacts review.

As fully discussed and explained in the Desert Rock administrative record, a proper collateral impacts analysis should focus on source-specific, local, or unusual circumstances. AR 120 at 29-33. For example, a proper collateral impacts assessment might consider circumstances that create "[a]n exceptional demand on water resources" such that this concern would "constrain a source from using that technology in favor of a less stringent, less water-intensive technology." *World Color Press*, 3 E.A.D. at 479 n.15 (citing *Columbia Gulf*, 2 E.A.D. 824).³⁹ Alternatively, an applicant might conduct a collateral impacts analysis by considering "the effects that different flue gas temperatures, acid gases inlet concentrations, control technology placement in relation to particulate control devices, and other matters would have on the formation and control of dioxin and other air toxics." *Hillman Power Co.*, 10 E.A.D. at 687. In contrast, by alleging in their Petition for Review and Supplemental Brief that an assessment of CO₂ emissions is required under the collateral impacts clause, NGO Petitioners are not calling for an analysis of equivalent scope to those in *World Color Press* or *Hillman Power Co.* Rather, Petitioners are calling for a complete redesign of the Desert Rock Project not because of site specific or localized concerns, but in response to a global issue, and demanding use of a technology that not even NGO Petitioners can prove would address their concerns. Global climate change, as all Petitioners acknowledge, is global in nature and not unique to the Desert Rock Project. *See, e.g.*, NGO

³⁹ As a preliminary matter, NGO Petitioners' allegations regarding the need to select IGCC technology to reduce water consumption or solid waste production are not dispositive where the technology they urge would require a complete redesign of the source. *Prairie State*, slip op. at 20; *see* Section II, *supra*.

Petitioners' Supp. Br. at 117-18. Thus, NGO Petitioners' demand that CO₂ analysis be conducted pursuant to the collateral impacts clause, and that IGCC be used to minimize the impacts of CO₂ is completely inconsistent with the purpose of the collateral impacts analysis. *See Columbia Gulf*, 2 E.A.D. at 827 ("The collateral impacts clause operates primarily as a safety valve whenever unusual circumstances specific to the facility make it appropriate to use less than the most effective technology.").

Because of the global nature of the climate change, NGO Petitioners have only been able to address generally, and have failed to offer "information that suggests that unusual circumstances or local conditions predispose [the Desert Rock] facility" to have the problems that NGO Petitioners objected to in their petition more so than other plants, for which CO₂ analysis has not been required. *Kawaihae*, 7 E.A.D. at 116-17. Rather, NGO Petitioners are using this project-specific appeal as a general soap box to object to all electric power production facilities and coal fired power plants because of their carbon emissions. The EAB appeals process is not an appropriate forum for their complaints, nor can their general grievances maintain their collateral impacts argument in this case. *Id.* at 117 (noting that the petitioners' claim must be rejected for presenting a hypothetical scenario rather than an actual facility where the complained problem has occurred and not providing any information suggesting that the facility in question has unusual circumstances or local conditions that predispose the site to have the complained of problem); *see also In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992) (noting that the petition was insufficient because it merely expressed generalized concerns about the impact on the environment and failed to identify specific permit conditions that gave rise to the petitioner's concerns).

In arguing that CO₂ emissions should be considered during the collateral impacts analysis, Petitioners point to a certain draft of the NSR Manual, which at that time stated that "greenhouse gases may be considered." NGO Petitioners' Supp. Br. at 115 (attaching Exhibit 13, an outdated version of the NSR Manual at B.49) (emphasis added). The weight accorded to the superseded version of the NSR Manual cited by NGO Petitioners is diminished by the fact that the guiding draft version currently available to the public does not include such guidance. *See* EPA, New Source Review (NSR) Archives, Technical Information, <http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf>. Moreover, the word "may" clearly leaves the issue to the discretion of the permitting authority. Nothing prevents a permitting authority from considering greenhouse gases, but a permit cannot be remanded on the basis that the permitting authority declines to make such a discretionary consideration the now-superseded Draft NSR Manual. Furthermore, EPA has considered, fully responded to and rejected this argument which was first raised by NGO Petitioners during the notice and comment period. *See* AR 120 at 29-33. Therefore, the Board should defer to EPA Region 9's discretion on this issue, as allowed for in EPA guidance and, as a result find no clear error or abuse of discretion upon which review of this issue could be granted.

More important to the Board than a superseded draft version is the current guidance on collateral impacts analysis. The current version of the NSR Manual is consistent with EPA Region 9's Response to Comments on this issue in that it emphasizes that the collateral impact analysis "should be made based on a consideration of site-specific circumstances" and "need only address those control alternatives with any significant or unusual environmental impacts that have the potential to affect the selection or elimination of a control alternative." NSR Manual at B.47. "Generally, these types of environmental concerns become important when

sensitive site-specific receptors exist or when the incremental emissions reduction potential of the top control is only marginally greater than the next most effective option." *Id.* "[W]here the applicant can show that unusual circumstances at the proposed facility create greater problems than experienced elsewhere, this may provide a basis for the elimination of that control alternative as BACT." *Id.* (emphasis added). Because their collateral impacts analysis calls for the assessment of a global, rather than source-specific local issue, it does not meet the standard for invoking the collateral impacts clause, and thus, the NGO Petitioners' argument must fail. *See Columbia Gulf*, 2 E.A.D. at 827.

C. Petitioners Fail to Show that the Costs of Regulating CO₂ Emissions Are Currently Within the Range of Costs Being Borne By Similar Sources.

Another allegation of NGO Petitioners is that the costs of CO₂ emissions should be included in the collateral impacts analysis. As with their other collateral impacts arguments, NGO Petitioners are unable to show that the cost of regulating Desert Rock's CO₂ emissions "is within the range of costs being borne by similar sources also charged with controlling that pollutant." *Inter-Power*, 5 E.A.D. at 135. Thus, again, Petitioners are trying to distort the collateral impact clause to reach an improper end. The intent of the collateral impacts analysis is to allow for reconsideration of the most stringent BACT in light of collateral effects that favor less stringent technology, while giving thought to local and unique conditions that may shape the determination. *Columbia Gulf*, 2 E.A.D. at 826-27. Petitioners are somehow twisting the collateral impact clause to require permitting authorities to consider the cost of future regulations; something that has never been done in PSD permitting and is not remotely present in any PSD permitting guidance. Costs associated with possible future CO₂ regulation (or any other type of air pollution regulations) will not be unique to Desert Rock (nor to any particular source) and will be absorbed by the entire economy of the United States. There is nothing

unique about the cost of CO₂ regulation to the Desert Rock Project that informs the source-specific Desert Rock BACT analysis or suggests that reconsideration of the chosen BACT would address the collateral impacts identified by NGO Petitioners.

NGO Petitioners have failed to even name a "similar source" that is currently subject to CO₂ emissions. Petitioners only mention IGCC technology, which is not a "similar source" as discussed above, and in no way demonstrate that CO₂ emissions from IGCC technology would be lower than that of the Desert Rock facility. As noted above, CO₂ emissions would likely be greater from an IGCC plant than from the permitted facility. Although NGO Petitioners have provided a range of cost estimates for future CO₂ emissions control, this cost alone, which is not specific to the type of facility regulated, is insufficient to support review of the Desert Rock PSD Permit because NGO Petitioners have not established (and cannot now establish, because they have urged only IGCC technology in their public comments) that "similar . . . facilities are being required to bear this additional expense to meet BACT." *Prairie State*, slip op. at 149; AR 66 at 12 n.31. Requiring Desert Rock Energy to incur such costs while other similar sources are not subject to similar regulation is inappropriate. *Inter-Power*, 5 E.A.D. at 149-50 (concluding that requiring a source to use lower sulfur coal to obtain lower emission rates would require that source "to bear costs beyond the costs being borne by similar facilities" and therefore, the Regional Office's decision to reject that alternative based "on cost-effectiveness grounds was not clearly erroneous." (emphasis in original)). The Desert Rock Project will have the lowest CO₂ emissions rate of any coal plant in the western United States. Thus, the Desert Rock Project will have a low, if not the lowest, compliance costs in any future CO₂ program; such compliance may be in the same order of magnitude as a liquefied natural gas-fired combined cycle plant.

NGO Petitioners' reliance on *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), to establish that EPA must assess the cost of carbon regulation is misplaced. *Center for Biological Diversity* is a National Environmental Policy Act ("NEPA") case that did not involve the issuance of a PSD permit or the application of regulations under the CAA. Rather, in *Center for Biological Diversity*, the National Highway Traffic Safety Administration ("NHTSA") considered the economic practicability of setting maximum feasible average fuel economy rates. *Id.* at 1180-81. The U.S. Court of Appeals for the Ninth Circuit directly commented that the NHTSA's NEPA analysis was distinguishable from situations where PSD permit approval was being challenged. *Id.* at 1201 (comparing the NEPA issue before the court to the PSD review conducted in *Citizens for Clean Air v. EPA*, 959 F.2d 839 (9th Cir. 1992)). The Ninth Circuit stated that assessing whether a PSD permit should have been issued is not analogous to a NEPA case because PSD cases involve a "high statutory threshold" of establishing that the specific technology that the petitioners advocated was BACT. *Id.* In light of the explicit distinction made by the Ninth Circuit, NGO Petitioners cannot now rely upon this inapposite case as authority in their petition for review of this PSD permit because they have failed overcome the threshold issue of establishing that IGCC is BACT. *Id.*

As EPA explained in their response to comments, although federal legislation may be passed to regulate CO₂ emissions, it is difficult at this stage to predict which proposal may be adopted. AR 120 at 32-33. Members of the 110th Congress introduced over 200 bills, resolutions, and amendments addressing global climate change, many of which contained different timelines, emissions reduction requirements, and mechanisms to achieve these reductions. *See, e.g.*, S. 3036, 110th Cong. (2008) (establishing a cap-and-trade system to cap CO₂ emissions from covered sources at 19 percent below current levels by 2020 and 71 percent

below them in 2050.); H.R. 2069, 110th Cong. (2008) (establishing a tax on coal, petroleum, and natural gas and increasing tax annually until emissions decrease 80 percent from 1990 levels); S. 1201, 110th Cong. (2008) (establishing a cap-and-trade system and freezing CO₂ emissions at current levels by 2011 and ultimately requiring a 17 percent reduction below 1990 levels by 2025). Adding to the confusion is a change in leadership of the committee vested with the authority to draft global climate change legislation, the House Energy and Commerce Committee.⁴⁰ These changes in leadership could represent a significant philosophical shift in addressing CO₂ emissions as both Representatives Henry Waxman and Edward Markey introduced legislation in the 110th Congress that differ from the House Energy and Commerce Committee discussion draft, as well as from each other. *See* H.R. 1590, 110th Cong. (2008) (establishing a cap-and-trade system and requiring emissions reductions of two percent per year in 2011 reaching 1990 levels by 2020, and requiring emissions to fall another five percent per year beginning in 2021 until an 80 percent reduction is achieved by 2050); H.R. 6186, 110th Cong. (2008) (establishing a cap-and-trade system and requiring a reduction of emissions to 85 percent below 2005 levels by 2025); and *Dingell-Boucher Discussion Draft* (establishing a cap-and-trade system and would reduce covered emissions to six percent below 2005 levels by 2020 and 80 percent below 2005 levels by 2050). Further, the global climate change discussion is now occurring against the backdrop of an economic downturn, and some Members of Congress have

⁴⁰ Former Energy and Commerce Chairman John Dingell (D-MI), working with his Energy and Air Quality Subcommittee Chairman Rick Boucher (D-VA), produced draft legislation to begin global climate change discussions in the 111th Congress. Unexpectedly, Congressman Henry Waxman (D-CA) challenged and defeated then-Chairman Dingell for control of the Committee. Currently underway is also a challenge for the Energy and Air Quality Subcommittee gavel, which may be passed from Chairman Boucher to Congressman Edward Markey (D-CA), former Chairman of the House Select Committee on Energy Independence and Global Warming.

acknowledged that global climate change legislation must be carefully designed to strengthen the nation's economy.

Without knowing the means that will be used to regulate greenhouse gases from major sources or the degree of emissions cuts required, data cannot be provided to "determine precisely the effect on air emissions" in order to quantify the benefits and costs of such regulation. *Citizens for Clean Air*, 959 F.2d at 847. Without guidance from Congress or EPA, or a determinative strategy to address such emissions, it is impossible to say at this premature stage what the range of costs will be for similar sources to regulate carbon emissions. Thus, the Board should not force Desert Rock Energy to "embark upon an exploration of uncharted territory" by being subject to carbon regulation that NGO Petitioners have not shown are borne by similar sources. *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 553 (1978)).

D. Petitioners Fail to Show that Consideration of the Endangered Species Act Consultation and Environmental Justice Issues Under the Collateral Impacts Clause Would Yield a Different Result.

Finally, NGO Petitioners assert that a separate endangered species assessment – beyond the Endangered Species Act ("ESA") § 7 consultation actually being undertaken - is required by the collateral impacts clause. NGO Petitioners' Supp. Br. at 123-24. As an initial matter, NGO Petitioners have not pointed to any data establishing the collateral impacts of CO₂ emissions on endangered species nor have they shown how this analysis can be conducted given that "some of the latest climate results from the science community . . . indicate that current science and models cannot link individual actions that contribute to atmospheric carbon levels to specific responses of species, including polar bears." Memorandum from Mark D. Myers to Director of Fish & Wildlife Service, at 1 (May 14, 2008). NGO Petitioners cite to *Indeck* for the proposition

that a separate collateral impacts analysis of the impact on endangered species is required. NGO Petitioners' Supp. Br. at 123 (citing *Indeck*, slip op. at 108). However, Petitioners fail to disclose to the Board that *Indeck* determined that a consultation conducted during the pendency of an appeal can meet the minimum sufficiency requirements. *Indeck*, slip op. at 111 n.150. Hence, the ongoing ESA consultation process is sufficient and NGO Petitioners have not made a showing that a separate analysis is required under the collateral impacts analysis clause. Accordingly, the full discussion about the Petitioners' allegations regarding the obligation to conduct a § 7 endangered species consultation and issues related to the delegation of the environmental impacts analysis to the Bureau of Indian Affairs ("BIA") can be found in Section XII, *infra*.

Rather than use this Section to repeat responses to duplicative Environmental Justice arguments raised by the NGO Petitioners, please see Section XI, *infra*, for a thorough response to NGO Petitioners' environmental justice claims regarding issues such as water resources and the impact on vegetation and soils; issues which NGO Petitioners argued once as affronts to environmental justice and again through improper use of the collateral impacts clause. NGO Petitioners have not shown how consideration of these issues through a collateral impact analysis would change the outcome achieved by EPA Region 9's application of the appropriate mechanisms of the PSD program or how EPA Region 9's decisions on these issues are clearly erroneous. *Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re Cardinal FG Co.*, 12 E.A.D. 153, 164 (EAB 2005).

Given NGO Petitioners' misuse of the purpose and intent of the collateral impact clause, EPA Region 9's thorough response to comments, and NGO Petitioners' inability to show how consideration of any of the above issues — IGCC, CO₂ regulation, affects on endangered

species, and environmental justice — would yield a different outcome from the one actually reached by EPA Region 9, the Board should deny review of this issue.

IV. EPA WAS NOT REQUIRED TO ASSESS THE IMPACT OF CASE-BY-CASE MACT BEFORE ISSUING THE PSD PERMIT.

Another argument raised by Petitioners is the allegation that, although not actually a part of the PSD program, EPA must consider the requirements for hazardous air pollutants ("HAPs") when determining BACT for non-HAP pollutants. As an initial matter, Petitioners waived this argument by failing to preserve this issue for appeal. Moreover, even if the Board were to grant review of this argument, the argument would fail. The CAA does not contain any requirement mandating that a case-by-case MACT determination be prepared for HAPs concurrently with the development of the PSD permit (which does not contemplate regulation of HAPs). Rather Congress expressly exempted the regulation of HAPs from the PSD requirements under section 112(b)(6) of the Act. CAA § 112(b)(6); 42 U.S.C. § 7412(b)(6). Having failed to overcome the reality of this statutory exclusion of HAPs from PSD review, Petitioners have not shown any deficiency with the Desert Rock PSD permit because EPA Region 9 did not conduct a case-by-case MACT analysis concurrent with its PSD analysis.

A. Petitioners Lack Standing to Raise Arguments Regarding the Role of a Case-By-Case MACT Analysis in the Development of a PSD Permit.

As a threshold matter, Petitioners lack standing and have waived their right to raise any arguments related to the regulation of any HAPs, including mercury, under the CAA and the impact of those regulations on the emission levels of non-HAP pollutants set during the PSD permitting process. As Petitioners acknowledge, "in order to demonstrate that an issue has been preserved for appeal, a petitioner must show that any issues being appealed were raised with reasonable specificity during the public comment period," unless that issue was not reasonably

ascertainable during the public comment period. *Indeck*, slip op. at 23, n.49 (citing 40 C.F.R. § 124.13; *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.8 (EAB 1999)); NGO Petitioners' Supp. Br. at 127. Here, Petitioners fail to demonstrate adequately that this issue was persevered appropriately for appeal.

Petitioners did not submit any timely comments raising this issue during the original comment period. Petitioners argue that they submitted comments "on the Draft Permit related to the control of mercury emissions and the Clean Air Mercury Rule [("CAMR")]" and, thus, because Mercury is a HAP, Petitioners have preserved for appeal the broad issue of the impact of other HAP pollutants on the PSD permitting process. *Id.* at 50-52. NGO Petitioners' Supp. Br. at 128 (citing AR 66 at 50-52; AR 73 Comment 70 at 2). As part of the CAMR rulemaking, EPA promulgated a New Source Performance Standard ("NSPS") for mercury that is applicable to electric utilities such as Desert Rock. 70 Fed. Reg. 28,606 (May 18, 2005). However, nowhere in these comments do NGO Petitioners relate issues surrounding the control of mercury, or other HAPs, to the requirements imposed under the then applicable CAMR and NSPS. NGO Petitioners' comments also do not address how the CAMR and NSPS requirements impact the BACT analysis for other, non-HAP, pollutants undertaken during the PSD permitting process. NGO Petitioners are now, through this proceeding, for the first time raising the issue of HAP regulation's impact on the BACT process.

The comment to which NGO Petitioners refer was submitted by NGO Petitioners to EPA on November, 13, 2006, the last day of the public comment period on the draft Desert Rock PSD Permit. AR 66. However, the comment never discusses performing a case-by-case MACT analysis concurrent with the PSD permitting process, reviewing the requirements of CAMR or NSPS (the regulatory programs controlling mercury throughout the comment period), or utilizing

this analysis to influence the selection of BACT for non-HAP pollutants. *Id.* Rather, the comment merely presents NGO Petitioners' general objections to the lack of mercury emissions limits in the PSD permit. *Id.* at 50-52. NGO Petitioners now place undue weight on this solitary, generalized comment to allege that they have standing to argue that a case-by-case MACT determination for the Desert Rock Project must be performed concurrently with the development of the PSD permit because of the MACT determination's alleged potential influence on the BACT analysis of non-HAP pollutants. NGO Petitioners' Supp. Br. at 129-49. However, this argument is patently different from those general mercury concerns raised by NGO Petitioners in their November 13, 2006 comment. AR 66 at 50-52.

The Response to Comments shows that EPA Region 9 understood NGO Petitioners' comment as requesting that EPA Region 9 identify what measures Desert Rock would need to take to comply with CAMR. AR 120 at 35.⁴¹ NGO Petitioners did not phrase their comment in a manner whereby EPA Region 9 could not have interpreted the NGO Petitioners' comments as a request for EPA to consider the regulation of HAPs generally as part of its BACT analysis for SO₂, NO_x or any of the other criteria pollutants. Thus, it is unreasonable "[t]o expect [EPA Region 9] to have inferred from these comments the arguments [NGO] Petitioners now raise on appeal. . . ." *Indeck*, slip op. at 58.

Moreover, NGO Petitioners' objections about mercury emissions fail to satisfy the specificity requirement associated with preserving the issues of whether the regulatory requirements established through the regulation of HAPs, generally, should be considered in the BACT analysis for non-HAP pollutants or whether a MACT determination must be performed

⁴¹ EPA Region 9 acknowledged that because CAMR had been vacated, a case-by-case MACT determination would be required prior to construction. AR 120 at 35-36.

concurrently with the BACT analysis. *See Arecibo & Aguadilla*, 12 E.A.D. at 117 ("Comments submitted during the comment period must be sufficiently specific. In evaluating whether to review an issue on appeal, this Board frequently has emphasized that the issue to be reviewed must have been specifically raised during the comment period." (emphasis in original)) (citing *New England Plating*, 9 E.A.D. at 732; *Maui Elec.*, 8 E.A.D. at 9). Because NGO Petitioners failed to specifically raise these issues during the public comment period, review of this issue is not warranted. *Id.*

The requirement to raise issues during the public comment period "is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather, it serves an important function related to the efficiency and integrity of the overall administrative scheme." *In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005). The rules are intended to "ensure that the permitting authority has the first opportunity to address any objections to the permit, and that the permit process will have some finality." *Id.* (quoting *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999)); *see also Indeck*, slip op. at 58 (noting the efficiency and integrity functions associated with the requirement to raise issues during the public comment period).

NGO Petitioners' lack of specificity cannot be overcome by an argument that they were unable to raise a more precise challenge during the comment period. These issues were "reasonably ascertainable" during the public comment period and should have been included in NGO Petitioners' November 13, 2006 comment, if not sooner. CAMR and NSPS were the applicable programs at the time, and it would have been reasonable to conclude that they would have imposed some restrictions on the Desert Rock Project's mercury emissions. The fact that now a MACT case-by-case analysis is required, as opposed to CAMR or NSPS, does not give

NGO Petitioners any new insight on the interplay between HAP regulation and the PSD permitting process that was not ascertainable before the comment period closed. If the NGO Petitioners were concerned about how control of HAPs would ensure a proper BACT analysis for non-HAP pollutants, they had the means and knowledge to have raised this issue during the public comment period.

Further, NGO Petitioners acknowledge that at least one of their rank was a party to *State of New Jersey v. EPA*, which sought to challenge the EPA rule delisting electric utility steam generating units ("EGUs") from regulation under section 112 of the CAA and led to the vacatur of CAMR and the NSPS for mercury after the close of the comment period. NGO Petitioners' Supp. Br. at 129 n.93 (noting that "one of Petitioners [NRDC] here was even involved in the *New Jersey* case"); *see also New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2007) (noting that John D. Walke⁴² and Jon Devine⁴³ participated on the brief for Environmental Petitioners). This involvement in the *New Jersey* case indicates that at least one of the NGO Petitioners should have anticipated that EGUs, including the Desert Rock Project, might be subject to case-by-case MACT analysis. In fact, the Board has previously held that it is not unreasonable to expect that "a petitioner can raise an issue where a decision is anticipated, but has not yet been issued. . . ." *Christian County*, slip op. at 16. All of the NGO Petitioners had notice of EPA's delisting of EGUs from regulation under section 112 following the publication of the delisting rule in the Federal Register on March 29, 2005 – more than eighteen months before the close of the public comment period for the Desert Rock facility's PSD permit. *See* 70 Fed. Reg. 15,944 (Mar. 29,

⁴² John D. Walke's biography on NRDC's website notes that he is a senior attorney and the director of the clean air project with NRDC's air and energy program. NRDC, NRDC Staff, <http://www.nrdc.org/about/staff.asp>.

⁴³ Jon Devine's biography on NRDC's website notes that he is a senior attorney. NRDC, NRDC Staff, <http://www.nrdc.org/about/staff.asp>.

2005). Furthermore, NRDC's petition for review in *New Jersey* was filed with the D.C. Circuit on May 18, 2005 – again, well in advance of the public comment period held from July 27, 2006 through November 13, 2006 for Desert Rock's PSD permit. Therefore, NGO Petitioners (including NRDC, which was specifically involved in the delisting rule appeal) had more than eighteen months to contemplate and consider how the challenges brought in *New Jersey* might impact the draft Desert Rock permit. Accordingly, these issues were reasonably ascertainable during the public comment period and the Board should deny review of these issues and avoid becoming "the first-level decision maker as to such newly raised issues, contrary to the expectation that 'most permit conditions should be finally determined at the [permit authority] level.'" *BP Cherry Point*, 12 E.A.D. at 219 (quoting *Knauf I*, 8 E.A.D. at 127). "To allow Petitioners to raise this issue at this stage would frustrate the Agency's important policy of ensuring predictability, efficiency, and finality in the permitting process by allowing the permit issuer the opportunity to address objections to the permit in the first instance." *ConocoPhillips Co.*, slip op. at 50.

Because these issues were reasonably ascertainable during the comment period, NGO Petitioners cannot overcome their lack of standing by demonstrating that they submitted comments after the comment period closed. NGO Petitioners point to comments they submitted to EPA on March 4, 2008, relating to the outcome of the *New Jersey* decision, which vacated the delisting rule. AR 59 (*see* attachment "Desert Rock Mercury Rule Filed".)⁴⁴ Although EPA exercised its discretion and opted to respond fully to NGO Petitioners' late comments, EPA emphasized that "these comments were submitted after the close of the public comment period."

⁴⁴ The State of New Mexico also points to late filed comments it submitted on June 19, 2008 as preserving this issue. Petitioner State of New Mexico's Supp. Br. at 35 (citing AR 102). EPA Region 9 chose not to respond to this late filed comment. AR 121 at 1.

AR 121 at 1. Even though the NGO Petitioners allege that EPA "misse[d] the point" of their comments, EPA fully responded to the only issue actually raised by the NGO Petitioners' comments. NGO Petitioners' Supp. Br. at 137; AR 121 at 21-23. EPA's election to respond to these late comments does not waive the threshold requirement of standing because the Board has previously determined that the mere fact that a party's comments are in the Administrative Record is insufficient grounds to establish standing where the comments were not received during the public comment period. *In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 531 (EAB 2000) (explaining that petitioners lacked standing even when the agency had received the comments in advance of the public comment period and those comments were in the record). The Board expressly noted that the use of the word "during" in the title of 40 C.F.R. § 124.13 – "Obligation to raise issues and provide information during the public comment period" – "cannot be dismissed as superfluous." *Id.* at 529. Therefore, the Petitioners here were required to file "all reasonably available arguments supporting their position by the close of the public comment period," which they failed to do. 40 C.F.R. § 124.13; *see also* 40 C.F.R. § 124.19(a). As previously noted, these issues were reasonably ascertainable, during the public comment period so Petitioners should have submitted specific comments on their perception of how HAP regulations might impact the BACT analyses in the Desert Rock PSD permit. "[A] litigant cannot simply sit back, fail to make good faith arguments and then, because of developments in the law, raise a completely new challenge." *Christian County*, slip op. at 18 n.21 (quoting *Old Ben Coal Co.*, 62 F.3d at 1007). Because Petitioners waited to assert a reasonably ascertainable argument until after the close of the public comment period, they cannot overcome the threshold issue of standing so this issue should be dismissed.

B. Conducting a BACT Analysis as Part of the PSD Permitting Process Does Not Require a Source to Prepare Concurrently a Case-By-Case MACT Analysis.

In advancing their untimely argument for the first time, Petitioners unsuccessfully attempt to assert that the CAA contemplates that conducting a case-by-case MACT analysis is a PSD requirement. NGO Petitioners' Supp. Br. at 138-140; New Mexico's Supp. Br. at 36-39. In particular, Petitioners attempt to draw support from section 165(a)(3) of the Act, a provision that merely sets forth those preconstruction requirements that must be completed before construction on a major emitting facility may commence. CAA § 165(a)(3); 42 U.S.C. § 7475(a)(3) (noting that "[n]o major emitting facility . . . may be constructed . . . unless the following conditions are met). Petitioners construe this section in isolation without considering that Congress exempted HAPs from the PSD requirements.⁴⁵ CAA § 112(b)(6), 42 U.S.C. § 7412(b)(6). However, EPA Region 9, which was aware of this exemption, explained in its Response to Late Comments that it would "not be appropriate to include emission limits for HAPs in the PSD." AR 121 at 21.

Furthermore, under 40 C.F.R. § 63.43(c), case-by-case MACT determinations can be made through several different review processes and at several different stages of the preconstruction review process. The regulations make clear that sources may conduct case-by-case MACT determinations as part of the preparation of a Title V permit, by obtaining a separate Notice of MACT Approval according to the requirements of 40 C.F.R. § 63.43 (f)-(h), or through any other "administrative procedures for preconstruction review and approval" 40 C.F.R. § 63.43(c). Apparently conceding their unfounded argument that Congress has established case-

⁴⁵ Given the express exemption prohibiting the regulation of HAPs under the PSD program, it is not relevant that the original applicant, Steag Power LLC, commented that a holistic approach to "state-of-the-art emissions control" "may be useful to consider. . . during facility design," NGO Petitioners' Supp. Br. at 145. Petitioners are unable to point to a requirement to adopt a holistic approach to emissions control under the CAA.

by-case MACT as a PSD requirement, NGO Petitioners acknowledge in their Supplemental Brief that "MACT related HAP emissions themselves need not be incorporated into the permit required under [section] 165(a)(1)." NGO Petitioners' Supp. Br. at 139 n.105.

Petitioners have also failed to explain why the Desert Rock PSD permit must be updated or reopened at a later time if the forthcoming MACT determination establishes that more stringent emission requirements are necessary for any non-HAP pollutants regulated under the PSD permit, especially given that a full proper BACT analysis was conducted for the non-HAP pollutants consistent with EPA guidance and the definition of BACT. As NGO Petitioners note, PSD pollutants are often used as surrogates during the MACT analysis. NGO Petitioners' Supp. Br. at 144. Therefore, it is conceivable, for example, that if EPA Region 9 elects to use particulate matter ("PM") as a surrogate for non-mercury metals, the case-by-case MACT analysis may determine that more stringent PM emissions limitations are necessary than were previously determined in the PSD permit.⁴⁶ However, even if such a determination is made during the case-by-case MACT analysis after EPA Region 9's issuance of the PSD permit, the PSD permit would not need to be reopened because the lower limit can be set in an applicant's operating permit, and the applicant in such a scenario would merely need to comply with that more stringent emissions requirement. In fact, in recognition of such scenarios where emissions requirements conflict, EPA has issued guidance explaining how "multiple emissions limits may be streamlined into one limit" that is "at least as stringent as the most stringent limit" as a part of

⁴⁶ The current BACT analysis does not need to consider to-be-developed HAP requirements as a "BACT floor" since no HAP requirement existed at the time the BACT determination and PSD permit was finalized. Under NGO Petitioners' line of reasoning, BACT analyses would need to be continuously re-visited as new regulatory requirements become effective in the course of a project's development. This type of continuous permitting process over the course of a project's development is impractical and was never contemplated within the PSD program.

the source's operating permit. EPA, White Paper 2 – Guidance for Improving Implementation of the Operating Permits Program, at 2 (Mar. 5, 1996).

Overall, Petitioners have failed to present any reason their failure to raise these issues during the public comment period should be overlooked by the Board, or any solid legal obligation of EPA to perform a case-by-case MACT determination concurrently with PSD permit review. Their position is further diminished by the express exemption of HAPs from the PSD requirements under section 112 of the CAA. CAA § 112(b)(6); 42 U.S.C. § 7412(b)(6). In light of these shortcomings, Petitioners' argument that a case-by-case MACT determination must be part of the PSD permit process should be dismissed.

V. EPA REGION 9 COMPLETED A THOROUGH BACT DETERMINATION FOR NO_x AND SO₂ THAT IS CLEARLY REFLECTED IN THE ADMINISTRATIVE RECORD.

At the onset, Respondent notes that EPA Region 9 is the leading PSD permitting authority in the United States. EPA Region 9 houses national experts in determining and selecting BACT for inclusion in PSD permits.⁴⁷ EPA Region 9 oversees the permitting activities of some of the most stringent permitting authorities in the nation, including those in California. Therefore, EPA Region 9 unequivocally has substantial expertise in dealing with highly technical and sophisticated issues surrounding PSD permitting.

NGO Petitioners question the adequacy of EPA Region 9's BACT determination for NO_x and SO₂, and allege that these BACT determinations were not subject to public notice and comment. Specifically, NGO Petitioners claim that the Region's BACT determination was based "exclusively" on BACT limits in existing permits and on "thin" information. NGO Petitioners'

⁴⁷ EPA Region 9 staff has been used as expert witness in coal-fired power plant enforcement cases on BACT issues. *See* Expert Report of Matt Haber, Best Available Control Technologies for the Baldwin Generating Station, Baldwin, Illinois) (2002), submitted in *United States v. Illinois Power Co.*, No. 99-833-MJR (S.D. Ill. 2002) by the United States.

Supp. Br. at 156, 166-170. NGO Petitioners also claim that this analysis came after the close of the public comment period. These claims must fail. The administrative record clearly shows that the EPA Region 9 conducted a thorough and appropriate BACT analysis for NO_x and SO₂ and that this analysis contained all of the expected regulatory criteria. The administrative record also shows that EPA Region 9 conducted a thorough public process wherein the public, including Petitioners, fully participated in EPA Region 9's BACT determination.

A. EPA Region 9 Performed a Complete BACT Analysis for NO_x and SO₂ Consistent with the Well-Established Top-Down, 5-Step, BACT Process.

NGO Petitioners' assertion that EPA Region 9 relied "exclusively" upon only one set of information is disingenuous. The plain reading and the expansive information reflected in the administrative record relating to the BACT determinations for NO_x and SO₂ reveal a complete and reasoned analysis by the Agency that considered more than just BACT limits in existing permits. This reasoned analysis, undertaken pursuant to the 5-step top-down process, shows that the BACT limits for NO_x and SO₂ were properly set and justified following a public review process as called for under the NSR Manual. The Board has stated that it would not reject a BACT determination that deviated from the top-down process as long as all regulatory criteria were considered and applied appropriately. *ConocoPhillips Co.*, slip op. at 30 (citing *Knauf I*, 8 E.A.D. at 129-30 n.14, 135 n.25). With respect to the Desert Rock PSD permit, compliance with all of the aforementioned regulatory criteria is evident in the administrative record.

Step 1 of a top-down BACT analysis requires the identification of all demonstrated and potentially applicable control technology alternatives. NSR Manual at B-11. With the exception of IGCC, which is discussed in Section II *supra*, NGO Petitioners do not assert that EPA or Desert Rock failed to identify all available technology applicable to the Desert Rock Project, nor have NGO Petitioners successfully identified any other technology that should have been

considered. Moreover, the NGO Petitioners fail to inform the Board that Step 1 of the BACT analysis was conducted on the record before the close of the public comment period. *See* AR 6.1 at 4-1 to 4-22 (Desert Rock permit application); AR 46 (EPA Region 9's Statement of Basis and Ambient Air Quality Impact Report). The NO_x technologies identified in the record include selective catalytic reduction ("SCR"); selective non-catalytic reduction ("SNCR"); staged combustion techniques, including low NO_x burners, SCONO_x (a NO_x adsorption/desorption technology), and gas reburn. The SO₂ control technologies identified in the record are wet flue gas desulfurization, limestone injection, spray dryer absorber, and the use of low sulfur coal. Each of these technologies is discussed and fully characterized in both the Desert Rock application and in EPA Region 9's Statement of Basis and Ambient Air Quality Impact Report. *Id.* The references consulted by EPA Region 9 during this identification process indicate that the Region cast its net widely to gather and identify all of the demonstrated and potentially applicable control technology alternatives. The references consulted included the RACT/BACT/LAER Clearinghouse, recent permits issued for similar sources, EPA's National Coal BACT Workgroup database, Department of Energy/National Energy Technology Laboratory database, an EPA spreadsheet of recently permitted and proposed coal-fired power plants, trade journals, information from industry conferences and vendor guarantees, in addition to conducting discussions with EPA and tribal permitting staff. AR 6.1 at 7-1 to 7-2; AR 46.

Step 2 of a top-down BACT analysis allows the permitting agency or permittee to eliminate any control alternatives that are not technically feasible because the alternative is either not available or not applicable. NSR Manual at B-17. NGO Petitioners do not assert that EPA or Desert Rock improperly excluded a control option as technically infeasible. Moreover, NGO Petitioners again fail to acknowledge to the Board that Step 2 was also conducted on the record

before the close of the public comment period. The administrative record clearly indicates that the only identified technology that was excluded because of its technical infeasibility was the SCONO_x technology. AR 6.1 at 4-7. This technology was determined to be infeasible at Desert Rock because it is "extremely sensitive to the presence of sulfur in the flue gas and could not be applied to coal-fired boilers." *Id.* None of the identified SO₂ technologies were found to be infeasible. All of the remaining technologies identified by EPA Region 9 and Desert Rock Energy during Step 1 were considered in the remaining steps of the BACT determination.

The third step of a top-down BACT analysis requires ranking each remaining, technically feasible control technology in accordance with the control efficiency of each technology. NGO Petitioners do not assert that EPA or Desert Rock improperly ranked the control technologies pursuant to Step 3. Further, they again ignore in their arguments to the Board the fact that Step 3 of the BACT analysis was conducted on the record before the close of the public comment period. Table 3 in EPA Region 9's Statement of Basis and Ambient Air Quality Impact Report illustrates the assessed hierarchy of the NO_x feasible control options, while Table 4 of that report shows the determined ranking for the SO₂ control technologies. AR 46 at 8, 16. Thus, it is readily apparent in the record that EPA Region 9 undertook this analysis prior to the close of the public comment period, contrary to what NGO Petitioners would have the Board believe, and that this ranking of BACT technologies was available for public comment.

Step 4 of a top-down BACT analysis requires the permitting authority and permittee to either select the top-ranked control option or provide a clear justification regarding why that option is inappropriate as BACT for the specific project in question. NSR Manual at B-26. If the top-ranked control option is selected as BACT, no economic collateral impact or alternative analysis is required. *Id.* Environmental impacts, however, should be considered, even when the

top option is selected. *Id.* EPA Region 9 selected the top NO_x and SO₂ control options – SCR and low-NO_x burners for NO_x and wet flue gas desulfurization and low sulfur coal for SO₂. No economic analyses were required because the top control options were selected in both cases. *Id.* Environmental impacts, however, were considered in accordance with the NSR Manual's guidance. The environmental impacts for the SCR were noted in Desert Rock Energy's permit application and EPA Region 9's Statement of Basis and Ambient Air Quality Impact Report. AR 6.1 at 4-5 to 4-6; AR 46 at 10. The environmental impacts associated with SCR include unreacted ammonia being emitted to the atmosphere, safety issues, and increased loading to the particulate collectors. EPA Region 9 and Desert Rock Energy did not identify any adverse environmental impacts from the wet flue gas desulfurization. Further, no adverse energy impacts from the selected NO_x and SO₂ control options were identified. EPA Region 9 and Desert Rock Energy concluded that those impacts they did identify did not warrant selection of a lower-ranked control technology. NGO Petitioners do not assert that EPA or Desert Rock improperly selected the appropriate control option. And, yet again, NGO Petitioners fail to acknowledge to the Board that Step 4 was conducted and documented in the record before the close of the public comment period.

Step 5 of the top-down BACT process requires the permitting authority to select as BACT the most effective control option remaining after the Step 4 analysis and specify a BACT emission limit for the source reflective of the imposition of the control option selected. *ConocoPhillips*, slip op. at 29. As part of these efforts, the permitting authority should explain how it derived the specific emissions limit and indicate whether that limit reflects the best emission rate achievable through application of the selected BACT. *Id.* at 35-36.

NGO Petitioners claim that EPA Region 9 solely relied on existing permitting limits and did not consider demonstrated short term emissions data when selecting the BACT rate. The Board has held, however, that a permitting authority is not required to set the BACT "emission limit at the most stringent emissions rate that has been demonstrated" in practice by a facility using similar emission controls. *In re Newmont Nevada Energy Investment*, 12 E.A.D. 429, 441-42 (EAB 2005) (citing *Kendall New Century Dev.*, 11 E.A.D. at 53). The Board has recognized the use of "safety factors" in the calculation of permit limits to take into account variability and fluctuation in expected performance of the pollution controls and that setting of emissions limitations for one facility at the highest control efficiency demonstrated at another facility would make violations of the permit unavoidable. *Id.* at 442 (citing *In re Masonite Corp.*, 5 E.A.D. 551, 560 (EAB 1994)). As stated by the Board:

In essence, Agency guidance and our prior decisions recognize a distinction between, on the one hand, measured "emissions rates," which are necessarily data obtained from a particular facility at a specific time, and on the other hand, the 'emissions limitation' determined to be BACT and set forth in the permit, which the facility is required to continuously meet throughout the facility's life. Stated simply, if there is uncontrollable fluctuation or variability in the measured emission rate, then the lowest measured emission rate will necessarily be more stringent than the "emission limitation" that is "achievable" for the pollution control method over the life of the facility.

Id.

NGO Petitioners are here attempting to use short-term data from other similar sources to override EPA Region 9's technical expertise with respect to the NO_x and SO₂ BACT emission rates the Region has reasonably selected for the Desert Rock Project. This method and simplistic approach runs contrary to the long-standing EAB precedent and the application of the BACT process.

In fact, EPA Region 9 did exactly what NGO Petitioners are seeking through this argument in the administrative record as part of the overall BACT analysis. EPA Region 9 considered, on the record, actual emissions data from other facilities in its establishment of the BACT emission rates at issue. AR 120 at 45-56, 58-57. The administrative record presents EPA Region 9's rationale and decision-making process how it considered, or why it did not consider, actually achieved emission data. *Id.* With respect to setting the NO_x emission limit, EPA considered the following emission data from particular sources submitted by commenters and provided the following justifications of how EPA Region 9 treated such information:

- The NO_x emission limit in the PSD permit for Louisville Gas and Electric, Trimble County Unit 2 – EPA found that the emission limit was 4.17 tons/calendar day, not per unit of production. In contrast, the rate set for the Desert Rock Project is in lb/MMBTU. Therefore, the limits established for these facilities are not comparable. Furthermore, the permit in Trimble County Unit 2 was "designed to avoid PSD and minimize impacts on the nearest Class I area" so the emissions at that facility do not represent BACT. *Id.*
- The W.A. Parish facility achieved emission limits – EPA found that the facility was able to achieve lower NO_x emissions than Desert Rock Project because the W.A. Parish facility uses Powder River Basin ("PRB") coal, which has higher reactivity, lower fuel nitrogen content and a greater percentage of fuel nitrogen in the volatile fraction than the Navajo coal to be used by the Desert Rock Project. *Id.* at 59. Furthermore, the ash content of the coal that will be used by the Desert Rock Project is considerably higher, which can impact the performance of catalysts used in SCR. *Id.* at 60. EPA also noted that the W.A. Parish facility only achieved low emission rates for a brief period of time. *Id.*
- Data provided by one commenter from Babcock & Wilcox – EPA found that the data does not represent actual achieved emission rates, but rather, emission goals. Hence, this data does not represent BACT for NO_x and was of limited value in the Desert Rock PSD review process. *Id.* at 63.
- Data showing that 25 units had lower NO_x rates – EPA found that the provided data could not inform EPA's decisionmaking because it did not include the averaging period used for measuring the listed emission rates, the fuel used, or the boiler characteristics at these facilities. Moreover, the commenter's own data indicates that there is a wide range of control that is affected by site-specific factors. *Id.* at 68.
- Data submitted by a commenter from the Topsoe Report – EPA found the data that was submitted did not provide the NO_x emission rates in lb/MMBTU or the properties of the

fuel used and thus the data was not relevant to the establishment of NO_x emissions limits for the Desert Rock Project. *Id.* at 70.

With respect to setting the SO₂ emissions rate at the Desert Rock Project, EPA considered the following emission data from particular sources submitted by commenters and provided the following justifications for how EPA Region 9 treated such information:

- The Mitchell Power Station in Courtney, Pennsylvania achieved emission rates – EPA found that the data does not represent BACT because there was only 88 days worth of data provided, for a 17 month period. EPA Region 9 concluded that such rates do not demonstrate that the emissions levels are continuously achievable over the life of the facility. Furthermore, a closer look at the data shows that the Desert Rock Project's performance will be better than that achieved at the Mitchell Power Station, which had a daily average emission rate less than or equal to the Desert Rock Project's rate for only 29 days out of one year. *Id.* at 47-48.
- Data submitted regarding the Chiyoda bubbling jet reactor at the Shinko-Kobe power plant in Japan – EPA found that this data was insufficient to establish that it represents BACT. For example, one of the documents submitted about the technology did not contain any technical information regarding efficiencies achievable or guaranteed emission rates. The other document submitted shows efficiency rates ranging from 82%-99% and no data clarifying the conditions under which the higher rates were achieved. Furthermore, EPA noted that many of these higher rate facilities provided in this list are no longer in operation. Moreover, a paper written by Yasuhiko Shimogama (and relied on by the commenter) cannot establish that the technology is BACT because there was no data regarding averaging periods, permitted emission rates or actual emissions data. EPA took the additional step of communicating with the Shinko-Kobe power plant and learned that there are unresolved operational issues with the technology that require frequent plant shutdowns. *Id.*
- Emission data from Chiyoda's CT-121 FGD system, which is used at both the University of Illinois's Abbott Power Plant and Georgia Power's Plant Yates – EPA found that the emissions rates at the Georgia Power facility were significantly higher than the Desert Rock Project's rate. With respect to the Abbott Power Plant, EPA found that those units are not a good reference for BACT here because they are much smaller than the Desert Rock Project's units. *Id.* at 50.
- Numerous other data submitted by commenters regarding planned facilities – EPA found that this data did not establish BACT because those facilities either had not yet received emissions limits or established operational data or the data provided indicates that the emissions rates will be greater than those at the Desert Rock Project. *Id.* at 51.

- Data from Mitsubishi's reports guaranteeing SO₂ removal up to 99.8% -- EPA found the reports indicate that the guaranteed rates are for "super high" inlet SO₂ conditions (2,000-3,000 ppm), which are not representative of the conditions at the Desert Rock Project. *Id.* at 52.
- Data from Lake Michigan Air Director Consortium and Midwest Regional Planning Organization regarding 99.5% control and cost basis for SO₂ removal – EPA found that this data is not reflective of the Desert Rock Project's conditions or economics because the data assumes a fuel sulfur content of 2.5%, which is two to three times higher than the fuel sulfur content at the Desert Rock Project. Furthermore, the submission indicates that site-specific quotes are needed to obtain an accurate cost analysis. *Id.* at 53.
- Data from the AES-Puerto Rico facility – EPA found that this facility was not a similar source because the AES-Puerto Rico facility is a 454 MW facility with two circulating fluidized beds. In contrast, the Desert Rock Project is proposed to be up to a 1500 MW facility with two 750 MW PC boilers. Thus, there are several source-specific factors that vary between the two sources, including type and size of the boilers, the firing conditions, and load. Furthermore, the majority of the coal used at AES-Puerto Rico is in the 0.60% sulfur range, while the coal that will be used at the Desert Rock Project averages around 0.82% and may be up to 1.2%. EPA also noted that even with the same controls as employed by the AES-Puerto Rico facility, the Desert Rock Project's emissions would always exceed those at AES-Puerto Rico because the Desert Rock Project's coal has significantly lower energy content. Therefore, to produce the same amount of energy output, the Desert Rock Project would need to burn more coal, which creates more emissions. *Id.* at 54-55.
- Data from the NEVCO Plant – EPA found that the NEVCO Plant had numerous source-specific differences from the Desert Rock Project. Furthermore, the sulfur content of the coal used at NEVCO is much lower at 0.4% and its emissions limit is set on a different basis than the Desert Rock Project's (30-days at NEVCO as compared to a 24-hour average at the Desert Rock Project). *Id.* at 55.

As demonstrated by the administrative record, EPA Region 9 devoted multiple pages in its Response to Comments to a description of how it derived the Desert Rock Project BACT emission rates from the selected BACT for both NO_x and SO₂. This process included reviewing the possible relevance of actual emissions from similarly controlled sources, as requested by Petitioners during the comment period. Thus, there was no clear error in EPA Region 9's establishment of NO_x and SO₂ emission limits.

B. NGO Petitioners were Afforded Proper Public Notice and Comment of EPA Region 9's BACT Determination and They Participated Fully in Development of the BACT Emissions Rates.

NGO Petitioners claim that EPA Region 9 did not act properly because it did not select and fully justify the final BACT emission limits for NO_x and SO₂ until after the close of the public comment period. NGO Petitioners' Supp. Br. at 165-66. EPA Region 9 followed the process outlined in the NSR Manual – a procedure that the EAB has found to be authoritative on BACT issues. *See, e.g., ConocoPhillips Co.*, slip op. at 6. Section IV.E of the NSR Manual states, "the ultimate BACT decision is made by the permitting agency after public review." NSR Manual at B-53 (emphasis added). The NSR Manual further states:

The BACT emission limit in a new source permit is not set until the final permit is issued. The final permit is not issued until a draft permit has gone through public comment and the permitting agency has had an opportunity to consider any new information that may have come to light during the comment period.

Id. at B-54- 55 (emphasis added). It would be inconsistent with this guidance, and the Agency's intent to establish a dialogue as part of the public notice and comment requirement, to determine and fully justify the final BACT emission limit before the public comment period. A permitting authority must base its BACT determination on a full consideration of all timely public comments. 40 C.F.R. § 124.18. In accordance with this requirement, EPA Region 9's final BACT emission limit was derived after the public comment period closed, from a review of not only existing permit limits, but also after consideration of emission data from sources operating domestically and internationally, review of state regulator presentations, and deliberation on all timely public comments. AR 120 at 36-76.

Petitioners were not denied any opportunity to comment on EPA's legal and factual basis for its end-of-day BACT determination. In fact, Petitioners submitted a vast number of comments, including comments requesting that EPA Region 9 examine the actual operation and

emission levels at similar plants. AR 66 at 36-45. In response to those comments, EPA Region 9 examined the similar plants and fully responded to the Petitioners' comments on achieved emission rates. NGO Petitioners object to the fact that these analyses were done after the close of the public comment period. There is no basis for this objection, as the NGO Petitioners submitted comments and EPA Region 9 fully responded to those comments. If NGO Petitioners have substantive and specific challenges to EPA Region 9's selection of the BACT rates for NO_x and SO₂ as justified in the administrative record, they should have raised them, instead of the unsupported procedural challenges they are presently advancing. *Prairie State*, slip op. at 47 (noting that a challenge to a Regional Office's BACT analysis must contain "a detailed and specific explanation of [the Regional Office's] alleged error" and denying review where no such demonstration is made by petitioners); *see also Tondu Energy*, 9 E.A.D. at 714 (noting that 40 C.F.R. § 124.19(a) "requires that a petitioner both state the objections to the permit that are being raised for review and explain why the permit issuer's previous response to those objections (*i.e.*, the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review").

As to the NO_x BACT limit, the only possible flaw to the administrative record that Petitioners raise is that EPA Region 9 did not consider the actual emissions from Unit 1 at the Trimble County LGE coal-fired power plant. NGO Petitioners' Supp. Br. at 161. However, NGO Petitioners only submitted comments to EPA Region 9 requesting examination of the permitted NO_x levels from Trimble Unit 2, which EPA Region 9 so did, as reflected in the Response to Comments. *See* AR 66 at 40 (Petitioners' comment); AR 210 at 58-63, 66 (EPA's response). NGO Petitioners cannot now say that EPA Region 9 should have intuited that NGO

Petitioners expected the Region to also consider Trimble Unit 1.⁴⁸ Because NGO Petitioners failed to make a specific request that Trimble Unit 1's actual emissions be considered by EPA Region 9 as part of its analysis to determine the BACT emission limit for the Desert Rock Project, NGO Petitioners have not met their burden of specificity to plead this issue before the Board. *See Arecibo & Aguadilla*, 12 E.A.D. at 117 ("In evaluating whether to review an issue on appeal, this Board frequently has emphasized that the issue to be reviewed must have been specifically raised during the comment period) (citing *New England Plating*, 9 E.A.D. at 732, and *Maui Elec. Co.*, 8 E.A.D. at 9); *see also Indeck*, slip op. at 58 (noting that it is unreasonable "[t]o expect the permit issuer to have inferred from these comments the arguments Petitioners now raise on appeal . . .").

Given the fact that EPA Region 9 performed a proper BACT analysis that is supported by the administrative record, and given the NGO Petitioners' full participation in the BACT process, it cannot be said that EPA Region 9 clearly erred, or was arbitrary or otherwise abusive of its discretion, when it set the NO_x and SO₂ BACT limits. Accordingly, the Board should deny review of the NO_x and SO₂ BACT emission limits.

⁴⁸ Petitioners cite to AR 25 (at 4) to indicate that they raised this issue with EPA. NGO Petitioners' Supp. Br. at 161. However, AR 25 is a copy of handwritten notes taken during a meeting held between EPA and citizen groups on April 22, 2005. Although this document is part of the administrative record, its inclusion in the record is not evidence that Petitioners raised this issue during the public comment period, which was held from July 27, 2006 to November 13, 2006. *See City of Phoenix*, 9 E.A.D. at 527-31 (explaining that petitioners lacked standing even when the Agency had received the comments in advance of the public comment period and those comments were in the administrative record because EPA cannot be obligated to conduct a time-consuming search of the entire administrative record to determine whether all comments had been addressed). In order to preserve this issue, Petitioners were obligated to raise the issue again during the public comment period. *Id.* at 531.

C. The Desert Rock Energy Project's NO_x Optimization Plan is Legal.

1. *A Public Comment Period Was Not Required to Include a NO_x Optimization Plan in the Final PSD Permit.*

A new public comment period is not required every time a new permit condition is added to a permit in response to comments received on a draft permit. *Indeck*, slip op. at 28. "Indeed, the regulations contemplate the possibility that permit terms will be added or revised in response to comments received during the public comment period." *Id.* (citing *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993); *In re Chem-Sec. Sys., Inc.*, 2 E.A.D. 804, 807 n.11 (EAB 1989)). Specifically, under 40 C.F.R. § 124.14, the Regional Administrator has discretion regarding whether to reopen a public comment period. The EAB generally defers to EPA's discretion regarding whether the public comment period should have been reopened as a result of changes made in a final permit. *In re Thermalkem, Inc.*, 3 E.A.D. 355, 357 (EAB 1990); *see also Amoco*, 4 E.A.D. at 981 ; *In re GSX Services of S. Carolina, Inc.*, 4 E.A.D. 451, 467 (1992).

One factor that the Board must assess whenever a change has been made to the draft permit is whether the record contained a thorough explanation of EPA's basis for changing the terms of the permit. *Indeck*, slip op. at 29 (citing 40 C.F.R. § 124.17(a)(1); *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 245 (EAB 2005)). Here, EPA provided a clear basis for their inclusion of the optimization plan. EPA explained that the commenters had shown evidence regarding the W.A. Parish facility suggesting "that lower emission limits may be feasible for the [Desert Rock Project]." AR 120 at 62. However, EPA noted that the ash content of the Desert Rock Project's coal is considerably higher than the PRB coal used at the W.A. Parish facility. AR 120 at 60. EPA noted that according to a paper authored by Steven A. Benson, entitled *SCR Catalyst Performance in Flue Gases Derived from Subbituminous and Lignite Coals*, "ash can have significant impacts on SCR performance." AR

120 at 61. In particular, during combustion, "[t]he particles resulting from the reaction with minerals produce low-melting-point phases that cause a wide range of fireside deposition problems. . . . These particles cause low-temperature deposition, blinding, and plugging problems in SCR systems." *Id.* Given that the typical ash content of the coal used at W.A. Parish is around 4.6%, while the ash content of coal used at the Desert Rock Project is estimated to be approximately 20.5%, EPA was "still uncertain to what extent the ash content [would] affect SCR performance." *Id.* at 60, 62. Therefore, rather than just leaving the NO_x limit at the level set in the proposed permit, EPA Region 9 decided to lower the limit out of sensitivity to concerns raised by the commenters, and EPA Region 9 developed an optimization period to test the effects of the higher ash content on the operation of the SCR system. *See id.* The optimization process specifically calls for Desert Rock Energy to install boiler components and SCR systems that are designed to "achieve a NO_x rate of 0.035 lb/MMBTU on a 365-day rolling average, which is 22% lower than the level that the commenter claims represents BACT (i.e., 0.045 lb/ MMBTU on a 365-[day] rolling average basis)." *Id.* (emphasis added). Furthermore, EPA clarified that the five-year duration it had set for the optimization period "was established to ensure that [the optimization period] encompasses a complete catalyst life-cycle and includes a small amount of time necessary for the Permittee to compile and analyze the operating data." *Id.* Following the conclusion of the optimization period, the NO_x emission limit rate will be lowered from 0.05 lb/MMBTU (over a 365-day rolling period) to 0.0385 lb/ MMBTU (over a 365-day rolling period) "unless the data collected pursuant to the catalyst management plans indicates that these limits are not feasible and [Desert Rock Energy] submits an application for an adjustment of limits." *Id.* at 62, 89. This response shows that EPA stated its basis for instituting the NO_x

optimization plan "with reasonable clarity" and "adequately document[ed] its decision making."
Indeck, slip op. at 29.

Additionally, in assessing whether the comment period should be reopened, the permit issuer should assess "(1) whether reopening the comment period 'could expedite the decisionmaking process,' and (2) whether comments on the draft permit have given rise to 'substantial new questions.'" *Thermalkem*, 3 E.A.D. at 357 (citing 40 C.F.R. §§ 124.14(a)(1); (b)). In this case, NGO Petitioners and all other interested parties were given a "full and fair opportunity during the original comment period to present their views (pro or con) as to the draft permit's limits. . . ." *Id.* at 358. Petitioners have failed to show that reopening the comment period would expedite the decisionmaking process. Therefore, the only issue remaining is whether the final Desert Rock PSD permit raised "substantial new questions."

In *Thermalkem*, the Board reviewed a similar situation. The Board was asked to assess whether EPA should have provided public notice and comment when EPA entered into a settlement agreement to revise RCRA permit limits. *Id.* at 356. The settlement agreement at issue provided for the deletion of two permit conditions and the raising of permit limits for five other permit conditions. *Id.* The Board ultimately determined that the permit revisions did not need to undergo public notice and comment because they did not raise substantial new questions. *Id.* at 357 The questions raised by the revisions were the same as those presented in the draft and final permits – "namely, the appropriate limits on metal feed rates necessary to protect human health." *Id.* Therefore, the Board was satisfied that the *Thermalkem* petitioners had already been provided a fair opportunity to present their views about the limits included in the permit. *Id.* Moreover, the Board was reassured that the petitioners' interests were protected by the

procedures provided under 40 C.F.R. § 124.19(a), whereby any person who filed comments or participated in a hearing on the permit could petition the EAB for review. *Id.*

The same logic as was used in *Thermalkem* applies to the situation here regarding whether any new substantial questions were raised by the inclusion of a NO_x optimization plan in the final permit. The inclusion of the optimization plan addresses the question of whether the NO_x emission rates in the permit are sufficiently protective. Petitioners have already been given an opportunity to submit their opinions about the limits that should be imposed in the permit. Because the final permit does not raise substantial new questions, no public comment period was required to include a NO_x optimization plan in the final permit. *See Thermalkem*, 3 E.A.D. at 357-58.

NGO Petitioners seem to argue that the optimization plan did not pose the same questions purely on the grounds that NGO Petitioners were not provided an opportunity to comment on the duration of the optimization plan. Specifically, Petitioners allege that had they been given such an opportunity, they "would have submitted technical information explaining that the catalyst life cycle for SCRs . . . is 2 to 3 years rather than 4 or 5 years." NGO Petitioners' Supp. Br. at 172. As an initial matter, the issue of the duration of the catalyst life does not raise a substantial new question because the Petitioners' underlying argument is still the same – whether the NO_x permit limits imposed meet BACT requirements. *Thermalkem*, 3 E.A.D. at 358. The complaint that Petitioners raise is distinguishable from the situation in *Indeck*, where the Board opted to remand the permit due to lack of public comment because the permit allowed for the construction of a facility that was physically different from that which was proposed. *Indeck*, slip op. at 30. The optimization plan here does not represent a similar type of significant change to the permit conditions. Furthermore, Petitioners' unsupported statement regarding the life-cycle of the

catalyst is insufficient to meet Petitioners' heavy burden of showing that EPA committed clear error in applying its technical judgment when setting the duration of the optimization plan. *BP Cherry Point*, 12 E.A.D. at 223, 228. Without any legitimate basis to claim, or evidence indicating, that EPA did commit a clear error, the Board should defer to EPA's expertise and experience on this technical issue of typical catalyst life-cycle and deny review of the NO_x optimization plan. *Newmont Nevada Energy*, 12 E.A.D. at 477, 479.

NGO Petitioners also challenge the fact that they were not given the opportunity to comment on the conditions specified in the application Desert Rock Energy is required to file at the end of the optimization period to modify the NO_x emission limits. NGO Petitioners' Supp. Br. at 171. However, the Board has rejected similar arguments regarding whether provisions of an optimization test plan must be made subject to notice and comment. *See Prairie State*, slip op. at 111. The *Prairie State* petitioners argued that the optimization plan allowed the PM₁₀ BACT limit to be revised and that the "final permit does not require that [the test plan and report used to revise the BACT limit] be subject to public notice, review, and appeal." NGO Petitioners' Supp. Br. at 82, submitted in *Prairie State*, PSD Appeal No. 05-02 (filed June 8, 2005). The Board should follow *Prairie State*'s precedent and determine here that public notice and comment is not required with respect to the application to be provided to EPA.

NGO Petitioners also object to the fact that the permit does not mandate that a public comment period be held if the NO_x limit is readjusted as part of the optimization plan. NGO Petitioners' Supp. Br. at 172. However, this objection is baseless because NGO Petitioners (and the public generally) will be provided with an opportunity to comment on any modifications to the Title V operating permit or other permitting process that will make any new limit an enforceable requirement. 40 C.F.R. § 70.7(h).

Lastly, NGO Petitioners raise additional arguments related to the regulation of emissions during startup and shutdown. Rather than repeating Desert Rocket Energy's response to those arguments herein, Section VI, *infra*, contains a complete discussion of compliance with BACT emission limits during startup and shutdown.

2. *The EAB Has Consistently Upheld the Legality of Optimization Plans and Has Found that Such Plans Do Not Delay Implementation of BACT.*

The Board has addressed the issue of optimization plans in at least six other instances and has consistently upheld their use. *Indeck*, slip op. at 28; *Prairie State*, slip op. at 104; *AES Puerto Rico*, 8 E.A.D. at 352; *In re RockGen Energy Center*, 8 E.A.D. 536 (EAB 1999); *In re Hadson Power 14-Buena Vista*, 4 E.A.D. 258 (EAB 1992); *In re Pennsauken County, New Jersey Resource Recovery Facility*, 2 E.A.D. 768 (EAB 1989). Based upon NGO Petitioners' inability to cite to any cases contrary to this precedent, it is clear that EPA has authority to institute an optimization plan where there is uncertainty regarding the emissions limits that are achievable, and did not commit clear error or abuse its discretion in doing so here.

Although Petitioners take issue with the duration of the optimization clause instituted by EPA Region 9, the Board has "concluded that such 'optimization clauses' are not *per se* impermissible." *Indeck*, slip op. at 86 n.126. Where there is uncertainty regarding the appropriate emissions limit, the EAB has upheld optimization plans that provided for an opportunity to lower the emissions rate and even those that enable the applicant to show that the emissions rate is not achievable and should be increased. *See, e.g., Hadson Power 14*, 4 E.A.D. 258 (denying review of a permit involving a NO_x limit subject to downward adjustment); *AES Puerto Rico*, 8 E.A.D. at 352 (denying review of a permit allowing upward adjustment of the PM₁₀ limit after obtaining stack data). Moreover, the Board has upheld optimization clauses of lengthy duration. *See, e.g., Prairie State*, slip op. at 111 n.88 (upholding an optimization clause

that provided for a three-year test period that could be "extended to a fourth year under certain limited circumstances."). Rather than finding optimization plans objectionable, the Board has even gone so far as to state that such plans are a "creative yet justifiable approach to ensuring that the permit contains effective control of [emissions]." *AES Puerto Rico*, 8 E.A.D. at 352.

Rather than acknowledge the role of optimization plans as creative solutions, NGO Petitioners object to the optimization plan, characterizing it instead as a means to "delay, potentially indefinitely, the imposition of BACT on the [Desert Rock Project]." NGO Petitioners' Supp. Br. at 173. Although Petitioners argue that a lower NO_x emission limit is achievable, they take the curious position that the more stringent post optimization period NO_x limits will never apply because Desert Rock Energy would simply mail-in a sham application for a higher limit that is post marked before the end of the optimization period. *Id.* at 173, 174. The lower NO_x emissions limit of 0.0385 lb/MMBTU (rolling 365-day average) is the default emissions limit and would not apply if, and only if, EPA agrees that Desert Rock Energy has shown, with supporting data, that meeting this low limit is infeasible. AR 122, Conditions IX.E.4, IX.E.5. Unless NGO Petitioners agree that such a limit may not be achievable (which they clearly do not as seen in their other arguments), it is inappropriate for NGO Petitioners to suggest that Desert Rock Energy would submit a bogus application to simply delay lowering an achievable NO_x limit. Such a preposterous, unjustifiable, hypothetical situation should not be entertained by this Board. It simply is not ripe for review and the Board should not give credence to Petitioners' unfounded conjecture that Desert Rock Energy would act in such an inappropriate manner. *See Kawaihae*, 7 E.A.D. at 117 (noting that the petitioners' claim must be rejected for presenting a hypothetical scenario).

Further, the Board has previously rejected challenges based upon the argument that an optimization period delays the implementation of BACT. *Prairie State*, slip op. at 111. Specifically, in *Prairie State*, the petitioners challenged the implementation of an optimization period on the basis that "[a] BACT limit must be established in the PSD permit, before the start of construction, not over three years later." NGO Petitioners' Supp. Br. at 80, submitted in *In re Prairie State Generating Co.*, PSD Appeal No. 05-02 (filed June 8, 2005). The Board squarely rejected a challenge to the implementation of an optimization period on the basis that a final BACT limit must be established in the PSD permit, before the start of construction, in *Prairie State* because the "approach effectively establishes the lower limit . . . in the present Permit" unless the facility can show that the limit is not feasible. *Prairie State*, slip op. at 110-11. The optimization plan instituted by EPA Region 9 for the Desert Rock Project does precisely that, and so is consistent with the optimization plan upheld by the Board in *Prairie State*. Optimization plans are an effective way to push BACT to lower emissions limits, and NGO Petitioners should endorse such plans rather than attacking them.

For the above reasons and the thoroughness of the administrative record explaining EPA Region 9's decision-making process, the Board should deny review of all issues relating to the NO_x optimization plan.

VI. EPA REGION 9'S STARTUP AND SHUTDOWN BACT EMISSION LIMITATIONS WERE PROPERLY ESTABLISHED AND JUSTIFIED IN THE ADMINISTRATIVE RECORD

Petitioners claim that EPA Region 9 illegally exempted periods of startup and shutdown from compliance with the BACT emission limits. NGO Petitioners assert that EPA Region 9 has committed clear error because (1) it did not provide a sufficiently specific technical justification why the Desert Rock boilers cannot meet steady-state SO₂ or NO_x BACT limits during periods

of startup and shutdown and (2) it did not respond to NGO Petitioners' legal argument that the lb/hour emission limits have not been justified as BACT limits by EPA Region 9.

NGO Petitioners' first assertion is simply false. EPA Region 9 specifically recognized in the administrative record that "BACT applies during all periods of operation including startup and shutdown." AR 120 at 105. In fact, EPA Region 9 found that the PC boilers "should be able to comply with the steady state lb/hr limits in the permit during startup and shutdown." NGO Petitioners do not cite to any document in the administrative record wherein EPA Region 9 states a different conclusion, so it seems clear that this argument regarding the inability of the PC boilers to meet steady-state SO₂ or NO_x BACT limits depends not on any current fact but rather on the assumption that the lb/hour emission limits have not been justified as BACT limits by EPA Region 9.

EPA Region 9 explained in its Response to Comments that it did not propose a separate emission limit for startup and shutdown periods, but instead applied the steady state lb/hour limits in the permit during these periods. *Id.* The reason for applying the steady state lb/hour limit instead of the lb/MMBTU limit is because "the emissions from the boilers are greater relative to the heat input during startup and shutdown periods," and so it might be difficult to establish compliance with the lb/MMBTU limit even when the lb/hour limit is otherwise met. *Id.* The Desert Rock boiler initially starts on low sulfur fuel oil only. *See* AR 12 at 5-2, 5-3. Once the boiler warms up to an appropriate temperature level, coal firing is introduced and oil firing is cut back. *Id.* at 5-3. The transition period from 100% fuel oil to 100% coal takes approximately one hour. The startup period ends at approximately 40% load. *Id.* This transition affects both NO_x and SO₂ measurements. NO_x emissions are impacted during startup because of lower SCR performance at low temperatures and temperature variations due to flame instability.

SO₂ emissions are impacted during startup due to changes in fuel type, flue gas flow, SO₂ concentration in the scrubber, and transient reactions in the scrubbing media. Similar effects occur during shutdown of the boilers. As temperature decreases during the boiler shutdown, SCR performance is impaired and the SO₂ transition impacts in the scrubber and flue gas reduces the removal rate of the SO₂ controls. These impacts, along with low heat input during startup and shutdown periods, makes meeting the lb/MMBTU rate on a consistent basis impracticable. Given the unstable combustion and factors listed, emissions during startup and shutdown cannot be accurately monitored on a lb/MMBTU basis and compliance issues can be presented. Therefore, EPA Region 9's rationale for establishing secondary SO₂ or NO_x BACT limits cannot be clearer, and NGO Petitioners, who bear the burden of proving that EPA Region 9's decision was clear error, have not suggested any other appropriate method for calculating or establishing an emissions limit for these pollutants during periods of startup or shutdown. *See Prairie State*, slip op. at 117.

EPA Region 9's approach is consistent with how startup and shutdown emissions were permitted and upheld by the Board in *Prairie State*. In *Prairie State*, the Illinois Environmental Protection Agency permitted secondary BACT emission limits for startup and shutdown derived "directly from the primary heat input BACT limits" and which did "not authorize emissions greater than the primary limits would allow at the units' rated heat input." *Prairie State*, slip op. at 115-16. EPA Region 9 used this same approach when permitting the Desert Rock Project. The NGO Petitioners understood the approach EPA Region 9 used to set the BACT emission limits during startup and shutdown, as indicated by the comments they submitted on this issue during the public comment period. AR 23 at 49. NGO Petitioners recognized that the lb/hr limit was based on the "maximum hourly heat input capacity of 6,800 MMBTU/hr during startup and

shutdown." *Id.*; *see also* AR 12 at 106. As an example, the 408 lb/hr NO_x emission rate was calculated by multiplying the BACT emission limit of 0.06 lb/MMBTU by the boiler maximum heat rate of 6810 MMBTU/hr. After the optimization period is concluded, the NO_x emission rate will be set at 340.5 lb/hr (30-day average). This rate was calculated by multiplying the EPA proposed emission limit of 0.05 lb/MMBTU and the boiler maximum heat rate by 6810 MMBtu/hr. As in *Prairie State*, then, the secondary BACT limits on startup and shutdown at Desert Rock are derived directly from the primary heat input BACT limits and do not authorize SO₂ or NO_x emissions greater than the primary limits would allow at the units' rated heat capacity. *See Prairie State*, slip op. at 117; AR 120 at 105.

Given that EPA Region 9 followed the EAB's direction in *Prairie State* and justified its rationale of why a lb/hour emission limit should be used during startup and shutdown periods in the administrative record, the Board should deny review of this issue.

VII. THE PSD PERMIT APPLICATION EXCEEDED THE PSD MODELING REQUIREMENTS FOR OZONE AIR AMBIENT IMPACT ANALYSES

The Desert Rock PSD permit application approved by the Region incorporates a State of New Mexico Environmental Department 2004 CAMx photochemical modeling episodes approved by EPA for an 8-hour ozone attainment demonstration. Early Action Compact for Ozone, Clean Air Action Plan, (hereinafter "NM Demonstration").⁴⁹ AR 12 at 6-50; 70 Fed. Reg. 48,285 (Aug. 17, 2005) (EPA's approval of the San Juan County Early Action Compact Plan). The NM Demonstration included simulated emissions from a power plant similar to the

⁴⁹ The NM Demonstration, including the San Juan Clean Air Action Plan and associated modeling reports is available on New Mexico's "Four Corners Ozone Task Force," available at <http://www.nmenv.state.nm.us/aqb/ozonetf/index.html>.

Desert Rock Project.⁵⁰ Although EPA does not require ozone modeling for the PSD permit applications, if they did impose such a requirement, the extensive NM Demonstration would easily meet and exceed any potential statutory PSD impact analysis to show that the emissions from the Desert Rock Project will not cause or contribute to an ozone NAAQS violation. *Id.*

This section addresses NGO Petitioners' inaccurate and repetitive allegations relating to the ozone analysis. NGO Petitioners raise needlessly repetitive comments relating to the NM Demonstration, which were fully addressed in EPA Region 9's Response to Comments. Given the repetitive nature of these comments, the NGO Petitioners' Supplemental Brief fails to provide the necessary evidence to overcome the deference granted to permitting authorities in matters requiring technical expertise. *Newmont Nevada Energy*, 12 E.A.D. at 430. Additionally, it was proper for EPA to refer to the Scheffe Table as a "useful and appropriate" analysis of potential ozone impacts required by the permitting authority. *Masonite*, 5 E.A.D. at 579. Finally, as supported by the NM Demonstration and as analyzed by EPA in the Response to Comments document, there is no evidence that the Desert Rock Project would "cause or contribute" to an exceedance of the ozone standard; the untimely monitored data presented by the Petitioners does not alter that conclusion.

A. The Desert Rock Application Exceeded Any PSD Requirements to Show that the Desert Rock Project will Not Cause or Contribute to Ozone Levels.

The NM Demonstration reviewed and subsequently approved by EPA Region 9 met and exceeded the CAA PSD requirements to show that the proposed Desert rock Project will not cause or contribute to a violation of the 8-hour ozone NAAQS standard. 42 U.S.C. § 7475(a)(3);

⁵⁰ AR 120 at 125 (citing Section 4.2 of "Air Quality Modeling Analysis for the San Juan Early Action Ozone Compact: Maintenance for Growth and Control Strategy Modeling", Alpine Geophysics, LLC and ENVIRON International Corporation, Inc., 26 February 2004, available at <http://www.nmenv.state.nm.us/aqb/ozonetf/index.html> (Attachment 4 to the Clean Air Action Plan) (hereinafter referred to as "NM Growth and Control Strategy Modeling"))).

40 C.F.R. § 52.21(k). To assess ambient air quality impacts of a proposed source upon a NAAQS standard such as ozone, the PSD regulations require an assessment of both the existing ambient air quality and whether the proposed facility will "cause or contribute" to future violation of a NAAQS, in this case the 8-hour ozone standard. NSR Manual at C.1-.2; 40 C.F.R. §§ 52.21(i)(5)(i), (k), (m). Desert Rock's February 2004 application, May 2004 revised application and June 2006 revised modeling collectively addressed the ozone monitoring and ambient air impact requirements applicable to the Desert Rock Project. AR 6.1 at 3-5, 7-5; AR 12 at 3-4, 7-6; AR 43 at 6-11, 12. The NGO Petitioners' concerns relating to the extensive NM Demonstration that supported the PSD ozone ambient air quality analysis were divergent at best and were sufficiently addressed in EPA Region 9's Response to Comments document. In fact, the NM Demonstration conducted exceeds EPA modeling regulations for analyzing the potential ozone impact from a single source. AR 120 at 124; 40 C.F.R. Pt. 51, App. W. 5.2.1(c). EPA Region 9 reasonably relied upon the NM Demonstration to determine that the Desert Rock Project would not "cause or contribute to" a violation of the ozone NAAQS as required by Section 165 of the Clean Air Act.

1. *The Desert Rock Application Met the PSD Ambient Air Quality Analysis Requirements for Ozone*

The air quality analysis conducted by Desert Rock, including the NM Demonstration relied on by EPA Region 9, fulfill the PSD ozone analysis requirements. When assessing the current air quality, the Desert Rock application relied upon state monitoring data which has historically been accepted by EPA to fulfill the preconstruction monitoring requirement in the ambient impact analysis. AR 6.1 at 3-5, 7-5; AR 12 at 3-4, 7-6; 61 Fed. Reg. 38,250, 38,295 (July 23, 1996) (noting that "[h]istorically, [the PSD preconstruction monitoring data requirement has been satisfied largely through the use of monitoring data collected from existing

State or local agency air quality monitoring networks"); EPA, *Ambient Monitoring Guidelines for Prevention of Significant Deterioration* at A-21 (May 1987) (noting that an option for determining the existing air quality concentrations "is to use air quality data collected in the vicinity of the proposed source or modification"). No party disputes Desert Rock's compliance with this aspect of the ambient air quality analysis.

For the future ozone ambient air quality impact analysis, the regulations provide that "all estimates of ambient concentrations required under [paragraph 52.21(k)] shall be based on applicable air quality models, data bases, and other requirements specified in appendix W of part 51 of this chapter." 40 C.F.R. 52.21(k)(2)(1). Specific to ozone, the appendix W modeling guidance states that when ozone impacts from individual sources are evaluated EPA regulations require consultation with the EPA Regional Office to determine the most "suitable approach on a case-by-case basis." 40 C.F.R. pt. 51. App. W § 5.2.1(c). In the instant case EPA Region 9, as the permitting authority, relied upon an extensive photochemical ozone attainment demonstration, submitted by the State of New Mexico and approved by EPA. AR 120 at 124. The NM Demonstration includes complex modeling scenarios necessary to accurately replicate and predict the photochemistry involved in ozone formation which is caused by the "interaction of multiple pollution sources on a regional scale, rather than with an individual source." *Id.* EPA Region 9's response to NGO Petitioners' comments on the ozone impact analysis reflected the current state of regulatory guidance and clarified that "there is no EPA-approved model for estimating the ozone impact of individual point sources." *Id.* NGO Petitioners acknowledged this response to a limited degree by stating in their Supplemental Petition that EPA has little guidance on the precise method to model or evaluate ozone PSD ambient air quality impact analysis. NGO Petitioners' Supp. Br. at 200. Prior decisions of the Board have recognized that

There is little by way of formal regulatory requirement governing the analysis predicting whether either the 8-hour ozone or the PM_{2.5} NAAQS will be exceeded, and there is much that is assigned to the permit issuer's technical judgment made in consultation with EPA's Regional Office. We generally accord broad deference to permitting authorities with respect to issues, such as this one, requiring the exercise of technical judgment and expertise.

Prairie State, slip op. at 128-29 (citing 40 C.F.R. pt. 51, App. W. § 3.2.2(a)).

2. *EPA Reasonably Relied upon the NM Demonstration to Determine the Desert Rock Project would Not Cause or Contribute to a Violation of the Ozone NAAQS*

In the instant case, EPA Region 9 relied on the NM Demonstration to analyze any potential ozone impact. Unlike the lack of requirements for ozone PSD ambient air impact analysis, modeling an ozone attainment demonstration requires compliance with a series of protocols including model selection, episode selection, data base development, model performance evaluation, application of models, attainment demonstration, peer-review, and documentation. 40 C.F.R. § 51 App. W § 5.2.1; EPA, *Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, PM_{2.5} and Regional Haze* (Apr. 2007). The NM Demonstration showed first, the proposed Desert Rock Project would not "jeopardize the ozone NAAQS", and further, the peak ozone increase from the proposed Desert Rock Project did not even occur at the same time or place as the maximum ozone levels modeled. AR 120 at 126. Based upon these findings, EPA reasonably determined that the Desert Rock Project would not "cause or contribute to" pollution exceeding the ozone NAAQS in violation of the CAA Section 165(a)(3). *See Prairie State*, slip op. at 139 ("EPA has long interpreted the phrase 'cause, or contribute to' to refer to significant, or non-de minimis, emission contributions.").

Consistent with EPA PSD requirements for other pollutants that refer to dispersion analysis for a full impact analysis, the NM Demonstration for San Juan County used a "credible

photochemical dispersion modeling study . . . under the direction of the NMED Air Quality Bureau staff." Environ, *Air Quality Modeling Analysis for the San Juan Early Action Ozone Compact: Base Case and Future Case Modeling* at 1-1 (Jan. 29, 2004) incorporated by reference by AR 12 at 6-50 and available as attachment 4 to the Clean Air Action Plan, and available at <http://www.nmenv.state.nm.us/aqb/ozonetf/index.html> (hereinafter "NM Base and Future Case Modeling"). The emissions inventory developed for the NM Demonstration included sources as far as Mexico to the south, Wyoming to the north, California to the west, and western Missouri to the east. NM Base and Future Case Modeling at 1-6. Significantly, the NM Demonstration also included emissions from a facility similar to the Desert Rock proposed facility. AR 120 at 124. Furthermore, the NM Demonstration model protocol was subjected to peer review by EPA, stakeholders, and the public. NM Base and Future Case Modeling at 1-4.

The Region highlighted the sophisticated nature of the ozone modeling in its Response to Comments by stating that the analysis exceeded those typically performed for a PSD permit:

The [NM Demonstration] incorporated impacts representative of the [Desert Rock Project] and the modeling showed continued attainment of the ozone NAAQS, emissions from the [Desert Rock Project] would not jeopardize the ozone NAAQS which is the only regulatory criterion applicable. The analysis performed for [Desert Rock Project] exceeds what is typically expected for ozone in a PSD permit.

AR 120 at 126 (emphasis added). NGO Petitioners allege that the timeframe used for the modeling was too short and that the wind on days modeled do not accurately reflect days when emissions from Desert Rock would have the most impact. NGO Petitioners' Supp. Br. at 193-94; New Mexico's Supp. Br. at 45-47. However, based upon its technical expertise, EPA Region 9 stated that in its judgment the time period used was sufficient because "[i]n this circumstance it was more important for the modeling to capture peak ozone-forming conditions, which it did."

AR 120 at 126. The model also included simulated emissions from a power plant source similar to Desert Rock, an additional power plant, and new oil and gas development.⁵¹ *Id.* at 124-25.

Petitioners attempt to muddle the CAA standard applicable to the ozone impact analysis by highlighting the phrases "minimal" and "2 ppb" in EPA's conclusion that the NM Demonstration adequately showed modeled power plants would have a "minimal effect on 8-hour ozone concentrations." NGO Petitioners' Supp. Br. at 194-95 (quoting *id.* at 125). EPA does not need to explain whether the impact is minimal, but only confirm that the projected emissions will not "cause or contribute" to a future violation of the ozone standard. 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k); NSR Manual at C.1-.2. To allege EPA erred in its analysis Petitioners refer to the NO_x SIP Call which established a NO_x contribution threshold of 2 ppb. NGO Petitioners' Supp. Br. at 194-195 citing *Rule to Reduce Interstate Transport of Fine*

⁵¹ The NM Demonstration relies upon present and future estimates for oil and gas emissions provided by the New Mexico Oil and Gas Association ("NMOGA") as well as the Colorado Department of Public Health and Environment ("CDPHE"). NM Growth and Control Strategy Modeling at 4-3, *available at* <http://www.nmenv.state.nm.us/aqb/ozonetf/index.html> (incorporated by reference in AR 120 at 125). The estimates include an increase in NO_x emissions of 5,331 tons per year. *Id.* State of New Mexico Petitioners claim the NM Demonstration underestimates future oil and gas NO_x emission estimates in the area and briefly reference studies by New Mexico Environmental Department and the Western Regional Air Partnership. New Mexico's Supp. Br. at 48. These references, however, are far from sufficient to allege EPA erred in its review; New Mexico and the underlying document that New Mexico relies upon fail to provide even the title of any studies allegedly conducted by the organizations much less any actual data supporting the statements. *Id.* (citing AR 57.9 at 2). EPA Region 9's Response to Comments recognizes that the NM Demonstration incorporates an increase in future NO_x emission from oil and gas facilities of 5,331 tons per year. AR 120 at 125 (citing the NM Growth and Control Strategy Modeling). New Mexico's petition, however, provides no future evidence or data to support the claim that additional emission increases should be included in the NM Demonstration. Such a cursory reference to allegedly higher future emissions fails to meet the standard necessary to merit EAB review. *See, e.g., Newmont Nevada Energy*, 12 E.A.D. at 489 (concluding that in "such circumstances we have no basis to remand the permit for reconsideration" where a petitioner "repeats its comments on appeal . . . [and] cites no statutory or regulatory authority or case law to support any of its positions. Instead [the Petitioner] merely expresses its opinion that the permit should be remanded.").

Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to NOx SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005). *Unlike the current situation, the sources evaluated in and modeling prepared for the NOx SIP Call relate to the ozone contribution to areas already designated as ozone nonattainment areas. Id.* Further, the 2 ppb was used by EPA in the NOx SIP Call as threshold marker for further analysis; if the ozone contribution exceeded 2 ppb, additional matrix were performed to determine whether the contribution was significant. *Id.* at 25,191.

Instead of discrediting the Region's conclusion, the NOx SIP Call methodology confirmed the Region's ozone impact analysis. As EPA explained in their Response to Comments document, the NM Demonstration did show that the maximum increase in ozone would be 2 ppb, but the Region concluded this was not a significant contribution because "[t]his increase did not occur at the same time and place as the overall modeled maximum of 69 ppb, so the addition of the power plants did not increase the maximum" ozone level. AR 120 at 125; *see also* NM Growth and Control Strategy Modeling at 4-6. Further, the Region explained that even if the NOx emissions of the modeled power plant facility were doubled, and then even if the NOx emission reductions had the improbable, but worst case effect of increasing the ozone levels in a one to one linear formation on the highest peak ozone day, the projected ozone levels still would not exceed the 75 ppb ozone standard. AR 120 at 125.

In a relevant decision, this Board concluded that when peak emission increases of proposed sources do not correspond with levels predicting a NAAQS or PSD increment exceedance, the evidence does not persuasively demonstrate that emissions from the proposed facility will "cause or contribute to" an exceedance. *Prairie State*, slip op. at 140-42. In *Prairie State*, the EAB referenced an EPA Memorandum that directly addressed the definition of "cause

or contribute to" and affirmed EPA's determination that found in order to be a significant source, the impact from the proposed source must also be demonstrated to be significant in a "spatial and temporal sense". *Id.* (citing *Memorandum from Gerald A. Emison, Director, to Thomas J. Maslany, Director, Air Management Division, Regarding Air Quality Analysis for Prevention of Significant Deterioration (PSD)* (July 5, 1988)). In other words, if the proposed source's peak emissions do not correspond to the modeled NAAQS or increment violation, then the proposed source is not "significant" and may receive a PSD permit. *Id.* Here, the NGO Petitioners have attempted to turn that finding on its head by arguing that even when an EPA-approved ozone photochemical model does not demonstrate the ozone NAAQS is exceeded *and* the proposed source's peak emissions do not correspond with the highest non-NAAQS-violating level, the permit for the proposed source should be denied.

NGO Petitioners also claim that variations in stack height, and location undermine the validity of the ozone model. NGO Petitioners' Supp. Br. at 193-94. Again, NGO Petitioners' comments and Supplemental Brief fail to point to a modeling standard that is required for PSD modeling and thus have no basis for their allegations against EPA's analysis of the NM Demonstration. *See Prairie State*, slip op. at 13 ("The Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124, which 'provides the yardstick against which the Board must measure' petitions for review of PSD and other permit decisions."). Regardless, EPA Region 9 sufficiently addressed each of the alleged inconsistencies raised by NGO Petitioners in its Response to Comments. AR 120 at 123-26. EPA Region 9 recognized that ozone is not directly emitted from a facility and is assessed on a regional basis because ozone "does not occur until the plume has mixed with the surrounding air and chemically reacted with it over a period of hours." AR 120 at 125. Because of the unique nature of ozone formation the model used in

the NM Demonstration was "useful for estimating typical impacts, even though the inputs do not exactly reflect the [Desert Rock Project's] geographical location." *Id.* NGO Petitioners identified no new issues in their Supplemental Brief that EPA Region 9 raised in its Response to Comments nor did NGO Petitioners show any reasons that indicate why they believe EPA Region 9's response to their comments was insufficient. *Id.* at 52, 54; NGO Petitioners' Supp. Br. at 193. Merely repeating objections made during the comment period does not warrant review by the Board. *Prairie State*, slip op. at 13; *Knauf I*, 9 E.A.D. at 5.

Not only are NGO Petitioners asserting a hollow argument, but NGO Petitioners' proposed "remedy" is redundant. While recognizing that there is little guidance to evaluate PSD impact modeling and that the model used in the NM Demonstration, CAMx, is appropriate for ozone impacts analysis, NGO Petitioners have suggested that apportionment modeling should be conducted to assess the "impacts of a small number of sources or a single county on ozone NAAQS attainment issues." NGO Petitioners' Supp. Br. at 200. This proposed remedy is redundant because the NM Demonstration includes 2007 and 2012 future case modeling with specific, source apportionment scenarios that demonstrate the additional emissions from a power plant such as Desert Rock will have "minimal impact" on 8-hour levels. NM Growth and Control Strategy Modeling at 6-2.

Based upon these misleading arguments and redundant remedies, NGO Petitioners have failed to "surmount [their] heavy burden of overcoming the deference the board generally accords to permitting authorities in matters requiring technical expertise." *Newmont Nevada Energy*, 12 E.A.D. at 430. When challenging technical issues like modeling, the Petitioners must demonstrate why the permitting authority's technical analysis is clearly erroneous and that the evidence for an alternative modeling protocol clearly outweighs the evidence against its

application. *Id.* The NGO Petitioners fail to articulate error in EPA Region 9's determination that the NM Demonstration both met the CAA PSD Ambient Air Impact Analysis for ozone and showed that the emissions from the proposed facility do not "cause or contribute" to an ozone NAAQS exceedance.

B. The Scheffe Table is A Useful and An Appropriate Tool to Use for Ozone Impact Analysis

Grasping for arguments to challenge the Desert Rock Project's PSD ozone analysis, the Petitioners have alleged that the Scheff Table is an inappropriate method to rely upon for ozone analysis. NGO Petitioners' Supp. Br. at 192; State of New Mexico's Supp. Br. at 55-56. As an initial matter, this argument is meritless because the EAB has recognized the Scheffe Table as a "useful and appropriate" analysis of potential ozone impacts required by the permitting authority. *Masonite*, 5 E.A.D. at 579.

Moreover, in the instant case, EPA Region 9 only incorporated the Scheffe Table as part of a response to comments received on the Desert Rock Project's ozone impact analysis. Contrary to Petitioners' assertions, EPA did not "rely" on the Scheff Table for the PSD impact analysis. As discussed above, the NM Demonstration submitted to and approved by EPA, included an emission source similar to the Desert Rock Project and determined that even with those and other predicted emissions, the 8-hour ozone standard would not be exceeded. AR 120 at 125. Therefore, the Scheff Table that Petitioners complain of merely supplemented the extensive ozone modeling scenarios reviewed and approved by EPA for the Desert Rock Project. *Id.* at 124. Hence, Petitioners' argument related to the Scheffe Table has absolutely no merit.

C. The Monitored Data Petitioners Reference is Untimely and Not Sufficient to Demonstrate Desert Rock will "Cause or Contribute to" an Ozone Violation

As presented in EPA's Response to Comments document and discussed in Section VII.A above, EPA reasonably relied upon the NM Demonstration to determine the Desert Rock Project would not "cause or contribute" to an exceedance of the ozone standard. AR 120 at 123-26. The untimely monitored data referred to by NGO Petitioners and submitted by New Mexico does not alter that conclusion. NGO Petitioners' Supp. Br. at 197-99; New Mexico's Supp. Br. at 49-54; AR 62 at 12 (referencing the spreadsheet 2008.xls provided on "6-18-08 attachmenst.zip").

The Petitioners' argument appears to assert that the ozone ambient air impact analysis should be reevaluated based upon the premature assumption that recent monitoring data shows the area will be in nonattainment with the new 8-hour standard of .075 ppm (75 ppb). *See* NGO Petitioners' Supp. Br. at 197 n.139; New Mexico's Supp. Br. at 49-54; 73 Fed. Reg. 16,436 (Mar. 27, 2008) (promulgating the new 8-hour ozone NAAQS to be effective on May 27, 2008). The Petitioners attempt to refute EPA Region 9's review of the NM Demonstration through the presentation of untimely current monitored data is misplaced for three reasons. First, revisions of the NAAQS standards are not self-implementing and as of this writing, EPA has yet to even issue proposals for the prerequisite rules or guidelines that are necessary to implement the new source review requirements for permits issued under the new 8-hour ozone NAAQS. 73 Fed. Reg. at 16,503 ("EPA plans to address how these requirements, such as attainment demonstrations . . . new source review . . . and other implementation requirements, apply to the revised NAAQS in a proposed rulemaking in Fall 2008.).⁵² Second, as further explained *infra*, the untimely submission of additional monitoring data does not provide substantial new

⁵² As of January 5, 2009, to the Respondents knowledge, EPA has not issued the above referenced proposed rulemaking.

information that merits consideration or would change the permitting decision. Third, the 2007 actual monitored ozone levels are lower than the predicted ozone levels for the monitors modeled in the 2005 NM Demonstration, thereby supporting the conclusion developed through modeling that emissions from the Desert Rock simulated facility would not contribute to the days with the highest ozone levels. As a result, the Petitioners have failed to present any evidence that sufficiently meets the burden of demonstrating that the Region's technical analysis was in error. *Newmont Nevada Energy*, 12 E.A.D. at 449. (In order to meet its heavy burden of obtaining review of a technical issue . . . a party arguing in favor of review must demonstrate why the [permitting authority's] analysis is clearly erroneous.").

In short, even with the new monitoring data, Petitioners have not shown that the emissions from the Desert Rock Project would have a significant impact that would cause or contribute to ozone exceedances – past, present or future. *See Prairie State*, slip. op at 142 (citing Memorandum from Gerald A. Emison, Director, to Thomas J. Maslany, Director, Air Management Division, Regarding Air Quality Analysis for Prevention of Significant Deterioration (PSD) (July 5, 1988) (affirming EPA guidance that a PSD permit may be granted if it is not demonstrated that the proposed source's impact is not "significant" in a spatial and temporal sense))). For these reasons, the Board should deny review of these claims.

1. *A New Ozone Standard is Not Automatically Imposed Upon a PSD Permit Applicant.*

In the past four years, the permit application life of the Desert Rock Project has spanned three ozone standards. The one-hour 125 ppb ozone standard was in effect when Desert Rock submitted the permit application in February 2004. Although EPA revoked the 1-hour ozone standard in 1997, litigation delayed implementation of the stricter 8-hour standard of 80 ppb until

June 15, 2004 two months after Desert Rock submitted its initial application. 69 Fed. Reg. 23,951 (Apr. 30, 2004).

The NM Demonstration included emissions simulating the Desert Rock Project and predicted that San Juan would be in compliance with the 80 ppb 8-hour standard. Then, in June 2007, EPA proposed a revised-"new" 8-hour standard which the Agency finalized as 75 ppb effective May 27, 2008 – two months before EPA issued the final Desert Rock Permit on July 31, 2008. 73 Fed. Reg. 16,436 (Mar. 27, 2008). Although EPA had not yet proposed the new, 75 ppb 8-hour ozone standard in 2004, the NM Demonstration also showed that future ozone episodes would not exceed the 75 ppb level, and as discussed above, that emissions from the proposed Desert Rock Project would not contribute to the highest ozone modeled days. AR 120 at 124-26; NM Demonstration at 7, section 3.3 (predicting that the design value for two ozone monitors in operation in 2004 would not exceed 75 ppb in 2007).

The new 8-hour NAAQS standard is not automatically imposed upon proposed sources applying for a PSD permit. The final rule promulgating the new standard establishes a new ozone standard but does not itself impose the emission limits upon existing or new sources and permits. Instead, the CAA and the implementing rule imposing the new standard requires several regulatory actions to take place before the new standard, and associated emission limits, may be imposed upon existing or proposed sources. *See* 42 U.S.C. § 7407(d)(1)(A) (providing one year for the governor of each state to designate areas as nonattainment); 42 U.S.C. § 7407(d)(1)(B)(i) (allowing EPA no more than two years after the governor's designation to finally promulgate the designations of nonattainment areas); 42 U.S.C. § 7410(a)(1) (providing no more than three years after promulgation of NAAQS to allow states to develop a SIP

infrastructure); 42 U.S.C. § 7502(b) (requiring SIP submittals to EPA no later than three years of final nonattainment designation).

Promulgation of the new 8-hour NAAQS is no exception. EPA's final rule provides the following: the states must submit designation recommendations by March 12, 2009; EPA will promulgate the nonattainment designations no later than March 12, 2011; and EPA will establish deadlines for SIP submittals no later than three years after May 12, 2011. 73 Fed. Reg. at 16,503 (Mar. 27, 2008). Moreover, subsequent to any new NAAQS promulgation, it is EPA's practice to issue guidance and regulations relating to planning, modeling, monitoring and implementation of significant emission rates for incorporation into the PSD permitting programs. *See, e.g.*, 70 Fed. Reg. 71,612, 71,618 (Nov. 29, 2005) (generally describing amendments made to the New Source Review permitting regulations for compliance with the then-effective 8-hour ozone standard of 80 ppb).

NAAQS promulgation does not impose control requirements directly upon a source and halt permitting midstream; rather, the NAAQS are standards that must be achieved through adoption of state implementation plans containing specific control measures based upon the timeframes and requirements established in the CAA. *See* 62 Fed. Reg. 38,651, 38,704 (July 17, 1997) (preamble to 1997 final rule promulgating the NAAQS for PM_{2.5} discussing how controls are imposed to achieve the standard). Should an area be designated as nonattainment, it is the responsibility of the delegated state and/or tribal authority to coordinate to implement control measures necessary and appropriate to meet the applicable NAAQS. 70 Fed. Reg. at 71,618 ("In implementing the [8-hour ozone rule] it is important for both States and Tribes to work together to coordinate planning efforts"); *see also* 42 U.S.C. § 7601(d) (generally allowing EPA to treat Indian tribes as States to meet the requirements of the Clean Air Act).

Based upon the CAA regulatory timelines and implementation requirements, the PSD permitting process is not structured to hold proposed sources hostage to changing standards – particularly when technical data demonstrates that emissions from the proposed project do not "cause or contribute" to the standard in question. In fact, by lifting the statutory "construction ban" previously imposed upon newly designated nonattainment areas that failed to submit a state implementation plan, the 1990 CAA amendments recognize that NSR permitting will continue even when an area is newly designated as nonattainment. *See* 70 Fed. Reg. at 71,673. Significantly, even situations when a construction ban is imposed such a ban only applies to "major stationary sources of emissions that cause or contribute to" the pollutant or precursor applicable to the designated nonattainment pollutant. 40 C.F.R. § 52.24(d) (emphasis added); *See Prairie State*, slip op. at 139 ("EPA has long interpreted the phrase 'cause, or contribute to' to refer to significant, or non-de minimis, emission contributions."). Therefore, even going to the extreme to apply a statutorily-designated construction ban to the area (a situation which is no longer allowed by the CAA and would not be allowed in the current situation) the proposed Desert Rock Project could be permitted because the NM Demonstration determined that it did not, in fact, cause or contribute to ozone exceedances. AR 120 at 126.

Regardless of the prerequisite regulations that must be in place before NAAQS controls may be imposed upon a source, current regulations also provide that monitoring data alone is not sufficient to make such a determination regarding emission limits – even if the prerequisite NAAQS framework were in place. Appendix W to Part 51 strongly cautions against the use of monitoring data in lieu of modeling to impose emission limitations upon new and existing sources. 40 C.F.R. Pt. 51, App. W, § 10.2.2.a ("Monitoring will normally not be accepted as the sole basis for emission limitation."). If monitoring data is used to establish the appropriate

emission limits for nonattainment SIPs or PSD permitting, there are several considerations that must be addressed such as the adequacy of the network, the established nature of the monitoring network, and whether the data set allows the most important individual source to be identified if more than one source or emission point is involved. *Id.* at 10.2.2.b. This regulatory caution against relying upon monitoring data applies even after an area has been designated nonattainment and EPA has implemented the appropriate new source review provisions applicable to the new standard. These considerations greatly weigh against NGO Petitioners' contention that such monitoring data should be used to halt a proposed project in an area that is currently designated as attainment where the modeling shows that such project will not "cause or contribute to" any potential ozone exceedance.

The NGO Petitioners' argument fails to provide any regulatory basis to remand the proposed permit for consideration of the recent monitoring data. NGO Petitioners' Supp. Br. at 199. As discussed above, appropriate emission limits to achieve the new 8-hour NAAQS may only be determined after EPA promulgates the appropriate implementing regulations. The monitoring data alone does not provide sufficient information to impose appropriate emission limits upon any new or existing source, nor does such monitoring data refute EPA Region 9's assessment based upon the NM Demonstration that the Desert Rock Project will not cause or contribute to an ozone exceedance. AR 120 at 126. Because NGO Petitioners do not satisfy the burden necessary to demonstrate that the EPA Region 9's decision was based upon a clearly erroneous finding of fact or conclusion of law, review should be denied. *See Prairie State*, slip op. at 129 ("We generally accord broad deference to permitting authorities with respect to issues...requiring the exercise of technical judgment and expertise.") (citing *Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997)).

2. *Petitioners' Untimely Submission of Additional Monitoring Data Does Not Provide Substantial New Information that Merits Consideration or Would Change the Permitting Decision.*

In March 2006, the State of New Mexico installed the Navajo Lake monitor referenced in the NGO Petitioners' Supplemental Brief. NGO Petitioners' Supp. Br. at 197-99. There is no evidence, based upon the NM Demonstration, that the Desert Rock Project would have any impact on the higher ozone levels days monitored by Navajo Lake or that stopping the proposed project would in any way remedy the elevated levels.

On June 17, 2008, NGO Petitioners submitted additional comments to EPA Region 9 and provided additional ozone monitoring data for San Juan County, New Mexico. AR 62 at 12 (referencing the spreadsheet "2008.xls" provided on "6-18-08 attachments.zip"). Although EPA Region 9 opted to exercise its discretion and fully responded to Petitioners' late responses to the rulemaking, EPA Region 9 emphasized that "these comments were submitted after the close of the public comment period." AR 121 at 1.

Under EPA's permitting rules, the administrative record for a PSD permit is considered complete on the date the final permit is issued. 40 C.F.R. § 124.18(c). The Board has repeatedly interpreted § 124.18(c) to mean that "the record is closed at the time of permit issuance and that documents submitted subsequent to permit issuance cannot be considered part of the administrative record."⁵³ *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, slip op. at 22 (EAB Mar. 19, 2008). Other Board decisions have echoed this principle, pointing out that allowing new substantive issues to be raised after permit issuance "would run contrary to

⁵³ Footnote 5 of New Mexico's motion to supplement the record seeks to cast doubt on this clear principle by making reference to 40 C.F.R. § 124.19(f)(1)'s definition of "final" for purposes of judicial review. DI 57. The language of the Board's opinion in *Keene*, however, makes clear that, for purposes of establishing an administrative record, the relevant date of record closure is when the permit is issued by EPA - in this case July 31, 2008. *Keene*, slip op. at 23.

the principle that the administrative record for a permitting decision is complete at the time of permit issuance." *BP Cherry Point*, 12 E.A.D. at 220 n.27 ; *see also Prairie State*, slip op. at 63 (rejecting petitioner's attempt to introduce new evidence as "simply not a sufficient basis for introducing further delay in issuing the Permit at this late stage in the administrative decisionmaking process"); *Dominion Energy*, 12 E.A.D. at 518-19 (refusing to admit into the administrative record items that arrived several hours *after* the permit issued because the "key distinction" "is the time of their submission and not their content"); *In re Gen. Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994) ("To accept such information would be to invite unlimited attempts by permittees to reopen and supplement the record after the period for submission of comments has expired[.]").

In *Keene*, the Board determined that the Region was not obliged to consider in its permitting analysis oxygen data collected subsequent to permit issuance and therefore declined review of the permit on that ground. *Keene*, slip op. at 23. Likewise, EPA Region 9 is not obliged to consider new data that was generated and submitted by Petitioners subsequent to the issuance of the Desert Rock permit. As it stands, the present motion seeks to reopen the administrative record for the improper purpose of extending the permitting process beyond its necessary limit, as the Board has defined it.

New Mexico attempts to rely on language from the Board's decision in *In re Dominion* as precedent for their attempt to alter the administrative record. New Mexico's Supp. Br. at 51. This reliance is misplaced. As an initial matter, *Dominion* does not stand for the proposition that the Regional Office has the authority to supplement the record *after* it has already made a decision on the permit. *See Dominion*, 12 E.A.D. at 695-96. Rather, in *Dominion*, the Board emphasized that under 40 C.F.R. § 124.17(b), the Region has authority to add new materials to

the administrative record where "new points are raised or new material [is] supplied during the public comment period" *Id.* (citing 40 C.F.R. § 124.17(b)). Petitioners' request to add additional data to the record is simply not analogous to the Region needing to supplement the record in response to comments or materials raised during the public comment process.

Dominion also acknowledges that the Regional Office has discretion to "[r]eopen or extend the comment period" where "data[,] information[,] or arguments submitted during the public comment period . . . appear to raise substantial new questions" *Id.* at 695 (emphasis added). Petitioners' situation does not merit reopening or extending the comment period because their comments were not submitted during the comment period. *Id.*; *see also Prairie State*, slip op. at 65 n.52 (noting that "[b]y extending the permit issuer's discretionary authority to reopen the public comment period in such circumstances, we do not alter the requirement that commenters 'must raise all reasonable and ascertainable issues and submit all reasonably available arguments supporting their position by the close of the comment period.'" (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 585 (EAB 1998))).

The PSD permit issued by EPA Region 9 should not be remanded to reopen the public comment period simply because Petitioners have located new information they believe supports their original comments. As explained above, the administrative record in this matter is closed. As New Mexico acknowledges, the standard for reopening public comment periods and permitting records is extremely high. *See, e.g.,* State of New Mexico's Supp. Br. at 4. The Board in *Keene* articulated that standard as requiring that "new data, information, or arguments 'appear to raise substantial new questions' about a permitting analysis that the permit issuer should, in its discretion, choose to hear." *Keene*, slip op. at 23 (emphasis added) (citing *Prairie State*, slip op. at 65-66 n.51-52). In the instant case, the issue of the Desert Rock facility's impact

on ozone levels in the area is certainly not a "substantial new question," as the issue was addressed at length in the permitting process and in the administrative record.

The Board has consistently held that "permitting authorities are under no obligation to consider comments received after the close of the public comment period." *Steel Dynamics*, 9 E.A.D. at 194 n.32. As the Board stated in *Keene*, and Petitioners remind us, "it is an exceptional case in which data developed after the issuance of a final permit will be deemed substantial enough to warrant a reopening of the permitting record." *Keene*, slip op. at 23. The Board cited as justification for this extremely high standard the very danger posed by New Mexico's present motion: "that the permitting processes provided under existing statutory and regulatory authorities might never be brought to an end." *Id.* The permit process for the Desert Rock facility has already been underway for almost five years⁵⁴ and must come to an end. When the record validates the permitting authority's decision to issue a permit, it is unreasonable to subject the applicant to an unnecessary delay. *In re Carlota Copper Co.*, 11 E.A.D. 692, 786 (EAB 2004).

The Board in *Keene* went on to deny review of the wastewater discharge permit and the request that the public comment period be reopened. The Board noted that the city had failed to seek admittance of its data until the reply stage of the appeal proceedings, while the Region had chosen in its discretion "not to reach beyond the time parameters of the permitting process," and that the Region could not be faulted for its choice. *Keene*, slip op. at 24. The matter before the Board is indistinguishable from *Keene* in this respect. EPA Region 9 gave due consideration to comments submitted by Petitioner and others during the public comment period, even going so

⁵⁴ Desert Rock submitted its initial permit application to EPA in February 2004. AR 6. EPA notified Desert Rock by letter dated May 21, 2004, that the permit application was deemed complete. AR 14.

far as to exercise its discretion to respond to late-filed comments. AR 120 (responding to timely comments); AR 121 (exercising discretion by responding to late filed comments). Petitioners attempt to translate this accommodation of late-filed comments into an indefinite waiver by EPA of its right—indeed, its regulatory imposed duty—to end the comment period. This self-serving interpretation, however, clearly runs counter to the guiding principle of agency deference employed by the Board in its review of permitting decisions.

The fact that EPA elected to respond to these late comments does not waive the threshold requirement of standing because the Board has previously determined that the mere fact that a party's comments are in the Administrative Record is insufficient grounds to establish standing where the comments were not received during the public comment period. *City of Phoenix*, 9 E.A.D. at 531 (explaining that petitioners lacked standing even when the agency had received the comments in advance of the public comment period and those comments were in the record). The Board expressly noted that the use of the word "during" in the title of 40 C.F.R. § 124.13—"Obligation to raise issues and provide information during the public comment period"—"cannot be dismissed as superfluous." *Id.* at 529. Therefore, the Petitioners here were required to file "all reasonably available arguments supporting their position by the close of the public comment period," 40 C.F.R. § 124.13. *See also* 40 C.F.R. § 124.19(a). "[A] litigant cannot simply sit back, fail to make good faith arguments and then, because of developments in the law, raise a completely new challenge." *Christian County*, slip op. at 18 n.21 (quoting *Old Ben Coal Co.*, 62 F.3d at 1007).

New Mexico's reliance on *In re St. Lawrence* is also unavailing. New Mexico's Motion to Supplement to the Record on Appeal at 7. That case involved the challenge of a PSD permit on the basis that the permit issuer had not considered in its analysis an NSPS rule that had been

proposed after the close of the public comment period but *before* the permit's issuance. *In re St. Lawrence County Solid Waste Auth.*, PSD Appeal No. 90-9, slip op. at 1-3 (Adm'r July 27, 1990). As the Board understands, however, a proposed NSPS has immediate legal consequences, since anyone constructing a new plant after the date of proposal must meet the proposed emission limits unless the final NSPS is less stringent. As the Administrator noted in his review of the Agency's permit analysis in that case, the proposed rule would apply retroactively and thereby constituted a preliminary determination by the agency that more stringent limits were "currently achievable." *Id.* at 2. Conversely, here, NGO Petitioners seek to introduce new data generated after the permit's issuance. As Petitioners recognize, such data certainly does not have any immediate legal consequences and does not constitute even a preliminary determination by the agency that nonattainment requirements apply in New Mexico.⁵⁵ Ozone concentrations in the area were fully considered by EPA Region 9 in its Desert Rock PSD permitting decision. Petitioners have not overcome the heavy burden of overcoming the general principle of agency deference afforded to scientific and technical matters. *Keene*, slip op. at 13.

In their efforts to stop or further delay final action on this permit, Petitioners seek to make much of (1) two data points from a newly installed ozone monitor and (2) supposedly "updated" information regarding oil and gas development in the area (development that, in many cases, was specifically authorized by the State of New Mexico, one of the Petitioners). As the administrative record makes clear, before issuing the permit, EPA Region 9 considered substantial amounts of information regarding ozone measurements and emissions of ozone

⁵⁵ The State of New Mexico specifically does not allege "that the area now be treated as a legally designated nonattainment area for purposes of permitting Desert Rock." State of New Mexico's Supp. Br. at 3 n.2.

precursors in the area. Under these circumstances, the Board should not entertain a motion to undermine the fundamental rules regarding the review of an administrative record.

The requirement to raise issues during the public comment period "is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather, it serves an important function related to the efficiency and integrity of the over all administrative scheme." *BP Cherry Point*, 12 E.A.D. at 219 . The rules are intended to "ensure that the permitting authority has the first opportunity to address any objections to the permit, and that the permit process will have some finality." *Id.* (quoting *Sutter*, 8 E.A.D. at 687); *see also Indeck*, slip op. at 58 (noting the efficiency and integrity functions associated with the requirement to raise issues during the public comment period).

Additional information provided to the permitting authority after the close of the comment period which does not raise substantial new questions does not warrant a reopening of the comment period. *Prairie State*, slip op. 140-41. Bringing up facts that do not substantially raise new questions would throw the permitting process into a never-ending cycle of uncertainty driven by the limitless amount of information and data that can be gathered for technical and scientific analysis such as an ozone demonstration. Timely and complete submission of comments provides some finality to the complex PSD permitting process which must coexist with the moving target of environmental law. *See ConocoPhillips.*, slip op. at 50 ("To allow Petitioners to raise this issue at this stage would frustrate the Agency's important policy of ensuring predictability, efficiency, and finality in the permitting process by allowing the permit issuer the opportunity to address objections to the permit in the first instance."). When the record validates the Region's decision to issue a permit, it is unreasonable to subject the applicant to an unnecessary delay. *Carlota Copper*, 11 E.A.D. at 786.

3. *2007 Actual Ozone Levels are Lower than the 2007 Modeled Ozone Levels*

Although the NGO Petitioners' Supplemental Brief provided additional information regarding "new" monitoring data, their Supplemental Brief failed to mention that the monitors modeled in the NM Demonstration are, in fact, still in attainment and that the model actually overpredicted the actual monitored 2007 design value. The ozone 8-hour standard is measured as a three year average of the annual fourth highest daily maximum 8-hour value, this average is referred to as the design value ("DV"). 40 C.F.R. Pt. 51, App. W at 10.1.c (describing how the standard is calculated for the ozone NAAQS.) It is the DV that is measured against the prior 8-hour ozone standard of 80 ppb and the new 8-hour standard of 75 ppb.

As demonstrated by the table below, the data shows that the monitors in operation at the time of the NM Demonstration and modeled in the NM Demonstration actually measure less than the modeled predictions.

	2007 Modeled DV	2007 Monitored DV
Substation	74.37 ppb	72 ppb
Bloomfield	72.49 ppb	69 ppb

As shown above, the modeled 2007 DV for the Substation and Bloomfield monitors was 74.37 ppb and 72.49 ppb, respectively. NM Demonstration at 7, section 3.3; *see also* NM Base and Future Case Modeling, Section 6.2.3 at 6-2, 3. Based upon the New Mexico ozone data listed on the EPA Air Data website, the actual 2007 design value for the same two monitors was 69 ppb for Bloomfield and 72 ppb for Substation.⁵⁶ The accuracy of the NM Demonstration as it relates

⁵⁶ Based upon the average of the fourth highest ozone 8-hour average for 2005, 2006 and 2007, for each monitor, as reported on EPA's Air Data web page, Monitor Values Report for New Mexico, available at <http://www.epa.gov/air/data/repst.html?st~NM~New%20Mexico>.

to the 2007 modeled monitors actual DV values supports the NM Demonstration's corollary finding that emissions from the simulated Desert Rock facility are not linked to causing the ozone days exceeding the standard. AR 120 at 125; NM Growth and Control Strategy Modeling, section 4.2.1 at 34-3. This correlation also refutes the State of New Mexico's argument that there is great disparity between the results of the modeling and the actual monitored data. New Mexico's Supp. Br. at 49-50.

Reliance on a "casual connection" between the proposed facility and ozone levels is not sufficient to demonstrate the Desert Rock Project will "cause or contribute" to an ozone exceedance. *See Old Dominion*, 3 E.A.D. at 787-88 (calling the FLMs' assumption that where air quality related values deteriorated, the addition of other sources of pollution will inevitably cause further damage an "unverified supposition").

When evaluating the NM Demonstration, it is clear that data alone from the Navajo Lake Monitor, recently installed in 2006, does not warrant halting the current permitting process for the Desert Rock Project. The Petitioners simply have nothing to substantiate their argument that emissions from the Desert Rock Project would cause or contribute to ozone exceedances in the area generally or specifically at the Navajo Lake Monitor. For this reason, the Board should deny review of Petitioners' claims regarding ozone modeling.

VIII. THE DESERT ROCK PERMIT COMPLIES WITH EXISTING REQUIREMENTS REGARDING PM_{2.5}.

In 1997, EPA promulgated a NAAQS for PM_{2.5} particulate matter with a diameter of 2.5 microns or less. 62 Fed. Reg. 38,652 (July 18, 1997). Prior to that time, the controlling particulate matter NAAQS was for PM₁₀, which is particulate matter with a diameter of 10

Monitoring data from 2008 was only updated through June 2008 and therefore not included in this analysis.

microns or less. *Id.* at 38,653-54. In October of 1997, EPA issued a guidance document detailing the use of PM₁₀ as a surrogate for PM_{2.5} in PSD areas. *See* AR 120 at 77 (citing AR 120.30, Memorandum from John S. Seitz, Interim Implementation New Source Review Requirements for PM_{2.5} (Oct. 23, 1997)). This memorandum explained that due to technical difficulties with monitoring, estimating, and modeling PM_{2.5} emissions, "EPA believes that PM₁₀ may properly be used as a surrogate for PM_{2.5} in meeting NSR requirements until these difficulties are resolved." *Id.* at 1.

In 2005, EPA provided further guidance regarding the implementation of the nonattainment-NSR provisions for PM_{2.5}. AR 120.31 (Memorandum from Stephen D. Page, Implementation of New Source Review Requirements in PM_{2.5} Nonattainment Areas (Apr. 5, 2005)). This 2005 memorandum from the Director of the Office of Air Quality Planning and Standards to the Regional Offices expressly re-affirmed the Office's 1997 guidance document with respect to PM_{2.5} in PSD areas. *Id.* at 1. EPA clarified that continuing the policy of utilizing PM₁₀ as a surrogate for PM_{2.5} "will effectively mitigate increases in PM_{2.5} emissions and protect air quality because PM_{2.5} is a subset of PM₁₀ emissions." *Id.* at 2. Therefore, "States should assume that a major stationary source's PM₁₀ emissions represent PM_{2.5} emissions." *Id.* However, in this memorandum, EPA cautioned that using the surrogate approach could be overly conservative and adverse to the permittee by noting that "assuming that all of the source's PM₁₀ emissions represent the source's PM_{2.5} emissions could inappropriately trigger nonattainment major NSR for PM_{2.5}." *Id.* at 3. The same could be said for triggering PSD. Hence, EPA noted that "a source may quantify its PM_{2.5} fraction" to avoid such a result. *Id.* (emphasis added). In fact, because there is no specific requirement to perform PM_{2.5} modeling, EPA's modeling guidelines invite individual sources to discuss with the Regional Offices "the most suitable

approach [to estimate the impact of the source] on a case-by-case basis." 40 C.F.R. Part 51, Appendix W at 5.2.2.1c.

On November 1, 2005, EPA issued a proposed rule to implement the PM_{2.5} NAAQS. 70 Fed. Reg. 65,984 (Nov. 1, 2005). The proposal presented three options for the transition period for SIP-approved states covering the time between when "this rule is final until EPA approves a State's PSD program for PM_{2.5}[:]" (1) continue to implement the 1997 guidance by utilizing PM₁₀ as a surrogate for PM_{2.5}, (2) update the 1997 guidance, or (3) allow States to request delegation of the federal PM_{2.5} program. *Id.* at 66,044.

EPA announced its final rule regulating PM_{2.5} in two parts. On April 25, 2007, the first part of the final rule addressed "attainment dates, SIP submittals, [and] reasonable further progress (RFP) requirements, etc." associated with PM_{2.5}. 72 Fed. Reg. 20,586 (Apr. 25, 2007). On May 16, 2008, EPA finalized the remainder of the NSR provisions presented in the proposed rule. 73 Fed. Reg. 28,322, 28,324 (May 16, 2008). One of the provisions of the May 16, 2008 final rule allows sources with pending permit applications to utilize PM₁₀ as a surrogate for PM_{2.5} if the application followed the 1997 surrogate approach, was deemed complete, and had been submitted by July 15, 2008. *Id.* at 28,340. In this rulemaking, EPA clarified that "PM₁₀ will act as an adequate surrogate for PM_{2.5}" for two reasons: (1) PM_{2.5} is a subset of PM₁₀ and (2) the precursors SO₂ and nitrogen dioxide NO_x, are already regulated under the NSR programs. *Id.* at 28,341.

In this case, Desert Rock relied upon conservative national EPA guidance and followed the EPA's surrogate approach in its permit application. EPA Region 9 approved this established approach, and Petitioners now challenge the application of this surrogate approach in Desert Rock's PSD permit.

A. EPA Region 9 Appropriately Determined that Desert Rock's PSD Permit Complies with the Requirements to Utilize PM₁₀ as a Surrogate for PM_{2.5}.

EPA's final rule regulating PM_{2.5} set forth basic criteria to determine whether a source should be grandfathered and allowed to use PM₁₀ as a surrogate. The rule merely requires that the source have been subject to the PM_{2.5} criteria in 40 C.F.R. § 52.21 before July 15, 2008 and that "the owner or operator submitted an application for a permit under this section before that date" consistent with the 1997 policy to use PM₁₀ as a surrogate for PM_{2.5} and that the application was administratively complete. 40 C.F.R. § 52.21(i)(1)(xi).

Desert Rock's permit complies with the grandfathering requirements that enable certain sources to use PM₁₀ as a surrogate for PM_{2.5}. Desert Rock submitted its PSD permit application to EPA on February 22, 2004. AR 6. EPA deemed the application administratively complete on May 21, 2004. AR 14. Without question, Desert Rock's PSD permit was administratively complete well in advance of the July 14, 2008 deadline. As a result, EPA determined that Desert Rock's permit was consistent with the 1997 guidance regarding the use of PM₁₀ as a surrogate. Therefore, EPA appropriately determined that Desert Rock may utilize PM₁₀ as a surrogate for PM_{2.5}. 40 C.F.R. § 52.21(i)(1)(xi). This rationale was specifically included in the administrative record. AR 120 at 77.

B. By Requesting that the EAB Review EPA's Rulemaking, Petitioners Seek Action that is Beyond the Board's Jurisdiction.

NGO Petitioners have improperly objected to the Administrator's decision to continue using the PM₁₀ surrogate policy for sources with completed applications before the effective date of the new rule. While NGO Petitioners are entitled to object to the rulemaking, the EAB is not the appropriate forum to raise such objections because NGO Petitioners are requesting relief that is beyond the Board's delegated authority. 40 C.F.R. § 124.19 (noting that conditions in a final

PSD permit decision may be appealed to the Board). Specifically, NGO Petitioners request that "[t]he Board should rule here that, as implemented in this instance, this approach [of using PM₁₀ as a surrogate for PM_{2.5}] is impermissible." NGO Petitioners' Supp. Br. at 212. However, the Board cannot act beyond its delegated authority. *See, e.g., In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 41 (EAB July 29, 2008) (noting the "Board's longstanding principle of declining to hear substantive challenges to earlier, predicate determinations that are separately appealable under other statutes"). Notably, the Board's jurisdiction does not include reviewing rulemakings by the Administrator. *Tondu Energy*, 9 E.A.D. at 715 ("As we have repeatedly stated, permit appeals are not appropriate for challenging Agency regulations."); *see also In re Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997) (noting the strong presumption against reviewing "final Agency regulations that are attacked because of their substantive content" based upon Congress providing another forum for challenging regulations). As a result, NGO Petitioners have requested that the EAB overturn final agency rulemaking – an action that the Board should refrain from taking.

Some of the Petitioners have already filed a challenge to the underlying national rulemaking in the U.S. Court of Appeals for the District of Columbia. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). Section 307(b)(1) of the CAA requires that petitions challenging rulemaking actions of the Administrator "may be filed only in the United States Court of Appeals for the District of Columbia." *Id.* Similarly, the final PM_{2.5} rule makes it clear that judicial review of the action must be filed in the United States Court of Appeals for the District of Columbia Circuit. 73 Fed. Reg. 28,321, 28,346. NGO Petitioners acknowledge that a case is pending in the D.C. Circuit, which challenges the final rule issued on May 16, 2008 allowing PM₁₀ to be used as a surrogate for PM_{2.5} for sources that were subject to that policy or that had

applications complete as of July 15, 2008. NGO Petitioners' Supp. Br. at 206 (referencing *Natural Res. Def. Council v. EPA*, No. 08-1250 (D.C. Cir., filed July 15, 2008)). The Board should deny review of the permit and adhere to its past ruling on its jurisdiction to refrain from hearing challenges to Agency rulemaking.

C. NGO Petitioners' Public Notice and Comment Challenges of the Final PM_{2.5} Rule in this Proceeding Are Not Material.

To the extent that the Board reviews the merits and procedural requirements for EPA's final PM_{2.5} regulations, NGO Petitioners allege that EPA promulgated final regulations that "waive" the PSD requirement for PM_{2.5} "without public notice or comment." NGO Petitioners' Supp. Br. at 205. This statement misrepresents the content of the final rule on PM_{2.5} and the procedures that EPA followed in proposing the final rule, including NGO Petitioners' opportunity to comment on the continuance of the policy of using PM₁₀ as a surrogate for PM_{2.5} during the rulemaking process. NGO Petitioners are raising this issue before the Board in an attempt to have the Board decide an issue that is squarely before the U.S. Court of Appeals for the District of Columbia. NGO Petitioners' Supp. Br. at 206 (noting that NRDC and Petitioners have appealed the rulemaking). Furthermore, NGO Petitioners provide no insight on how their overall comments in the rulemaking proceeding relate to the PM₁₀ surrogate policy nor how those comments would have changed EPA Region 9's PSD permitting action under review in this matter.

On November 1, 2005, EPA issued a notice in the Federal Register entitled "Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards." 70 Fed. Reg. 65,984 (Nov. 1, 2005). The proposal presented three options regarding how to implement the PSD program in the interim period between when the rule became final and the time that EPA approves a State's PSD program for PM_{2.5}. *Id.* at 66,044. As noted above, one of the options

presented by EPA was to continue to implement the 1997 guidance and to allow sources to use PM₁₀ as a surrogate for PM_{2.5}. *Id.* The public notice and comment period was held from November 1, 2005 until January 3, 2006. *Id.* at 65,984. As an outgrowth of this proposal, EPA's final rule allows sources that "previously submitted applications in accordance with the PM₁₀ surrogate policy to remain subject to that policy" if the application was complete before July 15, 2008. 73 Fed. Reg. at 28,340; 40 C.F.R. § 52.21(i)(1)(xi).

NGO Petitioners improperly emphasize that EPA's final rule on PM_{2.5} "became effective on July 15, 2008, just 16 days prior to issuance of the final PSD permit for Desert Rock on July 31, 2008." NGO Petitioners' Supp. Br. at 205 n.146. The effective date of the rule is not relevant where the issue is whether Petitioners had the opportunity to comment about the effect of a new rule regarding PM_{2.5} upon the Desert Rock permit. Therefore, it is important to note that EPA issued the notice in the Federal Register regarding implementation of the NSR Program for PM_{2.5} on November 1, 2005. 70 Fed. Reg. 65,984 (Nov. 1, 2005). Based upon this notice being provided over a year in advance of the closure of the Desert Rock draft permit, NGO Petitioners had ample notice that EPA might use PM₁₀ as a surrogate for PM_{2.5} in the future and had more than adequate opportunity to submit comments regarding their specific concerns about the potential use of PM₁₀ as a surrogate for PM_{2.5} during the notice and comment period held from July 27, 2006 to November 13, 2006. In fact, Petitioner San Juan Citizens Alliance submitted questions during the public comment period on the Desert Rock permit about the application of EPA's policy of using PM₁₀ as a surrogate for PM_{2.5}. AR 120 at 76-77. Similarly, NGO Petitioners submitted a general objection during the public comment period to the use of the PM₁₀ as a surrogate for PM_{2.5}. AR 66 at 55.

The "law does not require that every alteration in a proposed rule be reissued for notice and comment." *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (quoting *First Am. Discount Corp. v. Commodity Futures Trading Commission*, 222 F.3d 1008, 1015 (D.C. Cir. 2000)). Rather, no additional public notice and comment period must be held where a final action differs from the proposal if the final rule is a "logical outgrowth" from the proposal. *Id.*; see also *In re D.C. Water & Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, slip op. at 61 (EAB 2008). In assessing whether a final rule was a "logical outgrowth" of the proposed rule, the Board must assess "whether interested parties reasonably could have anticipated the final rulemaking" based on the proposed rule. *Natural Res. Def. Council v. EPA*, 279 F.3d at 1186. Hence, the reviewing court should consider "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.*

Because NGO Petitioners clearly had the opportunity to comment on this policy as applied to Desert Rock and exercised that option, EPA did not need to provide additional notice and comment about the grandfathering rule regarding PM_{2.5}. "Grandfathering" certain sources, such as Desert Rock given the timing of their permitting activities, under EPA's final PM_{2.5} rule was a "logical outgrowth" from the proposed rule. A new round of notice and comment would not represent the first opportunity that NGO Petitioners had to provide comments on the PM₁₀ surrogate policy. As explained above, NGO Petitioners were aware that EPA was considering an alternative that would have enabled sources to continue using PM₁₀ as a surrogate for PM_{2.5}. The final rule applies the 1997 surrogate policy in the same manner, but instead provides for a sunset of the PM₁₀ surrogate policy. Furthermore, NGO Petitioners were on notice that adopting a grandfathering provision was a possibility because EPA used a similar grandfathering policy in

1987 when the PM₁₀ rule was promulgated. AR 120 at 77; 52 Fed. Reg. 24,672 (July 1, 1987) (noting that out of a sense of "fairness," EPA was providing a grandfather provision to prevent retroactive review of sources not previously subject to such review and for those applicants that had submitted complete applications to EPA by July 1, 1987). Because the final PM_{2.5} rule is a "logical outgrowth" of the proposal, no additional notice and comment period was required to adopt the rule. *Natural Res. Def. Council v. EPA*, 279 F.3d at 1186.

Moreover, NGO Petitioners would not be able to present new and different technical objections to this policy beyond those they already presented. Before EPA Region 9 decided to issue the PSD permit to Desert Rock, EPA Region 9 considered and rejected NGO Petitioners' objections to utilizing PM₁₀ as a surrogate for PM_{2.5}. AR 120 at 77 (responding to NGO Petitioners' objection to using PM_{2.5} as a surrogate by citing to EPA's longstanding policy guidance and past particulate matter rulemaking). Thus, NGO Petitioners have not established grounds to review the application of the PM_{2.5} rule to Desert Rock. *See Cardinal FG*, 12 E.A.D. at 164 (noting that petitioners did not establish grounds for review where they raised the same issues on appeal as those presented in their public comment letter without explaining why the response provided was clearly erroneous or warranted review).

Finally, the final rule does not constitute a "waiver" of the PM_{2.5} requirements. NGO Petitioners' Supp. Br. at 205. The underlying guidance documents referenced in the Response to Comments makes it clear that utilizing PM₁₀ as a surrogate does not constitute a "waiver" of the PM_{2.5} requirement because PM_{2.5} is a subset of PM₁₀. AR 120.31. By expanding the scope of particulate matter that must be monitored for PM_{2.5}, sources that rely upon the surrogate policy may in fact be adopting a stricter standard. *Id.* As a result, there has not been a "waiver" of the PM_{2.5} requirement.

Given the arguments above, the Board should deny review of the PM_{2.5} issues.

D. Deference to EPA's Decision is Appropriate Because EPA Made a Technical Determination Regarding How to Comply with the PM_{2.5} NAAQS.

If the Board were to entertain NGO Petitioners' PM_{2.5} argument, the Board should exercise deference in assessing the application of and compliance with 1997 PM₁₀ surrogate policy to Desert Rock's PSD permit. The EAB has a long standing precedent of giving deference to the Region on permitting issues requiring technical expertise. *In re Peabody Western Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) (citing *Carlota Copper*, 11 E.A.D. at 708 ; *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 473 (EAB 2004); *In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001)). Deference to the Region's technical judgment is appropriate where "the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the Region is rational in light of all of the information in the record." *Id.* at 34 (citing *NE Hub Partners*, 7 E.A.D. at 567-68). Based upon the explanations provided in the Response to Comments documentation, EPA Region 9 reasonably supported its position in responding to Petitioners' objections to the use of PM₁₀ as a surrogate.

The EAB has previously determined that utilizing PM₁₀ as a surrogate for PM_{2.5} is acceptable and, in fact, requires compliance with a stricter standard. *Prairie State*, slip op. at 123-31; *BP Cherry Point*, 12 E.A.D. at 223. The Board concluded that by "count[ing] all the PM₁₀ from the Proposed Facility as PM_{2.5}," rather than treating PM_{2.5} as a smaller subset of PM₁₀, the applicant "performed a more conservative analysis, not a more lenient one." *BP Cherry Point*, 12 E.A.D. at 222, 223 (emphasis in original). The EAB's finding in *BP Cherry Point* is applicable here because the Board characterized the petitioners' complaint in *BP Cherry Point* as being a general objection "to the use of . . . PM₁₀ as a surrogate for PM_{2.5}" as is the case currently before the Board. *Id.* at 221. Similarly, the Board's findings in *Prairie State* are also

instructive because the petitioners in *Prairie State* presented a similar argument to that presented here by arguing that the surrogate analysis "did not determine whether the Facility will cause or contribute to an exceedance of the . . . PM_{2.5} NAAQS." *Prairie State*, slip op. at 128. In response, the EAB emphasized in *Prairie State* that "there is little by way of formal regulatory requirement governing the analysis predicting whether . . . the PM_{2.5} NAAQS will be exceeded . . ." *Id.* at 129. Therefore, the EAB determined it should provide broad deference to the regional authority's technical judgment and expertise in assessing compliance with the PM_{2.5} NAAQS. *Id.* These policies are applicable to Desert Rock's case and therefore this precedent should apply.

Moreover, a remand of the permit to EPA Region 9 is not appropriate in this case. The Administrator has made clear that EPA supports a policy, which enables certain sources to use PM₁₀ as a surrogate. 73 Fed. Reg. 28,321, 28,340 (May 15, 2008).⁵⁷ There is no need to remand the permit back to EPA Region 9 for further evaluation because EPA Region 9 has already provided a clear rationale in the response to comments document regarding its decision on this issue. AR 120 at 77.

In its Response to Comments, EPA Region 9 referenced the 1997 guidance document, in addition to the 2005 memorandum from Stephen D. Page, which clarifies that using PM₁₀ as a surrogate is appropriate because PM_{2.5} is a subset of PM₁₀ emissions. *Id.* EPA Region 9 also noted that a similar grandfathering policy was adopted in 1987 when the PM₁₀ rule was promulgated. *Id.*; 52 Fed. Reg. 24,714 (July 1, 1987) (providing in 40 C.F.R. § 52.21(c)(4)(ix) and (x) that sources with PSD applications for particulate matter or with all Federal and State preconstruction approvals or permits before July 31, 1987 are exempt from PSD review for

⁵⁷ The Administrators' statements on this issue are included in the administrative record for the Desert Rock permit given that the May 8, 2008 final rule was specifically referenced in EPA Region 9's Response to Comments. AR 120 at 77; *see also* 40 C.F.R. § 124.17(b).

PM₁₀); *see also* Memorandum from Darryl D. Tyler to Regional Air Division Directors at 2 (dated Aug. 5, 1987) (noting that the NAAQS promulgated for PM₁₀ on July 1, 1987 contain "grandfathering provisions"). Given that EPA Region 9 fully justified its position on this issue in the Desert Rock administrative record, the Board should deny review.

In sum, EPA Region 9, based on its technical judgment, reasonably determined that the established PM₁₀ surrogate policy should be applied to the Desert Rock Project and explained its justification in the administrative record – an explanation that included citations to the EPA-wide policy documents governing this issue. AR 120 at 77. The Board should give deference to this determination and deny review of this issue.

IX. EPA REGION 9 COORDINATED WITH THE FLMS TO PROTECT CLASS I AREAS FROM VISIBILITY IMPACTS, AND SATISFIED ALL REQUIREMENTS RELATED TO THE PROTECTION OF VISIBILITY

The Administrative Record documents the exhaustive efforts made by Desert Rock Energy and EPA Region 9 to work with the Federal Land Managers ("FLMs") to analyze the visibility impacts of the proposed facility and then, at the request of the FLMs, to include a condition in the Permit that goes well beyond any statutory or regulatory requirement in order to offset any possible impact on visibility. The National Park Service ("NPS") and the Department of Agriculture Forest Service ("USFS") are the FLMs for all the Class I areas within 300 kilometers of the Desert Rock Project. 42 U.S.C. § 7475(d)(2); 40 C.F.R. § 52.21(p). Despite the time limits in the CAA (one year to complete all aspects of a PSD permit) and EPA's regulations (which require the FLMs to analyze and document any visibility concerns within 30 days after receiving the permit application), Desert Rock Energy and EPA Region 9 spent more than 3 years working with the NPS and the USFS to analyze and then address their concerns about visibility.

The Administrative Record shows that, since the permit application was submitted in 2004, EPA, the FLMs and Desert Rock (or Desert Rock's outside consultant, ENSR) have exchanged numerous emails and letters, held several conference calls, and conducted at least one fact-to-face meeting regarding all aspects of modeling for the visibility analysis in Class I areas. *See* AR 1; AR 11 at 4; AR 15 at 2; AR 19 at 2-3; AR 20; AR 32 at 1-4; AR 37 at 4-7; AR 37 at 4-22; AR 37 Addendum at 1-1, 2; AR 37 Addendum at 3-2; AR 38; AR 41; AR 42; AR 46 at 44-45; AR 46.15 at 1; AR 46.20; AR 46.26; AR 46.28 at 3-5; AR 81; AR 92 at 182-186. Additionally, at the request of NPS, Desert Rock prepared and submitted supplemental modeling, which is clearly not required as part of the PSD permitting process, that further analyzed the impact of projected Desert Rock emissions on the Regional Haze reasonable progress goals in the area. AR 38; AR 120 at 149. Almost two years before the permit was issued, in a letter to EPA Region 9, dated October 26, 2006, NPS recognized the extensive collaboration that had already taken place by that time:

Over the past two years, the NPS has worked closely with representatives of [Desert Rock Energy], the U.S. EPA, the U.S. Forest Service, Dine Power Authority, and Navajo EPA to ensure that potential impacts of the proposed Desert Rock Energy Facility on air quality and related values were carefully analyzed.

AR 120.8 at 2.

As discussed in EPA's Response to Comments and explained further below, the Petitioners' visibility arguments fail for several reasons. First, Petitioners ignore EPA Region 9's role as the permitting authority and the extensive technical analysis that was conducted to make a visibility determination compliant with the CAA. Second, they mistakenly assert that the FLMs made a finding of adverse impact on visibility as provided under the CAA, when they clearly did not. Finally, Petitioners' argument regarding regional haze has no basis under federal law. There

is nothing in the PSD program that requires consideration of "regional haze," which is a completely separate program under the CAA. Even so, in order to address concerns raised by Petitioners and the FLMs, Desert Rock voluntarily conducted a regional haze modeling analysis, which demonstrated that emissions from the proposed facility would not interfere with the "reasonable progress" requirements of the regional haze program.

A. EPA Region 9 Met and Exceeded the CAA Requirements for Notification to the Federal Land Managers and Consideration of the Federal Land Managers' Comments.

The CAA requires that the permit issuer, in this case EPA Region 9, gives notice of the permit application to the appropriate FLM for any proposed major stationary source that may affect a Class I area. 42 U.S.C. § 7475. The implementing regulations require that the notification occur within thirty days from receipt of the application and in no case later than sixty days before a public hearing on a PSD application. 40 C.F.R. § 52.21(p)(1). The FLMs play an important role by considering whether a proposed facility will have an adverse impact on visibility or any other "air quality related value" in a national park or any other Class I area.

The CAA and its regulations also impose two significant limitations on the FLM's involvement in the permit review. First, the CAA itself grants the ultimate decision authority to the permitting authority. In order to influence the permitting process, the Federal Land Manager must demonstrate "to the satisfaction of the [permitting authority]" that "such facility will have an adverse impact" on Class I areas when the increments are not exceeded, as in this case. 42 U.S.C. § 7475. The regulations echo the statute, providing the FLM with the responsibility to "consider, in consultation with the Administrator, whether a proposed source or modification will have an adverse impact." 40 C.F.R. § 52.21(p)(3). Then, only if the permitting authority concurs, a permit application could be denied based upon a FLM's demonstration. 40 C.F.R.

§ 52.21(p)(4). Finally, EPA's guidance reiterates the statutory limitation placed on FLMs and recognizes the ultimate decision rests with the permitting authority. *See* NSR Manual at E.12 ("the reviewing agency makes the final decision on permit issuance"), E.19 ("the reviewing agency is responsible for . . . making a final determination whether construction should be approved, approved with conditions or disapproved").

The second limitation imposes a time frame on the FLM's ability to submit comments to the permitting authority for consideration. The CAA regulations require the permitting authority to consider "any analysis provided by the FLM within 30 days of the notification" 40 C.F.R. § 52.21(p)(3); *Prairie State*, slip op. at 151 ("The regulatory text's plain meaning is that the public notice must explain a permit issuer's decision to reject the FLM's adverse impact analysis when that analysis is 'provided within 30 days of the notification required by paragraph (p)(1) of this section'" (citing 40 C.F.R. § 52.21(p)(3))).

In the instant case, EPA Region 9 and Desert Rock complied with, and went beyond, the regulatory notice requirements; and the visibility analysis and coordination between the FLMs and EPA Region 9 took place over several years. EPA Region 9 provided the initial notification of the Desert Rock Project permit application to the FLMs in 2004. In an early letter to EPA Region 9 dated July 6, 2004, NPS acknowledged they had reviewed the Desert Rock Project application and requested that, "in the spirit of the PSD regulations" EPA Region 9 "afford [NPS] at least 30 days to review the preliminary determination and all other relevant information before beginning the public review process." AR 15. Between the 2004 notification and the 2006 public review process, several emails and letters were exchanged between EPA Region 9, NPS, and USFS. In fact, the notes from at least one face-to-face meeting have been included in the administrative record. AR 31.

The FLMs and Desert Rock devoted a significant effort to collaborate on the correct method to evaluate the predicted visibility extinction rate, a technical evaluation specifically cited by Petitioners. NGO Petitioners' Supp. Br. at 216-18 at 229. In March 2005, Desert Rock provided a point-by-point response to NPS regarding the visibility impact analysis. AR 46.28. Desert Rock responded to NPS' concerns relating to improvements made to FLAG model which computed hourly ratios of modeled to background extinction rather than 24-hour ratios, as prescribed by FLAG, to better account for visibility variances throughout the day. AR 46.28 at 3-5. Continuing to develop the extinction analysis in light of comments from NPS, in January 2006, Desert Rock submitted an updated modeling protocol that included results of an alternative regional haze analysis. AR 37 at 4-12. The alternative visibility analysis incorporated EPA's modeling guidelines for the final Regional Haze Regulations for the Best Available Retrofit Technology (BART) rule, signed by EPA on June 15, 2005. AR 37 at 4-12 (citing 70 Fed. Reg. 39,104 (July 6, 2005)).

Two years after EPA's initial notification regarding the Desert Rock Project permit, and as requested by NPS in 2004, EPA notified both NPS and USFS that the start of the 30-day FLM review period for the Desert Rock Project PSD permit would begin on March 27, 2006. 40 C.F.R. § 52.21(p). In compliance with the PSD regulations, EPA requested that NPS and USFS provide any finding of adverse impact by April 26, 2007. AR 40; 40 C.F.R. § 52.21(p)(3). NPS did not respond to this notification until October 26, 2006, well after the April 26, 2007 deadline which was set for the FLM to submit comments that demonstrate "a proposed new major source . . . may have an adverse impact on visibility in any Federal Class I area." 40 C.F.R. § 52.21(p)(3).

The Petitioners, however, are unwilling to accept the limitations placed upon FLMs in the permitting process and would like this Board to impose notification and consideration requirements upon the Region that are not imposed by law. NGO Petitioners' Supp. Br. at 215, 228; Nat'l Parks Amicus Br. at 14-15; New Mexico's Supp. Br. at 64, 74-75. In some cases, inexplicably, the enhanced coordination is asserted as an excuse for NPS to provide late comments. New Mexico's Supp. Br. at 74-75; Nat'l Parks Amicus Br. at 14. The exchange of information that occurred throughout 2004 to early 2006 prior to the draft permit issuance should have only placed the FLMs in a better position to evaluate and provide comments in accord with the federal regulations.

The FLM bears the burden of demonstrating an adverse impact when the proposed facility will not cause or contribute to an exceedance of the Class I increment. *Prairie State*, slip op. at 153. Here, NPS did not respond within the regulatory 30 days, much less with an analysis necessary to support or demonstrate an adverse impact on visibility. AR 120.8. Because NPS did not issue such a finding, the Region was not required to explain why it issued the permit given the FLM's nonexistent finding of an adverse impact on visibility. 40 C.F.R. § 52.21(p)(3).

Far from issuing a finding of adverse impact, the October 2006 letter from the NPS that NGO Petitioners reference stated that "the applicant has committed in good faith to perform and/or implement a full set of measures" that mitigate any portions of "the proposed project that may lead to adverse impacts in Class I areas." AR 120.8 at 2; NGO Petitioners' Supp. Br. at 216. In this letter, NPS was referring to mitigation measures included in a SO₂ Mitigation Agreement Memorandum of Understanding ("MOU") between Desert Rock Energy, EPA, and the Navajo Nation to purchase and retire SO₂ allowances. USFS also submitted a letter which, like NPS, did not issue a finding of adverse impact. AR 42. Contrary to the Petitioners' allegation, USFS did

not issue a finding of adverse impact on visibility. Rather, USFS supported the proposed MOU to "alleviate concerns." AR 42 at 2. As stated in its Preliminary Findings, the USFS determined that the proposed MOU "will more than offset the [Desert Rock Project's] contribution to regional visibility impairment." *Id.* (emphasis added). USFS did not state that the mitigation agreement was meant to remedy a finding of adverse impact on visibility. Without explanation or technical support,⁵⁸ USFS countered their position stated in the April 2006 letter and stated that the USFS "does find the predicted impacts would be adverse . . . but with the Mitigation Agreement that [Desert Rock] has agreed to execute, the [USFS] finds that those impacts would be sufficiently mitigated and would not recommend that the permit be denied based on impacts." AR 120 at 142-43. In other words, the MOU provided enough cushion above and beyond the reductions required in the draft permit that USFS determined that additional analysis was not necessary. AR 42 at 2.

This Board should reject the NGO Petitioners' attempt to fabricate a FLM finding of adverse impact. NGO Petitioners' Supp. Br. at 228-29; Nat'l Parks Amicus Br. at 2-3. EPA complied with the procedural and substantive notification and analysis requirements of the CAA. 42 U.S.C. § 7475(d)(2); 40 C.F.R. § 52.21(p)(1)(3). After extensive coordination with the EPA Region 9 and Desert Rock Energy, the FLMs did not issue a finding of adverse impact relating to visibility and NPS did not provide any response within the regulatory time period. 40 C.F.R. § 52.21(p)(1)(3). Ultimately, the FLMs' role is advisory and EPA makes the final permitting decision. As demonstrated in Section IX.B, the EPA Region 9's decision to approve the Desert

⁵⁸ Significantly, EPA guidance requires the FLM submit analysis supporting the adverse finding. *See* NSR Manual at E.23 ("The FLM has 30 days after receipt of the visibility impact analysis and other relevant information to submit to the reviewing agency a finding that the source will adversely impact visibility in a Federal Class I area.").

Rock Project, including the visibility analysis, was based upon review and modeling provided by Desert Rock Energy. Concerns and comments provided by the FLMs during the extensive permit application review period were addressed by revised modeling provided by Desert Rock Energy in 2006 (AR 37 and 38), EPA's Ambient Air Quality Impact Analysis in 2006 (AR 46), and EPA Region 9's Response to Comments (AR 120).

B. For the Cumulative Visibility Analysis Claim, Petitioners Have Failed to Either Provide New Comments to Counter EPA's Response to Comments or Prove Error in those Responses.

Neither the NGO Petitioners' reliance on NPS's modeling or the inaccurate assertion that cumulative analysis is required for visibility impacts fulfills the burden necessary to find error with the EPA Region 9's permit issuance. NGO Petitioners' Supp. Br. at 217, 229. In order to merit review, petitions "must include specific information supporting their allegations . . . and may not simply repeat objections during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review." *Knauf II*, 9 E.A.D. at 5. Here, NGO Petitioners failed to even provide general comments that challenge EPA's response to comments on these identical issues. AR 120 at 146-147.

NGO Petitioners' repeated claims that a cumulative visibility analysis was required are based upon two faulty arguments. First, NGO Petitioners continue to rely on NPS modeling that does not comply with EPA guidance and was addressed by EPA Region 9's Response to Comments. NGO Petitioners' Supp. Br. at 217-18 (citing AR 120.8; AR 66 at 73; AR 120 at 144-47). Second, NGO Petitioners merely repeat earlier comments asserting that a cumulative visibility assessment is required without addressing EPA's response that there are no regulatory requirements for a cumulative assessment or identifying error with the detailed modeling refinements conducted to analyze potential visibility impacts, including scenarios specifically

requested by NPS. NGO Petitioners' Supp. Br. at 229-30; AR 66 at 73-74; AR 120 at 146. As discussed below, the administrative record demonstrates that EPA Region 9 evaluated Desert Rock Energy's original visibility analysis conducted according to the Federal Land Managers' Air Quality Requested Values Workgroup (FLAG) requirements for cumulative visibility analysis during the permit review process (AR 37 and AR 46.28); provided its analysis in the issuance of the draft permit (AR 46 at 44-45); and responded to these concerns in the Response to Comments. AR 37, AR 46 at 44-45, AR 46.28, AR 120 at 146-147). In short, the NGO Petitioners' repeated reliance on a faulty NPS model and an inaccurate interpretation of FLAG guidance do not meet the "heavy burden" necessary to successfully assert error in the Region's decision, which was based upon technical analysis and review. *See Newmont Nevada Energy*, 12 E.A.D. at 430 (finding that the petitioner in that case "failed to surmount its heavy burden of overcoming the deference the [B]oard generally accords to permitting authorities in matters requiring technical expertise").

1. *The NGO Petitioners Have Relied Upon an NPS Model that is Not in Accord with EPA Guidance.*

The NGO Petitioners used modeling conducted by NPS to fabricate an adverse finding of visibility by NPS. NGO Petitioners' Supp. Br. at 218. As discussed extensively in this Section IX, NPS did not issue a finding of adverse impact on visibility; any analysis submitted by NPS and considered by EPA does not alter that underlying fact.⁵⁹ Regardless, in response to similar comments related to NPS's modeling submitted by the Petitioners in 2006, EPA noted that the modeling conducted by NPS used two models known as the Comprehensive Air Quality Model

⁵⁹ As discussed in Section IX.A *supra*, the NPS modeling relied upon by Petitioners was submitted in October 2006, after the regulatory comment period provided for an FLM finding of adverse impact on visibility. 40 C.F.R. § 52.21.

with Extensions ("CAMx") and the Langrangian CAPTIA Monte Carlo Model ("CMC"), which are non-guidance models for PSD modeling. AR 120 at 145.

The NGO Petitioners asserted in a letter submitted during the public comment period that Desert Rock's visibility model underestimated the impact of the Desert Rock Project's emissions when compared to the NPS technical analysis. AR 66 at 73; *see also* NGO Petitioners' Supp. Br. at 217 (citing an NPS conclusion that Desert Rock's visibility impacts "underestimate impacts.") In particular, Petitioners' 2006 comments referenced data obtained from NPS's use of CAMx and CMC, which are non-guidance models for PSD modeling. AR 66 at 73; AR 120 at 144. In response to the NGO Petitioners' comments, EPA Region 9 conducted additional analysis and crafted a "rough comparison" to evaluate the NPS modeled ammonium sulfate concentrations against the actual maximum measured ammonium sulfate concentrations at the Grand Canyon, Canyonlands and Mesa Verda in January 2001. AR 120 at 145-46. EPA Region 9's analysis determined that the NPS model overestimated the ammonium sulfate monitored concentrations by a factor of 3 to 37. *Id.* This finding led the EPA Region 9 to disagree with the commenter's assertion that the higher NPS results prove that Desert Rock underestimated the anticipated visibility impacts of the Desert Rock Project. AR 120 at 146. Instead, EPA Region 9 continued to support Desert Rock's visibility analysis which used CALPUFF, the model that the EPA guidelines recommend for long-range transport, in conjunction with the visibility methodology recommended by FLAG. *Id.* at 144-45.

In addition to the CALPUFF analysis prepared in accord with FLAG guidance, Desert Rock performed an additional analysis in response to NPS' concerns with the original visibility extinction analysis. Submitted in January 2006, Desert Rock's modeling update describes the revised visibility analysis approach selected based upon comments from NPS. AR 37, Appendix

A at Sections 1 and 2. In particular, to address NPS' concerns relating to the approach previously taken to account for meteorological conditions which may naturally obscure visibility, the revised analysis incorporated EPA's modeling guidelines for the BART rule, signed by EPA on June 15, 2005. 70 Fed Reg. 39,104 (July 6, 2005). The BART rule only applies to existing facilities, and not new sources such as Desert Rock. However, due to a lack of FLAG regional haze modeling guidance relating to meteorological impacts, Desert Rock proposed the EPA-approved BART modeling approach as alternative analyses to evaluate the potential regional haze impacts. *See* AR 46.28 (ENSR commenting that NPS has been reluctant to provide specific guidance to applicants as how to assess interference in regional haze assessments); *see also* 70 Fed Reg. 39,104, 39,107-39,121 (July 6, 2005) (discussing generally how EPA structured the BART modeling guidance to take into account the maximum modeled visibility impacts that may be unduly impacted by weather). Although EPA views the BART analysis as "additional information which the public could use to corroborate, and compare to, the standard results," the Agency did not rely upon the alternative analysis in its conclusion that the Desert Rock Project would not have an adverse impact on visibility. AR 120 at 147.

Petitioners fail to respond to EPA's analysis comparing the NPS model to monitored levels or to EPA's ultimate conclusion that the NPS model overestimated the ammonium sulfate monitored concentrations by a factor of 3 to 37. NGO Petitioners' Supp. Br. at 217; *see also* New Mexico's Supp. Br. at 73. By relying upon NPS modeling that is not compliant with PSD guidance, the Petitioners have failed to provide enough evidence or expertise to overcome the broad deference granted to permitting authorities on issues based upon the application of technical judgment and expertise. *Prairie State*, slip op. at 129; *see also Newmont Nevada Energy*, 12 E.A.D. at 430 (finding that the petitioner in that case "failed to surmount its heavy

burden of overcoming the deference the [B]oard generally accords to permitting authorities in matters requiring technical expertise"). Further, in addition to the lack of evidence supporting clear error, the Petitioners have not provided new issues to counter the EPA Region 9's response concerning faults relating to the NPS model or that the alternative BART analysis corroborated EPA's underlying determination that the proposed Desert Rock Project does not adversely impact visibility in Class I areas. *Compare* AR 66 at 73 with NGO Petitioners' Supp. Br. at 217-18; *Knauf II*, 9 E.A.D. at 5 ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review").

2. *A Cumulative Analysis for Visibility is not Required either for the Visibility Analysis or to Supplement the SO₂ Cumulative Analysis.*

In response to identical comments submitted by the Petitioners during the notice and comment period for the Desert Rock Project permit, EPA Region 9 noted that neither the CAA, nor any other regulatory program, requires Desert Rock Energy to prepare a cumulative analysis for visibility impacts. NGO Petitioners' Supp. Br. at 229-30; AR 66 at 73-74 (citing AR 15 at 2); New Mexico's Supp. Br. at 66-67; AR 120 at 146. EPA Region 9 pointed out that the FLAG guidance recognizes that a cumulative analysis would aid the FLM with its determination regarding an adverse visibility impact in some cases where the visibility extinction exceeds 10%. AR 120 at 146; FLAG at 26. But even if visibility exceeds 10%, the Petitioners are incorrect in stating that such a finding automatically requires a cumulative visibility assessment. While a cumulative visibility analysis may serve as additional guidance for FLMs, the FLMs reviewing the Desert Rock Project did not need a cumulative analysis to preclude an adverse finding. AR 120 at 146. FLAG at 26 (providing suggested levels for cumulative analysis thresholds). In fact, the EAB has recognized that the FLAG document is merely guidance – not a rule – and

therefore, the Board has previously affirmed permits where the permitting authority noted that the applicants' analysis and modeling showed five days exceeding the 5% extinction threshold and one day exceeding the 10% extinction threshold over the three years modeled. *Prairie State*, slip op. at 153-157.

Regardless, the 5% threshold argument for a cumulative analysis is moot, as described by EPA's Ambient Air Quality Impact Report (AAQIR), due to additional analysis that determined the days which exceeded 5% level of extinction were naturally obscured by rainy or cloudy weather. AR 46 at 44. The AAQIR described that when the additional visibility analysis exceeded the 5% level of extinction were naturally obscured by rainy or cloudy weather. AR 46 at 44. The AAQIR described that when the additional visibility analysis exceeded the 5% level of extinction, Desert Rock conducted an hour by hour weather analysis to exclude days when visibility was naturally obscured by rainy and cloudy weather. *Id.* The additional detailed analysis determined the extinction level would not exceed the 5% and thus was within the range of acceptable visibility impacts. *Id.* EPA reviewed the visibility analysis performed by Desert Rock and the supporting technical analysis to reach a finding of no adverse impacts to a visibility. AR 46 at 44.

NPS did provide comments on the meteorological refinements conducted to the FLAG analysis. *See* AR 46.28 (a March 30, 2005 ENSR Memorandum responding to several early issues posed by NPS relating to the visibility impact analysis). In addition to the visibility analysis prepared in accord with FLAG guidance and discussed in EPA's AAQIR, Desert Rock performed an additional analysis in response to NPS' concerns with the original visibility extinction analysis. Submitted in January 2006, Desert Rock's modeling update describes the revised visibility analysis approach selected based upon comments from NPS. AR 37, Appendix

A at Section 1 and 2. In particular, to address NPS' concerns relating to the approach previously taken to account for meteorological condition which may naturally obscure visibility, the revised analysis incorporated EPA's modeling guidelines for the final Regional Haze Regulations for the Best Available Retrofit Technology (BART) rule, signed by EPA on June 15, 2005. *Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, Final Rule*, 70 Fed. Reg. 39,104 (July 6, 2005).

The BART rule only applies to existing facilities, and not new sources such as Desert Rock. However, due to a lack of FLAG regional haze modeling guidance relating to meteorological impacts Desert Rock proposed the EPA-approved BART modeling approach as alternative analyses to evaluate the potential visibility impacts. *See* AR 46.28 (ENSR commenting that NPS has been reluctant to provide specific guidance to applicants on how to assess interference in regional haze assessments); *see also* 70 Fed Reg. at 39,107-39,121 (discussing generally how EPA structured the BART modeling guidance to take into account the maximum modeled visibility impacts that may be unduly impacted by weather). EPA's analysis of the BART alternative scenario concluded that the "modeling showed that visibility would improve the area regardless of the emissions from the proposed [Desert Rock Facility]." AR 46 at 45. Although EPA views the BART analysis as "additional information which the public could use to corroborate, and compare to, the standard results," the Agency did not rely upon the alternative analysis in its conclusion that the Desert Rock Project would not have an adverse impact on visibility. AR 120 at 147.

NPS' comments on the meteorological refinements were briefly referenced by the Petitioners. The references in the Petitions are so vague it is difficult to trace them back to the highly technical summary and analysis prepared by Desert Rock and reviewed by EPA for the

visibility determination. *Compare* New Mexico's Supp. Br. at 68-69 (referring to "refinements" and "meteorological" interferences) *and* National Parks Conservation Association's Petition at 7 (merely referencing "deviations" in modeling) *with* to AR 46.28 (ENSR's Response to NPS Technical Review of the STEAG Visibility Impact Analysis), *and* AR 37, at 4.4, *and* AR 37 Appendix A, at 2-1 to 2-6 (Addendum to Modeling Protocol). These brief references to alleged errors in modeling concepts evaluated by EPA Region 9 during the course of the permit evaluations do not merit review because the Petitioners fail to clearly articulate why the permitting authority's basis for the decision "is clearly erroneous or otherwise warrants review." *Prairie State*, slip. op at 13; 40 C.F.R. § 124.19(a).

The Petitioners also incorrectly cite to an EAB decision as support for a mandatory cumulative impact analysis. NGO Petitioners' Supp. Br. at 226, 230 (citing *Old Dominion Electric*, 3 E.A.D. 779). *Old Dominion* merely clarified that if a visibility impact cumulative analysis is conducted, the analysis does not need to incorporate future, unpermitted emissions. 3 E.A.D. at 788-89. Further, Petitioners' one sentence response that the "FLMs have found that Desert Rock's emissions will cause visibility extinction at greater than 10% in Class I areas" is not sufficient to explain why EPA's decision was erroneous. NGO Petitioners' Supp. Br. at 230 (citing AR 120.8 at 47). In fact, the reference to the NPS modeling, AR 120.8, bases the visibility claim on NPS modeling which, as discussed in Section IX.B.1, *supra*, was not conducted in accord with EPA guidance and determined by EPA to overestimate emissions when compared to monitored values. AR 120 at 144-45. Therefore, NGO Petitioners' allegation regarding a cumulative visibility assessment fails to satisfy the requirement that a petitioner demonstrate why the response to the objection "is clearly erroneous or otherwise warrants review." *Prairie State*, slip op. at 13.

In order to warrant review of the permit issuance, it is not sufficient to merely repeat objections made during the comment period. *Id.* at 13. Here, NGO Petitioners have provided no new issues or additional support to explain why EPA's response to comments warrants review. AR 66 at 73; NGO Petitioners' Supp. Br. at 230. Failing to adequately articulate new issues that could not have been reasonably ascertainable and were therefore not raised during the comment period, while also failing to explain why the permit issuer's response here was inadequate fails to meet the EAB standard for review or error. *Knauf II*, 9 E.A.D. at 5. Therefore, the Board should deny review of this issue.

C. The Mitigation Agreement Was Not a Remedy to the Desert Rock Permit

Throughout the permit process, NPS and USFS worked with Desert Rock Energy "in intensive negotiations" that culminated in a package of "mutually acceptable mitigation measures" to be implemented for the Desert Rock Project. AR 120.8 at 2. The SO₂ emission offsets implemented in the MOU are supplemental SO₂ reductions beyond CAA PSD requirements. As stated repeatedly throughout the administrative record, based upon review of Desert Rock Energy's visibility analysis and modeling, EPA Region 9 concluded the proposed project would not cause adversely impact visibility. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. Under the MOU, Desert Rock Energy committed to obtain emission reductions that would increase the SO₂ emission reductions already required by the pre-existing and Region-approved provisions of the draft PSD permit.

The Petitioners' arguments relating to the MOU all fail because the MOU does not serve as a remedy to a finding of adverse impact on visibility. NGO Petitioners' Supp. Br. at 230-32; New Mexico's Supp. Br. at 78-80. Instead, EPA Region 9 included the MOU in the permit, in accord with EPA guidance, to address uncertainty that the FLMs perceived in the modeling.

NSR Manual at E.19-20; AR 42 at 2; AR 120 at 140; AR 120.8 at 2. Petitioners have not and cannot point to any provision in the Clean Air Act that prevents the inclusion of non-PSD mandated requirements from being incorporated into a PSD permit.

The CAA provides that although EPA consults with the FLM to review a draft PSD permit, it is the permitting authority that finally determines whether the proposed facility may create an adverse visibility impact and ultimately determines whether to issue the permit. 42 U.S.C. § 7475; 40 C.F.R. § 52.21(p)(3); NSR Manual at E.12, E.19. As discussed in Section IX.B, *supra*, EPA Region 9 evaluated extensive visibility modeling scenarios, including models prepared by NPS. AR 37; AR 38; AR 120 at 140; and AR 120.8. EPA Region 9 ultimately determined that the Desert Rock Project would not cause an adverse impact on visibility. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. Notwithstanding this determination, EPA Region 9 included the MOU in accord with EPA guidance and based upon requests from the FLMs. NSR Manual at E.19-20; AR 42 at 2; AR 120 at 140; AR 120.8 at 2. EPA guidance recommends that in consultation with the FLM the permitting authority "where appropriate, incorporate permit conditions . . . which will assure protection of AQRV's. Such conditions may be most appropriate when the full extent of the AQRV is uncertain." NSR Manual at E.20. In this case, EPA Region 9 recognized "the general concerns expressed by the FLMs and uncertainty in modeling such impacts" and therefore decided to include the MOU "as an enforceable condition in the permit to remove any questions concerning the impact of the project on visibility in nearby Class I areas." AR 120 at 140.

As requested by the FLMs, and in accord with EPA guidance, EPA Region 9 added the MOU to the permit as a permit provision. AR 120 at 140; AR 122 at 7. Both NPS and USFS supported including the MOU as a provision of the PSD permit. AR 42; AR 120 at 143; AR

120.8 at 2. The MOU was not added to the Permit to mitigate a finding of adverse impact on visibility by the FLMs, and EPA Region 9 did not rely on the MOU in its permit determination. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. EPA Region 9's action to add the MOU to the permit demonstrates the willingness of the Agency and Desert Rock Energy to work collectively to address the concerns of the FLMs, even absent a finding of adverse impact on visibility.

Contrary to Petitioners' claims, the incorporation of the MOU into the permit does not prove that it functions as a remedy to a finding of an adverse impact on visibility. NGO Petitioners' Supp. Br. at 231; New Mexico's Supp. Br. at 76-77. Rather than serving as a remedy, the MOU supplements the existing SO₂ emission reductions in the permit and effectuates the intent of EPA's guidance to "serve as an arbitrator and advisor in FLM/applicant agreements." NSR Manual at E.20. Although it is not a remedy, the MOU does include provisions for adequate recordkeeping and reporting requirements that demonstrate enforceability under the PSD regulations as well as practical enforceability. AR 81 at 3-5; 40 C.F.R. § 52.21(b)(17); NSR Manual at A.5. The MOU includes two options that provide for additional sulfur reductions above the permit requirements. AR 81 at 3-5. Roughly, each option requires Desert Rock to reduce emissions directly from its operations or acquire and retire SO₂ emission credits equal to its annual SO₂ emissions, at a minimum, or up to a cost of three million dollars, whatever is greatest. *Id.* at 3, 4. Recordkeeping and reporting requirements include submitting a report to EPA, or FLM-approved party, 30 days after the end of each calendar year. *Id.* at 4, 5. The report must include the total SO₂ emissions from Desert Rock and, for emission credits, proof that the Emission Reduction Credits/Allowances have been transferred into an account with the U.S. EPA Clean Air Markets Division. *Id.* The Emission Credit Market provides adequate recordkeeping and reporting requirements that enable the parties and the FLMs to

ensure that Desert Rock Energy achieves the reductions required under the MOU. *Id.* at 3. *See* 42 U.S.C. § 403(b) (establishing an allowance transfer system to apply to "any other person who holds such allowances and "a system for issuing, recording and tracking [SO₂] allowances"). Because EPA included the MOU in the permit in compliance with EPA guidance and the MOU itself includes provisions that meet the enforceability criteria under the PSD program, the Petitioners' arguments regarding the unenforceable nature of the MOU are misplaced. NGO Petitioners' Supp. Br. at 231-32; New Mexico's Supp. Br. at 78 -80.

Regardless of whether this Board determines the permit provision is federally enforceable, review should be declined because the Petitioners fail to provide any justification for this Board's review. *In re Multitrade Limited Partnership*, 4 E.A.D. 24, 27-28 (EAB 1992). In *Multitrade*, without deciding whether a permit provision incorporating an MOU was federally enforceable, the Board declined to review of the question entirely for two primary reasons that closely mirror the current situation. *Id.* at 27-28. First, EPA was not a party to the agreement; second, if the agreement failed the permit would not violate any provision of federal law. *Id.* Likewise, in the instant case, EPA Region 9 is not a party to the MOU. And, although not anticipated or alleged by any of the parties, if the MOU were not satisfied the permit would still comply with federal law. EPA Region 9, as allowed by EPA guidance, incorporated the permit at the bequest of the FLMs to address their stated concerns relating to visibility impacts. NSR Manual at E.18-20; AR 42 at 2; AR 120.8 at 2. As EPA Region 9 has asserted, even absent the MOU the Desert Rock Project would not cause an adverse impact on visibility. AR 46 at 35-36, 38, 44; AR 120 at 140, 142. For these reasons, review of the federally enforceable nature of the MOU should be declined.

NGO Petitioners' arguments relating to the source of the emission reduction credits also falls short of meriting review for the same reason: the MOU does not remedy a finding of adverse impact, therefore it is not necessary to demonstrated that "the mitigation agreement will in fact offset adverse impact to visibility." NGO Petitioners' Supp. Br. at 231. As stated by EPA in its response to this identical comment, "in light of EPA's own conclusion that the mitigation would be sufficient to avoid an adverse impact, EPA is confident that, with the SO₂ mitigation measures in place, there will be no adverse impacts on AQRVs." AR 120 at 148. Again, EPA Region 9 has stated its conclusion as the permitting authority that the adverse impact did not exist even without the MOU, and adding the MOU at the bequest of the FLMs only naturally goes to further support that position.

Finally, the Petitioners also assert several moot claims relating to the MOU, including that the MOU was not signed, and was not part of the Administrative Record during the comment period. NGO Petitioners' Supp. Br. at 215-16, 230; New Mexico's Supp. Br. at 78-80. The MOU is not new information presented after the end of the comment period, and regardless, EPA Region 9 did not rely upon it when deciding whether to issue the permit. Therefore, the fact that the MOU was added to the permit after the comment period does not present information sufficient to reopen the permit to comments. *Prairie State*, slip op. at 3 ("Petitioners have not demonstrated how the post-comment period information upon which they rely is sufficiently significant to call into questions IEPA's permit limit. [The permitting authority] did consider, prior to issuing its decision, information substantially similar to the new information upon which the Petitioners rely"). Likewise, in the instant case, the MOU was available during the public comment period; thus, it was not new information to either the permitting authority, the FLMs or the Petitioners. *See* AR 120 at 142 (referencing an USFS comment letter that

enclosed a copy of the mitigation agreement); *see also* AR 120 at 149 (EPA's response noting that "the mitigation measures were reflected in the record of the draft PSD permit."). Even if the MOU were not a part of the administrative record, this Board has previously determined that a permitting authority did not commit clear error where a mitigation agreement negotiated between the permit applicant and a third party was not in the administrative record. *BP Cherry Point*, 12 E.A.D. at 234. As in this case, the permitting authority in *BP Cherry Point* did not rely upon the MOU to make its final permitting decision. *Id.* at 210, 234.

D. Desert Rock's Optional Modeling Assured the FLMs that the Project would not Impede Regional Haze Rate of Progress.

In addition to the 2004 and 2006 modeling scenarios demonstrating that the proposed Desert Rock Project would not adversely impact visibility in Class I areas, Desert Rock submitted another modeling supplement in March 2006 to show whether the area was proceeding towards the Regional Haze Rule ("RHR") reasonable progress goals. AR 38; 40 C.F.R. § 51.308(d) (federal regulations imposing the RHR state implementation plan requirements and reasonable progress goals). The additional RHR modeling scenario was prepared solely at NPS's request to "provide a more quantitative estimate of the potential regional haze benefits" of planned emission reductions from area coal-fired power plants Four Corners Power Plant (Four Corners Power Project) and the San Juan Generating Station (San Juan Generating Station) together with the projected emissions from the Desert Rock Project. AR 38 at 1-1. Although EPA did not rely on the RHR analysis to issue the PSD permit and refers to the modeling as "optional," the Region viewed the supplemental RHR modeling as useful information for the public. AR 120 at 149.

EPA's Response to Comments specifically stated "that there is no requirement to show regional haze reasonable progress in a PSD permit." *Id.* It is significant, however, that the

Agency recognized that the RHR model demonstrated the area's visibility improvement would exceed the 10% RHR Reasonable Progress Requirement through 2010. AR 120 at 149. The NGO Petitioners allege that the RHR supplemental modeling scenario was significantly flawed, and request that this Board remand the permit based upon the RHR reasonable progress modeling scenario. NGO Petitioners' Supp. Br. at 233-35. The NGO Petitioners' RHR modeling allegation is not based in PSD statutory or regulatory permitting requirements, is not supported in the Administrative Record, and attempts to penalize Desert Rock for preparing a supplemental modeling scenario which exceeds regulatory requirements.

The CAA includes a Regional Haze program to prevent and remedy visibility impairment. The Regional Haze program requires states to develop an implementation plan that improves regional haze in Class I areas. 42 U.S.C. § 7491(b)(2). The implementation plan must be submitted to EPA for approval and must include, at a minimum, the following two components: 1) a determination on whether older facilities built between 1962 and 1977 should implement Best Available Retrofit Technology ("BART"); and 2) measures to track and achieve reasonable progress towards the national visibility goal. 42 U.S.C. § 7491(b)(2); 40 C.F.R. § 51.308.

Clearly, the BART requirement of the Regional Haze program targets older facilities, not new facilities such as Desert Rock. In fact, the Desert Rock SO₂ permit limit is 0.06 lb/MMBTU, an emission reduction of 98%. AR 122 at 7. This represents an additional 60% reduction in emissions over BART's presumptive SO₂ limit of 95% reduction or 0.15 lb/MMBTU. 40 C.F.R. pt. 51, App. Y.

For the Regional Haze long-term strategy implementation plan and goals, states must consider several factors including ongoing emission reductions, emission limitations required to

meet Regional Haze reasonable progress goals, and the enforceability of such measures. 40 C.F.R. § 51.308(d)(3)(v)(G). The Regional Haze program imposes multi-year, multi-state planning goals that require states to coordinate to address pollution that impairs visibility. Each state must submit revisions to its respective Regional Haze implementation plan no later than July 31, 2018 and every ten years thereafter. 40 C.F.R. § 51.308(f). Additionally, periodic reports evaluating progress towards the RHR reasonable progress goal must be submitted every five years. 40 C.F.R. § 51.308(g).

Contrary to the NGO Petitioners' implications, the CAA does not require that individual permit applications model compliance with the Regional Haze state implementation plan in addition to the requirement to submit Regional Haze ten-year plan revisions and five-year reports. NGO Petitioners' Supp. Br. at 223-34. Instead, the CAA includes a separate provision to ensure that individual PSD permits do not adversely affect visibility at Class I areas. 42 U.S.C. § 7475(d)(2). As noted in Section IX.A, Desert Rock Energy, EPA Region 9, and the FLMs coordinated to ensure that Desert Rock's permit meets, and even exceeds, the CAA PSD visibility requirements. Consistent with the finding that Desert Rock's permit limitations comply with the PSD visibility requirements, the optional RHR modeling scenario, requested by NPS and using time periods and data provided by NPS for this purpose, found that the proposed Desert Rock Project emissions do not impede RHR reasonable rate of progress goals in the state implementation plan. AR 38 at Section 2 (describing the modeling procedures requested by NPS); AR 38 Section 4 (describing the modeling procedures requested by NPS); AR 38 at Section 4 (describing the modeling results.) In fact, the regional haze reductions exceed the 10% reduction needed by 2010 in all Class I areas modeled. AR 38 at 4-1.

NGO Petitioners, however, merely repeat prior comments made during the 2006 notice and comment period by claiming that the regional haze modeling effort failed to account for other current and future sources in the area including planned coal-fired power plant units and significant oil, gas and coal bed methane gas development for the region. AR 66 at 74; NGO Petitioners' Supp. Br. at 226. Specifically, EPA Region 9 responded to the NGO Petitioners' concerns on Regional Haze by stating:

The supplemental Regional Haze analysis performed by [Desert Rock Energy] was optional; there is no regulatory requirement to show Regional Haze reasonable progress in a PSD permit and therefore no requirement that this prospective estimate rely on enforceable future emission reductions. The modeling incorporated plausible assumptions about the future emissions from two large nearby sources ([Four Corners Power Plant] and [San Juan Generating Station]) in conjunction with [Desert Rock Project's] own emissions. The model incorporated the emission changes from those facilities and evaluated the change in visibility at Class I areas using the same metric that is used under the regional haze rule (64 FR 35714, July 1, 1999) which is the extinction improvement in the best 20% and worst 20% days. The analysis showed that the resulting visibility improvement exceeded the 10% regional haze rulemaking progress requirement through 2010 (based on a 6 year period, 10% of the way to the final goal in 2064).

AR 120 at 149. Further, EPA Region 9 noted that the NGO Petitioners' comments attempted to misapply the RHR on top of the PSD permitting requirements. *Id.* at 150. EPA Region 9 thoroughly responded to the NGO Petitioners' comments by explaining how Desert Rock performed the optional RHR modeling at the FLM's request and it was not required for the PSD permit. AR 120 at 149. Progress towards the RHR goal is a multi-state, multi-decade process. AR 120 at 150. Compliance with the RHR implementation plan cannot be accomplished within the context of an individual source's PSD permit; therefore, the CAA established a specific visibility provision within the PSD permitting program. 42 U.S.C. § 7475(d)(2). Here, the optional modeling provides additional assurance that the Desert Rock Project will not impede visibility improvement expected in the area. AR 120 at 149.

In sum, the NGO Petitioners have provided no regulatory support for the assertion that the RHR modeling submitted by Desert Rock in March 2006 was either necessary to the PSD permit analysis or was relied upon in error by EPA Region 9. Further, the NGO Petitioners fail to provide any new regulatory support to challenge EPA Region 9's Response to Comments about the supplemental nature of the RHR analysis. AR 66 at 74-76; NGO Petitioners' Supp. Br. at 233-34. Rather, the NGO Petitioners have merely repeated the same objections they raised during the comment period and place inappropriate reliance on 40 C.F.R. § 51.308 (relating to the RJR state implementation plans and not PSD permitting requirements) as the sole regulatory support for their argument. AR 66 at 74; NGO Petitioners' Supp. Br. at 233-34. To warrant review of the permit, petitioners must describe each objection that they are raising in their petition for review and explain why the permit issuer's previous response to these previously raised objections was clearly erroneous or otherwise deserves additional review. *Prairie State*, slip op. at 13. The NGO Petitioners have failed to meet this standard so the Board should deny review of these Regional Haze analysis claims.

X. THE ADMINISTRATIVE RECORD CLEARLY SHOWS THAT DESERT ROCK HAS SATISFIED ALL REQUIREMENTS RELATING TO PSD INCREMENTS

Under the CAA, anyone seeking to build a new power plant must demonstrate that the plant will not increase concentrations of certain pollutants above the relevant PSD "increments." A PSD increment is the maximum allowable increase in the concentration of a particular pollutant compared to a baseline concentration, as projected by EPA-approved computer models. *See* 40 C.F.R. § 52.21(c). "If, after taking into account emissions from a proposed source and certain existing sources, the modeled ambient air concentration of a pollutant is below the NAAQS, and the increase in concentration for that pollutant is less than the applicable PSD

increment, the permit applicant has successfully demonstrated compliance." *Knauf I*, 8 E.A.D. at 148-49.

As the Board well knows, it is often very complicated to evaluate compliance with the PSD increments – primarily because of the numerous issues associated with the "baseline emissions." In virtually all cases, the baseline concentrations for each pollutant at issue (the starting point for the increment analysis) can only be established after conducting historical research and computer modeling. To accomplish this task, the permit applicant must work with the permitting authority to identify the sources (both major and minor) that were operating at various points in the past (because the "baseline date" may be different in different areas that are potentially affected by the proposed plant) and then estimate and model emissions from those sources as of the baseline dates.

As EPA Region 9 explained in the AAQIR, however, the increment analysis for Desert Rock is more straightforward than encountered in many other applications, for three reasons. AR 46 at 41-42. First, because of the isolated location of the proposed plant and the nearby Class I areas, there are very few minor sources that could possibly "consume" increment in any Class I or Class II areas that might be affected by Desert Rock. *Id.* at 42. In fact, after consulting with state regulators in Arizona, Colorado, New Mexico, and Utah, "EPA has determined that emissions from minor sources and the potential for minor source growth will not have any effect on either the Class II or Class I increment analysis." *Id.* No one disputes this conclusion. Second, simple assumptions that were specifically designed to be "conservative" – i.e., to make it more difficult for the source to show compliance were used in the Desert Rock Project. *Id.* Specifically, Desert Rock Energy assumed "that all emissions at each major source consume increment regardless of baseline date," thereby overstating potential emissions. If this

type of conservative modeling shows that the source is in compliance (in this case with the PSD increments), then there is no need to deal with many issues that make the modeling analysis more complicated, but also more accurate. Third, after the relevant baseline dates, two major coal-fired power plants in the area substantially reduced their emissions, thus leaving more of the increment available for new, well-controlled facilities like Desert Rock. *Id.* Further, in response to NGO Petitioners' comments, EPA modeled several scenarios which increased the emission reductions required to achieve the NAAQS thus further restricting the increment available for new facilities. Although EPA's modeling was conducted on top of the already conservative assumptions modeled by Desert Rock, EPA confirmed after the additional analysis that the Desert Rock Project was in compliance with the PSD increments. AR 120 at 134.

In the case of Desert Rock, EPA Region 9 specifically noted that "[Desert Rock Energy's modeling] approach guarantees a conservative air quality assessment meaning that the assessment will predict higher impacts than will occur" because (1) for modeling 3-hour impacts, Desert Rock modeled the main stack at 50% higher than the proposed 24-hour maximum; and (2) it used the "worst case scenario" for different load conditions by "assuming 100% load." AR 46 at 37. These assumptions were used throughout the air quality impacts analysis (to analyze potential impacts on the NAAQS, increment consumption, deposition, visibility, and other air quality related values). AR 46 at 35, 37.

As EPA noted, the increment modeling also "assumes that all emissions at each major source consume increment regardless of baseline date. This procedure is considered conservative because it overestimates potential emissions." *Id.* at 35. Even with these conservative assumptions, the modeling analysis showed that emissions from the Desert Project,

"including the monitored background concentration[s], are well below the Class I and Class II increments where they are respectively applicable." AR 46 at 38; *see also* AR 120 at 122-23.

As discussed in more detail below, the NGO Petitioners challenge the Class I Significant Impact Levels ("SILs") and the baseline concentrations used in the increment analysis by using several convoluted arguments that for the most part are simply irrelevant. The administrative record shows that EPA considered and rejected most of these arguments. Where the EPA did not explicitly reject NGO Petitioners' arguments, it simply ran the models again using the emission rates proposed by NGO Petitioners, without deciding whether NGO Petitioners' arguments were valid. AR 120 at 133-134. As discussed in the Response to Comments, these additional modeling runs showed that, even using the assumptions proposed by NGO Petitioners, Desert Rock clearly satisfies all the increment requirements. *Id.* at 131-34. Finally, instead of responding to the model runs provided by EPA in response to NGO Petitioners' comments, the Petition asserts new arguments and emission rates which were not specifically presented to the Region during the comment period. In presenting this information that was outside the administrative record, NGO Petitioners still fail to meet the "heavy burden of overcoming the deference the board generally accords to permitting authorities in matters requiring technical expertise." *Newmont Nevada Energy*, slip op. at 430.

A. EPA Region 9 Properly Used "Significant Impact Levels" (SILs) to Identify the Class I Areas For Which a Full Cumulative PSD Increment Analysis Was Necessary

EPA and Desert Rock coordinated extensively with the FLMs responsible for Class I areas that might be affected by the Desert Rock Project – NPS and USFS. The administrative record shows that since the time that the initial permit application for Desert Rock was submitted in 2004, EPA, the FLMs and Desert Rock (or Desert Rock's outside consultant, ENSR) have

exchanged numerous emails and letters, held several conference calls, and conducted at least one face-to-face meeting regarding all aspects of the Class I increment analysis. See AR 1 at 2; AR 7 at 1; AR 9; AR 10; AR 13; AR 15; AR 19 at 2; AR 20; AR 27, Addendum at 2-1; AR 120 at 131-35; AR 120.8. The 2004 permit application included a PSD Class I impact modeling analysis using CALPUFF, the air quality model recommended by EPA and the FLMs. AR 6, AR 12. Desert Rock Energy's consultant, ENSR, provided January 2006 and March 2006 modeling updates to specifically address PSD Class I Increment and Regional Haze concerns raised by NPS and USFS. AR 37, AR 38.

Desert Rock Energy worked closely with EPA Region 9 and the FLMs to conduct a Class I SO₂ increment analysis that met the regulatory requirements and also addressed any concerns brought forth by the federal agencies. As requested by EPA Region 9 and NPS, ENSR used CALPUFF to model the potential impact of the proposed plant's SO₂ emissions. AR 37 at 4-1. This modeling exercise went beyond the EPA prescribed class increment evaluation of 100 kilometers and conducted a preliminary analysis at every Class I area within 300 kilometers of Desert Rock – a total of 15 different Class I areas. AR 37 at 4-2; AR 46 at 40. *See also* NSR Manual at E.18; *BP Cherry Point*, 12 E.A.D. at 218 n.22 (noting that "[p]roposed sources within this range of [100 km] may be required to perform a variety of analyses relating to the Class I area.").

Ignoring EPA's long-standing guidance and practice regarding the use of SILs in Class I area air quality assessments and prior decisions from this Board upholding their use, NGO Petitioners now repeat arguments that are unsupported and blatantly misrepresent prior EPA comments relating to Class I SILs. The NGO Petitioners first argue that Class I SILs are not "lawful" and cannot be used in the PSD increment analysis; then they claim that a full

cumulative analysis should be conducted for all Class I areas. NGO Petitioners' Supp. Br. at 252, 255; AR 66 at 64-65. As regulatory support for NGO Petitioners' argument against the use of SILs in Class I areas the NGO Petitioners reference an EPA Comment letter to a North Dakota SIP which stated "that it is not appropriate to establish Class I significance levels when an increment violation already exists." NGO Petitioners' Supp. Br. at 255 (citing EPA Comments ND PSD Rule at 5, found in "ltr_23_attachments.zip" folder of the administrative record). EPA's comments in the letter clearly restrict the use of SILs in Class I areas that already violate the increment but do not limit the use of SILs in Class I areas where the increment is not violated, such as the Class I areas analyzed for the Desert Rock Project. EPA Comments ND PSD Rule at 5-6 (found in "ltr_23_attachments.zip" folder of the administrative record). The NGO Petitioners' attempt to distort EPA's comments to support their interpretation contravenes EPA guidance and EAB decisions supporting the use of SILs in Class I areas where the increment is not violated.

The Desert Rock modeling properly used the SILs to evaluate the impact of SO₂ emissions in Class I areas. In accordance with EPA's modeling guidance, where the model indicated SO₂ emissions from the proposed facility would exceed the SIL in any Class I area, a full cumulative impact analysis was conducted to determine whether the Class I PSD increment would be exceeded in that area. NSR Manual at C.24-.28, E.18. For Class I areas, Desert Rock relied on EPA guidance which establishes the "de minimis" SIL level, as being less than 4 percent of the concentration defined for the existing Class I increment."⁶⁰ 61 Fed. Reg. at

⁶⁰ Desert Rock used the more conservative, or restrictive, Class I SIL for this permit analysis. Earlier EPA guidance established the Class I SIL at 1 µg/m³ (24-hour average) or more. NSR Manual at E.18; *Knauf I*, 8 E.A.D. at 155-56 (EAB 1999). Based upon the Desert Rock preliminary increment analysis, none of the Class I areas evaluated exceeded the prior 1

38,292. As explained by EPA, if emissions from a new source would not consume more than 4 percent of the Class I increment, then the source could not be considered to "cause or contribute to" an increment violation. *Id.* EPA's Response to Comments document recognizes the Class I SILs were never finalized but says "in practice, EPA and the FLM . . . have used the proposed SILs as a baseline for comparison and as one component of the determination whether an impact is significant." AR 120 at 127. In effect, the SILs are a screening tool used to focus the analysis on those areas where a new source may have a meaningful impact on air quality. This Board has recognized that EPA "has long interpreted the phrase 'cause, or contribute' to refer to significant or non de minimis emission contributions both in applicable EPA regulations and long-standing guidance." *Prairie State*, slip op. at 139.

The NGO Petitioners' assertion that cumulative emissions should be assessed in every Class I area should be dismissed as the Desert Rock Class I increment evaluation properly relied upon EPA guidance to evaluate emissions from the facility itself against the SIL as a preliminary increment analysis. NGO Petitioners' Supp. Br. at 255. Cumulative emission analyses are not required unless the impact of the emissions from the proposed facility under review exceeds the SIL. NSR Manual at C.24-.28, E.18. If the impact of the emissions exceed the SIL, the applicant must conduct a cumulative analysis to determine if the emissions exceed the applicable increment. *Id.* As discussed above, Desert Rock Energy conducted the cumulative SO₂ increment analysis in coordination with EPA Region 9 and in compliance with applicable EPA

µg/m³ value; the value used as the Class I SIL for the Desert Rock Project was 0.2 µg/m³ for a 24-hour average, significantly lower than the prior SIL recommended for Class I areas. AR 46 at 40. *Id.* at 156. The value used as the Class I SIL for the Desert Rock Project was 0.2 µg/m³ for a 24-hour average, significantly lower than the prior SIL recommended for Class I areas. AR 46 at 40; *Id.* Notably, based upon the Desert Rock preliminary increment analysis, none of the Class I areas evaluated exceeded the prior 1 µg/m³ value.

guidance. The NGO Petitioners' argument also disregards prior decisions of this Board, which have approved the use of SILs to evaluate the impact of emissions from the proposed facility alone. *BP Cherry Point*, 12 E.A.D. at 227 (noting that "EPA does not require a full impact analysis for a particular pollutant when emissions of that pollutant from a proposed source or modification would not increase ambient concentrations by more than prescribed significant impact levels"); *Knauf I*, 8 E.A.D. at 156 (denying review because modeling showed that any PM₁₀ concentrations would be less than the significant ambient impact level).

EPA Region 9 properly approved Desert Rock Energy's SO₂ increment analysis which evaluated the emissions from the Desert Rock Project against Class I SILs. The NGO Petitioners' unsupported claims that SILs are unlawful in Class I areas falls far short of demonstrating that the Region's decision "is clearly erroneous or otherwise warrants review." *Prairie State*, slip op. at 13. Desert Rock's modeling followed EPA guidance to determine if additional SO₂ modeling, including a cumulative SO₂ analyses, were required for Class I areas. The EAB should reject both SIL arguments posed by the NGO Petitioners.

B. EPA Properly Approved Conservative Baseline Assumptions Used in the SO₂ Cumulative Analysis

Where the preliminary Class I increment analysis required a cumulative emission evaluation, Desert Rock submitted the necessary PSD increment modeling to EPA in January 2006. AR 37. Based upon the cumulative analysis, EPA Region 9 found that the Desert Rock Project would not cause or contribute to a SO₂ Class I increment exceedance and therefore issued the draft PSD permit in July 2006. AR 46 at 42. In response to NGO Petitioners' comments on the draft permit regarding emission reductions taken at San Juan Generating Station to achieve the NAAQS, EPA ran additional models which revised the San Juan Generating Station emissions in the baseline concentration and simultaneously reduced the available increment for

the Desert Rock Project. AR 120 at 132-34. Even after incorporating the NGO Petitioners' revised emission estimates, EPA's Class I modeling scenarios confirmed that Desert Rock Project would not exceed the Class I increment. *Id.*

Assessing emission increases and decreases relative to the appropriate baseline concentration is an integral part of the PSD increment analysis. In fact, Desert Rock acknowledged early in the permitting process in an email to EPA in May 2003 that the SO₂ PSD increment analysis a key issue. AR 1. Consistent with this recognition, the appropriate baseline concentration remained the subject of considerable analysis throughout the permitting process, as documented in the Administrative Record. AR 1 at 2; AR 7 at 1; AR 9; AR 10; AR 13; AR 15; AR 19 at 2; AR 27, Addendum at 2-1; AR 120 at 131-35; AR 120.8.

The CAA establishes the SO₂ PSD increment as the maximum emission increase allowed in addition to the SO₂ baseline concentrations in place at the respective minor source baseline date. 42 U.S.C. § 7473(b). The regulations provide that the baseline concentration should include the following major source emissions: 1) actual emissions from major sources operating on the minor source baseline date and 2) allowable major source emissions if construction commenced before the major baseline date but the source was not yet in operation on the minor source baseline date. 40 C.F.R. § 52.21(b)(13)(i). After the minor source baseline date, the baseline concentration includes actual emissions increases or reductions from minor stationary sources in addition to the major sources. 40 C.F.R. § 52.21(b)(13)(ii).

As discussed below, the emissions included in Desert Rock Energy's PSD SO₂ increment analysis meets the regulatory requirements for calculating the baseline concentrations. Where the NGO Petitioners' comments pointed to historical uncertainty relating to the emissions necessary to meet the SO₂ NAAQS, the Region conducted supplemental CALPUFF modeling

that incorporated additional emission reductions into the baseline concentration and simultaneously reduced the available increment for the Desert Rock Project emissions. AR 120 at 131-34. Instead of responding to EPA's modeling, the NGO Petitioners repeat their assertions regarding the NAAQS emission limits and continue on a series of minor source baseline arguments. NGO Petitioners' Supp. Br. at 240-41, 244-49. The following sections demonstrate how each SO₂ NAAQS and minor source baseline argument that NGO Petitioners raise fails to establish that the permitting decision was clearly erroneous or based upon any erroneous findings of fact or conclusions of law. *Prairie State*, slip op. at 13. Therefore, the Board should decline review of these arguments.

1. *EPA's Additional Modeling Incorporated the NAAQS SO₂ Emission Limits and Confirmed that the Desert Rock Project Would Not Exceed the Class I Increment*

The baseline emission concentrations are often difficult to recreate because they require an evaluation of historical permitting and emission estimates. Conducting this analysis for the Desert Rock Project is no exception. The Desert Rock increment analysis erred on the side of caution and eliminated uncertainty regarding whether major source SO₂ emissions were part of the baseline concentration or counted against the available increment. AR 46 at 41-42. To avoid confusion, the cumulative increment analysis assumed that all major sources, with the exception of emission reductions from area power plants, consumed or reduced the increment available for SO₂ emissions from the Desert Rock Project. *Id.* By assuming that all major sources "consume the increment," the baseline dates were only relevant for two area power plants: San Juan Generating Station and Four Corners Power Project. EPA's Response to Comments discussed these power plants in detail and even conducted additional modeling to respond to NGO Petitioners' comments. AR 120 at 131-34.

Despite the conservative assumptions made in the Desert Rock increment analysis and the additional modeling conducted by EPA Region 9, the NGO Petitioners challenge the cumulative increment analysis by repeating the same SO₂ NAAQS argument presented in their comment submitted during the public notice and comment period. It is unclear why the NGO Petitioners again claim that the model inappropriately allows power plant emissions relating to SO₂ NAAQS reductions to "expand the increment." NGO Petitioners' Supp. Br. at 239-41; AR 66 at 68. EPA Region 9's Response to Comments responded to this concern in detail; the Region even conducted additional SO₂ PSD increment modeling for the Class I areas using the precise emission scenario suggested by the NGO Petitioners. AR 66 at 68; AR 120 at 132-34. EPA Region 9's CALPUFF model evaluated the effect of twelve additional modeling scenarios and emission assumptions, including both the New Mexico NAAQS modeling emission limits and the 3-hour emission limits for San Juan Generating Station as recommended by the NGO Petitioners. These modeling scenarios resulted in "considerably less increment expansion," and confirmed that even with the smaller increment expansion, the Desert Rock Project's proposed SO₂ emissions did not exceed the PSD Class I increment. AR 120 at 132-34. EPA provided the modeling files for the NGO Petitioners and the public to review, yet the NGO Petitioners have blatantly ignored EPA's modeling narrative provided in the Response to Comments and the modeling documentation provided by the Region. Instead, their Supplemental Brief inexplicably states that a lack of data made it "virtually impossible . . . to evaluate the increment-affecting emissions modeled for each scenario." AR 120 at 227; NGO Petitioners' Supp. Br. at 236. "It is not sufficient simply to repeat objections made during the comment period; instead a petitioner must demonstrate why the [permit issuer's] response to those objections (the [permit issuer's] basis for its decision) is clearly erroneous or otherwise merits review." *Newmont Nevada*

Energy, 12 E.A.D. at 471-72 (citing *Steel Dynamics*, 9 E.A.D. at 744; accord *Peabody W. Coal*, 12 E.A.D. at 33, 46 n.58; *Tondu Energy Co.*, 9 E.A.D. at 714; *Encogen Cogen.*, 8 E.A.D at 251-52.

EPA modeled additional SO₂ increment scenarios, which incorporated assumptions regarding the NAAQS emissions as requested by the NGO Petitioners. AR 120 at 131-34. Although this modeling confirmed earlier conclusions that the Desert Rock Project would not exceed the increment in Class I areas, the NGO Petitioners inexplicably opted not to respond to either EPA's narrative in the response to comments or the modeling data provided to the public. AR 46 at 38; NGO Petitioners' Supp. Br. at 251. For these reasons, the Board should reject the NGO Petitioners' argument regarding the NAAQS emission limits incorporated into the SO₂ cumulative Class I analyses.

2. *The Baseline Concentrations were Properly Determined Relative to the SO₂ Minor Source Baseline Dates*

The NGO Petitioners also assert unfounded, and in some cases new, claims that the relative minor source baseline dates require the use of allowable emission estimates in Arizona and Colorado and actual emission estimates in New Mexico and Utah. NGO Petitioners' Supp. Br. at 240, 244-49. EPA's own historical review determined that the SO₂ emissions requirements for Four Corners Power Project and San Juan Generating Station were in flux until the 1980s, well after most of the minor source baseline dates. AR 120 at 132, 134-35. In an attempt to disguise the fact that the NGO Petitioners themselves have little historical evidence to support any of these claims, their Petition spins the various minor source baseline arguments into a messy ball of yarn which is difficult to unravel, while also adding more new claims which NGO Petitioners raise for the first time.

The NGO Petitioners' "baseline" series of arguments begins with the allegation that the San Juan Generating Station emissions included in the baseline concentration for Arizona and Colorado should be estimated as "allowable" emissions rather than actual emissions estimates. NGO Petitioners' Supp. Br. at 245. The use of allowable emission estimates in the baseline concentration for a major source requires proof of two facts which the NGO Petitioners have failed to produce. First, in order to incorporate major source allowable emissions into the baseline concentration a petitioner must prove that the major source commenced construction prior to the major source baseline date. 40 C.F.R. § 52.21(b)(13)(i). Here, NGO Petitioners have merely speculated that San Juan Generating Station commenced construction on the SO₂ controls prior to the major source baseline. The facts presented to support the allegation that construction "commenced" prior to the major source baseline fall far short of the evidence required to fulfill the regulatory definition. 40 C.F.R. § 52.21(b)(9). Second, a petitioner must assert a viable allowable emission rate that should be used to estimate emissions. 40 C.F.R. §§ 52.21(13)(i)(b), (16). The NGO Petitioners' Supplemental Brief fails on this point as well. EPA, as discussed above, extensively responded to and modeled the NGO Petitioners' comments relating the SO₂ NAAQS emissions limit, which is the same the allowable emission rate asserted in the Petitioners' comments for Arizona and Colorado. AR 66 Attachments (see Stamper Report on SO₂ PSD Analysis at 9-11). In response, the NGO Petitioners failed to respond to the Region's modeling in their Supplemental Brief. Any attempt to raise arguments relating to new federally enforceable emissions rates is merely a diversionary tactic from their lack of a response to the substance of EPA's Response to Comments document. See *Prairie State*, slip. op. at 13 (noting that a petitioner must describe each objection it is raising and explain why the permit

issuer's previous response to each objection was clearly erroneous or otherwise deserving of review instead of merely repeating objections made during the comment period).

NGO Petitioners' argument regarding the emissions from San Juan Generating Station is completely unsubstantiated. From a regulatory perspective, construction can be "commenced" either through (i) actual on-site construction, *i.e.* fabrication, installation, or demolition, or (ii) entering into a contractual obligation "which cannot be cancelled or modified without substantial loss to the owner or the operator, to undertake a program of actual construction of the source to be completed within a reasonable amount of time." 40 C.F.R. § 52.21(b)(9). The NGO Petitioners never assert that the first option, actual construction, commenced for San Juan Generating Station prior to the major source baseline. Rather the NGO Petitioners attempt to rely on an underlying exhibit that only mentions the construction "may have commenced" before the major source baseline date and that an industry representative "implied" at a hearing that construction commenced before the major source baseline. NGO Petitioners' Supp. Br. at 240; AR 66 Stamper Report on SO₂ PSD Analysis at 10. The NGO Petitioners hardly present evidence sufficient to find the Region's decision was based upon clearly erroneous finding of fact. Petitioners must demonstrate that a PSD decision is based upon a clearly erroneous finding of fact or conclusion of law to support review by this Board. *Newmont Nevada Energy*, 12 E.A.D. at 437 (citing 40 C.F.R. § 124.19(a)).

In addition to the lack of evidence supporting the alleged start date of construction, the NGO Petitioners assert noncompliance with federally enforceable emission rates which were not specifically addressed during the comment period. NGO Petitioners' Supp.Br. 245-46. The NGO Petitioners' attached exhibit includes only one paragraph, which addresses the SO₂ emission requirements applicable in a federally approved SIP to set the allowable emissions rate

for San Juan Generating Station. AR 66, Stamper Report on SO₂ PSD Analysis at 10-11. EPA responded to this comment by conducting additional modeling scenarios that incorporated the very SIP emission limits referenced by the exhibit. AR 120 at 132-34, 227. The NGO Petitioners' Supplemental Brief for the first time asserts that the allowable emission rates should equal "emission reduction requirements that were more stringent than what was ultimately approved by EPA as part of the New Mexico SIP." NGO Petitioners' Supp. Br. at 245 (emphasis added).

Addressing new issues on appeal conflicts with EPA's regulatory requirement to raise all reasonably ascertainable issues during the public comment period. 40 C.F.R. § 124.19(a). Based upon this regulatory limitation, this Board has recognized that the EAB's power to review appeals should be only sparingly exercised. *Newmont Nevada Energy*, 12 E.A.D. at 437 (EAB 2005). If issues such as new emission rates were allowed to be raised for the first time on appeal, "it would undermine the efficiency, predictability and finality of the permitting process." *Prairie State*, slip op. at 78.

The NGO Petitioners' Colorado and Arizona minor source baseline arguments for San Juan Generating Station fail because the NGO Petitioners 1) did not provide any evidence that San Juan Generating Station construction commenced prior to the SO₂ Major Source baseline date, and 2) do not assert a viable allowable emission rate for San Juan Generating Station.

The NGO Petitioners recognize that the minor source SO₂ baseline date for New Mexico and Utah occurred after the controls were in place at San Juan Generating Station Units 1 and 2. NGO Petitioners' Supp. Br. at 247. Therefore, the NGO Petitioners allege that the *actual* emissions for San Juan Generating Station at the New Mexico and Utah minor source baseline

dates were lower than the eventual allowable emission levels, and so the actual emissions should be used in the baseline concentration established at the minor source baseline date. *Id.*

From the outset NGO Petitioners' argument is based upon false premises. NGO Petitioners' exhibit incorrectly refers to Utah's minor source baseline for SO₂ date as "Mid 79 or earlier." AR 66 Attachments (*see* Stamper Report on SO₂ PSD Analysis at 4, 11). Desert Rock confirmed in its January 2006 Modeling Update that the Class I increment modeling used the accurate minor source baseline dates, which were confirmed by the respective states. AR 37, Appendix A at 2-1. The Utah minor source baseline date reference by Desert Rock was April 1, 1990; this date was also used by NPS when discussing Canyonlands, a Class I area in Utah. AR 120.8 at 6 (Department of the Interior Preliminary Technical Comments on the Desert Rock Prevention of Significant Deterioration Permit Application) .

In addition to an inaccurate baseline date for Utah, the NGO Petitioners' argument also fails because it is based upon historical speculation regarding actual emissions in Utah and New Mexico. San Juan Generating Station did not operate continuous emission monitors at the time of the minor baseline years for New Mexico and Utah; therefore, the NGO Petitioners' entire argument regarding actual emissions is premised upon heavily qualified assertions, such as San Juan Generating Station "may have been reducing SO₂" and the facility "intended" to operate controls to meet certain emission levels. AR 66 (*see* Stamper Report on SO₂ PSD Analysis at 12); NGO Petitioners' Supp. Br. at 247. This qualified language only supports the EPA Region 9's actions, which accounted for some of the uncertainty by conducting additional modeling scenarios to measure the Desert Rock Project emissions against a considerably reduced SO₂ increment instead of speculating on the historical actual emissions. AR 120 at 131-35. The NGO Petitioners' tentative statements regarding possible actual emission rates are hardly

sufficient to demonstrate that the Region's decisions were based upon facts that were "clearly erroneous" as required by this Board to review a permitting authority's actions. *See Prairie State*, slip. op. at 13.

Moreover, the NGO Petitioners' Supplemental Brief alleges that the baseline concentration fails to include additional Four Corners Power Project emissions reductions necessary to meet the SO₂ NAAQS. NGO Petitioners' Supp. Br. at 244. EPA reviewed the SO₂ emissions modeled for Four Corners Power Project and disagreed with the NGO Petitioner's allegations that the Four Corners Power Project SO₂ emissions reductions allowed for too much increment expansion. AR 120 at 132. Specifically, EPA responded by clarifying that:

The requirements on Four Corners Power Project were in flux for a decade, and not finally decided until after the minor source baseline date, so it is not clear what allowable emission rate should be used. In any case, the baseline concentration is defined in terms of actual emissions at the time of the minor source baseline date; allowable emissions are used as a surrogate for sources permitted but not yet operating, or lacking sufficient operating history to establish an actual emissions rate. Actual emission reductions due to construction, such as of control equipment, are not part of the baseline and do affect the increment. Therefore, we properly used the actual emissions from the Four Corners Power Project as of the minor source baseline date.

Id. EPA went on to explain that the agency had "reviewed and accepted modeling for Four Corners Power Project showing the emission limits needed to meet the NAAQS." *Id.* In fact, the emission rates assumed by Desert Rock for Four Corners Power Project appear to be lower than those assumed in the 1981 New Mexico modeling for NAAQS attainment and proposed by the NGO Petitioners. *Id.*; AR 66 at 67. Because the baseline emissions assumed for Four Corners Power Project are more stringent than the actual emission limits for the facility, Desert Rock conservatively modeled that Four Corners Power Project emissions consumed a greater portion of the increment than is actually the case. AR 120 at 132-33.

The NGO Petitioners' Supplemental Brief fails to address EPA's narrative describing its Four Corners Power Project analysis and therefore this argument should be rejected. The NGO Petitioners did not "explain why the permit decision maker's previous response to those objections . . . is clearly erroneous or otherwise warrants review." *Commonwealth Chesapeake*, 6 E.A.D. at 769; NGO Petitioners' Supp. Br. at 243.

Taken together, the conservative calculation used by Desert Rock and the additional modeling and the responses to comments provided by EPA Region 9 support the determination that the proposed Desert Rock Project complies with the PSD increment limitations. The NGO Petitioners fail to provide any factual basis for the assertion that San Juan Generating Station "commenced construction" before the major source baseline date and then confound the argument by asserting new "allowable" emission rates for San Juan Generating Station should be used – arguments which were not raised during the comment period and which have not been substantiated in fact. Finally, for both San Juan Generating Station and the Four Corners Power Project the NGO Petitioners repeat arguments raised during the comment period without responding to EPA's modeling that evaluates lower NAAQS emission limits in the baseline. Even discounting these procedural errors, the NGO Petitioners have not provided any factual basis or specific legal error that demonstrates the EPA Region 9 "departed from standard statutory and regulatory requirements" or failed to provide justification for the approach used to calculate the baseline or the increment. NGO Petitioners' Supp. Br. at 249. EPA Region 9 responded to the NGO Petitioners' comments relating to SJGP and Four Corners Power Project SO₂ emissions in the baseline and increment expansion. When challenging technical issues such as these, a petitioner must demonstrate why the EPA's analysis is erroneous in order "to surmount its heavy burden of overcoming the deference the board generally accords to

permitting authorities in matters requiring technical expertise." *Newmont Nevada Energy*, 12 E.A.D. at 430. The additional baseline arguments related to allowable emissions are not only insufficient to prove a "clearly erroneous finding of act or conclusion of law" as required to merit review by this Board, but also were not specifically raised during the public comment period. 40 C.F.R. § 124.19(a); *Prairie State*, slip op. at 13, 78.

C. EPA's Additional Modeling Scenarios that Confirm Desert Rock Emissions Do Not Exceed the PSD Increment Did Not Need to Undergo Notice and Comment.

The well-documented coordination between EPA, FLMs, and Desert Rock provided many opportunities for the federal agency partners to consult with modelers and request specific modeling scenarios throughout the Desert Rock PSD permit analysis. The Administrative Record is replete with emails, letters and documentation relating to the emission inventories developed for the models, the types of models used for the analysis, and the final results. At least five modeling analyses were prepared and evaluated for this project: 1) the February 2004 initial PSD permit application (AR 6); 2) the revised May 2004 PSD permit application and revised modeling protocol (AR 12, AR 12.1); 3) the January 2006 revised PSD increment, visibility and regional haze modeling as requested by EPA and the FLMS (AR 37); 4) the March 2006 additional regional haze analysis (AR 38); and 5) modeling conducted by NPS and submitted to EPA in October 2006 (AR 120.8). None of the aforementioned models predicted that the cumulative SO₂ analysis, including emissions from the Desert Rock project, exceeded any Class I PSD increment.

Based upon comments submitted by the NGO Petitioners during the comment period, EPA conducted yet another modeling analysis that reduced the PSD increment available for the Desert Rock Project. The additional modeling primarily increased the San Juan Generating

Station SO₂ emissions reductions attributed to achieving the NAAQS and thus decreased the increment expansion available for emission from new sources such as Desert Rock. AR 120 at 131-34. Like the previous modeling analyses, the demonstration confirmed that projected SO₂ emissions, including the emissions from the proposed Dessert Rock Project, would not exceed the PSD increment in any Class I area.

"[T]he regulations contemplate the possibility that permit terms will be added or revised in response to comments received during the public comment period." *Indeck*, slip op. at 28 (citing *Amoco Oil Co.*, 4 E.A.D. at 980; *Chem-Sec. Sys.*, 2 E.A.D. at 807 n.11). Specifically, under 40 C.F.R. § 124.14, the Regional Administrator has discretion regarding whether to reopen a public comment period. The EAB generally defers to EPA's discretion regarding whether the public comment period should have been reopened as a result of changes made in a final permit. *Thermalkem*, 3 E.A.D. at 357; *see also Amoco Oil Co.*, 4 E.A.D. at 981; *GSX Services*, 4 E.A.D. at 467.

One factor that the Board must assess whenever a change has been made to the draft permit is whether the record contained a thorough explanation of EPA's basis for changing the terms of the permit. *Indeck*, slip op. at 29 (citing 40 C.F.R. § 124.17(a)(1); *City of Marlborough*, 12 E.A.D. at 244-45). Here, the EPA modeling scenarios were described in EPA's Response to Comments and the supporting data is included in the administrative record. AR 120 at 131-34, 227.

Additionally, in assessing whether the comment period should be reopened, the permit issuer should assess "(1) whether reopening the comment period 'could expedite the decisionmaking process,' and (2) whether comments on the draft permit have given rise to 'substantial new questions.'" *Thermalkem*, 3 E.A.D. at 357 (citing 40 C.F.R. §§ 124.14(a)(1),

(b)). Petitioners have not shown that reopening the comment period will "expedite the decisionmaking process." Therefore, the only issue remaining is whether the final Desert Rock Project permit raised "substantial new questions." It did not.

The modeling prepared by EPA functioned to support - not correct - the prior modeling analysis that determined the Class I increments were not exceeded. The findings did not alter any PSD permit terms, emission limits or control requirements in the PSD permit, nor did they change the EPA Region 9's proposed approval of the PSD permit. In short, EPA's modeling scenarios do not provide additional information or raise substantial questions that warrant the reopening of the comment period. *Prairie State*, slip op. at 64-65. The modeling did not create any change, much less any substantive change, in the permit requirements or the Region's determination; therefore, additional notice and comment beyond the exchange of information that has occurred since 2004 through the issuance of the PSD permit in 2008 is unnecessary.

XI. EPA PROPERLY ASSESSED THE IMPACTS OF THE DESERT ROCK PROJECT ON ENVIRONMENTAL JUSTICE COMMUNITIES AND MEANINGFULLY RESPONDED TO COMMENTS REGARDING ENVIRONMENTAL JUSTICE.

NGO Petitioners assert that EPA failed to fulfill its environmental justice responsibilities as it relates to the people of the Navajo Nation that inhabit the land surrounding the Desert Rock Project. NGO Petitioners' Supp. Br. at 257. There is a certain paternalistic quality to this particular argument, considering that (1) the Desert Rock Project was conceived by the Navajo Nation, the same low-income, minority community that the NGO Petitioners assert was disregarded in the PSD permitting process; (2) from a tribal law standpoint, the Desert Rock Project could only occur with the explicit approval of the Navajo Nation; and (3) from an economic standpoint, the revenue realized by the Navajo Nation as a result of the Desert Rock Project will be substantial and is essential to the community's continued viability. *See* AR 16;

AR 29. Indeed, the NGO Petitioners posit this environmental justice argument in the face of a resolution by the Navajo Nation Council, the elected body representing the interests of the Navajo Nation, approving necessary leaseholds. The margin of this vote, 66-7, demonstrates overwhelming support for the Desert Rock Project and Navajo Nation's partnership with Desert Rock Energy.

In advancing this environmental justice argument, the NGO Petitioners attack the sufficiency of the underlying analysis—in this context the NGO Petitioners challenge the soil and vegetation analysis, EPA's environmental justice analysis, and the BACT analysis, overstate EPA's obligations under the relevant law, and attempt to shoehorn into the PSD permitting process consideration of every single environmental issue related to the Desert Rock Project, whether or not related to air quality.

A. EPA Met Its Obligations Under the Environmental Justice Executive Order.

The environmental justice issues raised by the NGO Petitioners relate to the environmental justice mandate issued by President Clinton to the federal agencies in 1994. 59 Fed. Reg. 7,629 (Feb. 16, 1994) (the "Executive Order"). The Executive Order requires each federal agency, "[t]o the greatest extent practicable and permitted by law," to incorporate environmental justice into its mission "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States. . . ." *Id.* § 1-101.

EPA has issued three guidance documents regarding the Executive Order,⁶¹ EPA has stated that notwithstanding the lack of formal rules or guidance on environmental justice, EPA can address environmental justice issues in the context of the PSD permitting process. *See In re Ecoeléctrica, L.P.*, 7 E.A.D. 56 (EAB 1997); *AES Puerto Rico*, 8 E.A.D. at 350; *Knauf I*, 8 E.A.D. 121.

In each of the above-cited cases, the Board denied review of a PSD permit on environmental justice grounds where (1) the permitting authority conducted an analysis to identify impacted low-income or minority population areas, and (2) where such a population was identified, the permitting authority proceeded to assess whether the proposed PSD permit would result in a disproportionately high and adverse effect on human health or the environment in those areas. *See Ecoeléctrica*, 7 E.A.D. at 68-69; *AES Puerto Rico*, 8 E.A.D. at 350-51; *Knauf II*, 9 E.A.D. at 16-17.⁶² Precisely the same two-step process was employed by EPA here.

⁶¹ In April of 1995, EPA released the document titled "Environmental Justice Strategy: Executive Order 12898," which defined the approaches by which EPA would implement the Executive Order. In August 1997, EPA released the "Environmental Justice Implementation Plan" supplementing the 1995 guidance. Finally, in April 1998, EPA issued a guidance document entitled "Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses — April 1998" (the "NEPA EJ Guidance"). This last document may be found in the administrative record, as Attachment 35 to the Response to Comments. The record indicates that both EPA and Desert Rock Energy considered the NEPA EJ Guidance a useful benchmark in conducting their respective environmental justice analyses, in particular because the air quality impact analysis conducted in the context of the PSD permit is anticipated to be included as part of the DEIS's much broader environmental justice analysis. *See* AR 120 at 160; AR 77 at 1, 38.

⁶² A crucial component of EPA's environmental justice process is providing a meaningful opportunity for the public to participate in the PSD permit process. EPA's Response to Comments document details the extraordinary efforts made to offer such an opportunity, and, indeed, the NGO Petitioners do not challenge the sufficiency of the public participation component. *See* AR 120 at 2-7, 162-64; NGO Petitioners' Supp. Br. at 256-69.

1. *Using Population Data and Air Emissions Data, EPA Properly Concluded that the Proposed PSD Permit Would Not Result in a Disproportionately High and Adverse Effect on Human Health or the Environment in Low-Income or Minority Population Areas.*

The NGO Petitioners state that, "[r]ather than perform any actual analysis of the potential adverse impacts on EJ communities, EPA instead offers up a one sentence answer to all Environmental Justice Concerns." NGO Petitioners' Supp. Br. at 258 (emphasis in original). According to NGO Petitioners, "[w]hile the record contains a document entitled 'Additional Impacts: Environmental Justice Assessment,' dated July 12, 2006, this document contains nothing but very general factual information (such as demographic data), and some brief discussion of the types of issue that should be addressed in an Environmental Justice analysis (without actually performing any such analysis)." NGO Petitioners' Supp. Br. at 259. The NGO Petitioners' characterization of the content of the document is far from accurate.

The "Additional Impacts: Environmental Justice Assessment" report, dated July 12, 2006 (the "EJ Assessment") is a 39-page (excluding exhibits) analysis of the possible air quality impacts of the Desert Rock Project upon minority and low-income populations. *See* AR 77. According to the NEPA EJ Guidance, the use of national decennial census data depicting low-income/poverty and minority statistics is one of the most common methods used to determine the existence and location of low-income and minority communities. NEPA EJ Guidance at 2.1.2. Consistent with the NEPA EJ Guidance, the EJ Assessment recognizes that census data often includes many gaps. *See* AR 77 at 7; NEPA EJ Guidance at 2.1.2. Accordingly, the EJ Assessment drew population data not only from the 1990 and 2000 censuses, but also from data derived from the Colorado State Demography office, the Department of Indian Health Services, the New Mexico Department of Labor, post-2000 reports generated by the U.S. Census Bureau on income and poverty and, of course, data provided by the Navajo Nation itself. AR 77 at 8-20,

36-39; *see also* NEPA EJ Guidance at 2.1.2 ("additional methods available in locating the populations of interest including contacting local resources, government agencies, commercial database firms, and the use of locational/distributional tools").

Using this data, the EJ Assessment appropriately identified the distribution of minority and low-income populations within the Desert Rock Project's areas of influence. According to the EJ Assessment, every local and regional area of influence had a proportion of minority population and low-income population that exceeded the respective reference population in New Mexico, Arizona or Colorado. AR 77 at 8, 14. The fifteen Navajo chapters within the local area of influence had both a larger proportion of American Indian population and a larger proportion of families in poverty. AR 77 at 9.

The EJ Assessment pays special attention to the unique economic, cultural and health characteristics of this environmental justice community. *See, e.g.*, AR 77 at 7, 20-21 (discussing the cultural value of geographically dispersed populace); *Id.* at 22-23 (discussing cultural and economic aspects of grazing); *Id.* at 23-24 (discussing ceremonial uses of plants and animals). In preparing the EJ Assessment, Desert Rock Energy engaged a Navajo botanist and other ethnobotanists to perform field studies on culturally-significant flora, as well as consulting a Navajo cultural specialist regarding the practical and ceremonial uses of the plants and animals that were identified in the study area. AR 77 at 7. The EJ Assessment also studied the health conditions and health care situation, concluding that much of the region of influence is a medically-underserved area. AR 77 at 24-25.

Having identified impacted low-income or minority population areas, the EJ Assessment proceeds to assess whether the proposed PSD permit would result in a disproportionately high and adverse effect on human health or the environment in those areas. Because the proposed

action is a PSD permit, the EJ Assessment focused on the potential air quality effects upon the environmental justice population. AR 77 at 26.

To evaluate these effects, the EJ Assessment compares the anticipated maximum annual emissions from the Desert Rock Project to the NAAQS because:

[t]he [NAAQS] are considered to be sufficiently protective of human health and welfare and include an adequate margin of safety. Consequently, compliance with the NAAQS for a particular pollutant demonstrates that no adverse health effects would be expected for that pollutant.

AR 77 at 27. Applying the modeling of air quality impacts from the Desert Rock Project's air pollutant emissions, the EJ Assessment concluded:

- No significant (*i.e.*, equal to or greater than 1% of the NAAQS) ambient impacts for NO_x and CO were predicted to occur outside the plant perimeter;
- The maximum predicted ambient 3-hour concentration for SO₂ (10% of NAAQS) was predicted to occur approximately 0.66 miles from the plant and ambient concentrations of SO₂ in excess of 2% of the NAAQS were predicted to occur out to a distance of 6.6 miles from the plant; and
- The maximum predicted ambient 24-hour and annual concentrations of PM₁₀ were predicted to occur within 0.3 miles and 0.4 miles, respectively, from the plant perimeter, and ambient concentrations of PM₁₀ in excess of 3.33% of the NAAQS were only predicted to occur out to a distance of 0.7 miles from the plant.

AR 77 at 27. These results indicated project impacts above specified "significance" levels for SO₂ and PM₁₀, thereby requiring a cumulative impacts analysis. *Id.*⁶³ As noted in the EJ Assessment, the PSD application (Table 5-1) analyzes the maximum annual criteria pollutant emission rates from all sources in the area of influence. AR 77 at 28; *see also* AR 6 at 6-37.

⁶³ Analysis was performed to investigate how many residents live within the limited areas that were projected to have slightly elevated SO₂ and PM₁₀ levels. AR 77 at 28. According to the EJ Assessment, the residential population within 1.1 miles of the Desert Rock Project is two American Indian persons. *Id.* Within the 6.6 mile area implicated by the SO₂ analysis, the EJ Assessment identified a maximum population of 76 persons, all of whom are American Indian. *Id.*

Thus, EPA Region 9 found that the cumulative impacts of the Desert Rock Project and all other sources of SO₂ and PM₁₀ in the area of influence are not expected to exceed a fraction of the NAAQS. EPA used this data, which was presented in both the PSD application and the EJ Assessment, to make its environmental justice assessment: "EPA believes that, as demonstrated by our modeling of the [Desert Rock Project's] emissions, there will be no exceedances of any of the National Ambient Air Quality Standards, which are indicators of healthful air." AR 120 at 163-64.⁶⁴

B. This Board's Precedent Supports the Conclusion that the Proposed PSD Permit Would Not Result in a Disproportionately High and Adverse Effect on Human Health or the Environment in Low-Income or Minority Population Areas Where NAAQS are Satisfied.

EPA Region 9's conclusion regarding the lack of adverse effects on the identified environmental justice communities is grounded solidly in this Board's precedent. This Board has held repeatedly that a comparison of the maximum potential emissions of PSD pollutants from the proposed project to the underlying NAAQS and PSD increment may satisfy the Executive

⁶⁴ NGO Petitioners argue that EPA has "provided no details regarding its assessment of Environmental Justice concerns...." NGO Petitioners' Supp. Br. at 126 (citing *Knauf I*, in which this Board remanded a PSD permit on environmental justice grounds where there were "no details regarding Region IX's determination in the administrative record. As such we cannot judge the adequacy of the Region's analysis."). The administrative record contains the EJ Assessment, discussed in greater detail above, as well as EPA's eleven pages of discussion within the Response to Comments. AR 77; AR 120 at 155-66. Indeed, NGO Petitioners omit from their discussion any citation to *Knauf II*, in which the Board again addressed the sufficiency of the environmental justice determination on a petition for review of EPA Region 9's decision on remand. After remanding *Knauf I*, EPA Region 9 had provided for inclusion in the record two environmental justice assessment documents containing demographic and adverse impact analysis. *Knauf II*, 9 E.A.D. at 16. In *Knauf II*, the Board held that it would not address any challenge to the sufficiency of the environmental assessment where the petitioner could not demonstrate that the conclusion—that there was no adverse impact because NAAQS would not be exceeded—was clearly erroneous. *Id.* at 17. As is demonstrated in Section XI.B, NGO Petitioners fail to demonstrate that EPA's analysis here is clearly erroneous. Therefore, it is unnecessary for the Board to entertain on petition for review any challenge to other aspects of the EJ Assessment—including the methodology and data used for the demographic analysis or the scope of the adverse impact analysis. *Id.*

Order's required environmental justice analysis where the NAAQS are not violated. *See In re Shell Offshore, Inc.*, OCS Appeals 07-01 and 07-02, slip op. at 67-68 (EAB Sept. 14, 2007); *Ecoeléctrica*, 7 E.A.D. at 69; *Knauf II*, 9 E.A.D. at 17; *AES Puerto Rico*, 8 E.A.D. at 352.

In *Shell Offshore*, for example, this Board denied review of EPA Region 10's environmental justice analysis for two Outer Continental Shelf air regulation minor source permits ("OCS permits"). *Shell Offshore*, slip op. at 68. EPA Region 10 had determined that issuing the OCS permits would not cause "disproportionately high or adverse human health or environmental effects" on the identified environmental justice communities because the "emissions limits contained in a number of specific permit terms and conditions are expected to curb air pollution sufficiently so that air quality in the region continues to attain the NAAQS, national standards which EPA has established to protect human health and the environment." *Id.* The Board concluded that the petitioners in *Shell Offshore* had not established that EPA Region 10's rationale was clearly erroneous:

As the Region points out, the NAAQS are the Agency's standards, designed to protect human health and welfare with an adequate margin of safety. *See CAA* § 109(b), 42 U.S.C. § 7409(b). Because EO 12,898 concerns itself with effects that are "adverse," and because the Region has determined that no such adverse effects cognizable under the PSD permit program will result from the issuance of the Permits in this case, we need not address NSB's argument regarding the need for additional comparative analysis. *See In re: Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 16-17 (EAB 2000) (stating that, given finding of no adverse impact based on conclusion that additional pollutants will not result in exceedance of NAAQS or PSD increment, the Board need not address objections to numerous aspects of Region's environmental justice analysis)...Finally, as stated above, the record before us indicates that the Region has complied with its statutory and regulatory obligations regarding public notice and comment. Accordingly, review is denied.

Shell Offshore, slip op. at 67-68; *see also Knauf II*, 9 E.A.D. at 16-17 (no adverse impact where "the air quality within the area surrounding the proposed site would remain well within the levels determined to [be] healthful and environmentally acceptable"); *Ecoeléctrica*, 7 E.A.D. at 68 ("the

modeled maximum emission impacts from this project are insignificant and well below NAAQS, and [the] project therefore should have insignificant impacts on the surrounding communities"); *AES Puerto Rico*, 8 E.A.D. at 351 (finding no adverse effect where "all maximum predicted concentrations of [carbon monoxide, sulfur dioxide, nitrogen dioxide and particulate matter were] below the corresponding NAAQS").

Against this significant weight of authority, NGO Petitioners offer no countervailing authority support for their position. Rather, NGO Petitioners argue that an adverse effect finding tied to NAAQS would "render[] any Environmental Justice assessment an empty exercise." NGO Petitioners' Supp. Br. at 259. This assertion is clearly untrue. For example, in *AES Puerto Rico*, though EPA Region 2 found no adverse effect because total emissions were below the NAAQS, EPA Region 2 nonetheless added additional PSD permit conditions requiring future ambient monitoring and multi-source air quality analysis for SO₂ because of concerns raised during the public comment period. *AES Puerto Rico*, 8 E.A.D. at 351. Furthermore, EPA can use its authority to analyze alternative technologies for criteria pollutants based on their relative ability to control emissions of pollutants not directly regulated under PSD as a basis for addressing environmental justice concerns.⁶⁵ See Memorandum from Office of General Counsel, *EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting*, at 12 (Dec. 1, 2000). Each of these examples concretely shows how an environmental justice assessment need not be an "empty exercise" despite a finding that there is no adverse effect because of NAAQS compliance.

⁶⁵ As is further discussed below, NGO Petitioners misinterpret this authority as bestowing on EPA an obligation under BACT to consider alternative sources that could achieve better emissions performance.

C. EPA Meaningfully Responded to those Specific Issues Regarding Environmental Justice that Apply to the PSD Permitting Process.

Amid the purported "generalized failure to satisfy its Environmental Justice obligations," Petitioners assert that EPA also failed adequately to respond to several specific environmental justice comments. However, Petitioners conflate an adequate determination with a determination that Petitioners favor as if they were one and the same.

1. *EPA's Soil and Vegetation Analysis Was Proper and EPA Therefore Properly Responded to Environmental Justice Concerns Regarding Impacts on Agriculture and Pastoral Communities.*

40 C.F.R. § 52.21(o)(1) requires the PSD permit applicant to "provide an analysis of the impairment to . . . soils and vegetation that would occur as a result of the source." The results of the soil and vegetation analysis "shall be available at the time of the public hearing on the application for such permit." CAA § 165(e)(3)(C), 42 U.S.C. § 7475(e)(3)(C). The NSR Manual describes the soil and vegetation analysis thusly:

The analysis of soil and vegetation air pollution impacts should be based on an inventory of the soil and vegetation types found in the impact area. This inventory should include all vegetation with any commercial or recreational value, and may be available from conservation groups, State agencies, and universities.

For most types of soil and vegetation, ambient concentrations of criteria pollutants below the secondary national ambient air quality standards (NAAQS) will not result in harmful effects. However, there are sensitive vegetation species (e.g., soybeans and alfalfa) which may be harmed by long-term exposure to low ambient air concentrations of regulated pollutants for which [there] are no NAAQS

NSR Manual at D.5. The question regarding the adequacy of this soil and vegetation analysis is essentially a scientific one, with respect to which the Board ordinarily gives substantial deference to the permitting agency. *Indeck*, slip op. at 48 n.67. The soil and vegetation analysis here relied on *A Screening Procedure for the Impacts of Air Pollution Sources on Plants, Soils, and*

Animals, EPA 450/2-81-078 (Dec. 12, 1980) (the "Screening Procedure"). *See* AR 120 at 40, 150. Table 3.1 of the Screening Procedure lists screening concentrations for sulfur dioxide, ozone, nitrogen oxide, carbon monoxide, sulfuric acid, ethylene, and fluorine, representing minimum concentrations at which adverse growth effects or tissue injury were reported in scientific literature. *See* AR 120.40 at 10-11. EPA has indicated that the Screening Procedure "is the only guidance currently available for conducting additional impacts assessments" regarding soil and vegetation. AR 120 at 150.

Desert Rock Energy's PSD Permit application identified more than 30 plant species that may occur in the vicinity of the project site. *See* AR 12 at A8-4 to A8-6. In addition, the EJ Assessment states that in its analysis of environmental justice concerns related to plants and animals, Desert Rock Energy relied on a 2005 floristic survey and ethnobotanical report for the impact area. *See* AR 77 at 7, 23, 36. The soil and vegetation analysis evaluated impacts on vegetation by comparing the predicted impacts attributable to the project with the screening levels presented in the Screening Procedure. AR 46 at 45; *see also* AR 6.1 at 6-37; AR 43 at 6-11. The modeling analysis showed all impacts to be well below the screening levels. AR 46 at 45. Because most of the designated vegetation screening levels are equivalent to or less stringent than the NAAQS and/or PSD increments, EPA determined that "satisfaction of NAAQS and PSD increments assures that sensitive vegetation will not be negatively affected." AR 46 at 45.

In their petition, NGO Petitioners state that certain comments "raised concerns about harm to communities with a pastoral lifestyle as a result of adverse air-quality impact on vegetation used for grazing." NGO Petitioners' Supp. Br. at 262. In response to these environmental justice concerns, EPA relied on its soil and vegetation analysis to demonstrate that there would be no adverse air quality impact on vegetation used for grazing. *See* AR 120 at 150.

Petitioners argue, however, that EPA's soil and vegetation analysis is "manifestly inadequate," and that, as a result, EPA's response to environmental justice concerns implicating the effect of air pollution on vegetation used for grazing is likewise inadequate. NGO Petitioners' Supp. Br. at 263.⁶⁶ Specifically, Petitioners argue that this soil and vegetation analysis conflicts with this Board's holding in *Indeck*.

Because the question regarding the adequacy of the soil and vegetation analysis is essentially a scientific one, the Board assigns a particularly heavy burden to a petitioner seeking review. *Indeck*, slip op. at 48 n.67. "Thus, when issues raised on appeal challenge a permit issuer's technical judgments, clear error...is not established simply because petitioners document a difference of opinion or an alternative theory regarding a technical matter." *Id.* The Board will instead "look to determine whether the record demonstrates that the permit issuer duly considered the issues raised in the comments and whether the approach ultimately adopted by the permit issuer is rational in light of all the information in the record." *Id.*

In *Indeck*, this Board upheld the stand-alone utility of the Screening Procedure while noting that "reliance on the Screening Procedures may be insufficient [to satisfy 40 C.F.R. § 52.21(o)(1)] in the face of site-specific concerns that plainly call the adequacy of that analysis into question." *Id.* at n.66. In *Indeck*, the "site-specific concerns" were the location "of a nationally protected prairie -- essentially a preservation site for vegetation of national and historic significance -- . . . adjacent to, and apparently downwind from, the site for [the] proposed power plant" and the failure of the permitting authority to reference the national

⁶⁶ NGO Petitioners also raise this argument in the context of EPA's purported failure to coordinate the PSD permitting process with its ESA § 7 consultation. See NGO Petitioners' Supp. Br. at 274-76. As indicated below in Section XII, this section serves as Desert Rock Energy's response to NGO Petitioners' argument regarding the sufficiency of EPA's soil and vegetation analysis in both contexts.

preserve in its public notice. *Id.* at 41. The Illinois Department of Natural Resources and the U.S. Forest Service submitted to public comments on the proposed PSD permit noting that the proposed power plant was a "direct threat to sensitive habitat areas" and would undermine the objectives for ecosystem restoration. *Id.* at 36-38. The Illinois Department of Natural Resources specifically noted that "direct application of the NAAQS standards to all flora and fauna associated with the permit action may not be sufficient to address all potential endpoints at this site." *Id.* at 38. In addition, public comments noted that the prairie reserve contained a number of species potentially more sensitive to particular pollutants than species considered in the studies underlying the Screening Procedures. *Id.* at 45.

In light of these "site-specific" comments, the Board in *Indeck* clarified that the permitting authority would either have to rely on analysis beyond the Screening Procedures or explain "how that analysis alone satisfactorily responds to the comments on the draft permit, ensures comparability with the approach envisioned by the NSR Manual, and provides reasonable assurance that the [prairie preserve] will not be adversely affected by emissions from Indeck's facility." *Id.* at 49. Applying the standard set forth in *Indeck*, NGO Petitioners have failed to demonstrate clear error here in EPA's soil and vegetation analysis for two reasons.

First, Petitioners have failed to demonstrate the existence of comments raising the sort of "site-specific" concerns discussed in the *Indeck* opinion. To be sure, Petitioners raise the same generalized problems with the Screening Procedure discussed in the *Indeck* opinion, but these comments cite purported procedural requirements rather than any specific impact on the soil and vegetation analysis, which is required in order to secure the Board's review.⁶⁷ While there are

⁶⁷ For example, NGO Petitioners assert that the *Indeck* opinion requires an inventory of "all local plant species." NGO Petitioners' Supp. Br. at 263 n.184. This statement is erroneous,

Class I areas within the analysis area for the Desert Rock Project, there is nothing close to the circumstance in *Indeck*, where there was a national vegetation preserve adjacent to the proposed power plant that was not even referenced in the agency's public notice or in its response to comments.⁶⁸ Furthermore, Petitioners do not identify any public comment submitted regarding the PSD permit from a regulatory agency such as the USFS stating that EPA's soil and vegetation analysis is insufficient. Such critical comments from regulatory agencies were of paramount concern to the Board in *Indeck*. Finally, Petitioners have not identified any plant species in the impact area that are "more sensitive" to particular pollutants than species considered in the studies underlying the Screening Procedures. *See Kawaihae Cogeneration*, 7 E.A.D. 107 (denying review of PSD permit where petitioner did not provide any information that soil and vegetation "would be negatively impacted" or that there were "sensitive plant species that would be harmed by exposure to concentrations of pollutants below the secondary NAAQS"). Therefore, in the absence of submitting site-specific comments, Petitioners have not demonstrated that an analysis beyond the comparison of projected emissions to the concentrations identified in the Screening Procedures was required here. *See Indeck*, slip op. at 48-49.

as the *Indeck* opinion clearly requires only "some kind of baseline analysis of the vegetation and soils in the area." *Indeck*, slip op. at 50 n.69. As the *Indeck* decision recognizes, this baseline analysis can comprise the applicant's analysis that a site "is thinly vegetated with non-indigenous plant species, has rocky soil, and has very poor productivity potential for agricultural, orchard or grazing uses." *Id.* (citing *Kawaihae Cogeneration*, 7. E.A.D. at 130). That analysis is hardly an inventory of "all local plant species," yet the Board in *Kawaihae Cogeneration* declined to review the soil and vegetation analysis where the petitioners did not show that vegetation would be negatively harmed by the power plant or that there were sensitive plant species that would be harmed by exposure to concentrations of pollutants below the NAAQS. *See Kawaihae Cogeneration*, 7. E.A.D. at 130. NGO Petitioners fail to present that same information here.

⁶⁸ The closest Class I area here, Mesa Verde National Park, is approximately 75 kilometers away. *See AR 46 at 1.*

Second, even if Petitioners had raised a sufficient question regarding reliance on the Screening Procedure here, EPA provided an adequate explanation in its Response to Comments document of why the agency did not require analysis beyond the comparison of projected emissions to the concentrations identified in the Screening Procedures. *Indeck*, slip op. at 47. The Screening Procedure, EPA noted, is the only guidance currently available for conducting additional soil and vegetation impacts assessments. AR 120 at 150. Using the Screening Procedure to ensure that no vegetation suffers adverse growth effects or tissue injury at a concentration lower than the applicable NAAQS or PSD increment, EPA appropriately determined that in this case "satisfaction of NAAQS and PSD increments assures that sensitive vegetation will not be negatively affected." AR 46 at 45. In the absence of specific evidence demonstrating that there are sensitive plant species that would be harmed by exposure to concentrations of pollutants below the secondary NAAQS, review of EPA's determination must be denied. *See Kawaihae Cogeneration*, 7. E.A.D. at 130.

EPA recognized that because the purpose of the additional soil and vegetation impacts analysis is informational, where the analysis complies with the letter of the PSD regulations the informational purpose could be supplemented by referring to the biological assessment and DEIS required by the ESA and NEPA, respectively. *Id.* at 150-51 ("a more comprehensive assessment of the impact on soil, vegetation, and animal life, including the effects on livestock grazing, is underway as part of a biological assessment required under the [ESA], and for the [EIS]"); *see also* 43 Fed. Reg. 26,403 ("the impact assessment should generally be qualitative in nature and designed to inform the general public of the relative impact of the source on [air quality related] values"). It is true that, in *Indeck*, the Board noted that reliance by the permitting authority on an analysis conducted under the ESA consultation process would not save the permitting authority

from the public notice and comment problem. *Indeck*, slip op. at 50 n.70. However, EPA Region 9's statement in the Response to Comments document should not be read as deferring the soil and vegetation analysis to the ESA § 7 consultation and the NEPA process. Rather, EPA clearly intended to highlight a further opportunity for comment for those commenters unsatisfied with the soil and vegetation analysis conducted by EPA, but unable to articulate any "site-specific" concerns sufficient to require further analysis or response in the context of the PSD permitting process.

EPA also provided reasonable assurance that the soil and vegetation surrounding the Desert Rock Project will not be adversely affected by emissions from the facility:

EPA notes that the final PSD permit contains a condition delaying permit effectiveness (and thus prohibiting any project construction) until completion of the ESA process and also allowing for amendment of the permit terms or application as appropriate to address the consultation's findings.

AR 120 at 151; *see also* AR 122 at 4 (Permit Condition II.A).

As Petitioners note, the inclusion of a permit condition cannot cure the failure to provide the soil and vegetation analysis prior to the public comment period. *See* NGO Petitioners' Supp. Br. at 275. For example, in *Indeck*, the permitting authority attempted to supplement its soil and vegetation analysis with a permit condition that required the project proponent in *Indeck* to compile information on soil conditions and the condition of the vegetation that could potentially be affected by pollutants emitted by the proposed plant. *Indeck*, slip op. at 51-52. The permit condition here, by contrast, does not purport to cure any deficiency in the soil and vegetation analysis but merely satisfies the *Indeck* opinion's third requirement by assuring that the soil and vegetation surrounding the Desert Rock Project will not be adversely affected. As discussed in greater detail in Section XII, under Permit Condition II.A, construction is barred absolutely until the ESA § 7 consultation is complete. EPA retains the power to reopen or modify the PSD

permit, and even to compel the applicant to refile its application. AR 122 at 4. Overall, EPA possesses total authority over reshaping the PSD permit in whatever way necessary to reflect any reasonable and prudent alternative measures developed during the consultation process. If the FWS finds a negative impact and specifies ameliorative conditions, EPA is not prevented from making changes to the PSD permit based on FWS's input.

This factual background distinguishes EPA's rational determination here as to the adequacy of Desert Rock Energy's soil and vegetation analysis from the situation in *Indeck*. *Indeck*, slip op. p. 48 n.67. In *Indeck*, this Board was faced with a PSD permit soil and vegetation analysis for a power plant directly adjacent to a sensitive vegetation preserve, with a record that made no mention of the endangered or threatened plant species. *Indeck*, slip op. at 41. The soil and vegetation analysis in *Indeck* was specifically criticized by multiple federal agencies charged with preserving sensitive vegetation in the area, and by public comments that identified specific vegetation with sensitivities exceeding those in the Screening Procedures. *Indeck*, slip op. at 47. Here, Petitioners' analysis of *Indeck* is devoid of the factual context that compelled the decision in that case, and is further devoid of any similar factual context that would compel a similar decision in this case.

Because EPA has properly determined that there is no adverse impact to soil or vegetation, it reasonably follows that such a determination supports the conclusion that there is no significant adverse impact to agriculture or grazing sufficient to trigger environmental justice concerns.

2. *Concerns Regarding Mercury and Water Resource Consumption Are Beyond the Scope of EPA's Environmental Justice Analysis in the PSD Permitting Process.*

NGO Petitioners also attempt to shoehorn another attack on EPA's BACT analysis into their petition by trying to tie that analysis to purported deficiencies in the environmental justice analysis. Specifically, Petitioners argue that consideration of other technology options such as IGCC in the BACT analysis would have addressed environmental justice concerns regarding mercury emissions and water resource consumption. NGO Petitioners' Supp. Br. at 267, 268 n.191.

Public comments identified the potential for mercury emissions from the Desert Rock Project to be deposited in local water bodies that may be used for subsistence fishing, thereby leading to the potential for unhealthy levels of mercury in fish. *See* AR 120 at 161. According to Petitioners, EPA has "not only the authority but the obligation under BACT to consider the collateral environmental impacts of its BACT decisions, including [hazardous air pollutant]-related impacts such as mercury emissions." NGO Petitioners' Supp. Br. at 266. Similarly, Petitioners allege that "depletion of water resources" should "be the subject of a collateral impact assessment (to ensure that that suite of technologies and control measures is optimized to require as little water as possible." *Id.* at 268. Petitioners allege that IGCC would use substantially less water than a pulverized coal boiler. *Id.* at 268 n.191.

a. Petitioners Misstate the BACT Collateral Impact Analysis and, in Any Event, the Sole BACT Alternative, IGCC, Was Appropriately Excluded from the BACT Analysis as Redefining the Source.

NGO Petitioners' arguments related to mercury absorption and water consumption are simply another means the NGO Petitioners have used to challenge EPA's exclusion of IGCC in the BACT analysis. This argument is addressed in great detail in Sections II and III, *supra*.

Because of EPA's determination that IGCC would impermissibly redefine the proposed source, EPA did not need to consider the collateral environmental impacts of IGCC in its BACT analysis. Thus, NGO Petitioners cannot demonstrate that the EPA's environmental justice analysis was clearly erroneous because it did not consider the collateral environmental impacts of a technology that does not qualify as BACT.

In any event, the NGO Petitioners misunderstand the examination of HAPs, including mercury, and consumption of water resources as collateral environmental impacts in the BACT process.

The CAA defines the term "BACT" as an emission limitation for a regulated (*e.g.*, criteria) pollutant based on the use of available control technology that will result in the maximum reduction of emissions of that pollutant and that is achievable at a specific facility in light of the technology's "energy, environmental, and economic impacts and other costs." CAA § 169(3), 42 U.S.C. § 7479(3). This last clause of the BACT definition—called the "collateral impacts" clause—"tempers the stringency of the technology requirements whenever one or more of the specified 'collateral' impacts—energy, environmental, or economic—renders use of the most effective technology for a particular PSD-regulated pollutant inappropriate." *Hillman Power*, slip op. at 683 (citing *Columbia Gulf Transmission*, 2 E.A.D. at 826). In construing the environmental component of the collateral impacts clause, this Board has determined that alternative technologies for a criteria pollutant could be analyzed based on their relative ability to control emissions of pollutants not directly regulated under PSD. *See Genesee Power*, 4 E.A.D. at 848-50; *Hillman Power Co.*, slip op. at 683. The primary purpose of the collateral impacts clause is to allow use of a less effective control technology only when source-specific energy, environmental or economic impacts or other costs constrain a source from using a more effective

technology. *World Color Press*, 3 E.A.D. at 478; *see also Columbia Gulf*, 2 E.A.D. at 827 ("[t]he collateral impacts clause operates primarily as a safety valve whenever unusual circumstances specific to the facility make it appropriate to use less than the most effective technology"). For example, if a wet scrubber was considered BACT and if IGCC were considered a more effective control technology, but IGCC technology required significantly more water resources or increased mercury emissions, EPA could appropriately disregard IGCC in the BACT analysis. However, IGCC is not considered BACT, so such a hypothetical collateral impacts analysis does not apply here.

NGO Petitioners seek, however, to convert the collateral impacts clause from a "safety valve" for choosing a less effective control technology into an affirmative obligation to consider the allegedly positive collateral impacts of a control technology not part of the BACT analysis. This is simply an argument for the backdoor regulation of nonregulated pollutants, and it stretches the collateral impacts exception to the point where it swallows the rule.⁶⁹

b. IGCC Is Not a Cost-Effective Method to Control Mercury Emissions and Would Not Decrease Consumption of Water Resources Compared to the Proposed Desert Rock Project.

As demonstrated by the BACT analysis, IGCC is not a cost-effective method to control mercury emissions at the Desert Rock Project.⁷⁰ Although the mercury emissions rate from an IGCC plant would be 29 lbs/year as compared to 103 lbs/yr for the Desert Rock Project as

⁶⁹ Petitioners' arguments regarding IGCC and the BACT analysis are discussed in greater detail above, in Section II and Section III, *supra*. Furthermore, NGO Petitioners' argument that EPA is obligated to conduct its case-by-case MACT (which will specifically address mercury control options) in conjunction with the PSD permitting process is addressed in detail in Section IV, *supra*.

⁷⁰ Indeed, construction of IGCC may not even be viable at the Desert Rock site. *See* Section II, *supra*. While the general feasibility of IGCC is discussed in detail at Section II, *supra*, these points regarding mercury and water resources bear reemphasis in the context of NGO Petitioners' environmental justice argument.

proposed, the electrical costs of an IGCC plant would be at least \$3.5/MWh to \$6/MWh higher than the Desert Rock Project as proposed. *See* AR 34 at 3-5, 4-11. This cost increase is equivalent to more than \$500,000 per pound of mercury controlled. AR 37 at 3-5. The Board has previously determined that it is not clear error to disregard such exceptionally costly alternatives from the BACT analysis. *See Prairie State*, slip op. at 48-49 (finding no clear error where the permitting authority did not require further BACT analysis of IGCC because of higher capital costs and higher operating costs than less expensive and less uncertain control methods).

With respect to the NGO Petitioners' arguments regarding water consumption, the BACT analysis of IGCC demonstrated that IGCC would actually require more water than the proposed Desert Rock Project. Specifically, the water consumption rates associated with using IGCC at the Desert Rock site would range from 21,000 acre-ft/yr to 39,000 acre-ft/yr, while the Desert Rock Project as proposed would have a permitted water consumption rate of just 4,500 acre-ft/yr. Thus, a collateral impacts analysis of the comparative water use of IGCC and pulverized coal boilers would weigh in favor of disregarding IGCC because of its greater depletion of water resources. *See World Color Press*, 3 E.A.D. at 479 n. 15 ("[a]n exceptional demand on water resources is an example of an environmental impact associated with a technology that would constrain a source from using that technology in favor of a less stringent, less water-intensive technology").

Therefore, assuming *arguendo* that (1) comments to the Desert Rock PSD permit specifically raised these points, and (2) EPA's rejection of IGCC as a BACT was clear error, the petition still does not demonstrate that EPA's decision here was clearly erroneous. IGCC is simply not a practical means of controlling mercury emissions at the Desert Rock Project and

would consume more water resources, thereby undercutting the NGO Petitioners' collateral impacts analysis argument.

3. *Concerns Regarding the Implications of Public Health Services and Physical Infrastructure Are Beyond the Scope of EPA's Environmental Justice Analysis in the PSD Permitting Process and, in Any Event, No Such Concerns Are Present Here.*

Consideration of public health services and physical infrastructure is clearly beyond the scope of the environmental justice analysis required in issuing a PSD permit. According to the Board's prior decisions, it is reasonable for EPA to elect not to address non-air quality related impacts in its PSD permitting proceeding, particularly where the non-air quality related impacts (1) do not directly implicate the conditions of the PSD permit, or (2) significantly affect the BACT determination, and which (3) will in any event be addressed in a separate proceeding. *See Commonwealth Chesapeake*, 6 E.A.D. at 781.

Here, the NGO Petitioners have not identified any specific condition of the PSD permit that could be modified, added or deleted from the permit that would address their concerns regarding public health services or physical infrastructure. Similarly, Petitioners do not demonstrate that public health services or physical infrastructure considerations would impact the BACT determination. In any event, as EPA recognizes, these considerations are addressed in Chapters 3 and 4 of the DEIS. AR 120 at 161. Therefore, it was reasonable for EPA to elect not to address these non-air quality related impacts in its PSD permitting process.⁷¹

⁷¹ Indeed, the Chesapeake opinion provides even further support for EPA's response regarding water resources. Here, water resources do not directly implicate the conditions of Desert Rock Energy's PSD permit. As described above, consideration of water resources does not significantly affect the BACT determination for the Desert Rock Project. In any event, as recognized by EPA, the depletion of water resources has been addressed in Chapters 3 and 4 of the DEIS. Therefore, to the extent that EPA has discretion it was not clear error for EPA to elect not to address (in any more detail than it did) the impact of the Desert Rock Project on water resources.

Furthermore, as discussed in greater detail above, EPA found that there would be no adverse environmental impact on the identified environmental justice community. *See* AR 120 at 163-64. The NGO Petitioners' argument regarding "the implications of public health services and physical infrastructure" assume air-related health impacts that will allegedly be worsened by the unavailability of health care where EPA has already determined that there would be no air-related health impacts. NGO Petitioners' Supp. Br. at 269. It cannot be clearly erroneous for EPA to decline to address factors that will not aggravate air-related health impacts of emissions from the PSD-permitted source.

Similarly, the NGO Petitioners also claim that EPA improperly disregarded a "no-build" alternative to the proposed plant as part of its response to the environmental justice comments. Even assuming *arguendo* that the NGO Petitioners actually raised the "no-build" alternative with specificity in their comments to the PSD permit, EPA cannot be required to consider alternatives designed to address "disproportionately high and adverse human health or environmental effects" of issuing the PSD permit where EPA has already determined that issuing the PSD permit has no adverse human health or environmental effects. EPA is not required to address hypotheticals in its environmental justice analysis. *See, e.g., Kawaihae Cogeneration*, 7 E.A.D. at 117 (rejecting challenge of a permit for neglecting to consider "purely hypothetical catastrophic failure" of SCR ammonia system in its collateral environmental impact analysis).

NGO Petitioners argue that general "observations about the inadequacy of health care resources and physical infrastructure . . . effectively requested that EPA select a 'no build' alternative to the proposed plant." NGO Petitioners' Supp. Br. at 269. The NGO Petitioners contend that EPA's failure to consider the "no build" alternative is cause for remand. *Id.* However, this position ignores EPA's longstanding policy against "redefining the source" and

this Board's precedent holding that "the decision whether to consider alternatives that would 'redefine' the proposed source falls within the permit issuer's discretion." *See Prairie State*, slip op. at 43 (citing NSR Manual at B.13). EPA's policy against "redefining" the source is discussed in detail in Section II, but it is clear that not building the source is, to say the least, redefining it for the purposes of the PSD permitting process. "These limits on the permit issuer's obligation to consider alternatives are particularly important where, as would be the case with an evaluation of 'need' for additional electrical generation capacity, a rigorous and robust analysis would be time-consuming and burdensome for the permit issuer." *Id.* As the Board held in *Prairie State*:

We thus reject Petitioners' argument that a commenter can require a permit issuer to perform a rigorous analysis simply by raising the subject of "need" in the public comments. Instead, the permit issuer is only required to consider the analysis submitted during the public comment period, and it may engage in additional analysis as it sees fit, provided that the permit issuer's response to comments is sufficient to "demonstrate that all significant comments were considered.

Prairie State, slip op. at 43. Here, Petitioners cannot force EPA to engage in a detailed analysis contrary to its own policy against redefining the source in response to comments evincing a general preference that the Desert Rock Project not be built. Such a result would be contrary to this Board's precedent and would require a time-consuming and burdensome analysis of the "no build" alternative every time anyone opposed any project on any ground.⁷² That would be manifestly unreasonable, particularly where another agency (here, the BIA) has already been tasked with conducting the NEPA analysis. *Id.* at 44.

While NGO Petitioners have failed to show that Desert Rock Project will adversely affect human health or the environment in low-income or minority population areas, the administrative

⁷² The NGO Petitioners provide a generous reading of comments opposing construction of the Desert Rock Project due to concerns regarding mercury and water depletion as advocating a "no build" alternative that EPA should have analyzed. The point made in this section applies equally to the NGO Petitioner's characterization of such comments.

record demonstrates that not foregoing the Desert Rock Project in favor of some ephemeral, as yet unproven technology will deprive the Navajo Nation of essential revenue. The Desert Rock Project will employ over 200 permanent workers and up to a peak of 3,000 workers during the three to four years of construction. AR 77 at 29. Revenue from the Desert Rock Project is projected to reach \$50 million, or twenty-nine percent of the Navajo Nation's non-grant revenue. *Id.* at 31. The President of the Navajo Nation has written repeatedly to EPA emphasize that the Desert Rock Project is critical to the survival of the Navajo Nation:

To put the urgency of your timely issuance of a permit in perspective, please consider the following. As of early 2004, approximately 48% of the population on the Navajo reservation was unemployed, with roughly 43% of the total population living below the poverty level (compared with 18% below the poverty level in New Mexico). As of early 2004, per capita income on the Navajo Nation is \$7,412.00. (*Draft 2004-2005 Economic Development Strategy of Navajo Nation*). These grim statistics threaten the survival of the Navajo Nation. According to the Navajo Division of Community Development, the stagnation of economic development in Navajo country has forced Navajo families to move to far away cities to find their livelihoods. In 1996 the Division of Community Development projected that, without reducing outmigration, by 2012 more than half of the Navajo people may leave the Navajo reservation.

The only solution to this problem is responsible economic development such as the Desert Rock project. Desert Rock will generate approximately one-third of the Navajo Nation's currently declining annual operating budget for the Navajo Nation. This represents revenue from a variety of sources, including coal royalties, coal sales and other taxes, water use fees and land lease payments. In addition, Desert Rock will create between 2000 and 3000 construction jobs at peak development. Construction of the Desert Rock Energy Project will take approximately four (4) years. Upon commencement of operations, the Desert Rock Energy Project will employ 200+ individuals and the related coal mining operation will employ another 200+ individuals; there will also be a multiplier effect creating significant additional service and secondary jobs. Desert Rock offers the opportunity for significant Navajo Nation ownership (25% outright, up to an aggregate of 49% depending on extent of other equity investment).

Desert Rock is an "added value" project to the Navajo Nation. Navajo coal, water, land, and labor will stay on the Navajo Nation to produce greater revenues for the Navajo people. Desert Rock benefits will supplement, and in some cases, replace the revenues which are being lost from the shutdown of mining operations and impacts to other projects.

AR 29 at 2; *see also* AR 16. The Navajo Nation conceived of this project to harness its own resources to prevent the economic slide and subsequent dispersal of its people. "Navajo coal, water, land, and labor will stay on the Navajo Nation to produce greater revenues for the Navajo people." AR 29 at 2. It would be a perverse result for the federal government's concern for the welfare of the Navajo Nation to prevent the tribe from economic advancement of its own design where no adverse environmental effects have been shown.

For these reasons review of the PSD permit should be denied.

XII. EPA'S ISSUANCE OF A CONDITIONED PSD PERMIT DOES NOT VIOLATE THE AGENCY'S ENDANGERED SPECIES ACT OBLIGATIONS.

The purpose of § 7(a)(2) of the ESA is to ensure "that any action authorized, funded, or carried out by such [federal] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the . . . adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). The statute provides for "consultation with . . . the Secretary" to assist the federal agency proposing an action (known as the "action agency") in assessing whether its action complies with the substantive standards in ESA § 7(a)(2). *Id.* The U.S. Fish and Wildlife Service ("FWS"), within the Department of the Interior, has ESA authority over the non-marine species of interest in the Desert Rock Project. The National Marine Fisheries Service ("NMFS") has authority over certain ESA marine species. (FWS and NMFS are collectively referred to herein as the "Services").

The Services have adopted joint rules describing their ESA § 7 consultation role in 50 C.F.R. § 402. Those rules do not require consultation prior to every federal agency action, and the rules provide for different types of consultation. No project-specific consultation is required unless the federal action agency determines that its proposed action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If the action agency makes a "may affect"

determination, it may then engage in "informal consultation," which "includes all discussions, correspondence, etc. between the Service and the Federal agency." 50 C.F.R. § 402.13(a). As will be developed below, the extensive "correspondence" shows that the BIA, the lead agency on the Desert Rock Project, has been in informal ESA consultation with FWS since at least April 2007. *See* AR 80; AR 82; AR 92; AR 94.

If the action agency and FWS determine that the proposed action is "likely to adversely affect listed species or critical habitat," formal consultation should be initiated. 50 C.F.R. §§ 402.13(a), 402.14(b). At the outset, the initiation of formal consultation takes considerable time. The action agency must prepare a biological assessment (here, for the major construction project) and provide FWS with other information that FWS deems necessary before the formal consultation time clock starts. *See* 50 C.F.R. §§ 402.12, 402.14(c)-(f).

After the conclusion of formal consultation, FWS issues a biological opinion. If the action is found to satisfy substantively ESA § 7(a)(2), FWS provides a statement that allows the unintended or incidental take of some members of a listed species if the regulated party agrees to adopt particular "reasonable and prudent measures" to reduce the adverse effects of a "take." *See* 16 U.S.C. §§ 1536(b)(3), (4); 50 C.F.R. §§ 402.14(g), (h), (i). If FWS finds that the action as proposed would jeopardize the continued existence of an entire species, a variant of the action can still go forward if there is a "reasonable and prudent alternative" that avoids such jeopardy impacts. *See* 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h)(3).

Under ESA § 7(a)(2) and (b), action agencies like EPA make the final decision on whether an action complies with ESA § 7. Because EPA has the final decisionmaking authority, FWS's biological opinion is advisory, rather than legally binding. *See Bennett v. Spear*, 520 U.S.

154, 170-71 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-70 (1992); 50 C.F.R. § 402.16; 51 Fed. Reg. 19,926, 19,928 (June 3, 1986).

The ESA § 7 rules also encourage "consolidating" ESA "consultation" with the procedures required by other statutes, such as NEPA. 50 C.F.R. § 402.06. Similarly, another regulation provides that consultation can encompass "a number of similar individual actions within a given geographical area or a segment of a comprehensive plan." 50 C.F.R. § 402.14(b)(6). To achieve an efficient consultation process another rule provides that, "[w]hen a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency . . . The Director shall be notified of the designation in writing by the lead agency." 50 C.F.R. § 402.07.

All the Federal agencies involved in the siting and permitting of the Desert Rock Project, including the BIA, the Bureau of Land Management ("BLM"), and EPA, have agreed to coordinate the ESA § 7 consultation, with BIA, as the agency charged with administering lands held in trust for the Indian tribes, serving as the "lead agency" for that purpose. *See* AR 80 at 1; AR 92 at 1. As a result, consultation is underway, and Desert Rock has every confidence that it will yield a thoughtful, deliberate result based on the expertise of the agencies and other parties involved. This expectation is reinforced by the extensive discussions between BIA and FWS during the informal consultation process and by the fact that consultation has begun. *See* Letter from Field Supervisor, USFS, to Regional Director, Navajo Regional Office, BIA (Jan. 5, 2008) (the "Consultation Letter"); *see also* AR 80 (BIA's proposed Biological Assessment ("BA") and Request for Formal Consultation); AR 82 (FWS comments submitted to BIA on July 2, 2007); AR 92 (BIA's revised BA and Request for Formal Consultation); AR 94 (FWS request for further information).

After the initiation of an ESA § 7 consultation, ESA § 7(d) and the implementing rules prevent the federal agency and permit applicant from making "any 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 alternatives" under ESA § 7(b)(3), in the unlikely event that FWS finds the proposed project is likely to jeopardize the existence of an entire species or adversely modify designated critical habitat. 16 U.S.C. § 1536(d); 50 C.F.R § 402.09.

A. NGO Petitioners' Challenge to EPA's Role Relates Directly to the Sufficiency of the Consultation which Is Beyond EAB's Jurisdiction, and, Alternatively, EPA's Role as Cooperating Agency Is Reasonable.

NGO Petitioners have presented a veiled attempt to challenge the sufficiency of the § 7 consultation already under way when they argue that EPA has somehow violated its responsibility under the ESA by coordinating with BIA in its role as the lead agency, rather than taking on the lead agency role itself.⁷³ Not only does this argument fall beyond the jurisdictional scope of this Board, it is incorrect on the merits.

1. *The Substantive Decision to Name the BIA as the Lead Agency for ESA § 7 Consultation Is Not Within the Jurisdiction of this Board.*

As this Board has observed, the PSD regulations neither reference ESA procedures nor do they make the ESA decision-making process an inherent part of the PSD permit issuance process. *Indeck*, slip op. at 118. However, PSD permits are federal actions covered by the ESA, such that consultation pursuant to the ESA is, when required, essentially a condition precedent to

⁷³ Despite the *Indeck* decision's clear statement of the limits of this Board's jurisdiction, the NGO Petitioners engage in pages of argument regarding the merits of the "adverse effects" on determination under the ESA. Desert Rock Energy declines to waste any more of the Board's time on that issue, especially because adjudication of the issue would require reference to the administrative record in the ESA consultation, which is not complete and, in any event, is not available to the Board or any of the parties to this appeal. However, if the Board should reverse itself and take up this line of argument, Desert Rock Energy respectfully requests the opportunity to supplement its brief to address the record from the ESA § 7 consultation.

final agency action on the permit. *Id.* A failure to conduct a required ESA consultation calls into question the legality of the permit in its entirety and is thus reviewable by the Board. *Id.* On the other hand, the Board appropriately regards substantive decisions as separately operative and beyond this Board's jurisdiction, with challenges to such decisions proceeding as challenges under the APA. *Indeck*, slip op. at 118; *see also* New Mexico's Supp. Br. at 16.

Despite this jurisdictional bar, the NGO Petitioners argue that the EPA has "abused" the lead agency regulation by assenting to the designation of BIA as the lead agency for this § 7 consultation. *See* NGO Petitioners' Supp. Br. at 280. In assenting to the designation of BIA, the NGO Petitioners argue that EPA has indulged in "an incorrect reading of the lead agency provisions," which read:

When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. The Director shall be notified of the designation in writing by the lead agency.

50 C.F.R. § 402.07. The NGO Petitioners proceed then to interpret the phrase "particular action" to mean issuance of the PSD permit, and further proceed to apply the non-inclusive factors listed in the regulation to "dictate" the result that EPA is the proper agency to consult with FWS. NGO Petitioners' Supp. Br. at 280.

In making this argument, the NGO Petitioners do not limit their position to arguing that issuance of a PSD permit is a "Federal agency action" that requires EPA to comply with the ESA. Rather, the NGO Petitioners ask this Board to hold that BIA improperly included the issuance of the PSD permit within the coordinated ESA review. *Id.* Furthermore, the NGO Petitioners ask this Board to hold that even if the PSD permit is properly included within the

scope of the current consultation, BIA erred in assuming the "lead agency" role. *Id.* On a broader level, the NGO Petitioners are asking this Board to overturn the ESA § 7 consultation framework established by FWS in interpreting the meaning of its own regulations, whereby FWS has set the permissible scope of a "particular action" and committed the designation of a "lead agency" to the discretion of the consulting action agencies. NGO Petitioners' Supp. Br. at 280-81.

As other Petitioners have indicated, these requests are clearly beyond the Board's jurisdiction. *See* Center for Biological Diversity Pet. at 6 ("In the Center's view, legal challenges to an agency's failure to consult under section 7(a)(2) are properly brought in federal district court pursuant to the Act's citizen suit provision"). The NGO Petitioners are challenging not one but two substantive decisions made by FWS during the still-developing ESA § 7 consultation process. "Plainly, challenges to the actions of FWS belong in a different forum; the Board does not have jurisdiction to review [FWS's] decisions." *Indeck*, slip op. at 117. Such concerns should have been—indeed, still may be—pursued as a separate APA challenge to FWS's decision-making.

Furthermore, to the extent that Petitioners challenge not only the decisions of the FWS but also EPA's substantive decision to assent to BIA's designation as the lead agency, EPA's decision is appropriately regarded as separately operative from its compliance with the PSD permitting process, and Petitioners' challenge to the ESA decision should proceed as an APA challenge separate from this PSD permit appeal. *Id.*

The Board should reject this attempt to shoehorn Petitioners' challenge to substantive ESA decisions into a challenge of the PSD permit because there is a different, more appropriate venue for this particular argument when it is ripe for review. In limited circumstances, the Board

has found it appropriate to review substantive decisions deriving from other statutory regimes, but such review has only been exercised when the applicable legal framework explicitly incorporates the requirements of the other statute by reference, or when no other path for review is available. *Indeck*, slip op. at 118 n.162.

Here, the PSD permitting regulations do not incorporate the requirements of the ESA statute. Furthermore, the APA presents a clear path to review both the designation of the lead agency and the scope of the ESA action. In *National Wilderness Institute v. U.S. Army Corps of Engineers* ("NWI"), for example, the District Court for the District of Columbia entertained a challenge under the APA to EPA's designation as "lead agency" over the Army Corps following the issuance of a National Permit Discharge Elimination System ("NPDES") permit for discharges from the Washington Aqueduct. 2005 WL 691775 (D.D.C. Mar. 23, 2005); *see also Oregon Natural Res. Council v. Allen*, 476 F.3d 1031 (9th Cir. 2007) (challenge to scope of ESA § 7 consultation under APA). Given that the APA provides such means to address Petitioners' grievances the NGO Petitioners should be required to follow those procedures.

2. *Alternatively, EPA's Role In The ESA § 7 Consultation Is Reasonable.*

Even if the Board elects to examine the sufficiency of the ESA § 7 consultation, the substantive decisions regarding EPA's role were reasonable and should be upheld by the Board.

a. The Designation of the BIA as the Lead Agency is Well Within the Discretion of the Federal Agencies Involved.

The designation of a lead agency is explicitly contemplated by the ESA regulations. *See* 50 C.F.R. § 402.07 ("Designation of a Lead Agency"). Within the Department of Interior, FWS has been charged with working with the Federal agencies in the consultation process. 50 C.F.R. § 402.01(b). To that end, FWS compiled the Endangered Species Consultation Handbook –

Procedures For Conducting Consultation and Conference under Section 7 of the Endangered Species Act (FWS and NMFS 1998), <http://www.fws.gov/endangered/consultations/s7hndbk/S7hndbk.htm> ("ESA § 7 Consultation Handbook"). This handbook provides in detail the FWS's interpretation of the ESA and regulations promulgated thereto. *See generally* ESA § 7 Consultation Handbook, Forward. The FWS's ESA § 7 Consultation Handbook envisions a role where one agency leads the coordinated consultation and the other agencies provide their expertise on an as-needed basis: "[a]lthough one agency has the lead, the other still has to provide data for effects analyses and development of reasonable and prudent alternatives and measures if its activities may affect listed species or critical habitat." ESA § 7 Consultation Handbook, § 2.2(A) at 2-6.

The ESA regulations provide a non-inclusive list of factors that the coordinating agencies may use to determine the appropriate lead agency, including "the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action." 50 C.F.R. § 402.07. The FWS has summarized the current practice as "based on which agency has the principal responsibility for the project." ESA § 7 Consultation Handbook, at 2-6 2.2(A).

The project here is the construction and maintenance of a power plant on land held in trust for the Navajo Nation. BIA is the federal agency with the primary responsibility for administering trust land and, as such, it must ensure that the ESA and NEPA requirements are met before it approves this use of the land. BIA has thus been designated as the lead agency for preparation of the Desert Rock Project's environmental impact statement ("EIS"), which considers all the federal approvals for the project in a comprehensive manner. AR 170. As part of its role as lead agency for the EIS review, BIA will account for all impacts of the proposed

project, including impacts associated with EPA's PSD permitting action. The ESA regulations provide that "[c]onsultation, conference and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as [NEPA]" 50 C.F.R. § 402.06. For EPA to consult separately on the PSD permit when there is a project-level, consolidated review currently underway would be an incredible duplication of effort. It is reasonable to conclude that BIA can serve in the same lead "agency" role in a consolidated ESA § 7 consultation. *See NWI*, 2005 WL 691775 at *13 (finding it reasonable to designate a lead agency where "it would be unnecessary and inefficient for both the Corps and the EPA to consult on the matter").

More fundamentally, the "lead agency" decision is for the action agencies to determine amongst themselves, with no subsequent review by FWS or the courts. The Services' rule only identifies a non-exclusive set of factors the action agencies can "include" in "determining the appropriate lead agency." 50 C.F.R. § 402.07. Because the list of factors does not purport to be exclusive, and the weight attached to any factor is not specified, there are no reviewable standards to follow in determining the lead agency. *See* 5 U.S.C. § 701 (no Administrative Procedure Act review where "agency action is committed to agency discretion by law"); *Ness Inv. Corp. v. U.S. Dep't of Agric.*, 512 F.2d 706, 712-16 (9th Cir. 1975).

Further, 50 C.F.R. § 402.07 concludes with a sentence that the FWS "Director shall be notified of the designation in writing by the lead agency." This requirement to provide mere notification to the FWS Director implies that FWS has no authority to override the action agency's consensual judgment. Given that FWS lacks the authority to review the designation of a lead agency, neither the Board nor the courts should have the right to override such a decision.

The NEPA rule, which is analogous to the ESA, encourages the designation of a single "lead agency" on a single comprehensive EIS, instead of having each federal agency prepare a separate EIS on its portion of an overall action that has "functional interdependence." 40 C.F.R. § 1501.5. Like the ESA rule, the NEPA rule is structured so that the involved federal agencies themselves can determine the appropriate "lead agency." *Id.* One appellate court has correctly found that this common structure means that lead agency decisions are not judicially reviewable.

We conclude that the designation of a lead agency or joint lead agencies is a matter committed to agency discretion, and we find nothing in NEPA or the regulations suggesting that the courts may overrule the determination by the agencies that are involved that one or more of them will be lead agency or agencies.

Sierra Club v. U.S. Army Corps of Engr's, 701 F.2d 1011, 1041 (2d Cir. 1983).

BIA adhered to the regulations and formally notified FWS in writing that it is the designated lead federal agency for the purposes of consultation regarding the impact of the Desert Rock Project. *See* AR 80 at 1; AR 92 at 1. FWS accepted BIA's designation as the lead agency without question. *See* AR 82; AR 94. Thus, BIA was properly designated as the lead agency for the purposes of consultation with FWS, and EPA is not required to engage in consultation separately. EPA has been monitoring BIA's ESA compliance process and lending its expertise where appropriate. *See, e.g.*, AR 120 at 170, 173. This process is sufficient to meet the requirements of the ESA. *See NWI*, 2005 WL 601775 at *13 (Army Corps' notification to NMFS and NMFS's acceptance of Army Corps' lead agency status released EPA from ESA consultation requirement).

b. EPA Appropriately Defined the "Particular Action" Being Evaluated as the Construction and Operation of the Desert Rock Project, Not Merely the Issuance of the PSD Permit.

The NGO Petitioners incorrectly limit the permissible scope of the ESA § 7 consultation to EPA's issuance of the PSD permit. It is undisputed, as EPA recognized in its comments, that "the issuance of the PSD permit is a single federal action and that EPA is responsible for that federal action." AR 120 at 169. As EPA noted, however, BIA was designated to act as the lead agency for § 7 compliance in relation to the whole project – meaning the entire Desert Rock Project. *Id.*

A review of 50 C.F.R. §§ 402.06 and 402.07 in combination shows why the NGO Petitioners' view that "particular action" refers only to EPA's issuance of a PSD permit is unpersuasive. Sections 402.06 and 402.07 should be interpreted harmoniously, especially because they were complementary subsections (§ 402.10(c) and (d)) in the proposed rules. 51 Fed. Reg. 19,938-39 (June 3, 1986).

Section 402.06(a) provides that "[c]onsultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required under other statutes, such as the National Environmental Policy Act." Thus, § 402.06(a) allows a consolidated ESA consultation of the same breadth as is being considered in a NEPA document. The Draft EIS on the Desert Rock Project covers the authorizing actions by BIA, BLM, the Army Corps, and EPA. AR 22 at 1. Accordingly, 50 C.F.R. § 402.06 authorizes a consolidated ESA consultation of the same breadth, which includes EPA's CAA action, and which retains BIA as the lead agency for both the NEPA and ESA analyses.

FWS's regulatory intent was to "encourage" such consolidated ESA § 7 consultations and to leave it to the action agencies to determine the "most efficient" mechanisms:

The Service encourages Federal agencies to coordinate those responsibilities, but believes it is preferable to allow Federal agencies to do so in a manner that best conforms to their particular actions and which they believe is most efficient Several commenters applauded these paragraphs because the coordination of environmental reviews would reduce duplication of paperwork and save time [Section 402.06(a)] also express[es] the intent of the Service to avoid a fragmented analysis of environmental concerns through the Service's direct efforts to provide coordinated review.

51 Fed. Reg. 19,938 (June 3, 1986). Accordingly, §§ 402.06 and 402.07 are best interpreted as not requiring "fragmented analysis" of the ESA effects of part of a project – here, an ESA § 7 consultation on only the CAA impacts within EPA's purview. Rather, the regulations encourage a comprehensive ESA consultation and deferring to the action agencies' judgment on when doing so would be "most efficient."

The § 402.07 language on a "particular action [that] involves more than one Federal agency" can be comfortably read to refer to the entire federal action of approving the Desert Rock Project, not just EPA's PSD permit. Such a reading fulfills § 402.06's purpose of encouraging a consolidated ESA § 7 consultation on different federal agency actions. Moreover, that reading avoids tension or conflicts with the §§ 402.02 and 402.14 provisions requiring consideration of "interrelated" activities in the same consultation and the *Conner v. Burford* requirement for a "comprehensive biological opinion." The § 402.07 reference to when a "particular action involves more than one agency" should not be read to prohibit the broad ESA § 7 consultation that the other ESA § 7 rules encourage or require.

It is evident from the ESA § 7 Consultation Handbook that FWS considers and treats the term "particular action" in 50 C.F.R. § 402.07 to include action at the project-level, not simply at the permit-level. The ESA § 7 Consultation Handbook states:

When two or more Federal agencies are involved in an activity affecting listed species or critical habitat, one agency is designated as the lead (50 C.F.R. § 402.07), often based on which agency has the principle responsibility for the

project (e.g., a dam is maintained to provide a pool for generating electricity—a Federal Energy Regulatory Commission (FERC) responsibility, but the capacity behind the dam also provides flood storage, a Corps responsibility. In this case, FERC has lead for the consultation as the dam would probably not be there except for the power generation need).

ESA § 7 Consultation Handbook, 2.2(A) at 2-6. Construction and maintenance of a dam is obviously a project in which many federal agencies would be involved, as is the siting, construction and operation of a power plant on lands held in trust for the Navajo Nation. The interrelated portions of the Desert Rock Project require authorizations from different federal agencies. The Desert Rock Project includes: (1) construction and operation of a coal-fired electrical power plant, which requires, among other authorizations, approval of land leases and rights-of-way by BIA and issuance of CAA and Clean Water Act permits by EPA; (2) construction and operation of a water well field and water uses, which require approvals by at least the Army Corps; (3) expansion of surface coal mining operations at the Navajo Mine to provide the fuel for the power plant, which requires permits from the Department of Interior's Office of Surface Mining and BLM; and (4) transmission line and other rights-of-way, which require authorizations from BIA. AR 92 at 1-8. Yet the NGO Petitioners would require every single federal agency involved to prepare its own Biological Assessment, to consult separately with FWS, each no doubt moving on its own timeline, generating multiple Biological Opinions with no mechanism to avoid the possibility of conflicting conclusions or proposed alternatives.

FWS certainly thinks BIA's definition of the proposed action is consistent with its regulations. In its correspondence with FWS and its final BA for the Desert Rock Project, BIA described the proposed action as "the construction and operation of a 1,500 MW coal-fired power plant" including "the power plant, access roads, electrical transmission lines and a water well field," as well as "necessary coal mining operations." See AR 80 at 1; AR 92 at 1. FWS

accepted the BIA's definition of the proposed action without question, and the BIA and FWS are now in formal consultation. *See* AR 82; AR 94; Consultation Letter at 1.

BIA's definition of the proposed action here is also consistent with the way in which such an action would be (indeed, is, in this case) defined in the context of similar environmental consultations. NEPA, for example, mandates designation of a lead agency if more than one federal agency "is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity." 40 C.F.R. § 1501.5(a)(2). In fact, for the Desert Rock Project, BIA was similarly designated as the lead agency for NEPA purposes. *See* AR 22 (70 Fed. Reg. 12,005, (Mar. 10, 2005) (BIA's Amendments to Notice of Intent to Prepare an EIS for Desert Rock Project) (citing 69 Fed Reg. 65,215 (Nov. 10, 2004) (Notice of Intent to Prepare an EIS for Desert Rock Project))).

After all, the primary purpose of § 402.07 was to state that the action agencies can choose a "lead agency" for ESA § 7 consultation purposes, just as the agencies can under NEPA. *Compare* 40 C.F.R. § 1501.5 *with* 50 C.F.R. § 402.07. As discussed above, the "lead agency" concept includes situations where different federal agencies have jurisdiction to issue different permits for portions of an interrelated project. For example, consolidated ESA § 7 consultation took place on a "combined highway and flood control project" which involved the Army Corps as the "federal sponsor of the flood control channel and [the agency] providing funding for it," and the "Federal Highway Administration . . . supervising and funding the highway construction." *Sierra Club v. Marsh*, 816 F.2d 1376, 1378 (9th Cir. 1987). More recently, the U.S. Court of Appeals for the Ninth Circuit stated that "section 7 covers development projects 'interrelated or interdependent with' the discharge permitted by the permit" – and that logic requires an ESA § 7 consultation on the entire Desert Rock Project, not just impacts from air

emissions to protected species and their habitats. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 973 (9th Cir. 2005), *rev'd in part on other grounds sub nom. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) ("*NAHB*"); *see also NWI*, 2005 WL 691775 at *13 (approving a consolidated consultation on permits being issued by EPA and the Army Corps). Thus, the concept of a single ESA § 7 consultation for many federal permits needed for the larger project, with a single "lead agency," is well entrenched in case law. Moreover, because 50 C.F.R. §§ 402.06 and 402.07 were intended to allow a single "lead agency" to take the lead on ESA § 7 consultation in a multiple-permits-from-multiple-agencies situation, the "particular action" language should not be read to frustrate that objective.

Arguments by the NGO Petitioners and the Center for Biological Diversity suggest that EPA had to engage in a piecemeal ESA consultation on its "particular action" (50 C.F.R. § 402.07) – issuing a PSD permit that is one of many federal authorizations needed for the Desert Rock Project. NGO Petitioners' Supp. Br. at 280-81; Center for Biological Diversity Pet. at 21-25. Petitioners' view is contrary to considerable ESA case law and the regulatory thrust that interrelated actions can or must be analyzed together in a consolidated ESA § 7 consultation that results in FWS's comprehensive biological opinion. Given that law and regulatory thrust, either (1) "particular action" permissibly refers to the entire Desert Rock Project, not to EPA's issuance of a PSD permit in isolation; or (2) the meaning of "particular action" is irrelevant, because the agencies must or can engage in ESA § 7 consultation on the larger interrelated Desert Rock Project action.

- i. The ESA Requires Consideration of the Effects of Interrelated or Interdependent Actions.

Regardless of which federal agency action is deemed the triggering action for ESA § 7 consultation, the ESA § 7 rules require that the federal agencies provide information on and that

consultation be conducted on the "effects of the action." 50 C.F.R. §§ 402.12(a), 402.14(c), 402.14(g)(3); *see* 16 U.S.C. § 1536(a)(2) and (b). The ESA § 7 rules define the "effects of the action" to include not only the "direct and indirect effects of a [particular federal] action," but also the "effects of other activities that are interrelated or interdependent with that action." 50 C.F.R. § 402.02. The same rule goes on to state that "[i]nterrelated actions are those that are part of the larger action and depend on the larger action for their justification." *Id.* The PSD permit, land leases approved by BIA to allow construction of the power plant and transmission lines to connect to the grid, and federal permits regarding the coal mine and water needed for the power plant obviously are "interrelated or interdependent" federal actions. Accordingly, the ESA § 7 rules direct or allow consultation on the "larger action" – the entire Desert Rock Project.

A "'but for' test should be used to assess whether an activity is interrelated with or interdependent to the proposed action." 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (preamble explaining final ESA § 7 rules); *see* ESA § 7 Consultation Handbook at 4-26; *Marsh*, 816 F.2d at 1387. But for BIA's approval of land leases and several other federal agency actions, the Desert Rock Project will not be built, and EPA's issuance of a PSD permit will not result in activities that might affect listed species. Consequently, the regulatory requirement to consider all interrelated actions in a single ESA § 7 consultation means that EPA and other federal agencies are acting properly in seeking a consolidated consultation, and that Petitioners' demand for piecemeal consultation on one of many related permits is discouraged by applicable law.

Moreover, under some case law, FWS must issue a "comprehensive biological opinion." *See, e.g., Conner*, 848 F.2d at 1445, 1452-56. An ESA § 7 consultation that just looks at EPA's PSD permitting role with respect to air emissions impacts, and that does not address the potential

water and land-based effects on listed species that are under the purview of other federal agencies and other permits, would not produce a comprehensive biological opinion.

The ESA § 7 Consultation Handbook removes any regulatory ambiguity in stating that:

When one or more Federal actions are determined . . . to be interdependent or interrelated to the proposed action, or are indirect effects of the proposed action, they are combined in the consultation and a lead agency is determined for the overall consultation.

ESA § 7 Consultation Handbook at 4-27. Thus, regardless of whether EPA's PSD permitting is a "particular action" under 50 C.F.R. § 402.07, the result remains under the ESA § 7 rules that all federal agency actions related to the Desert Rock Project are "combined in the consultation."⁷⁴

ii. Consolidation of Interrelated Activities In ESA Consultation May Be Analogized to Coordinated Environmental Review Under NEPA.

A single ESA consultation on a consolidated set of federal authorizations needed for an interrelated action accords with the encouraged practice under NEPA. *See* 40 C.F.R. §§ 1501.5, 1502.4. The U.S. Supreme Court has found that courts must grant a wide berth to agency decisions on the scope of a NEPA document.

The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies.

⁷⁴ That is, even assuming *arguendo* that "particular action" must refer solely to EPA's issuance of a PSD permit – an assumption we show is mistaken above – the consultation process here still complies with the ESA. The action agencies must provide FWS with information on, and FWS must consider, the full "effects of the action" including "interrelated and interdependent" activities – that is, the whole Desert Rock Project. 50 C.F.R. §§ 402.02, 402.12(a), 402.14(c), (g)-(h). Thus, regardless of the meaning of "particular action," the agencies are complying with the ESA rules by preparing a coordinated biological assessment that looks at the effects on listed species of all interrelated actions, and by consulting with FWS on the larger action.

Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976). The same principles support the Board's deference to the responsible federal agencies' collective judgment on the meaning of "particular action" and the scope of the ESA § 7 consultation.

In sum, the ESA § 7 rules, other agency guidance, and case law allow or require that the ESA § 7 consultation take place on the larger Desert Rock Project action. The piecemeal, fragmented approach to consultation that is advocated by the NGO Petitioners and the Center for Biological Diversity is discouraged by law.

Consequently, the ESA legal issue is not whether EPA procedurally violated ESA § 7 by issuing a conditional PSD permit prior to the completion of an ESA consultation that concerns solely the effects on listed species of the PSD permit. Rather, the central ESA legal issue for the Board's consideration in these appeals is whether or not (1) in a situation where multiple federal permits are required from different federal agencies before the larger Desert Rock Project action can go forward, and where BIA is the lead agency for a consolidated ESA § 7 consultation on the interrelated Desert Rock Project actions; and (2) where BIA has been in informal consultation with FWS since 2007 and in formal consultation since January 5, 2009; and (3) where the various federal permits are being considered in different timeframes, but CAA § 165(c) compels a one-year timeframe for issuance of a PSD permit and a consent decree required EPA's action on that permit by July 31, 2008; EPA violated the ESA § 7(d) constraint against "irreversible or irretrievable" resource commitments by issuing a PSD permit (on the time deadline in the consent decree) that contains conditions barring construction without further notification from EPA and allowing EPA to amend the permit if needed after the conclusion of the comprehensive consultation. We show in the next section that EPA's action was allowed by, and did not violate, ESA § 7(d).

B. ESA § 7(D) was not Violated when EPA Issued a Conditioned PSD Permit Before the Completion of a Desert Rock Project Project-Wide ESA Consultation Because the Permit does not Authorize Construction that Might Affect Listed Species, and EPA Retained the Authority to Amend the Permit Based on the Results of ESA Consultation.

Petitioners argue that the issuance of the PSD permit represents an irreversible or irretrievable commitment of resources prior to the conclusion of consultation and so violates § 7(d). This is not so because when an appeal is filed, as is the case here, it postpones final agency action on the permit. *Indeck*, slip op. at 111 n.150. Accordingly, a consultation conducted during the pendency of an appeal can meet the legal requirements of ESA § 7. *Id.* BIA is now in formal consultation with FWS. *See* Consultation Letter at 1. The formal consultation period is expected to be completed in no more than 150 days because the 90-day deadline is extendable to 150 days without applicant approval. Consultation Letter at 2; 50 C.F.R. § 402.14(e). After concluding the formal consultation, FWS has an additional 45 days to provide the Biological Opinion, which will state the "opinion of [FWS] as to whether or not the Federal Action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitats." 50 C.F.R. §§ 402.02, 402.14(e).

ESA § 7(a)(2) allows federal actions to proceed unless a proposed action is "likely to jeopardize the continued existence" of a listed species. 16 U.S.C. § 1536(a)(2). ESA § 7(b)(3) still allows some form of the action to proceed if the agency adopts a "reasonable and prudent alternative" that "would not violate subsection (a)(2)." 16 U.S.C. § 1536(b)(3). However, § 7(d) of the ESA prohibits a federal agency from making "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 consultation with FWS is initiated. 16 U.S.C. § 1536(d). The purpose of this restriction is to ensure that the status

quo is maintained throughout the ESA § 7 consultation process. *Lane County Audubon Soc. v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992).

These precise protections have been incorporated into the conditioned PSD permit here:

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 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.

AR 122 at 4 (Permit Condition II.A). Condition II.A prevents any commitment of resources by EPA or the applicant. Construction is barred absolutely until the ESA § 7 consultation is complete. EPA retains the power to reopen or modify the permit, and even to compel the applicant to refile its application. EPA possesses total authority over reshaping the PSD permit in any manner necessary to reflect any reasonable and prudent alternative measures developed during the consultation process, thereby satisfying § 7(d). *See* 16 U.S.C. § 1536(d). If FWS finds a negative impact and specifies ameliorative conditions, EPA is not prevented from making changes to the PSD permit based on FWS's input. *See Indeck*, slip op. at 113.

EPA's issuance of the PSD permit here is consistent with the law, and there is no cause for this Board to take up the permit on review. The NGO Petitioners' position that the issuance of a PSD permit with such conditions attached still constitutes an "irretrievable and irreversible commitment of resources" foreclosing reasonable alternatives recommended at the end of consultation is at odds with the statute, with the case law interpreting the statute, and with the practical facts of this case.

1. *The Sequence of the ESA § 7 Consultation Does Not Affect the Validity of the PSD Permit Here Because There is No Final Agency Action*

This Board held in *Indeck* that appeal of the PSD permit decision has the effect of deferring final agency action on the permit. *Indeck*, slip op. at 112-13. Up to the time of final agency action, EPA retains the legal capacity to adjust the terms of the permit. *Id.* at 113. In other words, there is not yet an irretrievable commitment to the permit by EPA Region 9 within the meaning of ESA § 7(d) where an appeal is pending before this Board. *Id.* In *Indeck*, the Board concluded that "waiting to consult as late as during the pendency of a PSD appeal can meet minimum legal requirements, although it is prudentially inadvisable." *Indeck*, slip op. at 112-13 n.154.

There has been no final agency action on the PSD permit here, and so even leaving aside Condition II.A, discussed in greater detail below, there has been no irretrievable commitment of resources by EPA Region 9.

The State of New Mexico suggests that the Board in *Indeck* engaged in *post hoc* rationalization, that the Board would not have so held without "the benefit of hindsight" and was comforted by the knowledge that FWS had already found no adverse affect. New Mexico's Supp. Br. at 11. But the State of New Mexico's explanation of *Indeck* gives short shrift not only to the Board's prior decision but also to the PSD regulations: the Board's acknowledgement in *Indeck* that the PSD permit was not "final agency action" was a legal conclusion that was—and still is—compelled by the regulations governing the PSD permitting process. *See* 40 C.F.R. § 124.19(f)(1). The substance related to the participants' roles and sufficiency of the ESA consultation cannot affect that finding.

EAB recognizes in *Indeck* that "an ESA compliance strategy that acknowledges ESA only in the event of an appeal is not a compliance strategy at all, in that [such an approach]

would tolerate an ESA violation whenever an appeal is not taken." *Indeck*, slip op. 114. The ESA's compliance strategy was of particular concern in *Indeck*, where EPA Region 5's position was that no ESA § 7 consultation was even required. *Id.* at 99. If the *Indeck* petitioners had not appealed EPA Region 5's decision, the ESA § 7 consultation would never have occurred. *Id.* at 114. This lack of consultation is the danger that the Board was addressing: if EPA's policy was not to engage in consultation until issuance of the PSD permit was appealed, then its ESA compliance strategy would acknowledge the ESA only in the event of an appeal, and would, per the Board's decision in *Indeck*, not be a compliance strategy at all. *Id.*

Here, however, the Administrative Record demonstrates that it was always EPA's intent to complete the ESA § 7 consultation, and that EPA intended to do so in advance of issuing the PSD permit, consistent with the best practice indicated by the Board in the *Indeck* decision. As NGO Petitioners point out in their Petition, EPA found that it was bound to consult with FWS under ESA § 7 as early as 2006. *See* NGO Petitioners' Supp. Br. at 279; AR 47. In a 2006 letter, EPA stated that it would not proceed with the permit issuance until the consultation was concluded, FWS's Biological Opinion was reviewed and EPA determined that issuance of the PSD permit would be consistent with the ESA. AR 47.

NGO Petitioners chose to characterize EPA's 2006 statements as "admissions" of the relevant legal requirements, which is an uncharitable and inaccurate characterization. NGO Petitioners' Supp. Br. at 279. EPA's 2006 letter should be read as evidence of EPA's good faith intent to implement the best practices prescribed by the Board in the *Indeck* opinion. *See Indeck*, slip op. at 112, 112 n. 153 (advantages to early engagement include having more flexibility to make and implement modifications, using ESA-generated materials as part of the record supporting the permit decision, and recommending additional efficiencies for the applicant).

However, what is a best practice, or most advantageous to the applicant and EPA, or even what is the "ordinary course," is not, in this case, what is legally required. *Indeck*, slip op. at 110, 112. In *Indeck*, the Board held that the PSD and ESA processes are separate and need not necessarily be performed simultaneously or in a wholly integrated fashion. *Id.* at 110. Rather, coordination of the PSD and ESA reviews "is all that is required of the PSD permitting authority, and only to the extent feasible and reasonable." *Id.* at 110 n.149.⁷⁵

If there has been any procedural violation of the ESA, *Indeck* suggests the relief should instead be a stay of the EAB appeal (so there will be no final agency action before the completion of ESA consultation), not vacating or setting aside the permit. *See Indeck*, slip op. at 20.⁷⁶ This conclusion accords with the injunction "halt[ing] all [future] construction," issued in *Marsh*, 816 F.2d at 1389. There, the Ninth Circuit did not change the current status quo by unwinding activities that had already occurred. *Id.*; *see also* Consultation Letter at 1.⁷⁷

⁷⁵ Despite the State of New Mexico's contention, an "after-the-fact consultation" does not give rise to procedural defects. New Mexico argues that the ESA § 7 consultation will necessarily impact any further EPA action on the PSD permit. New Mexico's Supp. Br. at 16-17. The Board in *Indeck* made perfectly clear that "to the extent that ESA-related documentation is relied upon by a permitting authority" "in making PSD determinations," "such documentation must be included in the administrative record for the permit." *Indeck*, slip op. at 116 n.159. The State of New Mexico also argues that Petitioners will be precluded from applying the ESA-related determinations to other aspects of the permit. State of New Mexico Supp. Br. at 17. Yet, in *Indeck*, this Board found "nothing in the CAA, the ESA, or the relevant implementing regulations that supports Petitioners' contention that they must, as part of their participation in the PSD permit decision, be afforded public process concerning the ESA consultation." *Indeck*, slip op. at 116.

⁷⁶ *Indeck*, slip op. at 20 (citing 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 (May 20, 2004)).

⁷⁷ Likewise, in *Natural Res. Def. Council v. Houston*, the Ninth Circuit only found that the district court did engage in an "abuse of discretion" in setting aside the contracts (here, CAA permit), and noted that the "court had the discretion to preserve the contracts if the procedural flaw could have been rectified in another way." 146 F.3d 1118, 1129 (9th Cir. 1998).

According to FWS, formal consultation should be concluded by April 20, 2009. *See*

Consultation Letter at 2; 50 C.F.R. §§ 402.02, 402.14(e).

2. *EPA's Issuance of a Conditioned PSD Permit Was Subject Only to ESA § 7(d) Constraints Because the Agencies Had Initiated Informal Consultation by the Time of EPA's Action. In Any Event, ESA § 7(a) and 7(d) Constraints Should Be Equivalent.*

NGO Petitioners argue that EPA "violated [ESA] § 7(a) by issuing the PSD permit prior to initiation of consultation." NGO Petitioners' Supp. Br. at 284-85. Notably, the other Petitioners do not join in this mistaken argument.

ESA § 7(d) applies "[a]fter initiation of consultation." 16 U.S.C. § 1536(d). As introduced above, the ESA § 7 rules provide for two relevant types of consultation: (1) informal consultation under 50 C.F.R. § 402.13; and (2) formal consultation under § 402.14. "Informal consultation includes all discussions, correspondence, etc., between the Service and the Federal agency" and is "designed to assist the Federal agency" on compliance with "formal consultation" requirements. 50 C.F.R. § 402.13(a). BIA's first "correspondence" with FWS occurred at least when BIA transmitted its initial ESA § 7(c) biological assessment on Desert Rock Project on April 30, 2007. AR 80. Since that time, there have been numerous exchanges of correspondence between BIA and FWS, where BIA has attempted to provide the information FWS would like before it prepares a biological opinion. *See* AR 82; AR 92; AR 94.

Thus, BIA and FWS have been in the correspondence and discussions that constitute informal ESA § 7 consultation on the entire Desert Rock Project since at least April 30, 2007. The Services' guidance is that ESA § 7(d) constraints: (1) begin when a lead federal agency

Thus, even that Ninth Circuit opinion confirms the Board has the discretion to not vacate the conditioned ESA permit.

determines that the related actions "may affect" listed species and (2) include the informal consultation period.

This section 7(d) restriction remains in effect from the determination of "may affect" until the action agency advises the Services which reasonable and prudent alternative will be implemented, if the biological opinion finds jeopardy or adverse modification. . . . [Then, Figure 2-1 on the "Application of section 7(d): irreversible or irretrievable commitment of resources" states] Agency requests consultation, either formal or informal. "May affect" situation exists. . .section 7(d) prohibition begins.

ESA § 7 Consultation Handbook at 2-7, 2-9 (emphasis added). "Section 7(d) was triggered by informal consultation." *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 229 F. Supp. 2d 993, 1002 (N.D. Cal. 2002).

Consequently, ESA § 7(d) became the operative constraint on EPA's PSD permitting action by at least early 2007, when BIA made a "may affect" determination and began the correspondence and discussion with FWS that constitutes informal consultation. Accordingly, when EPA issued the conditional PSD permit on July 31, 2008, informal ESA consultation had been initiated and in process for over a year. As a result, the pertinent constraint on EPA's PSD permit, at the time it was issued, was ESA § 7(d), not § 7(a).

Further, the administrative record shows that Desert Rock Energy sought to enforce the time deadline under CAA § 165(c), and that EPA granted the conditioned PSD permit, only after informal consultation had dragged on for considerable time. AR 96; AR 98. EPA did not grant the PSD permit prematurely, but rather complied with both CAA § 165(c) and ESA § 7.

Even assuming *arguendo* that a relevant ESA § 7 consultation had not been initiated by the time the conditional PSD permit was granted, ESA § 7(d) still provides the relevant standards. It does so for two reasons.

First, some courts have noted that ESA § 7(d) applies only after consultation has been initiated – before then, ESA § 7(a)(2) creates the relevant constraint. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994). Since, however, ESA § 7(a)(2) provides no particular constraint, the content of the constraint should be borrowed from ESA § 7(d). That is, since Congress in ESA § 7(d) allowed certain preliminary activities to proceed that are not irreversible and irretrievable resource commitments, it makes no sense to require a more stringent standard to apply before the initiation of ESA consultation. Thus, as a matter of logic, ESA § 7(a)(2) and 7(d) constraints should be equivalent.

The ESA § 7 constraints seem to be equivalent under a Ninth Circuit statement that "section 7(d) clarifies the requirements of section 7(a)(2), ensuring that the status quo will be maintained during the consultation process." *Conner*, 848 F.2d at 1455 n.34. The status quo now is that a PSD permit has been issued, but it does not authorize development. That status quo will be maintained, even without an EAB order, until the completion of ESA § 7 consultation under the terms of Permit Condition II.A.

Second, as BIA and FWS are now in formal consultation, the facts by the time of the Board's decision will very likely be that BIA, on behalf of EPA and other federal agencies, will have concluded formal consultation with FWS on Desert Rock Project.⁷⁸

The facts here do not, therefore, call for a set aside and remand of the PSD permit. If ESA § 7(d) would allow EPA to issue the same conditioned PSD permit at the time of the Board's decision, then any "early" issuance of the permit is not prejudicial error, but harmless

⁷⁸ Under the ESA § 7 rules, formal consultation should be completed within 150 days unless the permit applicant consents to a time extension, and FWS should deliver its biological opinion within 45 days thereafter. 50 C.F.R. § 402.14(e). This 190-day period is often exceeded in practice.

error. The Administrative Procedure Act provides that agency actions should not be disturbed for such harmless error. 5 U.S.C. § 706. An alleged error is harmless if it did not prejudice the outcome or if the matter is clarified by the time it reaches the reviewing body. *See, e.g., NAHB*, 127 S. Ct. at 2530; *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006); *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004). The Board's precedent in *Indeck* confirms that what matters is the status of ESA § 7 compliance at the time of the Board's order and its role as the final agency action for EPA.

3. *The Services' Guidance on ESA § 7 Consultation Confirms that ESA § 7(d) Does Not Bar the Issuance of Such a Conditioned Permit Prior to the Completion of Project-Wide ESA Consultation.*

While the law does not require that the ESA § 7 consultation precede issuance of the PSD permit, as a practical matter, to avoid running afoul of ESA § 7(d), "[i]n 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." *Indeck*, slip op. at 111 (emphasis added).

FWS has interpreted ESA § 7(d) and found that not all irreversible and irretrievable commitments of resources are prohibited. ESA § 7 Consultation Handbook at 2-7. According to FWS, the formulation or implementation of any reasonable and prudent alternative must be foreclosed by the resource commitment to violate § 7(d). *Id.* Thus:

[R]esource commitments may occur as long as the action agency retains sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative. Destroying potential alternative habitat within the project area, for example, could violate section 7(d).

Id. Because the PSD permit does not allow construction "[d]estroying potential alternative habitat" and the permit does retain EPA's "discretion and flexibility to modify" the permit after

the conclusion of ESA § 7 consultation, there is no ESA § 7(d) violation under the Services' compelling interpretation.

On this point, Petitioners disregard FWS's interpretation of its own regulations and seek to turn the Board's observation regarding the logical effect of ESA § 7(d) into a rigid rule preventing the issuance of any permit, regardless of the circumstances under which the permit is issued, before the completion of the ESA § 7 consultation. In doing so, Petitioners elevate form over substance, disregarding the substance of the existing authority on and the policies underlying ESA § 7(d).

4. *There Is No ESA § 7(d) Violation Under the Relevant Case Law.*

Under the relevant case law, issuance of a permit that does not allow any construction on the PSD source without future agency approval does not violate ESA § 7(d). For example, one court has found that the issuance of a right-of-way permit before ESA § 7 consultation had been completed did not violate ESA § 7, where the permit required a later issuance of a Notice to Proceed with construction (equivalent to the "construction. . . may not commence until EPA notifies the Permittee" language here). *No Oilport! v. Carter*, 520 F. Supp. 334, 364-65 (W.D. Wash. 1981).⁷⁹ Thus, because the PSD permit does not authorize construction, its issuance prior to the completion of ESA § 7 consultation conforms to ESA § 7(d) limits.

Moreover, the PSD permit contains a condition giving EPA the power to amend the permit terms, if and as needed to ensure ESA § 7 compliance. Similar conditions have been

⁷⁹ ESA § 7(d) "was enacted by Congress [in 1978] mainly to prevent incidents such as the more than \$50 million loss at Tellico Dam as a result of *TVA v. Hill*." *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384, 390 (D. Wyo. 1987). The Services included the forerunner to § 7(d) in 1978-adopted regulations to prevent the "waste of millions of dollars" if construction occurs and the "activity is subsequently enjoined for noncompliance with section 7". 43 Fed. Reg. 870, 872-73 (Jan. 4, 1978). Because the conditioned PSD permit issued to Desert Rock Energy does not allow federal "construction" losses, this background regarding the legislative history of ESA § 7(d) further suggests the permit does not violate ESA § 7(d).

found to not violate ESA § 7(d) by three U.S. Courts of Appeals in OCS oil and gas leasing contexts. Those appellate courts found no ESA § 7(d) violation where the lease sale occurred before the completion of ESA § 7 consultation because "stipulations" or "disclaimers" on future ESA compliance had been inserted into the leases. *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193-94 (9th Cir. 1989); *Village of False Pass v. Clark*, 733 F.2d 605, 610-12 (9th Cir. 1984); *North Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980); *Conservation Law Found. v. Andrus*, 623 F.2d 712, 714-16 (1st Cir. 1979). The "special disclaimers in the Final Notice of Sale that specify [the Interior Secretary's] continuing control of any post-sale drilling" were found sufficient in *Village of False Pass*, 733 F.2d at 611. The "preliminary activities permitted by this lease sale entail no 'irreversible or irretrievable commitment of resources'"; thus, actions that are reversible in the future, with only the loss of private capital, are not "irreversible" commitments. *North Slope Borough*, 642 F.2d at 611. Similarly, another court found that the issuance of a NPDES permit under the Clean Water Act "does not fit into what Congress intended as an 'irreversible or irretrievable commitment of resources' in part because EPA retains authority to reopen and modify the permit or rescind it altogether." *NWI*, 2005 WL 691775 at *16.⁸⁰ Hence, a disclaimer like Permit Condition II.A here avoids an ESA § 7(d) violation even under several Ninth Circuit precedents.⁸¹

⁸⁰ In *NWI*, EPA issued an NPDES permit to the U.S. Army Corps of Engineers authorizing certain discharges from the Washington Aqueduct into the Potomac River several months before the conclusion of its consultation with FWS. *NWI*, 2005 WL 691775 at *4. *NWI* sued, claiming that the issuance of the final NPDES permit prior to the conclusion of consultation constituted an "irreversible or irretrievable commitment of resources" in violation of § 7(d). *Id.* at *16. The district court disagreed, noting that issuance of the NPDES permit would not have the effect of foreclosing the formulation or implementation of any reasonable or prudent alternative measures. *Id.* The district court reached this conclusion because the EPA retained "authority to reopen and modify the permit or rescind it altogether." *Id.* In other words, EPA

As one court recently and aptly summarized, the "relevant inquiry is whether the Bureau's actions permanently commit resources in a way that ties its hands for future actions." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 2008 WL 2223070 at *68 (E.D. Cal. 2008).⁸² Here, because Permit Condition II.A does not tie EPA's hands, EPA did not permanently and irreversibly commit resources in a fashion that violates ESA § 7 when EPA issued the PSD permit before the completion of Desert Rock Project-wide ESA § 7 consultation.

The purpose of ESA § 7(d) is "to prevent Federal agencies from 'steamrolling' activity in order to secure completion of the projects regardless of their impact on endangered species." *Thomas*, 936 F. Supp. at 745. ESA § 7(d) "is more a restraint than a bar" – it restrains irreversible resource commitments during the consultation period to prevent "'steamrolling' a project towards completion during consultation," but it does not bar all preliminary activities.⁸³

retained the right to revise its action to provide "alternative measures" that otherwise would not be available if the permit were a true "irreversible or irretrievable commitment of resources." *Id.*

⁸¹ Petitioners cite only self-selected cases from the Ninth Circuit. Those cases are distinguished at Section XII.B.8 below. Moreover, the Navajo Nation lands associated with the Desert Rock Project sit within the Tenth Circuit. This Board owes no greater deference to an individual Ninth Circuit opinion than it does to, say, Third Circuit decisions.

⁸² That court found that water diversions, unlike timber harvests, were reversible and did not violate ESA § 7(d). *Id.* at 69. *See also Pac. Rivers Council v. Thomas*, 1994 WL 908600 at *6 (D. Or. 1994) (ongoing grazing permits are not "irreversible because they are subject to amendment and modification by the [USFS] at any time"); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1216 (D. Id. 1993) (preliminary road work before completion of consultation found not to violate ESA § 7). All of those factors support a conclusion here that an amendable PSD permit that does not allow construction is not an irretrievable commitment of resources within the meaning of ESA § 7(d) and 50 C.F.R. § 402.09.

⁸³ Illustrating that ESA § 7(d) is not necessarily a bar to preliminary activities, one court has even found that ESA § 7(d) allows construction as long as its does not foreclose a site-specific alternative.

The plaintiffs seem to believe that § 7(d) prohibits absolutely all construction activities during the period of formal consultation. . . . Such a rigid construction of the statute, however, is not justified. The statute does not prohibit each and every

Houck, *The "Institutionalization of Caution" under § 7 of the Endangered Species Act: What To Do When You Don't Know*, 12 ENV'T'L L. REP. (ENV'T'L L. INST.) 15001 (April 1982). That is: (1) the Permit Condition against "construction" ensures there will not be "completion of the project" or truly irreversible impacts; and (2) EPA's ability to amend the permit in light of the consultation results shows a good-faith effort to comply with the ESA and CAA § 165(c), not to shunt aside the ESA. Thus, ESA § 7(d) does not "bar" preliminary actions such as the issuance of a conditional PSD permit that prohibits construction until completion of the consultation process.⁸⁴ Because the Desert Rock Project has not been "steamrolled" through the ESA requirements here, there is no ESA § 7(d) violation.

5. *The Practical Limitations of the Desert Rock Project Preserve the Integrity of the Consultation Process and Conserve Resources Pending Conclusion of the ESA § 7 Consultation.*

NGO Petitioners assert that "the illegally-issued PSD permit can, and probably has, sped the project along, limited options, and decreased flexibility for protecting species." NGO

permanent commitment of resources, only those which have the "the effect of foreclosing" the formulation of alternatives. . . . Thus, the statute calls for some judicial discretion to determine whether an agency's decision to proceed with action, prior to completion of formal consultation with NMFS, could have "the effect of foreclosing" alternatives and could, therefore, be considered arbitrary and capricious. . . [C]ontinued construction. . . will not foreclose the possible development of alternative avenues of wastewater removal.

Bays' Legal Fund v. Browner, 828 F. Supp. 102, 112-13 & n.24 (D. Mass. 1993). Consequently, the less-intrusive conditional PSD permit issued here – which does not authorize construction and does not foreclose EPA from modifying the permit if needed to create an alternative that complies with ESA § 7 – does not violate ESA § 7(a) or 7(d).

⁸⁴ Indeed, other agencies include permitting conditions similar to Condition II.A, designed to accommodate §7(d). FERC, for example, sometimes includes conditions in certificates of public convenience issued under Sections 3 and 7(c) of the Natural Gas Act (permitting the construction and operation of natural gas terminals and pipelines) that prohibit construction activities until completion of consultation with the Services. *See, e.g., In re Bradwood Landing LLC/NorthernStar Energy LLC*, 124 FERC ¶ 61,257 (Sept. 18, 2008).

Petitioners' Supp. Br. at 286. Consistent with the rest of their Petition, NGO Petitioners' allegation minimizes the importance of the ESA § 7 consultation to the overall Desert Rock Project and disregards the existence of many other federal actions governing the project's development process.

As a practical matter, the ESA § 7 consultation itself forestalls any meaningful action with regard to the Desert Rock Project until the interagency consultation is completed. Desert Rock Energy cannot conduct any construction activities under the PSD permit until the ESA § 7 consultation is complete. In addition, until the conclusion of the BIA-led ESA consultation, the BIA approval of the lease for the project land cannot be obtained. Furthermore, Desert Rock Energy likely cannot obtain any financing for the proposed project until construction can begin and it has obtained rights to the project land. To date, Desert Rock Energy has merely committed project development resources to this project which are needed to complete the permitting process and the ESA § 7 consultation.⁸⁵

⁸⁵ Furthermore, as discussed above, ESA § 7(d) is not designed to bar any action but, rather, only the "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)." 16 U.S.C. § 1536(d). Accordingly, "non-jeopardizing agency action may take place during the consultation process in light of. . .Section 7(d) where the action will not result in substantive violations of the Act." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964, 972-73 (9th Cir. 2002) (later vacated as moot) (emphasis added). The first court to interpret § 7(d) similarly found that Congress enacted § 7(d) to preclude the investments of a "massive amount of resources" in any endeavor if at the time of the investment there was a reasonable likelihood that the project, at any stage of development, would violate § 7(a)(2). *North Slope Borough v. Andrus*, 486 F.Supp. 326, 330 (D.D.C. 1979), *aff'd in relevant part*, 642 F.2d 589 (D.C. Cir 1980).

Here, NGO Petitioners have not carried their burden of showing the issuance of the conditional PSD permit is likely to jeopardize any ESA-listed species. NGO Petitioners could not credibly make that showing, as the PSD permit does not authorize construction. Consequently, the issuance of a permit that has not been shown to jeopardize any ESA-listed species, which does not allow construction before the completion of ESA § 7 consultation does not violate ESA § 7.

Furthermore, Condition II.A preserves the integrity of the ESA § 7 consultation process. As mentioned briefly above, NGO Petitioners suggest that issuance of the PSD permit somehow inherently "limited options," and "decreased flexibility for protecting species." *See* NGO Petitioners' Supp. Br. at 287 ("EPA will be less willing to make modifications. . .that may be necessary to protect endangered or threatened species and their habitat"). This same argument was raised and rejected in *Indeck*. *Indeck*, slip op. at 113 n.156.

Despite FWS's finding of no adverse effect, the *Indeck* petitioners argued that the sequence of the consultation in that case—following issuance of the PSD permit—unlawfully curtailed the ability of FWS to propose mitigation measures and impacted the integrity of the consultation process because the agencies approached the issue with a view to defending a decision the agencies had already made. *Id.* at 103 n.143.⁸⁶ The Board, however, noted that FWS stated in its concurrence that it stood by the process and the conclusions made during the consultation; therefore, the Board saw no reason to question FWS's willingness to arrive at a different substantive conclusion regarding the impact of the proposed action on endangered species or designated habitat. *Id.* at 113 n.156. Accordingly, the Board did not believe that the consultation process's integrity had been compromised. *Id.* Indeed, EPA's and FWS's actions are entitled to a presumption of regularity, and one cannot assume that government agencies will

⁸⁶ In *Indeck*, EPA Region 5 declined to consult with the FWS during the PSD permitting process, and various environmental groups filed a petition for review to the Board. *Indeck*, slip op. at 99. During the pendency of the appeal, EPA Region 5 initiated ESA § 7 consultation with FWS and, while the appeal was still pending, the consultation concluded, with FWS issuing a concurrence in Region 5's finding that the PSD permit was not likely to adversely affect any listed species or designated habitat. *Id.* at 21.

not comply with their statutory obligations in later stages of development. *See Conner*, 846 F.2d at 1448 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).⁸⁷

Finally, Petitioners' argument that EPA's investment of staff and time in the issuance of the PSD permit constituted an irretrievable and irreversible commitment of resources in violation of § 7(d) is an over-expansive and impermissible interpretation of the limitation. *See* NGO Petitioners' Supp. Br. at 285. If the Petitioners' position were the test, then it is difficult to see how the Board in *Indeck* did not reach the conclusion that EPA Region 5 had violated § 7(d) in that case. *See Indeck*, slip op. at 112.

6. *NGO Petitioners' Position Impermissibly Assumes that EPA and FWS Will Not Fulfill Their Future ESA Duties.*

NGO Petitioners' argument that Permit Condition II.A does not protect against ESA § 7 violations rests ultimately on the assumption that EPA and other federal agencies will not fulfill their ESA duties in the future. The viability of such a presumption has been litigated and rejected in the OCS leasing cases; the required presumption is that a federal agency will comply with the ESA and other laws in the future. *Overton Park*, 401 U.S. at 415; *FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *Tribal Village of Akutan*, 869 F.2d at 1194; *Village of False Pass*, 733 F.2d at 611; *North Slope Borough*, 642 F.3d at 608; *Conservation Law Found.*, 623 F.2d at 713-14. This Board and courts cannot presume that EPA will violate its ESA § 7 duties in its future implementation of Permit Condition II.A.

⁸⁷ The State of New Mexico attacks the Board's reasoning in *Indeck* by asserting that the decision was made "with the benefit of hindsight," and "all parties knew the outcome and implications of the completed ESA consultation before [the] Board began its review." State of New Mexico's Supp. Br. at 11. This point suggests that the Board would otherwise be concerned with the integrity of the consultation after issuance of the PSD permit. Yet, a careful examination of the *Indeck* opinion indicates that the Board assumed, as a matter of principle, that FWS would fulfill its charge and did not engage in the *post hoc* rationalization that the State of New Mexico suggests. *Indeck*, slip op. at 113 n.156.

As a result, ESA § 7 should not be read, as NGO Petitioners would read it, to "telescop[e] . . . every project hazard to endangered life and to the environment into one overwhelming statutory obstacle." *North Slope Borough*, 642 F.2d at 609; *see also Tribal Village of Akutan*, 869 F.2d at 1193-94.

7. *EPA Has Appropriately and Reasonably Balanced Its Obligations Under the CAA and the ESA.*

EPA's decision is an admirable accommodation of two different statutory mandates. This accommodation is permissible under *NAHB*, 127 S. Ct. 2518. In *NAHB*, the U.S. Supreme Court decided that where a statute (Clean Water Act § 402(b)) created a mandatory "shall" duty and did not give EPA discretion to consider impacts to ESA-listed species, it was permissible for the federal agencies to conclude that ESA § 7 does not apply and does not override the CWA mandate. 127 S. Ct. at 2525.⁸⁸ Accordingly, contrary to NGO Petitioners' position that ESA interests always prevail under *dicta* in *TVA v. Hill*, 437 U.S. 153 (1978), under the more recent holding in *NAHB* the policy interests Congress stated in ESA § 7 do not necessarily prevail against "shall" mandates that Congress has created in other statutes.⁸⁹

⁸⁸ *See NAHB*, 127 S. Ct. at 2525, 2532 (the Ninth Circuit's overridden reading of ESA § 7(a)(2) "would effectively repeal the mandatory and exclusive list of criteria set forth in [CWA] § 402(b), and replace it with a new, expanded list that includes [ESA] § 7(a)(2)'s no-jeopardy requirement"); 2532-36 (concluding that "we read [50 C.F.R.] § 402.03 to mean what it says: that § 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is required by statute to undertake once certain specified triggering events occur"); 2536-37 (distinguishing *TVA v. Hill*, 437 U.S. 153 (1978), as a situation where no statute compelled an action that is arguably inconsistent with ESA § 7); 2538 (summarizing the holding that, "[s]ince the transfer of NPDES permitting authority [to a State] is not discretionary, but rather is mandated once a State has met the criteria set forth in § 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger § 7(a)(2)'s consultation and no-jeopardy requirements. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed").

⁸⁹ NGO Petitioners are essentially arguing ESA § 7 is a super-statute that prevails over all other laws. There is some unnecessarily-broad *dicta* in *TVA v. Hill* supporting that view.

Here, CAA § 165(c) mandates that a PSD permit application "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). Notably, CAA § 165(c) does not say "shall grant unless ESA § 7(a)(2) consultation takes longer." Under the U.S. Supreme Court's decision in *NAHB*, EPA can lawfully and permissibly resolve this tension between the CAA and ESA by (1) granting the PSD permit near the time mandated by CAA § 165(c), and (2) inserting a permit condition that prohibits the commencement of construction until the ESA consultation is completed and allows for modification of the permit if that appears appropriate to EPA after completion of the ESA § 7 consultation.

Indeed, EPA might have had the authority under *NAHB* to issue an unconditioned final permit once ESA § 7 compliance dragged on past the one-year "shall grant" period specified in CAA § 165(c). That is, just as the Supreme Court found the agencies could conclude that CWA § 402(b) renders ESA § 7 inapplicable, EPA might be able to conclude that the delays here mean CAA § 165(c) renders ESA § 7 inapplicable.

Instead, EPA accommodated the two statutory mandates in a permissible manner. That fulfills the principle that statutes should be construed harmoniously if possible, and to not unnecessarily repeal another statute by implication. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549-50 (1974); *NAHB*, 127 S. Ct. at 2544-48 (Stevens, J., dissenting). EPA belatedly obeyed the

However, NGO Petitioners' view garnered only four dissenting votes in *NAHB*. *Compare TVA*, 127 S. Ct. at 2536-37 *with* 127 S. Ct. at 2538-43 (Stevens, J., dissenting).

"shall be granted. . .not later than one year" language in CAA § 165(c) by issuing a PSD permit where compelled by the statute and a consent decree.⁹⁰

EPA also inserted Permit Condition II.A into the PSD permit to provide for a possible permit amendment after the completion of ESA § 7 consultation. This condition does not allow any construction before the ESA § 7 consultation is concluded. This approach complies with the ESA § 7 case law discussed above. Further, even if the Board were to conclude that EPA's approach is not fully compliant with ESA § 7, EPA's approach is still lawful in light of its ability to reconcile conflicting statutory mandates under *NAHB*.

The NGO Petitioners note that in 2006 EPA had suggested it would wait until the completion of ESA § 7 consultation before issuing the PSD permit. NGO Petitioners' Supp. Br. at 279-80. But this preliminary view clearly does not bar EPA from changing its mind. As the Supreme Court stated in rejecting an environmental group's similar claim that EPA had arbitrarily changed its view:

the only "inconsistency" respondents can point to is the fact that the agencies changed their mind – something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's final action, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

⁹⁰ Long after the one-year period had been exceeded, Desert Rock Energy sued EPA to force its final permit decision, as required by CAA § 165(c). EPA entered into a consent decree providing that "[o]n or before July 31, 2008, EPA shall issue a final permit decision on the Permit Application." EPA's Unopposed Motion to Lodge Consent Decree (June 5, 2008), Exhibit A, Proposed Consent Decree, in *Desert Rock Energy Co., LLC v. EPA*, No. 4:08-cv-872 (S.D. Tex.). Thus, the July 31 permit decision was required both by the CAA statute and a consent decree.

NAHB, 127 S. Ct. at 2530. The agency's final and current interpretation receives *Chevron* deference, not preliminary views held by the agency. *Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005).

EPA's Response to Public Comments provides a cogent, rational explanation as to why, in the circumstances presented here, the agency decided to grant a conditional PSD permit before the completion of ESA § 7 consultation:

With regard to the Desert Rock project, EPA believes that issuance of the final permit prior to the conclusion of the ESA process is both appropriate and consistent with ESA requirements. . . . [T]he PSD and ESA processes must also be considered in light of statutorily mandated PSD obligations – the CAA requires EPA to either grant or deny a PSD permit within one year of receiving a complete application. 42 U.S.C. § 7475(c). EPA determined that this permit application was complete in 2004. In this case, the Desert Rock permit applicant and Dine Power Authority have filed suit against EPA for failure to comply with this statutory requirement. *See Desert Rock Energy Company LLC and Dine Power Authority v. EPA*, No. 4:08cv00872 (S.D. TX; filed March 18, 2008). For several reasons, including the time that has elapsed in this permitting process and the need to address the statutory timing requirements raised in the pending *Desert Rock* litigation, EPA believes that issuance of the final decision prior to conclusion of the ESA process is consistent with ESA requirements.

AR 120 at 171. EPA's accommodation of the mandates of both the CAA and the ESA is eminently reasonable and lawful. Accordingly, EPA's preliminary view at an earlier time is irrelevant.

8. *The Cases Cited by Petitioners Are Distinguishable, or at Least Are Contrary to the Above-Described Majority View in the Courts.*

In support of their ESA § 7 arguments, all three Petitioners primarily rely on *Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998). Two of the Petitioners miscite *Houston* as meaning that EPA could not, as a matter of law or *per se*, issue a conditioned permit before the completion of ESA § 7 consultation. *See State of New Mexico's Supp. Br.* at 15; NGO Petitioners' Supp. Br. at 285-86. But the Ninth Circuit panel declined to create a *per se* rule that

executing a water contract before the completion of ESA § 7 consultation violates the ESA, if the contract contains a "catchall savings clause" for modification of the contract based on the results on the ESA § 7 consultation. *Houston*, 146 F.3d at 1128. In refraining from such a ruling, the Ninth Circuit avoided a conflict with the Federal Courts of Appeals and District Court authorities cited above (including Ninth Circuit precedents like *Village of Akutan* and *Village of False Pass*), which allowed such arrangements in lease contract settings. See *Village of Akutan*, 869 F.2d at 1193-94; *Village of False Pass*, 733 F.2d at 610-12.

Instead, the holding in *Houston* relied on its distinguishable case-specific facts. In *Houston*, the Bureau of Reclamation renewed applications for water and irrigation from the Friant Dam during its ESA consultation with FWS. *Houston*, 146 F.3d at 1127. The contracts executed by the Bureau contained a provision allowing some contract modification to reflect the results of the ESA consultation, but limited such modification to minor adjustments and prohibited an adjustment to the amount of water delivered under the contract. *Id.* at 1127-28. NRDC sued, and the district court held that there was a *per se* violation of the ESA due to the Bureau's failure to conclude consultation before executing the water contracts, and on that basis, the District Court rescinded the contracts. *Id.* at 1128 n.5.

On appeal, the Ninth Circuit declined to address the District Court's sweeping conclusion in *Houston*, but rather affirmed the outcome on the basis that the water contracts constituted an "irreversible and irretrievable commitment of resources" in violation of § 7(d). *Id.* at 1128.

The Bureau argued that, even assuming the water contracts were a *per se* irreversible and irretrievable commitment of resources, the contract provision permitting modification prevented the foreclosure of reasonable and prudent alternatives and, therefore, § 7(d) was not violated. *Id.* The Ninth Circuit rejected this argument, noting that the contract condition was utterly

inadequate to serve that purpose because it did not permit a reduction in the quantity of water delivered, thus foreclosing the reasonable and prudent alternative of reallocating contracted water from irrigation to conservation. *Houston*, 146 F.3d at 1128. ("Article 14 is inadequate to serve that purpose here because it limits conservation-based modification to minor adjustments and prohibits an adjustment in the amount of water delivered.") The contract, therefore, represented an irreversible and irretrievable commitment of a resource—water—without regard to any alternative developed during the § 7 consultation process. *Id.* That logic does not apply here, because Permit Condition II.A allows EPA, without restriction, to modify the permit after and in accordance with the ESA § 7 consultation.⁹¹ For the issuance of the PSD permit here to resemble the water contracts from *Houston*, it would, for example, have to guarantee that EPA would not change the permit given alternatives developed in the ESA § 7 consultation.⁹² This

⁹¹ Under ESA § 7(a)(2) and (b), action agencies like EPA make the final decision on whether their action complies with ESA § 7. FWS's biological opinion is advisory, not legally binding. *See Bennett*, 520 U.S. at 170-71; *Lujan*, 504 U.S. at 568-70; 50 C.F.R. 402.16; 51 Fed. Reg. 19,926, 19,928 (June 3, 1986). Courts have found that an agency action satisfies ESA § 7 even where the action agency did not adopt all of the "reasonable and prudent alternatives" that FWS recommended to avoid jeopardy in its biological opinion. *Tribal Village of Akutan*, 869 F.2d at 1193-94. Given EPA's discretion, Condition II.A is appropriately not phrased in terms of compelling compliance with whatever FWS states in its biological opinion. Rather, it is appropriately phrased in terms of EPA's "power to reopen and amend the permit . . . 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."

⁹² NGO Petitioners make much of the Ninth Circuit's *dicta* in *Houston* that it did "not think that an agency should be permitted to skirt the procedural requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts." *Houston*, 146 F.3d at 1128. This statement is curious in the context of the Ninth Circuit's opinion and in the context here before the Board. The statement presupposes the illegality of the PSD permit, which, as the *Indeck* opinion demonstrates, need not necessarily be issued before completion of the ESA § 7 consultation. *Indeck*, slip op. at 110. Rather, coordination of the PSD and ESA reviews "is all that is required of the PSD permitting authority, and only to the extent feasible and reasonable." *Id.* at 110 n.149 (citing *Hadson Power Co.*, 4 E.A.D. at 299).

For application here, then, one must assume that NGO Petitioners posit that the PSD permit was illegally executed because it is an "irreversible and irretrievable commitment of

case is more like the fact patterns in the cases discussed above. In any event, even the outlier *Houston* decision does not compel adoption of Petitioners' view that there is an ESA § 7(d) violation under the facts of the conditioned permit. Thus, while the fact pattern of the *Houston* case should be distinguished, the reasoning of the decision supports the legality of EPA's action in issuing the Desert Rock Project's conditional PSD permit.

The Petitioners also rely on the famous snail darter/Tellico Dam decision in *TVA*. 437 U.S. 153. The holding in *TVA* – that an injunction must issue to prevent TVA from closing the dam gates – was based on the dire circumstances that dam closure would substantively violate ESA § 7(a)(2) by causing the extinction of the snail darter and adversely modifying its critical habitat behind the dam. *See, e.g., Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 543 n.9 (1987). As the Supreme Court later clarified, *TVA*'s language is closely tied to its facts and may not apply in other contexts. *Id.* (the "Ninth Circuit erroneously relied on *TVA*" which involved a "distinguishable" situation where "it was conceded that completion of the dam would destroy. . . the snail darter" and its critical habitat). The Desert Rock Project does not present any situation that is close to the facts and holding in *TVA*.

TVA did include considerable *dicta* on the legislative judgment in favor of protecting ESA-listed species. Petitioners strive to translate those *dicta* into a flat legal prohibition against issuing a heavily-conditioned PSD permit before the completion of ESA § 7 consultation that has

resources." Yet this conclusion would be illogical in the context of the rest of the Ninth Circuit's opinion in *Houston*, because, as applied here, it would mean that (1) the Bureau could not include the modifying clause to save the contracts from being illegally executed, (2) the contracts were illegally executed because they were an "irreversible and irretrievable commitment of resources," and (3) the contracts were an "irreversible and irretrievable commitment of resources" because the contract clause did withhold for the Bureau enough power to modify the contracts. *Houston*, 146 F.3d at 1128.

extended beyond a CAA deadline. But, as shown above, the lower courts have not read ESA § 7(d) in the manner that Petitioners suggest.

Petitioners "expect more from the *TVA* case than its facts and holding will allow." *Nat'l Wildlife Fed'n v. Burlington Northern RR*, 23 F.3d 1508, 1512 (9th Cir. 1994); accord *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (it is "far-fetched" and unpersuasive to interpret *TVA* as obliging the Services to do "whatever it takes" to conserve listed species). Petitioners' harsh view of the ESA "frustrates rather than effectuates legislative intent [by] assum[ing] that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

Tellingly, as shown above, the Supreme Court more recently found in *NAHB* that other statutory mandates can operate to constrain the ESA's reach. *See* 127 S.Ct. at 2525. Accordingly, EPA had the legal authority to accommodate its ESA § 7 and CAA § 165(c) mandates in the manner it did in issuing a conditional PSD permit.

Petitioners also rely on dubious implications from other Ninth Circuit decisions. Those decisions include *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Pacific Rivers*, 30 F.3d 1050; *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); and *Conner*, 848 F.2d 1441. These citations cannot overcome the fact that Ninth Circuit precedent *en toto* does not compel a conclusion that EPA is barred from issuing a conditioned permit before the completion of Desert Rock Project-wide consultation because (1) similar conditions were found not to violate ESA § 7(d) in *Village of Akutan* and *Village of False Pass* and (2) the Ninth Circuit declined to establish a *per se* prohibition on conditioned permits/contracts in *Houston*.

In *Conner*, the plaintiff challenged BLM's practice of granting oil and gas leases without preparing either an EIS under NEPA, or undergoing consultation with the FWS pursuant to ESA

§ 7. 848 F.2d at 1444. Each of BLM's oil and gas leases contained a Threatened and Endangered Species ("T&E") stipulation providing that BLM was responsible for determining the effects of any surface-disturbing activities upon any listed species or their habitat prior to the commencement of such activity, and that BLM's determination might result in restrictions or even disallowance of use and occupancy. *Id.* at 1455. The BLM argued that this T&E stipulation dispensed with the need for a comprehensive biological opinion at the initial lease phase, and that its determination that the leases did not constitute an "irreversible or irretrievable commitment of resources" under § 7(d) released it from its obligations under § 7(a)(2). *Id.* The Ninth Circuit rejected that argument, recognizing that § 7(d) does not obviate § 7(a)(2) whenever an irreversible or irretrievable commitment of resources is absent, but rather ensures that the status quo will be maintained during the § 7(a)(2) consultation. *Id.* at 1455 n.34. Here, EPA Region 9 does not contend that Condition II.A dispenses with its ESA § 7 consultation obligations, but only that Condition II.A serves to comply with § 7(d) during the consultation process. AR 120 at 172.

In fact, certain aspects of the *Conner* case support EPA's position. Some of the leases in *Conner* also contained a "No-Surface Occupancy" ("NSO") provision absolutely prohibiting surface disturbance in the absence of specific government approval. *Conner*, 848 F.2d at 1447. BLM argued that these leases made no irreversible or irretrievable commitment of resources sufficient to trigger NEPA's EIS requirement because the government retained absolute authority to decide whether any activities would ever take place on the leased land. *Id.* The Ninth Circuit agreed, holding that what the permittee really received was a priority right, a right of first refusal to develop the resources in question, should BLM allow such development. *Id.* at 1447-48 (citing *Sierra Club v. FERC*, 754 F.2d 1506 (9th Cir. 1985) (FERC's grant of preliminary permit

for construction and maintenance of a hydroelectric facility did not trigger NEPA because the permit issued gave the applicant no right to develop land without further agency approvals, including other permits)).⁹³

One portion of *Peterson* required that a road and a timber sale be considered together in the same NEPA document. 753 F.2d at 758-60. This portion of *Peterson* reinforces why the responsible federal agencies are preparing consolidated NEPA documents on, and are engaging in a consolidated ESA consultation on, the entire project. The ESA portion of *Peterson* did not concern ESA § 7(d). Rather, the panel found that because the Forest Service had not prepared a biological assessment, it committed a substantial procedural violation of the ESA. 753 F.2d at 763-65. That finding does not materially assist Petitioners, as BIA has prepared a biological assessment on the entire Desert Rock Project. AR 92; *see also* Consultation Letter at 1.

Pacific Rivers does not support Petitioners' position either. *Pacific Rivers* found that USFS timber sales "constitute *per se* irretrievable and irreversible commitments," because they allow the cutting of trees and alteration of wildlife habitat. 30 F.3d at 1057. Therefore, *Pacific Rivers* does not assist Petitioners here because of the materially different fact pattern. In Desert Rock Energy's case, Permit Condition II.A prohibits construction and thereby does not allow the type of irreversible changes to the environment involved in *Pacific Rivers*.

Pacific Rivers also found that "§ 7(d) applies only after an agency has initiated consultation under § 7(a)(2)" – before that time, constraints are governed by ESA § 7(a)(2) and not ESA § 7(d). 30 F.3d at 1056. Similarly, this portion of *Pacific Rivers* does not apply here.

⁹³ Indeed, the main import of *Conner* in the ESA context is that an ESA biological opinion must consider the totality of connected federal agency actions. *Conner*, 848 F.2d at 1453-58. By conducting a consolidated ESA consultation on all aspects of the Desert Rock Project, EPA, BIA and FWS have complied with this requirement.

BIA has been in informal ESA consultation since 2007 and is currently in formal ESA consultation. Instead, *Pacific Rivers* confirms that ESA § 7(d) sets the current constraints, and the case law discussed above shows that the issuance of the conditional PSD permit pending completion of ESA consultation does not violate ESA § 7(d).

Center for Biological Diversity also cites *Washington Toxics* for the proposition that an agency must comply with both the ESA and its other statutory duties. Center for Biological Diversity Pet. at 24-25.⁹⁴ But here, EPA is complying with both its CAA § 165(c) duty to issue some type of PSD permit in a time certain, and with its ESA § 7(d) duty to not allow construction or other irreparable impacts until ESA § 7 compliance is completed. Therefore, *Washington Toxics* does not apply here, either.

To conclude, the Board should deny review of the PSD permit because Petitioners have not demonstrated clear error; EPA's issuance of a conditioned PSD permit is consistent with EPA's CAA obligations and, to the extent that the question is within the Board's jurisdiction based on *Indeck*, within EPA's ESA obligations.

XIII. EPA HAS COORDINATED ITS PSD PERMITTING PROCESS WITH THE DESERT ROCK PROJECT'S NEPA PROCESS TO THE MAXIMUM EXTENT FEASIBLE AND REASONABLE, AND DID NOT CLEARLY ERR IN ISSUING THE PSD PERMIT PRIOR TO CONCLUSION OF THE NEPA PROCESS.

The Energy Supply and Coordination Act of 1974, 15 U.S.C. § 793(c)(1), specifically exempts the PSD permitting process from NEPA. However, the PSD regulations themselves require EPA to coordinate the PSD permitting process with the NEPA process in certain circumstances:

(s) *Environmental impact statements.*

⁹⁴ Because the Supreme Court later ruled to the contrary where there are conflicting statutory duties, in *NAHB*, some portions of *Washington Toxics* may no longer be good law. See *NAHB*, 127 S.Ct. at 2525.

Whenever any proposed source or modification is subject to action by a Federal Agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. § 4321), review by the Administrator conducted pursuant to this section shall be coordinated with the broad environmental reviews under that Act and under section 309 to the maximum extent feasible and reasonable.

40 C.F.R. § 52.21(s).

NGO Petitioners contend that EPA has violated the PSD regulations "by failing to conduct the permit proceedings in parallel with the NEPA proceedings, by failing to obtain from BIA and consider in the PSD proceedings (including the public comment process) relevant information generated through the NEPA process, and by approving the PSD permit before the NEPA process is completed." NGO Petitioners' Supp. Br. at 290-91. As with its argument regarding the ESA, NGO Petitioners seek to transform a common-sense coordination policy into an inflexible mandate holding the PSD permit hostage to a much broader, much larger and much longer administrative environmental process evaluating considerations well beyond the scope of the PSD permit.

A. The Record Reflects Coordination of the NEPA Process and the PSD Permitting Process.

EPA Region 9 described its compliance with 40 C.F.R. § 52.21(s) in its Response to Comments:

Region 9 has coordinated with the Bureau of Indian Affairs (BIA) to provide them with all information needed regarding the PSD permit and our Air Quality Analysis as they undergo the EIS process as follows: 1) we are a coordinating agency for the preparation of the Environmental Impact Statement, 2) we have provided BIA with extensive technical information from our review of the project, and 3) we have provided BIA with copies of public comments on the proposed PSD permit, and contact information for persons who have expressed interest in the proposed Desert Rock Project.

AR 120 at 168. In addition, in response to comments received in the PSD permitting process discussing issues beyond the scope of the PSD permit, EPA provided citations to the sections of

the draft EIS ("DEIS") specifically addressing such issues. *See, e.g.*, AR 120 at 161 (public health services), 166 (access to water). Through these actions, EPA Region 9 harmonized the PSD permit process and the NEPA process in a reasonable manner that extended beyond its role as a coordinating agency for the NEPA review; in its role as the PSD permitting authority, EPA Region 9 shared its data, relevant public comments and contact information with BIA.

By the time EPA Region 9 issued the PSD permit in July 2008, the DEIS had been issued, the public had already provided comments on the DEIS, and BIA had already published its response to comments. Indeed, the timelines of the PSD permitting process and the issuance of the DEIS were sufficiently contemporaneous that EPA was able to compare the air quality information received during the PSD permitting process with that developed during the NEPA process. EPA's Response to Comments indicates that it was aware of and participated in the NEPA process, and nothing raised during the NEPA process affected EPA's conclusion it had obtained all necessary information for issuing the PSD permit through the permitting process. AR 120 at 168, 170. In the face of this, NGO Petitioners allege that EPA's coordination of the NEPA and PSD permitting processes was clearly erroneous, without providing any specificity as to how. NGO Petitioners' Supp. Br. at 293. Due to this shortcoming, NGO Petitioners' claim must fail. *See* 40 C.F.R. § 124.19(a); *Steel Dynamics*, 9 E.A.D. at 744.

B. EPA Is Not Required to Conduct the PSD Permit Process "In Parallel" With the NEPA Proceeding, Nor Is EPA Required to Wait to Issue the PSD Permit Until After the NEPA Process is Complete.

NGO Petitioners list as separate "fatal" errors EPA's alleged "failing to conduct the permit proceedings in parallel with the NEPA proceedings" and EPA's "approving the PSD permit before the NEPA process is completed." NGO Petitioners' Supp. Br. at 290-91. Both of these arguments lack any basis in the law.

NGO Petitioners neglect to identify in their Petition a specific requirement that EPA must conduct its PSD permit proceeding "in parallel with the NEPA proceedings." *Id.* at 290. There is not such requirement in either this Board's precedent or in federal case law. Furthermore, the regulation requiring coordination during the PSD permitting process, likewise does not contain a requirement that such proceedings must be conducted "in parallel." *See* 40 C.F.R. § 52.21.

Moreover, NGO Petitioners have failed to specifically clarify what "in parallel" means in this context. As a result, NG Petitioners' Supplemental Brief provides no example of any case in which a court or agency has adopted this phrase to describe the coordination required by 40 C.F.R. § 52.21. In any event, it is difficult to see how the NEPA process and the PSD permitting process could be run "in parallel"; for the Desert Rock Project, for example, the scoping of the DEIS took almost a year, the statutory time period within which the EPA must complete the PSD permitting process upon receipt of a completed application. *See* AR 22; 42 U.S.C. § 7475(c). Requiring one year to scope a DEIS is not an unusual NEPA timeframe for a project like the Desert Rock Project. NGO Petitioners' position—that EPA must conduct the PSD permitting process "in parallel" with the NEPA process and must not issue the PSD permit until the NEPA review process is complete—would eviscerate the timeframe established under the CAA, rendering 42 U.S.C. § 7475(c) a nullity as a practical matter wherever a project requiring a PSD permit also triggered NEPA.⁹⁵

⁹⁵ As discussed, *supra*, in Section XII.B.7, in the context of EPA's coordination of the PSD permitting process and ESA consultation, EPA has reasonably and permissibly accommodated two statutory mandates, fulfilling the principle that statutes should be construed harmoniously if possible, and to not unnecessarily repeal another statute by implication. *See, e.g., Morton*, 417 U.S. at 549-50. Notably, CAA § 165(c) does not say "shall grant unless the NEPA process takes longer." 42 U.S.C. § 7475(c).

This illogical result is perhaps why this Board has held that 40 C.F.R. § 52.21 "does not require a [permitting authority] to refrain from issuing a PSD permit until the NEPA review process is complete." *Hadson Power*, 4 E.A.D. at 300. In *Hadson Power*, the Board stated that:

Under the plain language of this regulation, coordination is all that is required of the PSD permitting authority, and only to the extent feasible and reasonable. As used in this regulation, "coordinate" is best given its everyday meaning, namely to harmonize or to act together in a concerted way. In our view, then, this regulation does not require a state to refrain from issuing a PSD permit until the NEPA review process is complete.

Hadson Power, 4 E.A.D. at 300. According to *Hadson Power*, then, not only is EPA not required to conduct its PSD permitting process "in parallel" with the NEPA process, it is not required to wait for the NEPA review to be complete.

Unable to cite to any Board or federal court decision remanding a PSD permit issued prior to finalization of a related EIS, NGO Petitioners rely instead on two cases, *Hadson Power* and *Prairie State*, in which this Board held precisely the opposite—that issuance of a PSD permit prior to finalization of the EIS was reasonable. NGO Petitioners acknowledge this inconsistency, but argue that "the facts presented in those cases did not compel coordination as they do here." NGO Petitioners' Supp. Br. at 291. Specifically, NGO Petitioners argue that, in both *Hadson Power* and *Prairie State* the NEPA review did not pertain to any part of the project subject to PSD regulation, whereas here, "the NEPA proceedings for [the Desert Rock Project] are for the 'source' for which the PSD permit is sought." NGO Petitioners' Supp. Br. at 291.⁹⁶

⁹⁶ As NGO Petitioners recognize, the Board's decision in *Prairie State* is not even relevant here. In *Prairie State*, the Board declined a petition to review issuance of a PSD permit for failure to comply with 40 C.F.R. § 52.21 where the record did not show that there was any NEPA review pending or that any potential NEPA reviews covered any aspect of the proposed facility subject to PSD regulation. *Prairie State*, slip op. 163; *see also* NGO Petitioners' Supp. Br. at 291.

The Board's holding in *Hadson Power* is broader than Petitioners suggests. In *Hadson Power*, the applicant, Hadson Power, submitted an application for a PSD permit to build a coal-fired power plant in Buena Vista, Virginia. *Hadson Power*, 4 E.A.D. at 260. In order to offset its emissions, Hadson planned to provide a certain percentage of its steam generation to a manufacturer located across the Maury River from Hadson Power's proposed facility (in exchange for the steam, the manufacturer would shut down its own boilers). *Hadson Power*, 4 E.A.D. at 261, n.6. To effectuate this part of the project, Hadson Power needed to secure the Department of Interior's approval to run coal conveyance and utility improvements through Glen Maury Park, which triggered the need for NEPA review. *Id.* at 297. The coal conveyance was considered as part of the PSD permitting process as well. *Id.* at 298. During the NEPA review, however, Hadson Power abandoned its plans to use the coal conveyor, announcing instead its intention to rely on truck delivery of coal. *Id.*

In its comments to the proposed PSD permit, various local environmental groups requested that the permitting authority, the Virginia Department of Air Pollution Control ("VDAPC"), defer consideration of the PSD permit application until completion of the NEPA review. *Id.* VDAPC declined, noting that since the only portion of the NEPA review relevant to the PSD permitting process was the coal conveyance, its abandonment in favor of truck delivery eliminated any need to await completion of the NEPA review. *Hadson Power*, 3 E.A.D. at 298. On appeal, the Board agreed, and in fact went on to note that even if the coal conveyance option were still pending, the record demonstrated that VDAPC based its decision on air quality analysis that included the truck delivery option, and therefore the outcome of the NEPA review was irrelevant. *Id.* at 299-300. According to the *Hadson Power* Board, coordination with the

NEPA process was not even required "[b]ecause the outcome of the NEPA review would not provide any significant new information to the proceeding, or change the outcome." *Id.* at 300.

At this point, NGO Petitioners' analysis of the *Hadson Power* case stops. The Board also held, however, that where coordination was required, coordination did not mean that a permitting authority had to refrain from issuing a PSD permit until the NEPA process was complete. *Id.* at 299. The environmental groups in *Hadson Power* argued that deferring the PSD permit was necessary because "the NEPA review would provide a wealth of information relating to the impact of the proposed facility." *Id.* The Board again disagreed, holding that "[t]o the extent information would be relevant to the PSD permit, such information should have already been supplied in the PSD permit process." *Id.*

Here, as in *Hadson Power*, EPA Region 9 had all the information it required to make the PSD determination. AR 120 at 168. EPA Region 9 recognized that some comments made during the public comment on the PSD permit were relevant to the NEPA process, and it shared that information with BIA. EPA Region 9 provided relevant air quality impact data to BIA in its role as a coordinating agency. *Hadson Power*, the only relevant authority on this issue does not state that the PSD permitting authority is required to defer issuance of a PSD permit pending the completion of the NEPA process. *Hadson Power*, 3 E.A.D. at 299. Therefore, based upon this precedent, EPA Region 9 has made a reasonable attempt to harmonize the NEPA and PSD permitting processes in this case, and so NGO Petitioners have failed to demonstrate clear error requiring this Board's intervention.

C. 40 C.F.R. § 52.21 Is an Inappropriate Avenue by which to Challenge the Substance of EPA's PSD Permit Determination.

Despite the fact that the same argument was put forward and rejected by the Board in *Hadson Power*, NGO Petitioners argue that EPA Region 9 improperly issued the PSD permit

because it failed to obtain from BIA and consider in the PSD proceedings relevant information generated through the NEPA process. NGO Petitioners' Supp. Br. at 290-91. EPA Region 9, however, affirmed in its Response to Comments that it "has obtained all necessary information for issuing the PSD permit through the permitting process. There is no need to delay issuing this PSD permit." AR 120 at 168.

It is evident from the arguments they advance that NGO Petitioners' dispute is actually with the scope and outcome of the PSD permitting process itself, not EPA 9's coordination with the separate, BIA-led NEPA process. *See, e.g.*, NGO Petitioners' Supp. Br. at 294 ("the [NEPA coordinating] measures, however, have proven insufficient, as the record for the PSD permit proceeding, remains incomplete in some significant ways (as discussed throughout this brief)"). NGO Petitioners also assert that purported errors in the PSD permitting analysis—EPA's rejection of IGCC as BACT, for instance, or EPA's determination of the scope of its environmental justice analysis—somehow translate into failure in its coordination with the NEPA process:

The deferred analyses that have rendered this permit proceeding structurally unsound include assessment of environmental justice concerns (including the impacts to public health in local Navajo communities, impacts to soil, vegetation, species and assessment of collateral environmental impacts associated with solid waste, water use and water quality); assessment of impact on threatened and endangered plant and animal species; and meaningful consideration of alternatives to the proposed project (including consideration of need and a no-build alternative).

NGO Petitioners' Supp. Br. at 290. This argument only makes sense if one accepts that the analyses are indeed "deferred," that is, that EPA believed the analyses were necessary to the PSD permitting process but decided nonetheless to defer them to the NEPA process. In this context, EPA would therefore have issued the PSD permit without the information necessary to make the PSD determination. However, NGO Petitioners point to no statement in the record in which

EPA acknowledged that certain information relevant to its PSD determination would not be available until the final project-level EIS is issued.

Overall, this NEPA argument merely reiterates the other points on which NGO Petitioners attack the legality of the PSD permit, and which have been thoroughly rebutted throughout this brief. The sufficiency of EPA's environmental justice analysis is discussed *supra* at Section XI. The sufficiency of EPA's analysis of the possible impact to soil and vegetation is discussed *supra* at Section XI.B.2. The sufficiency of EPA's actions under the Endangered Species Act is discussed *supra* at Section XII. The sufficiency of EPA's analysis of alternatives to the proposed project is discussed *supra* at Sections II and III. Because NGO Petitioners discuss the "need" and "no-build" alternatives in the context of environmental justice, the sufficiency of EPA's analysis of those particular alternatives is discussed *supra* at Section XI.B.3.

As demonstrated by the administrative record, EPA Region 9 clearly took its coordinating responsibilities seriously. *See* AR 120 at 168. NGO Petitioners' characterization of EPA's substantive determinations as "deferring" analysis to the NEPA process is inaccurate and appears to be simply another manufactured basis for their legal challenge. EPA Region 9 is not "deferring" anything to the NEPA process; it has made a PSD determination fully supported by the record. To the extent that NGO Petitioners disagree with that assessment, the grounds for the legal challenge are the substance of the PSD determination itself, not EPA's coordination of the PSD permitting process with the NEPA process. Hence, there is no need for this Board to review the issuance of the PSD permit on this ground.

XIV. EPA REGION 9 ADEQUATELY RESPONDED TO PETITIONER GLUSTROM'S COMMENTS, AND WAS NOT OBLIGATED TO CONSIDER CONCENTRATING SOLAR POWER AS PART OF THE BACT ANALYSIS FOR THE DESERT ROCK PERMIT.

In her Petition for Review, Petitioner Glustrom makes two primary arguments: (1) that EPA Region 9 clearly erred by failing to consider and adequately respond to her comments that Concentrating Solar Power ("CSP") should be considered in the BACT analysis for the Desert Rock Project, and (2) that the Board should review EPA Region 9's exercise of discretion to decline to consider technology such as CSP that would redefine the source, and therefore fall outside of the BACT evaluation process.

Petitioner Glustrom submitted two comments to EPA Region 9 during the comment period preceding the issuance of the Desert Rock PSD permit. AR 63; AR 63.1. These comments urged that CSP should be part of the BACT analysis for the Desert Rock plant. *Id.* Petitioner Glustrom acknowledges that EPA Region 9 addressed her comments, and solar power generally, in Appendix A of its Response to Comments. *See* Pet. of Glustrom at 9 ("EPA has responded to the comments on page 10 and in Appendix A to their Response to Comments."). In its Response to Comments, EPA Region 9 went beyond Petitioner Glustrom's initial focus of urging that CSP be included as an alternative BACT technology and even evaluated the potential of solar power as an alternative technology in its own right. *See* AR 120, Appendix A. EPA Region 9 considered not only Petitioner Glustrom's comments and attachments, but also other comments addressing the potential of solar power. EPA Region 9's response to these comments addressed the established evidence in the comments – rather than the conjectural inferences that could be drawn from omissions in the evidence, on which many of Petitioner Glustrom's arguments now lie – and concluded that "the commenters' assertions about solar power are not adequate to demonstrate its suitability as an alternative to the proposed plant." AR 120 at 222.

Thus, Petitioner Glustrom's comments were adequately addressed by EPA Region 9 with respect to their general subject content – solar power.

Further, with respect to Petitioner Glustrom's actual comments – that CSP should be considered as an alternative source technology in the BACT analysis for the Desert Rock PSD permit – the Response to Comments clearly explains why EPA Region 9 will not use "the BACT requirement as a means to fundamentally redefine the basic scope of a proposed project[,]" which is the result sought by Petitioner Glustrom. *See* AR 120 at 13-21; Pet. of Glustrom at 28. Thus, Petitioner Glustrom's comments were also adequately addressed by EPA Region 9 to the extent they urged that EPA Region 9 consider using BACT analysis to redefine the source of the Desert Rock Project to CSP. The legal support for EPA Region 9's position has been thoroughly discussed in its Response to Comments, AR 120, and Section II, *supra*, of this Brief. These discussions establish that EPA Region 9's exercise of discretion, and ultimate refusal to consider redefining the source of the proposed technology through BACT, are not clearly erroneous.

Accordingly, EPA Region 9 has fully addressed Petitioner Glustrom's comments, and EPA Region 9's Response to Comments is complete and nothing in the permitting action was clearly erroneous. The Board should deny review of Petitioner's Glustrom's issues.

CONCLUSION

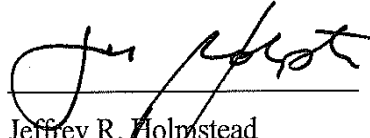
For the reasons stated above, Desert Rock Energy respectfully requests that this Board deny review of Desert Rock Energy's PSD permit or, in the alternative, uphold the PSD permit because the Petitioners have failed to demonstrate clear error in EPA Region 9's decision to grant the permit.

REQUEST FOR ORAL ARGUMENT

Due to the numerous factual and legal issues involved in this case, counsel for Desert Rock Energy believe that oral argument would be beneficial to the Court. Therefore, counsel for Desert Rock Energy respectfully request that oral argument be scheduled in this case.

[Signature Page Attached]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeff Holmstead", written over a horizontal line.

Jeffrey R. Holmstead
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
202-828-5800 (phone)
202-223-1225 (fax)
jeff.holmstead@bgllp.com

*Attorneys for Desert Rock Energy
Company, LLC*

January 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing DESERT ROCK ENERGY COMPANY'S RESPONSE TO PETITIONS FOR REVIEW in the matter of Desert Rock Energy Company, LLC, PSD Permit No. AZP 04-01 were served by United States First Class Mail on the following persons, this 8th day of January 2009:

Nicholas F. Persampieri
Earthjustice
1400 Glenarm Place, #300
Denver, CO 80202
npersampieri@earthjustice.org

George E. Hays
Attorney at Law
236 West Portal Ave. #110
San Francisco, CA 94127

John Barth
P.O. Box 409
Hygiene, CO 80533
barthlaw@aol.com

Brian Doster
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, DC 40460
doster.brian@epa.gov

Patrice Simms
Natural Resources Defense Council
1200 New York Avenue NW, Suite 400
Washington, D.C. 20005
psimms@nrdc.org

Ann Lyons
Office of the Regional Counsel
EPA Region 9
75 Hawthorne St.
San Francisco, CA 94105-3901
lyons.ann@epa.gov

Kevin Lynch
Environmental Defense Fund
Climate and Air Program
2334 N. Broadway
Boulder, CO 80304
klynch@edf.org

Seth T. Cohen
Assistant Attorney General
Office of the Attorney General of New Mexico
Water, Environment and Utilities Division
P.O. Drawer 1508
Santa Fe, NM 87504-1508
scohen@nmag.gov

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
aweeks@catf.us

Leslie Barnhart
Eric Ames
Special Assistant Attorneys General
New Mexico Environment Department
P.O. Box 26110
Santa Fe, NM 87502-6110
leslie.barnhart@state.nm.us
eric.ames@state.nm.us

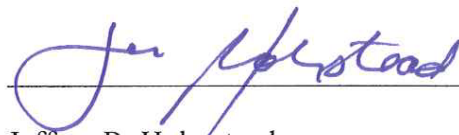
Deborah Jordan
Director, Air Division (Attn: AIR-3)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901
jordan.deborah@epa.gov

Amy R. Atwood
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
atwood@biologicaldiversity.org

Leslie Glustrom
4492 Burr Place
Boulder, CO 80303
lglustrom@gmail.com

Mark Wenzler
National Parks Conservation Association
1300 19th St NW Suite 300
Washington, D.C. 20036
mwenzler@npca.org

Douglas C. MacCourt
Ater Wynne
222 SW Columbia, Suite 1800
Portland, OR 97201-6618
dcm@aterwynne.com



Jeffrey R. Holmstead
Jason B. Hutt
Richard Alonso
Bracewell & Giuliani LLP
2000 K Street, N.W.
Washington, D.C. 20006
(202) 828-5800
*Attorneys for Desert Rock Energy Company,
LLC*

