

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

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IN RE: )

DESERT ROCK ENERGY COMPANY, LLC )

PSD Permit No. AZP 04-01 )

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

**STATE OF NEW MEXICO'S REPLY IN SUPPORT OF EPA'S MOTION FOR  
VOLUNTARY REMAND**

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## INTRODUCTION

EPA seeks to reconsider several issues in order to develop a more internally consistent and, therefore, efficient permitting process. EPA's Motion for Voluntary Remand presents only the narrow question of whether the Board has the authority to allow a voluntary remand at this stage of the proceedings. EPA rules, EAB precedent and federal case law make clear that the Board not only has this authority, but that, under the circumstances of this case, the exercise of that authority is the preferred approach for addressing the technical and discretionary policy issues identified by EPA.

Importantly, granting EPA's Motion does not constitute final agency action and does not make final determinations about any of the issues EPA intends to reconsider. 40 C.F.R. 124.19(f)(1); *and see, generally, Exxon v. Chao*, 298 F.3d 464, 467 (2002)(administrative remand order not final order subject to judicial review). The proposed remand does not, for example, render a final decision about the appropriate analysis for PM<sub>2.5</sub>, the MACT requirement or ESA compliance. Accordingly, if on remand EPA Region 9 handles any such issue in a manner that is contrary to law or results in a decision with which DREC disagrees, DREC will have the full panoply of appellate rights at its disposal. Moreover, while EPA's grounds for remand must be legitimate and not frivolous (a standard EPA overwhelmingly satisfies), it would be premature to conduct a more searching and necessarily speculative inquiry into the legality or prudence of EPA's ultimate determinations on remand. Those issues are not yet ripe for review.

The principal harm DREC suggests that it would suffer from the grant of voluntary remand is further delay in this permitting process.<sup>1</sup> As EPA's Motion suggests, however, in this

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<sup>1</sup> In prior pleadings and in its opposition to EPA's Motion, DREC has invoked Section 165(c) of the Clean Air Act, a lawsuit it brought to enforce that provision, and a never-entered and somewhat suspect consent decree that was

case, the requested remand is expected to promote a more efficient and timely completion of the permitting process. EPA Motion at 16. Even assuming, *arguendo*, that voluntary remand was denied, and further assuming that the Board was to deny remand on the merits, DREC would have a PSD “construction” permit that does not and cannot authorize construction for a long time to come because the ESA consultation and MACT determination must first be completed.<sup>2</sup> In EPA’s judgment, especially in light of the communication from the Fish and Wildlife Service regarding mercury impacts on endangered fish species, both of those determinations are likely to have ramifications for—and therefore require changes to—the PSD permit. Under such circumstances, the most efficient route to a final permitting decision is to remand the permit in order to integrate these determinations with the PSD permitting process, not to reopen the PSD permit at some point in the future.

## **ARGUMENT**

### **I. APPLICABLE AUTHORITY SUPPORTS EPA’S REMAND.**

DREC is unable to cite any authority to support its assertion that 40 C.F.R. Part 124 “prohibits” a voluntary remand of the permit by EPA at this stage of the proceedings. DREC at 7. To the contrary, both the Board’s rules and precedent evince a strong preference for decision-making by the permitting authority in the first instance. Federal case law also strongly favors granting EPA’s voluntary remand.

#### **A. EPA Rules and EAB Precedent Favor Voluntary Remand.**

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drawn up to resolve that lawsuit. New Mexico directs the Board to its Reply Brief filed previously in this appeal, wherein DREC’s arguments related to Section 165(c) are addressed. *See* State of New Mexico’s Reply Brief, February 19, 2009, pp. 9-11.

<sup>2</sup> It bears noting that the permit is also not complete because EPA has yet to develop a final statement of basis regarding PSD requirements for carbon dioxide. This determination may result in changes to the design parameters of the facility or further appellate review, or both.

DREC and ACCCE mischaracterize 40 C.F.R. § 124.19(d) as prohibiting voluntary remand after the Board grants review. DREC Resp. at 9-11; ACCCE Opp. at 4-5. In fact, section 124.19(d) does no more than to allow the permitting authority to *unilaterally* withdraw a permit up until the time review is granted or denied. Section 124.19(d) provides that a permitting authority need only offer “notification to the Board and any interest parties” in order to “withdraw the permit.” No permission or order from the Board is required. A region’s inability to *unilaterally* withdraw the permit after review has been granted does not translate, as DREC and ACCCE suggest, into a bar on a region’s ability to seek or the Board’s ability to grant leave to withdraw the permit. *Compare Broussard v. United States Postal Service*, 674 F.2d 1103, 1108 n. 4, (5th Cir. 1982)(“[t]he rule is that once a judicial suit is filed, an agency should not unilaterally reopen administrative proceedings-the agency should first ask the court to remand the case to it.”)

As others have indicated, the clear preference in the Part 124 appellate process is for “final adjudication of most permits at the regional level.” 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). Board precedent makes clear that voluntary remand is an appropriate means to allow for “final adjudication” at the regional level where, as here, “the permitting authority has decided to make a substantive change to one or more permit conditions, or otherwise wishes to reconsider some element of the permit decision.” *In re Indeck-Elwood, LLC*. PSD No. 03-04 (May 20, 2004).

DREC attempts to circumvent the strong preference for final permitting decisions at the regional level by suggesting, incorrectly, that the issues that inform EPA’s remand request in this case are more properly decided by the Board. Specifically, DREC argues that no “administrative deference” is due to Region 9 “with regard to the asserted changes in agency policy or

interpretation” that form the basis for the remand request, and that the Board is therefore the “branch of EPA [that] should be making substantive decisions regarding the Desert Rock Energy’s PSD permit.” DREC Resp. at 8-9.

The cases upon which DREC relies, however, have no bearing on the propriety of a remand and clearly only address circumstances in which “an interpretation of statutory or regulatory requirements” is at issue. *In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n. 55 (EAB 1997). EPA’s grounds for voluntarily remanding the permit in this case do not involve issues of statutory or regulatory interpretation. As to IGCC and PM2.5, EPA’s grounds for remand rest on a desire to revisit its exercise of discretion in the application of agency policy. As to MACT and the ESA, EPA’s remand request is to reconsider how best to integrate multiple requirements that affect—in potentially conflicting ways—project design and emissions controls. This is precisely the kind of “exercise of technical judgment and expertise” as to which the Board accords “broad deference.” *In re Newmont Nevada Energy Investment*, 12 E.A.D. 429, 444 (EAB 2005).

**B. Federal Case Law Unequivocally Favors EPA’s Voluntary Remand.**

Consistent with EPA rules and EAB precedent, federal case law lends strong support to EPA’s remand request, emphasizing both judicial economy as well as a preference for policy decisions to be made by those who are best positioned to make them. DREC’s and ACCCE’s efforts to sidestep the clear directives of the courts are wholly unavailing.

It is well established “that administrative agencies have inherent power to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.” *Sierra Club v. Van Antwerp*, 560 F.Supp.2d 21, 23 (D.D.C. 2008). In recognition of this power, and to avoid wasting judicial resources reviewing a decision that an agency wishes to revisit, federal courts generally grant agency requests for remand even after appellate

jurisdiction has attached. *See, e.g., Ford v. NLRB*, 305 U.S. 364, 375 (1939)(affirming grant of agency’s remand request despite attachment of exclusive judicial jurisdiction); *Wickett v. ICC*, 710 F.2d 861, 863 (D.C. Cir. 1983)(granting agency’s request for remand during appeal for the purpose of agency reconsideration).

*SKF USA v. United States* provides a thorough discussion of the appropriateness of granting an agency-initiated remand. 254 F.3d 1022 (Fed. Cir. 2001). In particular, *SKF* identifies two independent circumstances—each of which is applicable here—under which an agency’s remand request ought to be honored. First:

The agency may request a remand (*without confessing error*) in order to reconsider its previous position. It might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision or that decision’s relationship to the agency’s other policies. Here, the reviewing court has discretion over whether to remand...[a] remand may be refused if the agency’s request is frivolous or in bad faith...if the agency’s concern is substantial and legitimate, a remand is usually appropriate.

254 F.3d at 1029 (emphasis added). As set forth below, EPA has amply demonstrated that non-frivolous grounds exist for reconsidering aspects of this permit. Moreover, in the absence of “bad faith,” *SKF* makes clear that a remand to an agency “is required” where an agency seeks to reconsider its action on a matter as to which it has discretion. *Id.* at 1029-30. As the court notes in *SKF*, “an agency must be allowed to assess the wisdom of its policy on a continuing basis.” *Id.* at 1030, *citing Chevron v. Natural Resources Defense Council*, 467 U.S. 837, at 864 (1984).

Second, as explained in *SKF*, “intervening events outside of the agency’s control” may justify reconsideration if those events “draw [the agency’s] decision in question.” *Id.* at 1028-9 (internal citations omitted). Here, the U.S. Fish and Wildlife Service’s February 2009 letter indicating that existing mercury levels may be adversely affecting endangered fish species is just

such an “intervening event.” It legitimately calls into question EPA’s decision to allow post-issuance completion of the ESA consultation.

## **II. EPA PRESENTED SUBSTANTIAL AND LEGITIMATE GROUNDS FOR VOLUNTARY REMAND.**

For the reasons set forth in *SKF*, the Board need only determine here whether EPA’s grounds for voluntary remand are “substantial and legitimate” and not “frivolous” or made in “bad faith.” EPA provided several substantial bases for its remand request, none of which demonstrates frivolousness or bad faith. As suggested above, beyond a determination that these grounds are “substantial and legitimate,” any further inquiry into EPA’s grounds at this time would be premature. EPA has made no final determination as to any of these issues, and when it does, any party could seek review before this Board.

### **A. Reconsideration of the Integration of the ESA, MACT and PSD Processes Provides a Legitimate Basis for Voluntary Remand.**

EPA is entitled to reconsider its decision as to whether to integrate the PSD, MACT and ESA processes.<sup>3</sup> EPA asserts the discretion to coordinate these processes for “more efficient planning and permitting process.” EPA Motion at 17. These processes were not completed when EPA initially issued the permit. The ESA consultation was in the earliest stages, while the case-by-case MACT determination had not been initiated at all. Since then, the FWS has informed EPA that existing mercury emissions may be adversely affecting endangered fish in the Four Corners area. This finding will almost certainly require EPA to amend the permit to reduce or eliminate the potential mercury emissions from the project.

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<sup>3</sup> The State contends that EPA is required to complete the ESA and MACT processes before issuing the PSD permit. New Mexico’s Petition for Review and Supplemental Brief at 7-18, 35-41. “When an agency seeks a remand to take further action consistent with correct legal standards...remand [should be permitted] in the absence of apparent or clearly articulated countervailing reasons.” *Citizens Against Pelissippi Parkway Extension v. Mineta*, 375 F.3d 412, 416(6<sup>th</sup> Cir. 2004). Denial of a remand under such circumstances would be improper because it precludes an agency “from acting to comply with the very statute that formed the basis for the lawsuit.” *Id.*



Additionally, as EPA's Motion indicates, DREC must submit a case-by-case MACT determination for hazardous air pollutants, including mercury. The MACT determination also will affect the project's design and operation. As EPA explains, the BACT and MACT determinations may be interrelated, with the control of one pollutant affecting the control of another. EPA Motion at 16-17. EPA is best positioned to evaluate these technical issues and determine the most effective manner for integration of these processes.

DREC asserts that EPA justifies its desire to coordinate the processes on the "naked threat of future litigation on some unidentified grounds." DREC Response at 24. In fact, EPA never mentions the threat of litigation as a basis for seeking remand. EPA merely recognizes, as Petitioners have previously asserted, that inefficiencies arise if these processes are not properly integrated. EPA Motion at 14. Regardless of the threat of litigation, the Board's review of a permit that will almost certainly be changed is wasteful and inefficient.

DREC also contends that EPA's desire to coordinate processes would not "result in a more efficient planning and permitting process," but rather the "jettison[ing of] a completed process." DREC Response at 25. But there is no "completed process" to be jettisoned here. The permit is not final. Nor is there any suggestion that EPA intends to start the permitting process from scratch. DREC has always understood that EPA might be required to make adjustments to the permit to reflect the outcome of the ESA and MACT processes.

**B. Reconsideration of IGCC in the BACT Process Provides a Legitimate Basis for Voluntary Remand.**

EPA is also entitled to reconsider its position regarding IGCC. As set forth above, in the absence of bad faith, an agency's "doubts about the correctness of its decision or that decision's relationship to the agency's other policies," provide an adequate basis for a remand. *SKF*, 254 F.3d at 1029-30. As the court in *SKF* made clear, such authority derives from the proper

exercise of administrative discretion as addressed by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. *Id.*, citing 467 U.S. 837 (1984). An agency appropriately exercises such discretion unless “the agency is either compelled or forbidden by the governing statute to reach a different result.” *Id.* at 1029-1030. An agency thereby “fill[s] any gap left implicitly or explicitly, by Congress.” *Id.* Where an agency seeks, through a remand, to reconsider its exercise of such discretion, “remand is required, absent the most unusual circumstances verging on bad faith.” *Id.*

EPA asserts that it has the discretion to consider IGCC pursuant to the “redefining the source” policy.<sup>4</sup> Neither DREC nor ACCCE deny this assertion. DREC Response at 22; ACCCE Opposition at 9. Moreover, EPA does not propose to change this policy on remand. EPA Motion at 20 (“Region 9 is not seeking to change EPA’s longstanding policy that the BACT analysis should not be used to fundamentally redefine the proposed source.”) Rather, EPA proposes to reevaluate its *application* of this policy to DREF with respect to IGCC. Acting under the “redefining the source” policy in this case, EPA originally applied a further, so-called “headquarters policy” to exclude IGCC from the BACT analysis. EPA Motion at 18. This headquarters policy regarding the exclusion of IGCC was never formalized. Accordingly, EPA should be free to modify its exercise of its discretion.

Because it seeks to revisit the proper exercise of its discretion, EPA’s remand request may be denied only upon a showing of the “most unusual circumstances verging on bad faith.” *SKF*, 254 F.3d at 1029-1030. DREC makes no such showing. DREC’s principal basis for asserting bad faith is EPA’s alleged “willful misstatement of EPA Region 9’s own record.”

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<sup>4</sup> The State has consistently argued that the CAA compels the EPA to consider IGCC in the BACT analysis. *See* New Mexico’s Petition for Review and Supplemental Brief at 18-30. Although EPA does not accept the argument, it likewise does not claim that the CAA forbids such consideration. For the purpose of supporting EPA’s motion only, the State’s position is premised upon the assumption that the CAA neither compels nor forbids such consideration.

DREC Response at 20. DREC contends that EPA explicitly exercised discretion in choosing to exclude consideration of IGCC in the BACT determination in its original permitting decision. DREC Response at 22. Accordingly, DREC asserts that EPA's representation in its Motion for Remand that the original permitting decision was made based on a headquarters policy that precluded discretion as to IGCC is false. DREC Response at 21-22.

DREC's argument amounts to little more than a game of semantics. The question of what technologies to consider in the BACT analysis has consistently been a matter of EPA discretion. Under the former Administrator, the Region's exercise of that discretion as to IGCC was guided by the informal and unwritten "headquarters policy." Now, by contrast, the Region's exercise of discretion as to IGCC is not so constrained. Such a change—and EPA's characterization—do not constitute bad faith by any measure.

DREC also argues that EPA cannot reconsider its IGCC decision because it constitutes a "settled interpretation" which can be changed only through APA notice and comment rulemaking. DREC Response at 35. At this point, however, EPA requests remand only to evaluate whether to require consideration of IGCC. If EPA does decide to require consideration of IGCC in this case, DREC may challenge that decision before this Board.

Furthermore, there is nothing "settled" about the application of the redefining-the-source policy to IGCC. Petitioner knows of only two occasions when EPA excluded IGCC from the BACT analysis for coal-fired power plants under the "headquarters policy", and in both cases those decisions were appealed. One decision was remanded by the EAB on other grounds, and, in the other, EPA has requested a remand because the interpretation has been repudiated by the Administrator. At the same time, the EAB has cited with approval the consideration of IGCC in a final case, *Prairie State*, while other states, such as New Mexico, have interpreted the same

language to require consideration of IGCC. Certainly the application of the redefining-the-source policy to IGCC is not so settled that the agency must comply with the APA in order to change it.

**C. Reconsideration of PM2.5 Provides an Appropriate Basis for Voluntary Remand.**

DREC claims that EPA wants to “subject Desert Rock to rules that have yet to be promulgated”, to impose “new requirements”, and to apply “a different rule retroactively.” DREC Response at 11, 16, and 20. On the contrary, EPA Region 9’s motion for remand requests an “opportunity to reconsider the adequacy of the final PSD permit” and to consult with DREC regarding additional analyses necessary to demonstrate that the source “will not cause or contribute to a violation of the PM2.5 NAAQS and to establish a BACT emission limit in the permit.” EPA Motion at 9. EPA does not propose to apply any new requirements or a different regulation but “to reconsider its approach for demonstrating that this permit complies with the PSD requirements for PM2.5 applicable *under the existing regulations.*” *Id.* (emphasis added).

As stated in the introduction to the May 16, 2008 PM2.5 implementation rule, the Clean Air Act at section 165(a)(4) requires a BACT analysis for each pollutant subject to a NAAQS. 73 Fed. Reg. 28324 (May 16, 2008). EPA promulgated a NAAQS for PM2.5 in 1997 and strengthened the standard in 2006. *Id.* The existing PSD rules at 40 C.F.R. §52.21 require: installation of BACT; air quality monitoring and modeling to ensure that project emissions will not cause or contribute to a NAAQS violation; notification of Federal Land Managers; and public comment on the permit. *Id.* at 28323. Petitioners contended that, pursuant to the Act, the PSD regulations, and EAB precedent, EPA is required to conduct a BACT analysis for PM2.5. New Mexico’s Petition and Supplemental Brief at 56-64 and New Mexico’s Reply Brief at 29-35.

EPA acknowledges that it failed to conduct an analysis of the PM2.5 NAAQS. EPA Motion at 4. EPA also acknowledges that compliance with the existing Act and regulations requires consultation with the applicant to conduct a PM2.5 NAAQS analysis. *Id.* at 9. At the very least, the EAB decisions in *Prairie State* and *Cherry Point* make clear that a source has to do some sort of analysis to justify using PM10 as a surrogate for PM2.5. New Mexico's Reply Brief at 31-34. Because EPA acknowledges that it did not conduct such an analysis, and did not comply with the Act's provisions and PSD regulations requiring a PM2.5 NAAQS analysis and BACT limit, it is obligated to request a remand.

EPA has the authority to reconsider a permitting decision before the permit is final in response to arguments raised by petitioners or because it believes its original decision is incorrect on the merits. Under such circumstances, courts have held that it is an abuse of discretion to prevent an agency from acting to cure legal defects identified in an appeal. *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6<sup>th</sup> Cir. 2004). Courts should permit a remand to allow an agency to take further action consistent with correct legal standards in the absence of apparent or clearly articulated countervailing reasons. *Id.*; and see *SKF*, 254 F.3d at 1028-29.

Remand is also appropriate because EPA must determine how to comply with the stay. DREC does not dispute that the EPA Administrator has the discretion to change regulations and policies. DREC Response at 4 and 31. EPA states that one of the reasons for requesting the remand is the Administrator's stay of 40 C.F.R. §52.21(i)(1)(xi)—a provision that exempted certain permit applicants from compliance with the PM2.5 implementation rule. EPA Motion at 3-4. Although the Administrator has not made a final decision as to the regulations, EPA Region

9 must comply with the stay, and needs the opportunity to determine how to do so.<sup>5</sup> DREC may appeal the Administrator's decision to the D.C. Circuit Court of Appeals, and may also appeal EPA's ultimate decision on the PM2.5 issue in this case, but its complaint is not relevant to whether EPA must determine how to proceed in the wake of the stay.

Moreover, even if the Administrator's stay of 40 C.F.R. §52.21(i)(1)(xi) serves as the primary basis for EPA's request for a remand, the application of the stay is not improper because DREC has no vested property interest that could be affected. Desert Rock has not yet received a final permit. This situation is analogous to permit applications in the zoning context, which are subject to changes in zoning laws during the pendency of the permit. *See, for example, Stott Outdoor Advertising v. County of Monterey*, 601 F. Supp. 2d 1143, 1152 (N.D. Cal. 2009) (holding that an administrative body ordinarily may deny a building permit when there is a zoning change after the permit application is made); *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4<sup>th</sup> 534, 552, 103 Cal. Rptr. 2d 447 (2001) (finding no right to develop vests until all final discretionary permits have been authorized and substantial construction has occurred in reliance on a building permit.)

In addition, the pending Desert Rock permit is subject to the Administrator's stay of a final rule, but there is no retroactive application of any new requirements as a result of the stay. *Id.* at 459. A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. *Id.* Rather, the court must ask whether the new provision attaches new legal consequences to events *completed* before its enactment. *Id. citing Landgraf v. USI Film Products*, 511 U.S.

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<sup>5</sup> In the introduction to the PM2.5 implementation rule, EPA notes that the 1997 Seitz memorandum—which both EPA and DREC relied on to avoid conducting a PM2.5 analysis—recognized that EPA interpreted Part C of the Act to require PSD permits for PM2.5 upon the effective date of the NAAQS. EPA Motion for Remand at 4 and DREC Response at 29; 73 Fed. Reg. 28324 (May 16, 2008).

244 (1994).

### **III. VOLUNTARY REMAND AT THIS STAGE OF THE PROCEEDINGS DOES NOT VIOLATE THE FIFTH AMENDMENT.**

DREC's constitutional arguments against voluntary remand suffer from multiple, fatal defects.

#### **A. Remand Does Not Contravene the Equal Protection Principles of the Fifth Amendment.**

To show an equal protection violation as a "class of one," DREC must show that it was "intentionally treated differently from others similarly situated, and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). DREC cannot meet either requirement.

DREC's argument relies on permitting decisions made by three different state permitting authorities: the Georgia Department Environmental Protection Division, the Louisiana Department of Environmental Quality, and the Florida Department of Environmental Protection. DREC Resp. pp. 36-9. No case law supports DREC's claim under such circumstances for the simple reason that alleged intentional disparate treatment by different sovereigns does not give rise to an equal protection claim. That the actions were taken under EPA-approved SIPs, or that EPA has failed to challenge these actions through a SIP call does not alter the fact that the actions were taken by different sovereigns exercising their discretion in the implementation of different state air permitting programs.

In any case, DREC cannot demonstrate that the state-permitted coal-fired plants it references in Georgia, Florida and Louisiana are "similarly situated" to Desert Rock. "When a court determines whether persons are similarly situated for equal protection purposes, it must examine all relevant factors." *Syngenta Crop Protection, Inc. v. EPA*, 444 F.Supp.2d 435, 448

(M.D.N.C. 2006). With respect to government decisions that involve the exercise of “discretionary authority based on subjective, individualized determinations,” an equal protection claim generally does not lie unless there is a “clear standard against which departures, even for a single plaintiff, could be readily measured.” *Enguist v. Oregon Dept. of Agriculture*, 128 S.Ct. 2146, 2153 (2008) citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Where “myriad factors” underlay the government’s exercise of discretion, parties are “similarly situated” for purposes of equal protection analysis only if the circumstances present “no distinguishable legitimate...factors that might justify making different...decisions with respect to them.” *U.S. v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996).

Because PSD permitting decisions depend upon countless individualized considerations, there are numerous “distinguishable legitimate...factors” that negate DREC’s premise that other coal plants are “similarly situated” to Desert Rock. DREC has made no attempt to demonstrate that the Desert Rock Energy Facility, a 1500 MW coal-fired plant in northwestern New Mexico is “similarly situated” to a proposed 705 MW addition to an existing facility in New Road, Louisiana or to a proposed 750 MW expansion of an existing plant in Florida. In addition to the numerous facility-specific considerations that differentiate these plants and justify differential treatment, (such as size, location, coal-source, climate, proximity to Class I airsheds, existing air quality, etc.), none of these other facilities involve the issues presented by Desert Rock, such as, for example, the aforementioned considerations regarding endangered species.

Finally, DREC’s equal protection claim has no force so long as EPA has a “rational basis” for its decision in this instance. Where, as here, the allegedly differential treatment is not targeted at a member of a protected class and does not affect a fundamental right, the differential treatment “must be upheld...if there is any reasonably conceivable state of facts that could



provide a rational basis for [it].” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). In addition, “the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis.” *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). Here, as set forth in Section II, *supra*, EPA’s Motion provides abundant rational bases for its decision to seek voluntary remand.

Unable to otherwise satisfy its burden, DREC suggests that EPA actions that are allegedly “contrary to established law”—such as the one-year time limit in Section 165(c) of the Clean Air Act—necessarily lack a rational basis. DREC Resp. at 39. As EPA explains in its Motion, in this case, administrative efficiency and the interest in timely final resolution of this permitting action favor a voluntary remand (and therefore better serve section 165(c)). EPA Motion at 16. Moreover, as addressed above in Section I. A. *supra*, DREC’s argument that 40 C.F.R. § 124.19(d) “bars” EPA from withdrawing the PSD permit at this stage of the proceedings is entirely unfounded and thus cannot negate the rational basis for remand.

**B. Voluntary Remand Does Not Violate the Due Process Guarantee of the Fifth Amendment.**

DREC also fails to show a violation of the due process requirements of the Fifth Amendment. As DREC acknowledges, to show a due process violation, it must demonstrate: (1) “a life, liberty or property interest protected by the Due Process Clause”; (2) a deprivation of this property interest; and (3) that the government did not provide “adequate procedural rights prior to depriving [the person] of the property interest.” DREC Resp. at 42, *citing Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999). Here, DREC has no protected property interest in a non-final PSD permit. In any event, if the remand is granted, DREC has ample procedural rights prior to any final “deprivation” of a purported property interest.

**1. DREC has no protected property interest in a non-final PSD permit.**

The EPA has not taken final action on the permit, and therefore DREC has no protected property interest that could trigger the due process protections of the Fifth Amendment. A party seeking a license or permit from a government agency has a protected property interest only if the permit is, in effect, an entitlement, and the government agency lacks the discretion to deny it. *See, e.g., Gagliardi v. Village of Pawling*, 18 F.3d 188, 192-93 (2nd Cir. 1994)(finding no protected property interest in building permit that officials had discretion to grant or deny). DREC has no entitlement to a PSD permit “because nothing in the CAA provides for the issuance of a PSD permit as a matter of right.” *American Corn Growers Ass’n v. EPA*, 291 F.3d 1, 12 (D.C. Cir. 2002).

DREC suggests that a PSD permit in this case is a protected property interest because “EPA has already issued the final PSD permit to Desert Rock.” DREC Resp. at 44, n. 6. This argument ignores the fact that there has been no “final” agency action on the permit issued by EPA. Pursuant to 40 C.F.R. 124.19(f)(1), a PSD permit is not considered final until Board review and/or remand proceedings are complete. DREC’s reliance on *In the Matter of: General Electric Company* is misplaced. 4 E.A.D. 615 (EAB 1993). In *General Electric*, the Board considered the question of whether EPA changes to GE’s interim submissions under a final RCRA permit implicated due process considerations. Such interim submissions were required periodically *after* the final RCRA permit was in effect, and the Board’s analysis expressly applied to a context in which “a permit has been granted.” *Id.* 4 E.A.D. at 628. The Board determined that because “an interim submission has a material and, not infrequently, substantial effect in defining the permittee’s obligations under the permit” and may impose substantial costs on the permittee, a deprivation of property occurs that gives rise to a procedural due process

claim. *Id.* at 628-9. *GE* does not stand for the proposition that a non-final permit like Desert Rock's—a permit that the EPA still has the discretion and may even have the obligation to deny—constitutes a protected property interest for purposes of a due process analysis.

## **2. DREC has not and will not suffer a deprivation without due process.**

Even assuming DREC has a protected property interest in a non-final PSD permit, DREC cannot demonstrate that its interest would be deprived without adequate process as a result of the voluntary remand. “An essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and an opportunity for hearing appropriate to the nature of the case.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985)(internal quotes and citations omitted). Depending on the situation, due process may require “nothing more than an informal meeting with a person who has authority to prevent the deprivation,” or “just the opportunity to present objections in writing (a “paper hearing”) without the opportunity for an oral presentation.” *GE*, 4 E.A.D. at 627-8. In this case, no matter how the permitting process unfolds, DREC will have due process sufficient to satisfy the Fifth Amendment.

DREC argues that EPA's reconsideration of issues on remand “will cause a material impact on Desert Rock Energy's permit” that would “ultimately deprive Desert Rock Energy of its previously issued final permit without the benefit of the statutorily prescribed hearing before the Board.” DREC Resp. at 44-5.<sup>6</sup> To the extent that EPA alters its analysis or the permit requirements on remand, it would presumably do so only pursuant to notice and comment, and

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<sup>6</sup> DREC's suggestion that it is “entitled to a determination by the board on the merits of this permit,” confuses process with a protected interest. DREC Resp. at 45; *see, e.g., Zahra v. Town of Southold*, 48 F.3d 674, 681 (2nd Cir. 1995)(declining to recognize a protected property interest in procedures giving rise to a benefit, in distinction to the benefit itself). DREC has no protected interest in any particular form of process such as the Board's determination on the merits of this appeal.

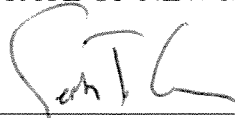
its decision would be subject to appellate review. If the Board grants EPA's Motion for Voluntary Remand, it has the discretion to ensure that such procedural safeguards are provided.<sup>7</sup>

### **CONCLUSION**

For the foregoing reasons, Petitioner the State of New Mexico respectfully requests that the Board grant EPA's Motion for Voluntary Remand.

Respectfully submitted on this 26<sup>th</sup> Day of June, 2009.

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<sup>7</sup> Also, even assuming that the remand, itself, could constitute a deprivation of property, DREC has received and will receive all the process that is due. DREC received notice of the requested remand and a full opportunity to submit written arguments to the Board. The Board, having considered DREC's arguments—and those of other participants—will issue a written order on the matter.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 26th, 2009 he caused a copy of the foregoing State of New Mexico's Reply In Support of EPA's Motion for Voluntary Remand to be served by U.S. mail and electronic mail on:

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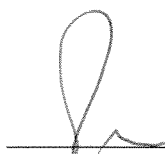
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