

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	)	
_____	)	

**CONSERVATION PETITIONERS' RESPONSE TO ACCCE'S MOTION  
REGARDING SUPPLEMENTAL AUTHORITY**

Petitioners Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, WildEarth Guardians, and Center for Biological Diversity (collectively "Conservation Petitioners"), hereby respond to the Motion to Take Notice of Supplemental Authority (the "Motion") of the American Coalition for Clean Coal Electricity ("ACCCE"). ACCCE's reliance on the case cited lacks merit and the case is of limited, if any, value to the Environmental Appeals Board ("EAB") in determining whether to grant the Environmental Protection Agency's ("EPA") Motion for Voluntary Remand ("Remand Motion").

ACCCE cites to, and attaches, Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc. et al. and Couch v. Friends of the Chattahoochee, Inc. et al., 2009 WL 1929192 (Ga. App. 2009), claiming that it "pertains to" a number of the issues before the EAB on the EPA Remand Motion and that the Georgia court's decision "supports" ACCCE's position in opposition to the Remand Motion. ACCCE's reliance on the Longleaf decision is misplaced as the decision is of limited, if any, value to the EAB here.

First, a decision of the Georgia State Court of Appeals is non-binding and of no precedential value to the EAB in that state court interpretations of federal law are not binding on federal courts.<sup>1</sup> See, e.g., Wojchowski v. Davies, 498 F.3d 99, 100, no. 9 (2<sup>nd</sup> Cir. 2007); First American Title Co. v. DeVaugh, 480 F.3d 438, 455 (6<sup>th</sup> Cir. 2007); Redgrave v. Boston Symphony, 855 F.2d 888, 917 (1<sup>st</sup> Cir. 1988); Congoleum Corp v. DLW Aktiengesellschaft, 729 F.2d 1240, 1242 (9<sup>th</sup> Cir. 1984); Martin v. Duffie, 463 F.2d 464, 468 (10<sup>th</sup> Cir. 1972).

Second, ACCCE's Motion attempts to use Longleaf to redirect or misdirect the EAB's attention to the actual issue in EPA's Remand Motion regarding Best Available Control Technology ("BACT") and modeling and analysis of small particulate matter emissions ("PM<sub>2.5</sub>"). ACCCE mischaracterizes the issues here as whether EPA "must" consider ICGC technology or require PM<sub>2.5</sub> analysis or use BACT to control CO<sub>2</sub>, all matters that the Georgia court spent some time addressing. However, EPA's Remand Motion presents no such questions. Rather, the issue before the EAB in this case is whether EPA has the discretion to take a voluntary remand of the Desert Rock PSD Permit and decide whether to require these things. In other words, the Georgia court was addressing whether a permitting entity must consider or use these requirements, not whether a permitting entity may do so. As a result, the Longleaf court's decision that a permitting entity cannot be compelled to use BACT to control CO<sub>2</sub> or to consider ICGG technology, has no bearing on whether the permitting entity has the discretion to so consider these things. In fact, the Longleaf decision recognizes this important distinction when it notes that EPA has the discretion to choose to require PM<sub>2.5</sub> analysis on a case-by-case basis. Longleaf Energy Associates, LLC, at p. 7.

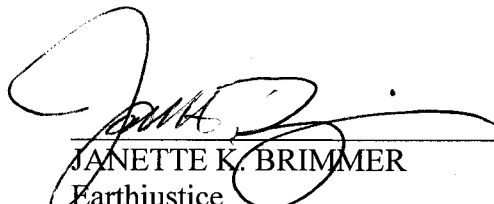
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<sup>1</sup> While the EAB is not a federal court, it is part of the federal appellate system for PSD Permits with review of EAB decisions going directly to the Circuit Courts of Appeal.

Third, an overall theme of the Longleaf decision is that the Georgia court finds that EPA's position on these issues is still being developed, that a permitting entity should not be required to guess at where EPA might be going, and that piecemeal disposition of such important matters is disfavored. This reasoning actually supports EPA's Remand Motion. EPA, in its motion here, is asking to have the opportunity to fully develop its position on these issues relative to the Desert Rock PSD Permit and it is asking the EAB to allow EPA to take a voluntary remand of the Desert Rock PSD Permit to in fact avoid a piecemeal approach and take a comprehensive, single approach to all of these issues in the single permit.

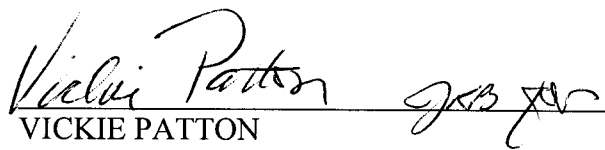
Finally, ACCCE's Motion claims that Longleaf supports the position that the Clean Air Act does not require use of BACT to control CO<sub>2</sub> under the PSD program. However, all issues regarding regulation of CO<sub>2</sub> in the Desert Rock PSD permit have already been remanded to EPA without opposition from Desert Rock or ACCCE. Therefore, issues regarding regulation of CO<sub>2</sub> are not part of the Remand Motion. Further, ACCCE never made this argument in its opposition to EPA's Remand Motion. Therefore, either ACCCE is trying, at this extremely late stage, to inappropriately raise a new argument or ACCCE is simply incorrect in its characterization of the Longleaf decision as supportive of the arguments that ACCCE actually made.

Respectfully submitted this 16<sup>th</sup> day of July, 2009.



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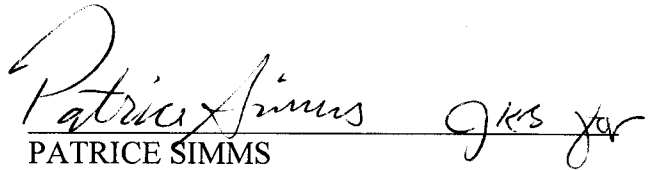
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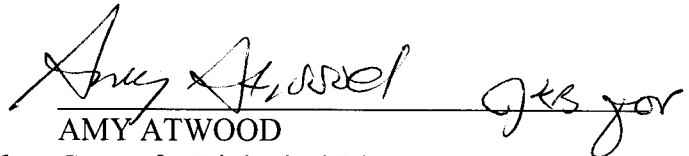
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## CERTIFICATE OF SERVICE

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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 16<sup>th</sup> day of July, 2009, at Seattle, Washington.

  
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