

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

In re Desert Rock Energy Company, LLC)
PSD Permit Number AZP 04-01) PSD Appeal Nos. 83-03, 83-04, 83-05 and
) 83-06
)
)

**PETITIONERS' MOTION FOR LEAVE TO FILE REPLY AND FOR CLARIFICATION
OF EFFECT OF NOTICE OF PARTIAL WITHDRAWAL OF PERMIT**

Petitioners Center for Biological Diversity ("CBD"), Dine Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (collectively "Conservation Petitioners") hereby move the Board for leave to file a single, consolidated reply brief no later than February 13, 2009. The brief would reply to the responses to the petitions for review and supplemental briefs filed by EPA, Desert Rock Energy Company, LLC ("DREC"), and Dine Power Authority ("DPA"), and to any amicus or other briefs opposing the petitions allowed by the Board. Conservation Petitioners request the opportunity to address all issues addressed in those briefs, except the issue whether EPA is required to set BACT emission limitations for carbon dioxide in the permit. In a January 7, 2009 Notice of Partial Withdrawal of Permit, EPA advised the Board and parties to this appeal that it had withdrawn its permit decision on the CO2 BACT issue, that it would reconsider and develop a new statement of basis on that issue, and provide notice and an opportunity for public comment on the new statement of basis. Petitioners request the Board to issue an order clarifying Petitioners' right to appeal EPA's final determination on the withdrawn CO2 BACT issue to the Board, and clarifying that the Board will resolve the issue, if necessary, based on petitions and briefs submitted in such appeal.

Counsel for Conservation Petitioners attempted to contact but was not successful in reaching counsel for EPA to discuss its position on this motion. Counsel for DREC and counsel for DPA advised that DREC and DPA oppose the motion to the extent that it requests leave to file a reply brief and take no position on the motion at this time to the extent that it requests clarification of the Notice of Partial Withdrawal of Permit.

THE PROCEEDINGS.

On July 31, 2008 EPA Region 9 issued a Prevention of Significant Deterioration (“PSD”) Permit to DREC. The permit authorizes construction of a 1500 Megawatt (“MW”) coal-fired power plant on Navajo land approximately 25 miles southwest of Farmington, New Mexico. On August 13, 2008 Conservation Petitioners except CBD filed a petition for review, motion for extension of time to file a supplemental brief on their objections to the permit, and motion to stay briefing of the CO2 BACT issue pending the Board’s then anticipated ruling in Deseret Electric Power Cooperative, PSD Appeal No. 07-03. On August 15, 2008, the State of New Mexico (“State”) filed a petition for review and request for additional time to file a supplemental brief. DREC opposed the requests for additional time to file supplemental briefs, and both DREC and EPA opposed the request to stay briefing of the CO2 BACT issue. On August 21, 2008, the Board granted the State and Conservation Petitioners except CBD a 30-day extension of time to file supplemental briefs, but denied the request to stay briefing of the CO2 BACT issue. CBD timely filed its petition for review on September 2, 2008. The remaining Conservation Petitioners and the State timely filed supplemental briefs on October 2, 2008.

On October 6, 2008, the Board ordered EPA to respond to the petitions no later than November 3, 2008. On October 9, 2008, EPA filed a motion requesting an additional 30 days for EPA, DREC and DPA to file responses to the petitions and supplemental briefs. Neither

Conservation Petitioners nor DREC opposed this request, and the Board granted it on October 14, 2008.

Subsequently, on November 13, 2008, the Board issued its decision in Deseret Power Electric Cooperative, PSD Appeal No. 07-03. In the decision, the Board rejected the rationale offered by EPA in the Deseret case for refusing to set CO2 BACT emission limitations in a PSD permit. Specifically, the Board rejected, as clearly erroneous, EPA's proffered rationale that it lacks authority to impose CO2 BACT emission limitations because "EPA has historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Slip. Op. at 9. Notably, EPA relied on the same rationale for refusing to consider CO2 BACT limitations in Desert Rock's PSD permit that it had relied upon, and that the Board rejected, in Deseret. Response to Late Filed Comments, AR 121, at 8-15. In the Deseret case, the EAB remanded the entire permit to EPA Region 8 and issued the following order:

On remand, the Region shall reconsider whether or not to impose a CO2 BACT limit in the Permit. In doing so, the Region shall develop an adequate record for its decision, including reopening the record for public comment. Petitioners or other participants in the remand proceeding who are not satisfied with the Region's decision on remand may appeal the Region's determination to this Board pursuant to 40 C.F.R. § 124.19.

Deseret, slip op. at 64.

Following the Board's decision in Deseret, on November 26, 2008, EPA moved for an additional 35-day extension of time to file responses to the petitions and supplemental briefs. In its motion, EPA stated that the Deseret decision has "a possible impact on the Desert Rock permit and this appeal," and asserted that it needed additional time to evaluate the agency's "overall approach to [the CO2 BACT] issue," and the implications of the Deseret decision and the agency's response to that decision on this case. Conservation Petitioners except CBD

advised the Board by letter on November 26, 2008 that they did not oppose the motion provided that the Board allowed those Petitioners until February 13, 2009 to file a reply. DREC did not oppose the motion to the extent that it sought a 20-day extension. On December 1, 2008 the Board granted both EPA and DPA an additional 35-day extension of time until January 8, 2009 to file responses. The Board's December 1, 2008 Order stated that "it anticipates receiving requests to file a reply brief to the Region's (and potentially Desert Rock's and DPA's) responses but will defer determining what further briefing will be permitted until after all responses have been filed."

Following receipt of the Board's December 1, 2008 Order, DREC filed its own motion requesting an additional 35-day extension of time until January 8, 2009 to file its response. The Board granted this motion on December 2, 2008.

On January 7, 2009, the day before its response was due pursuant to extensions of time totaling 65 days, EPA filed a Notice of Partial Withdrawal of the Permit. The Notice advised the Board and parties to this appeal that EPA had withdrawn the portions of its response to Petitioners' comments in this case that are the "portions of the Region's permitting decision [that] contain Region 9's basis for not including limitations on emissions of carbon dioxide in the permit." Notice 1. In the Notice, EPA acknowledges that it is withdrawing those portions of its response to comments because "they contain substantially the same reasoning that the Board found inadequate in Deseret Power." Id. at 2. EPA advises that it will "reconsider [the CO2 BACT issue] in light of the Board's opinion in Deseret and subsequent action by the Administrator." Id. at 2-3. EPA further advises that it "intends to present a new statement of basis addressing the issue of whether the permit should contain an emissions limitation for

carbon dioxide,” and that “[i]n accordance with the Part 124 Regulations,” it “will provide notice of this revised statement of basis and provide an opportunity for public comment.” *Id.* at 3.

Subsequently, on January 8, 2009, EPA, DREC and DPA each filed responses to the petitions and supplemental briefs. Consistent with its Notice of Partial Withdrawal, EPA’s response does not address the merits of the CO2 BACT issue. EPA Region 9’s Response to Petitions for Review, Supplemental Briefs and Amicus Brief 1. EPA’s response requests the Board to sever the CO2 BACT issue from the other issues on appeal, and to proceed toward resolution of the other issues. *Id.* at 1-2. DREC’s response, however, includes a 45- page section on the CO2 BACT issue. DREC’s Response to Petitions for Review 15-49. In this section, DREC makes new arguments based on alleged EPA interpretations not referenced in the July 31, 2008 response to comments on the CO2 BACT issue that EPA has withdrawn. For example, DREC relies on a memorandum issued by Administrator Johnson on December 18, 2008,¹ and an Advance Notice of Proposed Rulemaking published in the Federal Register on July 30, 2008. 73 Fed. Reg. 44,354. DREC Response 15 – 38.²

Also on January 8, 2009, the New Mexico Building and Construction Trades Council filed a motion for leave to file an amicus curiae brief in opposition to the petitions with a proposed amicus curiae brief. The proposed brief presents arguments in opposition to requiring

¹We note that the Johnson Memorandum is subject to both a pending petition for reconsideration filed on December 31, 2008, and a petition for review in the D.C. Circuit Court of Appeals file on January 15, 2009.

²DREC states that the ANPR “was explicitly cited in EPA Region 9’s response to comments, which citation contained a link where the public could access the ANPR.” DREC Response 24 (citing AR 120, at 23). However, EPA neither referenced nor relied on the ANPR in its now withdrawn response to comments on the CO2 BACT issue. AR 120, Section II.B.3.b.i., Pages 25-27; AR 121, Section 5, Pages 8-15. Instead, EPA references the ANPR in a separate response to comments in support of statements that EPA is working to develop an overall regulatory strategy for addressing the emissions of CO2 and other greenhouse gases under the Clean Air Act, and is seeking public input on specific effects of climate change and potential regulation of greenhouse gas emissions. AR 120, Section II.B.3.a.i., Page 23.

emission limits for carbon dioxide. Additionally, on January 8, 2009 the Navajo Nation filed a Motion to Intervene or File Non Party Brief.

On November 21, 2008, the State filed a motion to supplement the administrative record with evidence of high ozone levels and impacts from oil and gas development supporting Petitioners' claims that EPA had failed to adequately assess the contribution of construction and operation of the proposed Desert Rock power plant to violations of the National Ambient Air Quality standard for ozone. In the alternative, the State's motion requested the Board to remand the permit and provide notice and an opportunity for public comment on this information. Conservation Petitioners except CBD filed a joinder and concurrence in this motion on December 1, 2008. DREC responded to these motions on December 3, 2008. EPA did not respond to these motions until January 8, 2009.

ARGUMENT

I. THE BOARD SHOULD GRANT CONSERVATION PETITIONERS LEAVE TO FILE A REPLY NO LATER THAN FEBRUARY 13, 2009.

The Board's Practice Manual states that "petitioners who believe that the permitting authority's response requires a reply may, upon motion explaining why a reply brief is necessary, be granted leave to file a reply brief." EAB Practice Manual 36 (June 2004). The Board has on numerous occasions granted petitioners leave to file reply briefs in support of petitions for review of PSD permits and other types of permits. Egs., In re Northern Michigan University, Ripley Heating Plant, PSD Appeal No. 08-02, Order filed August 14, 2008; In re Conoco Phillips Co., PSD Appeal No. 0702, Order filed November 6, 2007; In re District of Columbia Water and Sewer Authority, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, Order filed July 26, 2007; In re Prairie State Generation Facility, PSD Appeal No. 05-05, Order filed August

19, 2005.³ The Board has granted such leave where “good cause is shown,” and filing a reply brief will assist the Board in its resolution of the issues. In re District of Columbia Water and Sewer Authority, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, Order filed July 26, 2007, slip op. at 3-4. Where it grants such leave, the Board sets a deadline for filing the reply that is “consistent with the timely adjudication for PSD permitting appeals.” In re Northern Michigan University, Ripley Heating Plant, PSD Appeal No. 08-02, Order filed August 14, 2008.

The Board should grant Conservation Petitioners leave to file a reply. The petitions and supplemental briefs raise issues of substantial importance to PSD permitting that have not previously been addressed by the Board. Such issues include:

- whether EPA erred by excluding IGCC from consideration at Step 1 of its BACT analyses for a number of pollutants based on application of its “redefinition of the source” policy where IGCC is fully consistent with the applicant’s stated purpose to produce electricity with coal from an adjacent mine on Navajo lands;
- whether EPA erred by failing to consider the collateral environmental impacts of carbon dioxide emissions and the collateral costs of future carbon dioxide regulation in its BACT analyses;
- whether EPA erred by issuing the permit without conducting a Maximum Achievable Control Technology Analysis (“MACT”) for hazardous air pollutants under Section 112(g) of the Clean Air Act, and determining, on the record, the impact that MACT requirements will have on PSD control technology selection, including BACT analyses, and corresponding permit limitations; and
- the extent to which EPA must coordinate its PSD permit proceedings with ongoing NEPA proceedings for the source for which the PSD permit is sought.

In addition, Conservation Petitioners’ initial review of the responses indicates that EPA and DREC have raised a number of new issues, not discussed in EPA’s Response to Comments, which Conservation Petitioners did not have a chance to address in their petitions and

³ Conservation Petitioners will provide the Board or any of the parties copies of these slip opinions on request, but note that each of the slip opinions is available on the Board’s webpage.

supplemental brief. For example, Petitioners asserted that DREC and EPA failed to demonstrate that the Desert Rock power plant will not cause or contribute to a violation of the PM2.5 NAAQS. In their responses, DREC and EPA argue, for the first time, that the EAB lacks the legal authority to address this issue. Desert Rock Response Brief at p. 144-49; EPA Response 68-75. Desert Rock and EPA also argue, for the first time, that timelines for application of a PM10 surrogate rule contained in an EPA final rule issued just 16 days prior to the issuance of the Desert Rock permit are a "logical outgrowth" of the proposed rule for the PM10 surrogate policy. DREC Response 145-49. Petitioners should have the opportunity to reply to these newly framed legal arguments.

In response to Petitioners' claim that EPA's SO2 increment analysis is flawed, DREC claims that Petitioners presented "new arguments and emission rates which were not specifically presented to the Region during the public comment." DREC Response 178. Petitioners disagree with this argument and should be permitted in a reply brief to demonstrate that the arguments in their Petition were presented to EPA during the public comment period.

Furthermore, Conservation Petitioners asserted in their supplemental brief that EPA added a NOx optimization plan to the permit after the close of the public comment period and unlawfully deprived them of an opportunity to comment on the plan Supplemental Brief 170-72. EPA asserts for the first time in its response that it was not required to provide public notice and an opportunity to comment on this addition to the permit because the optimization plan is a "logical outgrowth" of comments on the proposed permit. EPA Response 33, 37-39. EPA does not mention the "logical outgrowth" argument in its response to comments that explains its basis for including the optimization plan in the permit. AR 120, at 63-63.

EPA's recent withdrawal of its decision on the CO₂ BACT issue for reconsideration, public notice and comment, also presents a new ground for remanding the entire permit at this time which Conservation Petitioners should be permitted to brief in full. The CO₂ BACT requirement is inextricably intertwined with a number of other permit requirements. Indeed, a determination by EPA that a BACT analysis and emission limitations are required or otherwise appropriate for carbon dioxide could lead to (among other things) selection of IGCC through the CO₂ BACT analysis and/or a commitment to carbon capture and storage,⁴ and in turn the BACT choice for CO₂ also could result in changed BACT emission limitations for a number of other pollutants. Any changes to the permit intended to address CO₂ emissions would also have implications for hazardous air pollutants (and may dramatically change the MACT analysis required under section 112(g)). Similarly, any CO₂ related changes could have significant implications for environmental justice if they result in a plant with a different emissions profile, change the scope of, or schedule for construction, or result in a scaled down project or a project of a fundamentally different nature (e.g., a renewable energy project).

A remand of the entire permit would be the most appropriate response to EPA's partial permit withdrawal, in order to allow EPA to address other important issues. Conservation Petitioners and the State argued at length in their supplemental briefs that the permit and the process leading to its issuance are fundamentally flawed due to the failure to conduct, or the inappropriate deferral of, a number of required analyses that must inform the permit's terms and conditions. These analyses include, in addition to the CO₂ BACT analysis, the ESA

⁴ We note with regard to potential CO₂ related changes, that the Navajo Nation has reportedly requested some \$2.9 billion in stimulus monies, assertedly to pursue a number of priorities, including carbon capture and storage at the Desert Rock plant. [http://www.navajo.org/NewsReleases/George_Hardeen/2009/Jan09/President_Shirley_seeks_\\$2.9_billion_through_stimulus_program_for_Jan_10.pdf](http://www.navajo.org/NewsReleases/George_Hardeen/2009/Jan09/President_Shirley_seeks_$2.9_billion_through_stimulus_program_for_Jan_10.pdf)]

consultation, the MACT analysis for Hazardous Air Pollutants, coordination with and consideration of relevant information generated in connection with the ongoing NEPA proceedings, analysis of impacts to ambient ozone levels, and analysis of impacts to visibility and regional haze. Since EPA has now withdrawn for reconsideration the CO2 BACT portion of its permit decision, it makes sense to remand the entire permit so that the required analyses may be completed and EPA may take public comment and make any changes to the permit required by those analyses. This approach ultimately would lead to speedier and more efficient disposition of this permitting action, would avoid redundancy, and would conserve the resources of the Board by avoiding unnecessary briefing that might be overtaken by other events. Conservation Petitioners plan to fully develop this argument in a reply.

Especially in light of the novelty and complexity of the issues raised in the petitions and the new issues raised in the responses and in the Notice of Partial Withdrawal of Permit, good cause exists to allow Conservation Petitioners to file a reply brief, and a reply brief will likely assist the Board in its consideration of the issues.

Allowing Conservation Petitioners until February 13, 2009 to file a reply would not prejudice either EPA, DREC or any other participants in this proceeding, and would be “consistent with the timely adjudication for PSD permitting appeals.” See In re Northern Michigan University, Ripley Heating Plant, PSD Appeal No. 08-02, Order filed August 14, 2008. DREC may not begin construction unless and until a final permit is issued after conclusion of the Board’s review. However, allowing Petitioners until February 13, 2009 to file a reply is unlikely to delay either final issuance of a PSD permit or DREC’s plans to commence construction. Final issuance of a permit cannot occur until the withdrawn CO2 BACT issue is resolved. Further, the permit acknowledges that construction may not commence until

consultation obligations under the Endangered Species Act are satisfied. AR 122, ¶ II.a., Page 2. Before construction may commence, EPA must also perform a comprehensive, source-specific MACT analysis for the proposed plant and establish MACT emission limitations for each hazardous air pollutant that the facility will emit. 42 U.S.C. § 7412(g). In addition, the Bureau of Indian Affairs must issue a Final Environmental Impact Statement before it decides whether to approve a lease required for the project. For these reasons, it is unlikely that granting leave to file the reply brief would prejudice any of the participants in this case.

Permitting Conservation Petitioners until February 13, 2009 to file a reply brief is also reasonable given the length of the response briefs and the novelty and complexity of the issues. EPA and DREC were afforded 95 days to file their responses, and filed responses of 137 and 275 pages, respectively. The requested 36 days is a reasonable period of time to allow Petitioners to consider the lengthy responses and coordinate in preparing a joint reply. For these reasons, the Board should grant Conservation Petitioners leave to file, no later than February 13, 2009, a reply to the responses of EPA, DREC and DPA, and to any other briefs that the Board accepts for filing that oppose the petitions for review.⁵ The Board should also grant Petitioners leave to file, no later than February 13, 2009, a reply to EPA's and DREC's responses to the State's and Conservation Petitioners' motions regarding the information on ozone that recently became available.

⁵ We note that the Navajo Nation, relying on rules not applicable to this proceeding, moved for leave to intervene or file a nonparty brief in this case on January 8, 2009. The Navajo Nation did not file a proposed brief with its motion. Conservation Petitioners intend to file a response to the motion, which opposes the motion because the Navajo Nation is already represented in this case through DPA and the motion is untimely. If the Board permits the Navajo Nation to file a brief, Petitioners reserve the right to request additional time to reply to such brief. Further, if a joint response to the Navajo Nation's brief and the other briefs would be consistent with efficient resolution of this proceeding, Petitioners may seek additional time to reply to all briefs opposing the petitions.

II. THE BOARD SHOULD CLARIFY THAT IT WILL ALLOW APPEAL OF EPA'S FINAL DETERMINATION ON THE CO2 BACT ISSUE, AND, IF NECESSARY, RESOLVE THE ISSUE BASED ON BRIEFING IN SUCH APPEAL.

EPA withdrew its portion of the permitting decision in this case on the CO2 BACT issue based on the Board's decision in Deseret. Notice of Partial Withdrawal of Permit 2. EPA asserts that it "intends to prepare a new statement of basis addressing the issue," and "will provide notice of this revised statement of basis and provide an opportunity for public comment." Id. at 3. EPA, however, does not specifically indicate whether an appeal of such new statement of basis to the Board should be permitted and whether Petitioners should be permitted to brief the issue in such appeal. We respectfully request the Board to provide clarification on this issue. As the withdrawal is based on the Board's decision in Deseret, it would be appropriate for the Board to enter an order providing Conservation Petitioners the same relief that the Board provided in Deseret. Specifically, it would be appropriate for the Board to enter an order stating:

[T]he Region shall reconsider whether or not to impose a CO2 BACT limit in the Permit. In doing so, the Region shall develop an adequate record for its decision, including reopening the record for public comment. Petitioners or other participants in the . . . proceeding [on partial withdrawal of the permit] who are not satisfied with the Region's decision on [partial withdrawal] may appeal the Region's determination to the Board pursuant to 40 C.F.R. § 124.19.

We also respectfully request the Board to clarify that it will resolve the CO2 BACT issue, if necessary, based on briefs submitted on appeal of EPA's final determination on partial withdrawal of the permit rather than based on the briefing of this issue presented in DREC's response. Such clarification would avoid the need for Conservation Petitioners to respond to that briefing, which raises significant new issues, at this time. Petitioners are required to direct their objections to EPA's permitting decision to the agency's response to comments—petitioners must state their objections to the permit and show why EPA's previous response to those objections is clearly erroneous or otherwise warrants review. In re Prairie State Generating Co.,

13 EAD ____ (August 24, 2006); In re Deseret Electric Cooperative; slip. op. at 20. Therefore, it makes no sense for Petitioners to brief an issue on which the response to comments has been withdrawn. Furthermore, even if Petitioners briefed the issue now, they would likely feel compelled to seek to brief the issue again based on EPA's revised statement of basis.⁶

If the Board declines to remand this case in its entirety, with respect to at least some of the issues other than the CO2 BACT issue, Petitioners do not object to EPA's request that the Board move toward resolution. EPA Response 2. We recognize, however, that the Board may be reluctant to consider challenges to permit terms that potentially could change based on further proceedings on the CO2 BACT issues until those issues are resolved. Petitioners assert a number of objections to such permit terms. However, as discussed above, Petitioners also assert several objections to the failure to conduct, or deferral of, required analyses that should also inform the permit's terms and conditions. We respectfully submit that, if the Board declines to remand this case in its entirety, it would be consistent with the efficient conduct of this proceeding and the timely adjudication of this PSD permit appeal for the Board to proceed to review Petitioners' objections to such deficiencies in required analyses without delay following submission of Petitioners' reply.

CONCLUSION

For these reasons, Conservation Petitioners respectfully request the Board to enter an order:

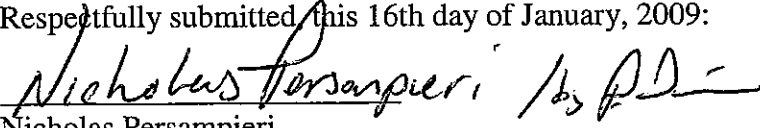
⁶Petitioners were already required to unnecessarily brief the CO2 BACT issues at length after EPA and DREC objected to and the Board declined to approve Conservation Petitioners' request to stay briefing of the issue pending the Board's ruling in Deseret. This briefing contributed substantially to the length of Conservation Petitioners' Supplemental Brief, consuming 70 pages. The length of the section was attributable in part to EPA's purported incorporation by reference of its response brief in the Deseret case into its response to comments in this case, and Petitioners need to address the issues raised in that lengthy brief. See AR 121, at 8.

(1) granting Conservation Petitioners leave to file no later than February 13, 2009 a single, consolidated reply to the responses of EPA, DREC and DPA to the petitions for review and supplemental briefs, and to any other briefs filed in opposition to the petitions;

(2) granting Conservation Petitioners leave to file no later than February 13, 2009 a single, consolidated reply to the responses of EPA and DREC to the State's and Conservation Petitioners' motions requesting supplementation of the record with the information on ozone that recently became available; and

(3) clarifying that the Board will allow Petitioners to appeal to the EAB EPA's final determination on the withdrawn CO2 BACT issue to be issued following reconsideration, public notice and comment, and will resolve the CO2 BACT issue, if necessary, based in briefing in such appeal.

Respectfully submitted this 16th day of January, 2009:


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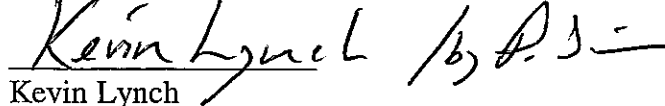
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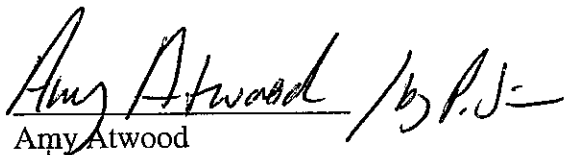
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The undersigned hereby certifies that on January 16, 2009 he/she caused a copy of the foregoing to be served by mail on:

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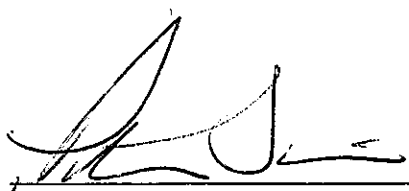
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