

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

IN THE MATTER OF:)

DESERT ROCK ENERGY COMPANY, LLC)

PSD PERMIT NO. AZP 04-01)
_____)

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

**JOINT MOTION FOR RECONSIDERATION OF ORDER ESTABLISHING DEADLINE
FOR RESPONSES TO REGION'S MOTION FOR VOLUNTARY REMAND**

Desert Rock Energy Company, LLC ("Desert Rock Energy"), the permittee in this matter, and Diné Power Authority ("DPA") respectfully bring this Motion for Reconsideration of Order Establishing Deadline for Responses to Region's Motion for Voluntary Remand. Under a recent order from the Board, all responses to EPA Region 9's Motion for Voluntary Remand (the "Remand Motion") are due no later than May 8, 2009, which is only 10 days after the Remand Motion was filed. In light of the unprecedented and unexpected nature of this Motion and the extraordinary consequences for Desert Rock Energy and the Navajo Nation if the Board were to grant the Motion, Desert Rock Energy and DPA request that the May 8th deadline be extended to June 11th, which is 45 days from the filing of the Remand Motion. Such an extension would not prejudice any party, is consistent with the extensions that have routinely been granted to other parties in this case, and would afford Desert Rock Energy and DPA the opportunity to respond to several important legal issues raised for the first time by the Remand Motion.

Counsel for Desert Rock Energy has attempted to contact the other parties in this proceeding (generally through their counsel) regarding their positions on this Motion. The Environmental Protection Agency and EPA Region 9 do not oppose this motion. The State of New Mexico and the NGO Petitioners¹ do oppose this motion. Leslie Glustrom opposes Desert Rock Energy's request for a 45-day extension, but does not oppose a 30-day extension.

STATEMENT OF SUPPORTING FACTS

The Board has been receptive to requests for extensions of time in the past. Indeed, the Board has granted EPA Region 9 no fewer than three different extensions to file its briefs in this matter, adding an additional 110 days to the appeals process. In addition, another 37 days in extensions have been granted to Petitioners. Desert Rock Energy has only sought and been granted extensions to align its briefing schedule with EPA Region 9's.

1. Desert Rock Energy submitted its PSD permit application to EPA Region 9 on February 22, 2004. AR 6. EPA Region 9 issued a finding that the application was complete on May 21, 2004. AR 14.
2. More than four years later, on July 31, 2008, EPA Region 9 issued a Prevention of Significant Deterioration ("PSD") permit to Desert Rock Energy. AR 122.
3. On August 14, 2008, NGO Petitioners filed a petition with this Board to review the PSD permit issued to Desert Rock Energy. NGO Petitioners' Petition for Review, Motion for Extension of Time to File Supplemental Brief, and Motion for Stay of Certain Issues Pending the Board's Decision in *In Re Deseret Power Electric Cooperative*. On August 15, 2008, the State of

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

New Mexico also filed a petition to review. State of New Mexico's Petition for Review and Request for Oral Argument.

4. On August 21, 2008, the Board granted the NGO Petitioners and the State of New Mexico a 30-day extension of time until October 2, 2008 to file supplemental briefs in support of their petitions for review. Order Granting NGO Petitioners' Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues.

5. Additional petitions for review were filed on September 2, 2008 by the Center for Biological Diversity and on September 5, 2008 by Leslie Glustrom. Center for Biological Diversity Petition for Review; Leslie Glustrom Petition for Review with Attachments.

6. On October 6, 2008, this Board issued an Order scheduling a response date of no later than November 3, 2008 for the submission of responses from EPA Region 9 and Desert Rock Energy. Order Scheduling Response Date.

7. The Board granted EPA Region 9's motion for a 30-day extension on October 14, 2008, and ordered that EPA Region 9, Desert Rock Energy, and DPA file their responses to the petitions, supplemental briefs, and/or amicus curiae brief no later than December 3, 2008. Order Granting Motion to Participate, Motion to File Amicus Curiae Brief, and Motion for Extension of Time to File Responses.

8. On November 26, 2008, five working days before the December 3rd deadline imposed by the Board, EPA Region 9 submitted a motion to the Board requesting an additional 35-day extension of time based primarily upon the Board's decision in *In re Deseret Power Electric Cooperative* case, PSD Appeal No. 07-03 (Nov. 13, 2008). Region's Motion for Extension of Time to Respond to Petitions and Supplemental Briefs.

9. The Board granted EPA Region 9's request for an additional 35-day extension of time on December 1, 2008 and ordered EPA Region 9 to file its response no later than January 8, 2009. Order Granting Motion for Extension of Time to Respond to Petitions and Supplemental Briefs. Thus, Desert Rock Energy was ordered to file its response by the same deadline granted to EPA Region 9: January 8, 2009. Order Granting Desert Rock Energy's Motion for Extension of Time to Respond to Petitions and Supplemental Briefs.

10. On January 7, 2009, the day before EPA Region 9's response was due, EPA Region 9 withdrew section II.B.3.b (pages 25-27) of its Response to Public Comments (Docket No. EPA-R09-OAR-2007-1110-120) and section 5 (pages 8-15) of its Responses to Late-Filed Public Comments (Docket No. EPA-R09-OAR-2007-1110-121), asserting that this action was authorized under 40 C.F.R. § 124.19(d). These portions of the administrative record dealt with the issue of the Best Available Control Technology ("BACT") for carbon dioxide.

11. On January 22, 2009, this Board issued an Order granting review of the permit. The Board also set a briefing schedule that ordered the State of New Mexico and NGO Petitioners to submit their respective reply briefs on or before February 13, 2009, and that EPA Region 9, Desert Rock Energy and DPA submit their respective surreplies on or before March 6, 2009.

12. On February 11, 2009, because of two medical emergencies that had affected the counsel for the State of New Mexico, the Board granted New Mexico's unopposed motion for an extension of time and ordered that the State of New Mexico file its reply brief on or before February 20, 2009. Order Granting Motion for Extension of Time to File Reply Brief. Through this order, the Board also ordered that all surreply briefs be due on or before March 13, 2009. *Id.*

13. On February 12, 2009, the Board granted the NGO Petitioners' request that the deadline for their reply brief and that of Petitioner Leslie Glustrom be extended to February 20, 2009. NGO Petitioners' Motion for Extension of Time to File Reply Brief. In contrast to Petitioner State of New Mexico, which required an extension for medical emergencies, NGO Petitioners provided no basis for their extension request other than consistency in the overall briefing schedule.

14. On March 13, 2009, the day that its surreply brief was due, EPA Region 9 filed a motion with the Board requesting an additional 45-day extension of time, until April 27, 2009, to file its surreply. EPA Region 9's Motion for an Extension of Time to File Surreply Brief.

15. On March 17, 2009, the Board granted EPA Region 9's extension of time, such that its surreply brief was due on April 27, 2009. Order Granting Motion for Extension of Time to File Surreply Brief. However, the Board did not grant corresponding extensions of time to Desert Rock Energy or DPA. *Id.* Instead, the Board ordered that Desert Rock Energy and DPA file their respective surreply briefs on or before March 20, 2009. *Id.*

16. On April 27, 2009, without any consultation with Desert Rock Energy, EPA Region 9 filed its extraordinary and unprecedented Remand Motion requesting "a complete remand of the Final PSD Permit and administrative record." Remand Motion at 8. Thus, after a permitting process that has already taken more than four years longer than allowed by statute, EPA has decided that it wants to start the process over again – not because it has identified any legal flaw in the existing permit, but because the new EPA Administrator wants to exercise her discretion to reconsider certain policies and conduct the PSD permitting process in a different way and without any regard to the rule of law. Given that Desert Rock Energy has invested millions of dollars and more than five years of effort to comply with all the existing procedural

and substantive requirements for obtaining a PSD permit (and to respond to requests from EPA and other federal agencies that go well beyond any legal requirements), and given that millions of dollars in annual revenue for the Navajo Nation hang in the balance, Desert Rock Energy and DPA deserve more than ten days to respond to the Remand Motion.

ARGUMENT

As EPA acknowledges in its Motion, its request in this case is unprecedented. Remand Motion at 7. It is also completely unexpected. No one from EPA ever suggested (at least not to Desert Rock Energy or DPA) that the Agency was considering the path it now is proposing to take. Nor did EPA ever consult with Desert Rock Energy or DPA about the Agency's Motion for Voluntary Remand.

Because EPA's Remand Motion is unprecedented, it raises a number of legal issues that go well beyond the Clean Air Act and the other environmental issues that Desert Rock Energy and DPA have been addressing in this case. Because it is also unexpected, we need to time to research and brief these issues for the Board.

Given the procedural posture of this case, it is the Board, and not the Administrator, that will need to rule on a number of important legal issues on behalf of EPA. *See* 40 C.F.R. § 124.19; 40 C.F.R. § 1.25(e). The Board's decisions on these issues will reflect on the integrity of EPA as an institution and its respect for basic notions of fairness and due process. We do not believe that the Board or EPA will be well served unless there is sufficient time to research and brief these issues.

The new Administrator clearly has discretion to change certain policies, as long as these changes are consistent with underlying statutory requirements, and then to apply these policy changes prospectively. She does not, however, have unfettered discretion to apply these policies retroactively. There is a body of case law dealing with the retroactive application of regulatory

requirements, but Desert Rock Energy and DPA have not had any reason before now to review this case law. Additional time is needed to research and brief these issues for the Board.

The new Administrator also must comply with certain procedural requirements in order to change existing policies. For example, under *Paralyzed Veterans* and its progeny, EPA must go through notice-and-comment rulemaking to change long-standing policies even if those policies were not originally adopted pursuant to notice-and-comment rulemaking. *See Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration*, 177 F.3d 1030, 1033-35 (D.C. Cir. 1999) (citing *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *see also Croplife America v. Environmental Protection Agency*, 329 F.3d 876, 881-84 (D.C. Cir. 2003)). Desert Rock Energy and DPA need additional time to research and brief these issues for the Board.

EPA's extraordinary Remand Motion also raises serious constitutional concerns. Desert Rock Energy began this permitting process many years ago with the expectation that, if it followed the procedural rules and met all the legal requirements for obtaining a PSD permit, then it would obtain a PSD permit in a timely fashion, as required by law. Now, EPA concedes that Desert Rock Energy has followed all the existing procedural and substantive requirements, but nevertheless wants to withdraw the permit and begin the permitting process over again under a different and undefined set of rules. We believe that this raises serious due process concerns, but we need additional time to research and brief these issues for the Board.

The Remand Motion also raises equal protection concerns. Since 2004, when the permit application for Desert Rock Energy was completed, permit applications for a number of other coal-fired power plants have been submitted and PSD permits have already been issued for those plants throughout the United States. To some extent, this is not surprising given the structure of

the Clean Air Act, which affords different permitting authorities discretion in making certain permit decisions. In this case, however, where EPA wants to follow a process for PSD permitting on Indian Lands that is so fundamentally different than the process used anywhere else in the country – and in a way that treats the Navajo Nation and its partners so unfairly – there are obvious equal protection concerns. Because we have not had any reason before now to research these issues, we need additional time to research and brief these issues for the Board.

EPA's Remand Motion also raises questions about the integrity of formal agreements executed on behalf of the United States by its authorized representatives. As the Board knows, the Clean Air Act requires that EPA make a final decision on a PSD permit within one year of receiving a complete permit application. 42 U.S.C. § 7475(c). After investing millions of dollars to prepare the information needed for a permit application, Desert Rock Energy submitted its PSD permit application on February 22, 2004. AR 6. Because there had already been extensive pre-filing consultations between Desert Rock Energy and EPA Region 9 permitting officials before the application was filed, EPA Region 9 was able to issue a formal determination that the permit application was complete just a month later – on May 21, 2004.

Over the next 3 years, Desert Rock Energy and DPA worked to address all the concerns raised about the proposed plant and agreed to number of conditions that go well beyond anything required by law. Despite these efforts, and despite statements by Region 9 career officials that the permit was ready to be issued, Desert Rock Energy and the Navajo Nation could not persuade EPA headquarters to allow Region 9 to issue the permit. Finally, Desert Rock Energy and DPA brought a lawsuit to compel EPA to make a final decision on the permit.

In response to this lawsuit, the U.S. Department of Justice ("DOJ") signed a consent decree on behalf of the U.S. Government, promising that EPA would make a final decision on

the permit by August 1, 2008. EPA Region 9 beat this deadline by a day, issuing the final permit on July 31, 2008. After the Region issued the permit, EPA and DOJ said that there was no reason to go to the trouble of formally entering the consent decree with the Court, since EPA had already complied with it. Somewhat naively, perhaps, Desert Rock Energy and DPA agreed. No one at Desert Rock Energy or DPA imagined that EPA might issue the permit and then take it back. We do not believe that the career officials representing EPA and DOJ at that time ever imagined such a result, either.

Now, however, EPA wants "a complete remand of the Final PSD Permit and administrative record to enable the Region to reconsider several important policy issues and take further action to request additional information." Remand Motion at 8. If the consent decree had been entered by the Court, EPA could not withdraw the permit unilaterally without facing sanctions from the Court. The fact that the consent decree was not entered by the Court, however, does not change the fact that there is a formal agreement between Desert Rock Energy, DPA and the U.S. Government. In light of this agreement, we believe that the Remand Motion raises serious legal issues that reflect on the integrity of the U.S. government. We need additional time to research and brief these issues for the Board.

In its Remand Motion, the Agency also argues that it is entitled to the remand "absent the most unusual circumstances verging on bad faith." Remand Motion at 8 (quoting *SKF USA Inc. v. U.S.*, 254 F.3d 1022 (Fed Cir. 2001)). We believe that the Agency's attempt to start the permitting process over again, in clear violation of a written agreement requiring a final permit decision by August 1, 2008, clearly represents "unusual circumstances verging on bad faith." But we also believe that the Board must consider other factors in deciding whether such circumstances exist in this case.

The Agency and the Board are dealing with a permitting action – a specific matter involving particular parties, governed by a particular set of rules. It would be bad faith if the Agency is intentionally delaying issuance of the Desert Rock permit long enough to allow EPA to conduct rulemaking on various issues that would place Petitioners and the new EPA administration in a better position to attach new limits and conditions to the Desert Rock permit that are not currently required by law. To the extent that Petitioners and the new EPA administration are communicating about such a strategy, then such communications would clearly represent bad faith.

Because of concerns about such strategic communications, on Tuesday, April 28, 2009, Bracewell & Giuliani LLP submitted a Freedom of Information Act ("FOIA") request on behalf of Desert Rock Energy to seek any EPA documents that might relate to conversations between EPA or other government officials and the parties that are opposing the Desert Rock permit. *See* Letter from Jeffrey R. Holmstead to EPA National Freedom of Information Officer (April 28, 2009), attached hereto as Exhibit A. If there are any such documents, we would like to review them before filing our response to the Remand Motion.

In the past, EPA has not been very timely in responding to FOIA requests, but Administrator Jackson has made this one of her priorities, as evidenced by the “fishbowl memo” issued on April 23, 2009. *See* Memorandum from Lisa P. Jackson to EPA Employees, *Transparency in EPA's Operations*, (April 23, 2009), attached hereto as Exhibit B. In this memo, Administrator Jackson directed EPA employees to “exercise their discretion in favor of disclosing documents whenever possible” under FOIA. She also said that EPA offices should respond quickly to such requests and even take steps to put information on the Agency website without waiting for a request from the public to do so. Desert Rock Energy and DPA expect,

therefore, that EPA will provide the requested documents within the timeframe required by FOIA. To the extent that EPA fails to comply with FOIA within the prescribed 20-day deadline, however, Desert Rock Energy and DPA may need to seek discovery in this proceeding.

CONCLUSION

For the reasons stated above, Desert Rock Energy and DPA respectfully request that this Board issue an order extending the time for parties to respond to the Remand Motion to June 11, 2009.

Dated: May 1, 2009

Respectfully submitted,



Jeffrey R. Holmstead
Bracewell & Giuliani LLP
2000 K Street, N.W., Suite 500
Washington, DC 20006-1872
(202) 828-5800 (phone)
(202) 223-1225 (fax)
jeff.holmstead@bgllp.com

*Attorney for Desert Rock Energy
Company, LLC*



Douglas C. MacCourt
Ater Wynne LLP
222 SW Columbia, Suite 1800
Portland, OR 97201-6618
(503) 226-1191 (phone)
(503) 226-0079 (fax)
dcm@aterwynne.com

Attorney for Diné Power Authority

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing JOINT MOTION FOR RECONSIDERATION OF ORDER ESTABLISHING DEADLINE FOR RESPONSES TO REGION'S MOTION FOR VOLUNTARY REMAND 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 1st day of May 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

Mark Wenzler
National Parks Conservation Association
1300 19th St NW Suite 300
Washington, D.C. 20036
mwenzler@npca.org

Leslie Glustrom
4492 Burr Place
Boulder, CO 80303
lglustrom@gmail.com

Stephanie Kodish
Clean Air Counsel
National Parks Conservation Association
706 Walnut Street, Suite 200
Knoxville, TN 37902
skodish@npca.org

Justin Lesky
Law Office of Justin Lesky
8210 La Mirada Place NE Suite 600
Albuquerque, NM 78109
jlesky@leskylawoffice.com

Louis Denetsosie, Attorney General
D. Harrison Tsosie, Deputy Attorney
General
Navajo Nation Department of Justice
P.O. Box 2010
Old Club Building
Window Rock, AZ 86515
Louisdenetsosie@yahoo.com
eputyag@hotmail.com

Douglas C. MacCourt
Michael J. Sandmire
Ater Wynne, LLP
222 SW Columbia, Suite 1800
Portland, OR 97201-6618
dcm@aterwynne.com

Respectfully submitted,



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

*Attorney for Desert Rock Energy
Company, LLC*

May 1, 2009

Exhibit A

BRACEWELL & GIULIANI

Texas
New York
Washington, DC
Connecticut
Dubai
Kazakhstan
London

Jeffrey R. Holmstead
Partner

202.828.5852 Office
202.857.4812 Fax

jeff.holmstead@bglip.com

Bracewell & Giuliani LLP
2000 K Street NW
Suite 500
Washington, DC
20006-1872

April 28, 2009

VIA FACSIMILE

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington D.C. 20460

Re: Freedom of Information Act Request regarding *In re: Desert Rock Energy Company LLC*, PSD Permit No. AZP 04-01, PSD Appeals Nos. 08-03, 08-04, 08-05 & 08-06

To Whom It May Concern:

In accordance with the applicable provisions of the Freedom of Information Act, 5 U.S.C. § 552, as amended, by this letter the undersigned requests copies of all documents (as described in Attachment A to this letter) and other records as defined in 5 U.S.C. § 552(f)(2), from the date of January 20, 2009 to the present, that relate to the following:

1. EPA Region 9's Motion for Voluntary Remand, filed on April 27, 2009, in *In re: Desert Rock Energy Company LLC*, PSD Permit No. AZP 04-01, PSD Appeals Nos. 08-03, 08-04, 08-05 & 08-06;
2. Any communication among or between any of the parties to *In re: Desert Rock Energy Company LLC*, PSD Permit No. AZP 04-01, PSD Appeals Nos. 08-03, 08-04, 08-05 & 08-06, the Executive Office of the President of the United States, including but not limited to the Council on Environmental Quality, or certain other entities¹ and any representative, consultant, counsel or employee of the EPA, including but not limited to the Administrator of the EPA, the Air and Radiation Law Office of the EPA's Office of General Counsel, or the Air Division of EPA Region 9; or

¹ The parties to *In re: Desert Rock Energy Company LLC* include the State of New Mexico, Leslie Glustrom, Diné Care, Environmental Defense Fund, Grand Canyon Trust, Natural Resources Defense Council, San Juan Citizens' Alliance, Sierra Club and Wild Earth Guardians. The "certain other entities" referred to are Earthjustice, Clean Air Task Force, the Center for Biological Diversity, and the National Parks Conservation Association.

BRACEWELL & GIULIANI

National Freedom of Information Officer

April 28, 2009

Page 2

3. Whether any current EPA official should be or is recused from any involvement in the permitting of the Desert Rock Energy Project and/or *In re: Desert Rock Energy Company LLC*, PSD Permit No. AZP 04-01, PSD Appeals Nos. 08-03, 08-04, 08-05 & 08-06, given past relationships with parties opposing the Desert Rock Energy Project and/or the issuance of the above-referenced PSD permit.

In accordance with 5 U.S.C. § 552(a)(6)(A)(1), we expect to receive your reply within 20 working days. To the extent that EPA withholds any requested records pursuant to an exemption listed in 5 U.S.C. § 552(b), we request that EPA produce a log of such documents with sufficient detail to justify the exemption. We are willing to pay up to \$500.00 for EPA to respond to this request. If the estimated cost exceeds this amount, or for any other questions or clarifications regarding the request, please contact:

Matthew J. Armstrong
Bracewell & Giuliani LLP
2000 K Street, NW
Suite 500
Washington, D.C. 20006
202-828-7411
matt.armstrong@bgllp.com

Very truly yours,

Bracewell & Giuliani LLP



Jeffrey R. Holmstead

JRH

cc: Brian Doster, *Air and Radiation Law Office, Office of General Counsel, EPA*
Ann Lyons, *Office of the Regional Counsel, EPA Region 9*

ATTACHMENT A

For the purposes of this letter, "document" shall mean and include, unless otherwise indicated, the original copies of any written, typed, printed, photocopied, photographic or tape recorded matter of any kind, no matter how produced, recorded, stored, or reproduced including but not limited to all letters, correspondence, contracts, paper communications, tabulations, charts, memoranda, handwritten notes, drafts, printed or stored e-mails, cables, voice mail transcriptions and recordings, records or transcriptions by a mechanical or computing device, by longhand or shorthand recording, tape recorder or by any other means, telephone logs and telephone messages, computer discs, interoffice communications, microfilm, lists, bulletins, calendars, circulars, desk pads, ledgers, minutes, journals, diaries, invoices, pamphlets, studies, notices, summaries, reports, analyses, teletype messages, work sheets and all other graphic materials, writings and instruments however produced or reproduced. Said definition shall include, inter alia, recordings, transcripts and/or summaries of oral communications, telephonic or otherwise. A draft or non-identical copy is a separate document within the meaning of this term. The term "document" applies to all such documents and things within your possession, custody, or control.

Exhibit B

From: Message from the Administrator
To: All EPA Employees
Date: 04/23/2009 01:48 PM
Subject: Transparency in EPA's Operations

Visit the Agency's Intranet for More Information

All Hands Email-Archive

This message is being sent to all EPA Employees.
Please do not reply to this mass mailing.

MEMORANDUM

SUBJECT: Transparency in EPA's Operations

FROM: Lisa P. Jackson
Administrator

TO: All EPA Employees

In my testimony before the Senate Committee on Environment and Public Works and in my January 23, 2009, memorandum to all employees, I expressed my commitment to uphold the values of transparency and openness in conducting EPA operations. President Obama recently said in a memorandum to agency heads: "Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset." I am asking each one of you to help me ensure EPA operates in full compliance with this principle.

The success of our environmental efforts depends on earning and maintaining the trust of the public we serve. The American people will not trust us to protect their health or their environment if they do not trust us to be transparent and inclusive in our decision-making. To earn this trust, we must conduct business with the public openly and fairly.

In 1983, then-Administrator William Ruckelshaus promised that under his leadership, EPA would operate "in a fishbowl." I wish to reaffirm this commitment and take the opportunity to provide guidelines about how we will ensure transparency in our interactions with all members

of the public. These guidelines are intended to maintain the fairness and openness of our operations and thus strengthen public confidence in our decisions. I am relying on EPA employees to use their good judgment to conduct themselves with the openness and integrity that alone can guarantee public trust in EPA.

General Principles

In all its programs, EPA will provide for the fullest possible public participation in decision-making. This requires not only that EPA remain open and accessible to those representing all points of view, but also that EPA offices responsible for decisions take affirmative steps to solicit the views of those who will be affected by these decisions. This includes communities of color, Native Americans, people disproportionately impacted by pollution, small businesses, cities and towns working to meet their environmental responsibilities, and others who have been historically underrepresented in EPA decision-making. EPA will not accord privileged status to any special interest, nor will it accept any recommendation or proposal without careful, critical, and independent examination.

Appointment Calendars

To keep the public fully informed of my contacts with interested persons, I have directed that a working copy of my appointment calendar, showing meetings with members of the public, be provided to the EPA Office of Public Affairs, where it will be available to the public each day on the EPA Web site. I also direct other senior Agency officials, including the Deputy Administrator, the Assistant Administrators, and the Regional Administrators, to make their working appointment calendars available to the public in a similar fashion.

Freedom of Information Act Policy

As President Obama has stated, the Freedom of Information Act should be administered with a clear presumption that openness prevails. All Agency personnel should ensure that this principle of openness is applied to the extent possible when responding to a FOIA request. Managers should give their staffs and the Agency's FOIA professionals the support needed to satisfy FOIA's transparency requirement in as timely and efficient a manner as possible. In accordance with guidance issued by Attorney General Holder on March 19, 2009, EPA offices should exercise their discretion in favor of disclosing documents whenever possible under the FOIA. Offices should assert an exemption to disclosure only where the Agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. Offices should also take steps to make information public on the Agency's Web site without waiting for a request from the public to do so. More detailed FOIA implementation procedures will be provided in the near future to assist you in carrying out this important government responsibility.

Because EPA is a public regulatory agency and employer to about 18,000 employees, EPA staff may come into possession of certain information that may need to be protected from disclosure under FOIA, including certain contract or business data, trade secrets, or personal privacy information. Although the Agency's business is to be conducted in an open and accountable manner, we must also ensure that information entitled to special protection is

handled with the utmost care and in full compliance with all applicable laws and regulations. Questions about whether special protections apply to certain information should be directed to the Office of General Counsel's General Law Office.

Rulemaking Proceedings

Much of EPA's business is conducted through rulemaking. It is crucial that we apply the principles of transparency and openness to the rulemaking process. This can only occur if EPA clearly explains the basis for its decisions and the information considered by the Agency appears in the rulemaking record. Therefore, each EPA employee should ensure that all written comments regarding a proposed rule received from members of the public, including regulated entities and interested parties, are entered into the rulemaking docket.

Robust dialogue with the public enhances the quality of our decisions. EPA offices conducting rulemaking are therefore encouraged to reach out as broadly as possible for the views of interested parties. However, while EPA may and often should meet with groups and individuals, we should attempt, to the maximum extent practicable, to provide all interested persons with equal access to EPA. In addition, it is essential to ensure that the public receives timely notice, as far as practicable, of information or views that have influenced EPA's decisions. This means that EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion with a member of the public or an interested group that contains significant new factual information regarding a proposed rule.

Questions about how to handle comments and other communications regarding a proposed rule should be directed to the appropriate program office personnel, attorneys in the Office of General Counsel, or regional staff working on the specific rulemaking.

I am committed to fulfilling President Obama's direction to agency heads to make use of tools and technology to increase outreach and interaction with the public. Public participation in Agency rulemaking proceedings may take a variety of forms, including public hearings and meetings, workshops, forums, focus groups, surveys, roundtables, Federal Register notice-and-comment procedures, advisory committee meetings, informal meetings with interested parties, internet-based dialogues, and other opportunities for informal dialogue, consistent with applicable legal requirements. I encourage our staff to be creative and innovative in the tools we use to engage the public in our decision-making.

Litigation and Formal Adjudication

EPA is engaged in a wide range of litigation. The conduct of litigation by the Agency should reflect the principles of fairness and openness that apply to other EPA activities. However, we must also protect privileged litigation and enforcement-sensitive information from unauthorized disclosure. Communication with parties involved in litigation with EPA about that litigation should be through an attorney representing EPA in the case. Program personnel who receive inquiries about pending litigation from persons who are not parties to the litigation should consult with an attorney representing EPA in the case before responding. If you do not know which attorneys are representing EPA in a specific case, contact knowledgeable EPA lawyers,

including the Office of General Counsel, the Office of Enforcement and Compliance Assurance, or an Office of Regional Counsel, as appropriate.

Formal adjudications (including certain administrative penalty proceedings and pesticide cancellation proceedings) are also governed by specific requirements that limit communications between EPA staff and interested parties. These limitations appear in the various EPA rules governing those proceedings. Information about these rules is available from the Office of General Counsel and on the EPA Intranet.

Contacts with Congress and the Press

EPA often receives requests for records or information from Congress, i.e. the Speaker of the House, the President of the Senate, the Chair of a Committee or Subcommittee with jurisdiction over EPA. It also receives informal requests from individual members of Congress and their staffs. I recognize the importance of Congressional oversight and encourage our programs to provide Congress with the information necessary to satisfy its oversight and legislative interests to the extent possible and consistent with our Constitutional and statutory obligations.

Information requests from Congress should be handled in consultation with managers of the affected EPA programs and our legislative affairs staff in the Office of Congressional and Intergovernmental Relations.

EPA also should be accessible to the press, which performs a vital role in informing the public about EPA's actions. As we respond to press inquiries, the EPA staff should respect our internal deliberative processes and strive for accuracy and integrity in our communications. This will ultimately enhance public trust in the Agency. When interacting with the press in the performance of your official duties, please coordinate with the managers of your program and media relations experts in the Office of Public Affairs.

Nothing contained in this memorandum interferes with your right to petition or to furnish information to Congress or a Member of Congress, as provided under applicable law, or to engage in protected whistleblowing activities.

Communications Generally

The Office of Public Affairs plays a central role in shaping the Agency's communications with the public. OPA will be providing further guidance on how our programs and regions should coordinate with it on the preparation of messaging materials and interactions with the press.

Conclusion

I have the utmost confidence in the ability of EPA's workforce to promote full public involvement and openness in all EPA affairs. I believe this will enhance the credibility of the Agency, boost public trust in our actions and improve the quality of our decisions. In short, we will let more sunlight into our Agency. I look forward to hearing any additional ideas you may have on how we can achieve this goal.

As I continue to work with all of you, I plan to provide further thoughts on how we can

strengthen EPA's public role in serving the needs of the public and advancing our environmental protection mission.